Racing Religion

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> The Jew is one whom other men consider a Jew: that is the simple truth from which we must start.
>
> Jean-Paul Sartre

> *But what exactly is a black? First of all, what's his color?*
>
> Jean Genet

Late in 1942, as the Second World War raged overseas, a Yemeni Muslim immigrant named Ahmed Hassan quietly appeared one day in front of a United States District Court judge. The Michigan resident had come to court for a hearing regarding his petition for naturalization, and while we don't know what he wore that day, it was probably something carefully chosen to downplay his "extremely dark complexion," as described in the judge's decision (In re *Hassan* 1942, 844). Hassan, after all, was making his official appearance in front of the Court to prove that he was a white person and, therefore, eligible for citizenship.

Although Hassan was one of the first Arab Muslims to petition for American naturalization, his case was far from unique. Beginning in 1790

(Act 1790) and until 1952 (Immigration 1952), the Naturalization Act had limited citizenship to "free white persons" but without exactly defining what makes a person white. Thus, many people, primarily of Asian descent, had appeared in front of the courts before Hassan to argue that they were "white by law," to borrow a phrase from Ian Haney Lopez's book (1996) of the same name. The immigration laws had changed over the years. In 1870, for example, the Naturalization Act was amended to include "aliens of African nativity and to persons of African descent" (Act 1870), and in 1940 (Nationality Act 1940), language was added to include "races indigenous to the Western Hemisphere." Nonetheless, certain Asians, beginning with the Chinese, had been excluded from American citizenship since 1878 (Haney Lopez 1996, 42–45). In 1882, Congress passed the first Chinese Exclusion Act, and in 1917, most immigration from Asia was further curtailed with the establishment of what Congress called the "Asiatic Barred Zone" (Chin 1998, 15). The reasoning here was that the country should not admit people who had no chance of naturalization. Despite all these changes, it was still far from clear just what race Hassan was, especially with Yemen sitting squarely on the Arabian Peninsula in Asia.

Hassan certainly knew he had a fight ahead of him and was aware that the battle would be about his group membership and not his individual qualifications. He understood that the Court would want to know if Arabs were white or yellow, European or Asian, Western or Eastern. He probably knew that the Court would wonder if Arabs, as a people, could assimilate into the white Christian culture of the United States or if they were, by nature, unsuited to adapt to the republic where they now lived. After all, in previous "racial-prerequisite cases," as they are called, such political and cultural questions were commonly asked, although they traditionally narrowed in simply on the color of one's skin. Even then, as Haney Lopez tells us, the courts adopted shifting standards of whiteness, first using scientific knowledge (now largely discredited) or congressional intent and then adopting the test of "common understanding" (1996, 67–77).

We know that Hassan was aware of the impending questions and the legal history of immigration by the fact that he came to Court that day armed with affidavits stating that his coloring "is typical of the majority of

the Arabians from the region from which he comes, which [in] fact is attributed to the intense heat and the blazing sun of that area" (In re *Hassan* 1942, 844). Under his arm were other affidavits, claims by unnamed ethnologists declaring that "the Arabs are remote descendants of and therefore members of the Caucasian or white race, and that [Hassan] is therefore eligible for citizenship" (846). He had done his homework. He had hope.

Whatever optimism he may have had, however, was soon dashed. Hassan's petition was denied. In his three-page decision dated December 14, 1942, Judge Arthur J. Tuttle straightforwardly stated that "Arabs are not white persons within the meaning of the [Nationality] Act" (In re *Hassan* 1942, 847). Interestingly, Tuttle based his determination of Hassan's whiteness not principally on the color of his skin but primarily on the fact that he was an Arab and Islam is the dominant religion among the Arabs. "Apart from the dark skin of the Arabs," explained the judge, "it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominately Christian peoples of Europe. It cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization" (845).[1]

Religion determines race. At least in 1942 it did, and so Arabs were not considered white people by statute because they were (unassimilable) Muslims. But by 1944, a mere seventeen months later, things changed radically. At that time, another Arab Muslim would petition the government for citizenship. His name was Mohamed Mohriez, and he was "an Arab born in Sanhy, Badan, Arabia," who came to the United States on January 15, 1921. Unlike Hassan, however, Mohriez would succeed in his petition. District Judge Charles E. Wyzanski, who ruled in Mohriez's favor, made a point of explaining in his brief decision (delivered on April 13, 1944) that the global political leadership of the United States requires its adherence to the principles of equality that it espouses. After citing *Hassan* and stating his position ("the Arab passes muster as a white person"), the judge ended his decision by admitting that the "vital interest [of the United States] as a world power" required granting Mohriez's petition (Ex Parte *Mohriez* 1944, 942, 943). Why? Wyzanski explained that his decision was necessary "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" (943). If in *Hassan* religion produces race, then in *Mohriez,* politics directly sways legal racial determination.

The last of the Asian exclusion laws was repealed in 1952 in favor of a restricting quota system of immigration. In 1965, the law changed again, abandoning the quota system entirely and making the racial prerequisite cases, with their now antiquated racial language, look like history. But half a century after the *Hassan* decision, and following the terrorist attacks of September 11th, Arabs and Muslims have again been repeatedly forced to undergo state scrutiny and official state definition simply because of their group membership and not because of their individual qualifications. Reminiscent of the earlier racial prerequisite cases, today's post-September 11th state policies also teeter uncomfortably on race, religion, and contemporary politics, and the result has been mass exclusions and deportations of Arab and Muslim men from the United States in a strategy that, I argue, can properly be described as deliberate and racist.

Specifically, I am talking about the policy known as "special registration," a program of the Bush Administration's war on terror that draws on the history of the racial prerequisite cases for its authority and its practice. When it was first announced, special registration drew some critical commentary from journalists and legal scholars, but it has not been investigated in depth. It bears looking into, however, for an inquiry into its mechanism should reveal at least two things: the insufficiency of past critiques of legal racial formation (like Haney Lopez's) to address how political expediency affects state definitions of race and the fact that through special registration the government has, in effect, turned a religion, namely Islam, into a race. The rest of the essay will elaborate these points, but since the details of special registration are not well known, it is worth reviewing the program in detail before continuing.

What's So Special about Special Registration?

On September 11, 2002, the one-year anniversary of the terrorist attacks on the United States, the Bush administration established the National Security Entry-Exit Registration System (NSEERS) as part of its strategy in the war on terror.[2] Since then, NSEERS, commonly known as "special registration," has been a controversial and poorly executed program, and it is particularly reviled in the American Muslim community, where the brunt of its enforcement is felt. Because parts of NSEERS were later suspended and augmented by another program, US-VISIT,[3] special registration has largely disappeared from discussions on the war on terror. However, contrary to what many believe, special registration not been completely eliminated by US-VISIT.[4] Instead, it has only been subsumed under US-VISIT. However, the bulk of special registration's enforcement, which resulted in the mass expulsion of thousands of Muslims from the United States, occurred prior to the implementation of US-VISIT. For that reason, I will refer to special registration as a program in the past.

What exactly was special registration? It was a government-mandated system of recording and surveillance that required all nonimmigrant males in the United States over the age of 16 who are citizens and nationals from select countries to be interviewed under oath, fingerprinted, and photographed by a Department of Justice official.[5] These procedures applied to nonimmigrant visitors as they crossed the border and entered the United States. Until December 2, 2003, this also applied to those already in the country (what the Department of Justice termed "call-in" registration).[6] All those who were required to register had to provide proof of their legal status to remain in the United States, proof of study or employment (in the form of school enrollment forms or employment pay stubs), and proof of residential address (such as a lease or utility bill).[7] Some also had to supply any and all of their credit card numbers, the names and addresses of two U.S. citizens who can authenticate their identity, and to answer questions regarding their political and religious beliefs.[8] Before the program was modified, registrants also had to reregister within 40 days with a

Department of Justice official if they remained in the country for more than 30 days, and then again annually. Additionally, special registrants could enter and exit from the United States only from specific ports of entry. Each and every time he entered and left the country, the nonimmigrant male had to go through the Byzantine and arduous registration process again.

It goes almost without saying that special registration was heavily burdensome on the registrant, and those who underwent it complained that they were treated as if they were guilty of a crime and had to prove their innocence, thus flipping an avowed tradition of American jurisprudence (innocent until proven guilty) on its head. The execution of the program also came under fire. When the deadline for the first call-in registration passed in December 2002, mayhem ensued, particularly in southern California, where, according to the *Washington Post,* hundreds of men (almost 1,200 nationwide) were incarcerated in mass arrests on alleged immigration violations (U.S. Detains 2003). Ramona Ripston, executive director of the American Civil Liberties Union (ACLU), compared special registration to World War II measures against Japanese Americans. "I think it is shocking what is happening. It is reminiscent of what happened in the past with the internment of Japanese Americans," she told *Reuters* (Hundreds 2002). Many of the men arrested had been in the country for over a decade and had families in the United States (with U.S. citizen children), and many more complained that their status was, in fact, legal but that their paper work was incomplete due to Immigration and Naturalization Service (INS) backlogs (Lee 2002). Tens of thousands of lives have been disrupted by the special registration program, many more if we consider the collateral effect on families. Since its implementation in October of 2002, NSEERS has registered at least 83,519 men and boys domestically (and over 93,740 at points of entry) (DHS Fact Sheet 2003). Out of this number, 13,799 have been served with "Notices to Appear" subpoenas, meaning that deportation proceedings have begun in their cases.[9] Not a single charge of terrorism has been levied as a result of special registration (Simpson et al, 2003; Charles 2004).

Just what is going on here? If special registration was meant to be a program to net terrorists, as the government claims, then it was clearly a

colossal and expensive failure. The Department of Justice stated that "In light of the attacks against the United States on September 11, 2001, and subsequent events, and based on information available to the Attorney General, the Attorney General has determined that certain nonimmigrant aliens require closer monitoring when national security or law enforcement interests are raised" (Special Call-In 2002, 1). But the criterion for "closer monitoring" of certain people was based almost exclusively on a single fact: national origin. Kris Kobach, an architect of the program, is unapologetic about such broad-based selection. "We had to just use the very blunt instrument of nationality [for special registration]," he explains (quoted in Simpson et. al, 2003). But the dull thud of this blunt program was its own stupidity since it was unlikely to result in the capture of a terrorist, who, if he or she were in the country already, would logically not bother to register before carrying out any nefarious activity. Since the mechanism (i.e., the profile) of the program was known, it was also highly unlikely to catch an incoming terrorist, who would again logically search for ways to circumvent special registration's categories.

Initially focused on citizens and nationals from five states (Iran, Iraq, Libya, Sudan, and Syria), the list of targeted nations requiring registration ballooned to 25 countries, some in North and East Africa (Egypt, Tunisia, Algeria, Morocco, Somalia, Eritrea), others in West Asia (Yemen, Kuwait, Saudi Arabia, United Arab Emirates, Qatar, Oman, Bahrain, Lebanon, Jordan), South Asia (Pakistan, Bangladesh, Afghanistan), Southeast Asia (Indonesia), and East Asia (North Korea). Six of these countries are listed by the State Department among the seven state-sponsors of terrorism (the initial five, plus North Korea. Cuba is the seventh, and its absence is telling). Two of these countries (Iraq and Afghanistan) have recently been invaded by the United States, and the vast majority of the rest are allies of the United States. This fact alone—that the overwhelming number of men who were subject to special registration came from friendly countries—is significant, for it proves that something else other than enemy nationality was operative here.[10]

That special registration was a discriminatory program is incontrovertible. Ostensibly, it discriminated by gender, age, national origin, and

citizenship status. The discrimination was, in all likelihood, entirely legal under the plenary power doctrine, a century-old Supreme Court decision that holds that Congress and the executive branch have sovereign authority to regulate immigration without judicial review (Chin 1998, 1–74; Olafson 1999, 433–53). That decision dates from 1898, upheld Chinese exclusion from the United States, and is still considered good law. Furthermore, according to legal scholar Gabriel Chin, the plenary power doctrine approves discrimination based not only on national origin but also on race:

> In immigration law alone, racial classifications are still routinely permitted. In recent decades, courts in the District of Columbia and the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have said not only that aliens may be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se. Apparently no court has even hinted to the contrary. These circuits merely honor an unbroken line of Supreme Court decisions holding that "Congress may exclude aliens of a particular race from the United States" and, more broadly, that an alien seeking admission "has no constitutional rights regarding his application." (Chin 1998, 3–4)

It ought to be noted that in the publication of its rule in the *Federal Register* (2002b), the Department of Justice cited key plenary power decisions to give special registration its legal legs on which to stand (52585).[11] Since the Chinese exclusion cases provided the foundation for the plenary power doctrine, special registration thus has its own direct connection to Chinese exclusion.

One should also note that little unites the disparate group of special registration countries but that they are all Muslim majority nations.[12] To argue, as the Department of Justice did, that what unifies the list is not Islam but the "heightened risk of involvement in terrorist" activity (presumably al-Qaeda membership) (*Federal Register* 2002a, 40582) just does not hold. By the government's own admission, al-Qaeda activity had already been discovered in France, the Philippines, Spain, Germany, and Britain, but no visitors from these countries were required to undergo special registration.

Indeed, the case of Richard Reid, the so-called shoe bomber, who converted to Islam (and thus is not a "citizen or national" of a Muslim country), underscores the limitations—or falsity—of such an argument.

Special registration accomplished several things, nonetheless. It reinscribed, through a legal mechanism, the cultural assumption that a terrorist is foreign-born, an alien in the United States, and a Muslim, and that all Muslim men who fit this profile are potential terrorists. But special registration also did more than this. Special registration made legal and executive sense to the government because it participated in a long bureaucratic tradition found in American law of racial formation. Through its legal procedures, special registration was a political and bureaucratic policy that created a race out of a religion.

Racing Religion

How does special registration "race" Islam? To begin answering this question, we need to investigate the relationship between religious and racial difference in American politics and to understand how both racial and religious difference can be exploited in ways that are racist by definition. Racism is, of course, a complex social phenomenon that is difficult to sum up in just a few words. George Fredrickson, however, offers a useful definition in his book-length essay on the topic. According to Fredrickson, racism "exists when one ethnic group or historical collectivity dominates, excludes, or seeks to eliminate another on the basis of differences that it believes to be hereditary and unalterable" (Fredrickson 2002, 170). While racism may at times appear similar to religious clashes, Fredrickson sees them as, in fact, quite distinct for the important reason that in religiously based systems or conflicts, the opportunities for conversion have always been present as a way to defeat one's own marginal status. In a religious conflict, it is not who you are but what you believe that is important. Under a racist regime, there is no escape from who you are (or are perceived to be by the power elite). Thus, Fredrickson correctly finds racial and not religious division as driving the Spanish Inquisition's purity of blood laws. "Anti-Judaism became anti-Semitism," he explains, "whenever it turned

into a consuming hatred that made getting rid of Jews seem preferable to trying to convert them, and anti-Semitism became racism when the belief took hold that Jews were intrinsically and organically evil rather than merely having false beliefs and wrong dispositions" (19). Jews and Muslims in medieval Spain were both collectively marked as dangerous and excludable because of a belief in their innate and hereditary natures. Exclusion was preferable to conversion.[13]

How one's religion or culture is apprehended, for example, can also assume a racist character. During the Spanish Inquisition, certain cultural (not necessarily religious) practices labeled one as a Jew or a Muslim. Changing one's sheets on Friday could make one Jewish in the eyes of the Christian community (Kamen 1998, 62), just as sitting on the ground (as opposed to in a chair) proved one was Muslim (223). As the explanatory power of scientific theories of race has declined in our contemporary world, culture has again assumed a prominent role in determining and describing racial difference. As Etienne Balibar (1991) puts its, "[C]ulture can also function like nature, and it can in particular function as a way of locking individuals and groups a priori into a genealogy, into a determination that is immutable and intangible in origin" (22).

Racism, however, should not be seen as something that is necessarily irrational or is a "consuming hatred," as Fredrickson describes it. While these certainly are historic realities, racism must also be understood as a careful ideology that is, unfortunately, politically useful, particularly in circumstances where one is called upon to define oneself against another. It determines the other, and it does so through various institutions, the law being a primary one among them. It also has historically led to three different categories of material consequences: exploitation, extermination, or exclusion (Fredrickson 2002, 9). All three, unfortunately, have their precedents in American history, as Michael Omi and Howard Winant point out in *Racial Formation in the United States:*

> From the very inception of the Republic to the present moment, race has been a profound determinant of one's political rights, one's location in the labor market, and indeed one's sense of "identity." The hallmark of this history has

> been racism, not the abstract ethos of equality, and while racial minority groups have been treated differently, all can bear witness to the tragic consequences of racial oppression. The examples are familiar: Native Americans faced genocide, blacks were subjected to racial slavery, Mexicans were invaded and colonized, and Asians faced exclusion. (Omi and Winant 1986, 1)

Here is a short history of racism in the United States, from extermination (of Native Americans) to exploitation (slavery and colonization) to exclusion (of Asians). It is in the last of these, exclusion, where special registration operates.

With its broad-brush focus on national origin, special registration juridically excludes thousands of Muslims by category and creates a barrier that repels even more. Special registration creates a vast, new legal geography of suspicion for the United States government, a geography that in some way mirrors the "Asiatic barred zone" of the 1917 Immigration Act. It may not prevent visitors from entering, but it makes it onerous to penetrate the border. Perhaps it would be more correct to say that special registration, rather than barring entry, draws a burdensome zone around Muslim-majority countries.

But special registration again does more. In requiring that citizens and nationals of those countries suffer through its burdens, special registration collapses citizenship, ethnicity, and religion into race. Under the special registration guidelines, immigration officers are charged with the authority to register whomever they have reason to believe should be specially registered. This procedure extends to nonimmigrant aliens who the inspecting officer has "reason to believe are nationals or citizens of a country designation by the Attorney General" (*Federal Register* 2002b, 52592). In a memo to regional directors and patrol agents, the INS clarified that this included cases such as "a nonimmigrant alien who is a dual national and is applying for admission as a national of a country that is not subject to special registration, but the alien's other nationality *would* subject him or her to special registration" (Memorandum 2002). Numerous reports since special registration began have indicated that birthplace is used as the trigger to determine the "reason to believe" one should be registered.[14]

The implications of every national being required to register means that if you happen to hold dual citizenship with, say, Sweden and Morocco, or if you were born in Morocco but are not its citizen, or if you were born out of Morocco but to parents who are Moroccan, then you qualify. Swedish citizenship, even if it is your only citizenship, is no protection from special registration if you were born or your parents were born in one of the listed countries. The reason why this in particular is troubling is that, considering the broad geography of special registration, it makes descent or inheritability of Islam (and gender) the defining criterion. And that inheritability has nothing to do with enemy nationality since most of the listed nations are considered allies of the United States. Nor has it anything to do with belief or political affiliation since it says nothing about each individual's worldview. Rather, it is only about one's blood relationship to Islam. Through that blood relationship, legal barriers have been established to exclude as many Muslims as possible, and that fact consequently turns Islam into a racial category.

The Arabian Gulf of Racial Difference

Troubling as all this is, the relationship of Islam to racial definition in the United States is not new with special registration, and it is important to review this past to understand the history that special registration has to the political and racial logic of the United States. In fact, the combination of Islam and immigration has its own legal history in the United States, and we can discover that by surveying some of the key racial prerequisite cases from 1909 to 1944, particularly cases like *Hassan* and *Mohriez* in which the petitioners are Muslim or come from countries with Muslim majorities. While we may be accustomed to thinking of racial definition as being determined by the color of one's skin, what we observe here is that religion in general, and Islam in particular, plays a role in adjudicating the race of immigrants seeking naturalization in the United States. The various immigration acts that constitute the body of racial exclusion laws did not explicitly place religion inside a logic of race, but the courts did repeatedly note the religion of an applicant, and that in itself was often a

deciding (if not the deciding) factor in determining the race of the petitioner. Although the physical attributes of the applicants were often discussed, the main question surrounding many of these cases, as in the *Hassan* decision cited earlier, was actually about the ability to assimilate to the dominant, Christian culture.

The cases are worth a look. An initial review reveals, as one might expect, that many of the cases did rely simply on ocular proof to determine race. Race, it would appear, was the color of one's skin, no more and no less. This seems to be the case with the Syrian Costa George Najour, who in 1909 went before the district judge to petition for citizenship. The judge was impressed that Najour "is not particularly dark, and has none of the characteristics or appearances of the Mongolian race, but, so far as I can see and judge, has the appearance and characteristics of the Caucasian race" (In re *Najour* 1909, 735). Najour's petition was granted.

Similarly, skin tone is called into question when, in 1909, four Armenians petitioned for naturalization. "I find that all were white persons in appearance, not darker in complexion than some persons of north European descent traceable for generations," writes the district judge in that case (In re *Halladjian* et al 1909, 835). Likewise, in *U.S. v. Dolla* (1910), the Circuit Court of Appeals makes the determination that in this case it lacks jurisdiction, but not without first noting the facts of the case, with a novelist's detail. The Court states that Dolla, an Afghan who lived in Calcutta before coming to the United States, has a "complexion that is dark, eyes dark, features regular and rather delicate, hair very black, wavy and very fine and soft." It continues:

> On being called on to pull up the sleeves of his coat and shirt, the skin of his arm where it had been protected from the sun and weather by his clothing was found to be 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. He was about medium or a little below medium in physical size, and his bones and limbs appeared to be rather small and delicate. Before determining that the applicant was entitled to naturalization the presiding judge closely scrutinized his appearance. (*U.S. v. Dolla* 1910, 102)

His race was written on his body, just above his tan line.

In the case of the Syrian Tom Ellis (1910), the judge notes that "ethnologically, [Ellis] is of Semitic stock, a markedly white type of race," although the judge does concede that "the words 'white person' . . . taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette" (1003). Ellis, too, was admitted.

In Ex parte *Shahid* (1913), the petitioner was, once again, a Syrian, yet this time "in color, he is about that of walnut, or somewhat darker than is the usual mulatto or one-half mixed blood between the white and the Negro races" (813). *Shahid* is most interesting because the judge acknowledges the limitations of phenotypical race. "One Syrian may be of pure or almost pure Jewish, Turkish, or Greek blood, and another the pure-blooded descendant of an Egyptian, an Abyssinian, or a Sudanese. How is the court to decide? It would be most unfortunate if the matter were to be left to the conclusions of a judge based on ocular inspection" (814). Taking up the argument that "free white persons" meant "Europeans," the judge goes on to acknowledge that that definition, too, is problematic since that "would exclude persons coming from the very cradle of the Jewish and Christian religions" (816). Although he seems bothered by such a line of thought ("such arguments are of the emotional ad captandum order that have no place in the judicial interpretation of a statute"), the judge relies on the strict application of the separation of powers to devolve himself of any greater comment on the matter. Shahid will be excluded, he explains, not because of his race but simply on his "own personal disqualifications" (817).

The first time a Syrian is denied naturalization because of his race occurs with Ex parte *Dow,* in 1914. Again, the Court finds it necessary to write the skin of the applicant. "In color he is darker than the usual person of white European descent, and of that tinged or sallow appearance which usually accompanies persons of descent other than purely European" (Ex parte *Dow* 1914, 487). Dow is first denied naturalization because, "following the reasoning set out in Ex parte *Shahid*," the Court here construed "free white person" to mean "inhabitants of Europe and their descendants" (489). The district

judge laments this, for Dow, he argues, is a capable man, but making law is beyond the power of the Court. To prove his point, the judge mixes nation, religion, and race in an exasperated (and racist) appeal. "No race in modern times has shown a higher mentality than the Japanese. To refuse naturalization to an educated Japanese Christian clergyman and accord it to a veneered savage of African descent from the banks of the Congo would appear as illogical as possible, yet the courts of United States have held the former inadmissible and the statute accords admission to the latter" (489).

Dow is appealed, and at first affirmed, as geography takes precedence over skin color. ("There is no known ocular, microscopic, philological, ethnological, physiological, or historical test that can settle the question of the race of the modern Syrian; but the applicant and his associates are certainly Asiatics in the sense that they are of Asian nativity and descent and are not Europeans" [In re *Dow* 1914, 362].) On further appeal to the Fourth Circuit Court of Appeals (*Dow v. United States* 1915), the decision is reversed, and Dow is finally admitted citizenship. In fact, the Syrian community mobilized every resource it had for the Dow case, as described by Alixa Naff (1985, 256).

All these cases take place before *U.S. v. Thind* (1923), the Supreme Court case that Haney Lopez cites as shifting the reasoning of the courts. Prior to *Thind,* the courts depended largely on so-called scientific knowledge to determine whiteness. After *Thind,* the notion of common understanding of what whiteness is held sway. It would seem, then, that in the bulk of the cases I have thus far discussed, race is understood primarily as the color of one's skin and secondarily as geographically determined. Skin color influences the decisions in *Najour, Halladjian, Dolla, Ellis, Shahid, Dow,* and others. In discussions of race, this is to be expected. Geography, too, plays a role in these cases, but what about religion?

All of the Syrians to come before the Court during the racial exclusion era were Christian, and the Court often found it important to underline this fact in every instance it could. In *Ellis,* the court reiterated the fact twice in the first paragraph of its decision. "The applicant is a Syrian, a native of the province of Palestine, and a Maronite. . . . It may be said, further, that he was reared a Catholic, and is still of that faith" (In re *Ellis* 1910, 1002). In

Halladjian, the court not only draws attention to the confessional traditions of the Armenians but uses their Christianity as proof of their eligibility for naturalization. "Race . . . is not an easy working test of 'white' color," averred the court (In re *Halladjian* 1909, 840), which then moved to discuss eligibility in terms of "ideals, standards, and aspirations." "In the warfare which has raged since the beginning of history about the eastern Mediterranean between Europeans and Asiatics, the Armenians have generally, though not always, been found on the European side. They resisted both Persians and Romans, the latter somewhat less strenuously. By reason of their Christianity, they generally ranged themselves against the Persian fire-worshippers, and against the Mohammedans, both Saracens and Turks" (In re *Halladjian* 1909, 841). The decision goes so far as to explain why Armenians are part of the Eastern Church and to excuse them for it. "Present war and their remoteness are said to have prevented the Armenian bishops from attending the Council of Chalcedon in the fifth century. Thus, they say that they were misled as to the pronouncement of that Council, and so a schism arose without heresy on their part" (841). Whereas Catholicism was a liability for a long time for Italians and Irish in the United States, it was considered favorably with regard to the Armenians, illustrating the shifting boundary of acceptability. "During the Crusades and afterwards many Armenians came into the obedience of the Roman Catholic Church, while retaining distinctive rites and customs" (841). Religion becomes the ultimate arbiter of admissibility, though, the court argues, without prejudice. "These facts are stated, without reproach to the followers of Mohammed or Zoroaster, because history has shown Christianity in the near East has generally manifested a sympathy with Europe rather than with Asia as a whole" (841). Christianity turns Armenians white.

In *Shahid,* too, the religion of the petitioner is proclaimed in the beginning. "According to his statement he is now 59 years of age, was born at Zahle, in Asia Minor, in Syria, and came to this country about 11 years ago, and is a Christian" (Ex parte *Shahid* 1913, 812). Dow, we are told, "is a Maronite—a Christian" (In re *Dow* 1914, 362).

After *Thind,* who is referred to not as an Indian but as a "high caste Hindu," the decisions adopt more explicit language regarding religion (as

science is discarded and replaced with culture). Another case involving the right of Armenians to naturalize comes before the Court in 1925. The case of *U.S. v. Cartozian* (1925) references both *Ozawa v. United States* (another Supreme Court decision from 1922 disallowing Japanese to naturalize) and *Thind* in its decision. It argues that "it is now judicially determined that mere color of the skin of the applicant does not afford a practical test as to whether he [the petitioner] is eligible to American citizenship" (*U.S. v. Cartozian* 1925, 919). Thus, the court feels emancipated from judging hue and tone and relies largely on religion (and assimilation) in its determination. "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 Turks, the Kurds, and allied peoples, principally, it might be said, on account of their religion, though color may have had something to do with it" (921). In *Wadia v. United States* (1939), the Court substitutes "ethnicity" for "race," calling Wadia "of the Parsee race," and feels compelled to disclose facts that must be important to its deliberations, including that "he was a follower of Zoroaster" (7).

By the 1940s, we have the two notable petitions of *Hassan* and *Mohriez*. Unlike the petitioners mentioned directly above, Hassan and Mohriez are both Muslim (at least by name). What makes their cases noteworthy is not just their faith community but the short span of time between when an Arab Muslim is considered nonwhite (Hassan) and when an Arab Muslim is officially considered white (Mohriez).[15] It is this abrupt shift, mirrored in the sudden creation of a Muslim race by special registration, that should concern us, for it illustrates not just the capricious nature of racial formation but also the depth to which contemporary American politics creates race, rather than race always creating politics.

But the legal scholars generally don't view *Hassan* and *Mohriez* through this perspective. Consider law professor John Tehranian's article "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America" (2000). Here, Tehranian correctly states that the "racial-determination games [of the courts] often produce judicial opinions riddled with internal contradictions and dadaistic logic that find Arabs to qualify as white in some situations and nonwhite in others" (839).

He argues that "the potential for immigrants to assimilate within mainstream Anglo-American culture was put on trial" (820) by these cases (and he explicitly discusses *Hassan* and *Mohriez,* among others, in the article). Tehranian labels the assimilation potential of petitioners as "the performance of whiteness." "Successful litigants," in Tehranian's view, "demonstrated evidence of whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping" (821).

While Tehranian's discussion is valuable for the way it accounts for religion as a racial determining category, its organizing principle of "performance" confuses the fact that the judge performs "whiteness" through his adjudication, not the litigant through testimony. Tehranian, to paraphrase W. B. Yeats, confuses the dancer for the dance. Hassan surely came to court ready to act the part of a white person, but the judge would not admit the act, since his own performance of whiteness requires denying Hassan's petition. More important, however, the judge could not admit Hassan because the political culture of the time would not allow for it. The inertia of America's racial tradition kept the categories consistent. By the time we get to Mohriez, the political situation has changed, with the Unites States shedding its isolationist past for global dominance as the war nears its conclusion. With that transformation (manifest in the judge's explicitly political reasoning in his decision), the racial logic of the United States has been sent into flux.

Regrettably, Haney Lopez in his otherwise fine book also fails to account adequately for the role of politics in racial formation. He reaches the conclusion that the "the incremental retreat from a 'Whites only' conception of citizenship made the arbitrariness of U.S. naturalization law obvious" (Haney Lopez 1996, 46). But there is nothing arbitrary about the racial shift from *Hassan* to *Mohriez,* or the creation of Islam as a post-September 11th racial category. These are clearly political decisions that have calculated consequences. While he does provide some historical context throughout his book for the reasons for racial flux, Haney Lopez seems unwilling to discuss politics in depth. In fact, the idea sometimes just drops out of the discussion. Consider this sentence from *White by Law,* where the idea simply disappears. "One might argue that [a judge's] views turned on cultural or political, rather

than racial, prejudice. However, these forms of prejudice blur together, each fading into the other. Indeed the concept of race incorporates, and arguably partially arose out of, cultural prejudice" (Haney Lopez 1996, 56). Instead of a sustained investigation into the politics of whiteness and the whiteness of politics, what we get from Haney Lopez is an appeal for whites to "relinquish the privilege of Whiteness" (Haney Lopez 1996, 202), thus making it clear that, for him, race-making in the law is less a system of rational domination by the state than it is a problem of individual white identity (which he explicitly labels "white race consciousness").

But politics matters a great deal, and it always has, as Yale historian Rogers Smith understands. Smith has exhaustively examined thousands of citizenship cases in the United States and has come to the conclusion that inclusion in the United States has not been determined by an overarching theory of liberalism or by republican notions of citizenship. Rather, "American citizenship laws have always emerged as none too coherent compromises among the distinct mixes of civic conceptions advanced by the more powerful actors in different eras" (Smith 1997, 6). The point is to recognize how labor or civil unrest or, especially for our purposes, war aids in producing citizenship and inclusion, which in the history of the United States, functions through political power and along the definitional axis of race.

One of the most painful examples of race-in-flux during American history must be Japanese internment during World War II. The signing of Executive Order 9066 resulted not only in the internment of over 110,000 people of Japanese ancestry, but also in the removal of the protections of citizenship, at the stroke of a pen, for over 70,000 of them.[16] Race trumped nationality. If you were born in the United States to Japanese parents prior to February 18, 1942, for example, you were an American citizen. But on February 19, you were born an enemy alien.[17]

There are other cases as well, situations which resolved into inclusion rather than exclusion. In 1943, for example, following the United States' entry into the war, Congress repealed the Chinese Exclusion Acts (but set a paltry quota of 100 Chinese immigrants a year). President Roosevelt described the measure "as important in the cause of winning the war and

of establishing a secure peace," (*INS Monthly Review* 1943, 16) and told Congress that Chinese exclusion had been an "historic mistake" (*INS Monthly Review* 1943, 17). Whereas Asians had been since 1917 an undifferentiated mass of people living in a barred zone of immigration, Chinese were now politically and ontologically distinct (especially from Japanese) and had achieved a type of honorary white status as evidenced by their (limited) ability to immigrate and naturalize. In his decision on Mohriez's petition, Judge Wyzanski shows he is aware of this fact. The end of the Mohriez decision reads:

> And finally it may not be out of place to say that, as is shown by our recent changes in the laws respecting persons of Chinese nationality and of the yellow race, we as a country have learned that policies of rigid exclusion are not only false to our professions of democratic liberalism *but repugnant to our vital interests as a world power.* (Ex parte *Mohriez* 1944, 942)

Sometimes politics, and not just personal or cultural prejudice, produces race.

The Armenian State of Exception

The point that I have been making in this essay is not only the one that Haney Lopez discusses in his book, namely that the law produces race, but also that we need to examine racial formation through law and policy as a rational system of administration and domination rather than as an example of individual prejudice or capriciousness to understand its full impact. Only then can we possibly imagine new political formations that will not be dependent on race as a principle of political domination. Moreover, what special registration proves is that any group can be racialized through America's traditions and then be sent into administrative hell through the bureaucracy of the state (what Hannah Arendt calls "rule by Nobody" [Arendt 1969, 81]). Racialization operates through a legal past and enables a legal machinery to provide differential rights, particularly to immigrants, who are the most vulnerable owing, in part, to the plenary power doctrine.[18]

In the case of special registration, we can also witness the bizarre memory of a bureaucracy. American history has long operated through a kind of racial logic that has its own inertia (call it tradition) as well as its own adaptability (call it political expediency), and at times both sides of American race policy will careen right into each other. Under special registration, this is precisely what happened. As the cases of *Halladjian* and *Cartozian* illustrated, Armenians—as a Christian people who live in the Middle East—were a particular conundrum for the courts. In fact, in *Hassan,* the judge cites the case of Cartozian in his decision. Judge Tuttle writes:

> The court there [in *Cartozian*] 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. (In re *Hassan* 1942, 846)

And yet, in a twist that can only reveal the strange pull of history on a bureaucracy, the Justice Department published the list of the third "call-in" group for registration on December 16, 2002. Designating Pakistan and Saudi Arabia as countries whose male citizens would be subject to special registration, the Department also included Armenia on its list. Without comment, Armenia was dropped the next day (Cooperman 2002).

Race, Terror, and Bureaucracy

Special registration is not necessarily a nefarious plot to racialize Islam, but it is a bureaucratic and cultural response to political turmoil. This is not to say that religious bigotry no longer exists. If we consider the words of deputy undersecretary for defense, Lieutenant General William Boykin, who claims that "my God [is] a real God," and a Muslim's God is "an idol," and that the United States must attack radical Islamists "in the name of

Jesus" (Three Star Bigotry 2004; Holding the Pentagon 2004), we find that his statements participate not in racializing Islam but in older traditions of religious prejudice that, sadly, are still with us. Moreover, we should not exonerate special registration from the charge of being a legal method of racial formation, even if it does not subject all Muslims to its procedures and despite the fact that not every Muslim majority country is included on its list. In fact, what special registration accomplishes is the production of a typology of Muslim for the war on terror, and by defining one type, it colors the whole population. What it produces is a kind of racial anxiety among Muslims, non-Muslims from Muslim countries, and those who are perceived to be Muslim. Every immigrant male in these groups must disidentify from the Muslim-as-terrorist figure, sometimes officially (as with special registration) or unofficially, as political policy and cultural attitudes bleed into each other. Suspicion is coded into law through race.

In fact, like Operation TIPS (Terrorist Information and Prevention System) (which asked us to spy on our neighbors), special registration is best understood as a form of political theater. It allows a new bureaucracy (homeland security) to parade itself as being hard at work. The public is both the cast and the audience in this play. While it is acted out, we are propelled into living in an increasingly militarized and surveyed society. And when government actions impact Muslim populations so visibly, the public understands what is politically acceptable (even if criminally prosecutable) behavior. Meanwhile, the government bureaucracy can mobilize statistics and bodies to prove that it is cleansing the country of a terrorist threat, all at the expense of Muslims in the United States.

What has been particularly disheartening, however, is the academic silence around special registration while it proceeds apace. Without outspoken critique, special registration will continue to race Muslims and to bind whiteness in the United States with political exigency and with notions of culture and Christianity. However, as Arendt (1969) says, "Neither violence nor power is a natural phenomenon . . . they belong to the political realm of human affairs whose essentially human quality is guaranteed by man's faculty of action, the ability to begin something new" (82). Now is the time to begin something new.

NOTES

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1. One should note that, according to the judge, Arabs have a culture while Americans have a civilization.
2. Established in September, NSEERS did not begin to be implemented until October 2002.
3. US-VISIT, announced on December 5, 2003, is an acronym for United States Visitor and Immigrant Status Indicator Technology. US-VISIT requires all visa-holding visitors to be electronically photographed and fingerprinted upon entry (it is planned for exits as well). US-VISIT differs from special registration in several key areas. It is not focused on Muslim male visitors but on all non-visa-holding visitors (citizens from 28 mostly Western European countries, Canada, and Mexico were exempt, but Congress has mandated that US-VISIT apply to all nonimmigrant visitors). Thus, US-VISIT is an improvement over the discriminatory NSEERS program. Yet, US-VISIT is not equivalent to NSEERS since it doesn't require an interview performed under oath (called "provision of information" by the Department of Justice). Nor does US-VISIT suspend special registration requirements for those who qualify. In other words, the special registration burden has been significantly reduced, but little else has substantively changed. See *Federal Register* (2004).
4. Christopher Thomas writes, "Over the past few weeks, reports have circulated that the special registration program has expired. The reports, however, are misleading" (Thomas 2004). Also see the *Federal Register* of December 2, 2003, which reports that US-VISIT "rule does not affect the procedures for the NSEERS registration of aliens, including fingerprinting, photographing, and provision of information" (*Federal Register* 2003, 67580).
5. In a draft memo proposing special registration, Assistant Attorney General Viet Dinh reminds the attorney general of his ability to require registration for aliens who are "fourteen years of age or older" (Dinh 2001). The age of 14 dates to the Alien Act of 1798 (also called "The Act Respecting Enemy Aliens"). The Act provides the executive branch with the authority to deport any enemy alien over the age of 14 without judicial review (and was controversial in its day, but is still lawful). Of course, those who are subject to special registration are, overwhelmingly, not enemy aliens (Alien Act 1798).

6. Call-in registration was suspended on December 2, 2003.
7. A January 21, 2003, advisory note from the Department of Justice came with the following information: "Registrants will be asked questions 'under oath.' The INS agent will 'record' the answers. The registrant will be fingerprinted and photographed. The officer may ask to see travel documents, including passport and I-94; any other government-issued identification; proof of residence, including leases or proof of titles; proof of school matriculation; and proof of employment. The officer may ask many other, unrelated questions, including questions related to national security and law enforcement" (Revised Questions and Answers 2003; Special Call-in Registration 2002).
8. Two friends of the author, unknown to each other and having different countries of origin, have undergone the above procedure, including the requirement of American citizen guarantors and personal questions about their political beliefs.
9. The Pakistani newspaper *Dawn* termed this the "largest deportation in [American] history" (Thirty-Five Percent 2003).
10. There is a legal tradition in European law for deporting enemy aliens, and it likely derives from the work of Emmerich de Vattel who in 1758 wrote: "The sovereign who declares war has not the right to detain the subjects of the enemy who are found within his state, nor their effects. They have come to his country in public faith; in permitting them to enter and live in the territory, he has tacitly promised them all liberty and surety for their return. A suitable time should be given them to withdraw their goods; and if they stay beyond the time prescribed, it is lawful that they should be treated as enemies, though as disarmed enemies" (quoted in Garner 1918, 27).
11. The Department of Justice cites, among other cases, *Fiallo v. Bell* (1977), quoting the Supreme Court decision in that case, which states that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens . . . the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (*Federal Register* 2002b, 52585).
12. All except for North Korea, which approximates a null category since the number of visitors from North Korea to the United States must be zero or very close to it.
13. Although he acknowledges it, Fredrickson fails to fully appreciate the persecution of Muslims during the Spanish Inquisition. For Muslim persecution during this period see Kamen (1998).
14. Soon after special registration began, registering dual nationals became commonplace and sparked a minor international incident. Canada issued a rare travel advisory for its citizens visiting the United States, since the United States was discriminating between types of Canadian citizenship. The United States offered Canada assurances that dual citizenship would not automatically trigger special registration, and Canada withdrew its advisory. Canadian citizens who are nationals from the listed countries, however, continue to complain that birthplace triggers registration automatically. See One Religion, 12 Voices (2003).
15. In fact, one could logically argue that Christian Arabs were admitted as white people

not because they are intrinsically white but because of their religious difference from Muslim Arabs. Thus, the race of Muslims is, in fact, first negatively determined with Najour's petition in 1909 and first positively determined with Hassan's in 1942.

16. The others were ineligible for citizenship, of course, owing to the naturalization laws that excluded Japanese from citizenship.

17. On March 9, 1942, criminal sanctions were added to relocation, making this date perhaps more significant than Roosevelt's Executive Order. General Dewitt's orders read, "[A]ll persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above areas by 12 o'clock noon, P.W.T., Saturday, May 9, 1942" (see Irons 1983, 48–74). To understand the political nature of racialization even better, one need only compare the fate of people of Japanese descent in Hawaii to those on the West Coast. While West Coast Japanese were rounded up as enemy aliens, Hawaiian Japanese—the dominant ethnic group (with larger numbers than whites, Filipinos, or Native Hawaiians)—were not interned en masse, despite the fact, of course, that Pearl Harbor is on Oahu. In California, the Japanese were politically vulnerable and thus imminently "racial-izable" (to coin an ugly word) by the state, whereas in Hawaii, mass evacuation of the Japanese descendent population would have crippled the islands.

18. The latest ominous remembrance of things past is the revelation that the Census Bureau had been providing specially indexed and extremely detailed population statistics on Arab Americans to the DHS (and will now do so only under high-level approval). Japanese internment was facilitated by similar Census Department work. See Clemetson (2004) and Census Now Limiting Arab Data Sharing (2004).

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