"Yellow" Skin, "White" Masks: Asian American "Impersonations" of Whiteness and the Feminist Critique of Liberal Equality*

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INTRODUCTION

In two historical Supreme Court cases from the early part of the twentieth century, when only whites and blacks could be United States citizens, two Asian American immigrants made the startling move of claiming that they were "white" and, therefore, deserved to be naturalized.1 The two petitioners – Takao Ozawa and Baghat Singh Thind – claimed they were white by dint of skin color, anthropological evidence, culture, and various other qualities suggesting they "belonged" to America.2 The petitioners' claims resonated with one central message: "I am just like you." Thind's and Ozawa's claims ultimately failed. The petitioners were denied citizenship because the Supreme Court, not surprisingly, held that they did not qualify as "white," and that despite their claims to the contrary, Ozawa and Thind were just "different."3

These cases are instructive not only for what they tell us about racial hierarchy and barriers faced by Asian Americans at the time, but also for what they say about current issues surrounding Asian American identity and the ineffectiveness of claiming sameness when one will invariably be labeled as different. Ozawa's and Thind's claims to whiteness and its attendant privilege serve as stark historical examples of a current phenomenon exhibited by some Asian Americans today: making assimilationist claims to the privilege of dominant, white culture in contemporary debates implicating the concerns of Asian Americans. Echoes of Ozawa's and Thind's claims to whiteness sound throughout the rhetorical positions that some Asian Americans have assumed in current...

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* The title of this paper comes from Frantz Fanon's Black Skin, White Masks, in which the French-Caribbean psychiatrist wrote about the psycho-social effects of racism on blacks as a result of European colonialism. The damage to black identity as a result of being defined by the dominant group as "Other," and therefore subordinate, particularly resonates with the issues this paper addresses. See FRANTZ FANON, BLACK SKIN, WHITE MASKS (1967).

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2. See infra Part I.
debates, including affirmative action. In this debate, the controversial "model minority myth" has served as the foundation for Asian Americans' claims resembling Ozawa's and Thind's, claims assuring racial insiders, "I am just like you."

This paper situates these historical and current claims to whiteness by Asian Americans in the context of Catharine MacKinnon's feminist critique of the liberal model of equality, which forces those seeking "equality" to claim similarity to dominant norms. By virtue of traditional equal protection doctrine's "similarly situated" requirement, those who are the same must be treated equally, and conversely, those who are different may be treated as such. MacKinnon's critique demonstrates how women seeking gender equality and racial minorities seeking racial equality, at the very least, face a patent unfairness insofar as they are required to equate themselves with their oppressors to remedy the conditions of their subordination. Furthermore, at worst, women and racial minorities face a doctrinal trap in which they are never meant to gain equality, since women and racial minorities are socially defined as "different." Equality claims ultimately collapse inward, as they are founded on a disingenuous structure that treats sameness and difference as exact opposites, when, in actuality, they bear a hierarchical relationship to one another, with "difference" masking the subordination of women and racial minorities. Therefore, the "difference" that these rights seekers must overcome is actually the subordinated positions they hold in gender and racial hierarchies, respectively.

MacKinnon's critique of the liberal equality model's foundation in sameness and difference underscores the impossibility of historical and contemporary claims to whiteness by Asian Americans. Despite their valiant efforts to show that they did indeed belong, Ozawa and Thind failed to overcome the social understanding of their ineluctable difference. Ozawa's and Thind's assertions that they were the same as whites (in fact, that they were white) act as a metaphor for the claims of some of today's Asian Americans, whose claims to white privilege belie the particularities and "difference" of today's Asian Americans. This paper explores examples, both old and new, that reveal the falsity of claiming similarity to a white norm in the face of the real, race-based structural inequities facing many Asian Americans that constitute their "difference." In addition, this paper aims to highlight how Ozawa's, Thind's and contemporary Asian Americans' claims to white privilege by "claiming sameness" ultimately reinforce the white privilege to which these claimants aspire.

This paper is divided into four sections. Part One briefly lays out the historical context of Ozawa v. United States and United States v. Thind and discusses Ozawa's and Thind's claims to white identity and the social meanings inherent in these claims to whiteness. Part Two explicates
MacKinnon’s feminist critique of the liberal equality model, as it applies to sex discrimination law, to race discrimination law, and to Ozawa’s and Thind’s claims. Part Three discusses a contemporary instance of Asian Americans “claiming whiteness” by embracing the “model minority myth” in the debate surrounding affirmative action. Lastly, Part Four reviews some theoretical suggestions to address and confront the problems of Asian American identity that this paper presents.

I. CLAIMING WHITENESS IN OZAWA AND THIND

A. History

Ozawa v. United States and United States v. Thind arose in the context of a line of cases from 1878 to 1944, in which immigrant petitioners sought citizenship under racially restrictive naturalization laws. In 1790, Congress passed the country’s first naturalization statute, which granted naturalization rights to “free white person[s].” This requirement persisted despite numerous other changes over the course of 80 years. In 1870, Congress amended the United States’ naturalization laws to extend citizenship rights to “aliens of African nativity, and to persons of African descent.” These racial prerequisites remained in place until 1952.

From the time of the first reported “racial prerequisite case” that tested the racial requirements for citizenship, In re Ah Yup, in 1878 to the last one in 1944, immigrant applicants from a number of countries— including Canada, Mexico, Japan, the Philippines, and Syria—sought naturalization in state and federal courts. All but one of these applicants claimed white identity. Ozawa and Thind were the only prerequisite

8. See Ian F. Haney Lopez, White by Law: The Legal Construction of Race 4, 49-50 (1996). For fuller discussion of these cases, including extensive analysis of Ozawa and Thind, and how all these cases reflect on the legal construction of “whiteness,” see generally id.


10. See id.

11. Id. at 404.

12. See id. at 411.

13. Ian Haney Lopez describes as “racial prerequisite cases” the line of cases arising under the racial requirements for citizenship in place until 1952. These cases framed the “fundamental questions about who could join the citizenry in terms of who was White.” Lopez, supra note 8, at 4.

14. 1 F.Cas. 223 (C.C.D. Cal. 1878) (holding that Chinese are not white on grounds of scientific knowledge, common knowledge, and congressional intent).


16. See Lopez, supra note 8, at 49.

17. See id. (citing In re Cruz, 23 F. Supp. 774 (E.D.N.Y. 1938) (holding that a person one-quarter African and three-quarters Native American is not eligible for naturalization as person of “African descent”). Lopez addresses why these applicants—including the Asian ones—did not try to gain naturalization by claiming to be of African descent, given the public and legal equation of Asians more with blacks than whites. He points to the geographical designation (“of African nativity, or African descent”), the more limiting legal definition of blackness that existed at the time, and the stigma of black status as the factors that might have precluded the prerequisite petitioners from adopting a strategy of claiming blackness. See Lopez, supra note 8, at 52. In addition, Ronald Takaki’s description of how the Chinese were often associated with blacks in the “racial imagination of white society” provides additional context for why Chinese naturalization applicants might have opted to
cases heard by the U.S. Supreme Court. The Court rejected both applicants' claims to whiteness.

The prerequisite cases arose in the context of fierce nativism and racism against the increasing numbers of Asian immigrants arriving in the United States after the Civil War. This Asian immigration was greeted by a pattern of anti-Asian sentiment that manifested itself as "prejudice, economic discrimination, political disenfranchisement, physical violence, immigration exclusion, social segregation, and incarceration." The swelling numbers of Chinese immigrants in particular posed a dilemma for Americans who debated what status these immigrants should have in the United States. The racial prerequisites for citizenship served as the focal point in the debate over how to handle this new "foreign" presence. According to Ian Haney Lopez, "the persistence of anti-Asian agitation through the early 1900s kept the prerequisite laws at the forefront of national and even international attention."
Given the racial stratification of the time, petitioners Ozawa and Thind were doing more than merely applying for citizenship. They were recalling and tapping into a host of social meanings about what it meant to be "white" and how "whiteness" befitted them for citizenship. Lopez's extensive analysis of Ozawa and Thind and other prerequisite cases of the time describes the division between "white" (fit for naturalization) and "non-white" (unfit for naturalization) as invoking connotations regarding "agency, will, moral authority, intelligence, and belonging." He spells out the contrasting applications of these attributes in this racial hierarchy between whites and non-whites: "[t]o be unfit for naturalization – that is, to be non-White – implied a certain degeneracy of intellect, morals, self-restraint, and political values; to be suited for citizenship – to be White – suggested moral maturity, self-assurance, personal independence, and political sophistication." The following two subsections discuss the arguments Ozawa and Thind made that tapped into these racial meanings.

B. Ozawa v. United States

In many ways, Takao Ozawa was in as perfect a position as he could have been to sustain his claim to whiteness. Although born in Japan, he moved to the United States as a young man in 1894 and grew up in California. He attended high school in Berkeley, California, and then attended the University of California at Berkeley. He sought naturalization while residing in Hawaii in 1914, but the District Attorney for the District of Hawaii opposed his petition. Ozawa pursued his cause for eight years before he reached the Supreme Court.

Lopez excerpts the brief Ozawa wrote and submitted to the Supreme Court.

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24. This paper relies on the notion that meaning inheres in socially constructed racial designations. Michael Omi and Howard Winant set forth their notion of "racial formation" based on the rejection of race as stable and natural, arguing instead that the meaning of race is "defined and contested throughout society, in both collective action and personal practice." Michael Omi & Howard Winant, Racial Formation in the United States from the 1960s to the 1980s 61 (1986). However, recognizing the contested and constructed nature of race does not necessarily mean that these "constructed" racial meanings lack reality or social force. For example, Lopez points to one example that shows that the category of whiteness is "real": "When White college students were asked what sort of compensation they would expect should they have to endure the remainder of their lives as someone suddenly made physically 'Black' but not otherwise changed, the majority 'seemed to feel that it would not be out of place to ask for $50 million, $1 million for each coming black year.'" Lopez, supra note 8, at 198-199 (quoting Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 32 (1992)). Charles Lawrence characterizes those who respond to the recognition of racial prejudice by advocating a "color-blindness" that views all racial classifications as inherently suspect as erroneously assuming that "cultural meanings 400 years in the making will disappear if we prohibit reference to those meanings in public law and policy." Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 Stan. L. Rev. 819, 836 (1995).

25. Lopez, supra note 8, at 16. Cheryl Harris's notion of whiteness as property is instructive for this discussion because of the manner in which she elucidates the propertied privilege of being white. See generally Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709 (1993).


27. See id. at 80.


29. Id.

30. See Lopez, supra note 8, at 81.

31. See id.
Court, which contained a litany of attributes that defined him as a “true American.” Ozawa introduces his list by stating, “In name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American.” He asserts, first, that he did not report his name, his marriage or the names of his children to the Japanese Consulate in Honolulu, “notwithstanding [that] all Japanese subjects are requested to do.” Second, he claims that he does not have “any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere.” Third, he states that he is sending his children to an “American church and American school in place of a Japanese one.” Fourth, he says, “most of the time” he uses the “American (English) language at home,” so that his children cannot speak “the Japanese language.” Fifth, he says he educated himself in American schools for nearly eleven years by supporting himself. Sixth, Ozawa asserts that he has “lived continuously within the United States for over twenty-eight years.” Seventh, he writes, “I chose as my wife one educated in American schools . . . instead of one educated in Japan.” And last, Ozawa states, “I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.”

Pervasive throughout the statement are Ozawa’s open rejection of his Japanese ancestry and his enthusiasm for all that is “American.” The Court’s characterization of Ozawa in the opening of its decision confirmed the extent to which the attributes Ozawa described about himself approximated a dominant notion of American citizenship. After describing a number of the factors Ozawa listed in his brief, the Court wrote: “That he was well qualified by character and education for citizenship is conceded.”

While Ozawa partially grounded his claims to fitness for American citizenship on personal circumstances, his claim that he was white was crucial to his argument that he was “American.” He presented his claim for citizenship in the context of the wording of the federal naturalization statute, which read, “The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent.” In contrast to his more abstract claims to being a “true

32. Id. at 80.
33. Id.
34. Id.
35. Id.
36. Id.
37. See id.
38. Id.
39. Id.
40. Lopez quotes scholar Yuji Ichioka, who describes Ozawa as “a paragon of an assimilated Japanese immigrant, a living refutation of the allegation of Japanese unassimilability.” LOPEZ, supra note 8, at 81 (citing Yuji Ichioka, The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case, 4 AMERASIA 1, 11 (1977)).
41. Ozawa, 260 U.S. at 189.
42. Section 2169, Title XXX of Revised Statutes (Comp. St. §4358).
American” based on the circumstances of his life, Ozawa’s claim to whiteness was quite literal. He argued that being “a Japanese who is ‘white’ in color” conferred upon him access to naturalization rights, based on the language of the statute. His claims to this whiteness in color relied on a number of anthropological sources which described the whiteness of the Japanese: “in Japan the uncovered parts of the body are also white”; “the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which whites assume as their own privilege”; and “in the typical Japanese city of Kyoto, those not exposed to the heat of summer are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.” Troubling is the manner in which Ozawa pointedly distanced himself from other “Eastern Asiatics,” placing himself on a higher rung in the racial pecking order. Additionally disturbing is his blatant claim to “the transparent pink tint which whites assume as their own privilege.” Ozawa attempted to place himself squarely in the land of the transparent-pink-tinted, leaving behind his darker, “yellower” Asiatic brothers. His statements claimed identification with a white norm, evidenced by the list of attributes which he asserted qualified him as a true American and by his literal claim to whiteness.

C. United States v. Thind

In contrast to Ozawa’s literal claim to “whiteness” based on his actual skin color, Bhagat Singh Thind argued his case by drawing on anthropological evidence to support his claim that his identity as an Asian Indian made him Caucasian, and, therefore, qualified him as white. He also claimed that the language spoken by his Aryan Indian ancestors in India’s Punjab region was shared by the Aryan people of Europe. Thind argued, third, that his social position in India and India’s social structure generally qualified him as “white”:

The high-class Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the negro, speaking from a matrimonial standpoint. The caste system prevails in India to a degree unsurpassed elsewhere...

With this caste system prevailing, there was comparatively a small mixture of blood between the different castes. Besides ethnological and philological aspects, it is a historical fact that the Aryans came to India, probably about the year 2000 B.C., and conquered the aborigines.

Lopez highlights Thind’s reliance on his ethnic group’s purported “purity, superiority, and a disdain for inferiors” as evidence of his whiteness. Just as Ozawa’s claim to whiteness involved rejecting his Japanese heritage and distancing himself from other Asians, Thind

43. Ozawa, 260 U.S. at 184.
44. LOPEZ, supra note 8, at 81 (quoting Brief for Petitioner at 55, 57, 71, Ozawa, 260 U.S. 178).
45. Id. (quoting Brief for Petitioner at 57, Ozawa, 260 U.S. 178).
46. Thind, 261 U.S. at 205-6.
47. Id.
48. Id.
49. LOPEZ, supra note 8, at 149.
dramatically distanced himself from other Indians and embraced what he perceived as a white cultural norm.

D. Maintaining Difference and Domination

The Court’s language in Ozawa and Thind reveals an unbending adherence to the rhetoric of difference, undisturbed by any attempts to establish sameness. In Ozawa, the Court opened its decision by listing the petitioner’s many “American” attributes and conceding that he was indeed “well qualified by character and education for citizenship.” However, the Court’s commitment to the rhetoric of racial difference is evident in the language of its holding:

Manifestly, the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.50

In the context of its concern over maintaining a “practical line of separation,” the Court relied on what is “popularly known” about whiteness, which means being part of the “Caucasian race.”51 The Court dismissed any notion that Ozawa could belong to the inside group eligible for citizenship and reasoned that, because “white” means “Caucasian,” Ozawa, being of Japanese descent, was “clearly of a race which is not Caucasian and therefore belong[ed] entirely outside the zone on the negative side.”52

Similarly, the language in the Court’s later decision in Thind resonates with a commitment to difference evinced by its holding in Ozawa. In posing the case’s dispositive questions for certification to the U.S. Supreme Court, the Ninth Circuit used Thind’s argument, which was based on class distinctions, in order to characterize the problem posed by his petition. One question the Ninth Circuit presented to the Supreme Court was, “Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?”53 Dismissing the “scientific,” anthropological evidence introduced by Thind to establish that he was “Caucasian” — and therefore, “white,” based on Ozawa — the Court firmly grounded the term “Caucasian” in popular perception. The language it used to arrive at this holding resembles that used in Ozawa to convey what the Court perceived as the stable nature of racial difference:

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

50. Ozawa, 260 U.S. at 197.
51. Id.
52. Id. at 198.
53. Thind, 261 U.S. at 206.
knows perfectly well that there are unmistakable and profound differences between them today.\textsuperscript{54}

Here, again, appears the language of difference, otherness, and a clear rejection of the petitioner's claim to sameness.\textsuperscript{55}

II. THE FEMINIST CRITIQUE OF "EQUALITY"

A. The Sameness-Difference Principle and Gender Equality

The claims to whiteness made in Thind and Ozawa find parallels in sex discrimination law, which feminist legal scholar Catharine MacKinnon has critiqued by arguing that traditional doctrine forces women to claim maleness in order to achieve equality. MacKinnon's critique of sex discrimination law focuses in part on the equal protection doctrine's "similarly situated" requirement as a prerequisite for a finding of unlawful differential treatment. This model of sameness fits into an overall structure of liberal rights ideology borrowed from Aristotle's notion of equality, in which likes are treated alike and unlikes unalike.\textsuperscript{56} The problem with this equality paradigm, argues MacKinnon, is that the standard for measuring likeness or difference purports to a foundation in gender neutrality but is actually male gendered: \textsuperscript{57} "Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure."

MacKinnon critiques this approach for its failure to inquire into "how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself."\textsuperscript{58} Through this failure, the "sameness-difference" rubric masks the extent to which gender "difference" is defined by power, treating it instead as biologically and

\textsuperscript{54} Id. at 209.

\textsuperscript{55} Scholars have distinguished the Supreme Court's decisions in Ozawa and Thind from one another on the basis of the Court's holdings in each case. Lopez argues that the two cases reveal the conflict between using "science" or "common knowledge" to explain racial divisions. See Lopez, supra note 8, at 6-7. In Ozawa, the earlier of the two decisions, the Court relied on both rationales to deem Ozawa as not part of what is "popularly known as the Caucasian race." Id. at 7 (quoting Ozawa, 260 U.S. at 197). Later, in Thind, the Court eschewed scientific understandings of race and instead based its analysis on popular understandings of who qualified as white. Lopez, supra note 8, at 8 ("What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood." Thind, 261 U.S. at 214-15.). However, for purposes of this paper, I am interested less in the legal status of the scientific and common knowledge rationales for racial identity and more in the Court's commitment to maintaining difference and its efforts to give content to that difference.

\textsuperscript{56} See Catharine A. MacKinnon, Reflections on Sex Equality under Law, 100 YALE L.J. 1281, 1284 n.28 (1991) [hereinafter MacKinnon, Reflections] (citing ARISTOTLE, ETHICA NICHOMACHEA bk. V.3, 1131a, 1131b (W. Ross trans. 1925)). MacKinnon also cites early cases brought before the enactment of the Fourteenth Amendment for this language on equality under Aristotle's model. See Barbier v. Connolly, 113 U.S. 27, 30-32 (1885); Hayes v. Missouri, 120 U.S. 68, 71 (1887); Reed v. Reed, 404 U.S. 71, 76 (1971) (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

\textsuperscript{57} CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 200 (1989) [hereinafter MACKINNON, TOWARD].

\textsuperscript{58} Id. at 220-221.

\textsuperscript{59} MacKinnon, Reflections, supra note 56, at 1286.
naturally derived. According to MacKinnon, “considering gender as a matter of sameness and difference covers up the reality of gender as a system of social hierarchy, as an inequality.” In fact, for women, “gender is more an inequality of power than a differentiation that is accurate or inaccurate. To women, sex is a social status based on who is permitted to do what to whom.” Rather than being a matter of natural differentiation between equals, gender “difference” between women and men means “domination” of women by men.

Under traditional equal protection doctrine, women are forced to take an assimilationist approach to seeking equality by claiming an empirical resemblance to men in order to satisfy the “similar situation” requirement. MacKinnon highlights the indignity of this position, when she asks: “Why should one have to be the same as a man to get what a man gets simply because he is one?” One consequence is that, in areas where women’s difference seems to require treatment not identical to men, women must emphasize their difference, creating the appearance of a double standard or an unprincipled exception to the equality model based on similarity. MacKinnon discusses, for example, how the issues of pregnancy, insurance, women’s schools, and women-only prisons are left out of the formal equality structure and have been “minimized as unimportant or lone exceptions or problems to be treated under some other rubric.” In addition, she argues, the traditional notion of equality has failed to consider sexual assault and reproductive control as legal issues of sex inequality.

Both approaches – the granting of rights to women based on sameness to men and the granting of “special” rights based on aberrant difference – result in women being held to a male standard. Consequently, women lose out overall when claiming either sameness or difference because within the structure of gender hierarchy, women are socially defined as subordinate to men. Very few women are capable of showing they are like men, and those who are most different from men must rely on doctrinal exceptions that are viewed as double standards which simply reinforce

60. MacKinnon, Toward, supra note 57, at 218.
61. Id.
62. Id.
63. MacKinnon elaborates on this point when she writes, “Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power. Distinctions of body or mind or behavior are pointed to as cause rather than effect, with no realization that they are so deeply effect rather than cause that pointing to them at all is an effect... Difference is the velvet glove on the iron fist of domination.” Id. at 219.
64. MacKinnon, Reflections, supra note 56, at 1287.
65. MacKinnon, Toward, supra note 57, at 225. MacKinnon continues, “Why does maleness provide an original entitlement, unquestioned on the basis of its gender, while women who want to make a case of unequal treatment in a world men have made in their image (this is really the part Aristotle missed) have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident of birth?” Id. (citations omitted).
66. See MacKinnon, Reflections, supra note 56, at 1287.
67. See MacKinnon, Toward, supra note 57, at 220.
68. MacKinnon, Reflections, supra note 56, at 1287.
69. See id.
70. See MacKinnon, Toward, supra note 57, at 221.
women’s subordination, rather than change the overall rule imposing such subordination. MacKinnon points to the ultimate irony in sex equality law in the context of socially defined gender difference: “[T]o require that one be the same as those who set the standard — those from whom one is already socially defined as different — simply means that sex equality is conceptually designed in law never to be achieved.”

B. The Sameness-Difference Principle and Race Equality

MacKinnon’s critique of sex discrimination law also looks to race discrimination cases, which first employed the sameness-difference approach by using white maleness as the “neutral” standard against which to evaluate wrongful discrimination. MacKinnon points to Plessy v. Ferguson as an illustration of the extent to which blacks could be treated differently on the grounds that they were different from whites. In addition, Brown v. Board of Education reflects a shift within the same conceptual framework — from black difference to black sameness — whereby blacks came to be understood in law to be the same as whites.

The prerequisite cases, such as Ozawa and Thind, fit squarely into the model of equality MacKinnon critiques in sex discrimination law and in such paradigmatic race discrimination cases as Plessy and Brown. The same question MacKinnon asks in the sex discrimination context presents itself in the context of Ozawa and Thind, but with the substitution of race for gender: “Why should one have to be the same as a [white person] to get what a [white person] gets simply because he is one?”

C. The Betrayal of the Claim to Whiteness

MacKinnon’s critique of the sameness-difference doctrine’s failure to consider the power differences inherent in racial and gender hierarchies aptly applies to Ozawa and Thind. Ozawa’s and Thind’s failures demonstrate the entrenched nature of a white ideology predicated on racial difference, a difference these two petitioners were hard pressed to overcome. Granted, MacKinnon’s critique focuses, in part, on how equality doctrine effaces the genderedness of the supposedly “neutral” norms to which women are forced to aspire. And, admittedly, Ozawa and Thind were not required to demonstrate similarity to a “neutral” standard. As MacKinnon points out, the disingenuous equality doctrine that presented this “neutral” standard did not emerge until Brown. Instead, Ozawa and Thind are significant for how they show explicitly what MacKinnon argues equality doctrine hides. Ozawa and Thind claimed they met the explicitly “white” standard but were unable to resist an ideology of white supremacy that subordinated them and coded this subordination as merely plain racial difference. Consequently, these cases illustrate white supremacist ideology at work.

71. See id. at 233.
72. Id.
73. See MacKinnon, Reflections, supra note 56, at 1289.
74. See id. at 1290.
In addition, these cases indicate how petitioners Ozawa and Thind "participated" in their own oppression, albeit most likely unwittingly, and how claims to whiteness such as theirs reinforce notions of white superiority. In making this argument, I acknowledge that Ozawa and Thind had few options available to them (although they could have claimed they were of African descent).\textsuperscript{75} I do not mean to attack Ozawa and Thind personally. Admittedly, they found themselves in difficult situations, in which their racial identity options were limited and in which their rights depended on their racial identity. And I certainly I do not mean to suggest that Ozawa and Thind should not have sought naturalization. I do argue, however, that the vigor of Ozawa's and Thind's claims reinforces the positive social meanings attached to whiteness. The claims affirm the notion that to deserve recognition as a full member of society—as a full socio-political being—one must be white.\textsuperscript{76} I am concerned about what these cases say about the power of white ideology and how this ideology maintains its power through building and maintaining racial hierarchy. I am concerned about the ideology that limited these two petitioners’ options such that they felt that, to become citizens, they were forced to claim the whiteness that was fundamentally premised on their subordination. At bottom, the power of white supremacy, in effect, limited Ozawa and Thind to reproducing and reinforcing the ideology that they were actually struggling to resist by asserting citizenship. The Court's decisions in these two cases reveal the difficulty these two Asian Americans faced.

### III. CLAIMING WHITENESS TODAY

#### A. Background

Eighty-eight years after the Supreme Court’s decision in \textit{Thind}, the question of how Asian American identity relates to “whiteness” (and to “blackness”) is still current. Increasingly, Asian Americans and scholars in general have critiqued and resisted the “black-white” paradigm that has historically framed our conceptions of race relations and civil rights policy.\textsuperscript{77} However, these efforts have not vitiated the staying power of the black-white model that Ozawa and \textit{Thind} demonstrate, literally by the fact that the petitioners faced only two ways of obtaining citizenship. Frank Wu’s exposition of Asian Americans’ role in the affirmative action debate shows how racial groups are conceived of as “white, black, honorary whites, or constructive blacks.”\textsuperscript{78} Asian Americans adopt different

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\textsuperscript{75} See supra note 17 and accompanying text.

\textsuperscript{76} See \textit{Lopez}, supra note 8, at 16 (for his discussion of the meanings attached to whiteness).


positions along this spectrum. Conservative forces have used the example of Asian Americans as fuel for their argument that affirmative action results in "reverse discrimination" against whites and Asian Americans.\textsuperscript{79} In this regard, Asian Americans may be viewed as "constructive whites," insofar as their interests are linked with those of affirmative action opponents concerned about the threat affirmative action poses to whites. However, Asian Americans have been treated as "constructive blacks" with respect to whether school segregation and anti-miscegenation laws apply to them.\textsuperscript{80}

Frank Wu’s black-white spectrum illustrates the force that this bipolar paradigm still has today. Mari Matsuda warns us of the significance that this black-white paradigm has for Asian Americans. She argues that Asian Americans run the risk of becoming a "racial bourgeoisie" — a "racial middle" between whites and blacks in today’s racial hierarchy.\textsuperscript{81} While being a "racial middle" might suggest a position of neutrality, or even a way out of the black-white binary, it is actually problematic because it uses Asian Americans to reinforce the existing racial structure premised on white dominance.\textsuperscript{82} Matsuda urges Asian Americans to resist the promise that being a racial middle appears to offer, that "[Asian Americans] can be just like whites if [they] try hard enough."\textsuperscript{83} Not coincidentally, Matsuda’s characterization echoes the central theme sounding through Ozawa’s and Thind’s claims to whiteness.

These brief discussions of Wu’s explication of the black-white paradigm and Matsuda’s warnings about being a "racial middle" suggest how today’s Asian Americans face a bind somewhat similar to that confronted by Ozawa and Thind. Today’s Asian Americans face the question of what means to use to assert their rights and gain the privileges of full membership in society. While Ozawa and Thind literally show what happens when a racial minority is required to show similarity to a white norm to gain equality (as critiqued by MacKinnon), contemporary examples of Asian American claims in the area of affirmative action show self-defeating, assimilationist claims to whiteness in more nuanced ways. In this instance, Asian American affirmative action opponents assume the "model minority myth" as justification for their position. By accepting the myth and using it as justification, some Asian Americans have made the

\textsuperscript{79} For example, Newt Gingrich coopted Asian Americans in his attack on affirmative action: "Asian Americans are facing a very real danger of being discriminated against" because they are becoming too numerous at prestigious universities which have affirmative action." \textit{Id.} at 225 (quoting Newt Gingrich at the Congressional Press Conference (CNN television broadcast, Feb. 22, 1995, transcript at 873-13)).

\textsuperscript{80} See Wu, supra note 78, at 249-250.

\textsuperscript{81} Mari Matsuda, \textit{We Will Not Be Used}, in \textit{WHERE IS YOUR BODY?} 150 (1996).

\textsuperscript{82} See \textit{id.} Matsuda explains how the notion of Asian Americans as the racial middle reinforces a racial hierarchy when Asian Americans are "used" to (1) create "success myths" about Asian Americans, thus perpetuating the "blame-the-victim ideology" ("model minority myth") against those who have not achieved this "success"; (2) deny employment or educational opportunity to others (Asian Americans are held up as an example to defeat affirmative action, despite gains to Asian Americans and others from these programs); and (3) serve as America’s "foreign" punching bag in times of hardship. \textit{Id.} at 150-154.

\textsuperscript{83} \textit{Id.} at 150.
claim that Asian Americans are similarly situated with whites. I have chosen this example because it particularly shows how Asian Americans have used the "model minority myth" to make such claims to whiteness. It is by no means the only example, nor is my discussion intended to be exhaustive. I merely use it to highlight my point that echoes of Ozawa and Thind remain with us today, that while opposing affirmative action might appear to advance Asian American interests to gain political and social equality, these positions belie the ingrained nature of racial "difference" and ultimately entrench white racial privilege.

B. The "Model Minority Myth's" Affirmation of White Supremacy

Claims to whiteness in the affirmative action area occur against the backdrop of the "myth" of Asian Americans as a "model minority." The "model minority myth" serves as a primary example of the racialization of Asian Americans as more "white" than other groups of color, facilitating the perception of Asian Americans as occupying a higher tier than other people of color in the racial hierarchy. The "model minority myth" depicts Asian Americans as "hardworking, intelligent, and successful" also known as deserving beneficiaries of the "American Dream." The message of this myth is that "a racial minority can succeed in the United States." Although the appellation appears complimentary, the myth is a trap. Scholars have argued that the "model minority myth" injures Asian Americans in two ways. First, the myth obscures the actual complexity of subordination suffered by Asian Americans. Second, the myth divides Asian Americans from other people of color who are deemed less than exemplary minorities and legitimates racially-drawn disparities of power and privilege. However, these two harms, taken together, point to the ultimate injury that the "model minority myth" commits — that of reinforcing white supremacy. By obscuring Asian American subordination and creating a narrative of Asian American success, the "model minority myth" masks how white supremacy has created socio-economic disparities (for which non-Asian American people of color are blamed for not being able to "overcome") and obscures how white supremacy has subordinated Asian Americans. The "model minority myth" fits into an overall system of "racial stratification" that treats racial classifications as natural and considers the gross disparities in material life for different racial groups as the "product of 'natural' and 'normal' socio-economic forces."

85. Gotanda, supra note 84, at 1089.
86. See Chang, supra note 77, at 1260; see also Gotanda, supra note 84, at 1091.
87. See Chang, supra note 77, at 1260. Matsuda critiques how the myth is used to "deny racism and to put down other groups." She explains, "African Americans and Latinos and poor whites are told, 'Look at those Asians—anyone can make it in this country if they really try.'" Matsuda, We Will Not Be Used, supra note 81, at 152.
88. Gotanda, supra note 84, at 1090-91.
myth, therefore, affirms white supremacy by entrenching racially-based disparities of wealth, power, and privilege that flow to the advantage of whites. Accordingly, while the "model minority myth" intends to draw parallels between dominant, white culture and Asian/Asian-American culture, the myth merely "reifies and attests to its original." In the next subsection, I will address how Asian American opposition to affirmative action reenacts a modern day version of the prerequisite claims and demonstrates the flaws of equality claims based on the sameness-difference principle.

C. Affirmative Action

The wholesale rejection of affirmative action by a vocal contingent of Asian Americans illustrates one way in which some Asian Americans have accepted the "model minority myth" and have made claims that reflect a belief in Asian American similarity to whiteness. While certain aspects of affirmative action pose troubling implications for Asian Americans in particular contexts, even more problematic is the reasoning behind the outright rejection of affirmative action. In this section I explore how this reasoning embraces the myth of Asian American success and, thus, obscures the racial oppression both Asian Americans and other people of color experience.

Asian American anti-affirmative action sentiment has found voice in a number of public Asian American affirmative action opponents. Asian American columnist Arthur Hu has gained notoriety for the strong anti-affirmative action stance in his writings and through a complaint he filed against UC Berkeley alleging discrimination against whites through the school's admissions policy. His objection to affirmative action is reflected in his argument that "quotas exclude Asians from the best colleges and jobs where being over-represented only means we studied harder." Lawyer-columnist Lee Cheng also objects to affirmative action as being divisive and unnecessary, citing his own professional experience, in which he says he has been judged by nothing more than his qualifications:

I have worked long hours since signing on in September, but the work has generally been challenging, and I have been treated respectfully, and probably too patiently for my own good. One thing I never sensed from any of the attorneys at my predominantly "white" firm was the feeling that they regarded me as a "minority hire," or as an "Asian American" attorney. All that seemed to matter to them was the quality of my work,

89. GARY OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 139 (1994).
91. Arthur Hu, Preference is Not Equality, and Neither are Quotas, NORTHWEST ASIAN WEEKLY, Nov. 6, 1998, at 3.
my attitude and my willingness to be a team player.92

Lastly, our very own Chinese American Secretary of Labor Elaine Chao has been a vocal opponent of affirmative action, arguing that these race-conscious measures harm whites and Asian Americans.93

I do not mean to suggest that all Asian Americans oppose affirmative action. In fact, while the popular press reported high levels of Asian American support for Proposition 209,94 the 1996 California state initiative that repealed affirmative action in public employment, contracting, and education, others have countered this portrayal, asserting that actually up to four-fifths of Asian Americans voted against Prop 209.95 Rather than aiming to settle these quarrels, I am mainly concerned with how the Asian Americans who oppose affirmative action, like those highlighted above, adopt the “model minority myth” to make a claim to whiteness.

Admittedly, affirmative action is a complicated issue. An exhaustive investigation of the issue lies beyond the scope of this paper. However, it is worth briefly addressing how the quota issue fits into the arguments that affirmative action opponents have made. As quoted above, Hu bases his anti-affirmative action stance on the fact that it imposes unfair quotas on Asian Americans. Hu taps into Asian American charges, particularly forceful between 1983 and 1986, that selective universities and colleges were using racial quotas to limit Asian American enrollment.96 In response, these universities argued that Asian American applicants were either “overrepresented” or “not qualified for admission.”97 The controversy provoked a number of in-house admissions policy reviews as well as federal investigations by the Justice and Education departments.98

In 1988, conservatives and neo-conservatives began suggesting that discrimination against Asian American applicants proved the failure of affirmative action.99 That year, former San Jose State University president John Bunzel criticized Berkeley’s affirmative action policy for going too far, suggesting that the school’s focus on diversity was squeezing out

97. Id. at 9.
98. See id.
99. See id.
qualified whites and Asian Americans to admit blacks and Hispanics.100 Others, like James Gibney, writing for the New Republic in 1988, blamed the harm that Asian Americans appeared to experience through quotas on affirmative action for other minorities: "If Asians are underrepresented based on their grades and test scores, it is largely because of affirmative action for other minority groups."101

Contrary to these commentators’ positions, however, the quota problem does not necessarily point to the automatic rejection of affirmative action. For example, an article by scholars Gabriel Chin, Sumi Cho, Jerry Kang, and Frank Wu, argues that opposing racial quotas that harm Asian American applicants does not necessarily mean renouncing affirmative action entirely.102 One can support affirmative action for people of color, including Asian Americans, and oppose the sort of “negative action” that racial caps on Asian American admissions effects.103 These scholars argue that affirmative action programs do not necessarily translate into quotas that restrict Asian Americans.104 Central to these scholars’ argument is the insight that racial quotas on Asian American university applicants actually inure to the benefit of whites and to maintaining the white privileged nature of our universities.105 Chin, Cho, Kang, and Wu show us that the anti-affirmative action position that Gibney and Bunzel take is not necessarily the logical answer to the quota question.

Opposition to affirmative action on the basis of the quota issue rests fundamentally on the “model minority myth.” The myth allows us to believe that Asian Americans are exempt from the past and present racial subordination that affirmative action hopes to remedy. It enables opponents of affirmative action to believe that Asian Americans do not need these programs to achieve representation in significant parts of the higher education context106 or in public contracting and employment.107 It enables these Asian Americans to ignore the gains they have made from affirmative action.108 By embracing the “model minority myth,” we can lose sight of the pay and promotion gap Asian Americans experience. In defending the significance of affirmative action for Asian Americans, Charles Lawrence and Mari Matsuda reference the 1995 Glass Ceiling Commission, which stated, “despite higher levels of formal education than

101. Id. at 115 (quoting James Gibney, The Berkeley Squeeze, NEW REPUBLIC, Apr. 11, 1988, at 15-16).
103. See id.
104. See id. at 159-60.
105. See id. at 159. See also CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 96 (1997) (arguing that Asian Americans were not displaced by other minorities but by whites, including athletes and “legacy” admits).
106. Asian Americans are significantly underrepresented in the humanities in general and in higher education administration and management. See Chin et al., supra note 102, at 154.
107. See id. at 153-155.
108. See id. at 155 (pointing to increased Asian American representation in the San Francisco Fire Department due to affirmative action).
other groups, Asian Americans and Pacific Islander Americans receive lower yields in terms of income or promotions.” We can also lose sight of the racial violence that Asian Americans experience. And the “model minority myth” also allows us to forget that “Asians and Pacific Islanders” in the United States are more likely than “non-Hispanic Whites” to be poor. The model minority does the dirty job of covering up these inequities to enable Asian Americans who want to reject affirmative action out of hand to do so.

By accepting the “model minority myth,” Asian Americans who oppose affirmative action also deny the racial oppression other people of color experience. Glenn Omatsu writes of Asian American neo-conservatives:

Thus they emphasize individual advancement as the way to overcome racism. They believe that people of color can rise through merit, which they contend can be measured objectively through tests, grades, and educational attainment . . . In their obsession with “merit,” “qualifications,” and “objective” criteria, they lose sight of power and oppression in America.

The “model minority myth” bolsters the claim that all one needs to do is work hard in order to rise in society. On this view, there is no need for an affirmative action regime geared toward addressing inequities from racial oppression. According to this perspective, Asian Americans are not linked to other people of color in any sort of meaningful or real way. They are “successful” because they “worked hard,” and the others are not because they did not.

Asian American opponents of affirmative action who base their stance on the “model minority myth” stake their claims on the assumption that Asian Americans are really no different than whites. They assume that Asian Americans do not benefit from affirmative action; in fact, they are its victims. They would have us believe that Asian Americans do not experience the broad, pervasive racial discrimination that affirmative action partially addresses, that they are quite distinct from other racial groups because they occupy a position of privilege and success, more closely approximating whiteness than any sort of “colored-ness.”

This Asian American claim to whiteness reinforces white privilege by justifying the status quo of racial disparity. By opposing affirmative action, these Asian American detractors deny the reality of racial discrimination that Asian Americans and others of color experience. They divide themselves from others of color and gloss over the particularity of Asian American experiences of oppression in favor of a rosier version of reality. In effect, they make a claim of sameness to the white norm. However, as MacKinnon demonstrates, this claim is deceptive, for the whiteness that these Asian Americans claim is built on racial hierarchy. It cannot promise

109. LAWRENCE & MATSUDA, supra note 105, at 196.
110. See Chin et al., supra note 102, at 157-158.
111. See U.S. Census Bureau, THE ASIAN AND PACIFIC ISLANDER POPULATION IN THE UNITED STATES 5 (1999).
112. Omatsu, supra note 90, at 47.
the way out – or a way up. While principally argued in a different context, that of sex discrimination law, MacKinnon’s central insight applies here. It is that gender and, in this case, racial hierarchy are so entrenched as to define (and limit) the very terms by which we choose to assert our rights and protect our interests. In the affirmative action context, aligning with whites (or making the claim to whiteness) looks like the means to protecting Asian American interests. However, the claim is ultimately self-defeating.

IV. ASPIRATIONS: RESISTANCE AND REDEFINITION

Third’s and Ozawa’s claims, however compelled by historical circumstance, are equally tragic today, given current examples of Asian Americans confined in a racial structure predicated on white privilege. The coercive forces that limited Third’s and Ozawa’s options, compelling them to choose a futile and damaging strategy, reveal the limited racial definitional choices presented to Asian Americans today. Kimberlé Crenshaw’s notion of coercion operating on disempowered individuals, forcing them to comply with their oppression, strikingly applies in this instance.¹¹³ It also urges us to think of ways we can resist this type of coercion.

In the context of this paper, this resistance involves, in part, the refusal to continue down the path of Ozawa and Third. MacKinnon’s critique in the sex equality sphere is instructive here for it advises us to depart from the dominant-norm-predicated sameness approach in favor of a more open-ended pluralism. Two areas present possibilities for resisting the coercion to claim whiteness: first, focusing on the particularity of Asian American experiences; and second, continuing efforts toward coalition building with other groups of color. Focusing on particularity allows us to resist, specifically, such damaging notions like the “model minority myth,” which underlie the claim to whiteness that Asian American opponents make. It focuses attention on Asian American experiences of racial oppression. This identification of subordination may serve as a basis for building cross-racial coalitions. By linking up with other people of color, Asian Americans can resist manipulation by those conservative forces trying to “use” them as a “racial middle.”¹¹⁴ They can allow us to recognize the disingenuousness of claiming similarity to a white norm that is based on widespread oppression of various racial minorities.

Robert Chang’s framework for Asian American legal scholarship presents the possibility of combining these two elements to move away from the white dominated sameness-difference model confronting Ozawa, Third, and contemporary rights seekers. One aspect of Chang’s framework involves focusing scholarly attention on the specificity of Asian American experience. Chang, like numerous other Asian American scholars,¹¹⁵

¹¹⁴. Matsuda, We Will Not Be Used, supra note 81, at 150.
¹¹⁵. See Chang, supra note 77, at 1267; but see Janine Young Kim, Are Asians Black? The Asian-
eschews the traditional black-white racial model for its lack of particularity, arguing, “To focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States. It ignores such things as nativistic racism. It ignores the complexity of a racial hierarchy that has more than just a top and a bottom.”116 It is through narrative that Chang suggests that participants in Asian American legal scholarship “speak our oppression into existence, for its must first be represented before it can be erased.”117

In addition to the push toward particularity, however, scholars urge us to identify commonalities. Such coalition building is rendered impossible or difficult at best by Asian American claims to whiteness, exemplified by the prerequisite cases and other contemporary examples like affirmative action. While focusing on a perspectivist, narrative-driven approach to scholarship, Chang acknowledges the need for solidarity to ensure diversity of views and to create a coalition of disempowered groups.118 Building on this notion of coalition, Gary Okihiro, while critiquing the inadequacy of the black-white racial paradigm, also looks for bases of commonality between disempowered groups, positing that Asian Americans actually find themselves closer to African Americans than whites.119 Finally, Mari Matsuda’s notion of “looking to the bottom”120 as a means of “adopting the perspective of those who have seen and felt the falsity of the liberal promise”121 is a model for the perspective-driven, commonality-based approach toward coalition. Her discussion of Gramsci’s notion of “organic intellectuals, grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression,”122 presents a possibility for forming common bases of understanding.

By identifying both the particularity and commonality of the Asian American experience, Asian Americans can resist the trap of claiming whiteness. These modes of resistance keep us connected to our experiences of oppression and cognizant of the workings of racial hierarchy. They keep us connected to ourselves and to other people of color.

I do not purport to offer novel ideas on how Asian Americans can dismantle white racial ideology. I merely hope to show how we may draw on existing understandings of Asian American identity and scholarship to consider ways to avoid the traps I have discussed in this paper. Chang’s suggestion to identify particularity and commonality offers one solution to this complex problem of how to avoid the assimilationist claims to

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American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm, 108 YALE L.J. 2385 (1999) (arguing that the paradigm retains significance as a tool for understanding racial stratification).

116. Chang, supra note 77, at 1267.
117. Id.
118. See id. at 1249.
119. See Okihiro, supra note 89, at 34.
121. Id.
122. Id.
whiteness that appear to promise equality or advancement but end in the self-defeating reinforcement of white supremacy.

CONCLUSION

The trap of the claim to whiteness is one not faced by Asian Americans alone. As revealed by the stories of Ozawa and Thind, it is a fundamental mechanism of the structure of racial hierarchy and subordination. But the losses of complying with these coercive forces make these claims truly tragic. Examples of others who have adopted the "white" role are instructive. Charles Lawrence writes about Supreme Court Justice Clarence Thomas, whom Lawrence describes as having made his career "by his denial of any kinship with me."123 This disavowal has consisted of a willingness to adopt the role created for him by his white "patrons." Writes Lawrence, "The stigma he bears comes with making oneself in the master's image; that is to say, as the master imagines you."124

The losses suffered by individuals like Thomas are instructive and cautionary. Writes Lawrence:

[Justice Thomas] is a vivid reminder of our own vulnerability to internalized racism and self-deprecation. The obvious impossibility of his assimilation among the whites he serves, and his painful isolation from his own community, are a warning that there is no freedom in dissociation from the suffering of our brothers and sisters. When those of us who are relatively privileged participate in society's defamation of people of color, we injure ourselves.125

Lawrence's admonition strikingly applies to Asian American claims to whiteness. Inherent in these claims is a rejection of self, of community, and of coalition with other Asian Americans and others of color. Also tragic is the drive toward an assimilation that will never be achieved and the divisive isolation that Ozawa's and Thind's petitions enacted by blatantly rejecting difference. Lawrence's words warn of the lonely place that is the path to white acculturation. "There is no freedom in dissociation from the suffering of our brothers and sisters," he writes.126 These words remind us that, today, we are not so far removed from the dilemmas Ozawa and Thind confronted.

123. LAWRENCE & MATSUDA, supra note 105, at 122.
124. Id. at 124.
125. Id. at 139.
126. Id.