T1.40

67/14
C

No. 10,299

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN T. REGAN,
Appellant,

vs.

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

BRIEF FOR APPELLANT.

U. S. WEBB,
WEBB, WEBB & OLDS,
Mills Tower, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Textbooks

No. 10,299

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN T. REGAN,

Appellant,

vs.

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

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

The complaint for injunction, verified and filed May 7, 1942 in the office of the clerk of the United States District Court in and for the Northern District of California, Southern Division (Tr. of Rec. p. 11), alleges the jurisdictional facts as follows:

Paragraph I alleges:

> "This action arises under the Constitution and laws of the United States and more especially under the Constitution of the United States, Sections 1 and 2 of Article II thereof, the Fourteenth, Fifteenth and Seventeenth Amendments thereto, Section 1 of Article II of the Constitution of the State of California, and the following

Acts of Congress: Act of May 31, 1870, c. 114, section 1, 16 Stat. 140 (U.S.C., Title 8, section 31); Act of April 20, 1871, c. 22, section 1, 17 Stat. 13 (U.S.C., Title 8, section 43), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars. The jurisdiction of this Court is also invoked under Section 24 (1 and 14) of the Federal Judicial Code (U.S.C., Title 28, section 41, subsections 1 and 14)."

(Tr. of Rec. p. 2.)

In paragraph II it is alleged

that the City and County of San Francisco is a political subdivision of the State of California comprising the Fourth and Fifth Congressional Districts of said State; that the defendant, Cameron King, is now and since March, 1941 has been the Registrar of Voters in said City and County and as such has been and is charged with the registration of all electors of the State of California who reside in said City and County and with the care, custody and control of the register of voters therein, that registration of an elector in said City and County, as in all other counties in said State, is a prerequisite and condition precedent to the right of an elector to vote at any and all elections held in said City and County, including the right to vote for members of the House of Representatives, for members of the Senate and for Presidential Electors, and that such registration, as in all other counties in said State, is permanent and the name of anyone placed upon the register of voters remains and continues thereon during the life of any such registrant and entitles such registrant to vote at any and all elections held in said

> City and County, unless his registration be sooner terminated for certain specified causes not here involved, or unless and until his registration be cancelled and terminated upon the production of a certified copy of a judgment directing the cancellation to be made.
>
> (Tr. of Rec. pp. 3-4.)

In paragraph III it is alleged that

> plaintiff is a native-born citizen of the United States and is a citizen of the State of California, that he is now and for several years last past has been a resident of the City and County of San Francisco and of the Fifth Congressional District in said City and County, and that under the Constitution and laws of the United States and the Constitution and laws of the State of California, he is now and for several years last past has been a duly and regularly registered and qualified elector in said City and County and in said District, entitled to vote in said City and County at all elections held therein, both primary and general, and entitled to vote for members of the House of Representatives from said Fifth Congressional District, for members of the Senate and for Presidential Electors.

It is then alleged that

> plaintiff has for several years last past regularly and customarily voted at elections held in said City and County, that it is now his right and privilege and his intention to vote and he will regularly vote in said City and County at all elections held therein, that a primary election will be held in the State of California on the 25th day of August, 1942, and a general election will be held therein on November 3rd, 1942, that at said

primary election plaintiff will be and is entitled to vote and will vote, as a member of the Democratic Party, for the nomination of candidates for the House of Representatives, and at said general election plaintiff will be and is entitled to vote and will vote for members of the House of Representatives, and that subsequent elections will thereafter be regularly held in said State and City and County as prescribed by law for the election of members of the House of Representatives, members of the Senate and Presidential Electors, at which plaintiff will be entitled to vote for members of these respective offices of the United States.

(Tr. of Rec. pp. 4-5.)

Paragraph IV alleges:

"By the Constitution and laws of the United States and the Constitution and laws of the State of California, the privileges of an elector of the State of California, including the privileges of voting and of registration as an elector, are granted only to citizens of the United States and are expressly withheld and prohibited to all aliens ineligible to citizenship in the United States."

(Tr. of Rec. p. 5.)

In paragraph V it is alleged that

the defendant, as Registrar of Voters of the City and County of San Francisco, charged with the registration of all electors who reside in said City and County and with the care, custody and control of the register of voters therein, and his predecessors in office, have for several years last past registered and retained, and that the defendant does now retain upon said register more than

twenty-six hundred Japanese of the full blood born in the United States and in the State of California of alien parents born in the Empire of Japan, and that said Japanese so registered as aforesaid, and residing in said City and County, approximately fifteen hundred of whom have resided and do reside in the Fifth Congressional District in said City and County, have for several years last past customarily voted in said City and County at elections held therein for members of the House of Representatives, for members of the Senate, and for Presidential Electors.

It is then alleged upon information and belief

that said Japanese will be permitted to and will, unless their registration be terminated and cancelled and their names be removed and stricken from the register of voters in said City and County, vote for nomination of candidates for the House of Representatives at the primary election to be held on the 25th day of August, 1942, and for members of the House of Representatives at the general election to be held on the 3rd day of November, 1942.

(Tr. of Rec. pp. 5-6.)

It is also alleged that

said Japanese, unless their registration be terminated and cancelled and their names be removed and stricken from the register of voters of said City and County, will be permitted to and will vote at subsequent elections held in said City and County as prescribed by law for the election of members to the aforementioned offices of the United States.

(Tr. of Rec. pp. 5-7.)

In paragraph VII it is alleged that

> each of said Japanese so born and registered as aforesaid in the City and County of San Francisco has filed an affidavit of registration with the defendant, as Registrar of Voters of the City and County of San Francisco, charged with the registration of all electors who reside in said City and County and with the care, custody and control of the register of voters therein, in which each of them has stated under oath that he was and is a citizen of the United States of America and of the State of California, and that these statements are, and each of them is, false and untrue, "but the defendant in his capacity as aforesaid, and his predecessors in office, have erroneously and unlawfully accepted and received said affidavits and have erroneously and unlawfully accepted as true said statements so made and have erroneously and unlawfully incorporated and included said affidavits and the names of said Japanese in the register of electors of said City and County, which said register shall consist of and contain the names of duly qualified electors only, and is the register of electors used and employed in said City and County at all elections held therein to ascertain and determine the qualified electors so as to enable qualified electors only to cast their votes."
>
> (Tr. of Rec. pp. 7-8.)

Paragraph VIII alleges:

> "The rights and privileges of plaintiff as an elector of the State of California, secured to him by the Constitution and laws of the United States and by the Constitution and laws of the State of California, comprehend and include the right and

privilege of plaintiff to have his name be and remain upon said register of electors with other duly and regularly registered and qualified electors only, the right and privilege to vote in said City and County of San Francisco with all other duly and regularly registered and qualified electors only, and the right and privilege to have all votes cast by him counted, recorded and given their full and true value, force and effect with the votes of all other duly and regularly registered and qualified electors only, all without interference, impairment or denial by or through persons ineligible to exercise the rights and privileges of electors of the State of California."

(Tr. of Rec. p. 8.)

Paragraph IX then alleges:

"Defendant, as Registrar of Voters in said City and County of San Francisco, and his predecessors in office, by wrongfully and unlawfully permitting and according registration as aforesaid to said Japanese, and by retention of the names of said Japanese upon the register of voters of the City and County of San Francisco, have infringed upon, interfered with and impaired said rights of the plaintiff as an elector and have deprived plaintiff of the full and true value, force and effect of the votes cast by him as aforesaid, and have denied and deprived plaintiff of his adequate and proportionate share of influence in the elections at which he has voted as aforesaid and have severely and irreparably damaged and injured plaintiff in his rights and privileges as an elector of the State of California."

(Tr. of Rec. p. 9.)

Finally it is alleged in paragraph X that

> unless the defendant is ordered and directed to strike and remove the names of said Japanese from the register of voters of the City and County of San Francisco and is ordered and directed to terminate and cancel their registration, said Japanese, who are now and have been alien enemies continuously since December 7th, 1941, when the United States of America became at war with the Empire of Japan, will be enabled and permitted to vote, and, as plaintiff is informed and believes, and upon such information and belief alleges, said Japanese will vote at the primary election to be held on August 25th, 1942 as aforesaid, at the general election to be held on November 3rd, 1942 as aforesaid, and at all subsequent elections held in said City and County, to the further and continuing irreparable damage and injury of plaintiff in his rights and privileges as a regularly and duly registered and qualified elector in the State of California.
>
> (Tr. of Rec. pp. 9-10.)

Issue was joined upon answer to the complaint, verified and filed May 28, 1942 (Tr. of Rec. p. 15). By the answer certain of the allegations of the complaint were admitted and others were denied.

Upon stipulation between the parties, paragraph VI of the complaint was excluded and eliminated from consideration by the Court, and it was agreed that the findings of fact need not refer to paragraph VI (Tr. of Rec. pp. 17-18).

As appears from the findings of fact when the cause came on for trial, the facts in the case were stipulated and agreed to in open Court and the cause was thereupon submitted to the Court for its decision and determination (Tr. of Rec. pp. 18-19).

Paragraph VI of the complaint having been omitted by stipulation from consideration by the Court, no finding was made or required as to the allegations of that paragraph.

The findings of fact are identical with the allegations of the complaint with two exceptions, namely: Certain Japanese are specifically named in finding V (Tr. of Rec. pp. 22-23) and the charge as to the falsity and untruthfulness of the affidavits mentioned in paragraph VII of the complaint, and the charge of error and unlawfulness on the part of the defendant as to the acts performed by him as alleged in paragraph IX of the complaint are eliminated by finding 6 (Tr. of Rec. 24-25).

The right to vote for members of Congress and for Presidential electors, and to so vote without impairment of that right, and the jurisdiction of the United States District Court in an action for impairment or diminishment of that right is founded upon the provisions of the Constitution and Statutes of the United States set out and referred to in paragraph I of the complaint for injunction. Those provisions, and the provision of the Constitution of the State of California which is germane, provide as follows:

(a) Constitutional Provisions Upon Which the Right to Vote for Members of Congress and for Presidential Electors Is Based.

1. Sec. 2 of Article I of the Constitution of the United States provides in part as follows:

> "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."

2. Sec. 4 of Article I of the Constitution of the United States provides in part as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

3. Sec. 1 of Article II of the Constitution of the United States, respecting election of the President of the United States, provides in part 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."

4. Sec. 1 of the Fifteenth Amendment of the Constitution of the United States provides 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."

5. The Seventeenth Amendment to the Constitution of the United States provides in part as follows:

"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."

6. Sec. 1 of Article II of the Constitution of the State of California provides in part as follows:

"*Who are and who are not electors—Absent voters.* Every 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, and of the county in which he or she claims his or her vote ninety days, and in the election precinct forty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; * * * provided, further, no alien ineligible to citizenship, * * * shall ever exercise the privileges of an elector in this state; * * *."

(b) Statutory Provisions Under Which the District Courts Are Expressly Vested With Jurisdiction of Actions Respecting Impairment or Interference With the Right to Vote for Members of Congress and for Presidential Electors.

1. 8 U. S. C. A., Sec. 31 (Act of May 31, 1870, c. 114, Sec. 1, 16 Stat. 140) provides:

> "*Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

2. 8 U. S. C. A., Sec. 43 (Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13), provides as follows:

> "*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. 28 U. S. C. A., Sec. 41, subsection 1, provides in part as follows:

"The district courts shall have original jurisdiction as follows:

(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, * * *."

4. 28 U. S. C. A., Sec. 41, subsection 14, provides as follows:

"*Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

This is an action to restrain interference with the exercise of a personal civil right based upon the Constitution of the United States and to enjoin interference and impairment of that right. The judgment appealed from, namely, the judgment of the United States District Court, entered and docketed September 17, 1942 (Tr. of Rec. pp. 28, 29), is a final judgment.

The Circuit Court of Appeals has jurisdiction to review said judgment by appeal.

U. S. C. A., Title 28, Sec. 225 (a).

This appeal was taken by the filing by plaintiff's attorneys of a notice of appeal, as authorized by Rule 73(a) of the Rules of Civil Procedure for the District Courts of the United States within three months after the entry of judgment and decree on September 17, 1942.

Notice of appeal filed September 25, 1942 (Tr. of Rec. p. 29), as required by Title 28, Sec. 230, *U. S. C. A.*

The appeal has been perfected and the record prepared and printed under the provisions of Rules 73 and 75 of the Rules of Civil Procedure for the District Courts of the United States and Rules 19 and 20 of the Rules of this Court.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

(a) Statement of the Case.

There is no controversy between the parties relative to the facts.

The findings of fact are found in the Transcript of Record at pages 18 to 26, both inclusive, and those facts are, so far as need here be repeated:

That the City and County of San Francisco is a political subdivision of the State of California, comprising the Fourth and Fifth Congressional Districts;

that defendant is now and since March, 1941 has been the Registrar of Voters in said City and County, and as such is charged with the registration of electors of the State of California who reside therein, and with the care, custody and control of the register of voters therein; that registration is a prerequisite and condition precedent to the right of an elector to vote, including the right to vote for members of the House of Representatives, for members of the United States Senate and for Presidential electors; that such registration is permanent and the name of anyone placed upon such register remains thereon during the life of the registrant and entitles such registrant to vote at any and all elections held in the City and County, unless such registration be sooner terminated for specified causes not herein involved, or unless and until his registration be cancelled upon the production of a certified copy of a judgment directing the cancellation to be made. That plaintiff is a native-born citizen of the United States and is a citizen of the State of California, is and for several years last past has been a resident of such City and County and of the Fifth Congressional District therein, and that he is now and for several years last past has been a duly registered and qualified elector in such City and County and in said District and entitled to vote at all elections held therein, including members of the House of Representatives of the Fifth Congressional District and members of the Senate and Presidential electors.

That plaintiff has for several years last past regularly voted at elections held in such City and County,

and it is his right and privilege and intention to so vote at elections hereafter held therein.

That by the Constitution and laws of the United States, and the Constitution and laws of the State of California, the privilege of an elector, including the privilege of voting and of registration, is granted only to citizens of the United States and are withheld from and prohibited to all aliens ineligible to citizenship in the United States.

That among the many Japanese so registered and heretofore so voting and who will continue in subsequent elections to vote are those named at pages 22 and 23 of the transcript.

That such Japanese have for several years last past customarily voted in such City and County at elections held therein for members of the House of Representatives, members of the Senate and for Presidential electors, and will continue so to do at elections hereafter to be held unless their registration be terminated and cancelled and their names removed from the register of voters.

That the Japanese so registered and so voting were born in the United States, and in their affidavits of registration alleged themselves to be citizens of the United States and of the State of California, and that they were so born in the United States is not disputed or challenged.

That it is the right and privilege of the plaintiff as a citizen of the United States and of the State of California to have his name upon the great register of

voters with other duly qualified electors only, and it is his right and privilege to vote in said City and County with all other duly registered and qualified electors only, and it is his right and privilege to have all votes cast by him counted, recorded and given their full and true value, force and effect with the votes of all other duly and regularly registered and qualified electors only, all without interference, impairment or denial, by or through persons ineligible to exercise the rights and privileges of electors of the State of California, including persons who are not citizens of the United States and persons who are not eligible to citizenship of the United States.

That unless the defendant is ordered and directed to strike and remove the names of said Japanese from the register of voters of the City and County of San Francisco, said Japanese will vote at the election held on November 3, 1942 and at all subsequent elections held in said City and County.

As conclusions of law, pages 26 and 27 of the transcript of record, the Court found that Japanese of the full blood born in the United States of alien parents born in the Empire of Japan are citizens of the United States and as such have been properly registered and are duly qualified electors of the City and County of San Francisco and of the Fifth Congressional District and entitled to vote therein, and that defendant properly and lawfully retains the names of such Japanese upon the register of electors of the City and County of San Francisco, and that they are entitled to vote for nomination of candidates for the House of

Representatives at the primary election held on the 25th day of August, 1942, and at the election of November 3, 1942, and to vote at all subsequent elections held in the City and County of San Francisco. The Court further found that by reason of the citizenship of such Japanese, plaintiff has not and will not suffer any damage and that defendant is entitled to judgment, and judgment in favor of defendant followed.

(b) Questions Presented.

The facts found by the Court are not questioned but are stipulated to be correct (T. R. p. 32).

Appellant contends that the Japanese in question have been illegally registered and that their names should be stricken from the rolls.

Appellee contends that such Japanese have been lawfully registered and that their names should not be stricken from the rolls.

Appellant contends that Japanese wherever born are not citizens of the United States.

Appellee contends that Japanese born in the United States are citizens thereof.

Appellant contends that the registration of Japanese is illegal and that their names should be stricken from the rolls.

Appellee contends that the registration of Japanese is legal and that their names should not be stricken from the rolls.

Appellant contends that the voting by Japanese is an invasion of his rights as a citizen of the United States.

Appellee contends that the voting by Japanese invades no right of appellant.

These questions are raised by averments of the complaint (T. R. pp. 2, 10); by denials and admissions of the answer (T. R. pp. 11 to 14); and by the conclusions of law (T. R. pp. 26-27).

SPECIFICATIONS OF ERROR RELIED UPON.

Appellant contends that the Court below erred in its conclusion that:

I.

Japanese of the full blood born in the United States and the State of California of alien parents born in the Empire of Japan are citizens, and each of them is a citizen of the United States.

II.

That defendant and his predecessors in office have properly and lawfully accepted the affidavits of registration of Japanese and have properly and lawfully registered them as duly and regularly qualified electors in the City and County of San Francisco and in the Fifth Congressional District.

III.

That defendant does now properly and lawfully retain the names of such Japanese upon the register of electors of the City and County of San Francisco so as to enable and permit such Japanese to vote for the nomination of candidates for the House of Representa-

tives and for members of the United States Senate, and for Presidential electors.

IV.

That by reason of the citizenship of such Japanese plaintiff has not and will not suffer any damage, and that plaintiff is not entitled to any relief, and finally

V.

That the Court erred in rendering judgment in favor of defendant and against plaintiff (T. R. pp. 28-29).

ARGUMENT.

I. IT IS CLAIMED THAT THE JUDGMENT OF THE COURT BELOW FINDS SUPPORT IN A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

The Court below bases its conclusion upon *U. S. v. Wong Kim Ark,* 169 U. S. 649, and *Morrison v. California,* 291 U. S. 82. In its memorandum and order (T. R. p. 16) it adds the case of *Perkins v. Elg,* 307 U. S. 325.

We shall here state the facts involved in the *Wong Kim Ark* case and shall later in this brief advert to the other two cases.

Wong Kim Ark was a Chinese born in the United States and based his claim to citizenship upon the first sentence of the Fourteenth Amendment of the Federal Constitution. The Supreme Court approved his claim and declared him to be a citizen of the United States solely because he was born therein.

Appellant was not unaware of this decision but brought this action in the belief that the decision was erroneous and agrees that if that case was correctly decided, the judgment from which he appeals must be affirmed.

If there were nothing more to be said of this case, and if there were not outstanding reasons for appellant's belief in its error, both appellant and his counsel might be assumed to possess an excess of temerity, but there are outstanding facts which justify this action.

The facts involved in the *Wong Kim Ark* case and the facts upon which the present case is predicated are the same and these facts have never been re-presented to the Supreme Court of the United States, and in making this statement we are not overlooking what was said by Justice Cardozo in *Morrison v. California,* or what was said by Chief Justice Hughes in *Perkins v. Elg* above referred to.

The decision was made by a divided Court, Justice Gray writing the majority opinion in which five of his associates concurred. Justice McKenna did not participate. A dissenting opinion was submitted by Chief Justice Fuller with whom Justice Harlan concurred. The majority opinion was based upon the single fact that Wong Kim Ark was born in the United States. It did not deal with the question of race or color except in its reference to Negroes and Indians. It ignored the fact that for more than one hundred years Congress in the exercise of its power to adopt uniform naturalization laws had steadfastly restricted the right of naturalization to white people. It made no refer-

ence to the objectives of the Constitution as declared in the preamble of that instrument. As to the Fourteenth Amendment, the majority opinion freely admits that: "its main purpose doubtless was, as has been often recognized by this Court, to establish the citizenship of free Negroes", but held that by reason of the universality of the language employed all other peoples were included.

The opinion pointed out that under the common law of England all persons born in that Kingdom, with limited exceptions not here involved, were citizens of the British Empire and held that that law was in force here, and that it should be applied in the construction of the Fourteenth Amendment. The prevailing opinion has been freely and frequently criticized by jurists, lawyers and publicists who concur in the view that the dissenting opinion presents the correct exposition of law upon all questions involved. These facts and others to be adverted to under the heading of "Argument" furnish ample reason for the bringing of the instant case.

II. THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The Fourteenth Amendment was introduced shortly after the close of the Civil War, adopted by the 39th Congress in 1866, and became a part of the Constitution in 1868.

While this amendment covered several subjects unrelated in character, we are here concerned only with its first sentence reading:

"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."

III. THE THIRTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Within 249 days after the surrender at Appomattox the Thirteenth Amendment to the Federal Constitution was adopted by Congress and become a part of the Constitution in December, 1865. The first sentence of that amendment is:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

If not by President Lincoln's Proclamation of 1863, then by this amendment some three million Negroes theretofore slaves became freemen.

These freemen were for the most part born in the United States, were subject to its jurisdiction but were not citizens, and the great majority of them resided in the several States which had seceded and which had not yet been readmitted into the Union.

IV. THE FIFTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Fifteenth Amendment was adopted by the Congress in 1869 and became a part of the Constitution early in 1870 and the first paragraph reads:

> "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."

It was assumed by those urging the Thirteenth, Fourteenth and Fifteenth Amendments that the ex-slaves, if given the right to vote, would vote the Republican ticket.

We have quoted under the three preceding headings the pertinent provisions of the Thirteenth, Fourteenth and Fifteenth Amendments because they had a common object and should be considered together. This relationship of the three amendments would more clearly appear if their several provisions had been incorporated in one amendment and, having the same objective, they might well have been so incorporated.

No questions of construction arise in the present case relative to the Thirteenth or Fifteenth Amendments. We are here concerned with the proper construction of the Fourteenth Amendment only. In construing the provisions of the Fourteenth Amendment here involved, reference will be made to some facts appearing in the history of this country from the first settlement to the present day, including legislation of Congress and the decisions of Courts having relevancy to the present inquiry.

This country was settled by white people from European countries. The people who comprised the original Thirteen Colonies, who framed the Articles of Confederation and who administered the government under such Articles were white people from European coun-

tries and their descendants, who may be called, for lack of a better name, Caucasians. The only people with whom they came in contact who were not white were Indians or Negroes and the latter were slaves.

During the Colonial period there were no Asiatics in this country. Except the Indian and the Negro, the colonists had contact with whites only, and they sought to establish in the New World a government of, for and by white people. The Declaration of Independence was made by white people and catalogued the evils from which they had suffered. Those who made that declaration for its support placed "a firm reliance on the protection of Divine Providence", the only true God. They did not rely upon Buddha, Confucius or Hirohito, nor upon the latter's immediate or remote ancestors.

After these people had won their freedom, their basic law, the Articles of Confederation, having proved insufficient and defective, their representatives met for the purpose of strengthening such organic law. That assembly soon arrived at the conclusion that their objectives could not be achieved through amendment or modification of the Articles of Confederation and they then determined that a new organic law should be framed and addressed themselves to the drafting of a Constitution.

After four months of deliberation by perhaps the most far-seeing, patriotic, liberty-loving people that ever assembled under one roof, the Constitution of the United States as it now stands, except for the amendments that have since been added, was adopted. It was

adopted as a new and basic law of the Republic of the United States, a government to be composed of the people who had framed it and their descendants, "a government of the people, by the people, for the people." And it was that government to which Lincoln at Gettysburg urged "increased devotion" that it should "not perish from the earth".

Among the many powers conferred upon the Congress by the sovereign people was the power to adopt and provide for an uniform system of naturalization. It was recognized by the framers of the Constitution that other people would wish to come to this land and it was their view that such immigration was desired. They contemplated, however, that those who came would be sympathetic with and supporters of the Republic. They well knew that that sympathy and support for the new government could be best assured by making the people who subsequently came citizens of it, and they designed that those who thereafter became citizens should be Europeans and that before the privilege of citizenship should be exercised they should be given here a period of probation, then examined and if found worthy, they should take an oath binding themselves to the support of this government and severing all relations with and all allegiance to the governments from which they came.

Congress exercised its power "to establish an uniform law of naturalization" by providing that "free white persons" might gain through that process the privilege of American citizenship.

Historical facts to which reference has been made and others to be later referred to are not suggested

with any thought that the members of this Court are not with them entirely familiar, but rather to bring them freshly to mind for they furnish an enduring light and he who essays the construction of constitutional provisions without availing himself of such light labors in darkness.

The Constitution was ratified by the requisite number of States on June 21, 1788. On April 30, 1789, Washington was inaugurated President of the United States. The naturalization law extending the privilege of citizenship to white persons only was passed by Congress and approved by the President in the following year. Washington presided at the Constitutional Convention and he was the first to sign the Constitution. As President of the United States he gave executive approval to the law restricting naturalization to white persons. A number of the persons whose names were appended to the Constitution as members of Congress participated in the adoption of that law.

V. UNIFORM NATURALIZATION LAW.

The naturalization law thus adopted in 1790 has been amended a score of times and always Congress has held steadfastly to the original policy. The restriction to free white persons has been adopted in every amendment except in two instances, one, occurring in 1870 when Congress in effecting the purposes of the Thirteenth, Fourteenth and Fifteenth Amendments, extended the privilege to "aliens of African nativity and to persons of African descent", and the other, in

1873 when a committee codifying the naturalization laws in its report inadvertently omitted from the provision the words "free white persons" but upon discovery in the following year these words were restored and continue in the law to the present day. It is significant, too, that when it was sought to restore these words to the statute, some members of Congress opposed such action, contending that the time had come to extend the right of naturalization to all peoples of the world. This proposal, however, was overwhelmingly defeated.

The word "free" as used in the Immigration Statute was used in the early enactment because slavery existed at that time and some white persons were held as slaves to some extent in the Colonies and certainly in some of the countries from which these people came. The word no longer has significance and may now be eliminated from consideration.

This situation was recognized by the Supreme Court of the United States and in *U. S. v. Ozawa,* 260 U. S. 178, 198, 67 L. ed. 199, the Court said:

> "Undoubtedly the word 'free' was originally used in recognition of the fact that slavery then existed, and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded."

The original statute and all subsequent amendments may be now regarded and construed as though the word "free" had never been used.

By the uniform naturalization law Congress has never extended the privilege of naturalization to other than white persons, except by the provision adopted in 1870 providing for the naturalization of Negroes and by special acts extending the right to Filipinos and Puerto Ricans who had served in the armed forces of the Union.

We have called to the Court's attention the legislative history of the naturalization laws steadfastly pursued by Congress prior to the Fourteenth Amendment and as steadfastly pursued by Congress since that amendment for the purpose of emphasizing the improbability that Congress by the adoption of the Fourteenth Amendment intended any change in the policy which it has steadily pursued during the century and a half of the Republic's existence, except as to Negroes. In fact, it is clear that Congress did not intend by the adoption of the Fourteenth Amendment any other change in that policy and if the Fourteenth Amendment has been correctly construed in that regard the change was achieved without Congress intending any such result.

We have referred to the several acts passed by Congress extending naturalization on more favorable terms to "aliens" who had served in the armed forces of the Union. The construction of these acts by the Supreme Court of the United States made subsequent to the decision of the *Wong Kim Ark* case is of special significance.

In 1921, *Toyota v. U. S.*, 268 U. S. 402, 69 L. ed. 1016, Hidemitsu Toyota, a native born Japanese who

had served for a number of years in the armed forces of the United States and who had received "eight or more honorable discharges", applied for naturalization in the United States District Court for the District of Massachusetts and his application was granted. Thereafter a proceeding was brought to cancel the certificate of naturalization on the grounds that it had been illegally procured and the District Court held that the applicant was not entitled to be naturalized and entered its decree cancelling the certificate. An appeal having been taken to the Circuit Court of Appeals, that Court certified to the Supreme Court of the United States the two questions involved, (1) whether a person of the Japanese race, born in Japan, may be naturalized under the 7th Subdivision of Section 4 of the Act of June 29, 1906 as amended by the Act of May 9, 1918, and (2) whether such subject may legally be naturalized under the Act of June 19, 1919.

The opinion of the Court after reviewing many of the special acts involved and the decisions of Courts construing them, answered both questions in the negative. The full significance of this decision cannot be obtained except by reading the entire opinion, hence we quote but briefly from it.

It is true that the Court held that the word "aliens" as well as the words "any person of foreign birth" were limited and restricted by the words "free white persons" as used in Section 2169, Revised Statutes, 2nd Ed., p. 944, and emphasizes the fact that Congress with the exception of the particular instances referred

to has pursued its unchanging policy of limiting naturalization to white persons and the Court refuses to give construction to these statutes which would hold that Congress has departed from such purpose without intending to do so. At page 412 of the opinion it is said:

> "The element of color and race included in that section is not specifically dealt with by section 30, and, as it has long been the national policy to maintain the distinction of color and race, radical change is not likely to be deemed to have been intended."

Not only in matters of naturalization has Congress persisted generally in the policy of admitting to citizenship white persons only but that purpose runs through legislation affecting the immigration of colored races. The Chinese Exclusion Law prohibited the immigration of Chinese. In 1917 an act was adopted which prohibited immigration to this Country of the people of a large area in which was included all of India. In 1924 Congress amended the Immigration Law so that it now prohibits the immigration to this Country of all persons "ineligible to citizenship". The Chinese Exclusion Law was passed prior to the decision of *Wong Kim Ark*. The Act of 1917, usually referred to as the Barred Zone Act, as well as the amendment of the Immigration Law of 1924, was passed subsequent to the decision in that case. Thus Congress has evidenced its intention both before and after the *Wong Kim Ark* case to restrict immigration as well as naturalization to white persons.

In *U. S. v. Ozawa,* heretofore cited, the Supreme Court of the United States held that a Japanese was not entitled to naturalization because he was not a white person as that term was used in the naturalization laws. In the following term the Court held in *U. S. v. Thind,* 261 U. S. 206, 67 L. ed. 617, that a Hindu was not entitled to naturalization for the reason that he was not a white person and the Court pointed out that it was not reasonable to assume that Congress did intend to extend naturalization to peoples whose immigration to this Country had been expressly prohibited, the Court saying:

> "It is not without significance in this connection that Congress, by the Act of February 5, 1917, 39 Stat. at L. 874, chap. 29, Sec. 3, Comp. Stat. Sec. 4289¼b, Fed. Stat. Anno. Supp. 1918, p. 214, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the Congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants."

Prior to 1898 Congress had prohibited the immigration of Chinese, though in that regard the Supreme Court held that by the Fourteenth Amendment Chinese born in this Country were citizens. Subsequent to 1898 Congress, by the Acts referred to, prohibited the immigration to this Country of all Asiatics

and yet, under the *Wong Kim Ark* decision, every Asiatic born in the United States is, when born, a citizen.

VI. WONG KIM ARK CASE FURTHER CONSIDERED.

We shall now give further consideration to the *Wong Kim Ark* case. We have referred to several phases of the history of the United States, to the course of legislation and to the decisions of the Courts upon related questions. That decision in so far as it holds that Japanese are made citizens by the Fourteenth Amendment, is out of harmony with this entire history. It attributes to Congress a momentary obsession during which it abandoned the principles which it had kept in view until 1866, and to which it immediately returned following its adoption of the amendment. That amendment as construed is an abortive act of Congress conflicting with the principle found in the naturalization law which it had adopted in 1790 and strictly pursued until 1866.

There is a construction of the act which harmonizes with the entire course of Congressional action and with the decision of the Courts, both before and after the *Wong Kim Ark* case. Let it here be remembered that the prevailing opinion of the Court in that case as heretofore quoted admits that the "main purpose" of the amendment was "to establish the citizenship of free Negroes". That it was intended to and did accomplish this purpose is not questioned, nor is it questioned that such was its main purpose. It is denied

that it was intended to establish the citizenship of all other peoples of color born in the United States.

In extending citizenship to the Negro, the Congress intentionally departed to that extent from its previous policy. If the amendment be construed as also extending citizenship to all persons born in the United States *and eligible to citizenship* under the naturalization laws, such construction would be in harmony with the policy to which it has steadfastly adhered.

The amendment was adopted by Congress during the period of reconstruction. Its purposes were largely political and it was pressed by certain of the victors for the purpose of securing a further political advantage over the vanquished.

In the five volumes of the Congressional Record which report the debates upon that amendment it is shown conclusively that not only its main purpose but its only purpose was to citizenize the Negro because of the effect that such status might have upon the election returns of the States which had seceded. It was charged by those who opposed the amendment that such was its object and it was freely admitted by some of those who advocated it that that was the purpose. During the debates it was suggested that the provision might have a wider application but it was neither pressed nor resisted upon that ground. The construction that it grants citizenship to the Negro and to all whites born in this Country accomplishes every purpose which can fairly be attributed to Congress and excludes the repellent thought that it was intended to achieve the citizenship of all other peoples

of color born in the United States and, in this connection, it might be remembered that the other people of color embrace from three-fifths to two-thirds of all the peoples of the world. The construction which has been suggested was the construction given to the amendment by Chief Justice Fuller in his dissenting opinion. We are not unmindful that a dissenting opinion, however persuasive and however sound, is not the decision of the Court. Nevertheless not infrequently has it occurred that the views upon which a dissenting opinion were based later became the wisdom of the majority opinion of the same Court, and we think it likely if the United States Supreme Court be given the opportunity, such result will here follow.

The majority opinion of the Court cited the common law of England under which persons born in that Kingdom were citizens thereof and held that the common law of England had survived the Revolution and that it controlled the construction of provisions of the Federal Constitution. Without discussing the instances in which the common law of England may yet be held to control, we think it clear that such law, if generally applied, in this instance, defeats the objectives of the Constitution. Such law does not apply. It is a startling doctrine that in the instance of a conflict between the Constitution of the United States and the law of England that the law of England and not the Federal Constitution controls. If such be the law then the Constitution was adopted in vain.

The dissenting opinion denies that the question is ruled by the English common law. At page 709 of Vol. 169 U. S., it is said:

"And to the same effect are the modern writers, as, for instance, Bar, who says, 'To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parent determines it—that of the father where children are lawful, and where they are bastards, that of their mother, without regard to the place of their birth; and that it must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent.' International Law, Section 31.

"The framers of the Constitution were familiar with the distinction between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

"Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated.

"The states, for all national purposes embraced in the Constitution, became one, united under the same sovereign authority, and governed by the same laws, but they retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, and protection to life, liberty, and property rested

primarily with them. So far as the jus commune, or folk-right, relating to the rights of persons, was concerned, the colonies regarded it as their birthright, and adopted such parts of it as they found applicable to their condition. Van Ness v. Packard, 27 U. S. 2 Pet. 137 (7:374).

"They became sovereign and independent states, and when the Republic was created each of the thirteen states had its own local usages, customs, and common law, while in respect of the national government there necessarily was no general, independent, and separate common law of the United States, nor has there ever been. Wheaton v. Peters, 33 U. S. 8 Pet. 591, 658; 8: 1055, 1579.

"As to the jura coronae, including therein the obligation of allegiance, the extent to which these ever were applicable in this country depended on circumstances, and it would seem quite clear that the rule making locality of birth the criterion of citizenship because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution.

"Doubtless, before the latter event, in the progress of monarchial power, the rule which involved the principle of liege homage may have become the rule of Europe; but that idea never had any basis in the United States."

The views of the dissenting opinion are tersely stated at page 731, Vol. 169 U. S., as follows:

"I think it follows that the children of Chinese born in this country do not, *ipso facto,* become citizens of the United States unless the 14th

> Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?"

The dissenting opinion is cited as an able and comprehensive brief in support of appellant's position here.

VII. ANALYSIS OF MORRISON v. CALIFORNIA AND PERKINS v. ELG.

It has been heretofore stated that reference would later be made to *Morrison v. California,* 291 U. S. 82, and *Perkins v. Elg,* 307 U. S. 325.

The *Morrison* case was a prosecution of defendants charged with criminal conspiracy to violate the provisions of the Alien Land Law. There was in the case no question of citizenship. One of the defendants, Doi, was alleged in the indictment to be an alien Japanese ineligible to citizenship, while Morrison was a native-born white citizen of the United States.

In the course of the opinion Justice Cardozo stated "a person of the Japanese race is a citizen of the United States if he was born within the United States", citing in support of that statement the *Wong Kim Ark* case. This is no more than a recognition that such was the decision in the *Wong Kim Ark* case. There was no contention that Doi, the Japanese de-

fendant, had or had not become a citizen by virtue of the Fourteenth Amendment to the Federal Constitution, or by virtue of the naturalization laws. He was pleaded to be an alien Japanese. Justice Cardozo merely recognized the doctrine of the *Wong Kim Ark* case, as many other Courts have done.

In *Perkins v. Elg* the facts were, as stated by Mr. Chief Justice Hughes in the first paragraph of the opinion:

> "The question is whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States."

From this statement of the facts it appears that Miss Elg was doubly, if such a thing be possible, a citizen of the United States. She was a citizen of the United States because (1) She was a white person born in the United States and a citizen thereof at the time of birth under either construction of the Fourteenth Amendment and (2) she was a citizen of the United States under the naturalization laws, her parents being naturalized citizens at the time of her birth. She was a Swede, a white person, a Caucasian, and the Swedes were among the first settlers in this country, participated in the revolution, and in the founding of the new government, and were included

within "We, the People of the United States." Indeed, the only question involved was whether Miss Elg's citizenship had been forfeited by reason of the removal of her parents from the United States and their voluntary expatriation during her minority.

It appeared also that within eight months after she reached majority she returned to the United States and continued to reside therein. Some six years after such return she was threatened with deportation on the claim that she was not a citizen and out of this threat the case arose. The Court without difficulty held that her citizenship had not been lost.

VIII. THE PREAMBLE OF THE FEDERAL CONSTITUTION.

An analysis of the majority opinion in the *Wong Kim Ark* case would not be complete without reference to the first paragraph of the Federal Constitution of which it made no mention. It reads:

> "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

That the Preamble of the Constitution was overlooked and disregarded by the Court in the *Wong Kim Ark* case is plainly evident. If the language of the Fourteenth Amendment had been construed consistently with the objects and purposes of the Consti-

tution as declared in the Preamble, a different result would surely have been reached. That the Preamble is a guide for construction is established by countless authorities. The consideration that should be given to the Preamble in the construction of subsequent provisions of the Constitution is stated by *Story on the Constitution,* 5th Ed., Chap. VI, Sec. 459, as follows:

> "The importance of examining the preamble, for the purpose of expounding the language of a statute has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law, and civilians are accustomed to a similar expression, *cessante legis proemio, cessat et ipsa lex.* Probably it has a foundation in the expression of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature are to be regarded and followed. It is properly resorted to where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble."

The rule thus stated is frequently approved by the Courts and by other writers on the Constitution.

Before attempting to answer the question whether the admission of Japanese born in the United States to American citizenship be in harmony with or in conflict to the objectives of the Constitution as indicated in the quoted Preamble, it seems well that some consideration be given to the Japanese race.

Anthropologists do not agree as to the origin of this people. They do not agree "whence they came". In this question we may not be interested but we are just now tremendously concerned in "whither they goest?"

Because of racial characteristics of the Japanese, assimiliation with Caucasians is as impossible as it is undesirable. They believe themselves to have descended from Heaven. They believe their Emperor to be a descendant of the Sun-God. They deny the existence of the God whom Christians worship. They believe that they are destined—that they are predestined, to rule the world. The Emperor is the head of the Church and he is worshipped directly because in their faith he descended from the Sun-God. It may not be understandable how seventy millions of people can, through force of any faith, believe Hirohito is a God, but nevertheless the Japanese so believe. They believe that any war waged by their Emperor is a holy war and that those who die upon the battlefield for their Emperor-God have reached the highest pinnacle of perfection. Fatalism is universal with them. The off-spring of Japanese wherever born are taught the Japanese faith and pledged to its observance. Dishonesty, deceit, and hypocrisy are racial characteristics and it is within the code of Japanese obligations

that deceit, dishonesty and hypocrisy shall be employed, practiced and pursued whenever and wherever the result will be to the advantage of the Empire of Japan. A Japanese born in the United States is still a Japanese. The presence of the Japanese in the United States has resulted and can result only in evil and this evil is intensified and multiplied by their ability to exercise the privileges of citizenship. Sir Walter Scott may not have had the Japanese character in mind when he wrote:

"The wretch concentred all in self,
Living, shall forfeit fair renown,
And, doubly dying, shall go down
To the vile dust from whence he sprung,
Unwept, unhonored, and unsung."

(Lay of the Last Minstrel)

but Kipling may have had them in mind when he wrote:

"East is East, and West is West,
And never the twain shall meet."

Unfortunate was the visit of Commodore Perry to Japan in 1853—unfortunate because that visit resulted in the later establishment of a real friendship on the part of the United States government for the Japanese Empire and of a pseudo-friendship of Japan for the United States. Motivated by their racial characteristics the Japanese misled, deceived and hoodwinked the representatives of the United States government into a governmental policy through which Japan obtained from this government and this country the ma-

terial aid to build the war machine with which the United States is now confronted. Through all of this period of preparation this government was lulled into a belief of actual friendship to such an extent that the government's policy in dealing with Japan was apologetic, fawning and forgiving. Even as her fleet was on the way, accredited representatives of Japan were assuring the departments in Washington of Japan's continued friendship and this attitude of the Federal government was not changed until the Pearl Harbor catastrophe. A correct appraisal of the Japanese character by representatives of this government would have resulted in a policy of dignified firmness and if such a policy had been pursued, we would not now be at war with Japan.

Some hundreds of thousands of Japanese residents in the United States are now being held in concentration camps and it is currently reported that the military authorities intend to remove some one hundred and fifty thousand Hawaiian Japanese to the mainland. Through investigations by the military authorities, aided by the Investigating Department of the federal government, it was ascertained that this action was necessary because of the mass disloyalty of resident Japanese. The action was taken to prevent these Japanese from aiding behind the lines the Japanese effort to conquer, their threat to destroy, the United States. There are some citizens of the United States and some persons eligible to citizenship likewise in concentration camps because of their disloyalty. There are among our people some

Benedict Arnolds but the Nathan Hales are legion. There are some jaundiced sentimentalists who believe in the loyalty of the Japanese but there is no credible proof of this claim.

This Nation is at war with Japan. Japan seeks the destruction of this government and the subjugation of our people. This condition did not exist in 1866 but it was then a possibility, even a probability. As earlier in this brief suggested, the framers of the Constitution of the United States had no acquaintance with the Japanese and "The People of the United States", as used in that Constitution, did not comprehend Japanese and the naturalization legislation immediately following expressly excluded them. The Preamble of the Constitution expressly prohibited a subsequent extension of citizenship to the Japanese by constitutional amendment, if such action did not tend to achieve the objectives as stated in the preamble. The record of events since the adoption of the Constitution, including Pearl Harbor, Singapore, Bataan, Guadalcanal, and a hundred other fields and waters in which American citizens have been slaughtered by Japanese proclaim in thunder tones that Japanese citizenship conflicts with the objectives of the Constitution. Let us here again consider these objectives.

(1) To form a more perfect Union.

(2) To establish justice.

(3) To insure domestic tranquility.

(4) To provide for the common defense.

(5) To promote the general welfare, and

(6) To secure the blessings of liberty to ourselves and our posterity.

Japanese citizenship will not aid in forming a more perfect Union.

The vesting in these people of the privileges and immunities of American citizenship will not aid in the establishment of justice.

Domestic tranquility is not insured by their participation in the affairs of this government. On the contrary, history is replete with evidence that their presence here and their participation in the affairs of this government destroy domestic tranquility.

The fifth column activities of the Japanese on the mainland and in Hawaii and elsewhere establish beyond question that neither their citizenship nor their presence is provision for the common defense.

The history of Japanese activity and an appreciation of their racial characteristics establish clearly that their citizenship in no fashion promotes the general welfare of the people of the United States, and finally,

Neither their presence in the United States, nor their citizenship tends in any fashion to secure the blessings of liberty to ourselves or our posterity.

Their citizenship militates against each of the enumerated objectives.

It is pertinent to inquire here who was included in "ourselves and our posterity". "Ourselves" included

those who framed the Constitution and all the people for whose government it was framed. "Ourselves" included white people only—surely it did not include Japanese! The "posterity" of ourselves included white people only—surely those who framed the provision did not contemplate Japanese! The white people of that day did not regard Japanese as their posterity, and by no constitutional or legislative enactment could the term be so expanded as to include them now. Common sense repels the thought that the framers of the Constitution designed to make certain that the blessings of liberty would be secured to the Japanese people. Had the design, the intent, or the purpose of the framers of the Constitution been considered by the Court in the *Wong Kim Ark* case, it is believed that it would have been declared, with the exception of the Negro, the incident of birth established the citizenship of those people only who were then eligible to become citizens.

We are not unmindful that the Republic of the United States since the adoption of the Constitution has been at war with European nations and that we are now at war with European nations. People from each of these nations were among the first European immigrants to this continent. People from each of the European nations and their descendants—their posterity—participated in all the activities of the Colonial period, in the Revolutionary War, and in the adoption of the Constitution. It was this "We, the People of the United States"—the white people—the American people—who won the independence and established the Republic.

It was doubtlessly realized that war with the mother countries might in the course of time occur. This was a possibility that could not be avoided. It was a hazard that had to be taken but it was confidently believed by the framers of the Constitution, and the people of the States adopting it, that in such event the people of the United States and their posterity would be loyal to the government they had created.

The status of the Negro is in no way involved in this case. Neither the citizenship of the Negro nor his eligibility to naturalization is questioned.

CONCLUSION.

We respectfully submit that the judgment and order of the District Court should be reversed.

Dated, San Francisco,
December 21, 1942.

Respectfully submitted,

U. S. WEBB,
WEBB, WEBB & OLDS,
Attorneys for Appellant.

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

this.....*day of December, 1942.*

.....

City Attorney
of the City and County of San Francisco,

.....

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