# No. 10,299

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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JOHN T. REGAN,

*Appellant,*

vs.

CAMERON KING, as Registrar of Voters in the City and County of San Francisco, State of California,

*Appellee.*

## BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE.

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## BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE.

### STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTION.

This is an appeal prosecuted by the appellant from a judgment and decree (R. 28) of the United States District Court in and for the Northern District of California rendered against him and in favor of the appellee on his complaint for an injunction (R. 2) and appellee's answer (R. 11) thereto traversing the allegations thereof after a hearing had on the merits of the issues involved. The complaint seeks to compel the appellee as registrar of voters in the City and County of San Francisco, State of California, to strike from the voting rolls the names of some 2,600 native-born American citizens of Japanese ancestry who were

born in California. The complaint alleges that despite the fact these persons were born in California they are aliens not entitled to suffrage and that, consequently, their registration affidavits were false in averring citizenship. It further alleges the appellant to be a voter and that his right to vote might be impaired by the possibility that the votes of said citizens when exercised might have an offsetting or diminishing effect upon his own vote.

The complaint, a bill in equity, on its face failed to show facts sufficient to justify the equitable relief prayed because the specific issues it sought to raise had been expressly decided by the Supreme Court, in prior decisions, adverse to the contentions of appellant. In addition, it was fatally defective in that it contained no allegation of fact specifying the particulars wherein the affidavits alleged to have been filed by the registrants were false as declared in paragraph VII. It failed to alleged the elements of fraud necessary to justify equitable relief. It is strange that neither a motion to strike the complaint and dismiss the action nor a general demurrer was interposed in lieu of an answer being filed. The issues could have been tested without a hearing on the merits.

The findings of fact and conclusions of law were signed by the trial court on July 2, 1942 (R. 27), and on the same day the written Opinion or Memorandum and Order (R. 15-16) of the court below dismissing the action was rendered and filed. Thereafter, on September 17, 1942, there was filed in the proceeding below a stipulation (R. 17-18) between the parties providing that "paragraph VI of the complaint for in-



junction shall be excluded and eliminated from consideration by the court in this case, and that the findings of fact herein need not refer to said paragraph VI". The reason for excluding this material is not revealed by the record and is not apparent. The deleted matter leaves the complaint without substance and renders it wholly vague, indefinite and uncertain. A motion to dismiss the appeal would seem to lie.

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## THE STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTIONS.

It was contended by appellant and apparently by the appellee that the court below had jurisdiction by virtue of the provisions of Title 28 USCA, sec. 41, subd. 14, and Title 8 USCA, secs. 31 and 43. It is contended that the Circuit Court of Appeals has jurisdiction upon appeal to review the judgment and decree of the court below under the provisions of Title 28 USCA, sec. 225(a). The question whether the District Court had and the Circuit Court of Appeals has jurisdiction of the suit at all is doubtful as hereinafter argued.

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## CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS THE VALIDITY AND CONSTRUCTION OF WHICH ARE INVOLVED AND DRAWN INTO QUESTION.

1. Section 51 of the *Political Code* of the State of California which declares that all persons born in California or elsewhere in the United States and residing in California are citizens of California.

2. Section 1083 of the *Political Code* of the State of California which declares that every native citizen of the United States who is 21 years of age and has resided in California for 90 days preceding an election and has conformed with the law governing the registration of voters shall be a qualified elector.

3. Section 21 of the *Elections Code* of the State of California which provides that a voter means any elector registered as such under the provisions of the Elections Code.

4. Section 70 of the *Elections Code* of the State of California which provides that every person who qualifies under Sec. 1 of Art. II of the California Constitution and complies with the Elections Code's provisions governing the registration of voters is entitled to vote at any election held within the territory wherein he resides.

5. *Section 1* of *Article II* of the *California Constitution* which provides that every native citizen of the United States of the age of 21 years and a resident of the State for one year preceding an election date shall be entitled to vote.

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**FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS THE VALIDITY AND CONTRUCTION OF WHICH ARE INVOLVED AND DRAWN INTO QUESTION.**

1. *Article I, Sec. 2, subd. 1,* and *Article II, Sec. 1,* of the *U. S. Constitution* and the *17th Amendment* thereof under which the United States adopts as the qualifications for electors for federal officers the qualifications prescribed by the several States.



2. *Article I, Sec. 4, subd. 1,* of the *U. S. Constitution* under which the United States adopts as the times, places and manner of holding elections for federal officers those prescribed by the several States.

3. The *Fourteenth Amendment* of the U. S. Constitution which grants national and state citizenship to all persons born in the United States and subject to its jurisdiction.

4. The *Fifteenth Amendment* of the U. S. Constitution which prohibits the federal and state governments from abridging the right of citizens to vote by reason of race.

5. *Article IV,* Sec. 2, cl. 1, of the *U. S. Constitution* which provides that citizens of each State are entitled to all privileges and immunities of citizens in the several States.

6. The *Nationality Act of 1940* (Title 8 USCA, sec. 601) which declares persons born in the United States and subject to its jurisdiction are nationals and citizens of the United States at birth.

7. The *Elective Franchise Statute* (Title 8 USCA, sec. 31) which forbids racial discrimination against citizens in the matter of voting.

8. The *Civil Rights Statutes* (Title 8 USCA, sec. 41 et seq.) which forbid racial discrimination against citizens in the matter of voting.

## PLEADINGS NECESSARY TO SHOW EXISTENCE OF THE JURISDICTIONS.

The pleadings necessary to show the existence of the jurisdictions and which tender all the material issues involved herein are the complaint for injunction (R. pp. 2-11) and the answer thereto. (R. pp. 11-15.) The findings of fact and conclusions of law appear in the record on appeal at pages 18-27, the judgment and written opinion of the court below dismissing the complaint at pages 28-29 and the notice of appeal at page 29.

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## QUESTIONS INVOLVED.

1. Can the appellant as an elector in California compel the appellee registrar of voters to strike from the register of electors the names of some 2,600 native-born American citizens of Japanese ancestry who were born in California and are residents and citizens thereof upon the ground that said persons are not citizens simply because their ancestors came from Japan?

2. Is the appellant's complaint cognizable in equity when it shows on its face that the appellant's right to vote is not abridged and that his sole grievance is that the right of these citizens to vote might, when exercised, have a tendency to impair or diminish the effect of his vote?

3. Have the federal courts jurisdiction to entertain an action or bill to determine the qualifications of electors which depend upon the laws of the State of California and not upon the laws of the United States?



These questions are raised by the averments of the complaint (R. 2-11); the admissions and denials contained in the answer (R. 11-15); and the findings of fact and conclusions of law. (R. 18-28.)

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## SUMMARY OF ARGUMENT.

The judgment and decree of the court below dismissing the appellant's complaint for an injunction was correct and should be affirmed for the following reasons:

National and state citizenship is conferred upon native-born Americans of Japanese ancestry by the 14th Amendment. The Supreme Court has expressly so decided in *Morrison v. People of the State of California,* 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664. The *Nationality Act of 1940* (8 USCA 601) expressly declares persons born in the United States are nationals and citizens of the United States. California citizenship is, by Sec. 51 of the *Political Code,* conferred upon all persons born in California or elsewhere in the United States and residing in the State.

The *California Constitution* (Sec. 1, Art. II) provides that every native citizen of the United States who is 21 years of age and has been a resident of the State for one year is entitled to vote at all elections. Section 1083 of the *Political Code* declares that every native citizen of the United States who is 21 years of age and has been a resident of the State for one year preceding an election and has conformed with the state law governing the registration of voters is a qualified

elector. Section 21 of the California *Elections Code* defines a voter as an elector registered as such under the code. Section 70 thereof provides that every person who qualifies under Sec. 1 of Art. II of the California Constitution and complies with the provisions of the *Elections Code* governing the registration of voters is entitled to vote at any election held within the territory wherein he resides. The right of suffrage is, therefore, conferred by state law upon the American citizens of Japanese ancestry who have qualified therefor and whose names the appellant seeks to strike from the roll of voters.

The United States, in the federal Constitution (Art. I, Sec. 2, subd. 1; Sec. 4, subd. 1; Art. II, Sec. 1, and the 17th Amendment), has adopted as the qualifications of electors in voting for federal officers those qualifications prescribed by the several States and, in the instant case, those prescribed by California.

The right of these American citizens of Japanese extraction to vote is safeguarded by the 14th Amendment and particularly by the *privileges and immunities, due process* and *equal protection* clauses thereof and also as one of the inherent and implied rights of national citizenship. Their right to vote also seems to be protected and safeguarded to them by the *privileges and immunities* clause of Article IV, Sec. 2, cl. 1, of the U. S. Constitution. In addition thereto, the *contemporaneous construction* long placed upon these amendments and statutes by the officials charged with the administration of the election laws, including the determination of citizenship rights thereunder, has the



force of law. American citizens of Japanese lineage have long been accorded the right to vote by these officers and the doctrine of contemporaneous construction is applicable herein and conclusive upon their right to vote.

Although the *15th Amendment,* the *Elective Franchise Statute* (8 USCA 31) and the *Civil Rights Statutes* (8 USCA 41 et seq.) do not confer suffrage upon any person directly they do forbid the racial discrimination the appellant seeks by his bill to practice upon the American citizens of Japanese ancestry mentioned therein.

Inasmuch as the right to vote for federal officers depends primarily upon the laws of California it is doubtful if the federal courts have jurisdiction to entertain the appellant's suit for he does not assert that any forbidden discrimination has been practiced upon him or that his right to vote has been abridged.

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**ARGUMENT.**

The appellant's suit is one the design and avowed purpose of which is to deprive native-born American citizens of Japanese ancestry of their right of suffrage and, as an incident thereto, of their rights to national and state citizenship. It is also an attack upon the similar rights, privileges and immunities of all other native-born American citizens of other oriental ancestry. The method of attack conducted by the appellant is unusual. It was not launched directly against

the individual citizens most concerned who are either serving in our armed forces or are detained in relocation centers and, in consequence, are unable to defend their rights, but was brought against the registrar of voters during their absence.

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### THE RIGHT TO VOTE INHERES IN THE PEOPLE.

In ordaining and establishing the federal Constitution our colonial forebears gave to this nation a representative republican form of government. Wisely the framers thereof included therein a provision guaranteeing a *"Republican Form of Government to Every State in the Union"*. (Art. I, sec. 4.) A republican form of government is a government by representatives chosen by the people and is not a government of a class but one of the people. See *In re Duncan,* 139 U.S. 449, 35 L. Ed. 219; *Minor v. Happersett,* 21 Wall. 175, 22 L. Ed. 627. It derives all its powers, legislative, executive and judicial, from the general body of citizens. Our federal government is one of limited powers, the 9th Amendment reciting that other rights are *"retained by the people"* and the 10th carrying a recital that neither the powers not delegated to the United States by the Constitution nor prohibited by it to the States *"are reserved to the States, or to the people"*.

The right of a people to select or choose governmental officials inheres in the people of a republic. Were it not so we would be blessed with neither a republic nor a republican form of government. The people did



not surrender to the United States the power to grant or withhold the right to vote. The right to vote inheres in all freemen subject to the qualifications for electors being prescribed or determined by the States or the peoples in the respective States. It is an inherent and implied right of both state and national citizenship.

An examination of the federal Constitution reveals that it does not directly confer the right of suffrage upon any person. It does not prescribe the qualifications for electors either for members of Congress or the President but it recognizes that these qualifications are matters for determination by the several States with the exception of the prohibitions imposed by the provisions of the 15th Amendment against discrimination by the States. This appears from the following pertinent provisions therof, to-wit:

Article I, section 2, subdivision 1:

> "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Article I, section 4, subdivision 1:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; * * *"

Article II, section 1, subdivision 2, providing the manner of electing the President and Vice-President, reads as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

17th Amendment:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

The United States has adopted as the qualifications of electors for members of Congress those prescribed by the several States for electors of the most numerous branch of the legislatures of the States. Although the right to vote for federal officers is, in a measure, dependent upon the federal Constitution it depends primarily upon the laws of the several States. *Ex parte Yarbrough,* 110 U.S. 651, 663, 4 S. Ct. 152, 28 L. Ed. 274; *Wiley v. Sinkler,* 179 U.S. 58, 21 S. Ct. 17, 45 L. Ed. 84; and *Swafford v. Templeton,* 185 U.S. 487, 22 S. Ct. 783, 46 L. Ed. 1005.



**THE FIFTEENTH AMENDMENT PROHIBITS RACIAL DISCRIMINATION IN VOTING.**

On March 30, 1870, the *15th Amendment* of the federal Constitution was adopted, section 1 thereof reading as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude."

The right to vote existed prior to the adoption of this Amendment and was inherent in the people. The Amendment was necessitated because the right was being denied in prejudiced and ignorant localities to persons of African nativity and descent. It placed the freedman's right to vote beyond State discrimination. It sets up an immunity from discrimination arising in federal and state elections from federal and state sources. It is a conclusive barrier set up against the precise sort of discrimination the appellant herein seeks to practice against our native-born citizens of Japanese ancestry and other native-born American citizens of oriental ancestry.

In setting up this immunity the Amendment deprives the States of their power over suffrage only insofar as it prevents them from discriminating against voters on the basis of racial origin, color, or previous condition of servitude. *Guinn v. U. S.,* 238 U.S. 368, 35 S. Ct. 926, 59 L. Ed. 1340; *Myers v. Anderson,* 238 U.S. 347, 35 S. Ct. 932, 59 L. Ed. 1349; and *Lane v. Wilson,* 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281. Outside of this prohibition the power to determine the

general qualifications for voters still depends upon the laws of the several States. In the *Guinn* case, in referring to the effect of this Amendment, the Supreme Court declared:

> "While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that, as a consequence of the striking down of a discriminating clause, a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U.S. 651, 21 L. Ed. 274, 4 S. Ct. 152; Neal v. Delaware, 103 U.S. 370, 26 L. Ed. 567. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state Constitutions in which, at the time of the adoption of the Amendment, the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word "white" disappeared and therefore all male citizens, without discrimination on account of race, color, or previous condition of servitude, came under the generic grant of suffrage made by the state."



**ELECTIVE FRANCHISE STATUTE AND CIVIL RIGHTS STATUTES FORBID RACIAL DISCRIMINATION IN ELECTIONS.**

It is also to be noted that Congress, pursuant to the power conferred upon it by Section 2 of the 15th Amendment, has passed the *Elective Franchise Statute* (8 USCA 31) which prohibits State discrimination in the matter of voting and the *Civil Rights Statutes* (8 USCA, secs. 41, et seq.) to enforce its provisions against the types of discrimination thereby enjoined and which the appellant, nevertheless, seeks to practice herein. Compare also the provisions of 18 USCA, secs. 51 and 52.

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**SUFFRAGE RIGHTS DEPEND PRIMARILY UPON STATE LAW.**

The voting rights of these citizens whom the appellant seeks to disenfranchise depend primarily upon the laws of the State of California which define electors and their qualifications. The suffrage right of all citizens in California, including the appellant, likewise depend upon the laws of California. Were it conceivable that the appellant might be successful in preventing these citizens from voting for members of Congress herein their names could not be stricken from the rolls as electors in this State for their right to registration depends upon California law and not upon federal law. It would be obvious that in such an event the appellant himself and all our State electors would likewise be prevented from voting for federal officers for want of adequate federal machinery by which the qualifications for electors for federal officers could be determined. There could then be no elections for federal officers

until the people by constitutional amendment provided a method of determining electors and their qualifications for voting for federal officers. Inasmuch as the elective terms of federal officers expire at the end of definite periods prescribed by the federal Constitution the appellant would leave us without a federal government.

There may, therefore, be some doubt whether the appellant's suit is one over which the federal courts have jurisdiction. The appellant's request is an extraordinary one. He ask this court to nullify the California law prescribing the qualifications for electors which we submit is an internal legislative matter for the State to determine and outside the province of federal authority. By assailing the State's method of determining electors and prescribing their qualifications he is also attacking the long established method of electing federal officers and which, for want of another, would deprive us of a federal government. For the same reasons he would, at the same time, upset the State's method of determining electors and prescribing their qualifications and leave us without a State government.

By virtue of the provisions of Section 2 of Article I of the California Constitution *"all political power is inherent in the people"*. Section 50 of the California *Political Code* declares that its people, as a political body, consists of *"citizens who are electors"* and *"citizens not electors"*. Section 51 thereof declares that the *"citizens of the State are"*:



> "1. All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls;
>
> "2. All persons born out of this state who are citizens of the United States and residing within this State."

Section 1083 of the California *Political Code* defines its electors as follows:

> "Every native citizen of the United States, every person who shall have acquired the rights of citizenship under or by virtue of the Treaty of Queretaro, and every naturalized citizen thereof, who shall have become ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the State one year next preceding the election * * *, and who has conformed to the law governing the registration of voters, shall be a qualified elector * * *."

Section 21 of the *Elections Code* of the State of California provides that a *"voter"* means any elector who is registered under the provisions of the *Elections Code*. Section 70 thereof provides as follows:

> "Every person who qualifies under the provisions of section 1 of Article II of the Constitution of this State and who complies with the provisions of this Code governing the registration of electors is entitled to vote at any election held within the territory within which he resides and the election is held."

Section 1 of Article II of the Constitution of the State of California defines an elector and prescribes his qualifications as follows:

"Every native citizen of the United States, every person who shall have acquired the rights of citizenship under and by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the day of the election, * * * shall be entitled to vote at all elections * * *; provided, further, no alien ineligible to citizenship * * * shall ever exercise the privilege of an elector in this State; * * *"

The treaty of Queretaro to which the foregoing references are made is more commonly known as the Treaty of Guadalupe Hidalgo dated February 2, 1848, entered into between the United States and the Republic of Mexico, exchanged at Queretaro on May 30, 1848, and subsequently ratified by the President and proclaimed by him on July 4, 1848.

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**THE APPELLANT'S SUIT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.**

From the foregoing it is apparent that the right to vote for federal officers and for state officers and upon state matters and issues basically depends upon the laws of California. In *Shiba v. Chikuda,* 214 Cal. 786, 7 Pac. (2d) 1011, the California Supreme Court declared that persons of Japanese blood born in the United States were entitled to all the privileges to which native-born citizens are entitled. The appellant herein is in the position of a suitor asking the federal



courts to nullify a right to vote which depends upon State law and with which it has no power to interfere.

It is also to be observed that the appellant's right to vote for members of Congress is not involved in his suit. His only complaint is that his right to do so is being impaired by virtue of the fact that those against whom he would discriminate are exercising the right to vote. What he evidently means is that although he is personally granted the full privilege of voting there is a possibility the effect of his vote might be diminished or offset in an election if the votes of those whom he would deprive of suffrage rights were counted. He has not asserted that he is being deprived of any right, privilege or immunity guaranteed to him by the 14th Amendment or that his right to vote is being denied to him personally by reason of his race, color, or previous condition of servitude to bring himself within the safeguards of the 15th Amendment. It appears, therefore, that his suit does not "arise under the Constitution or laws of the United States" and does not raise a substantial federal question. See *Gully v. First National Bank,* 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70. It does not raise a substantial federal question for the additional reason that the specific issues presented by his complaint have been decided adversely to his contentions by the Supreme Court in recent decisions as his brief herein admits.

**THE FOURTEENTH AMENDMENT CONFERS CITIZENSHIP UPON THE NATIVE-BORN.**

The status of a *"native citizen of the United States"* under Sec. 1 of Art. II of the California Constitution who is also a *"citizen"* by virtue of Sec. 50 of the California Political Code and an *"elector"* under the provisions of Sec. 1083 of the California Political Code is further defined by the provisions of the *Fourteenth Amendment* adopted on June 13, 1866. Section 1 of this Amendment provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside * * *"

This Amendment gave constitutional guarantee of citizenship and equal civil rights to freedmen. Slavery had already been abolished and was prohibited by the 13th Amendment adopted in 1865.

It has now long been established that all persons born in the United States of alien parents not entitled to diplomatic immunity or whose children's citizenship is not preserved by treaty to a foreign power are, by reason of the universality of the language of this Amendment, citizens of the United States. Citizenship by reason of birth extends to all children born here whatever their racial origin. The same rule does not obtain in the case of orientals of foreign birth seeking naturalization, however, for our Naturalization Law precludes them from obtaining citizenship. See *U. S. v. Ozawa,* 260 U.S. 178, 43 S. Ct. 65, and *Yamashita v.*



*Hinkle,* 260 U.S. 199, 43 S. Ct. 69, deciding that foreign-born Japanese are not entitled to naturalization, and *U. S. v. Thind,* 261 U.S. 206, 67 L. Ed. 617, deciding that a foreign-born Punjabi is not entitled to naturalization. These decisions denying naturalization to foreign-born orientals are based upon the Supreme Court's construction of the *Naturalization Act of 1790* which limited naturalization to *"any alien being a free white person"* and the statute as later enlarged to include persons of African nativity. That court held that neither a foreign-born Japanese nor a foreign-born Punjabi was a *"free white person"* within the meaning of the statute.

In the case of *U. S. v. Wong Kim Ark,* 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890, the Supreme Court expressly decided that a person born in the United States of resident alien Chinese parents was a citizen of the United States by the fact of his birth here. The court also declared that the only exceptions to this rule were children born here of alien parents engaged in the diplomatic service of a foreign government or of alien parents whose citizenship and that of their children was preserved to the parent's country by treaty, and Indian children owing direct allegiance to their several tribes. By reason of the universality of the language of the 14th Amendment the court decided that the place of birth was the criterion of nationality and citizenship in the United States and that citizenship was not confined to white persons.

In *Morrison v. People of the State of California,* 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664, the Supreme

Court, in applying the doctrine of the *Wong Kim Ark* case, expressly declared that the 14th Amendment conferred citizenship upon children here of alien Japanese parentage. The opinion declares:

> "A person of the Japanese race is a citizen of the United States if he was born within the United States."

The appellant apparently attaches little significance to the decisions of the Supreme Court. He asks this court to overthrow the decisions of the highest tribunal in the land. Authority, precedent and finality of decision appear to have made little impression upon him and the sponsors of his suit who seek to disenfranchise these people and to deprive them of citizenship.

In *Perkins v. Elg,* 307 U.S. 325, 59 S. Ct. 884, 83 L. Ed. 1320, the Supreme Court held that if a native-born child is taken abroad where he may be considered naturalized by the laws of the foreign state such does not constitute a renunciation of American citizenship and the child can, upon attaining his majority, return and elect to retain his citizenship here. The opinion confirms the Wong Kim Ark decision.

Under the provisions of 8 USCA, sec. 807, however, a native-born child living abroad with a parent can lose citizenship after attaining his majority or by the expatriation of his parents if he fails to acquire a permanent residence in the United States by the time he is 23 years of age.



**SUFFRAGE IS SAFEGUARDED BY THE 14TH AMENDMENT.**

The right of a citizen to vote is safeguarded by the privileges and immunities clause of the 14th Amendment from discrimination by a State. *Nixon v. Herndon,* 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759, and *Nixon v. Condon,* 286 U.S. 73, 52 S. Ct. 484, 76 L. Ed. 984. It would also seem to be amply protected by the *due process* clause and the *equal protection* clause thereof and by the *privileges and immunities* clause of Art. IV. Sec. 2, cl. 1, of the federal Constitution.

Suffrage would also appear to be an *inherent* and *implied* right springing from national and state citizenship or as an incident thereto safeguarded by the *due process* clause of the *5th Amendment.* It appears to be one of the *"rights so vital to the maintenance of democratic government",* one of the *"immutable principles of justice which inhere in the very idea of free government",* and one of the *"fundamental rights which belong to every citizen as a member of society".* See discussion of these rights in *Schneider v. Irvington,* 308 U.S. 147, 161; *Holden v. Hardy,* 169 U.S. 366, 389; and *U. S. v. Cruikshank,* 92 U.S. 542. See also: *Corfield v. Coryell,* 4 Wash. (U.S.) 371, 6 Fed. Cas. No. 3230. See also: Art. I, Secs. 1, 2 and 10 and due process clause of Section 13 of the California Constitution and the Preamble to the U. S. Constitution.

### THE NATIONALITY ACT DECLARES THE NATIVE-BORN TO BE CITIZENS.

The *Nationality Act of 1940* (8 USCA, sec. 601), provides as follows:

> "The following shall be nationals and citizens of the United States at birth:
>
> (a) A person born in the United States, and subject to the jurisdiction thereof;"

The appellant has ignored the effect of this statute on the issues involved herein. This statute, in addition to the 14th Amendment, confers nationality and citizenship upon all persons born here regardless of their racial origin. He seems to prefer to attack the provisions of the 14th Amendment without conducting a similar attack upon this statute by which Congress confers the same privileges upon the native-born that the people have written into the 14th Amendment. If the provision of the 14th Amendment which has been decided by the Supreme Court to confer citizenship on native-born children of Japanese stock were stricken out or redecided so as to exclude them they would still be citizens by birth by virtue of the Nationality Act passed by Congress.

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### CONTEMPORANEOUS CONSTRUCTION OF AMENDMENTS AND STATUTES AFFIRMS SUFFRAGE AND CITIZENSHIP RIGHTS.

The right of citizens of oriental parentage to vote has long been exercised. The American public has long acquiesced in their right so to do. It is not improbable that a few persons of oriental pedigree had exercised



the right before the passage of the 14th and 15th Amendments. Many of our States had not restricted citizenship and suffrage to white persons consequently, if there were any here between the time the Republic was founded and the dates of the passage of these amendments, they may have exercised voting privileges without challenge or interference. In any event these amendments remove all doubt of the right of native-born Americans of oriental extraction to citizenship and to suffrage. The American public has long acquiesced in their right to citizenship and to suffrage. Our administrative officials have long given these amendments and the Nationality Law prior to 1940 *"an unvarying and uninterrupted contemporaneous construction"* granting these rights and this doctrine would seem to have the force of law by reason of this fact alone. See discussion of doctrine of contemporaneous construction in 59 *Corpus Juris* 1029 and cases there cited.

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### THE PREAMBLE TO THE FEDERAL CONSTITUTION.

The preamble to the Constitution recites that one of the purposes thereof is to *"secure the Blessings of Liberty to ourselves and our Posterity"*. On page 47 of his brief the appellant asserts that it is pertinent to inquire as to whom the framers of the Constitution had in mind in referring to *"ourselves and our posterity"*. He draws the conclusion that the meaning is restricted to white people. He has not, however, taken the trouble to ascertain whether or not there were any people of Asiatic origin in the United States at the

time the Constitution was drafted and adopted on September 7, 1787, simply assuming their absence. Those who framed the Constitution did not expressly exclude such people from its benefits and did not expressly limit its blessings to white people. The phrase *"We the People of the United States"* in the preamble would seem to encompass all persons regardless of racial origin. It would seem to embrace all denizens inhabiting the colonies at the time, excluding the Indians. It is not unlikely that a few Asiatics were here at the time the Constitution was drafted and adopted. Our merchants ships had then long been plying the seven seas and many had been active in the East India and Asiatic trade for some time. A few persons of Asiatic derivation were doubtlessly engaged as sailors in the maritime service and when their vessels periodically put in at our ports they commingled freely with our early inhabitants.

The first Naturalization Act was passed by Congress in 1790. It restricted naturalization to *"free white persons"*. It was Congress, therefore, that set up a discrimination that does not appear to have been contemplated by the Constitution. It is not improbable that Congress, in passing it, desired to exclude itinerant Asiatics from being naturalized but it is more likely it was intended as a bar to prevent negroes from naturalization in order to preserve the system of slavery. History discloses that the importation of persons of African nativity for slavery purposes continued until some time after 1790. Congress evidently was winking at this sordid practice. It took a Civil



War and the 13th, 14th and 15th Amendments to destroy slavery and grant negroes the guarantees of citizenship and equal civil rights enjoyed by freedmen.

The agitation against orientals came from the Pacific Coast and came much later. The *Chinese Exclusion Act* was passed on May 6, 1882. (8 USCA, sec. 263.) On March 14, 1907, President Theodore Roosevelt, pursuant to a power conferred upon him by Congress, issued an order suspending the immigration of Japanese and Korean workers under what is termed the *"Gentlemen's Agreement"*. The federal *Immigration Act* was amended on May 26, 1924, to provide, with certain exceptions, that "no alien ineligible to citizenship shall be admitted to the United States". The California *Alien Land Law,* known as the "Alien Property Act of 1913", forbidding the ownership of land and leaseholds therein by aliens ineligible to citizenship was adopted in 1913. See Stat. 1913, p. 206, Deering's Gen. Law, 1937 Ed., Act 260. This anti-oriental legislation was the result of political pressure exerted by professional baiters of orientals and others who derived a grim satisfaction from the movements directed against orientals. They gained political preferment and reaped economic advantages and benefits from the hardship and suffering they were so willing to have imposed upon the unfortunate. The anti-oriental movement is a sordid episode in our history. An excellent brief history of the agitation resulting in the anti-Japanese legislation is contained in *House Report No.* 2124, of May 1942, p. 72 to 91, prepared by the *"Select Committee Investigating National Defense Mi-*

*gration",* known also as the *Tolan Committee.* The "History of the Labor Movement in California" by Prof. Ira B. Cross of the University of California, published by the U. C. Press, 1935, contains an interesting history of the agitation against the Chinese. See Chaps. VI and VII. It also contains a history of the Anti-Japanese Movement. See pp. 262 to 268.

It was the deprivation of civil liberties in Germany that paved the road for the march of Hitler to power and enabled him and his minions to make the life of the German people a protracted funeral march to the grave. Only voices alien to America would deprive the unfortunate citizens of Japanese extraction of their civil rights and liberties. Those who inspired this unjust assault upon their rights are true to type. They fish in troubled waters. They exhibit the typical courage of the opportunist and the oppressor—they kick the weak and defenseless. It is regrettable that our democratic institutions confer upon them the mantle of citizenship and the rights and liberties they would take away from others.

The old agitational groups from which this suit seemingly stems have changed their names but not their identities and would now masquerade in garments that bear the semblance of respectability. They continue to nurse old prides and hates that are products of a past age which was nourished on inflammatory propaganda and sordid yellow-journalism. They still appeal to prejudice and abandon reason. They continue to sow the seeds of race-hatred.



THE LEGEND OF THE WHITE RACE.

The appellant asserts on page 42 of his brief that citizens of Japanese ancestry are not assimilable with *Caucasians* because of *racial characteristics.* What he means by Caucasians is nebulous. No reliable ethnologist or anthropologist now employs such a term to describe anything definite. Goebbels, Himler and Rosenberg employ it to describe an *Aryan* which is just as nebulous and Hitler, born an Austrian, had himself made a German citizen in order to qualify himself as a Caucasian or Aryan in order to fall within the definition he had given of a super-race. The appellant seems to be unaware that the word Aryan is assigned to a primitive Asiatic people who once inhabited central Asia and migrated into Europe and India. He seems also to be unaware that the word Caucasian was once applied to identify a prehistoric skull of an Asiatic tribesman found in the mountainous region lying between the Caspian and Black Seas known as the Caucasus. For a time the skull was accepted by a few scientists as establishing the standard of cranial perfection. The peoples who inhabited the Caucasus region were fair-complexioned Asiatics. Their descendants inhabit it today and are Asiatics. Herr Hitler has already been chagrined to learn from his German High Command that these people whom he deems to be Asiatic sub-humans are among those extraordinary heroic people who have successfully defended Stalingrad against his own hordes of barbarian Caucasians or Aryans.

What the appellant probably meant to say was that people whose ancestors came from Europe will not as-

similate people whose ancestors came from Asia. His conclusion is erroneous for it is not based upon fact but upon the biological fiction of a white race and the myth of race superiority. Hundreds of native-born and alien Japanese have married native-born whites and their offspring are of mixed stock. Miscegenation statutes in some States have prevented racial assimilation on a larger scale. These barriers were erected by whites who entertained the notion that the interbreeding of fair and dark skinned peoples was undesirable. Europe has not, within known historical eras, witnessed a pure race. That continent has always been inhabited by mixed racial stocks of incompletely known origins. Suffice to say that no European today is entirely free from Asiatic and African blood. The continent was subjected to invasions by the Mongols, Huns, Tartars and others who left traces of Asiatic blood coursing in the European blood stream. The Mohammedan invasion left traces of Asiatic, Levantine and African blood coursing in the veins of Europeans. Immigrants to Europe from many countries of the world and of many racial stocks have been absorbed by the continental nations and their blood courses in the veins of Europeans. Europe has been a vast melting-pot: America has been a vast melting-pot. Those who would claim purity of race must trace their genealogy back to the Neanderthal man, thence to the suspected ape-like ancestor of man, and then bridge the enormous gap through aeons to a particular lowly amoeba to which the word white would lack significance.



Our citizens of Japanese pedigree whom the appellant seeks to disenfranchise and the other citizens of oriental ancestry whom he also seeks to disenfranchise were born and reared here. They have been educated in our public and private schools and institutions of higher learning where they, along with our white children, have had inculcated in them the same democratic principles, ideals and traditions with which all our people are indoctrinated. They work here and contribute to our wealth. In excess of 5,000 of these young Americans of Japanese ancestry now serve in our Army and several thousand serve in the Hawaiian Territorial Guard—thousands of other young Americans of other oriental ancestry likewise serve in our armed forces. They are defending America and safeguarding all those great libertarian principles which they and we have been taught to love, cherish and preserve. There can be little doubt that they are fully assimilated into our ways and manners of life. Their patterns of thinking and acting are not distinguishable from our own. They entertain similar individual aspirations. Despite these facts the appellant and the group he represents assert these people are not assimilable. Despite these facts he and his sponsors would disenfranchise them, deprive them of citizenship and have them deported. The protection given to us all, including the appellant and his sponsors, by these brave young Americans of oriental pedigree serving in the armed forces, is viewed with gratitude by all Americans except, apparently, the appellant and those who sponsored this suit to deprive them of their right to vote and of citizenship.

THE FICTION OF DIVINE DESCENT.

The appellant has convinced himself, according to his declarations on page 42 of his brief, that American citizens of Japanese ancestry and alien Japanese believe that the Emperor of Japan is "a descendant of the Sun-God". He has mixed his genders. He probably meant to say that the Mikado or Dairi is a descendant of a Sun-Goddess. The *Kojiki* (Records of Ancient Matters) compiled in 712 A. D. and the *Nihongi* (Chronicles of Japan) compiled in 720 A. D. state that the sun-goddess Amaterasu had a grandson, Ninigi, whose great grandson was Kamu-Yamato-Iware-Biko (722-585 B. C.), the first ruler of Japan. Fourteen centuries after his death this ruler was given the name of Jimmu Tenno which is sometimes referred to as "son of Heaven". The name Jimmu is posthumous and was invented in the reign of Kwammu (782-806 A. D.) and is purely *descriptio personae.* It is a Chinese translation of the quality assigned to a ruler and means *"divine-valour".* Tenno means ruler. (See article on "Japan" by Captain Frank Brinkley, R.N., vol. 5 Encyclo. Brit., 11th Ed. pp. 252-254.) Apparently Jimmu Tenno himself made no claims to divine descent or divine power.

The belief that "they are descended from Heaven" or that the Japanese Emperor is a "descendant" of a sun-goddess is not entertained by any sensible Japanese national or American citizen of Japanese extraction. Many Americans, however, entertain beliefs that are quite as ridiculous. The story of divine descent for rulers is not peculiar to any peoples inhabiting the



earth. It is derived from the *creation myths* which are common to all peoples. These myths are a common heritage whether they are Babylonian, Egyptian, Greek, East Indian, Ceylonese, Scandinavian, African, Chinese, Japanese, Incan, Mayan, Amerindian or Aztec. They form the bases for national epics. (See the *Mahabharata, Ramayana, Books of Chilam Balam, Nibelungenlied,* and *Iliad.* See also the *Rig-Veda* and *Avesta.*) These myths all attribute descent from gods and goddesses whom ancient man deemed to have been prolific to people Earth with inhabitants. These myths were employed to explain creation. They explain, in a crude, perhaps, but nevertheless poetic manner, the origin of Earth's people about which there still appears to be considerable confusion and doubt. The biblical story of Adam and Eve which explains creation is one of the many showing the creation of man in the image of his Creator. It is derived from the older Ceylonese version of Adama and Heva. Until recent times a majority of rulers asserted titular descent from gods and goddesses in order to employ the fiction of divine descent the better to impress and rule over people and to exaggerate their own importance. Louis-Soleil, known as Louis XIV, "le roi- soleil" was a fairly recent claimant to the dubious honor.

For centuries the Mikado had been relegated to a position of relative unimportance by a retirement forced upon him by the Shoguns. With the collapse of the Shogunate he was recalled from Kyoto to Yedo (Tokyo) to assume what little political power the new order was willing to surrender. The fiction of divine

descent was again revived by the politicians for political reasons but it was not conceived and accepted as an article of religious faith. In his political capacity the Mikado is accepted by his subjects as the Emperor of Japan and in his priestly capacity as the Chief Priest of Shinto, the national religion of Japan. In neither capacity does it appear that he claims divine descent and in neither is he worshipped by his subjects, the belief of the appellant to the contrary notwithstanding.

The King of England is the titular head of the Church of England and the Archbishop of Canterbury the actual head. Both are revered by British subjects but does any intelligent person believe this means either is worshipped as a divine spirit? The Pope of Rome is infallible in religious matters affecting the Church of Rome but does any intelligent person believe that because he is deemed to be a representative of the Divine on earth that Catholics worship him as a divine spirit? The appellant mistakes respect and reverence for adoration and worship. While people may respect their primates, Protestant, Catholic and Shinto, they reserve their adoration and worship for the Divine Spirit.

The Shintoists believe in an after-life and in a Divine Spirit termed *Zain* which, interpreted, means Supreme Being or God. The tetragramaton Zain is but one of the many universal four letter words composing the sacred name of the Deity. The Japanese Emperor as the Chief Priest or Pope of the Shinto religion is but a mere representative of the Divine on earth in



the same manner and to the same extent as the Pope and the Archbishop of Canterbury. Neither he, the Pope nor the Archbishop is considered an earthly divinity by osmotic process or by divine descent. There have been a few careless writers who have made statements to the contrary without a full knowledge of the matter and a few persons have entertained a belief in the statements so made and have repeated the erroneous conclusions. It is easy to bandy about statements that have no basis in fact and in times of war their repetition crops up to gain credence among the gullible and to plague the truth. This demonstrates that truth is generally the first casualty in times of war and the liberty of peoples the second.

The appellant's declaration that the Japanese in America deny the Christian God is absurd. The majority of them are Christians, a small proportion of them Buddhists and a negligible number may be of the Shintoist faith. Shintoism is sometimes referred to as ancestor-worship by a few writers who fail to examine into the matter. It is not ancestor-worship however. Its ritual contains and its precepts teach respect and reverence for ancestors. It might be characterized as teaching ancestor-respect or ancestor-reverence. This respect and reverence has been taught by all the great religions of the earth. *"Honor thy Father and thy Mother"* is an admonition and one of the cardinal precepts upon which Christianity has been founded. Those who take an inordinate pride in claiming purity of their own race, the white race, exhibit the symptoms of ancestor reverence and by their insistence on it seem

to indicate their own reverence, which they find so objectionable in others, is not distinguishable from ancestor-worship. It is a belief they entertain, a creed-fetish they adore and a religion of a type which is still guaranteed to them by the Constitution. It gives them a feeling of race-superiority and imbues them with an intolerant race-prejudice. According to scientists the coccyx betrays that the human has but lately emerged from the tailed state. Perhaps it is too much to expect that mere humans, in whom emotion bulks large and reason small, could, within the brief time since the dawn of reason when they first ceased to be wholly instinctive in reaction, advance from a state of ignorance to a state of mental enlightenment and abandon race-prejudice. It was one of the hopes of democracy that this might be achieved in America. The appellant's suit herein indicates the hope has not yet been fulfilled.

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### APPELLANT'S PREJUDICE REVEALED.

"Dishonesty, deceit, and hypocrisy are racial characteristics" of all Japanese aliens and American citizens of Japanese ancestry, according to the appellant's expansive statement appearing on pages 42 and 43 of his brief. They are no better and no worse on the average than individuals of other races. The Japanese government, however, is worse than most governments, saving those of present day Germany, Italy, Hungary and Roumania. Our quarrel is not with American citizens of Japanese ancestry and it is not with unhostile Japanese aliens who have made their residence



here and who came here for lawful purposes. Our real quarrel is not with the Japanese people but with the Japanese government which consists of an ambitious, reckless and treacherous group of military parasites who hold the Japanese people in thralldom and exploit them for their own purposes. Our own government officials have repeatedly announced that our quarrel is with the Japanese government and not with the Japanese people whom we shall free from their chains when we have achieved final victory. The traits the appellant ascribes to the Japanese generally and to our citizens of Japanese ancestry are silly.

The appellant's brief exhibits an extraordinary prejudice against our own citizens of Japanese extraction and, by implication, one just as profound against our citizens of Chinese and other Asiatic extraction. It reveals a deeply ingrained bias against all peoples who are not classified by him as whites or negroes. The bias extends, apparently, to the white Ainu, the aboriginal inhabitants of Honshu and Hokkaido, whose purity and definiteness of white lineage is probably older than that of any other whites in the world. The Ainu has been identified as a Caucasian and Aryan and inasmuch as no Japanese can with verity assert freedom from Ainu blood the appellant appears to have been declaiming against the whites the while he has been lauding them. The appellant argues for a white America too late. The world has moved on. Sensible people no longer attach much faith to the myth of a white race. The appellant would also exclude from suffrage rights and citizenship the Indians,

Eskimos and Aleutians whom scientists assert to be Mongolians but whom Congress, in the Nationality Act (8 USCA, sec. 601b) has specifically declared to be nationals and citizens of the United States.

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**CONCLUSION.**

The appellant's suit is a malicious attempt to disenfranchise and de-citizenize not only our citizens of Japanese stock but all other citizens of oriental or Asiatic stock. These purposes his brief boldly declares in arguing that suffrage and citizenship are reserved only for members of the white race. The theory upon which his assault is based is that the *People* did not know what they were doing when they passed the 14th and 15th Amendments, that the *Supreme Court* did not know what it was doing when it construed these amendments and that *Congress* did not know what it was doing when it enacted the Nationality Act. It is an amazing theory.

Those who instituted this suit have chosen a strange time in which to assail our cherished constitutional rights and liberties. The attack is the embodiment of intolerance toward minorities within our midst who are good and loyal citizens. It is an affront to our thousands of citizens of oriental ancestry, Japanese, Chinese, East Indians, Filipinos and others who are serving in our armed forces, and to their families. It is an affront to all American citizens. It is an affront to our dark-skinned Allies of other races who are joined



with us in a great common cause to defeat the oppressor nations. It strikes at the morale of our racial minorities and at the morale of the American public. It might spread the germs of disunity among our citizenry at a time when we most need unity.

We submit that the judgment of the court below was correct and should be affirmed.

Dated, San Francisco, California,
January 27, 1943.

Respectfully submitted,
WAYNE M. COLLINS,
*Counsel, American Civil Liberties Union, Inc. and A. C. L. U., Northern California Branch, Amici Curiae.*

A. L. WIRIN,
*Of Counsel.*

* From Galen Fisher

*Due service and receipt of a copy of the within is hereby admitted*

*this.....day of January, 1943.*

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*Counsel for Appellant.*

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City Attorney
of the City and County of San Francisco,

.....

Chief Deputy City Attorney,
of the City and County of San Francisco,
*Counsel for Appellee.*