

Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship

Charles J. McClain†

During the late eighteenth and early nineteenth centuries, American citizenship was not available to many Asians who immigrated to this country. However, many of these immigrants actively sought American citizenship and judicially challenged a number of laws and court decisions which prevented them from becoming American citizens. In this Article, the author traces this historical quest for citizenship by members of various Asian ethnic groups. The author describes the landmark cases brought by Chinese, Japanese, Indian, Filipino, and Korean immigrants as they sought to establish citizenship by birth and by naturalization. These cases reveal an Asian immigrant population that was not afraid to stand up to state and federal discrimination. This Article points to the importance of citizenship in an immigrant community's search for full membership in the American political community.

If the privileges of your laws are open to us, some of us will doubtless acquire your habits, your language, your ideas, your feelings, your morals, your forms, and become citizens of your country . . . and we will be good citizens.

-Letter from Chinese residents of
San Francisco to the governor of
California, April 1852.¹

That the test of color rather than personal worth should constitute our prime basis of citizenship is a sad commentary on American legislative wisdom.

-Message to Congress from President
Theodore Roosevelt, December 1906.²

† Vice Chairman of the Jurisprudence and Social Policy Program and Lecturer, Boalt Hall School of Law, University of California, Berkeley. A.B. 1964, Xavier; M.A. 1966, Columbia; Ph.D. 1972, Stanford University; J.D. 1974, University of California, Hastings College of the Law. I am grateful to Roger Daniels, Earl Maltz, and Laurene Wu McClain for helpful comments on this paper.

1. Hab Wa et al., *Letter of the Chinamen*, S.F. HERALD, Apr. 30, 1852, at 2.

2. Harry M. Naka, *The Naturalization of the Japanese Veterans of the American World War Forces 18-19* (1939) (unpublished M.A. thesis, University of California (Berkeley)) (quoting from the annual message to Congress by President Theodore Roosevelt on Dec. 4, 1906).

INTRODUCTION

As James Kettner remarks in his much-praised monograph on the development of the concept of American citizenship, the Civil War and the Fourteenth Amendment (added to the Constitution in 1868) brought a new coherence to the concept of citizenship and did much to clear up prior confusion about who did and who did not belong to the national political community.³ One group of residents—small to be sure at the time—whose status the war and the postwar amendment did not settle was that of Asians living in this country. Indeed, the right of Asians, whatever their country of origin, to lay claim to the title “citizen” would be a contentious question for a lengthy period of time following the Civil War and would not be finally settled until the mid-twentieth century.

This Article chronicles the efforts of early Asian immigrants to become recognized as American citizens—efforts that began, many may be surprised to learn, not long after the Civil War’s conclusion. These efforts—quite distinct from one another in one sense but deeply connected in another—constitute a fascinating but not sufficiently known chapter in American legal history. The primary purpose of this Article is to make this chapter of history better known.⁴ Beyond that, I harbor the hope that this account may shed some modest additional light on our understanding of the term “citizen.” I associate myself in this connection with a remark made by Judith Shklar in her recent monograph on American citizenship. There she suggests that one may enrich one’s understanding of what it means to be an American citizen by investigating “what citizenship has meant to those women and men who have been denied [it] and who [at the same time have] ardently wanted [it].”⁵

I.

THE QUESTION OF CITIZENSHIP FOR CHINESE

A. The Quest for Naturalization

The Chinese were the first Asians to immigrate to the United States in large numbers and also the first Asians to seek to be recognized as American citizens. Their efforts date from the 1870s.⁶ These immigrants faced

3. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 350-51 (1978).

4. For earlier works covering aspects of this subject, see generally Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237 (1945) (tracing the history of racial exclusion in naturalization laws); Jeff H. Lesser, *Always “Outsiders”: Asians, Naturalization, and the Supreme Court*, 12 AMERASIA J. 83 (1985) (discussing statutory and legal treatment of Asian immigrants ineligible for citizenship).

5. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 15 (1991). Shklar’s book focuses mainly on the plight of black Americans.

6. However, as early as 1852, at the very outset of Chinese immigration, certain Chinese residents of San Francisco declared their interest in becoming citizens in an open letter to the governor of California. Hab Wa et al., *supra* note 1.

an uphill struggle. Since the Chinese first began immigrating to this country, a widely shared assumption had existed in the white community that Chinese could not become naturalized American citizens. The assumption had foundation in the law.

The first federal naturalization statute, enacted in 1790, restricted the right of naturalization to "any alien, being a free white person."⁷ That language remained in the statute, which underwent several other modifications, until the Civil War. Congress revisited the question of racial eligibility for naturalization in 1870, but as a subsidiary though important issue within a more general debate over the reform of the naturalization process. The debate was prompted mainly by concerns on the part of some that fraudulent naturalizations were tainting elections.⁸ In Congress, versions of a new naturalization statute were discussed that would have eliminated the word "white" from the provision defining classes of persons eligible for naturalization.⁹ However, Westerners and other representatives objected on the grounds that this would extend the naturalization privilege to Chinese immigrants, and the change in wording was voted down.¹⁰ The new naturalization statute that was ultimately enacted did contain a section extending the privilege of naturalization to "aliens of African nativity, and to persons of African descent."¹¹

When all federal laws were codified in 1874, the codifiers left the phrase "being a free white person" out of the statute,¹² but the following year that omission was corrected so that the naturalization law—or Section 2169 of the Revised Statutes of 1875, as the codification was called—now read: "The provisions of this title shall apply to aliens being free white persons¹³ and to aliens of African nativity and to persons of African descent."¹⁴ As so worded, this provision remained on the statute books until the mid-twentieth century.

The language of Section 2169 and its legislative history stood as rather formidable barriers to Chinese naturalization, but in the mid- and late-1870s, several Chinese in the San Francisco area initiated proceedings seemingly aimed at getting an authoritative court ruling on the question of their eligibility for citizenship. In December 1875, two Chinese immigrants took the first step toward naturalization by filing in federal court in San

7. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

8. The episode is discussed in Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 236 (1994).

9. *Id.* at 237.

10. *See id.* at 237-40.

11. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256.

12. *Id.*

13. This is a curious locution since the Thirteenth Amendment, ratified in 1865, made it legally impossible that there should ever be any *unfree* persons of any color in this country.

14. Act of Feb. 18, 1875, ch. 80, 18 (Part 3) Stat. 316, 318.

San Francisco their declarations of intention to become citizens.¹⁵ One was the publisher of a Chinese-language newspaper; the other was an officer of one of the Chinese district associations.¹⁶ Interestingly, the latter told a committee of the California state senate four months later that a great many Chinese desired to become U.S. citizens, in part because they hoped thereby to influence legislation that had been historically unfriendly to the Chinese.¹⁷ Neither of these men took any further action on their applications, but in 1878 a test case was finally brought.¹⁸

In April of that year,¹⁹ four Chinese filed naturalization petitions in the federal circuit court in San Francisco, in the matter that came to be known as *In re Ah Yup*.²⁰ Their attorney contended that the term "white persons" was vague and indeterminate and could not be taken literally, since within the class of persons called "white" could be found individuals of many different shades—"from the lightest blonde to the most swarthy brunette."²¹ Several local lawyers opposed the petitions. They called the court's attention to the relevant provision of the Revised Statutes of 1875, which, they argued, forbade Chinese naturalization.²² A week later, the court ruled that the Chinese were ineligible for naturalization.²³ The words "white person," said the court, had a well-settled meaning in both common speech and scientific literature and were seldom if ever used in a sense so comprehensive as to include individuals of the Mongolian race.²⁴

15. *Declaration of Mongolians to Become Citizens*, EVENING BULL., Dec. 30, 1875, at 3; *Chinese Citizens*, S.F. EXAMINER, Dec. 30, 1875, at 3.

16. *Declaration of Mongolians to Become Citizens*, *supra* note 15, at 3. Chinese district associations were mutual aid associations consisting of members from the same geographic district in Kwangtung province.

17. CALIFORNIA STATE SENATE SPECIAL COMMITTEE REPORT ON CHINESE IMMIGRATION, at 179 (1878) (testimony of Hong Chung, inspector of the Sam-yup Company). In the S.F. EXAMINER article of Dec. 30, 1875, *supra* note 15, one of the two Chinese applicants is identified as a Hong Chung, and is presumably the same Hong Chung who testified before the state senate. Senator Oliver P. Morton of Indiana echoed these exact sentiments several years later in writing:

[I]n my judgment, the Chinese cannot be protected in the Pacific States while remaining in their alien condition. Without representation in the legislature or Congress . . . the law will be found insufficient to screen them from persecution. Complete protection can be given them only by allowing them to become citizens and acquire the right of suffrage, when their votes would become important in elections, and their persecutions, in great part, converted into kindly solicitation.

VIEWS OF THE LATE OLIVER P. MORTON, S. Misc. Doc. No. 20, 45th Cong., 2d Sess. 4 (1878). Morton chaired the congressional committee that in 1876 conducted hearings on the West Coast on Chinese immigration.

18. *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104).

19. *Can Chinese Be Naturalized?*, S.F. BULL., Apr. 22, 1878, at 3.

20. 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104).

21. *Ah Yup*, 1 F. Cas. at 223. See also *Chinese Residents Apply for Citizen Papers*, DAILY ALTA CAL., Apr. 23, 1878, at 1.

22. *Can Chinese Be Naturalized?*, *supra* note 19, at 3.

23. *Ah Yup*, 1 F. Cas. at 224.

24. *Id.*

Since this was only the decision of one federal circuit court, it was not binding on other federal or state courts.²⁵ In 1882 Congress authoritatively settled the question of Chinese eligibility for naturalization by including in the first Chinese Exclusion Act a provision forbidding any court, whether state or federal, from admitting any Chinese to citizenship.²⁶ It was now crystal clear that there could be no statutory path to citizenship for the Chinese. What still remained unsettled, however, was whether there might not be a constitutional path.

B. *The Arguments for Citizenship by Birth*

1. *In re Look Tin Sing*

The opening words of the Fourteenth Amendment, added to the U.S. Constitution in 1868, provide that “[a]ll 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.”²⁷ The first case to raise the question of whether these words applied to Chinese born in the United States was that of *Look Tin Sing*, brought in 1884.²⁸ *Look Tin Sing*, the son of a Chinese merchant, was born in Mendocino, California, and had gone to China for an education when he was nine. When he sought to return to the United States five years later, he was prevented from doing so by the immigration authorities, on the grounds that he was barred by the terms of the 1882 Chinese Exclusion Act. A *habeas corpus* action was soon brought to challenge this decision.²⁹

The attorneys for the boy contended that the plain language of the Fourteenth Amendment settled the matter: *Look Tin Sing* had been born in the United States and *ipso facto* was a citizen of this country.³⁰ The government’s lawyers seized on the phrase “subject to the jurisdiction thereof.” They argued that although *Look Tin Sing* had been born in the United States, he was not at the time subject to American jurisdiction. The boy, they said, was only partially subject to the jurisdiction of the United States when he was born in this country; he owed his primary allegiance to the

25. A Chinese who had served in the Civil War was admitted to citizenship by a New Haven, Connecticut, court in 1880. N.Y. TIMES, Mar. 17, 1882, at 5.

26. Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58. In 1890 the Camden, New Jersey Court of Common Pleas, notwithstanding the law, issued a certificate of naturalization to one Gee Hop. When he later sought to enter the United States on the strength of this certificate, however, the federal circuit court in San Francisco held that it was void and that immigration authorities did not need to honor it. *In re Gee Hop*, 71 F. 274 (N.D. Cal. 1895). The primary purpose of the 1882 Exclusion Act was not to control naturalization but to suspend the immigration of Chinese laborers.

27. U.S. CONST. amend. XIV.

28. *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884). This case and the Chinese naturalization case *Ah Yup*, 1 F. Cas. 223, are more fully discussed in CHARLES J. McCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994). For a discussion of this book, see Robert C. Bering, *Review Essay*, 2 ASIAN L.J. — (1995).

29. *Look Tin Sing*, 21 F. at 905-06.

30. *Id.* at 906-07.

Emperor of China.³¹ What he acquired at most by his American birth was the right to renounce his allegiance to China and declare his allegiance to the United States once he became an adult.³²

The circuit court rejected this view and ruled that Look Tin Sing was an American citizen and had the right to enter this country.³³ The language of the Fourteenth Amendment was sufficiently broad to cover him. The words "subject to the jurisdiction thereof" were only meant to exclude the children of foreign diplomats born in this country.³⁴

Because the issue was so important, there was a general expectation that the circuit court decision, regardless of its outcome, would be appealed to the United States Supreme Court for a final decision. But for reasons that are not clear, it was not. The important constitutional question raised by this case would not be addressed by the Supreme Court until a little over a decade later.

2. United States v. Wong Kim Ark

It was in the case of *United States v. Wong Kim Ark*,³⁵ decided in 1898, that the fascinating doctrinal issues merely touched upon in *Look Tin Sing* would be fully explored. Wong Kim Ark was born in San Francisco in 1873. In the fall of 1895, he sought to land in that city after a visit to China, but he was prevented from doing so and was ordered detained aboard ship by the Collector of Customs. Thomas Riordan, a lawyer who represented the Chinese Consulate in San Francisco and the Chinese Six Companies (the coordinating council of the various mutual aid associations to which Cantonese immigrants in California belonged), sued out a writ of *habeas corpus* on Wong Kim Ark's behalf.³⁶ The question of Wong Kim Ark's right to land was brought before Judge William Morrow of the federal district court in San Francisco.³⁷ Judge Morrow, citing the petitioner's birth in this country and relying mainly on the authority of *Look Tin Sing*, ordered him discharged from custody.³⁸ The Supreme Court, Judge Morrow noted, had never authoritatively ruled on the question of citizenship by birth but it had as yet announced no doctrine at variance with *Look Tin Sing*.³⁹

The matter was immediately appealed to the Supreme Court on an agreed statement of facts.⁴⁰ The issue presented to the Court was to be a narrow one: whether a child born of Chinese subjects permanently domi-

31. *Id.* at 906.

32. *Id.* at 907.

33. *Id.* at 910-11.

34. *Id.* at 906.

35. 169 U.S. 649 (1898).

36. *In re Wong Kim Ark*, 71 F. 382, 382-83 (N.D. Cal. 1896).

37. *Id.* at 383.

38. *Id.* at 386-87, 392.

39. *Id.* at 392.

40. *United States v. Wong Kim Ark*, 169 U.S. 649, 650 (1898).

ciled in the United States, but not in a diplomatic capacity, became at the time of his birth a citizen of this country.⁴¹ All sides, it seems clear, had decided that the time had come for an authoritative ruling from that tribunal.

Joining Riordan on the appeal were two other lawyers: Maxwell Evarts, the son of the eminent New York attorney and former Senator and Secretary of State, William Maxwell Evarts; and J. Hubley Ashton, the well-known constitutional lawyer.⁴² Four years earlier, Evarts and Ashton had represented the Chinese in an unsuccessful challenge⁴³ of the Geary Act,⁴⁴ the 1892 law that among other things required all Chinese laborers in this country to carry certificates of residence on pain of being deported if found without them.⁴⁵ George Collins, a San Francisco lawyer who had written on the question of birthright citizenship,⁴⁶ filed an *amicus curiae* brief supporting the U.S. government.⁴⁷

The attorneys for Wong Kim Ark submitted two lengthy briefs in which they set forth their argument, which rested on two bases. First, they argued that the Fourteenth Amendment should be seen as declaratory of the existing American law, which embodied the common law principle that birth within the territorial boundaries conferred citizenship, and they were able to cite numerous authorities in support of this proposition.⁴⁸ Secondly, the attorneys argued that the members of Congress who framed and voted on the Fourteenth Amendment had the Chinese explicitly in mind when they drafted the language in question.⁴⁹ They noted that President Andrew Johnson, in vetoing the Civil Rights Bill of 1866, gave as one of his reasons the Bill's language declaring "all persons born in the United States, and not subject to any foreign power" to be U.S. citizens, as this would have made citizens of the Chinese residing in the Pacific states.⁵⁰ They also quoted excerpts from congressional debates showing clearly that some proponents of the Fourteenth Amendment saw its citizenship clause as including the Chinese.⁵¹

41. *Id.* at 653.

42. *Id.* at 652.

43. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

44. Geary Act, ch. 60, 27 Stat. 25 (1892).

45. *Id.* § 6, 27 Stat. 25-26.

46. See George D. Collins, *Citizenship by Birth*, 29 AM. L. REV. 385 (1895); George D. Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof?*, 18 AM. L. REV. 831 (1884).

47. Brief on Behalf of the Appellant, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

48. Brief of the Appellee, *passim*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 449) (brief submitted by Maxwell Evarts) [hereinafter Evarts Brief]; Brief for the Appellee, *passim*, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 449) (brief submitted by J. Hubley Ashton) [hereinafter Ashton Brief].

49. Ashton Brief, *supra* note 48, at 23-25.

50. Evarts Brief, *supra* note 48, at 34.

51. Ashton Brief, *supra* note 48, at 23-25. Actually, if the Fourteenth Amendment had retained the wording of Section One of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27—which defined citizens

The United States agreed that the weight of authority in the lower courts was against it on the question of citizenship by birth, but it argued that these decisions had been erroneous in assuming that the English common law principle applied in this country.⁵² Attorneys for the government argued that the common law doctrine grew out of the essentially feudal belief that anyone born within the king's domain was the king's subject; it had no application in a republican government.⁵³ The Roman law principle that the citizenship of the parent attaches to the child, regardless of where the child is born, was the more appropriate principle.⁵⁴ The key to deciding the case, they argued, was to be found in the amendment's phrase "subject to the jurisdiction."⁵⁵ Those words meant "subject to the complete jurisdiction," political as well as civil, and had been chosen to exclude aliens who happened to be born in this country.⁵⁶ In support of this view, the government cited the words of Justice Samuel F. Miller, the author of the majority opinion in the *Slaughter-House Cases*.⁵⁷ In the course of that opinion, Justice Miller said that the main purpose of the citizenship clause of the Fourteenth Amendment was to establish citizenship for the Negro and that the phrase "subject to the jurisdiction" was meant to exclude from the clause's operation "children of ministers, consuls, and citizens or subjects of foreign States born within the United States."⁵⁸

The United States also made a policy argument against accepting the Chinese position. Allowing the Chinese to acquire citizenship by birth, George Collins argued in his amicus brief, would run counter to the public policy of the United States concerning the Chinese, as embodied in its immigration and naturalization laws. As Collins stated:

For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we *must* accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that

as those who were "born in the United States and not subject to any foreign power"—instead of adopting the more broadly phrased "born or naturalized in the United States, and subject to the jurisdiction thereof," the Chinese would have had a much more difficult time arguing for citizenship by birth.

52. Brief for the United States, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 449). In fact, the precedents were not quite as clear-cut as they were often made out to be. While most courts accepted the principle that birth to American citizen parents conferred American citizenship, there was some disagreement as to whether birth to alien parents on American soil conferred the same privilege. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167-168 (1875).

53. Brief for the United States, *supra* note 52, at 6-8.

54. *Id.* at 9-11.

55. *Id.* at 37.

56. *Id.* at 41.

57. 83 U.S. (16 Wall.) 36 (1873).

58. *Id.* at 73.

would be sacred from the foul and corrupting taint of a debasing alienage.⁵⁹

The opinion in *United States v. Wong Kim Ark*, handed down by Justice Gray, ran to over fifty pages. He and his colleagues in the majority were convinced of the correctness of the argument advanced by Wong Kim Ark that before the Civil War, American jurisprudence had accepted the English common law principle of citizenship by birth and that this view had been adopted by the Framers of Section One of the Fourteenth Amendment.⁶⁰ The language of the amendment was clear and unambiguous, Justice Gray declared, and the policy preferences of the other branches on the question of Chinese naturalization could play no role in the Court's interpretation of the amendment. As he put it:

Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment⁶¹

Justice Gray considered Justice Miller's expression of the contrary view in the *Slaughter-House Cases*,⁶² but dismissed it as dictum.⁶³

There was also, the Court thought, a practical consideration. As Justice Gray put it, to reach the result urged by the United States would cast doubt upon the citizenship of "thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States."⁶⁴

Chief Justice Fuller wrote a dissenting opinion, joined by Justice Harlan, in which he argued that "subject to the jurisdiction thereof" meant not subject to the political jurisdiction of any foreign power.⁶⁵ But Chinese, wherever in the world they happened to be born, owed allegiance under Chinese law to the emperor of China. That allegiance, furthermore, could not be renounced.⁶⁶ Chief Justice Fuller declared that the Fourteenth Amendment was not designed to accord citizenship to persons so situated.⁶⁷

59. Brief on Behalf of the Appellant at 34, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (No. 904).

60. *Wong Kim Ark*, 169 U.S. at 675.

61. *Id.* at 694.

62. 83 U.S. (16 Wall.) 36 (1873).

63. *Wong Kim Ark*, 169 U.S. at 678.

64. *Id.* at 694.

65. *Id.* at 725.

66. *Id.*

67. *Id.* at 726.

II.

JAPANESE EFFORTS TO ACHIEVE NATURALIZATION

A. *The Applicability of Naturalization Laws*

Japanese immigration to the United States commenced in earnest in the late nineteenth century and eventually led to the same sort of hostile reaction that Chinese immigration had provoked earlier. Japanese born in this country were of course just as able as Chinese to take advantage of the principle of citizenship by birth, affirmed in *Wong Kim Ark*. What remained unclear, however, was whether Japanese came under the statutory ban on naturalization that so clearly applied to the Chinese. Japanese were, after all, not explicitly mentioned in the Chinese Exclusion Act of 1882.⁶⁸

The first immigrant from Japan to seek a court ruling on the naturalization question was a man named Shebata Saito, who in 1894 filed a petition in a Massachusetts federal court to be admitted to citizenship.⁶⁹ The court, however, ruled that the legislative history of the federal naturalization laws disclosed an intent on the part of Congress to exclude all persons of the "Mongolian race" from the privilege of naturalization.⁷⁰

Shortly after the opinion came down, the *American Law Review* published an article extremely critical of the decision. The article was written by John H. Wigmore, Dean of Northwestern University Law School, who was already beginning to be recognized as one of the great legal academic figures of his time. Wigmore began his analysis by making the interesting assumption that there was no great unwillingness to admit the Japanese to citizenship.⁷¹ Wigmore wrote: "That we should deliberately propose to rank as inferior to ourselves and unworthy of incorporation in our political society the members of a people to whom we and the whole civilized world have . . . become indebted for so much" would imply "an attitude of inflated conceit and ignorant prejudice of which there are no indications."⁷² The question, he went on, was then strictly one of statutory interpretation, and here he thought the court had clearly been in error.⁷³ He argued that the only thing statutory history disclosed about Congress' use of the term "white" was an intent to exclude the Chinese.⁷⁴

Wigmore then went on to make the more dubious argument that the Japanese and the Chinese did not belong to the same race and that the Japanese qualified as "white" if the term were thought of as applying to skin

68. Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58.

69. *In re Saito*, 62 F. 126 (C.C.D. Mass. 1894).

70. *Id.* at 127.

71. John H. Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818, 818 (1894).

72. *Id.*

73. *Id.*

74. *Id.* at 819.

color.⁷⁵ Wigmore undermined his own argument to an extent when he noted that the statute as worded was incapable of consistent interpretation because, as he put it, "it involves a futile attempt to draw a distinction which has no counterpart in facts."⁷⁶ The solution in Wigmore's opinion was to let eligibility for naturalization depend upon nationality, with the eligible nationalities specifically mentioned in the law.⁷⁷

B. *The Importance of Naturalization*

Substantial numbers of Japanese immigrants to California and other western states began to take a serious interest in naturalization in the early twentieth century—and for a variety of reasons. In an article published in the *North American Review* in 1907, Kiyoshi Kawakami, a Japanese resident of the United States and holder of a master's degree in political science from the University of Iowa, mentioned several such reasons. First, there was the matter of hurt ethnic pride. "If the Mikado's subjects should resent even the segregation of a handful of their children into special schools," Kawakami wrote in the year after the diplomatic imbroglio that arose when San Francisco decided to segregate its Japanese schoolchildren, "why should they not be provoked more deeply by a law which indiscriminately classifies them as 'undesirables,' regardless of their individual character, achievements, or social standing . . . ?"⁷⁸ Secondly, he noted that a sizeable number of Japanese immigrants were farmers and that many states placed limitations on the property ownership rights of noncitizens.⁷⁹ Finally, and significantly, there was for some the desire to participate in political affairs. Many Japanese had been involved in politics in Japan, followed politics avidly in the United States, and wished to be involved in the American political scene.⁸⁰ They wished, as Kawakami put it, not only to have the unlimited rights but also "the full duties of American citizenship."⁸¹

The question of naturalization took on acute significance for the Japanese in California in 1913 when the state passed its first Alien Land Law. This measure made it impossible for aliens ineligible to become American citizens to own or lease agricultural land.⁸² It was of course aimed at out-

75. *Id.* at 823-27.

76. *Id.* at 827.

77. *Id.*

78. K.K. Kawakami, *The Naturalization of Japanese: What it would Mean to the United States*, 185 N. AM. REV. 394, 394 (1907).

79. *Id.* at 394-95.

80. *Id.* at 395.

81. *Id.* at 395. Kawakami was somewhat disparaging of ordinary Japanese laborers and thought that literacy and educational requirements in the immigration laws would prevent them from becoming naturalized. YUJI ICHIOKA, *THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885-1924*, at 192 (1988). Kawakami was originally a Marxian socialist but went on to become a publicist in the United States for the Japanese Foreign Ministry. *Id.* at 133, 190.

82. Under the California Constitution, the state had the right to discriminate in the matter of property ownership against aliens who were neither white nor of African descent. *See CAL. CONST.* of

ing the Japanese from the position they had acquired in the state's agricultural economy. Japanese-language newspapers published in the state began to advocate naturalization as a way of avoiding the impact of the new law,⁸³ and shortly after the measure's passage, a group of Japanese in San Francisco founded a Society for Promoting the Acquisition of Citizenship.⁸⁴

When it became clear that the Japanese would not be able to acquire naturalization rights by diplomacy, as efforts by Japanese diplomats to raise the question with the U.S. State Department had gotten nowhere,⁸⁵ some Japanese began to advocate bringing a test case to determine whether the new federal immigration law enacted in 1906 might offer one way to naturalization. One association of Japanese immigrants on the West Coast passed the following resolution in 1914: "Whereas, recognizing the present urgency of solving the naturalization question, be it hereby resolved that a test case be instituted at an appropriate time in pursuit of the just legal goal of acquiring the right of naturalization for the Japanese."⁸⁶ As it happened, some 2500 miles to the west, a Japanese immigrant by the name of Takao Ozawa was at about this time independently taking steps to bring just such a case.

C. Ozawa v. United States

Ozawa graduated from public high school in Berkeley, California, and spent three years studying at the University of California at Berkeley although he did not graduate. He moved to Hawaii and in October 1914 filed in the U.S. District Court for the Territory of Hawaii a petition to be admitted to citizenship.⁸⁷ In two briefs that he wrote himself and submitted in support of his petition, Ozawa stressed his good character and the efforts he had made to assimilate into American society. "I neither drink liquor of any kind, nor smoke, nor play cards, nor gamble, nor associate with improper persons," he wrote. "My honesty and my industriousness are well known among my Japanese and American acquaintances and friends . . ."⁸⁸ He stressed the many ways in which he had severed his ties with things Japanese, noting that he had no connection with any Japanese organi-

1879, art. 1, § 17. However, it had theretofore never exercised that right. See CAL. CIV. CODE § 671 (West 1982 & Supp. 1995).

A state law denying citizens of a certain racial background the right to own agricultural land would probably have been held unconstitutional. It certainly would have been barred by federal statute. Section 1 of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified during most of the period covered by this paper as Revised Statutes of 1875, tit. 24, § 1978) (current version at 42 U.S.C. § 1982 (1988)) guaranteed to all *citizens* of the United States the same right to inherit, purchase, lease, sell, hold, and convey real and personal property in every state and territory as was enjoyed by white citizens.

83. ICHIOKA, *supra* note 81, at 214-15.

84. *Id.* at 215-16.

85. *Id.* at 212-18.

86. *Id.* at 218 (footnote omitted).

87. *Id.* at 220.

88. *Id.* at 219 (footnote omitted).

zations of any kind. He had not reported his name to the Japanese consulate in Hawaii even though all Japanese subjects were required to do so. His children attended American churches and schools and could not even speak the Japanese language.⁸⁹ It took two years for the district court to issue a formal response to Ozawa's petition. The court ruled that he was not qualified for naturalization and denied his petition.⁹⁰

Ozawa had pressed his case in the district court with little fanfare and, as noted above, without the support of any organized Japanese group, but his case did arouse interest on the U.S. mainland. When he decided to pursue an appeal, several Japanese organizations decided to take up his cause.⁹¹ He then retained an attorney. To assist Ozawa and his attorney in the appeal, the Japanese organizations retained the eminent New York lawyer and former Attorney General in the Taft administration, George Wick-ersham, to represent Ozawa in the Supreme Court.⁹² For a variety of reasons, the appeal made its way through the layers of the federal judiciary at a glacial pace. The Ninth Circuit Court of Appeals sent the questions raised by the appeal directly to the Supreme Court for decision, without ruling on them itself. The Supreme Court calendared the case for argument during its October 1918 term. However, at the request of the U.S. State Department, which was anxious not to cause any embarrassment to Japan, a wartime ally, the Court decided to postpone the hearing of the case until the conclusion of hostilities.⁹³ It was not until the Court's October 1922 term that it actually heard Ozawa's argument.⁹⁴

Ozawa sought to make several points. He contended that the new federal naturalization law, the Naturalization Act of 1906,⁹⁵ had introduced a whole new scheme of naturalization, conferring the privilege of naturalization on all aliens irrespective of race, by superseding if not repealing Section 2169 of the Revised Statutes.⁹⁶ The 1906 Act, a comprehensive revision of federal immigration and naturalization law, provided that: "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."⁹⁷ It then went on to describe the procedure without mentioning any racial criteria.⁹⁸ However, it did not specifically repeal Section 2169 of the Revised Statutes, which remained on the books, albeit elsewhere in the collected federal statutes. Ozawa further argued that nowhere in the history of congressional enactments concerning

89. *Id.* at 219.

90. *Id.* at 220.

91. *Id.* at 221.

92. *Id.* at 222.

93. *Id.* at 225.

94. *Id.* at 226; CONSULATE-GENERAL OF JAPAN, 1 DOCUMENTAL HISTORY OF LAW CASES AFFECTING JAPANESE IN THE UNITED STATES, 1916-1924, at 17, 115 (1925).

95. Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596 (repealed in part 1940).

96. *Ozawa v. United States*, 260 U.S. 178, 180-81 (1922).

97. Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596 (repealed in part 1940).

98. *Id.* § 4, 34 Stat. at 596-97.

naturalization was there evidence of any congressional intent to exclude Japanese from the privilege of naturalization, Congress having explicitly excluded only the Chinese.⁹⁹ This, he said, was all the more reason for according the Japanese the privilege of naturalization.¹⁰⁰ In the alternative he argued that Japanese were "white" within the meaning of the statute.¹⁰¹ The term should be given the meaning that it had when the framers of the first naturalization statute, the 1790 Act, put the term into that law; their only intent there was to exclude blacks and native Indians from the privilege of naturalization.¹⁰² Ozawa also introduced some ethnological evidence—rather dubious, it must be said—purporting to show that the Japanese were in fact part of the Caucasian race and did not deserve to be classified as belonging to the Mongolian branch of humanity.¹⁰³

The state of California took a lively interest in the proceedings for an obvious reason—its laws aimed at discouraging Japanese immigration were premised on the inability of the Japanese to become citizens—and filed an amicus brief in the case, strongly urging affirmance of the lower court decision.¹⁰⁴

The U.S. Supreme Court rejected all parts of Ozawa's multipronged argument. It held that no implied repeal of Section 2169 of the Revised Statutes need be read into the 1906 Naturalization Act.¹⁰⁵ Both the 1906 Act and Section 2169, said Justice Sutherland for a unanimous Court, could stand and be given effect.¹⁰⁶ Section 2169 established the racial criteria for naturalization;¹⁰⁷ the 1906 Act simply introduced a new naturalization procedure without disturbing those criteria.¹⁰⁸ The Court rejected Ozawa's contention that the term "free white persons" as used in the 1790 naturalization law was meant only to *exclude* "Negroes and Indians."¹⁰⁹ The statute's purpose, said Justice Sutherland, was to say what persons were to be *included* in the category of those eligible for naturalization.¹¹⁰ It was not enough to say that the framers of the 1790 Act did not have in mind the brown or yellow races of Asia when they enacted it. For the petitioner to prevail he would have to show that "had these particular races been sug-

99. CONSULATE-GENERAL OF JAPAN, *supra* note 94, at 23-30, 38-41.

100. *Id.*

101. *Id.* at 33-37.

102. *Id.*

103. They were of lighter skin color than other Asians. *Id.* at 42-43. Their ancestors, the Ainu, were thought to be white. *Id.* at 7.

104. *Id.* at 52.

105. *Ozawa v. United States*, 260 U.S. 178, 192 (1922).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 195.

110. *Id.*

gested the language of the act would have been so varied as to include them within its privileges."¹¹¹ It was of course an impossible burden to meet.

The Court gave short shrift to Ozawa's claim that somehow he could be classified as "white." The term "white" did not refer to skin color, Justice Sutherland declared, but rather to membership in a racial group. It was to be seen as denoting persons of the Caucasian race as that term was popularly understood.¹¹² Under this interpretation of the term, the petitioner could not be seen as belonging to the white race.¹¹³ The Court noted that it was not laying down a bright-line test and that there had been and would continue to be borderline claims which would have to be determined on a case-by-case basis. According to the Court, the appellant's case was clearly not one of them.¹¹⁴

III.

THE QUESTION OF CITIZENSHIP FOR INDIANS

The U.S. Supreme Court was forced by the U.S. government itself to confront just such a borderline case later in the same term. In *United States v. Thind*,¹¹⁵ the Court was presented with the question of whether members of another Asian group—namely, inhabitants of India—were eligible for naturalization.

Bhagat Singh Thind had immigrated to the United States in 1913 from the Punjab region of northwest India. He had served in the U.S. Army during World War I and was discharged with the rank of sergeant. He appears to have been active in Indian groups in this country that supported the Indian independence movement. Thind applied for admission to citizenship in the federal district court in Oregon.¹¹⁶ In a well-reasoned statement accompanying his petition, he explained the basis of his claim, which rested on the ground that he was "white" within the meaning of the naturalization statute.¹¹⁷

Thind made an interesting argument. The term "white," he contended, clearly could not refer to skin color since many dark-skinned Europeans had been ruled eligible for naturalization—a point acknowledged by the Court in *Ozawa*. Rather, it must refer to "race" as that term was used in modern ethnography.¹¹⁸ But all modern ethnographers designated those inhabitants

111. *Id.*

112. *Id.* at 197.

113. *Id.* at 198.

114. *Id.* The court acknowledged the briefs pointing up the high state of development of the Japanese. It had no disagreement with this estimation. Nor, it said, was there "implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority." *Id.*

115. 261 U.S. 204 (1923).

116. *In re Thind*, 268 F. 683, 683 (D. Or. 1920).

117. Statement Appended to Brief of Respondent at 34-37, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202).

118. *Id.* at 37-39.

of India who, like Thind, came from the northwest part of the country as belonging to the "Aryan" or "Caucasian" race.¹¹⁹ "I am, therefore, a pure Aryan," he declared.¹²⁰

Having made his legal argument, Thind turned to the question of his worthiness to be admitted to membership in the American political community. "I am willing and eager to undertake the responsibilities of citizenship," his petition read, "having shown my eagerness by buying Liberty bonds to help carry on America's part in the war and by enlisting in the fighting forces of the country."¹²¹ The district court was convinced by his argument and, over the opposition of the naturalization examiner, granted him his certificate of naturalization.¹²²

This did not end the matter, however. Two years later the U.S. Attorney filed a motion with the court asking it to cancel the certificate, but the motion was denied.¹²³ The government appealed to the Ninth Circuit Court of Appeals, but as in *Ozawa*, the court passed the matter on to the Supreme Court for decision.¹²⁴ By this time, a number of lower federal courts had addressed the question of Indian eligibility, with three holding them eligible for naturalization and one holding them not.¹²⁵ The question the appellate court put to the Supreme Court for decision was this: "Is a high caste Hindu of full Indian blood . . . a white person within the meaning of section 2169 . . . ?"¹²⁶

Thind's attorney made essentially the same argument on appeal as Thind had in his naturalization statement.¹²⁷ The government, for its part, conceded that Thind might technically be Aryan¹²⁸ but contended that the privilege of naturalization should be open only to those who belonged to "white civilization," as that term was generally understood. Indians were universally seen as belonging to a different cultural and political fellow-

119. *Id.* at 34.

120. *Id.* at 35.

121. *Id.* at 49.

122. *In re Thind*, 268 F. 683, 686 (D. Or. 1920).

123. Brief for the United States at 1-2, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202).

124. Brief of Respondent at 1-3, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202).

125. Three lower courts had ruled that inhabitants of India (or at least some of them) belonged to the Caucasian race and as such were eligible for naturalization. See *In re Singh*, 257 F. 209 (S.D. Cal. 1919) (where the petitioner was a high-caste Hindu); *In re Mozumdar*, 207 F. 115 (E.D. Wash. 1913) (where the petitioner was a high-caste Hindu); *United States v. Balsara*, 180 F. 694 (2d Cir. 1910) (where the petitioner was a Parsee). The attorney representing the petitioner in *Singh* was, interestingly, himself a naturalized Indian. One court had gone the other way. See *In re Singh*, 246 F. 496 (E.D. Pa. 1917) (where the petitioner was a Hindu).

126. *Thind*, 261 U.S. at 206. In the statement accompanying his petition, Thind implied that he belonged to the Kshatriya caste, one of the upper Hindu castes. In fact he was a Sikh and thus outside the caste system. Ironically, an earlier Indian applicant for naturalization, Akhay Kumar Mozumdar, a member of this caste, had gone out of his way to differentiate himself from the Sikhs, who, he said, constituted the majority of Indians living in the United States. They were, he said, a group not high-caste at all but of mixed blood and having a separate religion. *Mozumdar*, 207 F. at 116.

127. Brief of Respondent at 8-23, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202).

128. Brief for the United States at 3-4, *United States v. Thind*, 261 U.S. 204 (1923) (No. 202).

ship.¹²⁹ The government harped on the popular, as opposed to the scientific, conception of racial identity. Whatever the Hindu might be to the ethnographer, the government argued, in popular conception the Indian was seen as "alien to the white race and part of the 'white man's burden.'" ¹³⁰

The Supreme Court handed down its opinion a few months after *Ozawa*, with Justice Sutherland once again speaking for the Court. Overruling the lower court decisions, the Supreme Court ruled that Indians were not eligible for naturalization because they could not be considered "white" within the meaning of Section 2169.¹³¹ The case gave Justice Sutherland the opportunity to expand further on the test the Court had laid down in *Ozawa*.

Justice Sutherland rejected Thind's attempt to identify himself as "Caucasian." In the first place, Justice Sutherland expressed doubt that there was any uniformly agreed-upon scientific understanding of that term.¹³² In any event, it did not matter; as he put it, the words of the naturalization statute were to be interpreted in accordance with the understanding of "the common man from whose vocabulary they were taken."¹³³ "It may be true," Justice Sutherland wrote, "that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . ."¹³⁴ "[T]he average . . . white American," he went on, "would learn with some degree of astonishment" that he and the Hindu belonged to the same racial group.¹³⁵ Justice Sutherland also pointed to the fact that in 1917 Congress had banned further Indian immigration to the United States.¹³⁶

Justice Sutherland averred that because of their physical characteristics, Indians would *always* be looked upon as being different, no matter how successful they or their descendants were at adopting American ways.¹³⁷ He wrote:

The children of English, French, German, Italian, Scandinavian, and other European parentage," he wrote, "quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry."¹³⁸

129. *Id.* at 14-15.

130. *Id.* at 18-19.

131. *Thind*, 261 U.S. at 214-15.

132. *Id.* at 208-09.

133. *Id.* at 209.

134. *Id.*

135. *Id.* at 211.

136. *Id.* at 215 (citing Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876. India is not named but is identified by geographical references).

137. *Id.* at 215.

138. *Id.*

The *Thind* decision occasioned much protest both in India and from the Indian immigrant community in the United States. One leader of the Indian American community, Taraknath Das, a University of Washington graduate who had himself been naturalized in 1914, said that the decision put the United States on the same footing as the British Empire in terms of discrimination against Indians, notwithstanding the United States' often-expressed solicitude for India.¹³⁹ Others cited textbooks from the nineteenth century classifying Indians as whites.¹⁴⁰ Still others attached importance to Justice Sutherland's British birth, arguing that this had prejudiced him against Indians.¹⁴¹

Justice Sutherland's common or average man test had interesting repercussions for the naturalization status of one subgroup of Indians, the Parsees. The Parsees were a distinct ethnic group living in India and were descendants of Persian refugees who had come into the country in the middle ages.¹⁴² Based on that genealogy, a federal district court in 1910 had permitted a Parsee who had immigrated to the United States to be naturalized.¹⁴³ But in 1939, Judge Augustus Hand, in an opinion that he wrote for the Second Circuit Court of Appeals, reached a different conclusion. Applying the common man test, he held that Parsees were nonwhite and therefore ineligible for naturalization.¹⁴⁴

IV.

FILIPINO EFFORTS TO ACHIEVE NATURALIZATION

Another provision of the 1906 Immigration Act gave rise to a separate though doctrinally related series of cases. These had to do with the naturalization rights of residents of the Philippines. As a consequence of its defeat in the Spanish-American War, Spain in 1898 ceded the Philippines to the United States. An act passed by Congress in 1902 for the administration of the Philippines declared most inhabitants of the islands to be Philippine citizens but left unclear the exact nature of their relationship to the U.S. government.¹⁴⁵ Everyone agreed that neither the treaty with Spain nor the 1902 Act had made Filipinos citizens of the United States. On the other hand, the consensus was that they could not be considered aliens inasmuch as they resided on U.S. territory, enjoyed the protection of the American

139. Taraknath Das, *American Naturalization Law Is Against the Chinese, Japanese and Hindustanees*, 39 MOD. REV. 349, 350 (1926).

140. Gary R. Hess, *The "Hindu" in America: Immigration and Naturalization Policies and India, 1917 - 1946*, 38 PAC. HIST. REV. 59, 67 (1969).

141. *Id.* at 66-67.

142. *United States v. Balsara*, 180 F. 694, 695 (2d Cir. 1910).

143. *Id.* at 695-97.

144. *Wadia v. United States*, 101 F.2d 7, 9 (2d Cir. 1939).

145. Act of July 1, 1902, ch. 1369, § 4, 32 Stat. 691, 692.

government, and owed some sort of allegiance to the United States.¹⁴⁶ However, since they were not aliens, they could not avail themselves of the existing naturalization laws, which applied only to aliens.¹⁴⁷

The 1906 Immigration Act contained a provision which by its terms seemed to address this problem and to open the way to citizenship to all inhabitants of the Philippines. Section 30 provided that "all the applicable provisions of the naturalization laws . . . shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States . . ." ¹⁴⁸ The matter was not so simple, however, as a series of federal cases would shortly reveal.

A. *In re Alverto*

Eugenio Alverto, a citizen of the Philippines and a U.S. Navy veteran, was one of the first to seek to avail himself of the 1906 Act. In 1912, he filed a naturalization petition in the federal district court in Philadelphia, citing Section 30 of the 1906 Act and an 1894 law providing for the naturalization of honorably discharged Navy veterans.¹⁴⁹ Because Alverto was of mixed Spanish and native Filipino ancestry, the question was whether Alverto's mixed parentage made him nonwhite and whether the language of Section 30 thus needed to be qualified by the racially limiting language of Section 2169 of the Revised Statutes.¹⁵⁰ The district court held that Congress did not intend by Section 30 to extend the privilege of citizenship to all inhabitants of the Philippines but only to those who were otherwise so qualified, i.e., to white inhabitants of the islands.¹⁵¹ Over the course of the next several years, the federal district courts for the southern and eastern districts of New York signalled their complete agreement with *Alverto's* interpretation of the 1906 law.¹⁵² However, a contrary line of authority began to develop as well.

B. *In re Mallari and In re Bautista*

In 1915 the Supreme Court of the District of Columbia, in ruling that the language of Section 30 of the 1906 Act was to be taken literally and without qualification, ordered one Monico Lopez, a Filipino, admitted to

146. See, e.g., *In re Bautista*, 245 F. 765 (N.D. Cal. 1917); *In re Alverto*, 198 F. 688 (E.D. Pa. 1912).

147. Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596 (repealed in part 1940).

148. *Id.* § 30, 35 Stat. at 606.

149. *Alverto*, 198 F. at 689.

150. *Id.*

151. *Id.* at 690-91.

152. See, e.g., *In re Rallos*, 241 F. 686 (E.D.N.Y. 1917); *In re Lampitoe*, 232 F. 382 (S.D.N.Y. 1916).

citizenship.¹⁵³ Moreover, when the Secretary of Labor urged the Solicitor General to appeal the decision, the Solicitor General refused to do so, stating that the court's interpretation of the 1906 Act accorded exactly with his own understanding and also with that of the U.S. Attorney General, as stated in an official opinion issued in 1908.¹⁵⁴ The federal district court in Massachusetts threw its weight behind this interpretation of the law the following year, ruling in *In re Mallari*¹⁵⁵ that all Filipinos were eligible for naturalization.¹⁵⁶ An examination of congressional debates clearly showed that the purpose of Section 30 was to open the right of naturalization to inhabitants of the Philippines, and not to impose any limitations as to race or nativity on that right.¹⁵⁷ The racial limitations of Section 2169 seemed inapplicable, said the court, since that section had to do with the naturalization of *aliens* whereas Section 30 concerned the naturalization rights of *non-aliens*.¹⁵⁸

In re Bautista,¹⁵⁹ decided by a federal district court on the other side of the continent, provided the most extensive argument to date in support of Filipino naturalization rights. Engracio Bautista, another U.S. Navy veteran with a distinguished service record, had applied for naturalization to the federal district court in San Francisco. He impressed the court with his familiarity with American institutions and attachment to the principles of the Constitution. In addition, he was demonstrably of good moral character. The government, however, opposed Bautista's naturalization on the ground that he was not white.¹⁶⁰ District Judge William Morrow ordered Bautista admitted to citizenship, basing his decision on his reading of legislative history.¹⁶¹ That history made clear beyond a doubt that Section 30 was added to the Immigration and Naturalization Act of 1906 in order to benefit the inhabitants of the Philippine Islands.¹⁶² This was done by Congress with full knowledge that Filipinos belonged to the Malay or brown race.¹⁶³ Since the 1906 Act did not repeal Section 2169 of the Revised Statutes, it must have been Congress' purpose, he concluded, to modify Section 2169 to admit to citizenship this one group of nonwhite applicants.¹⁶⁴

153. Naval Digest 237-38 (1916).

154. *In re Bautista*, 245 F. 765, 770 (N.D. Cal. 1917).

155. 239 F. 416 (D. Mass. 1916).

156. *Id.* at 418.

157. *Id.*

158. *Id.* The petitioner was held to be ineligible for naturalization in this case—but for reasons other than race. *Id.*

159. 245 F. 765 (N.D. Cal. 1917).

160. *Id.* at 767.

161. *Id.* at 769.

162. *Id.* at 768.

163. *Id.* at 769.

164. *Id.*

By the end of 1917, the question of Filipino eligibility for naturalization remained unsettled. A half-dozen federal courts had passed on the question and had divided evenly on it. No appeals had been taken in any of these cases, and so the opportunity had not arisen for an authoritative ruling from a higher court. As it would happen, the definitive ruling on Filipino eligibility for naturalization under the 1906 Act would come six years later in a case involving an entirely different law and an entirely different issue—namely, the naturalization rights of those Asian immigrants who had served in America's armed forces.

V.

ASIAN VETERANS AND CITIZENSHIP

A. *In re Kumagai and In re Bessho*

The United States has several times in its history passed statutes affecting the naturalization rights of alien veterans. The earliest, passed in 1862 in the midst of the Civil War, provided:

Any alien . . . who has enlisted, or may enlist, in the armies of the United States . . . and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen¹⁶⁵

Buntaro Kumagai, a Japanese subject and an Army veteran, sought in 1908 to take advantage of this provision to support his naturalization claims, but the U.S. District Court for the Western District of Washington rejected his claim.¹⁶⁶ It ruled that Section 2169 of the Revised Statutes, which had been passed after the Civil War measure, was the last expression of congressional will on the subject of nonwhite naturalization and was therefore a limitation on the earlier law.¹⁶⁷

Another Japanese veteran, this time of the U.S. Navy, filed a similar claim two years later and met a similar fate. Namyo Bessho petitioned for naturalization in the U.S. District Court for the Eastern District of Virginia in 1910, citing an 1894 statute that provided naturalization rights and an expedited procedure for veterans of the Navy and Marine Corps.¹⁶⁸ When his petition was denied, he appealed the decision to the Fourth Circuit Court of Appeals.¹⁶⁹ Counsel for Bessho argued that the 1894 Act had to be seen independently and was in no way controlled by the limiting language of

165. Revised Statutes of 1875, tit. 30, § 2166, 18 (Part 1) Stat. 378, 379.

166. *In re Kumagai*, 163 F. 922, 924 (W.D. Wash. 1908).

167. *Id.*

168. *Bessho v. United States*, 178 F. 245, 245 (4th Cir. 1910).

169. *Id.*

Section 2169.¹⁷⁰ It was, after all, a later expression of congressional will. However, the court found force in the fact that the 1906 recodification of immigration law, while specifically repealing other immigration-related sections of the Revised Statutes of 1875, had left Section 2169 unrepealed. It interpreted this as a reenactment of the measure and again concluded that the racially restrictive language of that provision had to be kept in mind when implementing any other naturalization law.¹⁷¹ The opportunity to raise similar claims was created by the passage of laws affecting the naturalization rights of veterans during and after the First World War.

B. In re En Sk Song and Petition of Charr

In 1918, about a year after the United States entered the European War, Congress passed a law that added seven new subdivisions to Section Four of the 1906 Immigration and Naturalization Act.¹⁷² Certain of the law's provisions seemed to hold potential for Asian veterans interested in naturalization. Subdivision Seven, for example, provided that "any native-born Filipino" who served in the Navy or Marines could file a petition for naturalization without having to prove continuous residence for five years in the country, if a naturalization examiner determined that such residence was impossible to establish.¹⁷³ Other language in the same subdivision provided that *any alien* who served in the military during the war would be eligible for naturalization without having to observe the normal formalities of a declaration of intention of citizenship and a five-year waiting period.¹⁷⁴ Elsewhere, the 1918 Act stipulated somewhat confusingly that it was not intended to repeal Section 2169 of the Revised Statutes, except as specified in Subdivision Seven as noted above.¹⁷⁵

In response to the 1918 Act, some Japanese-language newspapers in the United States published reports that enlistment would now open the way to naturalization.¹⁷⁶ And in December 1918, a federal district court judge in Hawaii said from the bench: "Alien Japanese, Chinese, and Koreans, serving in the United States Army or Navy, are eligible to become citizens of the United States."¹⁷⁷ A second act, passed in 1919 after the war's end, provided that "[a]ny person of foreign birth" who had served in the military during the world war was eligible for naturalization.¹⁷⁸

170. *Id.* at 246-47.

171. *Id.* at 246-47.

172. Act of May 9, 1918, ch. 69, 40 Stat. 542.

173. *Id.* § 1, 40 Stat. at 547.

174. *Id.*

175. *Id.*

176. Naka, *supra* note 2, at 41.

177. Naka, *supra* note 2, at 48. The potential impact of naturalizing Asian veterans was significant. It is estimated that between 700 and 1000 persons of Asian ancestry served in the armed forces of the United States during World War I. *Id.* at 38.

178. Act of July 19, 1919, ch. 24, § 1, 41 Stat. 163, 222.

Two of the first Asians to respond to these suggestions were Korean.¹⁷⁹ En Sk Song had served in the U.S. Army during World War I and filed a petition for naturalization in the U.S. District Court for the Southern District of California in December 1919.¹⁸⁰ The court responded to his petition in a written opinion handed down almost two years later. Song was without legal representation in the proceeding, but the court addressed the claims that a lawyer might have been expected to raise in his behalf.¹⁸¹

It first addressed the claim that the words of the 1918 measure should be taken at face value, and that Congress in enacting it had thereby intended to confer the privilege of naturalization literally upon "any alien," irrespective of race, who had served in the armed forces. The court was not prepared to accept this gloss on the act. Pointing to the 1894 statute at issue in *Bessho*, the court noted that Congress had used the term "any alien" before without intending any repeal of the longstanding ban on Asian naturalization contained in Section 2169 of the Revised Statutes; the court could not find implied repeal in this iteration.¹⁸² Indeed, the court noted that the new 1918 law expressly saved that provision.¹⁸³ The court also addressed the policy argument that "any alien, irrespective of his race, who may have bared his breast to the bayonet of the enemy during the recent war in our defense is thereby entitled as a matter of right and of justice to the privilege of citizenship."¹⁸⁴ The court implied that there might be force and justice in this plea, but it was a plea that ought more properly be made to the legislature.¹⁸⁵ The court concluded that the limited purpose of Subdivision Seven, with respect to Asians, was to extend the privilege of naturalization for the first time to veteran Filipinos.¹⁸⁶

The other Korean applicant was Easurk Emsen Charr. Thanks to a privately printed autobiography,¹⁸⁷ many more details are known of his quest for American citizenship—a quest that was a preoccupation for much of his adult life. Charr had been drafted into the U.S. Army during the war. As a non-citizen, he could have refused the draft, but he chose to join the Army.¹⁸⁸ While serving he learned of the passage of the 1918 law and

179. They were both natives of Korea but were formally Japanese subjects, since Japan had annexed the Korean peninsula in 1910.

180. Petition for Naturalization, Nat'l Archives, Pacific Southwest Region Naturalization Records, 1918-46 Bound volume, Record Group 21, Petition 324-M.

181. It is unclear from the opinion whether the court was responding to arguments that En Sk Song himself made to the court or whether it was addressing these arguments *sua sponte*.

182. *In re En Sk Song*, 271 F. 23, 25-26 (S.D. Cal. 1921).

183. *Id.* at 26.

184. *Id.* at 25.

185. *Id.*

186. *Id.* at 26.

187. EASURK Emsen CHARR, *THE GOLDEN MOUNTAIN* (1961). A new edition of *THE GOLDEN MOUNTAIN* is forthcoming with a new introduction by Wayne Patterson (University of Illinois Press forthcoming 1996).

188. *Id.* at 178-79.

immediately tried to take advantage of its provisions. But to his bitter disappointment, a naturalization examiner, sent to the base where he was stationed to interview servicemen, turned him away on the grounds that Koreans were not on the list of eligible foreigners.¹⁸⁹ Upon discharge from the Army, Charr enrolled as a freshman at Park College in Missouri. There he learned from a Kansas City newspaper that a federal court in California had naturalized a service veteran of Japanese ancestry. This piqued his interest. He reasoned that if a Japanese could become naturalized, and in California, the most anti-Japanese state in the union, then so could he. Charr consulted the college dean and was referred to Cameron Orr, an attorney and a Park College alumnus, for legal advice.¹⁹⁰ With Orr's encouragement and assistance, Charr filed a petition for naturalization in the U.S. District Court for the Western District of Missouri.¹⁹¹ His petition met the same fate as Song's, the court again concluding that the 1918 legislation was to be read in conjunction with and not in opposition to Section 2169.¹⁹² It claimed the earlier cases of *Kumagai* and *Bessho*, although based on different statutes, were relevant.¹⁹³

After receiving the court's initial decision, Charr petitioned for a rehearing, calling the tribunal's attention to the 1919 legislation, which had not been discussed in the original hearing.¹⁹⁴ However, the court noted that there was no legislative history whatsoever on this measure, it having been passed without debate as a rider to an appropriations bill at the end of the session.¹⁹⁵ The court declared its unwillingness to see the act as relaxing the provisions of the 1918 measure.¹⁹⁶

C. *The Cases of Ichizo Sato and Hidemitsu Toyota*

Ichizo Sato, another war veteran and a Japanese subject, had more luck with the federal courts than did Charr and Song. Sato's citizenship application to the U.S. District Court for the Territory of Hawaii was accepted and he was admitted to citizenship by that court in 1919.¹⁹⁷ He thereafter moved to Sacramento, California, and once he was settled, he sought to register to vote in the state. The county clerk refused the request on the grounds of Sato's race. Sato then sought a writ of mandate from the county court, but this too was refused. The matter was appealed to the California

189. *Id.* at 188-93.

190. *Id.* at 208-09.

191. *Id.* at 210.

192. *In re Easurk Emsen Charr*, 273 F. 207, 212 (W.D. Mo. 1921).

193. *Id.* at 211.

194. *Id.* at 213.

195. *Id.* at 214.

196. *Id.* Some years later Charr moved to Chicago and while there, with the assistance of a University of Chicago law faculty member, made a third attempt to take advantage of the veterans' provision of the naturalization law. A lower level naturalization official turned him away, however, and he did not pursue the matter any further. CHARR, *supra* note 187, at 238-40.

197. *Sato v. Hall*, 217 P. 520, 521 (1923).

Supreme Court.¹⁹⁸ That court, however, relied on *Charr* and refused to overrule the lower state court.¹⁹⁹

Many lower courts had now spoken on the question of Asian veterans' eligibility for naturalization, but it was clear that only a ruling by the United States Supreme Court would settle the matter definitively.²⁰⁰ The U.S. government would itself set in motion the events that led to just such a result. In 1921 Hidemitsu Toyota, a World War I veteran, succeeded in securing a certificate of naturalization from the U.S. District Court for the District of Massachusetts.²⁰¹ Some time later, the U.S. Attorney for the district petitioned the court to cancel that certificate.²⁰² The petition was granted in a very brief opinion, and the case was then appealed to the Circuit Court of Appeals, which certified the question to the U.S. Supreme Court for decision.²⁰³

*Toyota v. United States*²⁰⁴ was argued before the U.S. Supreme Court in March 1925, and Justice Pierce Butler handed down the Court's opinion in May of the same year.²⁰⁵ Adopting essentially the reasoning of the lower federal courts, the Court ruled that the purpose of the 1918 Act was modest.²⁰⁶ It was designed to speed up the naturalization process for certain alien servicemen and to make Filipino veterans alone eligible for naturalization.²⁰⁷ Although the question was not formally before the Court, the Court ruled that until passage of the 1918 Act, no nonwhite Filipinos had been eligible for naturalization.²⁰⁸ Butler went to great lengths to try to reconcile the scattered and somewhat conflicting provisions of federal law, but the true principle of statutory construction on which the Court operated was well-stated by Justice Butler at the end of the opinion: It had long been the firm policy of the nation to maintain distinctions of color and race in its naturalization policy, and an intention to make radical changes in that policy should not lightly be imputed to the Congress.²⁰⁹

Toyota was the last great case to raise the issue of Asian eligibility for naturalization. By the mid-1920s it was clear to all Asian groups that they could expect no help from the United States Supreme Court in their efforts

198. *Id.*

199. *Id.* at 518, 520-21.

200. In *Ozawa v. United States*, 260 U.S. 178 (1922), the Court had cited *Kumagai* and *Charr* with approval, but only for the proposition that the term "white person," when used in the naturalization laws, meant Caucasian. *Id.* at 197. However, *Ozawa* did not specifically deal with the question of veterans' eligibility. In 1923 a federal district court dismissed a Chinese veteran's petition for naturalization on the authority of *Ozawa*. *In re Dong Chong*, 287 F. 546 (W.D. Wash. 1923).

201. *Toyota v. United States*, 268 U.S. 402, 406 (1925).

202. *Id.*

203. *Id.* at 407.

204. 268 U.S. 402 (1925).

205. *Id.* at 402, 406.

206. *Id.* at 409-10.

207. *Id.*

208. *Id.* at 410.

209. *Id.* at 412.

to gain access to the naturalization process. In every Asian naturalization case, when faced with the choice between a strict and a flexible interpretation of a statute, the Court had favored the stricter view. This was in striking contrast to lower federal tribunals, which often had interpreted legislation expansively in favor of Asian claimants. These Supreme Court decisions seemed to be saying that the nation had adopted a firm policy against Asian naturalization and the courts would do nothing to relax that ban in any way.

In the end, it would take a series of Congressional enactments to change the situation. In 1935, in response to long and persistent lobbying by Japanese veterans' groups and with the strong support of the American Legion, Congress amended the naturalization laws to make veterans of the First World War eligible for citizenship, notwithstanding the racial limitations set forth in Section 2169.²¹⁰ In 1943, in the midst of the Second World War and as a gesture of friendship towards a wartime ally, Congress extended eligibility for naturalization to Chinese residents,²¹¹ in 1946 Filipinos and persons of Indian descent were granted eligibility.²¹² It was not, however, until 1952 that all persons of Japanese and Korean ancestry were granted the privilege of becoming naturalized American citizens.²¹³

CONCLUSION

In 1886 the United States Supreme Court affirmed in the case of *Yick Wo v. Hopkins*²¹⁴ that alien residents of the United States were "persons" within the meaning of the Fourteenth Amendment and that as such no state could deny them the equal protection of the law, nor deprive them of life, liberty, or property without due process of law. Invoking this principle, the Court ruled that the racially discriminatory administration of a San Francisco laundry licensing law had deprived a group of Chinese laundrymen of their equal protection rights. In *Truax v. Raich*,²¹⁵ decided in 1915, the Court cited the same principle and held that a state could not deny aliens the right to earn a living in any of the common occupations of the community.²¹⁶ Thus, by the early twentieth century, aliens had been assimilated to the constitutional status of citizens with respect to the exercise of many rights and liberties. Why then, one might ask, the persistent quest for citi-

210. Act of June 24, 1935, ch. 290, § 1, 49 Stat. 397, 398 (repealed 1940). The law also validated post hoc certificates of naturalization issued in the past under the authority of the 1918 or 1919 acts. The story of the campaign that led to the enactment of the 1935 measure is recounted in Naka, *supra* note 2.

211. Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 601.

212. Act of July 2, 1946, ch. 534, sec. 1, § 303(a), 60 Stat. 416.

213. Section 311 of the Immigration and Naturalization Act eliminated race as a factor in naturalization. Act of June 27, 1952, tit. 3, ch. 2, § 311, 66 Stat. 163, 239.

214. 118 U.S. 356 (1886).

215. 239 U.S. 33 (1915).

216. The Arizona law that was the subject of the litigation limited the ability of private employers to hire noncitizens. *Id.* at 35.

zenship by members of all Asian groups? There are certainly many practical explanations.

If aliens had been put on the same legal plane as citizens for some purposes by the time most of these cases were brought, they certainly had not been given full constitutional equality. When the anti-Japanese alien land laws were challenged, for example, the Supreme Court upheld them as legitimate exercises of state police power.²¹⁷ The Court in *Truax* may have barred certain kinds of discrimination in private employment, but in the same term it held that discrimination against aliens in public employment was valid.²¹⁸ Furthermore, the *Truax* decision said nothing about the numerous state licensing statutes which limited access to many businesses and professions—such as the law²¹⁹—to citizens. The Supreme Court in fact would sanction these laws in 1927.²²⁰

To be a citizen was to have the right to vote²²¹ and to hold political office. As Senator Oliver Morton noted in the nineteenth century when speaking of the west coast Chinese, a community of voters was more likely to be the object of politicians' and legislators' kindly attentions rather than their hostilities.²²² Actual representation in the councils of government offered a minority community additional protections. And yet, having said all of this, one has the strong impression in examining the histories of Asian efforts to obtain American citizenship—efforts which in the case of each Asian group go back to the earliest period of its presence in this country—that more than a search for legal right and advantage was at work here. The citizenry of a nation, aspirationally at least, constitutes a community. It is a community bound together in a number of ways—by allegiance to common ideals, by a willingness to work for the realization of those ideals, and by mutual feelings of concern and solicitude. To be counted as a member of such a community is to attain a sense of personal security, and perhaps too a sense of personal identity, that permanent resident alien status simply cannot confer.²²³ Furthermore, active involvement in a democratic commu-

217. See *supra* note 82.

218. *Heim v. McCall*, 239 U.S. 175 (1915). One, although clearly not the principal, factor motivating the Korean immigrant Charr to seek naturalization was his interest in government employment. He had scored high on a postal service examination but had been denied a position because of his alien status. *CHARR*, *supra* note 187, at 239-40, 276.

219. One reason the leader of the Japanese war veterans fought so hard to obtain the naturalization privilege was that he wanted to practice law. *Naka*, *supra* note 2, at 71-73.

220. *Ohio ex. rel. Clarke v. Deckebach*, 274 U.S. 392 (1927). Some of these laws would doubtless not survive scrutiny under the Court's modern equal protection doctrine. See *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971). Some might, however. For a discussion of the modern equal protection doctrine as applied to resident aliens, see *infra* note 223.

221. Initially of course this held true only for Asian males. After adoption of the Nineteenth Amendment in 1920 it held true for Asian females as well.

222. See *supra* note 17.

223. For a discussion of membership in a community as constitutive of one's personality, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982).

nity—that is, participation in its deliberative and policy-making processes—is for many a means of personal fulfillment. To reside on the soil of a nation, to have decided to make it one's permanent home, and then to be denied these possibilities must be frustrating for many and is no doubt why thousands of permanent resident aliens to this day pursue naturalization. These considerations too, we may be fairly sure, entered into the minds of the early Asian petitioners for citizenship. The Asian quest for citizenship was in part then a quest for full membership in the American body politic, a quest to be counted in the fullest sense as part of the people of the United States, something that was seen as having meaning and value in and of itself.

In one of his last books, ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975) (published posthumously), the great constitutional scholar Alexander Bickel made a powerful argument that the concept of citizenship has played and should play only the most minimal role in our constitutional framework. Few rights now turn on citizenship, he argued, the rights of persons having been assimilated to those of citizens by a long line of decisions, rendered since the Civil War, such as *Yick Wo* and *Truax*. These, he suggested, were the authentic voice of the constitution. *Id.* at 33-54. Residence in the United States, and not citizenship, he argued, was and ought to be the defining element in the relations between individuals and the state and federal governments. *Id.* at 53-54.

Bickel wrote this in 1971, shortly after the Supreme Court handed down its decision in *Graham v. Richardson*, 403 U.S. 365 (1971), which barred treating resident aliens differently from citizens in the provision of welfare benefits. That decision and others like it did much to erase the distinction between citizens and permanent resident aliens and suggested that citizenship might in fact be on the way to disappearing as an important constitutional category. But this trend did not continue and there has been some important backsliding since then. There remains today an important line of demarcation separating the status of alien and citizen. Thus it is clear from later decisions that aliens may be barred from a number of important occupations, including, e.g., that of police officer (*Foley v. Connelie*, 435 U.S. 291 (1978)) and public school teacher (*Ambach v. Norwick*, 441 U.S. 68 (1979)). They certainly may be prohibited from voting or holding elective office.

There are several reasons for these developments. One is that the Court believes it would be bad to completely abandon the distinction between citizen and noncitizen. The Court said in *Sugarman*, 413 U.S. at 642, "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'" (citation omitted). Or as the Court put it in *Foley*, 435 U.S. at 295, to apply strict scrutiny to statutory exclusion of aliens would "depreciate the historic values of citizenship." (citation omitted). The basic idea seems to be that there is some significant value and meaning in the concept of a national community and that a community without boundaries would be a contradiction in terms.