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# Persecutory Agency In The Racial Prerequisite Cases: Islam, Christianity, And Martyrdom In *United States v. Cartozian*

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**Persecutory Agency in the Racial Prerequisite Cases:  
Islam, Christianity, and Martyrdom in *United States v.  
Cartozian***

DOUGLAS M. COULSON\*

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*This article examines the trial transcript and judicial opinion in the 1924 naturalization trial of Tatos Cartozian, whose naturalization was opposed by the United States Department of Labor based on the assertion that as an Armenian he was not “white” and was therefore racially ineligible for naturalization under a law that limited eligibility for naturalization to “white persons” and other racial groups until 1952. The article situates the case within its legal and historical context then examines the arguments advanced by the Armenian defense during the trial as reflected in the transcript preserved by the National Archives and Records Administration, particularly the defense’s portrayal of Turks, Kurds, and Syrian Muslims as historical persecutors of Armenians in Asia Minor. The article argues that the persecutory agency in the defense’s trial narrative created a powerful sense of social solidarity with Americans by portraying Turkey as a common enemy of Americans and Armenians during the post-World War I era and examines the consequences of this rhetorical strategy. After examining the transcript, the article then examines how the judicial opinion responds to the defense’s rhetorical strategy and argues that although the opinion adopts the defense’s narrative, the opinion reflects an inability or refusal to clearly delineate the agency in the narrative, is marked by a style that suggests a broader resistance to narrativity, and remains silent on the Armenian genocide and diaspora at the center of the case, all of which suggest an uncomfortable relationship to the “historical interpretation” of race that had recently emerged as an interpretive strategy in the case law surrounding the Naturalization Act. The article concludes by reflecting on the rhetorical strategy of unification against a common enemy found in Cartozian and elsewhere in the discourse regarding the racial prerequisite in the early Naturalization Act, what the strategy suggests about the function of narrative in naturalization discourse, and how the strategy helped to define American identity amid growing tensions between race, nationality, and religion in the early twentieth century.*

**INTRODUCTION**

*Q. Are there not also Armenians who are Mohammedans?*

*A. Not one, only if they have become Mohammedan by force, by persecution . . . .*

*Q. But people of Armenian origin and race and blood do belong to the Mohammedan faith; have joined that faith? Is that not true?*

*A. By force, perhaps, they have been made, during the massacres, to save their lives.*

Cross-examination of M.B. Parounagian during the 1924 naturalization trial of Tatos Cartozian<sup>1</sup>

*I found that Armenians assimilate with American life more readily than any other race from Southeastern Europe or Asia Minor, for two reasons. One is that the American missionaries who have been working in Armenia and among the Armenians for one hundred years have acquainted the American public about the Armenians. . . . The other reason is that Armenians have been known among the Christian people of Europe and America as the great defenders of the Christian religion, and I believe there is an admiration for the Armenians for the way they have withstood the onslaught of Mohammedanism.*

Direct examination of M. Vartan Malcolm, author of *The Armenians in America*, during the 1924 naturalization trial of Tatos Cartozian<sup>2</sup>

*Q. What was the attitude of the Armenian race in so far as you came in contact with them during the World War?*

*A. It was one of the most inspiring experiences in my life. They were willing to serve, not only as enemies of Turkey, not only to defend their own native country, but they felt a deep loyalty to this country. All of them were willing to enter the army; and I know a great many cases of Armenians who came a great distance, paid their own expenses and entered the United States army and never were sent across to fight the Turks.*

Direct examination of Mrs. Otis Floyd Lamson during the 1924

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1. Transcript of Evidence, United States v. Cartozian, No. E-8668 (D. Or. May 8-9, 1924), at 17-18, in Civil and Criminal Case Files, District of Oregon (Portland), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. [hereinafter *Cartozian Trial Transcript*].

2. *Id.* at 126-27.

naturalization trial of Tatos Cartozian<sup>3</sup>

The epigraphs above appear in the transcript of a trial that was held in the United States District Court for the District of Oregon on May 8-9, 1924 to determine whether Armenian immigrant Tatos Cartozian was eligible to become an American citizen by naturalization. The United States Bureau of Naturalization, then under the direction of the Department of Labor and represented by attorneys from the Department of Justice, opposed Cartozian's naturalization based on the assertion that as an Armenian he was not "white" and was therefore racially ineligible for naturalization. The Naturalization Act of 1790 limited eligibility for naturalization to "free white persons," and in 1870, after Pacific Coast senators who sought to prevent the naturalization of Chinese immigrants defeated a Civil War Reconstruction amendment that sought to remove the racial requirement from the Act, a compromise amendment was passed extending racial eligibility for naturalization to both "free white persons" and "aliens of African nativity and persons of African descent." Consequently, from 1870 to 1940, to be eligible for naturalization a person had to be either "white" or "African," but the racial eligibility of Asian petitioners remained disputed because some claimed that they fit neither of the racial categories recognized by the Act.<sup>4</sup> Although after 1940 eligibility for naturalization was also extended to "descendants of races indigenous to the Western Hemisphere," "Filipino persons or persons of Filipino descent," "Chinese persons or persons of Chinese descent," and "persons of races indigenous to India," the Act continued to limit eligibility by race until the racial prerequisites were finally removed in 1952.<sup>5</sup>

During this period any court of general jurisdiction could grant a naturalization certificate, and until the late nineteenth century no

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3. *Id.* at 60-61.

4. *See* Naturalization Act of Mar. 26, 1790, 1 Stat. 103 (1790); Naturalization Act of Jan. 29, 1795, 1 Stat. 414 (1795); Naturalization Act of Apr. 14, 1802, 2 Stat. 153 (1802); Naturalization Act of Mar. 26, 1802, 2 Stat. 292 (1804); Naturalization Act of May 26, 1824, 4 Stat. 69 (1824); Naturalization Act of July 14, 1870, 16 Stat. 254 (1870); Revised Statutes §§ 2165-74 (1875); Act of Feb. 18, 1875, 18 Stat. 316 (1875); Revised Statutes §§ 2165-74 (2d ed. 1878); DARRELL HEVENOR SMITH, *THE BUREAU OF NATURALIZATION: ITS HISTORY, ACTIVITIES AND ORGANIZATION* (1926).

5. *See* Naturalization Act of Oct. 14, 1940, 54 Stat. 1137 (1940); Naturalization Act of Dec. 17, 1943, 57 Stat. 600 (1943); Naturalization Act of July 2, 1946, 60 Stat. 416 (1946).

published judicial opinions were issued regarding the racial prerequisite in the Act.<sup>6</sup> Between 1878 and 1954, however, numerous federal and state courts, and ultimately the United States Board of Immigration Appeals, issued written opinions offering interpretations of the phrase “white person” in response to the naturalization petitions of numerous immigrants from Asia and the Pacific Rim.<sup>7</sup> These cases, which have come to be known as the “racial prerequisite cases,” offer conflicting opinions about the meaning of race in cases involving Chinese, American Indian, Hawaiian, Burmese, Japanese, Asian Indian, Mexican, Parsi, Filipino, Syrian, Korean, Afghan, Iraqi, Armenian, Turkish, Arabian, Tatar, and Kalmyk petitioners.<sup>8</sup> The courts in these cases frequently noted the difficulty of determining the racial classification of individual petitioners and appealed to Congress

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6. See SMITH, *supra* note 4.

7. Only two of the cases addressed the subsequent extension of the act to non-“white” racial classifications. One case addressed the meaning of the phrase “aliens of African nativity and persons of African descent,” see *In re Cruz*, 23 F. Supp. 774 (E.D.N.Y. 1938) (holding that a petitioner who was three-quarters Native American and one-quarter African was not of sufficient “African descent” to be eligible under the Act), and another case addressed the meaning of the phrase “persons of Chinese descent,” see *In re B—*, 3 I. & N. Dec. 304 (B.I.A. 1948) (holding that a person born in Germany of a German mother, but of a father who was Siamese but “predominantly Chinese in blood,” was neither a “white person” nor a “person of Chinese descent”).

8. For a comprehensive list of published judicial opinions addressing the racial prerequisite in the Naturalization Act, see IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1st ed. 1996). In addition to the cases identified by López, the United States Board of Immigration Appeals issued a series of racial prerequisite cases under § 13(c) of the Immigration Act of 1924, which prohibited the admission to the United States of any alien “ineligible to citizenship” as defined in part by the racial eligibility provisions of the Naturalization Act. See Immigration Act of 1924, §§ 13(c), 28(c), 43 Stat. 153 (1924). See also *In re S—*, 1 I & N Dec. 174 (B.I.A. 1941) (holding that a native and citizen of Iraq, whose parents were “full-blooded Arabians” and whose ancestors “came from Turkish stock,” was a “white person”); *In re K—*, 2 I & N. Dec. 253 (B.I.A. 1945) (holding that a native and citizen of Afghanistan, “of the Afghan race,” was a “white person”); *In re B—*, 3 I. & N. Dec. 304 (B.I.A. 1948) (holding that a person born in Germany of a German mother, but of a father who was Siamese but “predominantly Chinese in blood,” was neither a “white person” nor a “person of Chinese descent”); *In re S—*, 4 I & N. Dec. 104 (B.I.A. 1950) (holding that a native and citizen of Russia “of the Tartar race, born in Ufa, Russia,” was a “white person”); *In re R—*, 4 I & N. Dec. 275 (B.I.A. 1951) (holding that natives of Russia “whose blood was found to be predominantly that of the Kalmuk race” were “white persons”); *In re J— W— F—*, 6 I. & N. Dec. 200 (B.I.A. 1954) (holding that a native of the Philippines, but “racially Chinese (full blood)” was not a “white person”).

to clarify the meaning of the Act, and the opinions conflicted so widely that one court labeled the racial classification issue a “Serbonian bog.”<sup>9</sup>

Because the racial prerequisite cases required litigants, lawyers, and judges to advance arguments and evidence in support of particular racial classifications in the procedurally structured setting of a judicial proceeding with formal provisions for discovery, the subpoena of witnesses and other evidence, and opportunities for both sides to be heard, the cases offer a unique opportunity to study the rhetorical dimensions of racial discourse and the role of law in constructing racial identities. As Ian Haney López writes in *White by Law: The Legal Construction of Race*, the racial prerequisite cases litigated whether, for example, “a petitioner’s race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors,”<sup>10</sup> and the rhetorical strategies employed in advancing one or more of these factors in particular cases provide a rich source for studying the discourse of race and law. The racial prerequisite cases are also unique because they forced participants to contrast “white” not with the racial category of “black” or “African” but with “Asian,” as numerous immigrants from Asia and the Pacific Rim, including many from western Asia and the Middle East, petitioned for naturalization. Although Europeans often described Chinese and Japanese people as “white” in their first encounters with them<sup>11</sup> and early courts granted Chinese immigrants naturalization certificates without apparently

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9. See *In re Dow*, 213 F. 355 (E.D.S.C. 1914), *rev’d*, 226 F. 145 (4th Cir. 1915). The figure of a Serbonian bog derives from Lake Sardonis, said to have been between Egypt and Palestine, which had the deceptive appearance of solid ground because of the sand that blew into it. The phrase figuratively refers to any situation from which it is difficult to extricate oneself. Cf. JOHN MILTON, *PARADISE LOST* 592-94 (David Scott Kastan, ed., Hackett Publ’g Co. 2005) (“A gulf profound as that Serbonian bog / . . . Where armies whole have sunk . . .”).

10. LÓPEZ, *supra* note 8, at 2.

11. See MICHAEL KEEVAK, *BECOMING YELLOW: A SHORT HISTORY OF RACIAL THINKING* 4, 27, 37, 41-42 (2011). Early classifications of Chinese and Japanese people as “white” even used particularly unequivocal descriptions such as “rather white” (*zimblich weiß*), “truly white” (*véritablement blanc*), “completely white” (*fulkomligen hvita*), “white like us” (*bianchi, si come siamo noi*), and “as white as we are” (*aussi blancs que nous*). *Id.* In one particularly noteworthy example, George Washington wrote in 1785 correspondence to his former aid-de-camp, Tinch Tilghman, that he was surprised to receive a report that Chinese sailors resembled American Indians because he “had conceived an idea that the Chinese, tho’ droll in shape and appearance, were yet white.” *Id.* at 36.

questioning their racial eligibility for naturalization,<sup>12</sup> by the mid-nineteenth century racist science had begun to advance the theory that Asians belonged to a “yellow” race that occupied a suspect “middle” position between the “white” and “black” races.<sup>13</sup> The racial prerequisite cases challenged this newly emerging distinction between “white” and “yellow” races as petitioners from all corners of Asia claimed to be “white.”

Although few records of the proceedings in the racial prerequisite cases exist, *Cartozian* is a remarkable exception because the National Archives and Records Administration has preserved a nearly complete record of the proceedings in the case, including a 167-page transcript of a two-day trial, a 97-page transcript of four expert depositions, a 30-page defense brief, trial exhibits, and other documents, and because the Armenian lobby mounted an unparalleled defense in the case. According to one source, the Armenian community raised approximately \$50,000 in donations to defend the case (equivalent to over \$500,000 today), and shortly after the case was filed the lead attorney for the Armenian defense informed the Government’s attorney in the case that the Armenians would spare no expense to defend the case.<sup>14</sup> The defense hired the prestigious Portland law firm McCamant and Thompson to represent Cartozian and offered the testimony of twenty-three witnesses at trial, including renowned Columbia University anthropologist Franz Boas, Harvard ethnologist Roland

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12. Until the Chinese Exclusion Act expressly prohibited Chinese naturalizations in 1882, courts frequently granted Chinese immigrants naturalization certificates as reflected, for example, in accounts of Chinese naturalizations in New York and North Carolina as early as the 1830s. *See, e.g.,* JOHN KUO WEI TCHEN, *NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE 1776-1882*, at 76, 136, 231-32 (1999). Furthermore, a July 22, 1870 newspaper article recounts Massachusetts’ longstanding practice of naturalizing “Chinese as well as other Asiatics” since at least 1843, along with “natives of the Sandwich Islands” and “persons of African descent, who are not darker than ordinary white persons.” *See* BOSTON DAILY ADVERTISER, July 22, 1870, at column A. As late as the turn of the twentieth century, the United States Circuit Court for the District of Massachusetts also found that it had long been its practice to admit Asians to citizenship. *See In re Halladjian*, 174 F. 834, 843-44 (C.C.D. Mass. 1909).

13. *See* KEEVAK, *supra* note 11, at 19, 49, 60, 74-75.

14. *See* Earlene Craver, *On the Boundary of White: The Cartozian Naturalization Case and the Armenians, 1923-1925*, 28 J. AM. ETHNIC HIST. 30 (2009); Phillip Lothyan, *A Questions of Citizenship*, 3 PROLOGUE 21, 267, at 272 (Fall 1989).

Dixon, German geographer and political economist Paul Rohrbach, and James Barton, foreign secretary of the American Board of Commissioners for Foreign Missions who headed the relief expedition in Turkey after World War I. The defense also offered twenty-two exhibits into evidence, including a comparative list of English and Armenian words and a tabulation of 339 answers to a questionnaire sent to Armenian men in the United States regarding their residence, citizenship, occupation, and membership in Christian churches and professional, civic, and fraternal organizations.<sup>15</sup> The record of these proceedings offers the most detailed record available of the arguments and evidence advanced to determine whether an individual petitioner was “white” within the meaning of the racial prerequisite in the Naturalization Act.

Despite this substantial record, prior scholars have largely treated *Cartozian* as a footnote to the earlier case of *In re Halladjian*, in which a federal district court in Massachusetts held that four Armenians were “white” and therefore racially eligible for naturalization,<sup>16</sup> a case that had served as precedent on the question of Armenian eligibility for naturalization before *Cartozian*. Furthermore, those scholars who have discussed *Cartozian* have mostly limited their remarks to the arguments and evidence presented by the defense regarding Armenian assimilability with “white” Europeans and Americans, including ethnographic and statistical evidence of prior Armenian naturalizations in the United States and Armenian marriages to contemporary Europeans and Americans. In *Whitewashed: America’s Invisible Middle Eastern Minority*, for example, John Tehranian argues that *Cartozian* epitomizes performative aspects of whiteness reflected in the racial prerequisite cases and concludes that “performance of whiteness and perceived assimilatory capacity played a critical role in the court’s decision” in the case.<sup>17</sup> Similarly, in an article in the National Archives publication *Prologue*, Phillip Lothyan focuses exclusively on evidence of census figures regarding the number of Armenian naturalizations in the United States, evidence of affinities between European and Armenian languages, and evidence that Armenians intermarried and

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15. See *Cartozian* Trial Transcript, *supra* note 1, at a-d, 104; *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925). See also Craver, *supra* note 14, at 44-51.

16. See *In re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909).

17. JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 51-54 (2009).

assimilated quickly with Europeans and Americans.<sup>18</sup> In Ian Haney López's *White by Law*, the only book-length study of the racial prerequisite cases, López only mentions *Cartozian* in passing to note that Columbia University anthropologist Franz Boas provided expert testimony in the case,<sup>19</sup> and Matthew Frye Jacobson gives the case a similar treatment in *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*,<sup>20</sup> as does Ariela Gross in *What Blood Won't Tell: A History of Race on Trial in America*.<sup>21</sup>

The epigraphs above reveal another rhetorical strategy that played a dominant role in the trial and judicial opinion in *Cartozian*, however, a strategy that is the inverse of Armenian assimilability with "white" Europeans and Americans. According to the Armenian defense, it was significant not only that the Armenians readily assimilated with Europeans and Americans but that Armenians were entirely inassimilable with their Islamic neighbors in Asia Minor. According to the defense, this inassimilability was evidenced by Armenian support of Europeans during the Crusades and by Muslim persecution of the

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18. See Lothyan, *supra* note 14. Likewise, in a recent article discussing the archival records in the case, Earlene Craver focuses primarily on the direct evidence of assimilability in the case. See Craver, *supra* note 14, at 56.

19. LÓPEZ, *supra* note 8, at 4-5.

20. See MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 240 (1998).

21. See ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 235 (2008); see also Janice Okoomian, *Becoming White: Contested History, Armenian American Women, and Racialized Bodies*, 27 MELUS 213, no. 1, Spring 2002 (emphasizing direct evidence of assimilability in the case). At least one later court also emphasizes the direct evidence of assimilability in *Cartozian*. In *In re Hassan*, Judge Arthur Tuttle cites *Cartozian* in support of his holding that an "Arab, being a native of Yemen," was not a "white person" and was therefore racially ineligible for naturalization. See *In re Hassan*, 48 F. Supp. 843 (E.D. Mich. 1942). Judge Tuttle states:

It is recognized that in *United States v. Cartozian* . . . , the District Court held an Armenian from Asia Minor eligible to citizenship as a white person. The court there found, however, that the Armenians are a Christian people living in an area close to the European border, who have intermingled and intermarried with Europeans over a period of centuries. Evidence was also presented in that case of a considerable amount of intermarriage of Armenian immigrants to the United States with other racial strains in our population. These facts serve to distinguish the case of the Armenians from that of the Arabians.

*Id.* at 846.

Armenians since the rise of the Ottoman Empire, culminating in the Armenian genocide of World War I. This rhetorical strategy operated on many levels, but it particularly appealed to the process of transcending social division by adopting a perspective of unity in relation to shared fear of an outgroup threat, a process Kenneth Burke describes as “identification by antithesis,” in which “allies who would otherwise dispute among themselves join forces against a common enemy.”<sup>22</sup> In the epigraphs above, M.B. Parounagian testifies that the Armenians were persecuted by Ottoman Turks who forced Armenians to convert to Islam “during the massacres, to save their lives,” a reference to the Turkish massacres of Armenians that escalated during the 1890s through the Armenian genocide of World War I and resulted in many Armenian refugees fleeing to the United States.<sup>23</sup> Similarly, M. Vartan Malcolm testifies that Europeans and Americans admired Armenians as “the great defenders of the Christian religion” who withstood “the onslaught of Mohammedanism” at the hands of the Turks, and Mrs. Otis Floyd Lamson testifies of how Armenians fought with American troops against a common enemy during World War I. Similar references to the Crusades, the Hamidian massacres of Armenians during the 1890s, and the Armenian genocide of World War I are found throughout the trial transcript.

Many scholars have studied the tendency to unify against a common enemy in the context of intergroup conflict and war. Social scientists, for example, have studied the relationship between outgroup

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22. See KENNETH BURKE, *DRAMATISM AND DEVELOPMENT* 28 (1972) [hereinafter *DRAMATISM*]; see also KENNETH BURKE, *The Rhetoric of Hitler's Battle*, in *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* (3d ed. 1973). Burke also notes that this antithetical form of identification can serve to deflect criticism, because “a politician can call any criticism of his policies ‘unpatriotic,’ on the grounds that it reinforces the claims of the nation’s enemies.” See *DRAMATISM*, *supra*, at 28. Burke introduced “identification” as the central concept of the rhetoric of symbolic action to replace the more instrumental and propositional rhetorics of earlier theorists. In contrast to such earlier rhetorics, Burke proposed that persuasion operates by the process of merger and division by which people form collective identities, or by the perennial struggle between “us” and “them.” See *Identification*, in *ENCYCLOPEDIA OF RHETORIC* 375, 375 (Thomas O. Sloane ed., 2001).

23. Indeed, most Armenian immigrants who came to the United States during the early twentieth century came as refugees. See LESLIE A. DAVIS, *THE SLAUGHTERHOUSE PROVINCE: AN AMERICAN DIPLOMAT’S REPORT ON THE ARMENIAN GENOCIDE, 1915-1917* (Susan K. Blair ed., 1989).

threats and ingroup cooperation,<sup>24</sup> and scholars in rhetorical and literary studies, political science, and history have all studied the use of shared enmities to construct group identities in the writing of history, literature, and war propaganda.<sup>25</sup> Similarly, veteran war correspondents have written extensively about the powerful solidarity formed among those engaged in war.<sup>26</sup> Such studies frequently note the deep emotional attachment that results from fear of a common enemy and the costly sacrifices individuals experiencing this attachment make to defend the group. As Chris Hedges writes, “the communal march against an enemy generates a warm, unfamiliar bond with our neighbors, our community, our nation, wiping out unsettling

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24. See, e.g., Masaki Yuki and Kunihiro Yokota, *The Primal Warrior: Outgroup Threat Priming Enhances Intergroup Discrimination in Men But Not Women*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 271 (Jan. 2009); see also, e.g., LAWRENCE LESHAN, *THE PSYCHOLOGY OF WAR: COMPREHENDING ITS MYSTIQUE AND ITS MADNESS* (1992); Mark Van Vugt, David De Cremer, and Dirk P. Janssen, *Gender Differences in Cooperation and Competition: The Male Warrior Hypothesis*, 18 PSYCHOL. SCI. 19 (Jan. 2007). In a classic investigation of intergroup conflict known as the Robbers Cave experiment, researchers studied the effectiveness of measures to reduce intergroup conflict among youth groups at a summer camp and concluded that the most effective method for reducing the conflict was the introduction of a series of superordinate goals requiring intergroup cooperation. See MUZAHER SHERIF, O.J. HARVEY, B. JACK WHITE, WILLIAM R. HOOD, AND CAROLYN W. SHERIF, *THE ROBBERS CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION* (1961). Although the Robbers Cave researchers claim to have rejected the introduction of a “common enemy” as a means of reducing the conflict in their experiment because it implied intergroup conflict on a larger scale, in at least one of the experiments they suggested to their subjects that “vandals” may have been responsible for an interruption of water supply that intergroup cooperation was required to restore. *Id.*

25. See, e.g., SUSAN A. BREWER, *WHY AMERICA FIGHTS: PATRIOTISM AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ* 46-86 (2009); JEFFREY JEROME COHEN, *HYBRIDITY, IDENTITY AND MONSTROSITY IN MEDIEVAL BRITAIN: ON DIFFICULT MIDDLES* (2006); MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 66-89 (1988); JEREMY ENGELS, *ENEMYSHIP: DEMOCRACY AND COUNTER-REVOLUTION IN THE EARLY REPUBLIC* (2010); IGAL HALFIN, *INTIMATE ENEMIES: DEMONIZING THE BOLSHEVIK OPPOSITION, 1918-1928* (2007); DOUGLAS WALTON, *APPEAL TO PITY: ARGUMENTUM AD MISERICORDIAM* (1997); Robert L. Ivie, *Images of Savagery in American Justifications for War*, 47 COMMUNICATION MONOGRAPHS 279 (1980); Eve Kornfeld, *Encountering “the Other”: American Intellectuals and Indians in the 1790s*, 52 WM. & MARY Q. 287 (1995); Vladimir Zorić, *The Furies of Orestes: Constructing Persecutory Agency in Narratives of Exile*, 5 COMP. CRITICAL STUD. 179 (2008).

26. See, e.g., CHRIS HEDGES, *WAR IS A FORCE THAT GIVES US MEANING* (2002); ANTHONY LLOYD, *MY WAR GONE BY, I MISS IT SO* (1999).

undercurrents of alienation and dislocation,”<sup>27</sup> and Sam Keen notes in his study of political propaganda that “the majority of tribes and nations create a sense of social solidarity and membership in part by systematically creating enemies.”<sup>28</sup> In *Cartozian*, the defense sought to defend Armenians’ racial identity with “white” America by not only offering direct evidence of their assimilability with Europeans and Americans, but through what Murray Edelman calls a “dramaturgy of enmity”<sup>29</sup> that invoked anti-Islamic prejudice encoded in centuries of cultural memories of the Crusades, a narrative that represented Armenians as Christian martyrs at the hands of “black pagans, Turks, and Saracens.”<sup>30</sup> This narrative also echoed American war propaganda during World War I that had thematically invoked the imagery of the Crusades in portrayals of the war as a war between “white” Christians and dark barbarian “Huns,” and appealed to significant tensions that lingered between the United States and Turkey during the postwar period as a result of Turkey’s opposition to the establishment of an independent republic of Armenia and its continued massacres of Armenians and American missionaries. Accordingly, the defense’s narrative of persecution by the Ottoman Turks in *Cartozian* appealed both to historical fears of barbarian invaders in medieval Europe recently called to mind by American war propaganda and to contemporary fears of Turkish aggression.<sup>31</sup>

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27. HEDGES, *supra* note 26, at 9, 45, 74.

28. SAM KEEN, *FACES OF THE ENEMY: REFLECTIONS OF THE HOSTILE IMAGINATION* 17 (1986). Keen argues that “we scapegoat and create absolute enemies, not because we are intrinsically cruel, but because focusing our anger on an outside target, striking at strangers, brings our tribe or nation together allows us to be part of a close and loving in-group.” *Id.* at 27. Thus, according to Keen “we create surplus evil because we need to belong.” *Id.*

29. See EDELMAN, *supra* note 25, at 78, 83. In his discussion of the rhetorical construction of political enemies, Edelman writes that “the highlighting of foreign enemies to weaken domestic dissent or divert attention from domestic problems is a classic political gambit because it is so often an effective one.” *Id.*

30. See WILLIAM SHAKESPEARE, *Richard II*, in *THE OXFORD SHAKESPEARE THE COMPLETE WORKS* 339, 359 (John Jowett et al. eds., 2d ed. 2005) [hereinafter *Richard II*] (“Many a time hath banish’d Norfolk fought / For Jesus Christ in glorious Christian field / Streaming the ensign of the Christian cross / Against black pagans, Turks, and Saracens”). This passage of *Richard II* is quoted in Judge Lowell’s opinion in *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909).

31. See, e.g., BREWER, *supra* note 25, at 46-86. The postwar tension between the United States and Turkey related in large part to the status of Armenian refugees created by the Armenian genocide of World War I and efforts to establish an

Significantly, although prior critics have argued that direct evidence of assimilability played a pivotal role in the racial prerequisite cases and *Cartozian* in particular, this emphasis on direct evidence of assimilability fails to account, on the one hand, for cases in which petitioners were held to be racially ineligible for naturalization despite having offered powerful assimilability evidence, and on the other hand for cases in which petitioners were held racially eligible for naturalization despite having offered relatively little assimilability evidence. In a case decided only two years before *Cartozian*, for example, the United States Supreme Court noted that although Japanese petitioner Takao Ozawa had attended American schools and churches with his family and maintained the use of English in his home, because he belonged to the “Japanese race” he was not “white” and was therefore racially ineligible for naturalization.<sup>32</sup> Similarly, the

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independent republic of Armenia. Although President Wilson initially awarded territory to establish an independent republic of Armenia in the Treaty of Sèvres, after Turkish nationalists gained independence for Turkey they renegotiated the terms of postwar peace in the Treaty of Lausanne which established the current borders of Turkey and awarded no territory to Armenia. The United States Senate refused to ratify the Treaty of Lausanne, but it nonetheless prevailed as the final negotiation of Turkey’s postwar borders after the other major powers ratified it. *See generally* STANFORD J. SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* (1976). Even before World War I, conflict between the United States and the Ottoman Empire had emerged over the racial prerequisite in the Naturalization Act. On November 1, 1909, shortly after the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization issued a restrictive interpretation of the racial prerequisite that concluded Turks, Syrians, and other “Asiatics” were non-“white” and therefore ineligible for naturalization, the Turkish embassy vigorously protested the Bureau’s position. *See generally Turkey Will Protest*, WASH. POST, Nov. 1, 1909; *Conflicting Views Taken of Asiatic Exclusion*, DALL. MORNING NEWS, Nov. 6, 1909; *Aliens Refused Naturalization*, DULUTH (MINN.) NEWS TRIBUNE, Sept. 29, 1909; *Race Row Up To Courts*, WASH. POST, Nov. 4, 1909. This protest included an open letter from the Ottoman Charge d’Affairs denouncing the Bureau’s position in the *Washington Post*, calling the Bureau’s interpretation of the act as “pernicious as it is artificial, since it is calculated to hinder the cause of peace, amity, and brotherhood among the natives, that cause so eloquently preached from the American pulpit and tribune.” A. Rustem Bey, *Thinks Law Unfair*, WASH. POST, Nov. 3, 1909.

32. *See Ozawa v. United States*, 260 U.S. 178, 189-190 (1922). Ozawa argued that the Japanese were assimilable with life in the United States in part by noting that “in art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation to western methods.” Like the defense in *Cartozian*, Ozawa also cited Japanese marriages to Europeans and Americans. Brief for Petitioner at 78, *Ozawa v. United States*, 260 U.S. 178 (1918) (No. 222). In addition, Ozawa

United States District Court for the Eastern District of South Carolina repeatedly held that Syrian petitioners were not “white” and were therefore racially ineligible for naturalization despite ample evidence that they belonged to the Judeo-Christian religious tradition by both faith and geography and in the face of the assertion that any interpretation of the Naturalization Act that excluded them would also exclude those with similar origins, including, hypothetically, Jesus of Nazareth.<sup>33</sup> On the other hand, various Turkish, Arab, Parsi, Asian Indian, and Kalmyk petitioners were held to be “white” and therefore racially eligible for naturalization despite their geographical origins in Asia and their Islamic, Zoroastrian, Hindu, Sikh, and Buddhist religious backgrounds.<sup>34</sup> These and other racial prerequisite cases cannot be understood solely by reference to direct evidence of assimilability or the “performance of whiteness and perceived assimilatory capacity.”<sup>35</sup>

To explore these issues, this article will examine the rhetorical strategies reflected in *Cartozian*. The article will begin by situating the case within its historical context during a time of crisis for Armenian refugees as postwar negotiations for an independent Armenia grew increasingly doubtful and within the legal context of case law

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quoted an American educator who had written that “those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians.” *Id.* at 83.

33. *See Ex parte Shahid*, 205 F. 812, 816 (E.D.S.C. 1913); *see also In re Dow*, 213 F. 355 (E.D.S.C. 1914). The decisions in these cases were later reversed by *Dow v. United States*, 226 F. 145 (4th Cir. 1915). *See generally* Sarah Gualtieri, *Becoming “White”: Race, Religion and the Foundations of Syrian/Lebanese Ethnicity in the United States*, 20 J. AM. ETHNIC HIST. 29, 41-42 (2001).

34. *See, e.g., United States v. Balsara*, 180 F. 694, 696 (2d Cir. 1910); *In re Mozumdar*, 207 F. 115, 117 (E.D. Wash. 1913); *In re Singh*, 257 F. 209, 212 (S.D. Cal. 1919); *In re Sallak*, No. 14876 (N.D. Ill., East. Div., June 27, 1924), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region (holding that a petitioner “born in Palestine” was a “white person”); *In re S—*, 1 I & N Dec. 174 (B.I.A. 1941); *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944); *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration Pacific Region (holding that “a native and citizen of Palestine . . . of the Arabian race,” was a “white person”); *In re K—*, 2 I & N. Dec. 253 (B.I.A. 1945); *In re R—*, 4 I & N. Dec. 275 (B.I.A. 1951).

35. TEHRANIAN, *supra* note 17, at 51-54.

interpreting the racial prerequisite in the Naturalization Act, particularly the United States Supreme Court's opinions in *Ozawa v. United States* (1922) and *United States v. Thind* (1923). The article will then examine the rhetorical strategy of the Armenian defense reflected in the trial transcript, particularly the portrayal of Turks, Kurds, and Syrian Muslims as historical persecutors of Armenians. The article argues that by portraying Turkey as a common enemy during the postwar period the defense's narrative created a powerful sense of social solidarity with Americans, but that the trial transcript also reflects a tension between this strategy and Armenians' proto-nationalist aspirations for an independent nation and was premised on a negation of Armenian national agency that metaphorically echoed the genocide the Armenians suffered in World War I, highlighting difficult identity issues in the case that the judicial opinion does not reflect. The article then examines Judge Charles Wolverton's judicial opinion in *Cartozian* in light of the arguments advanced during the trial and argues that although Judge Wolverton adopts the defense's narrative of Armenian inassimilability with the Turks, Kurds, and Syrian Muslims of Asia Minor as a central justification for his conclusion that Armenians are "white," his opinion leaves the agency in the historical narrative on which he relies ambiguous and reflects a broader refusal of narrativity that suggests an uncomfortable relationship with the "historical interpretation" of race that had recently emerged in case law interpreting the racial prerequisite in the Naturalization Act. The article concludes by reflecting more generally on the rhetorical strategy of unifying against a common enemy as a strategy evident throughout the long of discourse surrounding the racial prerequisites to naturalization and how this strategy helped to define American identity amid growing tensions between race, nationality, and religion in the early twentieth century.

#### **THE LEGAL AND HISTORICAL CONTEXT OF *CARTOZIAN***

On April 24, 2010, President Barack Obama marked the ninety-fifth anniversary of the Armenian genocide by remarking that "on this solemn day of remembrance, we pause to recall that 95 years ago one of the worst atrocities of the 20th century began," for "in that dark moment of history, 1.5 million Armenians were massacred or marched

to their death in the final days of the Ottoman Empire.”<sup>36</sup> Between 1894 and 1896, Turkish attacks on the Armenian minority in the Ottoman Empire resulted in the deaths of approximately 100,000-250,000 Armenians in what were referred to as the Hamidian massacres, named after Sultan Abdul Hamid II, also known as the “Red Sultan” or the “Bloody Sultan” for his Armenian massacres. Following the rise of the Young Turks, another 15,000-25,000 Armenians were massacred in the region of Adana, Turkey in the spring of 1909, and experts estimate that between one to one and a half million Armenians were killed in the Ottoman Empire during World War I in what is widely referred to as the Armenian genocide. As Vahakn Dadrian remarks, although the number of Armenians who died during World War I gives that period a particular gravity, the Armenian genocide was “punctuated by a history of accumulative tensions, animosities, and attendant sanguinary persecutions, . . . anchored on a constantly evolving and critically escalating perpetrator-victim conflict” extending deep into the history of Anatolia.<sup>37</sup> This perpetrator-victim conflict is crucial to understanding the arguments advanced in support of Armenian racial eligibility for naturalization in *Cartozian*.

Many critics have argued that the treatment of the Armenian Christian minority in the Ottoman Empire was an incident of the rising nationalisms of the early twentieth century and the volatile nature of state boundaries in the Balkans, Anatolia, Ukraine, and the Caucasus, which had a profound impact on previously tolerated subjects like the Armenians. According to Cathie Carmichael, for example, many of these people, including the Armenians, never made the transition from subject to citizen. As a result, the practice of population elimination in Europe and western Asia from the nineteenth through the mid-twentieth century occurred because certain groups never received full citizenship rights.<sup>38</sup> Tragically, the idea that conflicts of nationality and citizenship could be resolved by violent population elimination inspired a generation of such “eliminationists,” as reflected in the question Adolf Hitler is reported to have put to German troops before

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36. Peter Baker, *Obama Marks Genocide Without Saying the Word*, N.Y. TIMES, Apr. 25, 2010, at A10.

37. Vahakn N. Dadrian, *The Armenian Genocide: An Interpretation, in AMERICA AND THE ARMENIAN GENOCIDE OF 1915*, at 52 (Jay Winter ed., 2003).

38. See CATHIE CARMICHAEL, *GENOCIDE BEFORE THE HOLOCAUST 3* (2009).

the invasion of Poland after instructing them to kill all Polish men, women, and children they found: “Who, after all, speaks today about the annihilation of the Armenians?”<sup>39</sup> As this statement suggests, such eliminationist campaigns have often sought to eliminate not only the physical presence of the populations they targeted but their historical presence as well.<sup>40</sup> Although the international movement for recognition of the Armenian genocide has recently established it as one of the three canonical genocides alongside the Holocaust and Rwanda, for decades it was so immersed in silence that it was often referred to as the “forgotten genocide,” the “unremembered genocide,” the “hidden holocaust,” or the “secret genocide,”<sup>41</sup> and it has remained the object of genocide denial by Turkey from the immediate postwar period to the present.<sup>42</sup>

The phrase “crimes against humanity” was originally coined to refer to the Armenian genocide and the first war crimes tribunals in Turkish history were convened to prosecute Ottoman officials for their treatment of Armenians during the war,<sup>43</sup> but under the pressure of

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39. *See id.* at 3, 10; *see also* ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 149 (2d ed., 2011).

40. As Lawrence Douglas notes of Israeli Attorney General Gideon Hausner’s approach to the subsequent trial of Adolph Eichmann, Hausner treated the Nazis’ crime “as both the act of physical annihilation and the more profound attempt to erase memory itself—both of the cultural life of a people and of the crimes of the final solution.” LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND MEMORY IN THE TRIALS OF THE HOLOCAUST 106 (2001).

41. *See* PETER BALAKIAN, THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA’S RESPONSE xii (2003); JONES, *supra* note 39.

42. *See generally* BALAKIAN, *supra* note 41, at 11; DONALD BLOXHAM & FATMA MÜGE GÖÇEK, *The Armenian Genocide*, in THE HISTORIOGRAPHY OF GENOCIDE 360 (Dan Stone ed., 2008); ROBERT KOOLAKIAN, STRUGGLE FOR JUSTICE: A STORY OF THE AMERICAN COMMITTEE FOR THE INDEPENDENCE OF ARMENIA, 1915-1920, at 21-23 (2008). For recent news regarding Turkey’s aggressive campaign to deny the Armenian genocide, *see, e.g.*, David Rennie, *France to Jail Deniers of Armenian Genocide*, THE DAILY TEL. (London), Oct. 13, 2006, at 21; Sebnem Arsu, *Turks Angry Over House Armenian Genocide Vote*, N.Y. TIMES, Oct. 12, 2007.

43. *See* BALAKIAN, *supra* note 41, at 331-47; JONES, *supra* note 39. Significantly, these proceedings resulted in a number of guilty verdicts and executions before they were abandoned. *See, e.g.*, Vahakn N. Dadrian, *The Naim-Andonian Documents on the World War I Destruction of Ottoman Armenians: The Anatomy of a Genocide*, 18 INT’L J. MIDDLE EAST STUDIES 311-60 (1986): 311-60; Vahakn N. Dadrian, *The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series*, 11 HOLOCAUST AND GENOCIDE STUDIES 28-59 (1997)

Turkish nationalism the war crimes tribunals were soon abandoned and the major powers stopped publicly confronting Turkey about the issue.<sup>44</sup> For many in America the Armenian genocide had been the greatest crime of the war, and the division of the Ottoman Empire to create an independent republic of Armenia was considered necessary to protect Armenians from further violence in the future. Accordingly, President Wilson awarded the Armenians territory in Anatolia for an independent republic of Armenia in the Treaty of Sèvres, but after Turkey gained independence the Treaty of Sèvres was annulled by the Treaty of Lausanne which awarded no territory to Armenians and effectively eliminated the possibility of an independent Armenia. The United States Senate refused to ratify the Treaty of Lausanne over the Armenian question, but after the other major powers ratified it the treaty ultimately prevailed as the final statement on Turkey's postwar borders.<sup>45</sup> Because the Treaty of Lausanne was signed while the *Cartozian* case was pending and it was ratified by the other major powers shortly after the trial but before Judge Wolverton issued his opinion in the case, the negotiations for an independent Armenia during the postwar period and their apparent failure at the time of the trial provide a critical context for understanding the stakes of the *Cartozian* case for the many Armenian refugees who had become stateless.

Surprisingly, in the midst of this growing doubt regarding the ability of the major powers to secure an independent nation for Armenian refugees, the United States Bureau of Naturalization renewed its challenge to the racial eligibility of Armenians for naturalization by filing its petition in *Cartozian*. Because by the time the case would be decided the Immigration Act of 1924 prohibited any

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(hereinafter Dadrian, *The Turkish Military Tribunal's Prosecution*); see also *The Turkish Military's Prosecution*, WASH. POST, Feb. 13, 1919. The Turkish Attorney General appointed to prosecute the perpetrators of the Armenian genocide in the Turkish war crimes tribunals after the war himself denounced the crimes against the Armenians as "crimes against humanity." See Dadrian, *The Turkish Military Tribunal's Prosecution*, *supra*, at 43.

44. See BALAKIAN, *supra* note 41, at 331-47; see also SHAW, *supra* note 31; Richard G. Hovannisian, *Confronting the Armenian Genocide*, in PIONEERS OF GENOCIDE STUDIES 34 (Samuel Totten & Steven Leonard Jacobs eds., 2002).

45. See BALAKIAN, *supra* note 41, at 331-47. In 1994, the Soviet Union granted independence to the current Republic of Armenia which consists of portions of eastern Armenia annexed by the Soviet Union after World War I.

alien “ineligible to citizenship” from entering the United States,<sup>46</sup> the case would also ultimately decide Armenian eligibility for immigration. As a result, the Government’s decision to challenge Armenian racial eligibility for naturalization at this particularly vulnerable moment profoundly shocked the Armenian community. The Armenian weekly review *Gotchag* later wrote that the case was of great concern to all Armenians, “rich and poor, educated and uneducated, big and small,”<sup>47</sup> and the *Washington Post* noted that it seemed “strange to raise the question of eligibility at this late hour.”<sup>48</sup> The move threatened many stateless Armenian refugees not only with the diplomatic abandonment of efforts to secure an independent Armenia but simultaneous exclusion by its greatest ally the United States, a combined set of conditions previously inconceivable to the Armenian community. It also forced the American Committee for an Independent Armenia to divide its energies between opposing the ratification of the Treaty of Lausanne and defending the *Cartozian* case.

The Government’s renewed challenge to Armenian racial eligibility for naturalization was apparently motivated by a desire to clarify conflicting rulings among lower courts after Armenian naturalization petitions increased during the postwar period and some lower courts began to interpret dicta in the United States Supreme Court’s opinion in *United States v. Thind* (1923) to indicate that historical residents of Asia such as the Armenians might be racially ineligible for naturalization regardless of other factors relevant to their racial classification. The Bureau of Naturalization’s official policy when *Cartozian* was filed was to take no action to question the racial eligibility of Asians other than the Chinese who were expressly rendered ineligible for naturalization by the Chinese Exclusion Act and the Japanese who had been consistently held ineligible for naturalization by lower courts and ultimately by the Supreme Court.<sup>49</sup>

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46. See 43 Stat. 153, §§ 13(c), 28(c) (1924).

47. See Craver, *supra* note 14, at 56; Lothyan, *supra* note 14, at 272.

48. *The Status of Armenians*, WASH. POST, Aug. 1, 1925, at 6.

49. See, e.g., Correspondence from Commissioner of Naturalization Richard Campbell to the Secretary of Labor dated March 22, 1913, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (confirming the Bureau of Naturalization’s policy of not “raising the question in any way as to whether

As discussed above, prior to *Cartozian* the question of Armenian racial eligibility had been settled to the satisfaction of the Bureau of Naturalization by *Halladjian*, in which a federal district court in Massachusetts held four Armenian petitioners to be “white” and therefore racially eligible for naturalization.<sup>50</sup> The Bureau of Naturalization adopted the holding of *Halladjian* and offered no objection to Armenian naturalizations until it became apparent that lower courts had begun to raise their own objections to Armenian eligibility despite the Bureau’s position.<sup>51</sup>

After World War I, Armenian refugees began immigrating to the United States in greater numbers to escape religious persecution and genocide,<sup>52</sup> and between 1920 and the time of the *Cartozian* trial Armenian petitions for naturalization had increased by sixty percent due in part to the Armenian genocide and the desire of many Armenians to secure passports to return and help loved ones abroad.<sup>53</sup> Although the defense in *Cartozian* argued that the “color line” had never been drawn against Armenians and that they readily assimilated with “white” Europeans and Americans, historical evidence suggests that Armenian immigrants suffered significant racism and xenophobia in the United States during the early twentieth century. In Fresno, California, for example, where a substantial Armenian immigrant community resided, the “white” establishment referred to Armenians

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aliens applying for citizenship came within the [racial eligibility] provisions of section 2169” of the Naturalization Act).

50. See *In re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909).

51. See, e.g., *Cartozian* Trial Transcript, *supra* note 1, at 141 (discussing March 7, 1924 correspondence from Commissioner of Naturalization Raymond F. Crist to M. Vartan Malcolm introduced into evidence during the trial).

52. Significantly, the first statutory protection of refugees was an exception to the literacy test for immigrants “seeking admission to the United States to avoid religious persecution in the country of their last permanent residence,” Immigration Act of Feb. 5, 1917, 39 Stat. 874 (1917), a measure particularly designed to protect Armenians and Russian Jews. In a 1924 habeas corpus proceeding regarding Ossana Soghanalian’s admission to the United States as an alien fleeing religious persecution and seeking an exemption under this provision, the record showed that “the Turks killed her father and mother, and killed or deported all the Christians in Hadjin, that she was seized and kept in a harem for 3 1/2 years, until she was saved by the Allied armies,” and that she pleaded that ““if the government of the United States sends me back, I will throw myself overboard, as I have no place to go.”” *Johnson v. Tertzag*, 2 F.2d 40, 41 (1st Cir. 1924).

53. See *Cartozian* Trial Transcript, *supra* note 1, at 138, 141; see also Craver, *supra* note 14, at 56.

as “Fresno Niggers,” excluded them from churches and social centers, and prohibited them from owning or leasing land through restrictive land covenants.<sup>54</sup> Armenians were also frequently excluded from American labor unions because they were regarded as “foreigners.”<sup>55</sup> The discrimination Armenians faced in communities like Fresno likely contributed to the growing questions regarding Armenian whiteness among lower courts.

These growing racial tensions generated by increased Armenian immigration were further compounded by the United States Supreme Court’s opinion in *United States v. Thind* (1923), in which the Court commented in dicta that “there is much in the origin and historic development of the [Naturalization Act] to suggest that no Asiatic whatever was included” within the scope of the racial prerequisite in the Act.<sup>56</sup> In both *Thind* and *Ozawa v. United States* (1922), decided a mere three months before *Thind*, the Court rejected scientific definitions of race as an interpretive index of the meaning of the racial prerequisites in the Naturalization Act and instead applied what is commonly referred to as the “ordinary usage” rule of statutory interpretation, according to which the words of a statute are to be interpreted according to their ordinary usage or “popular sense” unless a technical meaning is clearly indicated. Accordingly, the Court held that the words “white person” in the Naturalization Act should be interpreted as “words of common speech and not of scientific origin, . . . written in the common speech, for common understanding, by unscientific men.”<sup>57</sup> The Court reached this holding in specific

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54. See MICHAEL BOBELIAN, CHILDREN OF ARMENIA: A FORGOTTEN GENOCIDE AND THE CENTURY-LONG STRUGGLE FOR JUSTICE 110 (2009). Both President Eisenhower and then Vice President Richard Nixon owned property containing such anti-Armenian covenants. See *id.*

55. See M. VARTAN MALCOLM, THE ARMENIANS IN AMERICA 83-126 (Pilgrim Press, 1919).

56. *United States v. Thind*, 261 U.S. 204, 214 (1923).

57. *Id.* at 214. In *Thind*, Justice Sutherland specifically cites the prior precedent of *Maillard v. Lawrence* in applying the ordinary usage rule of statutory interpretation. See *Thind* at 214; *Maillard v. Lawrence*, 57 U.S. 251, 261 (1853) (“If language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society.”). Lower courts also applied this rule to the racial prerequisite in the Naturalization Act and such lower court

response to the growing incidence of lower courts adopting the ethnographic classification of Caucasian as determinative of the meaning of the term “white” in the Naturalization Act. By applying the ordinary usage rule, the Court specifically rejected the ethnographic classification of Caucasian as an adequate definition of the word “white” except “in the popular sense of the word” or as it is “popularly known,” which according to the Court often diverged from its scientific definition.<sup>58</sup>

Before the Court’s opinions in *Ozawa* and *Thind*, lower courts had examined numerous historical sources to discover the original intent of the phrase “white persons” in the minds of the First Congress and often split over whether the phrase should be interpreted affirmatively to include only those who the First Congress commonly considered “white” or negatively as a catch-all term that included everyone except those people who the First Congress specifically considered non-“white” (*i.e.*, Africans and American Indians). Many early racial prerequisite courts reached the latter conclusion.<sup>59</sup> Indeed, this interpretation was supported by numerous historical sources cited by early racial prerequisite courts but was ultimately rejected by the Supreme Court in *Ozawa* based on the conclusion that the affirmative form of the Naturalization Act and the petitioner’s burden of proof did not support such a definition:

It may be true that [the African and American Indian] races were alone thought of as being excluded, but to say that they were the only ones within the intent of the

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precedent was expressly approved in the Supreme Court’s opinion in *Ozawa*. See *Ozawa v. United States*, 260 U.S. 178, 197 (1918). See also *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910) (applying the ordinary usage rule to the racial prerequisite in the Naturalization Act); *In re Saito*, 62 F. 126, 127 (C.C.D. Mass. 1894) (same). See generally G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES: FOUNDED ON THE TREATISE OF SIR PETER BENSON MAXWELL 4 (Frederick D. Linn & Co., 1888).

58. See ENDLICH, *supra* note 57, at 197; *Thind*, 261 U.S. at 208-09.

59. See, e.g., *In re Rodriguez*, 81 F. 337, 349 (W.D. Tex. 1897) (“Indeed, it is a debatable question whether the term ‘free white person,’ as used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country.”). The petitioners and *amici curiae* in racial prerequisite cases also frequently argued this and similar arguments. See, e.g., *United States v. Balsara*, 180 F. 694, 696 (2d Cir. 1910) (“Counsel for certain Syrian interveners as *amici curiae* contend the words ‘free white persons’ were used simply to exclude slaves and free negroes.”).

statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges.<sup>60</sup>

In this passage, the Court not only rejects the definition of whiteness as a catch-all term referring to everyone except those who the First Congress specifically considered non-“white,” but it assumes that most or all of the “races of Asia” were “brown or yellow” and not “white” within the meaning of the Naturalization Act, an erroneous assumption according to the historical evidence.<sup>61</sup>

Courts interpreting the racial prerequisite in the Act also struggled to identify factors that might be used to determine whether petitioners should be classified as “white” or non-“white” within the meaning of the Act. Only a fraction of the published judicial opinions addressing the racial prerequisite were issued before 1909, and with one exception the opinions in the early cases are brief and primarily rely on the racial classification systems of the leading ethnological authorities of the nineteenth century such as Friedrich Blumenbach, George Buffon, Georges Cuvier, Thomas Huxley, Augustus Keane, and Carl Linnaeus, particularly the ethnographic classification of Caucasian which the Court ultimately rejected in *Ozawa* and *Thind*.<sup>62</sup>

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60. See *Ozawa*, 260 U.S. at 195-96. Cf. *Scott v. Sandford*, 60 U.S. 393, 420 (1857) (writing that the racial prerequisite in the Naturalization Act “would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure”).

61. For a detailed discussion of early descriptions of Chinese and Japanese people as “white” by Europeans and Americans, see KEEVAK, *supra* note 11.

62. See, e.g., *In re Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878); *In re Saito*, 62 F. at 127; *In re Po*, 28 N.Y.S. 383 (N.Y. City Ct. 1894); *In re Yamashita*, 10 P. 482 (Wash. 1902). For a discussion of the scientific evidence of race introduced in the early racial

As acceptance of racialist science began to decline in the scientific community after the turn of the twentieth century, however, many lower courts began to anticipate the conclusion that popular and scientific meanings of race could not be reconciled and turned to other means of defining race. Many of these courts openly recognized that race was socially, culturally, and historically constructed, one court even finding that “there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia.”<sup>63</sup> Some courts also recognized that whiteness was a highly contingent and negotiable political commodity and that judicial interpretations of the term “white” in the Act had at times been both broadened to include groups whose whiteness had once been unrecognized and narrowed to exclude groups whose whiteness had not previously been challenged.<sup>64</sup>

The courts that reached the conclusion that racialist science was unreliable as a guide to interpreting the racial prerequisite in the Naturalization Act developed what was referred to as the “geographical test” of race, described as a commonality of geographical origin, blood, previous social and political environment, laws, usages, customs, and traditions, or a closely related test referred to as the “historical interpretation” of race, best exemplified by the Solicitor General’s argument that what constitutes a “white person” cannot be “wholly determined upon either geographical, philological, or ethnological

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prerequisite cases, see LÓPEZ, *supra* note 8, at 49-77. One notable exception to this early trend is *In re Rodriguez*, in which Judge Thomas Maxey wrote a lengthy opinion in support of his conclusion that Mexicans were “white.” See *In re Rodriguez*, 81 F. 337. In *Rodriguez*, Judge Maxey carefully analyzes the racial classifications of early census forms and the history of treaties entered into by the United States to support his conclusion that Mexicans had never previously been classified as non-“white” or been denied citizenship on the basis of race. *Id.* at 349. Many early courts also considered complexion or skin color to determine whether a petitioner was “white” and referenced skin color as relevant to their conclusions; however, given its variability, the courts largely rejected the “utter impracticability” of such an index of race standing alone. See *In re Singh*, 246 F. 496, 497-98 (E.D. Pa. 1917). The United States Court for the Southern District of Georgia, for example, admitted a petitioner from Calcutta, India, whose parents were natives of Afghanistan, finding among other things that “the skin of his arm where it had been protected from the sun and weather by his clothing was . . . several shades lighter than that of his face and hands, and was sufficiently transparent for the blue color of the veins to show very clearly.” *United States v. Dolla*, 177 F. 101, 102 (5th Cir. 1910).

63. *In re Halladjian*, 174 F. 834, 845 (C.C.D. Mass. 1909)

64. See, e.g., *id.*; *In re Singh*, 246 F. 496, 498-99 (E.D. Pa. 1917).

bases,” but “can only be determined in the light of history” and included only “those peoples of the white race who, at the time of the formation of the government, lived in Europe and were inured to European governmental institutions, or upon the American continent,” who, “from tradition, teaching, and environment, would be predisposed toward our form of government, and thus readily assimilate with the people of the United States.”<sup>65</sup> Courts adopting the “historical interpretation” of race relied on historical narratives rather than ethnological authorities to justify their racial classifications, often referencing authorities as old as the Hebrew and Christian scriptures as well as various historians, geographers, and travel writers from ancient Greece through the Middle Ages and the Renaissance in lengthy discussions of the geographical, political, religious, and cultural histories of various racial groups from central and western Asia to determine if a particular petitioner was “white.”<sup>66</sup>

Although the Supreme Court did not expressly adopt the “historical interpretation” of race in *Thind*, its adoption of this interpretation is suggested by the Court’s conclusion that the racial prerequisite in the Naturalization Act should be interpreted according to the ordinary or popular sense of racial classifications rather than scientific definitions of race and by two crucial findings that the defense directly responded to in *Cartozian*. The petitioner in *Thind* was a “high caste Hindu of full Indian blood” who advanced the Indo-European invasion theory of Indian civilization originally developed by European scholars who concluded that Europeans and Asian Indians descended from a common “white” ancestor who invaded the Indian subcontinent prior to India’s Vedic era and conquered the darkskinned

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65. Brief for the United States at 20, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202). Cf. *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910).

66. See, e.g., *In re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909); *In re Mozumdar*, 207 F. 115 (E.D. Wash. 1913); *Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913); *In re Dow*, 213 F. 355 (E.D.S.C. 1914), *rev’d*, 226 F. 145 (4th Cir. 1915); *United States v. Thind*, 261 U.S. 204 (1923); *Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944); *In re S—*, 4 I. & N. Dec. 104 (B.I.A. 1950); *In re R—*, 4 I. & N. Dec. 275 (B.I.A. 1951). One judge even commented on the peculiarity of this form of writing in his opinion, noting that the lengthy genealogy of racial history in the opinion “may seem wholly out of place in a reasoned judicial opinion as to the construction of a statute, except as illustrating the Serbonian bog into which a court or judge will plunge that attempts to make the words ‘white persons’ conform to any racial classification.” *In re Dow*, 213 F. 355, 364 (E.D.S.C. 1914), *rev’d*, 226 F. 145 (4th Cir. 1915).

Dravidians of the region. Adding to this theory of Asian Indian origins another argument that circulated among Indian nationalists, the petitioner in *Thind* claimed that high caste Hindus were not only “white” by virtue of their descent from a premodern “white” ancestor but that due to the caste restrictions on marriage imposed by Hindu law they had preserved their racial purity to such an extent that they enjoyed a racial purity unparalleled even by European and American whites.<sup>67</sup> In its opinion in *Thind*, the Court first rejects the idea that descent from “some remote, common ancestor” could determine a person’s present racial status, stating that “it may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today.”<sup>68</sup> The Court then adds that although Asian Indians may have descended from Indo-European invaders of the Indian subcontinent who were once “white,” their intermarriages with the darkskinned Dravidians of the subcontinent had rendered contemporary Asian Indians non-“white” in any ordinary or popular sense of the term. After dismissing the significance of an Indo-European ancestor, the Court then adds that contemporary Asian Indians are undoubtedly inassimilable with life in the United States, writing that while

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, . . . it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.<sup>69</sup>

The Court fails to explain this conclusion but merely asserts it as self-

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67. As Harold R. Isaacs writes, Asian Indians who internalized this theory often conceived themselves as “more ‘white’ than the ‘whites,’ indeed, as descendants from that ‘pure Aryan family’ of prehistoric times,” endowing them “with a sort of Mayflower status in relation to ‘whiteness.’” HAROLD R. ISAACS, *IMAGES OF ASIA: AMERICAN VIEWS OF CHINA AND INDIA* 290 (Capricorn Books ed. 1962).

68. Among other arguments offered in support of its opinion in *Thind* the Court notes that in 1790 the Adamite theory of creation, according to which all of humanity descended from a common ancestor, was generally accepted, and as a result any definition that relied on a remote common ancestor would render the statutory language meaningless. *See United States v. Thind*, 261 U.S. 204, 212-15 (1923).

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

evident, and consequently while the passage suggests some form of assimilability test as one means of interpreting the racial prerequisite in the Naturalization Act it is unclear what test of assimilability the Court intended.

The Court's opinion in *Thind* provides the most immediate precedent for *Cartozian*, and because the Court issued its opinions in *Ozawa* and *Thind* less than a year before *Cartozian* was filed, *Cartozian* also provides one of the earliest attempts by lower courts to interpret these important opinions of the Court regarding the racial prerequisites in the Naturalization Act. The Court's opinions in *Ozawa* and *Thind* rejected the argument that contemporary descendants of an Indo-European ancestor were necessarily "white" within the ordinary usage of the term absent evidence that they remained assimilable with contemporary Europeans and the opinions suggested the Court's endorsement of the "historical interpretation" of race that had developed during the previous decades. As discussed further below, the defense in *Cartozian* responded directly to these considerations by seeking to establish that unlike high caste Hindus, Armenians not only descended from a premodern European ancestor but remained assimilable with contemporary Europeans despite residing in Asia for centuries. To accomplish this, the defense embraced the "historical interpretation" of race and advanced a narrative of a uniquely rigid racial segregation in Asia Minor as evidenced by their historic persecution by the Turks, Kurds, and Syrian Muslims, a narrative that invoked the anti-Islamic sentiment of mythic battles between Christianity and Islam during the Crusades, popular epithets of the Armenians as the "Christian people of ancient Eden," the "first people to embrace Christianity," and "guides to the Crusaders,"<sup>70</sup> and tensions between the United States and Turkey during the post-World War I era.

### **THE CARTOZIAN TRIAL: A STORY OF PERSECUTION AND MARTYRDOM**

The transcript of the *Cartozian* trial preserved by the National Archives and Records Administration reveals a great deal about the conflicts and tensions in the case that are not evident in the published

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70. KOOLAKIAN, *supra* note 42, at 23.

opinion.<sup>71</sup> As Robert Ferguson writes, because trial transcripts reflect complete records of court proceedings in which everything that is said is spontaneously recorded, they reveal, “as nothing else quite can, the real preoccupations in the flow of legal argument,” supplying a better perspective for understanding “the formulation of story that lies at the center of all courtroom proceedings,” and

if transcripts are decidedly more opaque, less accessible, and less dramatic than final opinions, they are richer in the range of commentary that they include, and they tell us much about the choices made in a final opinion. As complete records of court proceedings, transcripts register the conflict in the advocacy system in ways that a judicial decision ignores in the name of judgment.<sup>72</sup>

In *Cartozian*, the transcript reveals the conflicts and tensions that faced Armenians during the postwar period and the defense’s rhetorical strategy of creating a powerful sense of social solidarity with Americans by portraying Turkey as a common enemy through a historical narrative of Turkish persecution of Armenians culminating in the Armenian genocide of World War I. The transcript also reveals the conflict between this rhetorical strategy and Armenians’ protonationalist aspirations, insofar as this strategy depended upon a negation of Armenian national identity that at times metaphorically echoed the eliminationist campaign the Armenians had recently suffered in the war, a conflict that highlights difficult identity issues in the case not evident in the judicial opinion.

Significantly, correspondence between the lead counsel for the Armenian defense and the Department of Labor indicates that the Government repeatedly reassured concerned Armenians that the case

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71. Because expert witnesses Paul Rohrbach, Roland Burrage Dixon, James Barton, and Franz Boas testified by deposition in the case, textual references to the transcript may alternatively or collectively refer to the transcript of evidence of the two-day bench trial held on May 8-9, 1924 in Portland, Oregon and to the transcript of expert depositions held between April 5-9, 1924. The transcript of these expert depositions was introduced as evidence during the trial and thus constitutes part of the trial record. The footnote citations identify whether one or both of these transcripts serve as a source for the textual content.

72. Robert A. Ferguson, *Becoming American: High Treason and Low Incentive in the Republic of Laws*, in *THE RHETORIC OF LAW* 103, 103 (Austin Sarat & Thomas R. Kearns eds., The Univ. of Mich. Press 1994).

was friendly.<sup>73</sup> Apparently as a result, the Government presented virtually no opposition to Armenian racial eligibility for naturalization during the trial but rested its case after introducing only a small amount of documentary evidence and brief testimony regarding reports from the Committee on Immigration and Naturalization of the United States House of Representatives that classified Armenians as originating in “Turkey in Asia.”<sup>74</sup> This stance is consistent with the Department of Labor’s policy, discussed above, of taking no position on the racial eligibility of individual naturalization petitioners but merely informing courts of the petitioner’s race and prior judicial precedent regarding the eligibility of people classified as belonging to that race. The Government otherwise relied on the position that the trial court and any appellate courts reviewing the case could take judicial notice of “historical, geographical and ethnological matters and works and authorities” to determine whether Armenians were “white,” a position with which Judge Wolverton and the defense agreed. Surprising as this conclusion may sound after decades of confusion regarding the meaning of the racial prerequisite in the Act, the Government appears

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73. See, e.g., Correspondence from M. Vartin Malcolm to Commissioner of Naturalization Raymond Crist dated Jan. 8, 1924, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (writing that “we realize that . . . the suit commenced by the Government [in *Cartozian*] is friendly, and on every level I have heard the expression of the hope that we may and will win . . .”).

74. The Government introduced several reports of the Committee on Immigration and Naturalization of the United States House of Representatives showing that Armenian immigration was categorized as originating from “Turkey in Asia,” George Washington’s statement in his Farewell Address to the American people that “with slight shades of difference, you have the same Religion, Manners, Habits, and political principles,” and a statement from John Quincy Adams’s writings expressing the expansionist doctrine of “manifest destiny,” writing that “the whole continent of North America appears to be destined by Divine Providence to be peopled by one nation, speaking one language, professing one general system of religious and political principles, and accustomed to one general tenor of social usages and customs.” See *Cartozian* Trial Transcript, *supra* note 1, at 4 (referencing George Washington’s “The Farewell Advice of the Father of His Country” and John Quincy Adams’s “One Nation in North America”). The Government’s attorneys did not state what they found significant about these items, but they appear to support the Government’s argument that the racial prerequisite to naturalization was only intended to include Western Europeans, who from tradition, teaching, and environment would be predisposed toward the American form of government and readily assimilate with the American people.

to have taken the position that because the Supreme Court had effectively adopted the “historical interpretation” of race in *Thind* and the trial court could take judicial notice of historical facts, racial classification no longer required formal proof.<sup>75</sup> Importantly, this position would have rendered the trial unnecessary, and although Judge Wolverton initially agreed that he would likely want to look at materials on racial classification outside of the record, he eventually declined to do so as reflected in a statement toward the end of his judicial opinion that “I have confined my investigation to the testimony in the record, and have made no attempt at independent investigation respecting race, color, assimilation, or amalgamation.”<sup>76</sup> Thus, because the Government presented almost no evidence in the case and Judge Wolverton declined to take judicial notice of facts outside the record, the arguments and evidence presented by the Armenian defense provide the sole record from which the case was decided.

The defense presented a tripartite case for Armenian whiteness within the meaning of the Naturalization Act: (1) Armenians descended from Indo-European ancestors who originated in Europe and migrated to Asia Minor in the seventh century B.C.E. in one of the many Indo-European invasions of central Asia, (2) unlike descendants of the Indo-European invaders of the Indian subcontinent who were rejected as non-“white” in *Thind* because they had intermarried with the darkskinned Dravidians of the subcontinent, Armenians had remained “white” due to a unique geographical, linguistic, and religious isolation in Asia Minor, and (3) Armenians readily assimilated with contemporary Europeans and Americans as evidenced by their Christianity, their proximity to the people of the Russian Caucasus region who were the original inspiration for the Caucasian racial classification, and numerous marriages of Armenians to Europeans and Americans. Because Armenians claimed whiteness through one of the many Indo-European invasions of central Asia like

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75. See *Cartozian* Trial Transcript, *supra* note 1, at 8. Judicial notice allows courts to rely on the existence and truth of facts without the necessity of formal proof only when they are “universally regarded as established by common notoriety, *e.g.*, the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc.” See BLACK’S LAW DICTIONARY 848 (6th ed. 1990) (*sub verbo* “judicial notice”); see also A DICTIONARY OF MODERN LEGAL USAGE 485 (Bryan A. Garner ed., 2d ed. 1995) (*sub verbo* “judicial notice; judicial cognizance”).

76. *United States v. Cartozian*, 6 F.2d 919, 922 (D. Or. 1925). See also *Cartozian* Trial Transcript, *supra* note 1, at 1-5.

the Asian Indian petitioner had in *Thind*, the greatest challenge for the defense was to distinguish their case from that of high caste Hindus which had been rejected in *Thind*. The defense primarily sought to accomplish this by first claiming that Armenians had remained isolated in Asia Minor due to their inassimilability with the Turks, Kurds, and Syrian Muslims of the region. To establish this the defense advanced a historical narrative that featured these Islamic groups as persecutors of the Armenian Christian minority in the Ottoman Empire and as perpetrators of the Hamidian massacres of the 1890s and the Armenian genocide of World War I, leaving the Armenians a displaced people who would become stateless if they were held ineligible for American citizenship. Second, the defense claimed that in contrast to their inassimilability with these groups Armenians were completely assimilable with contemporary Europeans and Americans.

The argument that Armenians descended from a remodern “white” ancestor who originated in Europe and migrated to Asia Minor in the seventh century B.C.E. reflected what was known at the time as the “classical hypothesis” of Armenian origins. The defense supported this claim through the expert testimony of Columbia University anthropologist Franz Boas, Harvard ethnologist Roland Dixon, and M. Vartan Malcolm, author of *The Armenians in America*. These experts collectively cited a host of anthropological, archaeological, philological, geographical, historical, and travel authorities, beginning with the fifth century B.C.E. Greek historian Herodotus’s *Histories* and the first century B.C.E. Greek geographer Strabo’s *Geography*, to support the conclusion that Armenians descended from Phrygian colonists who migrated to Asia Minor from Europe and belonged to the Alpine subdivision of the Caucasian race.<sup>77</sup> Significantly, although this

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77. The works cited include: Johann Friedrich Blumenbach, *On the Natural Variety of Mankind* (M.D. thesis, University of Göttingen, first published in 1776); Friedrich Braun, *The Aboriginal Population of Europe and the Origin of the Teutonic People*; DANIEL BRINTON, *RACES AND PEOPLES: LECTURES OF THE SCIENCE OF ETHNOGRAPHY* (1890); ROLAND DIXON, *THE RACIAL HISTORY OF MAN* (1923); WYNFRID DUCKWORTH, *STUDIES FROM THE ANTHROPOLOGICAL LABORATORY* (1904); LOUIS FIGUIER, *LES RACES HUMAINES* (1873); MADISON GRANT, *THE PASSING OF THE GREAT RACE* (1916); ALFRED HADDON, *THE RACES OF MAN AND THEIR DISTRIBUTION* (1909); JEAN BAPTISTE JULIEN D’OMALIUS D’HALLOY, *DES RACES HUMAINES OU ÉLÉMENTS D’ETHNOGRAPHIE* (1845); JOHANN HEINRICH HÜBSCHMANN, *ARMENISCHE STUDIEN* (1883); Paul Kretschmer, *Der nationale Name der Armenier Haik* (1932); FELIX VON LUSCHAN, *THE EARLY INHABITANTS OF WESTERN ASIA* (1911); HENRY LYNCH, *ARMENIA: TRAVELS*

was the prevailing hypothesis of Armenian origins at the time, the defense exaggerated the reliability of the hypothesis, the racial homogeneity it reflected, and the marginality of competing hypotheses. The history of Armenian origins in Strabo's *Geography* is not only laden with mythology but claims that Armenia was founded by the consolidation of a host of heterogeneous people from central and western Asia.<sup>78</sup> Moreover, in M. Vartan Malcolm's book *The Armenians in America*, written less than a decade before the trial, Malcolm acknowledges that some scholars identified the Armenians with the non-Aryan Hittites of the Bible.<sup>79</sup> In one noteworthy example of the latter hypothesis, Mardiros Ananikian argues in the *Mythology of All Races* published at nearly the same time as the trial that the original inhabitants of the Armenian plateau, known as the Urrarians, belonged to the same non-Aryan and non-Semitic peoples as the Hittites.<sup>80</sup>

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AND STUDIES (1901); JACQUES DE MORGAN, *THE HISTORY OF THE ARMENIAN PEOPLE: FROM THE REMOTEST TIMES TO PRESENT DAY* (1918); WILLIAM RIPLEY, *RACES OF EUROPE* (1899); OTTO SCHRADER, *PREHISTORIC ANTIQUITIES OF THE ARYAN PEOPLES: A MANUAL OF COMPARATIVE PHILOLOGY AND THE EARLIEST CULTURE* (1890); and GIUSEPPE SERGI, *MAN, HIS ORIGIN, ANTIQUITY, VARIETY AND GEOGRAPHICAL DISTRIBUTION*. See Transcript of Dr. Paul Rohrbach, Roland Burrage Dixon, Dr. James L. Barton, and Dr. Franz Boas Deposition, *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925) (No. E-8668), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. [hereinafter *Cartozian* Deposition Transcript]; *Cartozian* Trial Transcript, *supra* note 1, at 101, 128-29.

78. In the same chapter of *The Geography* that the defense cites, Strabo reports that the Armenians descended from Jason and Medea, a reference to the epic myth by which Jason, who was raised by a centaur, led the Greek Argonauts on a quest for the Golden Fleece which was guarded by a dragon that never slept. See STRABO, *THE GEOGRAPHY OF STRABO* 269 (H.C. Hamilton & W. Falconer trans., G. Bell & Sons, Ltd. 1913). Strabo also writes that the ancient origin of Armenia derives from Armenus of Armenium, who accompanied Jason in his expedition into Armenia, and that the Jasonia serve as proof of Jason's expedition. See *id.* at 272; cf. THE READER'S ENCYCLOPEDIA: AN ENCYCLOPEDIA OF WORLD LITERATURE AND THE ARTS 45, 555, 707 (William Rose Benét ed., 1948). In addition to these mythic origins of the Armenians, Strabo notes in *The Geography* that Armenia was originally a small country enlarged by the conquest of surrounding areas, consolidating under one language an array of heterogeneous peoples. See STRABO, *supra* note 78, at 269, 273-74.

79. See MALCOLM, *supra* note 55, at 49.

80. See MARDIROS H. ANANIKIAN, *THE MYTHOLOGY OF ALL RACES* 7-8 (Canon John Arnott MacCulloch ed., 1925). According to Ananikian, the Armenians conquered the Urrarians and reduced many to serfdom, imposing on them the Armenian name, language, religion, and civilization, such that "it is very natural that

Nevertheless, the “classical hypothesis” that Armenians descended from Indo-Europeans who migrated to Asia Minor from Europe was the prevailing theory of Armenian origins and endorsed by numerous authorities.<sup>81</sup>

The defense then claimed that despite residing in Asia Minor for centuries, Armenians had remained “white” due to their religious isolation which had “preserved their individuality, their religion, and their national characteristics, as against the conquering Turks, more than probably any other people.”<sup>82</sup> Harvard ethnologist Roland Dixon testified, for example, that the Armenians had maintained a remarkable homogeneity despite tremendous pressure from the Turks and other conquerors of the region, who were presumably racially Asian in origin:

The Armenians retained their nationality and national characteristics against the tremendous pressure brought to bear upon them by these conquerors for many centuries. They were practically the first nation to be converted to Christianity, and they have retained their faith in the face of tremendous odds from the early fourth century to the present time.<sup>83</sup>

Similarly, the defense asked Franz Boas to read the following

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such a relation should culminate in a certain amount of fusion between the two races.”  
*Id.*

81. In *In re Halladjian*, Judge Lowell probably offered the most accurate conclusion regarding Armenian racial origins, writing that like Europeans “the present inhabitants of western Asia have their racial descent so mixed that there are many individuals who cannot safely be assigned by descent to any one race, however comprehensive.” 174 F. 834, 837-38 (C.C.D. Mass. 1909). Judge Lowell also wrote:

Only where a people has remained without considerable emigration or immigration, substantially unmixed, in the same country for a very long time, do racial and geographical boundaries coincide. The inhabitants of no considerable part of Europe belong to a race thus unmixed. In what is called by analogy a “mixed race,” the cross must have been ancient, and the hybrid must have persisted without much later crossing. In nearly all Europe the mixture is not only ancient, but has continued to modern times, and even to the present day.

*Id.* For an excellent study of how historians rhetorically constructed a single Anglo-Saxon race out of a heterogeneity of races in Britain, see COHEN, *supra* note 25.

82. See *Cartozian* Deposition Transcript, *supra* note 77, at 36; *Cartozian* Trial Transcript, *supra* note 1, at 103.

83. *Cartozian* Deposition Transcript, *supra* note 77, at 35.

translated excerpt from Felix von Luschan's work *Die Tachtadschy*, in which von Luschan wrote that the racial homogeneity of Armenians was unparalleled anywhere in the world<sup>T</sup>

the homogeneity of this people which is not found in equal or similar degree in any other civilized nation, is interesting because it shows that owing to the striking geographical, linguistic and religious isolation of Armenia during its development and florescence, the type has remained pure and has been consolidated to such an extent that even today, many centuries after the fall of the empire, it has remained almost entirely uniform.<sup>84</sup>

Several witnesses also denied they knew of even a single instance when an Armenian married a Muslim or converted to Islam other than by forced conversion.<sup>85</sup> When one witness was asked if he had ever known of any marriages between the Armenian race and the Turks or the Kurds, he replied, "I have never heard of it," and when another was pressed on cross-examination regarding whether or not there were some Armenian Muslims he replied adamantly, "not one."<sup>86</sup> In this testimony and elsewhere in the trial transcript, the defense argued that unlike the Asian Indians of the Indian subcontinent, Armenians had retained their original "white" racial identity through the centuries due to a unique geographical, linguistic, and religious isolation.

The defense claimed that this unparalleled isolation and racial purity was due to the inassimilability of Armenians with their Islamic neighbors as evidenced by a history of violent religious persecution suffered by the Armenians since their conquest by the Ottoman Turks, ultimately culminating in the Hamidian massacres of the 1890s and the Armenian genocide of World War I. This argument invoked deep historic prejudices between Christianity and Islam, which remain evident in the United States during the post-9/11 era<sup>87</sup> but which were also a particularly powerful source of American identification with

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84. *Id.* at 82; *Cartozian* Trial Transcript, *supra* note 1, at 103.

85. *Cartozian* Trial Transcript, *supra* note 1, at 14-15, 17-18, 51-53, 66.

86. *Id.* at 17, 52. Similarly, Mrs. Floyd Lamson testified that she had never known of an Armenian woman who had married a Muslim. *Id.* at 66.

87. See TEHRANIAN, *supra* note 17, at 51-54; SALAH D. HASSAN, *Arabs, Race and the Post-September 11 National Security State* in MIDDLE EAST REPORT 224, 16-21 (2002).

Armenians during the late nineteenth and early twentieth century. When American missionaries began arriving in the Ottoman Empire and establishing Christian missionaries and schools in the mid-nineteenth century, the Christian communities in the United States developed a powerful religious identification with Armenians. As Judge Francis Cabot Lowell notes in *Halladjian*, in the European imagination Armenia was “continuously associated with the place and landscape of the Bible,” particularly Armenia’s national symbol, Mount Ararat, the site of God’s covenant with Noah in the biblical book of Genesis and located in Armenia by Renaissance cartographers.<sup>88</sup> Recognizing this mythic power of Armenia in mid-nineteenth century America, Walt Whitman wrote in his poem to the peoples of the world, “*Salut au Monde*,” in *Leaves of Grass*,

*You thoughtful Armenian pondering by some stream of the  
Euphrates! You peering amid the ruins of Nineveh!  
You ascending Mt. Ararat!*<sup>89</sup>

The Hamidian massacres of the 1890s were widely published in American headlines and had a profound impact on the American public, even prompting debate about military intervention in the region before the turn of the century.<sup>90</sup> In part as a result of the sympathy generated by these massacres, the early twentieth century became an era of popular epithets about the Armenians, referring to them as the “Christian people of ancient Eden,” the “first people to embrace Christianity,” and “guides to the Crusaders.”<sup>91</sup> The Armenians were also frequently called “the starving Armenians” in recognition of the

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88. *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909). Renaissance cartographers located the Garden of Eden and other sacred sites of biblical literature in or near Armenia. See BALAKIAN, *supra* note 41, at 29-30. The Caucasian racial classification had also long centered around hypotheses about the location of Mount Ararat and the subsequent spread of Noah’s progeny. See KEEVAK, *supra* note 11, at 74, 80.

89. WALT WHITMAN, *LEAVES OF GRASS* 146 (Harold W. Blodgett & Sculley Bradley eds., N.Y. Univ. Press 1965).

90. See BALAKIAN, *supra* note 41, at xix, 4, 10-11, 66-67, 207, 282-85, 345. On September 10, 1895, for example, decades before the Holocaust of World War II, a *New York Times* headline described the persecution the Armenians suffered during the Hamidian massacres as “Another Armenian Holocaust.” See *Another Armenian Holocaust*, N.Y. TIMES, September 10, 1895.

91. KOOLAKIAN, *supra* note 42, at 23.

starvation that flowed from their treatment in the Ottoman Empire, and after a grassroots charity drive spread news of the Armenian genocide through this epithet, American children were often told to remember “the starving Armenians” when admonished to clean their plates.<sup>92</sup> As President Herbert Hoover would later comment of the era, “the name Armenia was in the front of the American mind” and “known to the American schoolchild only a little less than England.”<sup>93</sup>

As a result of this powerful identification with Armenians, Americans were deeply shocked by the Armenian genocide of World War I and the politics of denial that followed. In the immediate postwar period, numerous books and films about the genocide proliferated in the United States and worldwide. Most notably, in 1918, Henry Morgenthau’s memoirs of his service as American ambassador to Turkey were published under the title *Ambassador Morgenthau’s Story* to wide critical acclaim,<sup>94</sup> including a lengthy chapter entitled “The Murder of a Nation” that recounts the horrific details of the Armenian genocide which Morgenthau describes as “one of the most hideous chapters of modern history,”<sup>95</sup> lamenting that “the whole history of the human race contains no such horrible episode.”<sup>96</sup> The same year *Ambassador Morgenthau’s Story* was published, the epic drama of Aurora Mardiganian’s struggle to survive her forced march across Anatolia was published as a book and adapted to silent film under the title *Ravished Armenia*, depicting the terror of genocide on the screen for the first time.<sup>97</sup> Through these and other cultural representations of the Armenian genocide that proliferated in the postwar era, the shock and trauma of the events was still fresh in the American mind at the time of the *Cartozian* trial.

Although the events are not specifically referenced in the judicial opinion in *Cartozian*, the trial transcript reveals that the Hamidian massacres of the 1890s and the more recent Armenian genocide of World War I were frequently discussed during the trial. Two Armenian

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92. See BALAKIAN, *supra* note 41, at 75, 291.

93. HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER: YEARS OF ADVENTURE 1874-1920*, at 385 (The MacMillan Co. 1951).

94. See HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU’S STORY* 301-25 (1918).

95. *Id.* at 305.

96. *Id.* at 322.

97. BALAKIAN, *supra* note 41, at 314-17.

witnesses testified that they and their parents had escaped from Turkey during the Hamidian massacres to seek refuge in the United States,<sup>98</sup> M. Vartan Malcolm testified that Armenians came to the United States in larger numbers during the 1890s because of the sympathy that the American missionaries showed to them, noting that “from that time on these people have come here because of their religious persecution by the Turks and because they found friends among the American missionaries in Turkey,”<sup>99</sup> and Malcolm testified that the reason for the dramatic increase in Armenian applications for naturalization in the United States since 1920 was that Armenians, particularly bachelors “whose parents have been driven out of their home land through the last Turkish massacres and the war needed a passport and other protections to go back and find their lost loved ones.”<sup>100</sup> In addition, James Barton, foreign secretary of the American Board of Commissioners for Foreign Missions who headed the relief expedition in Turkey after World War I, referenced the Turkish deportations of Armenians during the war.<sup>101</sup> The end of M. Vartan Malcolm’s testimony on the first day of the trial he explained to Judge Wolverton that although President Wilson had awarded Armenia territory for an independent republic of Armenia in the Treaty of Sèvres it no longer existed and “today the entire Armenian people are scattered all over the Near East, and the possibility of Armenians going back to the old country is absolutely dead.”<sup>102</sup> When Judge Wolverton asked him if the Armenians had any governmental organization in Turkey, Malcolm explained, “we have no Armenia, your Honor,” “there is no Armenia now,” adding,

I must state that we lost a million Armenians during the war. There were before the war four million Armenians in all the world. We lost one quarter of the entire population. No other nation has lost so many as the Armenians. And there are now in all the world about two and a half million Armenians, and most of them are in the Caucasus. They took refuge there in order to save

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98. See *Cartozian* Trial Transcript, *supra* note 1, at 19, 56-57.

99. *Id.* at 101-04.

100. *Id.* at 138.

101. See *Cartozian* Deposition Transcript, *supra* note 77, at 46.

102. *Cartozian* Trial Transcript, *supra* note 1, at 153-54.

themselves.<sup>103</sup>

When asked if Syria was more populated than Armenia, another witness responded “well, certainly, because the Armenians have been decimated in their numbers, and scattered broadcast.”<sup>104</sup> The defense emphasized that as a consequence of these conditions, if their citizenship were denied or revoked the Armenian refugees would be a stateless people, a “people without a country.”<sup>105</sup>

The defense also specifically represented the Armenians as religious martyrs who suffered Turkish persecution because they would not recant their Christian faith,<sup>106</sup> often reiterating the claim that the Armenians were “the oldest Christian nation” and had remained devout in their Christian faith through the centuries.<sup>107</sup> Numerous witnesses testified to the positions of Armenians in Christian churches in Armenia, Europe, and America, including a number of witnesses who were ministers, pastors, or Sunday school teachers, and the defense’s tabulation of hundreds of responses to a questionnaire distributed to Armenian American men lists detailed Christian affiliations for most of the respondents.<sup>108</sup> Paul Rohrbach testified of how Armenians in

103. *Id.* at 155.

104. *Id.* at 18. Likewise, after being asked if the Syrians had not suffered similar treatment, M.B. Parounagian testified that only one part of Syria had suffered similar persecution but “only I know about the Armenian race and their persecution, their sufferings.” *Id.* As indicated in the epigraph at the beginning of this article, this witness also testified that Armenians never married Turks unless it was “by force” and Armenians never adopted Islam except “for force, perhaps, they have been made, during the massacres, to save their lives.” *Id.* at 17-18.

105. Because an Armenian who left Turkey forfeited his personal and property rights and the Turkish government would not issue a passport to him, he would be unable to travel without an American passport. *See, e.g., Cartozian Trial Transcript, supra* note 1, at 68, 130-31. As one witness testified, “we are a people with no country, and it is a great privilege for every Armenian to call America as their own country.” *Id.* at 72.

106. This was a familiar narrative regarding Armenian history in the Ottoman Empire. In an article published in *The New Armenia* shortly before *Cartozian*, for example, Herbert Lee wrote that “when . . . we remember that these [Armenians] were slain *because* they would not deny Christ, may we not assert that here is the supreme call to every Christian in the world?” Herbert Powell Lee, *Armenia as the Measure of Our Civilization*, *THE NEW ARMENIA*, Sept.-Oct. 1921, at 67-69; *cf.* KENNETH BURKE, *A RHETORIC OF MOTIVES* 222 (1950) (“Martyrdom [bearing witness] is so essentially rhetorical, it even gets its name from the law courts.”).

107. *Cartozian Trial Transcript, supra* note 1, at 14.

108. *See id.* at 11-12, 20-21, 38-40, 42, 44-46, 56, 62, 81, 84, 89, 98, 114, 117, 166. *See also* Defendant’s Exhibit listing “names, addresses, occupations, the maiden name of those that are married, citizenship, membership and affiliation with native American

Venice and Vienna belonged to the Armenian church, described as “a very old branch of Christendom,” even detailing how the Armenian monasteries in Venice and Vienna had “very large libraries and a very noted printing office” used for “the most difficult printing work in the eastern language of Europe,”<sup>109</sup> and James Barton testified that the Armenians were “pastors of our churches” and everywhere “recognized as a Christian race.”<sup>110</sup> The defense also emphasized that Armenians retained their Christian faith by withstanding “the onslaught of Mohammedanism,” or as Roland Dixon testified, “against

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fraternal, educational, religious, and social institutions, of 339 persons of Armenian parentage, now residing in all parts of the United States, and who are engaged in business and in some professions,” *United States v. Cartozian*, No. E-8668 (D. Or.), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash. [hereinafter *Cartozian* Tabulation Exhibit].

109. *Cartozian* Deposition Transcript, *supra* note 77, at 12-13.

110. *Id.* at 54-55. The defense’s reliance on Armenian Christianity as evidence of whiteness follows a frequent theme among racial prerequisite cases during the early twentieth century of associating whiteness with Christianity. *See, e.g.*, *United States v. Thind*, 261 U.S. 204, 213 (1923) (using the biblical allusion “bone of their bone and flesh of their flesh” to describe those European immigrants who the First Congress intended by the phrase “white persons”); *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909) (noting that “by reason of their Christianity, [Armenians] generally ranged themselves against the Persian fire-worshippers, and against the Mohammedans, both Saracens and Turks,” that when the Armenians were conquered by the Saracens in the seventh century they recovered their independence in the ninth century under princes who they claimed “were of the lineage of David,” and that when the Armenians were finally conquered in Armenia by the Turks, their refugees set up an independent state in Cilicia “streaming the ensign of the Christian cross against black pagans, Turks, and Saracens”); *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910) (noting that a Syrian petitioner was “reared a Catholic, and is still of that faith”); *In re Dow*, 213 F. 355, 364 (E.D.S.C. 1914), *rev’d*, 226 F. 145 (4th Cir. 1915) (writing that the modern inhabitant of the Lebanon District of Syria in which a Syrian petitioner was born was not the location either of the Old Testament or “the labors of Christ”); *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942) (canceling the naturalization certificate of an Arab petitioner based on the conclusion that Arabs were “part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe”). Of course, the association of whiteness and Christianity also has a long history in Western imperialism. *See, e.g.*, JACOBSON, *supra* note 20, at 212.; RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 39 (1st ed. 1972); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 14-15, 21, 46-47 (1990).

tremendous pressure” and “in the face of tremendous odds” due to their persecution by the Turks, Kurds, and Syrian Muslims of Asia Minor.<sup>111</sup>

Finally, in even more explicit terms the defense appealed to anti-Islamic sentiment by explicitly framing Armenian Christianity as superior to the Islamic faith of the Turks, Kurds, and Syrian Muslims of Asia Minor. The attorneys for the Armenian defense repeatedly exploited the epithet of Armenians as “guides to the crusaders” by asking witnesses what effect the Crusades had on the Armenians,<sup>112</sup> and one witness attributed the downfall of the last kingdom of Armenia to the fact that “Armenians had given all of their men protectors and a great deal of the resources of their country” to the European crusaders.<sup>113</sup> Other witnesses testified that “the social conception of Mohammedans is that a woman is a chattel; the Christian conception of a woman is that she is the equal of the man,” that unlike the monogamy practiced by Armenians “the Mohammedan is permitted to have four wives, legal wives, and as many concubines as his pocketbook will permit,” and that Armenians and Christian civilization were “entirely superior to the Mohammedan faith” and “superior to the Mohammedan ideals.”<sup>114</sup>

The defense’s representation of Islam as an inferior religion and its association of Christianity with whiteness and Islam with “black pagans, Turks, and Saracens”<sup>115</sup> is disturbing on many levels, but

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111. *Cartozian* Trial Transcript, *supra* note 1, at 126-27; *Cartozian* Deposition Transcript, *supra* note 77, at 35.

112. *See Cartozian* Deposition Transcript, *supra* note 77, at 36, 88.

113. *Cartozian* Trial Transcript, *supra* note 1, at 67.

114. *See* MALCOLM, *supra* note 55, at 14, 51-52, 137. M. Vartan Malcolm claimed that Syrians did not have the word “home” in their language because a Syrian Muslim’s wife and children did not dwell with him, but were kept apart. *Id.* at 137. The Armenian defense also argued in their brief that the Supreme Court’s dicta in *Thind* suggesting that “no Asiatic whatever” may be eligible for naturalization was based in large part on the congressional debates regarding the Naturalization Act in 1870 and 1875 in which congressmen opposed to removing the racial prerequisite from the Act emphasized their concern that the Chinese, whom they sought to exclude, were a “pagan people.” The Armenian defense argued that the 1870 and 1875 debates, however, suggested “no intention whatever to exclude the Armenians, a Christian people living in Asia Minor.” *See* Brief for Defendant at 14-20, *United States v. Cartozian*, 6 F. 2d 919 (D. Or. 1925) (No. E-8668), in Civil and Criminal Case Files, District of Oregon (Portland), Records of the District Courts of the United States, Record Group 21, National Archives and Records Administration Pacific Alaska Region, Seattle, Wash.

115. *See Richard II*, *supra* note 30; *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass.

particularly when considered in light of the fact that Armenian efforts to achieve a “white” status by representing Turks, Kurds, and Syrian Muslims as non-“white” for purposes of naturalization was a dubious legal conclusion at the time. Although the Supreme Court’s dicta in *Thind* that “no Asiatic whatever” might be racially eligible for naturalization provided an opportunity for litigants to advocate that certain groups from the Middle East were racially ineligible for naturalization, most authorities had held that Turks, Syrians, and Arabs were “white” within the meaning of the Naturalization Act and continued to until the racial prerequisites were repealed in 1952.<sup>116</sup> In

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1909).

116. Although John Tehranian argues that in the history of the racial prerequisite cases only “occasionally, and by the slimmest of margins, [were] Middle Easterners . . . considered white,” this conclusion references only the published judicial opinions in the cases and is debatable even with reference to those. See TEHRANIAN, *supra* note 17, at 49. There is ample evidence that Middle Easterners were more frequently considered “white” within the meaning of the Naturalization Act, and the Bureau of Naturalization had an official policy of not opposing the naturalization of Arabs and other petitioners from the Middle East almost from the inception of the Bureau in the first decade of the twentieth century. See, e.g., *When “White” Is Not White*, THE STATE, Oct. 20, 1909 (reporting that a number of Turks employed in Indiana factories had been naturalized); “Free Whites” From Turkey, WASH. POST, Nov. 8, 1909 (reporting that Judge Arthur L. Brown of the United States District Court for the District of Rhode Island admitted Jacob Thompson, a “subject of the Sultan of Turkey and a native of Armenia,” to citizenship over the government’s objection, stating that “it has been the practice of this court for many years to recognize Armenians and Turks as coming within the designation of free white persons, and the court will continue so to consider them until a court of higher authority decides otherwise”); Internal Correspondence from the Acting Secretary of the Department of Commerce and Labor to Messrs. O’Brien, et al. dated Nov. 15, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (reporting that “the records of the Department show but three cases in which courts have held Syrians are not white persons” and including a table of the cases); *In re Najour*, 174 F. 735 (C.C.N.D. Ga. 1909) (holding that a Syrian “from Mt. Lebanon, near Beirut” was a “white person”); Correspondence from Secretary of the Department of Commerce and Labor Charles Nagel to Secretary of State Philander Knox dated Dec. 7, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC (writing that “neither the Department [of Commerce and Labor] nor the Division of Naturalization has requested that appeals be taken in any of the cases” in which Syrians applicants had been held to be “white” and therefore racially eligible for naturalization); *In re Halladjian*, 174 F. at 845 (noting prior naturalizations of Armenians “as well as Syrians and Turks,” who had all been “freely naturaliz[ed] in this court until now”); *In re Mudarri*, 176 F. 465

1909, after the Chief of the Naturalization Division of the Bureau of Immigration and Naturalization claimed that “Turks, peoples of the Barbary states and Egypt, Persians, Syrians, and ‘other Asiatics’” were not “white” in statements restrictively interpreting the racial prerequisite to naturalization, the interpretation was almost immediately withdrawn after it met with vigorous objection not only from the Ottoman Empire but from the State Department and the Department of Justice, and Secretary of Commerce and Labor Charles Nagel later wrote in correspondence that he had taken immediate steps to ensure “a discontinuance of any aggressive measures” by the Government against these groups.<sup>117</sup> Similarly, after a federal district court canceled the naturalization certificate of an Arab petitioner in 1942 based on the conclusion that Arabs were “part of the

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(C.D. Mass. 1910) (holding that a Syrian “born in Damascus” was a “white person”); *In re Ellis*, 179 F. 1002 (D. Or. 1910) (holding that a Syrian who was “a native of the province of Palestine” and “a Turkish subject” was a “white person”) (cited with approval in *Ozawa v. United States*, 260 U.S. 178, 197 (1922)); *Dow v. United States*, 226 F. 145 (4th Cir. 1915) (holding that a Syrian was a “white person” and that “a large number of Syrians have been naturalized without question,” reversing *Ex Parte Dow*, 211 F. 486 (E.D.S.C. 1914) and *In re Dow*, 213 F. 355 (E.D.S.C. 1914) (on rehearing)), *In re Sallak*, No. 14876 (N.D. Ill., East. Div., June 27, 1924), in Significant Civil and Criminal Case Files, 1899-1925, District of Oregon (Portland), Records of U.S. Attorneys and Marshals, Record Group 118, National Archives and Records Administration Pacific Alaska Region (holding that a petitioner “born in Palestine” was a “white person”); *In re S—*, 1 I & N Dec. 174 (B.I.A. 1941) (holding that a native and citizen of Iraq, whose parents were “full-blooded Arabians” and whose ancestors “came from Turkish stock” was a “white person”); INS, *The Eligibility of Arabs for Naturalization*, MONTHLY REV., October 1943, at 12, 12-16 (concluding that persons of “the Arabian race” are “white persons”); INS, *Summaries of Recent Court Decisions*, MONTHLY REV., Jan. 1944, at 12 (reporting a January 13, 1944 ruling of the United States District Court for the Western District of Pennsylvania that “an Arab born in Beit Hanina, Palestine” was a “white person”); *In re Shaikhaly*, Nat. Case No. 119332 (S.D. Cal. Dec. 20, 1944), in Folder 119332, Contested Naturalizations, Southern District of California, Central Division (Los Angeles), National Archives and Records Administration Pacific Region (holding that “a native and citizen of Palestine . . . of the Arabian race,” was a “white person”); *In re K—*, 2 I & N Dec. 253 (B.I.A. 1945) (holding that a native and citizen of Afghanistan, “of the Afghan race,” was a “white person”).

117. Correspondence from Charles Nagel to Justin S. Kirreh dated November 13, 1909, in Records of the Immigration and Naturalization Service of the United States, Record Group 85, Box 1573, File 19783/43, National Archives Building, Washington, DC; see *Aliens Refused Naturalization*, *supra* note 31; *Turkey Will Protest*, *supra* note 31; A. Rustem Bey, *supra* note 31; *Race Row Up To Courts*, *supra* note 31; *Conflicting Views Taken of Asiatic Exclusion*, *supra* note 31; *Way Paved for Syrians*, GRAND FORKS DAILY HERALD, Dec. 15, 1909.

Mohammedan world and . . . a wide gulf separates their culture from that of the predominately Christian peoples of Europe,” both the Bureau of Naturalization and later courts quickly repudiated the decision, noting that it had long been the administrative policy of the United States not to object to Arab naturalizations.<sup>118</sup> In *Halladjian*, Judge Lowell forcefully rejected the Government’s claim that “the Turks have never commingled with Europeans, nor can it be said with any truth that they are descendants of Europeans,” noting instead that “for many centuries the Turks have ruled in Europe and Asia over Christians of many names, and have employed Christians for many purposes,” and that “the Turks, indeed, both socially and sexually, commingled with Europeans to an unusual degree.”<sup>119</sup> Furthermore, President Wilson formally recognized Syrian American citizenship when he signed a presidential proclamation encouraging Americans to make donations to the American Red Cross to help Armenians and Syrians stricken during World War I, writing in his proclamation that “thousands of citizens of the United States in practically every State of the Union were either born in Syria or are the children of Syrians born in that country.”<sup>120</sup> As these sources reflect, the majority of both executive and judicial authorities concluded that Middle Easterners were “white” and therefore eligible for naturalization, a fact neither the Armenian defense nor the Government addressed during the *Cartozian* trial. Instead, the Armenian defense simply adopted the useful fiction that Turks, Kurds, and Syrian Muslims were not “white” and were therefore racially ineligible for naturalization as a foil against which to establish Armenian whiteness by virtue of the segregation of these respective groups in Asia Minor.

This fiction raises a number of difficult questions about the defense in *Cartozian*, the racial prerequisite in the Naturalization Act, and the Supreme Court’s interpretation of the racial prerequisite in *Ozawa* and *Thind*. If the Armenians were as inassimilable with Turks, Kurds, and Syrian Muslims as they claimed and these groups were also

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118. Compare *In re Hassan*, 48 F. Supp. 843, 845 (E.D. Mich. 1942), with *In re S--*, 1 I & N Dec. 174 (B.I.A. 1941), *The Eligibility of Arabs for Naturalization*, *supra* note 116, at 16, and *Ex parte Mohriez*, 54 F. Supp. 941, 942 (D. Mass. 1944).

119. *In re Halladjian*, 174 F. 834, 839 (C.C.D. Mass. 1909).

120. Proclamation No. 1345, *Contribution Days for Aid of Stricken Syrian and Armenian Peoples* (Aug. 31, 1916), reprinted in KOOLAKIAN, *supra* note 42, at 130-32.

“white” and eligible for naturalized citizenship, not to mention birthright citizenship under the Fourteenth Amendment, did the defense actually prove that Armenians were inassimilable with early twentieth century America? The defense’s central premise was that Christianity determined not only their assimilability with Western whites but their inassimilability with Asian racial groups through an indissoluble link between whiteness and Christianity, and the defense frequently heralded the claim that Armenia was the first nation to make Christianity a national religion. The First Amendment prohibits the establishment of a national religion in the United States, however, and although Christianity has been a dominant strain in American religious history since the nation’s earliest beginnings, American religious life was significantly more diverse by the early twentieth century.<sup>121</sup> As mentioned earlier, numerous courts held that petitioners from Islamic, Zoroastrian, Hindu, Sikh, and Buddhist religious backgrounds were “white” and therefore eligible for naturalized citizenship, not to mention the children born to these and other religious groups who became citizens by birth under the Fourteenth Amendment.

By emphasizing an indissoluble link between whiteness and Christianity in their effort to establish that they were not truly “Asian,” the defense ironically cast doubt on Armenian assimilability with non-Christian whites in the United States. This problem also extends to the defense’s reliance on the prospect of Armenian statelessness to create sympathy for their cause. Could the Allied abandonment of Armenian aspirations for an independent nation have signified the conclusion that Armenians did not truly belong to the West? One writer complained that “instead of extending protection to Armenia as to all of the other Allied nations, the Allies abandoned Armenia to her enemies” after World War I, and that American Christians were washing their hands of the Armenian suffering because “they, and the enemies of Armenia, denounce a Union of Church and State.”<sup>122</sup> The defense’s effort to create a religious identification with American Christians had already failed during the postwar negotiations for an independent republic of Armenia for reasons that could have also doomed their claim of racial eligibility for naturalization in the United States.

In addition, although the rhetorical strategy of the defense

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121. *See generally, e.g.*, 1 ENCYCLOPEDIA OF AMERICAN RELIGIOUS HISTORY 52-53 (Edward L. Queen II et al. eds., 3d ed. 2009).

122. Lee, *supra* note 106, at 69.

succeeded in securing a favorable ruling in the case it also reflects what Kenneth Burke calls the “paradox of purity” or the “paradox of the absolute,” implicit in “any term for a *collective* motivation, such as a class, nation, the ‘general will,’ and the like,” where the collective motive only becomes a “pure” by negating any individual motive.<sup>123</sup> The defense could only prove that Armenians had retained their racial “purity” despite residing in Asia for centuries by establishing that they had remained in a state of proportionately “pure” isolation from the Turks, Kurds, and Syrian Muslims. The defense sought to establish this through a narrative in which Armenians were represented as the passive victims of religious persecution by these Islamic neighbors, a narrative that suggests the ritual purification through violence that is the epitome of martyrdom.<sup>124</sup> By connecting Armenian racial identity to this persecutor-victim conflict, Armenian racial “purity” was made proportionate to the negation of Armenian national agency, in effect claiming that the more pure the persecution the more pure the race. As Sam Keen writes of political propaganda, “he who projects the power and responsibility for doing evil onto the enemy loses the ability to take initiative, to act,”<sup>125</sup> and in the defense’s narrative Armenians are represented with little or no power to act but instead are represented as passive victims of Turkish persecution. This highlights an important aspect of the rhetorical strategy of unifying against a common enemy and may even be crucial to its effect. Social psychologists have noted the relationship of this phenomenon to the willingness of men to deny their individual interests and sacrifice themselves on behalf of their group, for example, and the relationship between persecutory agency and the paradox of purity is close because the unification that is the goal of the strategy requires the negation of one or more of the individual groups that merge to form the new unity.<sup>126</sup>

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123. See KENNETH BURKE, *A GRAMMAR OF MOTIVES* 35-38 (California ed. 1969).

124. In *The Myth of the State*, Ernst Cassirer describes the deep disillusionment Arthur de Gobineau felt after the initial intoxication of his nineteenth-century theories of racial supremacy subsided, a disillusionment that arose as a result of this paradox of purity because the “higher races,” as Gobineau conceived of them, could not fulfill their historical mission of ruling the inferior races without close contact with those races, but “to them contact is a dangerous thing, the permanent and eternal source of infection.” See ERNST CASSIRER, *THE MYTH OF THE STATE* 245-46 (1946).

125. KEEN, *supra* note 28, at 23.

126. See JAMES JASINSKI, *SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN*

Significantly, the absolutism that results from this sort of paradox is evident not only in the defense's claim that Armenians were absolutely inassimilable with the Turks, Kurds, and Syrian Muslims of Asia Minor, but in its corresponding claim that Armenians were absolutely assimilable with contemporary Europeans and Americans. In support of the latter claim, the defense offered a wealth of evidence including Armenians' proximity to the people of the Caucasus region of southwestern Russia who formed the original inspiration for the Caucasian racial classification, Armenian Christianity and support for Europeans during the Crusades, marriages between Armenians and contemporary Europeans and Americans, statistical evidence regarding prior Armenian naturalizations in the United States, and evidence of Armenian membership in American churches and professional, civic, and fraternal organizations.<sup>127</sup> The defense also offered evidence that

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CONTEMPORARY RHETORICAL STUDIES 588-91 (2001) (*sub verbo* "transcendence"); Vugt et al., *supra* note 24, at 22.

127. See, e.g., *Cartozian* Trial Transcript, *supra* note 1, at 9-15, 19-24, 26-29, 47-50, 56-95, 64-66, 99, 104-27, 136; *Cartozian* Deposition Transcript, *supra* note 77, at 5-11, 36-37, 52-55, 90-93. In presenting this evidence of assimilability, the defense went to particularly extraordinary lengths to establish that Armenians had been freely admitted to numerous "whites only" fraternal organizations such as the Freemasons, the Benevolent and Protective Order of Elks, the Independent Order of Foresters, the Fraternal Order of Eagles, the Modern Woodmen of America, the Loyal Order of Moose, the Independent Order of Odd Fellows, and the Knights of Pythias. See *Cartozian* Trial Transcript, *supra* note 1, a-d, 104; *United States v. Cartozian*, 6 F. 2d 919 (D. Or. 1925); see also Craver, *supra* note 14, at 56. The defense not only offered evidence that Armenians were members of these organizations, but presented testimony from organizational officers of the Freemasons, the Benevolent and Protective Order of Elks, the Loyal Order of the Moose, the Independent Order of Odd Fellows, and the Knights of Pythias regarding the racial prerequisites for membership in their groups, even introducing the constitution and statutes of the Benevolent and Protective Order of Elks into evidence. See *Cartozian* Trial Transcript, *supra* note 1. The Deputy Grand Master of the Independent Order of Odd Fellows, for example, testified that the Odd Fellows admitted Armenians but excluded Chinese, Japanese, and Hindus from membership on racial grounds. *Id.* at 36-38. The defense also elicited testimony from the Deputy Grand Master that the whiteness of Syrians for purposes of Odd Fellows membership had been "adjudicated" within the organization and found to be white. *Id.* The admission of evidence regarding fraternal racial prerequisites and private adjudications of whiteness within these organizations raises particularly interesting questions about the relationship between private dispute resolution and public law in *Cartozian*. It is also noteworthy that the defense continued to adopt the rhetorical strategy of unifying against a common enemy in conjunction with these direct forms of assimilability evidence. For example, the defense frequently noted Armenian military service both in the Spanish American War and in World War I in

Armenian immigrant communities in Europe and America did not form enclaves but readily interspersed with the native European and American populations, however, and this testimony often took a particularly disturbing turn, using metaphors of disappearance, loss, and consumption in support of a claimed assimilation so absolute that it suggested a continuation of the eliminationist campaign the Armenians had only recently escaped in the war. When asked about Armenian “colonies” in Europe, for example, M. Vartan Malcolm testified that an Armenian colony in Lemberg, Poland that had once numbered approximately 200,000 Armenians had become assimilated into the Polish population to such an extent that when he visited Lemberg a decade before the trial he found “no trace” of the Armenian colony there with the exception of “the great buildings which these Armenians had built, and the names of the streets in a certain section of the town,” because “the entire colony had disappeared by assimilating with the native population.”<sup>128</sup> Similarly, Malcolm testified that the oldest Armenian colony in Europe, which was in Holland, “has disappeared, and there are no traces of it left,” that an Armenian colony in Marseilles, France, too, “has disappeared,” and that Armenian colonies in Italy and England “have been lost within the native

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connection with such assimilability evidence. See *Cartozian* Tabulation Exhibit, *supra* note 108. The defense highlighted the fact that some of the respondents belonged to the national guard and state defense corps, that several were draft board examiners, and that others supplied medical and legal advice to draft and exemption boards during the war. See *id.* Other respondents worked in support of the Liberty Bond campaign, one was a Four Minute Man appointed by President Wilson to speak in support of America’s participation in World War I, and another was a War Work Secretary of the Y.M.C.A. See *id.* Judge Wolverton also expressed interest in the question of Armenian military service. During the testimony of Martin Fereshetian, for example, Judge Wolverton interjected to ask the witness if he had been in the war, and when the witness replied that he was exempt but had asked to serve anyway, Judge Wolverton asked the witness to confirm that he had not claimed an exemption on account of his nationality. See *Cartozian* Trial Transcript, *supra* note 1, at 23. The defense also repressed evidence of significant racial discrimination and xenophobia toward Armenians in the United States during this period. See, e.g., BOBELIAN, *supra* note 54, at 110. The transcript reflects several references to Fresno, California as the Government sought to highlight the well-known racial discrimination toward Armenians there, and Judge Wolverton asked a witness if she knew what proportion of the Armenians living in Fresno had been admitted to American citizenship. See *Cartozian* Trial Transcript, *supra* note 1, at 24-25, 72.

128. *Cartozian* Trial Transcript, *supra* note 1, at 96.

populations.”<sup>129</sup> Franz Boas read from a French writer explaining that the Armenians had probably not “played an important part in [French] national history and demography” because immediately upon their arrival they “submerged themselves in the great French family” and were “devoured” by the French nation.<sup>130</sup> Similarly, one Armenian witness testified that as soon as Armenians learned to speak English, they immediately separated from each other and became “very readily consumed in American life.”<sup>131</sup>

The language of this testimony suggests particularly extreme claims of assimilation, an assimilation as absolute as the eliminationist campaigns such as the Armenian genocide of World War I. This testimony suggests that the assimilability of Armenians was considered proportionate to the “decay” of Armenian immigrant communities in Europe and the United States,<sup>132</sup> and the metaphors of disappearance, loss, and consumption not only reflect the continued elimination of the Armenian identity elsewhere praised as so resilient to eliminationist efforts but negates Armenian national agency by representing Armenians as passive objects in this process of assimilation much like their agency is negated by their representation as passive victims of Turkish persecution. As Richard Hovannisian remarked to the Permanent Peoples’ Tribunal during its session on the Armenian genocide in 1985, one result of the Allies’ failure to establish an independent republic of Armenia during the post-World War I period was a life of exile and dispersion for Armenians, who were “subjected to inevitable acculturation and assimilation on five continents and facing an indifferent and even hostile world that preferred not to remember.”<sup>133</sup> The defense’s rhetorical strategy in *Cartozian* not only reflects the acceptance of this fate, but by denying Armenians’ frustrated protonationalist aspirations the defense denies the suffering brought by the forced acculturation and assimilation that is often a continuing harm of genocide. As Primo Levi writes of the Holocaust of World War II, “we had not only forgotten our country and our culture, but also our family, our past, the future we had imagined for ourselves,

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129. *Id.* at 96-97.

130. *Cartozian* Deposition Transcript, *supra* note 77, at 82-83.

131. *Cartozian* Trial Transcript, *supra* note 1, at 64, 68.

132. *See Cartozian* Deposition Transcript, *supra* note 77, at 93.

133. *See* Richard G. Hovannisian, *The Armenian Question, 1878-1923*, in *A CRIME OF SILENCE: THE ARMENIAN GENOCIDE* 28 (Gérard Libaridian ed., 1985).

because, like animals, we were confined to the present moment.”<sup>134</sup> The absolute assimilability that the defense sought to establish in *Cartozian* reflects a metaphorical continuation of the eliminationist campaign directed at Armenian history, culture, and identity, and while this conflict was largely avoided during the trial it clearly emerged during the final hours of testimony.

The conflict between Armenian protonationalism and the absolute assimilability of Armenians with Europeans and Americans becomes most apparent during the final hours of the trial when the Government’s attorney cross-examines M. Vartan Malcolm about his 1919 book *The Armenians in America*, where in stark contrast to his unqualified endorsement of Armenian assimilability with Americans during his testimony in *Cartozian* he writes that Armenians are less than entirely assimilable to American life.<sup>135</sup> In one passage of the book, for example, Malcolm states that “an independent Armenia will naturally attract many Armenians who are now in the United States” because Armenians “have no home here” and would long to return to their birthplace in Armenia which they could never forget. In other passages, Malcolm claims that “as a rule Armenians marry within their own race” and warns Armenian men against marrying American women. Elsewhere he cites among the reasons Armenians should return to Armenia the fact that they had been excluded from American trade unions because they were regarded as “foreigners” and that their ignorance of the English language and American customs would lead to nothing but frustration if they remained in America.<sup>136</sup> When the Government’s attorney confronts Malcolm with the contradiction between such passages and his assertions that Armenians were entirely assimilable to American life, Malcolm explains frankly that he had written *Armenians in America* in connection with the Paris Peace Conference and the negotiations of the United States and other Allied powers for the independent republic of Armenia President Wilson had promised. Malcolm explains that all of that changed after the plan for an independent Armenia had failed, and he acknowledges that the purpose of his book had been argumentative:

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134. PRIMO LEVI, *THE DROWNED AND THE SAVED* 75 (Raymond Rosenthal trans., Summit Books 1989).

135. See *Cartozian* Trial Transcript, *supra* note 1, at 147-55.

136. See MALCOLM, *supra* note 55, at 83-126.

What I say there does not mean that the Armenians are not faithful and good citizens of America, but that the Armenian colony in America would furnish some material which, in some measure, would help to build up an Armenian state, and help to improve conditions in the East and to make a better world and less war.<sup>137</sup>

This exchange highlights the difficult identity issues facing Armenian refugees during the postwar period and the conflict between the frequent Armenian testimony of assimilability offered to satisfy the requirements of the Supreme Court's opinion in *Thind* and the protonationalist aspirations that had grown doubtful at the time of the *Cartozian* trial. The paradoxical position reflected in the defense's case reveals this tension in a way the judicial opinion ignores and illustrates the problems that evidence of assimilability presented in the racial prerequisite cases.

#### THE "HISTORICAL INTERPRETATION" OF RACE AND THE PROBLEM OF NARRATIVITY IN JUDGE WOLVERTON'S OPINION

Judge Wolverton did not issue his opinion in *Cartozian* until July 27, 1925, more than a year after the trial. Judge Wolverton had been a judge for thirty years at the time of the *Cartozian* trial, having been appointed to the federal bench in 1905 by President Theodore Roosevelt after serving more than a decade on the Oregon Supreme Court, and Judge Wolverton had already issued two significant opinions interpreting the racial prerequisite in the Naturalization Act. It was Judge Wolverton's district court opinion that the Supreme Court had recently reversed in *Thind*,<sup>138</sup> and a decade earlier he published an opinion in *In re Ellis* holding that a Syrian petitioner was "white" and therefore racially eligible for naturalization.<sup>139</sup> In *Ellis*, Judge

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137. *Cartozian* Trial Transcript, *supra* note 1, at 153-55.

138. See generally *In re Thind*, 268 F. 683 (D. Or. 1920), *rev'd*, 261 U.S. 204 (1923).

139. See *In re Ellis*, 179 F. 1002, 1003 (D. Or. 1910). In contrast to the Supreme Court's reversal of Judge Wolverton's opinion in *Thind*, his opinion in *Ellis* was included among a list of lower court opinions expressly approved of by the Court in *Ozawa* because Judge Wolverton had written in *Ellis* that the ordinary usage rule of statutory interpretation required that the racial prerequisite in the Naturalization Act be interpreted according to its "popular sense." See *Ozawa v. United States*, 260 U.S. 178, 197 (1918) (including *In re Ellis* in a list of cases with which "we see no reason to differ"). Because in *Thind* the Supreme Court reversed two cases holding that Hindus were "white" after also expressly approving of them in *Ozawa*, however, some doubted

Wolverton had relied almost exclusively on the Government's admission that the petitioner was "white" but rejected the Government's argument that the racial prerequisite in the Act did not include all whites but only those people of the "white race" who at the time the Naturalization Act was passed either lived in Europe or on the American continent and were "inured to European governmental institutions." Judge Wolverton briefly cited Daniel Brinton's *Races and Peoples*, Augustus Keane's *The World's Peoples*, and Joseph Deniker's *The Races of Man* and noted that from these sources the Government's attorney admitted that the petitioner was "a member of what is known as the white or Caucasian race."<sup>140</sup> In *Thind*, Judge Wolverton relied on previous lower court precedent, citing cases holding that Armenians, Asian Indians, and Parsis were "white" within the meaning of the Act as particularly illustrative.<sup>141</sup> Beyond these precedents, Judge Wolverton offered no other authorities to support his decision in *Thind*.

In *Cartozian*, Judge Wolverton did not have the opportunity to adopt the approach he had taken in either *Ellis* or *Thind*. Instead, he adopted the defense's theory of the case in its entirety, although as discussed below, Judge Wolverton's opinion manifests a marked absence of narrativity that raises intriguing questions about his response to the "historical interpretation" of race that had recently emerged in case law interpreting the racial prerequisite in the Naturalization Act. The defense's tripartite case for Armenian racial eligibility for naturalization discussed above provides the basic structure of Judge Wolverton's opinion: (1) Armenians descended from premodern "white" ancestors who originated in Europe and migrated to Asia Minor in the seventh century B.C.E., (2) Armenians had remained "white" due to their unique geographical, linguistic, and religious isolation in Asia Minor, and (3) Armenians readily assimilated with contemporary Europeans and Americans (although with regard to this third part of the argument Judge Wolverton places greater emphasis on Armenia's proximity to and alliance with the Russian people of the Caucasus region who were the original inspiration for the Caucasian

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the status of *Ellis* after *Thind* as well.

140. Judge Wolverton also noted that the petitioner was "reared a Catholic, and is still of that faith." *In re Ellis*, 179 F. at 1002-03.

141. See *In re Thind*, 268 F. 683, 684 (D. Or. 1920).

racial classification than on the other assimilability evidence cited in his opinion).

Judge Wolverton begins his defense of Armenian whiteness in the opinion with the foundational premise that Armenians belonged to the Alpine subdivision of the Caucasian race, beginning this section of his opinion with the simple declaration, “That the Armenians are of Alpine stock can scarcely be doubted.” He then lists numerous authorities supplied by the defense to support this classical hypothesis of Armenian descent from Europeans who migrated to Asia Minor in the seventh century B.C.E., citing Herodotus’s *Histories*, Strabo’s *Geography*, Daniel Brinton’s *Races and Peoples*, William Ripley’s *Races of Europe*, Henry Lynch’s *Armenia, Travels and Studies*, and Alfred Haddon’s *The Races of Man and Their Distribution*, as well as the testimony of Franz Boas and Roland Dixon.<sup>142</sup> Judge Wolverton uses curiously hyperbolic language to defend this hypothesis, writing that “all the evidence points to” the European origins of Armenians, that the continuity of the Alpine race across Asia Minor “cannot be doubted,” that the authors and writers relied on by Boas and Dixon are “entirely reliable” and their conclusions have been accepted “without hesitation,” and that the evidence is so overwhelming that “nobody doubts” it.<sup>143</sup> With this language, Judge Wolverton ignores and perhaps even seeks to suppress the alternative hypotheses of more heterogeneous Armenian origins discussed in Judge Lowell’s opinion in *Halladjian* and M. Vartan Malcom’s book *The Armenians in America*.

After advancing this foundational premise, Judge Wolverton then offers his version of the historical narrative that justifies his finding that the Armenians not only descended from a premodern Indo-European ancestor but had remained “white” despite residing in Asia for centuries through their unique geographical, linguistic, and religious isolation. In contrast to the detail given this narrative by the Armenian defense, however, Judge Wolverton reduces this narrative to the following two sentences in the *Cartozian* opinion:

Although the Armenian province is within the confines of the Turkish Empire, being in Asia Minor, the people thereof have always held themselves aloof from the

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142. *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925).

143. *Id.*

Turks, Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it. The Armenians, tradition has it, very early, about the fourth century, espoused the Christian religion, and have ever since consistently adhered to their belief, and practiced it.<sup>144</sup>

Unlike Judge Wolverton's conclusion that the evidence of Armenians' descent from Indo-European ancestors is so overwhelming that "nobody doubts it," this passage is fraught with doubt and hesitation and reflects a markedly ambiguous agency at the center of the narrative.

The most significant language in this passage is the phrase "held themselves aloof," particularly the word "aloof." By condensing the defense's historical narrative of Islamic persecution and martyrdom in Asia Minor into the brief statement that the Armenians "held themselves aloof" from the Turks, Kurds, and allied peoples of the region, Judge Wolverton introduces an ambiguity regarding the agency in the narrative that suggests an inability or unwillingness to clarify it. The Armenians are given the active voice in this passage, but are they also given the active agency?<sup>145</sup> Who is doing what to whom in Judge Wolverton's account? Did the Armenians discriminate against the Turks, vice versa, or both, and who was to blame for the rigid segregation between the two groups? This was, after all, a significant historical question at issue in the case. Much of the testimony had addressed whether or not the Armenian communities in Europe and the United States formed enclaves, leading the defense to make such strong claims of Armenian assimilability with contemporary Europeans and Americans as that Armenian colonies in Europe and America had left "no trace" of themselves or been "devoured" or "consumed" by the local populations. Moreover, one of the familiar claims of genocide denial is that the perpetrators are the real victims because the killing was committed in self-defense and the perpetrators also suffered

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144. *Id.*

145. As *The Oxford Companion to the English Language* explains, "in English, the semantic role of the subject in active constructions is typically agentive, but not exclusively so: *books* in *These books sell well* is not the agent but the affected." See THE OXFORD COMPANION TO THE ENGLISH LANGUAGE (Tom McArthur ed., 1992) (*sub verbo* "agent").

casualties. With regard to the Armenian genocide, Turkey claimed that Armenians were separatists who provoked the atrocities against them by forming alliances with foreign powers and that the genocide of World War I was justified by the fact that Armenians joined Russian forces during the war to form a “fifth column” inside the Ottoman Empire.<sup>146</sup> The ambiguity of the word “aloof” in the *Cartozian* opinion suggests a deliberate evasion of this central question of who was responsible for the isolation of Armenians from the Turks, Kurds, and allied peoples in Asia Minor.

The word “aloof” originally derives from “a loof,” a combination of the preposition “a,” referring to motion toward a position of contact, and the noun “loof,” referring to the palm of the hand. The combined form “a loof” came to refer to the injunction to a rudder operator of a ship to “keep your loof” in the act of turning the ship toward the wind and clear of the direction where it might otherwise drift. From this arose the sense of “steering clear of,” or “giving a wide berth to” anything with which one might otherwise come in contact, as in the exhortation to “keep aloof.” The word may also describe a lack of sympathy or community with a person or group, in the sense of someone who stands “coldly aloof” from others.<sup>147</sup> The latter meaning is more often associated with the verb “hold,” or alternatively “stand” or “keep,” as in the phrases, “stood aloof,” “kept aloof,” “held aloof,” or Judge Wolverton’s phrase “held themselves aloof.” This sense of “aloof” may even refer to a person ignoring pleas of help or appeasement, as in the final act of Shakespeare’s *Hamlet* when Laertes tells Hamlet “I stand aloof, and will no reconciliation,”<sup>148</sup> or may

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146. See generally, JONES, *supra* note 39, at 168-72; Dadrian, *The Turkish Military Tribunal’s Prosecution*, *supra* note 43, at 34. The Turkish Attorney General who prosecuted the perpetrators of the Armenian genocide in the war crimes trials held in the Ottoman Empire after World War I even partially blamed the victims for provoking the atrocities during his opening remarks, a claim that elicited protest from the Armenian lawyers who strongly disputed the accuracy and propriety of the Attorney General’s remarks and left the proceedings in protest after failing to have him disqualified. The Ottoman officials on trial also asserted that their acts were required by Armenian threats to state security, but these assertions were contradicted by documentary evidence introduced during the proceedings. Dadrian, *supra* note 43, at 34-36, 38-39.

147. See OXFORD ENGLISH DICTIONARY 359 (J.A. Simpson & E. S. C. Weiner eds., 2d ed. 1989).

148. See WILLIAM SHAKESPEARE, *Hamlet*, in WILLIAM SHAKESPEARE: THE COMPLETE WORKS (Stanley Wells et al. eds., 2d ed. 2005).

suggest a resistance offered to temptation, echoing its earlier use as an injunction to turn a ship toward the wind so that it does not drift.

This tension between those who “hold themselves aloof” and the group denied sympathy or community by this action creates a remarkably ambiguous representation of agency. What is the nature of the relationship between the Armenians and their Islamic neighbors in Asia Minor in this narrative? How does it explain centuries of Armenian isolation despite the close proximity to these people? Have the Armenians “held themselves aloof” for fear of being massacred or of being seduced (either religiously or sexually)? Judge Wolverton adds that the Armenians held themselves aloof based “principally . . . on account of their religion, though color may have had something to do with it,” an explanation that further compounds the ambiguity of the passage rather than clarifies it. The unequivocal claim that the Armenians “always” held themselves aloof from these people was necessary to distinguish the case from *Thind*, yet the certainty of the claim is almost immediately contradicted by the hesitation of merely claiming that “it might be said” that this isolation was principally due to religion but that color “may” have had “something” to do with it.<sup>149</sup> Moreover, the trial record reflects no discussion of “color” having anything to do with the relationship between the Armenians and the Turks, Kurds, and allied peoples of Asia Minor, at least not explicitly. Are the Turks, Kurds, and allied people of Asia Minor persecutors or victims in this passage? What does the answer reflect about Armenian assimilability in the diverse population of early twentieth century America? The passage leaves these questions unanswered.

At almost the same time as the trial in *Cartozian*, the word “aloof” also appears in *United States v. Pandit*, a racial prerequisite case in which the Government sought to cancel the naturalization certificate of Asian Indian immigrant Sakharam Pandit after the Supreme Court held that high caste Hindus were racially ineligible for naturalization in *Thind*. In what appears to have been a novel strategy in the racial prerequisite cases, Pandit had argued that the Government

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149. The second sentence of the quoted passage from the *Cartozian* opinion reflects a similar juxtaposition of certainty and hesitation, claiming “tradition has it” that in “about” the fourth century Armenians adopted Christianity but have “ever since consistently adhered” to their belief and practiced it. *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925).

was equitably estopped from canceling his naturalization certificate because among other things he had lost his high caste status in India when he became an American citizen and if his naturalization certificate were canceled he would be an outcast in India and a stateless person. When an expert witness testified in an evidentiary hearing that a high caste Hindu who became an American citizen would lose his high caste status in India, Judge Paul McCormick interrupted the witness to ask if Brahmins in India exercised rights as British subjects, adding, “I mean, do they do it because of necessity or through choice? Does the Brahmin as a caste, the Hindu caste, *hold itself aloof* from the rest of the citizenry and accept the political status simply because they have to accept it?”<sup>150</sup> In this question, Judge McCormick uses “aloof” in a phrase nearly identical to Judge Wolverton’s in *Cartozian*, but in the context of asking whether a Brahmin’s exercise of his rights as a British subject was voluntary. Judge McCormick’s use of “aloof” in *Pandit* leaves no ambiguity; for the Brahmin caste to “hold itself aloof” in the context of Judge McCormick’s question is unmistakably an act of choice.

A different use of “aloof” appears in a 1951 opinion of the United States Board of Immigration Appeals holding that the Kalmyk people of southeastern European Russia, although originally “a tribe of Mongolian stock” and Asiatic in origin, were “white” within the meaning of the Nationality Act of 1940 by virtue of their identification with Europeans by several generations of affinity, education, cultural activity, and several decades of Soviet rule in Russia. In the course of limiting the scope of its opinion, the Board carefully distinguishes the Kalmyks of southeastern European Russia to whom the opinion refers from the Kalmyks who migrated east to China in 1771, because unlike the former group of Kalmyks the latter “*stayed aloof* from the neighboring Russian and non-Russian tribes” out of “fear of Russian Tsarist influence and domination.”<sup>151</sup> This use of “aloof” suggests a passive or reactionary agency as the Kalmyks fled the Russian Tsar, perhaps even suggesting that they were chased or driven. Like Judge McCormick’s use of “aloof” in *Pandit*, the agency in the Board’s use

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150. Transcript of Record, *United States v. Sakharam Ganesh Pandit*, No. 4938 (9th Cir. Aug. 13, 1926), 121-22 (emphasis added), in Records of the U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration Pacific Region, San Bruno, Calif.

151. *In re R--*, 4 I & N. Dec. 275, 280 (B.I.A. 1951) (emphasis added).

of “aloof” is relatively clear, although the agency lies as much with the Tsar as with the Kalmyks. By contrast to these examples, however, the agency of Judge Wolverton’s claim that the Armenians “held themselves aloof” from the Turks, Kurds, and allied peoples of Asia Minor remains unclear.

Studies of the racial prerequisite cases that focus exclusively on the direct evidence of assimilability discussed in Judge Wolverton’s opinion in *Cartozian* also neglect the fact that a close reading of the opinion reveals that he only relies on evidence of Armenian marriages to contemporary Europeans and Americans, prior Armenian naturalizations and membership in American social clubs, and Armenian use of the English language to corroborate a more figurative argument regarding Armenians’ affiliation with the Russian people of the Caucasus region of southwestern Russia. Specifically, after advancing his extraordinarily condensed version of the defense’s historical narrative, Judge Wolverton argues that Armenians are assimilable with contemporary Europeans and Americans based on the geographical and political proximity of Armenians to the Russian people of the Caucasus region who originally inspired the Caucasian racial classification, an argument Judge Wolverton notes is one of analogy:

Whatever analogy there may be or may exist between the Caucasian and the white races that may be of assistance in the present controversy, the alliance of the Armenians with the Caucasians of Russia has ever been very close. Indeed, the Armenians have for many generations, possibly centuries, occupied territory in Caucasian Russia, have intermingled freely and harmoniously with that people, and the races mix and amalgamate readily and spontaneously.<sup>152</sup>

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152. *Cartozian*, 6 F.2d at 920. Judge Wolverton’s use of the word “spontaneously” in this passage appeals to the notion of “racial instincts,” once again responding to *Thind* in which the Supreme Court concluded that the racial difference of high caste Hindus was “of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.” *United States v. Thind*, 261 U.S. 204, 210-11 (1923). In 1896, the Supreme Court’s opinion in *Plessy v. Ferguson* had similarly claimed that “legislation is powerless to eradicate racial instinct, or to abolish distinctions based upon physical differences.” *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). During the era surrounding World War I, this

The prominence given this argument in Judge Wolverton's opinion significantly outweighs the emphasis placed on it by the defense. Although during Franz Boas's testimony he quoted a passage from Johann Friedrich Blumenbach's *On the Natural Variety of Mankind* in which Blumenbach explains that he named the Caucasian racial classification after Mount Caucasus because he considered the people of that region "the most beautiful race of men" and "the autochthones of mankind,"<sup>153</sup> the trial transcript is otherwise entirely silent on the etymology of the Caucasian racial classification. Furthermore, the only testimony regarding the Armenian alliance with the Russian people of the Caucasus region came when M. Vartan Malcolm testified that the Armenians took refuge in the Caucasus to save themselves from the Armenian genocide of World War I.<sup>154</sup> Judge Wolverton's metonymic claim that Armenians' proximity to and affiliation with the Russian people of the Caucasus region demonstrated that Armenians were "white" is also curious in light of the Supreme Court's rejection of the Caucasian racial classification as an index for the meaning of the racial prerequisite in the Naturalization Act, unless Judge Wolverton believed the metonymic association supplied evidence of the ordinary or popular meaning of the term "white."

Although prior studies of *Cartozian* have largely focused on the evidence of Armenian marriages to contemporary Europeans and Americans, prior Armenian naturalizations and membership in American social clubs, and Armenian use of the English language referenced toward the end of the *Cartozian* opinion, it is significant that Judge Wolverton first emphasizes the claim that Armenians are metonymically "white" by virtue of their association with the Russian people of the Caucasus. Moreover, after making this argument Judge Wolverton pauses to state that "the status of the [Armenian] people thus evolved is *practically conclusive* of their eligibility to citizenship in the United States, seeing that they are of Alpine stock, and so remain

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belief in racial instincts developed into the argument that the truths of race did not need scientific verification but could be learned from "intuition." See, e.g., THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 353 (New ed. 1997); WILLIAM PETERSEN ET AL., CONCEPTS OF ETHNICITY 88 (1980). Although a theory of racial instincts also appears to be the basis for the defense's theory of the case in *Cartozian*, Judge Wolverton's claim that Armenians "spontaneously" intermingled with other "whites" is the most explicit statement of this theory in the record.

153. See *Cartozian* Deposition Transcript, *supra* note 77, at 66.

154. *Cartozian* Trial Transcript, *supra* note 1, at 155.

to the present time, without appreciable blending with the Mongolian or other kindred races.”<sup>155</sup> Contrary to prior scholarly emphasis on the assimilability evidence in the latter half of the opinion, Judge Wolverton clearly indicates his satisfaction with the evidence discussed at this earlier point in the opinion as “practically conclusive” of the question. He only catalogues additional assimilability evidence after remarking, “but to pursue the inquiry further, it may be confidently affirmed that Armenians are white persons, and moreover that they readily amalgamate with the European and white races.”<sup>156</sup> He then catalogues testimony and statistical evidence introduced by James Barton, Franz Boas, Roland Dixon, Mrs. Otis Floyd Lamson, M. Vartan Malcolm, and Paul Rohrbach regarding Armenian assimilability with contemporary Europeans and Americans, including statistical evidence introduced by Boas and Malcolm.<sup>157</sup>

When Judge Wolverton’s opinion in *Cartozian* is considered as a whole, it is also apparent that his condensed narrative of Armenian isolation in Asia Minor is not the only passage in which the agency of the events depicted is ambiguous, but the opinion generally fails to clarify the agency in the events described and attributes virtually no agency to Armenians. Judge Wolverton represents the Armenians as a people whose origins are shrouded in mythology, migrate from Europe to Asia Minor, then “hold themselves aloof” from dark Islamic hordes until they are driven out of the region and consumed by the populations of Europe and the United States. In the *Cartozian* opinion, the Armenians truly are a people without a country because they have no national agency. The absence of a clear agency in the opinion also forms part of a larger pattern of narrative refusal manifested in a lack of transitional words and phrases in the opinion, any clear framework linking the beginning and ending of the opinion, or a coherent order of meaning in which the relationships between events are ordered into a purposive sequence. While the opinion depends on a particular historical account of Armenian isolation from their Islamic neighbors in Asia Minor, the account of this isolation is presented with virtually no narrative development, which is also lacking in the rest of the opinion. Instead, the sections before and after the historical account

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155. *United States v. Cartozian*, 6 F.2d 919, 920 (D. Or. 1925).

156. *Id.*

157. *Id.* at 921.

read more like a catalogue of evidentiary items with no explanation of the relationship between them and no recognition of their contested nature.

This absence of narrativity in the *Cartozian* opinion is particularly interesting because it suggests the form of natural history that Hayden White attributes to annals in contrast to fully developed histories. In his essay “The Value of Narrativity in the Representation of Reality,” White argues that unlike a fully realized history, annalists show no concern for any system of human morality or law but present “a world in which things happen to people rather than one in which people do things,” a world in which events “appear to belong to the same order of existence as the natural events which bring either ‘great’ crops or ‘deficient’ harvests, and are as seemingly incomprehensible.”<sup>158</sup> Despite the Supreme Court’s rejection of racist science in *Thind*, the stylistic choices reflected in the *Cartozian* opinion suggest a world of biological determinism, and in this sense Judge Wolverson’s opinion suggests a continued ambivalence about the “historical interpretation” of race that had recently emerged in the case law. Throughout the opinion, Judge Wolverson introduces rhetorical appeals to scientific authority and statistical evidence in close proximity to the historical narratives on which the opinion most centrally relies, as though the certainty of science might compensate for the contingency of histories steeped in mythology, tradition, and figurality.

What is perhaps most remarkable about the judicial opinion in contrast to the trial transcript in *Cartozian*, however, is the opinion’s deafening silence regarding the Armenian genocide and the resulting displacement of Armenians that gave rise to the case in the first place and the threat of statelessness the case posed were Armenians denied eligibility for naturalization to the United States. Even in *Halladjian*, written years before the Armenian genocide of World War I, Judge Lowell wrote that since the Armenians’ final conquest by the Turks they had been “oppressed by the Turks, and have looked vainly to Europe for relief.”<sup>159</sup> As is apparent from the *Cartozian* trial transcript, the violent persecution of the Armenians by Turks, Kurds, and Syrian

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158. HAYDEN WHITE, *The Value of Narrativity in the Representation of Reality*, in THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION, at 10, 14 (1990).

159. *In re Halladjian*, 174 F. 834, 841 (C.C.D. Mass. 1909).

Muslims was a central theme of the defense's case, offered to explain why Armenians remained "white" despite centuries of residence in Asia while Asian Indians had not remained "white" in the Indian subcontinent. Judge Wolverton was clearly presented with an exigency to speak to this issue, but neglects to even allude to it in his opinion. This raises particularly difficult questions given the silences that have attended many genocides and the Armenian genocide in particular, which was long referred to as the "forgotten genocide," the "unremembered genocide," the "hidden holocaust," or the "secret genocide."<sup>160</sup> Is Judge Wolverton's silence and the absence of a clear narrative in the *Cartozian* opinion a part of this legacy of silences surrounding genocide?

As the first genocide in modern history, the Armenian genocide left spectators as well as survivors with a powerful feeling of speechlessness, the sense that they were confronting an event for which there were not yet words. As one writer attempted to describe it during the postwar period,

Those bodies endured the most frightful physical suffering possible to human flesh and nerves—more than your imagination can conceive after reading all the horrors of Indian torture; of shipwreck and starvation in open boat or on desert island; of famine and pestilence in India or China; of being lost on the trackless desert; of being mangled and burned in a wreck of railroad train or of theater or of home; or of tortures by Inquisition or by Roman Empire. All that you have experienced or witnessed or read or heard of pain and horror pales before the dreadful realities of Armenian famine and massacre.<sup>161</sup>

This author's effort to negatively define these traumatic experiences by reference to the horrors that they surpass has now become a commonplace of genocide discourse, and genocide has often posed such unique challenges to speech that silence is considered the only appropriate response to it. In his study of the oral narratives of Holocaust survivors, Lawrence Langer concludes that the frequent

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160. See BALAKIAN, *supra* note 41, at xii.; JONES, *supra* note 39, at 149.

161. Lee, *supra* note 106, at 67.

refusal of Holocaust survivors to speak of their trauma is sometimes motivated by an “anxiety of futility,” the certainty that those who most need to understand will not understand and may even be alienated by the incomprehensibility of the events. Because such events dispel the idea that choice is “purely an internal matter, immune to circumstance and chance,”<sup>162</sup> they contest the notion of autonomous agency on which law, narrative, and history depend and even the concept of narrativity itself, a view perhaps suggested by Theodor Adorno’s statement that to write poetry after Auschwitz would be barbaric.<sup>163</sup> Perhaps Judge Wolverton found that the only appropriate response to the history of violence at the heart of the defense’s historical narrative was silence or that the history of this violence was so incomprehensible as to defy narrativity. The answer to this question is ultimately unknowable, but the problem of narrativity in the context of genocide offers a possible explanation of the broader narrative refusal reflected in the *Cartozian* opinion.

#### **TRANSCENDING RACIAL DIVISIONS BY UNIFYING AGAINST COMMON ENEMIES**

The Department of Labor initially moved to appeal Judge Wolverton’s decision in *Cartozian* to the Supreme Court but agreed to drop the appeal after the change of administrations following President Harding’s death brought opposition to any appeal.<sup>164</sup> The record of the proceedings in *Cartozian* not only offers the most detailed record available of the arguments and evidence advanced to determine whether a particular petitioner was “white” within the meaning of the racial prerequisite in the Naturalization Act, but is one of the earliest cases to have interpreted the Supreme Court’s opinions regarding racial eligibility for naturalization in *Ozawa* and *Thind*. The record in *Cartozian* reveals that the defense used a rhetorical strategy of unifying against a common enemy, invoking both cultural memories of the Crusades and the Mongol invasions of medieval Europe reflected in the legends of merciless slaughter committed by such figures as Attila the

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162. Cf. LAWRENCE LANGER, HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY xii (1991).

163. See, e.g., Liliane Weissberg, *In Plain Sight, in VISUAL CULTURE AND THE HOLOCAUST*, 14 (Barbie Zelizer ed., 2001).

164. See Craver, *supra* note 14, at 56.

Hun, Genghis Kahn, and Tamerlane,<sup>165</sup> as well as contemporary tensions between the United States and Turkey arising out of World War I and continued Turkish aggression toward Armenians and American missionaries. The trial transcript in *Cartozian* also reveals the conflict between the assimilability that the Armenians claimed with contemporary Europeans and Americans and their protonationalist desire for an independent republic of Armenia that had become doubtful by the time of the trial, a conflict not evident in the judicial opinion but which highlights the difficult identity issues at the center of the case.

Since Benedict Anderson's groundbreaking work on nationalism in *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, in which Anderson claims the nation is only an "imagined political community,"<sup>166</sup> numerous studies have followed of the ways in which national identity is rhetorically constructed. As M. Lane Bruner writes, national identities are negotiated through "the clash of multiple and conflicting discourses, including battles over memory, over domestic and foreign policy, and over constitutions and the meaning of laws," battles in which contradictory aspects of national history are erased or suppressed through narrative omissions to create the false appearance of a heterogeneous history.<sup>167</sup> Importantly, studies

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165. See KEEVAK, *supra* note 11, at 4, 75-76; see also KEEN, *supra* note 28, at 26. ("The old image of Genghis Khan and the Mongol hordes still haunts us and is retooled and pressed into service when needed."). Michael Keevak argues that it was only at the end of the nineteenth century that "the idea of a yellow East Asia would fully take hold in the Western imagination, crystallizing in the phrase 'the yellow peril' to characterize the perceived threat that the people of the Far East were now said to embody" and that the association of yellow skin with Asian races during the nineteenth century firmly brought together what had been closely allied for centuries, "yellow skin, numerous 'Mongolian' invasions, and the specter of large numbers of people from the region migrating to the West." KEEVAK, *supra* note 11, at 124-25.

166. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM*, 145-46 (2d ed. 2006); see also VANESSA B. BEASLEY, *YOU, THE PEOPLE: AMERICAN NATIONAL IDENTITY IN PRESIDENTIAL RHETORIC* (2004); METAPHORICAL WORLD POLITICS (Francis A. Beer and Christ'l De Landtsheer, eds., 2004); M. LANE BRUNER, *STRATEGIES OF REMEMBRANCE: THE RHETORICAL DIMENSIONS OF NATIONAL IDENTITY CONSTRUCTION* (2002); COHEN, *supra* note 25; MAURICE OLENDER, *THE LANGUAGES OF PARADISE: RACE, RELIGION, AND PHILOLOGY IN THE NINETEENTH CENTURY* (Arthur Goldhammer trans., 2008); SARA SULERI, *THE RHETORIC OF ENGLISH INDIA* (1992).

167. See BRUNER, *supra* note 166, at 1-11, 89; cf. Eve Darian-Smith,

of nationality have frequently compared and contrasted national identity with race and religion, the imagined communities that the nation displaced. Thus, Anderson writes that in western Europe the eighteenth century “marks not only the dawn of the age of nationalism but the dusk of religious modes of thought” and that nationalism “has to be understood by aligning it, not with self-consciously held political ideologies, but with the large cultural systems that preceded it,” specifically those religious communities and dynastic realms “out of which—as well as against which—it came into being.”<sup>168</sup> Similarly, Maurice Olander notes the indelible mark left on the twentieth century by eighteenth and nineteenth century philologists whose search for the origins of human language linked philology with the preeminence of particular races, religions, and nations, and whose emphasis on the declining importance of race in favor of linguistic and religious identities eventually rendered race “a matter of language, religion, laws, and customs, more than of blood.”<sup>169</sup> The conflicts between these competing forms of group identity are powerfully revealed in the racial prerequisite cases of the early twentieth century, particularly those cases adopting the “historical interpretation” of race, and *Cartozian* illustrates how such identities were forged through the rhetorical strategy of unifying against common enemies.

This rhetorical strategy is not unique to *Cartozian* or to the historiography of the early twentieth century racial prerequisite cases, but expressions of solidarity against common enemies are found throughout the legislative, executive, and judicial discourse surrounding the racial prerequisites in the Naturalization Act, suggesting that many of the participants in this discourse found the strategy particularly persuasive of racial classification. In the earliest interpretation of the racial prerequisite in the Naturalization Act by the United States Supreme Court, for example, Chief Justice Roger Taney wrote in his infamous majority opinion in *Dred Scott* that in drafting the original Naturalization Act, while the First Congress could have provided for the naturalization of American Indians, “in their untutored and savage state no one would have thought of admitting them as

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*Postcolonialism: A Brief Introduction*, 5 SOC. & LEGAL STUD. 291, 297 (1996) (noting that “law, alongside climate, geography, history, and cultural practices, shapes the mythological imagery” of national identities).

168. ANDERSON, *supra* note 166, at 11-19.

169. OLENDER, *supra* note 166, at 58-59.

citizens in a civilized community,” and

moreover, the atrocities they had but recently committed, when they were allies of Great Britain in the Revolutionary War, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white [in the Naturalization Act] was not used with any particular reference to them.

Furthermore, although Justice Taney acknowledges that American Indians were not constitutionally incapable of becoming citizens but simply not contemplated by the original Act’s racial prerequisite, to support his contrary conclusion that Africans were constitutionally incapable of becoming citizens he writes that while American Indian governments were deemed foreign they were also free and “their alliance sought for in war.” Moreover, amidst a lengthy body of evidence that Justice Taney cites in support of the majority’s decision in *Dred Scott*, he lends particular emphasis to the fact that Africans were racially ineligible to fight in defense of the states under state militia laws, noting that “nothing could more strongly mark the entire repudiation of the African race” than its ineligibility to fight in defense of the states because “he forms no part of the sovereignty of the state, and is not therefore called on to uphold and defend it.”<sup>170</sup>

Other courts concluded that judicial interpretations of the racial prerequisite in the Act had broadened as a result of the Revolutionary War and the various annexation treaties of the nineteenth century in which the United States naturalized the inhabitants of annexed territories without regard to race. One federal judge wrote regarding the period when the First Congress drafted the original Naturalization

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170. *Scott v. Sandford*, 60 U.S. 393, 404, 415, 419-20 (1857). Similar to Justice Taney’s remarks about the savagery of American Indians, a later opinion by an Alaska district court holding that an American Indian was not “white” within the meaning of the Naturalization Act noted that it was the practice of the United States at the time the Act was written to treat the American Indian tribes in the same manner as “peoples or tribes unfriendly to our government, living under conditions of barbarism.” *In re Burton*, 1 Alaska 111, 114 (D. Alaska 1900).

Act, for example:

As the inhabitants of what was then the United States were a more or less homogeneous people who or whose immediate forbears had come from what has been termed “Northern Europe,” and as the vast territories then known as Florida and as Louisiana formed no part of our national domain, and as our people had been in almost continuous conflict with the French and Spaniards, it is doubtful whether the words “white persons,” as used in common speech, originally included any of the so-called Latin races. The events of the Revolution, however, and the gratitude which our people felt toward France, and more especially the large number of French Huguenots who had come to make their homes here, caused instant recognition of the French as having a common heritage with us, and the phrase automatically expanded to include them.<sup>171</sup>

Similarly, in an opinion holding that a “pure-blooded Mexican” petitioner was “white” and therefore eligible for naturalization, another federal district court judge relied heavily on the Treaty of Guadalupe-Hidalgo, the Adams–Onís Treaty, and the Gadsden Treaty, which had naturalized numerous Mexican inhabitants of newly acquired territories without regard to race.<sup>172</sup> In fact, in Justice McLean’s dissenting opinion in *Dred Scott* he noted that “on the question of citizenship it must be admitted that we have not been very fastidious,” referencing the Treaty of Guadalupe-Hidalgo in which “we have made citizens of all grades, combinations, and colors,” and the Adams–Onís Treaty which naturalized the inhabitants of the annexed Florida and Louisiana territories without regard to race.<sup>173</sup>

Following World War I and the emergence of displaced and stateless persons like the Armenians, this rhetorical strategy of unifying against a common enemy also served the plight of such groups who sought asylum before legal protections for asylees had matured. This strategy appears in the opinions issued in two cases before the United States Board of Immigration Appeals during the early Cold War era, for example, determining the racial eligibility of refugees from the

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171. *In re Singh*, 246 F. 496, 498-99 (E.D. Pa. 1917).

172. *See In re Rodriguez*, 81 F. 337, 349 (W.D. Tex. 1897).

173. *See Sandford*, 60 U.S. at 529 (McLean, J., dissenting).

Soviet Union for admission to the United States after they had been refused entry by immigration officials on the basis that they were not “white” and therefore “ineligible to citizenship” as defined by the Immigration Act of 1924. In opinions concluding that the Tatar and Kalmyk immigrants in these cases were “white” within the meaning of the Nationality Act of 1940 “in spite of their Asiatic origin” and overturning the decisions to deny the immigrants admission, the Board of Immigration Appeals highlights the systematic displacement and deportation of the immigrants by the Soviet government. In a 1950 case involving a Tatar immigrant from eastern Russia, “Mohammedan by religion,” the Board notes that the immigrant was a soldier in the Red Army from 1941 to 1945 but after he was captured by the German army “he stated that he was born in Istanbul, Turkey, to avoid repatriation to Russia,” and that the people of his birthplace were “reportedly being systematically displaced or exterminated and replaced by a special military class of so-called Russianized Cossacks or trusted members of the Red Army’s communist youth organization.”<sup>174</sup> Similarly, in a 1951 case involving Kalmyk immigrants, the Board notes that the immigrants in the case “fled from Russia about 1920, after resisting the communist revolutionary forces,” that in 1943 the Soviet Politbureau “determined that the Kalmuks should be displaced and deported, because they opposed the oppressive regime and, hence, were considered wanting in loyalty, dangerous to the State,” and that the “helpless Kalmuk minority group” was herded into unheated railroad cars and deported, “without warning and at gun-point,” many of them dying en route.<sup>175</sup> In both cases, the Board’s opinions emphasize that the immigrants had been subjected to deportation and eliminationist campaigns by America’s new Cold War enemy the Soviet Union and were seeking refuge in the United States, reflecting a persecutory agency remarkably similar to that of the Armenian defense in *Cartozian*.

In Matthew Frye Jacobson’s examination of the relationship between whiteness and American imperialism, he refers to a similar process he calls the “crucible of empire,” by which the whiteness of non-Anglo-Saxon immigrants from Europe whose whiteness had often been considered inferior to that of Anglo-Saxons during the late

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174. *In re S--*, 4 I & N. Dec. 104 (B.I.A. 1950).

175. *See In re R--*, 4 I & N. Dec. 275, 276, 280 (B.I.A. 1951).

nineteenth century was confirmed as American expansion into the Pacific and the imagination of Pacific natives as “savages” dissolved the boundary between such “superior” and “inferior” whites.<sup>176</sup> The racial prerequisite cases reveal similar examples of this process far beyond the probationary “white” races of Europe, however, as Armenians and other immigrants from central and western Asia were also made “white” by the alchemic process of appealing to persecutory narratives such as the defense’s narrative of Turkish persecution in *Cartozian*, and it is important to note that this process reflects specific rhetorical strategies adopted by the participants in the cases as they negotiated group identities amid the growing tensions between race, religion, and nationality in the early twentieth century.<sup>177</sup>

According to Sam Keen, human beings create enemies “not because we are intrinsically cruel, but because focusing our anger on an outside target, striking at strangers, brings our tribe or nation together and allows us to be part of a close and loving in-group,” or in other words, “we create surplus evil because we need to belong.”<sup>178</sup> It is a mistake to conclude that “striking at strangers” creates this sense of solidarity or belonging, however, for as Arthur Koestler writes, it is the human capacity for devotion rather than aggression that causes wars.<sup>179</sup>

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176. JACOBSON, *supra* note 20, at 203-222.

177. Legislative debates regarding the racial prerequisite in the Naturalization Act also reflected an effort to establish identification through shared fear. For example, during Civil War Reconstruction debates regarding whether the word “white” should be removed from the Naturalization Act, Pacific Coast Senators warned of the threat posed by rising numbers of Chinese immigrants which they described as a “mighty tide of ignorance and pollution that Asia is pouring with accumulating force and volume into the bosom of our country.” CONG. GLOBE, 41ST CONG., 2D SESS. 5120, at 5121-25, 5148-77 (1870). By contrast, during the debates regarding the repeal of the Chinese Exclusion Act and the extension of the Nationality Act to provide for the racial eligibility of Chinese people for naturalization during World War II, congressmen appealed to China’s alliance with the United States in the war against the “bloody Hirohoto dynasty of Japan,” noting that “today we are allied with [China] in every way that a great and honorable people can be allied with another great people to fight for the principles of government we hold so dear,” and “we must act together, and to act together we must wipe out every vestige, whatever the cause may have been for its enactment, which speaks contempt and disrespect for the great Chinese people.” 89 CONG. REC. 8598, 8598 (1943).

178. KEEN, *supra* note 28, at 17, 27.

179. ARTHUR KOESTLER, *JANUS: A SUMMING UP* 14 (1978). Koestler notes that most wars are not fought for personal gain but “out of loyalty and devotion to king, country or cause,” and crimes committed for selfish motives have been far outnumbered in

In numerous instances throughout the discourse surrounding the racial prerequisite in the Naturalization Act, when the racial eligibility for naturalization or the scope of the term “white” within the meaning of the Act is expanded to include individuals or groups a passive or persecutory agency is used to frame the actions of the petitioners. When petitioners sought to establish their racial eligibility for naturalization solely through direct evidence of assimilability, by contrast, advancing narratives in which they played an active role by recounting their history of conquests, development of civilized society, or the discriminatory segregation of non-“white” people such as Africans and aborigines, they were held to be racially ineligible for naturalization even when they presented an impressive list of such evidence. Moreover, numerous military expediencies expanded the racial demographics of American citizenship through the naturalization provisions of annexation treaties such as those discussed above and legislative extensions of racial eligibility to military allies surrounding World War I and World War II. Thus, although in Justice McLean’s dissent in *Dred Scott* he argues that “on the question of citizenship it must be admitted that we have not been very fastidious,”<sup>180</sup> when viewed from a rhetorical perspective the decisions regarding racial eligibility for naturalization appear to flow from a consistent motive of solidarity in defense of the nation, whether the perceived threats that supported this motive were real or fictional. Throughout the discourse surrounding the racial prerequisite in the Naturalization Act, appeals to unify against a common enemy nearly always accompanied findings of racial eligibility for naturalization while similar appeals were nearly always absent when racial eligibility for naturalization was denied. Such appeals also frequently received an emphasis that suggests they were considered particularly persuasive by comparison with other factors that were used to racially classify the petitioners.

The contrast between these rhetorical strategies suggests that the maxim “the enemy of my enemy is my friend,” commonly used to describe unification against a common enemy, might be more aptly

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human history by those “massacred in unselfish loyalty to one’s tribe, nation, dynasty, church, or political ideology, *ad majorem gloriam dei*.” *Id.* at 14, 77-78, 82-83, 89, 93 (“The crimes of Caligula shrink to insignificance compared to the havoc wrought by Torquemada.”).

180. See *Sandford*, 60 U.S. at 529 (McLean, J., dissenting).

formulated as “the victim of my enemy is my friend.” As Chris Hedges explains the close bond felt by fellow soldiers in war:

The closeness of a unit, and even as a reporter one enters into that fraternity once you have been together under fire, is possible only with the wolf of death banging at the door. The feeling is genuine, but without the threat of violence and death it cannot be sustained.<sup>181</sup>

The unifying power of violent attacks such as Pearl Harbor and September 11, as well as the many minor examples of threats in human society, is in the first instance an effect not of anger but of fear, and is intensified only when the enemy is rhetorically framed as the aggressor. It is Armenians maintaining their Christianity in Asia Minor by standing firm “in the face of tremendous odds” against “the onslaught of Mohammedanism” perpetrated by Turks, Kurds, and Syrian Muslims,<sup>182</sup> or the “helpless Kalmuk minority,” who “without warning and at gun-point,” were “herded into unheated railroad cars,” “without benefit of food or water, many [dying] en route, while the rest were scattered in various spots of the Soviet Union.”<sup>183</sup> The powerful force to unify against a common enemy, as in these examples, is not created by banging at the door of the wolf of death, but by the wolf of death banging at the door.

By illustrating how this rhetorical strategy operates in the racial prerequisite cases, *Cartozian* also reveals the failure of the “historical interpretation” of race as a substitute for racialist science in the case law interpreting the racial prerequisites in the Act. Although the courts of the early twentieth century that adopted the “historical interpretation” of race openly recognized, as Ian Haney López notes, that race is not “a biologically defined group, a static taxonomy, a neutral designation of difference, an objective description of immutable traits, a scientifically defensible division of humankind, [nor] an accident of nature unmolded by the hands of people,”<sup>184</sup> but a highly contingent political commodity that is socially, culturally, and historically constructed, they continued to enforce the racial prerequisites in the Naturalization Act through a historiography that

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181. HEDGES, *supra* note 26, at 115-16.

182. *Cartozian* Trial Transcript, *supra* note 1, at 126-27; *Cartozian* Deposition Transcript, *supra* note 77, at 35.

183. *In re R—*, 4 I & N. Dec. 275, 280.

184. LÓPEZ, *supra* note 8, at 107.

was equally if not more capable of effecting racial divisions than biological determinism. Rather than conclude that because race was socially, culturally, and historically constructed the racial prerequisite to naturalization was so ambiguous as to be impracticable of application, the racial prerequisite courts of the early twentieth century constructed racial classifications through a dramaturgy of enmity that imagined American identity against perceived threats to the nation. The fact that in *Cartozian* the defense constructed Armenian whiteness by representing Turks, Kurds, and Syrian Muslims as non-“white” when these and other people from the Middle East had largely been held to be “white” for purposes of naturalization even suggests that the form of this rhetorical strategy itself may have been particularly important.

By shifting the focus to a rhetoric of fear that adapted itself to changes in the geopolitics of the era, the ability of this rhetorical strategy to transcend racial differences to unify against a common enemy explains perceived contradictions in the racial prerequisite cases where emphasis on direct evidence of assimilability fails. It is important to emphasize that this was not a political ideology but a rhetorical strategy, however, and that the geopolitics of the early twentieth century only provided the material with which the participants in the cases could rhetorically construct group identities. The rhetorical situation of individual cases must be closely examined, particularly the arguments and evidence advanced by the participants and the identity issues implicated by the historical context at the time, to understand the effect of persuasion on the cases. Although the courts continued to exclude certain petitioners from naturalization on the basis of race until the racial prerequisites were finally removed from the Act in 1952,<sup>185</sup> the broader threats to the nation that emerged during the Second World War brought further erosion of the policy of racial exclusion in naturalization as eligibility was extended to people in China, India, and the Philippines to bolster their support for the war effort, and judicial and administrative interpretations of the racial prerequisite broadened in individual cases from similar motives, but only after these threats and the solidarity to oppose them were rhetorically constructed. It is perhaps fitting that in the final lines of the last published judicial opinion in a racial prerequisite case, Judge

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185. McCarran-Walter Act, 8 U.S.C. § 1422 (1952) (providing that the “right of a person to become a naturalized citizen . . . shall not be denied . . . because of race”).

Charles Wyzanski adopts this rhetorical strategy to advocate an end to the policy of racial exclusion, writing that the policies of exclusion reflected in the racial prerequisite to naturalization “are not only false to our professions of democratic liberalism but repugnant to our vital interests as a world power,” and

in so far as the Nationality Act of 1940 is still open to interpretation, it is highly desirable that it should be interpreted so as to promote friendlier relations between the United States and other nations and so as to fulfill the promise that we shall treat all men as created equal.

Petition for citizenship granted.<sup>186</sup>

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186. *Ex parte Mohriez*, 54 F. Supp. at 943.