Washington Law Review

Volume 39 | Number 1

4-1-1964

Washington's Alien Land Law—Its Constitutionality

Theordore Roodner

COMMENT

WASHINGTON'S ALIEN LAND LAW—ITS CONSTITUTIONALITY

HISTORICAL BACKGROUND

The law,[1] currently extant in Washington, denying aliens who have not declared their intention in good faith to become citizens of the United States the right to own land, and the constitutional provision[2] to the same effect have their beginnings in prejudice and mob violence. Although the modern application of the law has been directed almost solely at the Japanese residents of the state, at its inception it was probably aimed at the Chinese.

In the 1860's and 70's many Chinese laborers were imported into this area to work in the gold mining industry.[3] When the gold mining boom ended they found work at menial tasks unacceptable to the bulk of the white population. However, in the mid-1880's work on the Canadian and Northern Pacific railroads came to an end and many whites were without jobs. The serious unemployment among whites caused them to desire the once disagreeable jobs held by the Chinese. The white unemployed worker looked upon the three thousand working Chinese as a threat of "cheap foreign labor." The uneasy situation came to a head of violence in the anti-Chinese riots of 1885-86. Primarily active in the incitement of anti-Chinese sentiment were the labor organizations, as well as some business men and professional people. The trouble became so serious that eventually federal troops had to be brought in to keep the peace. With the arrival of federal troops and the dismissal of many Chinese, the crisis abated.[4]

However, in December, 1885, those people who wished to be rid of the remaining Chinese procured the introduction of several anti-

[1] RCW 64.16.010—.150. For previous discussions of the Alien Land Law see the following: Cross, *Alien Ownership of Corporations* (Washington Legislation—1955), 30 WASH. L. REV. 195 (1955); Cross, *Alien Land Law* (Washington Legislation—1953), 28 WASH. L. REV. 178 (1953); *Note,* 24 WASH. L. REV. 162 (1949); Note, 8 WASH. L. REV. 131 (1933); Note, 6 WASH. L. REV. 127 (1930). McKinlay, *The Washington Fisheries Code of 1949; Constitutionality of Discriminatory Provisions,* 24 WASH. L. REV. 274 (1949). This article dealt with a law, passed in 1949, that barred non-declarant aliens from obtaining a commercial fishing license (Ch. 112, 1949 Session Laws, § 63). This law was later amended to remove the bar against non-declarant aliens; see RCW 75.28.020.

[2] WASH. CONST. art. II § 33.

[3] AVERY, HISTORY AND GOVERNMENT OF THE STATE OF WASHINGTON 197 (1961).

[4] *Id.* at 199.

Chinese bills in the territorial legislature. These bills were designed to prevent Chinese from holding land, from operating laundries, and from being hired for employment. On their face the bills were directed at those "ineligible for citizenship."[5] Under the federal law of the time, orientals, in general, could not become citizens of the United States. The anti-Chinese element also sought to have Congress pass any laws that might be needed to validate the proposed territorial laws.

The territorial legislature did pass the land law, but the others failed, primarily because it was felt that they would probably be unconstitutional.[6] Thus, Washington has its first alien land law. It was a law designed not only to restrict the entry of Chinese into the state, but also to force out those already here. By the end of 1886 the agitation against the Chinese appears to have ended, but the law remained on the books.[7]

The next step in the current law's development occurred when the state constitutional convention of 1889 adopted a provision prohibiting the ownership of land by those aliens who had not declared their intention, in good faith, to become citizens of the United States.[8] It is not patently clear that the constitutional provision was aimed at any particular racial group, though doubtless many of the delegates who voted for it had the anti-Chinese riots of three years past in mind. There were those in the committee discussing the provision who attacked it because it was reminiscent of the anti-Chinese legislation of earlier years.[9] The supporters of the provision did not single out the Chinese experience as the motivation behind the provision; but instead, they spoke in general terms, such as, "protect American land for Americans."[10] One Irish member of the committee harked back to British land ownership in Ireland as an example of the supposed

[5] *Id.* at 198.

[6] *Id.* at 199. It should be noted that this was not the first attempt to procure legislation aimed at restricting the Chinese. Apparently sentiment had built up against the Chinese at an earlier date. Gov. William Pickering, in a message delivered to the 11th annual session of the Legislative Assembly, on December 23, 1863, made the following recommendation, "The large number of Chinese who have collected in several of the mining regions on the Pacific coast, in some instances almost to the exclusion of our own citizens, is a source of serious complaint. I would recommend that some protective measures be adopted by the legislature to abate or remove the evil complained of." *Messages of the Governors of the Territory of Washington to the Legislative Assembly, 1854-1889*, in 12 UNIVERSITY OF WASHINGTON PUBLICATION IN THE SOCIAL SCIENCES, 115 (1940).

[7] AVERY, *op. cit. supra* note 3, at 199.

[8] WASH. CONST. art. II, § 33.

[9] THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION—1889, 551 (1962).

[10] *Ibid.*

dangers of alien land ownership. Another supporter saw it as a means to protect the institutions of the state.[11]

It is likely that any anti-Chinese sentiment held by the delegates would not appear on the surface. The eyes of the nation, as well as those of Congress, were on this constitutional convention. It is doubtful that the delegates would have wanted the nation aware of a racially discriminatory provision in a state constitution that would later have to be approved by the President.

About the time the Chinese population in the state levelled off the Japanese began to move in. Japanese immigration into the state had its beginnings around 1878, when it is reported that approximately thirty-four were working in the Puget Sound area. About 1890 a few Japanese had begun to operate their own businesses. However, it was only around 1900 that the Japanese had become a noticeable group in the area.[12]

It does not seem that the early immigration of the Japanese drew any noticeable degree of animosity. One writer comments that the whites, during the early period, were pleased to have the "little orientals" provide small services for them.[13] The paucity of Japanese in the area during the Chinese riots doubtless accounts for the fact that there was no organized baiting of the Japanese. Yet, the Japanese probably shared the lot of the Chinese when feeling ran high against the latter group as most occidentals probably did not distinguish between the Chinese and Japanese.

In view of their small numbers, and the nature of the work they were engaged in prior to 1900, it cannot be said that the Japanese constituted a pressure on the available lands of the state. The Japanese population in Washington in 1900 was 5,617, it rose to 12,929 in 1910, and just before passage of the 1923 Alien Land law it was 17,387.[14]

The exact number of land-owning Japanese farmers just before passage of the land law is not known. One report says,

> In 1920, there were over a thousand cultivators on 25,000 acres; the product was valued at nearly $4,000,000. They were the owners of

[11] *Ibid.* For a discussion of the mood of the time, and the "Populist" movement's effect on alien land laws see: Sullivan, *Alien Land Laws—A Reevaluation,* 36 TEMP. L.Q. 15, 31 (1962). See note 94 *supra.*

[12] Miyamoto, *Social Solidarity Among the Japanese in Seattle,* in 11 UNIVERSITY OF WASHINGTON PUBLICATIONS IN THE SOCIAL SCIENCES 64 (1939).

[13] *Ibid.*

[14] ICHIHASHI, THE JAPANESE IN THE UNITED STATES 166 (1932).

> 3,500 dairy cattle, which supplied approximately one-half of Seattle's milk requirements, and nearly three fourths of the small fruits and vegetables consumed in the larger cities. They accounted for nearly 10% of the total state production of milk, soft fruits and vegetables that year.[15]

Despite their relatively few numbers, when viewed in relation to the white population of the state, the Japanese, through his skill and effort, had won an important place for himself in the agricultural market. Doubtless this eminence was one of the major factors in the passage of the land law.

Japanese immigration into the state of California was causing a considerable amount of trouble. When the Japanese in that state also had won an important position for themselves in the state's agriculture, and bigots were having a field day. Because of delicate relations with Japan, President Roosevelt made numerous efforts to dissuade the state from enacting restrictive legislation against the Japanese.[16] These efforts in the long run failed and, in 1921, California added the finishing touches to a very comprehensive law aimed at Japanese land holdings.[17] The Attorney-General of California announced to the world that the avowed purpose of the legislation was not only to discourage immigration of Japanese into the state, but to drive those already there out.[18] It is probable that the agitation in California against the Japanese was echoed in the other western states.[19] Washington had the second largest Japanese colony in the nation,[20] and during that period, similar restrictive legislation was enacted throughout the west.[21] The people of Washington may have felt that the harsh law in California would drive the Japanese out, and they were hoping, by passage of the law, to dissuade mass immigration into this state.

---

[15] *Id.* at 167. [16] *Id.*Ch. XV. [17] *Id.* Ch. XVII.

[18] This proposition was announced by the then Attorney General of California, Ulyses S. Webb, in a speech before the Commonwealth Club of San Francisco on August 9, 1913. See ICHIHASHI, *op. cit. supra* note 14, at 275.

[19] The nature of this agitation is best illustrated by the following quote from MCWILLIAMS, PREJUDICE, 60 (1944). "In point of virulence, the 1920 agitation far exceeded any similar demonstration in California. In support of the initiative measures, the American Legion exhibited a motion picture throughout the state entitled 'Shadows of the West'! All the charges ever made against the Japanese were enacted in this film. The film showed a mysterious room fitted with wireless aparatus by which 'a head Japanese ticked out prices which controlled a state wide vegetable market'; spies darted in and out of the scenes, Japanese were shown dumping vegetables into the harbor to maintain high prices; two white girls were abducted by a group of Japanese men only to be rescued, at the last moment, by a squad of American Legionaires."

[20] ICHIHASHI, *op. cit. supra* note 14, at 166.

[21] For a survey of the various alien land laws in the U.S. see SULLIVAN *op. cit. supra* note 11.

One cannot tell how effective the law was in driving the Japanese out of Washington by restricting their ownership of land.[22] Numerous ways were found to avoid the law. The corporation proved a useful tool for the Japanese. Because the original law with respect to alien owned corporations could be avoided only by the use of two corporations, it is difficult to say how much land was held via the corporate device. On writer points out that a Japanese community association formed a corporation under the "trusteeship of some white lawyers, and under its name ... some 800 acres ... (were bought up) which it redistributed among Japanese farmers who had lost possession of their land."[23]

Although the Japanese that were in Washington stayed on for the most part, immigration into the state dwindled after passage of the land law. Before enactment of the land law there were 17,387 Japanese in the state, ten years later in 1930 there 17,837; the population had increased by only 450.[24] Thus, the territorial laws, originally aimed at the Chinese, evolved into a useful tool for accomplishing the social and economic aims of those groups who felt imposed upon by the Japanese.

The effectiveness of the law with respect to the Japanese came to an end in 1953 with the passage of the McCarran immigration act which removed the bar to Japanese eligibility for citizenship. From that point on they could declare their intent, in good faith, to become citizens.[25]

CONSTITUTIONALITY OF WASHINGTON'S ALIENS LAND LAW

In the last two general elections the voters of the state of Washington have refused to repeal the constitutional provision prohibiting the ownership of land by non-declarant aliens. Consequently, there has been renewed interest in the law's validity, under the United States Constitution, among those who desire the removal of this soiled page from the state's history. Although the Supreme Court specifically upheld the Washington Alien Land Law in 1923,[26] recent cases indicate that the law may be vulnerable to constitutional attack.

In 1923 the Supreme Court was called upon to invalidate the

[22] One writer stated, "(T)he state anti-alien land laws have been unusually effective as applied to the Japanese because the latter are living in countries where the district attorneys have the reputation for being keen to investigate any alleged infractions." MEARS, RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST 259 (1928).

[23] MIYAMOTO, *op. cit. supra* note 12, at 115.

[24] ICHIHASHI, *op. cit. supra* note 14, at 166.

[25] 8 U.S.C. §§ 1422, 1101 (1952). [26] Terrace v. Thompson, 263 U.S. 197 (1923).

California[27] and Washington Alien Land Laws as being repugnant to the fourteenth amendment to the United States Constitution. In the four cases, decided the same day, the two state laws were unqualifiedly upheld. Of the four, the leading case was *Terrace v. Thompson*,[28] which involved the Washington law.

In *Terrace*, a white citizen sought to lease land to a Japanese alien residing in the State of Washington. Under Washington law, an alien who had not declared, in good faith, his intention of becoming a citizen could not enter into a lease of the real property involved. Nakatsuka, the potential lessee, could not make such a good faith declaration because under the applicable Federal law at that date, Japanese were not eligible for naturalization. The potential lessee and lessor sued to enjoin enforcement of the law, alleging that they were being denied property and liberty without due process of law and that Nakatsuka, the alien, was being denied the equal protection of the law.[29]

The court, harking back to the traditional common law view that a state could bar an alien from holding land within its borders,[30] found little difficulty in disposing of the due process allegation. The court probably regarded an alien's ability to hold land as a privilege, granted by the states in abrogation of the traditional common law view. Therefore, the alien's privilege to hold land could be revoked by the state without infringing on the due process clause. This proposition was summed up as follows: "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause."[31]

When dealing with the alleged denial of equal protection the court looked for a reasonable purpose to be accomplished by the state's law,

---

[27] Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Frick v. Webb, 263 U.S. 326 (1923).

[28] 263 U.S. 197 (1923).

[29] The parties also argued that the Washington law interfered with a treaty in force between the United States and Japan concerning the rights and privileges of aliens of each signatory in the territory of the other. The court decided that there was no conflict between the state law and the treaty. Terrace v. Thompson, 263 U.S. 197, 211, 222 (1923).

[30] For a discussion of the rights of an alien to hold land in feudal times, and at common law, and a discussion of the early American cases see, KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW, Ch. 5 (1946). For a criticism of the court's use of early authority on the disability of aliens to hold land in the United States see, McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7, 38-42 (1947).

[31] Terrace v. Thompson, 263 U.S. 197, 218 (1923).

and then determined whether or not the classification used was rationally related to that purpose. Little difficulty was encountered in identifying a rational purpose. The court assumed that ownership of land by aliens who had not declared their intention to become citizens might pose a danger to the welfare of the state.[32] This proposition had its birth in feudal times, when land tenure carried with it certain duties to the state.[33] However, the court did not specify the dangers that the state might reasonably fear from ownership of land by aliens.

The petitioners argued that there was no rational basis to the classification employed by the state because it sought only to bar those ineligible for citizenship, in this case the Japanese.[34] The court recognized that the statute acted against those ineligible for citizenship when it described the restricted class as consisting of, "[A]liens who may, and who intend to, become citizens. . . ."[35] Instead of recognizing the class as one designed to accomplish a discriminatory purpose, the court upheld the classification on the basis that it was one created by Congress. It was held that the state could reasonably rely on a class created by Congress in the exercise of its plenary power over immigration and naturalization. In declaring certain groups of aliens ineligible, the Congress created a class which the state might use for the application of its alien land law. The court said: "The state may properly assume that the considerations upon which Congress made such classification are substantial and reasonable."[36]

The views expressed by the court in *Terrace v. Thompson* were deemed controlling when the California law was placed before the court. The California law defined the class who could not hold land as, those aliens ineligible for citizenship. It was a more narrowly defined class than that created by the Washington law, but fitted neatly into the reasoning of the court in *Terrace*. In the three cases decided on the California law it was held constitutional to deny aliens the right to acquire an interest in real property,[37] the right to farm land under

[32] *Id.* at 220.

[33] See KONVITZ, *op. cit. supra* note 30 at 148. In feudal times the holding of land carried with it certain obligations to superior lords. Among these obligations was the duty to perform military service. For obvious reasons, an alien would not always be a desireable soldier in the Lord's army. Furthermore, because of the duty the alien owed to his own sovereign, he would be incapable of swearing fealty to his lord. Thus, the alien was regarded as a misfit, best segregated with his own kind, not at all suited to fit into a society whose basis was the ownership of land.

[34] Terrace v. Thompson, 263 U.S. 197, 218 (1923).

[35] *Id.* at 219.

[36] *Ibid.* See discussion in text at note 59 *infra* for a criticism of this argument.

[37] Porterfield v. Webb, 263 U.S. 225, (1923).

a share-cropping agreement,[38] and the right to own stock in a corporation authorized to take title to real property.[39]

The land law cases did no violence to the then existent pattern of Supreme Court decisions on the rights of aliens under the fourteenth amendment. Although the alien was nominally cloaked with the protection of the amendment,[40] it was inconsistently applied with regard to his rights. Ostensibly the alien had the same right to due process and equal protection as the citizen; the concept was generally accepted, but its application did not conform to the spirit of the amendment. Time and again the alien was allowed to be rationally considered as suspect.

In *Clarke v. Deckebach*,[41] the city of Cincinnatti was allowed to bar aliens from the operation of pool rooms. The court took judicial notice of the fact that pool rooms had "dangerous tendencies,"[42] and therefore, the city had a valid objective in attempting to control these tendencies. The court was not willing to say that aliens were as fit as citizens to operate such a dangerous business; they deferred to the city council's judgment.[43] This implied that it was reasonable to assume that aliens might cause more trouble in the operation of pool rooms than citizens. Thus, a mild form of xenophobia had been given judicial sanction.

Other restrictions on alien activity were upheld. It was considered constitutional to withhold liquor licenses from them,[44] to bar them from being ship's pilots,[45] to bar them from working for the state[46] or hunting the state's game.[47] The alien was very much the "stranger in our midst." Nevertheless, there were limits as to how far a state could go in discriminating against the alien. He could not be barred from following ordinary modes of gainful employment,[48] he could not be taxed solely on the basis of his alien status,[49] and he could not be

---

[38] Webb v. O'Brien, 263 U.S. 313 (1923).
[39] Frick v. Webb, 263 U.S. 326 (1923).
[40] Yick Wo v. Hopkins, 118 U.S. 356 (1886). The court interpreted the fourteenth amendment to apply to all "persons" within a state's territorial jurisdiction, thus aliens being persons were given the protection of the amendment.
[41] 274 U.S. 392 (1927).
[42] *Id.* at 397.
[43] *Ibid.*
[44] Trageser v. Gray, 73 Md. 250, 20 Atl. 905 (1890).
[45] State v. Ames, 47 Wash. 328, 92 Pac. 137 (1907).
[46] Heim v. McCall, 239 U.S. 175 (1915). See: Powell, *The Right to Work for the State*, 16 COL. L. REV. 99 (1916).
[47] Patsone v. Pennsylvania, 232 U.S. 138 (1914).
[48] Truax v. Raich, 239 U.S. 33 (1915).
[49] *Ex Parte* Kotta, 187 Cal. 27, 200 Pac. 957 (1921).

barred from following the occupations of a peddler,[50] barber,[51] or laundryman.[52]

Because of the fine distinctions used to determine that which an alien could and could not do, the alien had a hard time determining that which he had a constitutional right to do, and that which he did not. One proposition was clearly established, however, classification on the basis of alienage could be "rational" in many situations.

Recent cases decided by the Supreme Court indicate that the spirit of the fourteenth amendment will probably be more strictly applied in cases involving aliens. Two cases decided by the Supreme Court in 1948[53] lead to speculation that the Washington land law might now be considered unconstitutional. These cases may have worked a major change on the line of decisions allowing alienage to be a rational basis for classification.

In *Oyama v. California*[54] the Supreme Court was called upon to set aside an escheat proceeding against a Japanese under the California alien land law. The decision of the court struck down one provision of the California law, thereby reversing the state supreme court; however, the rest of the law was left intact. But, the opinion, by no means, reaffirmed the earlier land law cases, it merely avoided decision on the argument that the entire law was invalid.[55] There were, however, two concurring opinions, subscribed to by four of the eight Justices sitting,[56] that would have reversed on the grounds that the entire land law was unconstitutional.

By and large the concurring opinions viewed the California law as one primarily directed at Japanese aliens, and as such a discrimination based solely on race. The court was not unmindful of the history of the law. Mr. Justice Black stated,

> "If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar states from denying to some groups, on account of

---

[50] State v. Montgomery, 94 Me. 192, 47 Atl. 165 (1900); *contra.* Commonwealth v. Hana, 195 Mass. 262, 81 N.E. 149 (1907).

[51] Templar v. Board of Examiners, 131 Mich. 254, 90 N.W. 1058 (1902).

[52] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[53] Takahashi v. Fish and Game Comm'n. 334 U.S. 410 (1948); Oyama v. State of California, 332 U.S. 633 (1948).

[54] 332 U.S. 633 (1948).

[55] *Id.* at 647.

[56] Eight justices participated in the decision of the court. Mr. Justice Vinson delivered the opinion of the court, Mr. Justice Black, with Mr. Justice Douglas, delievered a separate concurring opinion, and Mr. Justice Murphy, with Justice Rutledge delivered another concurring opinion. Mr. Justice Reed, with Mr. Justice Burton, dissented.

> their race or color, any rights, privileges, and opportunities accorded to other groups."[57]

Mr. Justice Murphy stated in his concurring opinion: "I believe that the prior decisions of this court giving sanction to this attempt to legalize racism should be overruled."[58] Thus, four Justices viewed the California law as a racist statute and sought to overrule *Terrace v. Thompson* and the California land law cases on that basis.

Mr. Justice Murphy attacked the proposition expressed in *Terrace v. Thompson* that a state may rely on a classification created by an act of Congress to accomplish its purposes.[59] The classification created by Congress to accomplish objectives within its power is not necessarily constitutional when employed by a state. The state may use the classification for different ends, and in a different setting. The considerations that supported one do not necessarily carry over into the new usage and setting. Therefore, Mr. Justice Murphy pointed out that the state's classification had to stand on its own feet when attacked; it could not rely for constitutional validity on the fact that the class was created by Congress. "[I]f a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting."[60]

Mr. Justice Black further argued for the law's invalidity on the grounds that it interfered with a right granted by Congress.[61] Although the Japanese aliens were barred from citizenship, they were, nevertheless, granted the right to enter and reside in this country. Therefore, California could not seek to discourage their entry into, and continued residence in that state without thereby constricting the right granted by Congress. In granting an alien the permission to enter this country, Congress has allowed that alien to move freely within the nation, and live where he will. The alien land laws seek to prevent the entrance of the undesired alien. Therefore, the land law causes an unconstitutional conflict with the supreme, valid act of Congress. This argument, presented by Mr. Justice Black, later

---

[57] Oyama v. State of California, 322 U.S. 633, 649 (1948) (concurring opinion).
[58] *Id.* at 672 (concurring opinion).
[59] See text at note 36 *supra.*
[60] Oyama v. State of California, 322 U.S. 633, 664 (1948) (concurring opinion).
[61] *Id.* at 649-650 (concurring opinion). Interestingly, Mr. Justice Black also stated that the California law interfered with the policy obligations assumed by the United States when it became a signatory to the United Nations Charter. The Charter provision referred to by Mr. Justice Black requires the signatories to "promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter arts. 55c, 56, 59 Stat. 1046 (1945).

became one of the bases of the decision in *Takahashi v. Fish and Game Commission.*[62]

The state of California barred those aliens ineligible for citizenship from obtaining a license to fish in California waters. This law was held unconstitutional in the *Takahashi* case. Justice Black, speaking for the court, based the decision on two main points. It was held that the state's denial of an alien's right to fish was an interference with a right granted that alien by the federal government, namely, the right to enter and reside within the United States.[63] Secondly, and perhaps more importantly, it was held a violation of the equal protection clause to deny a fishing license to an alien merely on the basis of his alienage.[64] The opinion stated:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws.[65]

The court, however, did not completely close the door to distinctions based on alienage: "for these reasons the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[66]

It is difficult to tell whether the court was primarily motivated by a desire to end a statute designed to discriminate against the Japanese or sought to broaden the protection given aliens by the fourteenth amendment to cover situations where no racial discrimination was involved. The opinion expressly avoided basing the decision solely on racial discrimination, stating that it was not necessary to reach that issue in order to dispose of the case.[67] On its face, this would indicate a decision on the broader ground; nevertheless, the proximity of the *Takahashi* case in time and sentiment to the *Oyama* case cannot be disregarded. The concurring opinions in *Oyama* were primarily directed to the racially discriminatory character of the California legislation.

In the *Takahashi* case the court distinguished the land law cases

---

[62] 334 U.S. 410 (1948).

[63] *Id.* at 419. The court also referred to a civil rights statute designed to give equal rights to all *persons* within the jurisdiction of the United States, 8 U.S.C. § 41 (1958). See also, Chy Lung v. Freeman, 92 U.S. 275 (1875); Hines v. Davidowitz, 312 U.S. 52 (1941).

[64] *Id.* at 420.

[65] *Ibid.*

[66] *Ibid.*

[67] *Id.* at 418.

from the case at bar. It stated that the land law cases represented a state power peculiar to the land within its jurisdiction.[68] It was obvious that the court was not trying to reaffirm its prior decisions in the land law cases, but was merely attempting to distinguish them.

Have *Oyama* and *Takahashi* materially changed the law with regard to aliens? One point seems clear; state laws classifying aliens on the basis of race, or tending to discriminate against aliens on the basis of race would probably be void under the modern view. Such was the view adopted by the California Supreme Court when it decided to declare the California alien land law unconstitutional under the fourteenth amendment. In *Sei Fujii v. California*,[69] the California court identified the state's law as one primarily designed to discriminate against Japanese, and as such it was considered a racial discrimination, invalid under the equal protection clause.[70]

In spite of the *Oyama* and *Takahashi* cases, it would appear that states will still be allowed to make classifications on the basis of alienage, provided they can convince the court that there is a valid purpose to be accomplished, and that the classification bears a rational relationship to that purpose. Although the test would be the same as before, it will probably be more stringently applied. The court in *Takahashi* impliedly recognized some "narrow" grounds on which a classification on the basis of alienage would not clash with the constitution.[71] The problem is, therefore, to determine whether or not the Washington law would qualify to occupy this narrow ground. The *Oyama* case could not be used as precedent for the invalidation of the Washington law because the law no longer operates against one racial group. In 1953 the Federal Immigration act was altered so that no racial group is now barred from citizenship.[72] Therefore, any alien, otherwise qualified, could declare his intent, in good faith, to become a citizen and he would thereby be fully qualified to own land in Washington.[73]

As noted above, the history of the Washington provision antedates that of the California law. Washington had an alien land law as early

[68] *Id.* at 422.

[69] 38 Cal. 2d 718, 242 P.2d 617 (1952). See also Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949), striking down the Oregon Alien Land Law, similar to that of California. See also State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955) striking down the Montana Alien Land Law as violative of the fourteenth amendment.

[70] For the status of the various alien land laws in the United States see, Sullivan, *Alien Land Laws—A Reevaluation*, 36 TEMP. L. Q. 15 (1962).

[71] See discussion in text at note 66 *supra*.

[72] 8 U.S.C. § 1422, 1101 (1958).

[73] RCW 64.16.010.

as territorial days,[74] while California's did not come into existence until a much later date. While the California law was enacted solely to discriminate against the Japanese,[75] the Washington constitutional provision was not designed for this purpose.[76] Indeed, the Washington prohibition on the ownership of land by aliens has been applied to whites of British,[77] Swiss,[78] and German[79] nationalities. Therefore, although the law enacted in 1921 to implement the constitutional provision had as its primary target the Japanese, the entire land law history would appear to be more defensible than that of California, insofar as it was not entirely a racially discriminatory measure. In any event, the racial discrimination issue vis-a-vis the land law is dead. The law now applies to *all* aliens who have not declared an intention to become citizens, on an equal basis. No one group, among those non-declarant aliens, is singled out by the operation of the law. Therefore, the question that the court would deal with if the Washington land law were before it would be vastly different from that involved in *Oyama.*

More probably, the Washington law is placed in jeopardy by the broad statement in *Takahashi* that aliens, except in narrow circumstances, are to be placed on the same footing as citizens. Therefore, in order to establish that the law does not deny the non-declarant equal protection it woul seem that the state's major burden would be in establishing a valid and reasonable purpose to be accomplished by the law.

The state of California, in *Takahashi,* sought to justify its action on the basis of an alleged special public interest in the fish found along its coast line.[80] This proposition was based on an early Supreme Court holding to the effect that a state's citizens, collectively, own the tide waters and the fish in them.[81] The court did not attempt to reject the argument that the state had a special interest in the fish, it merely said: "'[O]wnership is inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting

---

[74] See note 5 *supra* and accompanying text.
[75] See, ICHIHASHI, *op. cit. supra* note 14, Ch. XVII.
[76] See discussion in text at note 9 *supra.*
[77] State v. O'Connell, 121 Wash. 542, 209 Pac. 865 (1922).
[78] State ex rel. Tanner v. Staeheli, 112 Wash. 344, 192 Pac. 991 (1920).
[79] Abrams v. State, 45 Wash. 327, 88 Pac. 327 (1907).
[80] Takahashi v. Fish and Game Comm'n., 334 U.S. 410, 420 (1948).
[81] Patsone v. Pennsylvania, 232 U.S. 138 (1913); Geer v. Connecticut, 161 U.S. 519 (1895); McReady v. Virginia, 94 U.S. 391 (1876).

all others to do so."[82] In effect, whether or not the state owned the fish was not material to the question at issue. In the face of this holding would the state be able to assert a special interest in the land lying within its jurisdiction? Doubtless the state's claim of a "special interest" in its own territory has more substance than a claim of interest in the fish passing through its coastal waters. One of the classic principles of the common law is the ownership of land by the ultimate lord, the sovereign, and the Supreme Court has not yet attempted to revoke that doctrine. The cases recognizing a state's special prerogative, with regard to its land, still stand.[83] Therefore, since the Washington law is no longer burdened with the albatross of racial discrimination, it stands a far better chance of passing the scrutiny of the court than did the California laws. A state's land involves a matter with a vastly different historical background than that of a state's fish resources. The State's interest in land, revered by the common law for centuries, in the least changeable of legal fields, might prove stubborn enough to withstand modern constitutional attack.

Undoubtedly numerous emotional arguments could be made in an attempt to sustain the validity of the state's interest and purpose in maintaining the law. One may doubt the efficacy of an argument such as "America for the Americans," if presented to the Supreme Court. However, the argument that the law is designed to conserve the state's land, in the face of increasing population, for those with a permanent or lasting connection with the state might not be regarded as unreasonable. By far the largest class affected by the Washington law are non-resident aliens; it may be arguable that these people would have a lesser interest in the welfare of the state than would a citizen of Connecticut, who though absent from the state, would have a greater interest in its welfare by virtue of the national union. Absentee land-lordism has never been regarded as beneficial to the land so controlled. The state does have an interest in assuring the economically beneficial use of its land; this is one of its most important assts. If it is residential property, the state does not wish to see it deteriorate; if it is farm land the state does not wish to see it lie fallow. An alien residing in the state, with no intention of becoming a

---

[82] Takahashi v. Fish and Game Comm'n., 334 U.S. 410, 421 (1948).

[83] *Cf.* Hauenstein v. Lynham, 100 U.S. 483 (1879); Orr v. Hodgson, 4 Wheat. (17 U.S.) 453 (1819); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 602 (1813).

citizen, might not be considered to have that lasting and permanent interest in the general welfare of the community that a state desires of its landholders.

Doubtless the propositions posited herein are subject to attack. They are intended only as suppositions of what the state's argument might contain in order to establish a valid purpose for barring non-declarant aliens from holding land within the state.

Even if the court were to uphold the Washington land law on the basis of the old cases dealing with a state's special interest in its land, the law would still be subject to attack on other grounds. At the beginning of the twentieth century, in *Truax v. Raich,*[84] the court expressed the idea that an alien admitted to this country by the federal government could not be denied the right to enter and reside in any state of the union by an action of the state. It was said that a state's denial of the right to work at ordinary employments effectively barred that alien from residing in that state.

This argument was made and rejected in *Terrace v. Thompson,*[85] as the court saw no substantial connection between the right to hold an interest in land, and the right to follow ordinary modes of employment. However, the concept of the *Truax* case was strongly reaffirmed in *Takahashi*[86] and might be extended to cover the situation where an alien was denied the right to own land. It would appear that in order to come under the concept originally enunciated in *Truax* one would have to demonstrate how the denial of land ownership interfered with the right to pursue an ordinary line of employment. Although under the Washington law, an alien could own certain mineral lands, and property required to finish any of the minerals extracted from those lands, he is nevertheless barred from owning all other types of property, including agricultural, residential, and commercial properties.[87] If one is a farmer, his pursuit of gainful employment might be severely curtailed, and of course, a non-declarant alien could neither buy or lease a residence for a long term. Therefore, the issue would narrow to whether or not these restrictions constitute an interference with the right granted the alien by Congress.

In 1953 the Washington alien land ownership provision in the state constitution was amended in order to grant certain Canadians

---

[84] 239 U.S. 33 (1915).
[85] 263 U.S. 197 (1923).
[86] Takahashi v. Fish and Game Comm'n., 334 U.S. 410, 415 (1948).
[87] RCW 64.16.010.

the right to own land in the state, regardless of whether or not they had declared an intent to become citizens.[88] The right was granted on a recipricol basis; a Canadian from a province that allows Washingtonians to hold land in that province can hold land in Washington. This change in the Washington constitution was necessitated by fears that the Canadian provinces would retalliate against Washingtonians because of the state's bar on the ownership of land by Canadians.[89] As the law now stands all aliens who have not declared their intention in good faith to become citizens of the United States are barred from holding land in the state, except Canadians. This exemption for Canadians raises some serious doubts on the continued validity of the entire Washington law. If the equal protection formula is applied to this new classification, the state might have a hard time showing that equal protection was not denied. All non-declarant aliens are not treated equally. Canadians have certain privileges denied to the alien nationals of other sovereigns. The state would have to show that there is a valid purpose to be accomplished by the distinction, and that the classification used bears a rational relationship to the accomplishment of that purpose.[90]

As noted above, the Canadian exemption was designed to protect the land holdings of Washingtonians in the Canadian provinces. From the standpoint of the equal protection clause, this should qualify as a valid, reasonable objective. The exempt class created would clearly bear a logical relationship to the objective because only by allowing Canadians to hold land could the state assure its residents that they would qualify for reciprocal treatment by a Canadian province. The problem does not lie with the class of those exempted, but rather with those not exempted from the provision. The British alien is denied a right given to the Canadian. Is there any rational basis for this distinction between Canadian and Britisher? If the state may bar all aliens from owning land, may it further distinguish between aliens?

The state could probably point to a compelling need to exempt Canadians, as opposed to any other national group. One point is obvious, the geographical proximity of Canada to Washington makes it far more likely that Washingtonians will seek to own land in Canada rather than in Britain. Therefore, the rationality of the distinction

---

[88] WASH. CONST. art. II, § 33; RCW 64.16.150.

[89] Cross, *Washington Legislation—1953, Property*, 28 WASH. L. REV. 178 (1953).

[90] See, McGovney, *Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947) .

would lie in the more compelling need to protect the Washingtonian's ability to hold land in Canada. The court has rejected attacks on the basis of a denial of equal protection on far more tenuous grounds.[91] However, the court, not willing to overrule the many cases recognizing a state's special interest in its land, might, out of hostility to distinctions based on alienage, be willing to find a lack of rationality in the classification created by the Canadian exemption.

There is another possible aspect to the equal protection argument based on the Canadian exemption; an American citizen, resident in Washington, might be able to claim a denial of equal protection. Should such a person hold land in a country that decided to escheat lands held by persons whose home jurisdiction does not extend the right to hold land to its subjects, then that Washingtonian would be at a disadvantage compared to his neighbor who might own land in Canada. The person owning the Canadian land is protected by the state's law, but the one owning land in the other nation is not.

The Canadian exemption raises another constitutional issue. The patent purpose of the exemption allowed to Canadians by the state is to protect Washington owned lands in Canada. This action is capable of being regarded as an attempt to conduct affairs with a foreign sovereign, and as such might squarely conflict with the constitutional provision vesting the authority to conduct such affairs in the Federal government. In the *Chinese Exclusion Cases,* the court said: "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[92]

It would seem that the point is well settled that when a state seeks to legislate in an area involving relations with foreign nations its power is not concurrent with that of the Federal government, but "whatever power a state may have is subordinate to supreme national law."[93] Therefore, if it is established that the Washington law does operate in the field of foreign affairs, the next step would appear to be an examination of federal action in this area, in order to ascertain whether or not it conflicts with the state action. In other words, has the Federal government superseded the state in adjusting the

[91] See: Railway Express Agency v. New York, 336 U.S. 106 (1949); Goessaert v. Cleary, 335 U.S. 464 (1948). For a general discussion of Equal Protection doctrine see, Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

[92] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[93] Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

privileges and protections granted to American citizens in Canada and other foreign nations?

It would appear, in light of the pervasive network of treaties governing the rights of aliens in this country, and Americans abroad, that the federal government has attempted to provide a complete scheme for the adjustment of various recipricol rights. The tests for determining whether or not supercession has occurred are many and ever changing,[94] varying from fact pattern to fact pattern. The broadest statement of the concept is perhaps the most useful: "(The Court's) primary function is to determine whether, under the circumstances of ... (the) particular case, ... (the state) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[95]

It is relatively easy to see the need for such a rule. Should the several states attempt to play favorites among foreign nations, rivalries and animosities could easily arise, affecting not one state but all. Should the British government become piqued at the special favor granted the Canadians by the state of Washington, the animosity would be directed against the nation as a whole, not merely the state. Abroad, this union is regarded as a single entity; in the conduct of international affairs the nation must act as a unified body, not 50 separate bodies acting inconsistently.[96]

In *Clark v. Allen*,[97] the Supreme Court had occasion to consider a similar argument with regard to a California law that controlled the devolution of real property within the state. The California law allowed alien non-residents to take by devise or operation of law on a reciprocal basis. If the alien's nation granted the privilege to American citizens, then the same privilege was granted to the alien. It was argued that this was a state extension into foreign affairs. The court did not agree.[98] It was said that California had not "entered the forbidden domain of negotiating with a foreign country. . . ."[99] The

---

[94] *Id.* at 67. See also Sullivan, *op. cit. supra* note 11.

[95] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[96] The enactment of the California anti-Japanese land law gives an excellent example of the international repurcussions that may result when states legislate in a field that may have international ramifications. In 1913 mobs swept the streets of Tokyo in protest to the activity then in progress in the California legislature with reference to the Alien Land Law. Demands were made by these mobs for reprisal against the United States. The passage of the land law was an important factor in the creation of anti-American societies in Japan. See: MCWILLIAMS, PREJUDICE 46 (1944).

[97] 331 U.S. 503 (1947).

[98] *Id.* at 517.

[99] *Ibid.*

effect of the California law on the United States foreign relations was viewed as remote, and indirect, and thus the court did not consider it a meddling in forbidden territory.[100]

The Washington law bears a striking difference from the California law. The California law purported to grant the reciprocal rights to all nations, the Washington law singles out only one nation for favored treatment. California did not seek to adjust relations with any particular foreign power, while Washington's law was specifically designed for that purpose. In light of this distinction it would appear plausible that the two cases are readily distinguishable.

Although the Washington law remains on the books, this writer has learned from interested parties that it is no longer being enforced. It is rumored that aliens currently hold land in Washington, in their own names, without employing any of the available devices for evading the law. This situation bodes ill for a constitutional test of the law. With no person being adversely affected in a real and palpable sense by the law, the federal courts might be prone to regard any attempted test as premature.[101]

THEODORE ROODNER

[100] For a discussion of the international effect of the various alien land laws see, Sullivan, *Alien Land Laws—A Reevaluation,* 36 TEMP. L.Q. 15, 42 (1962); see also discussion in note 96 *supra.*

[101] In Poe v. Ullman, 367 U.S. 497 (1961), the Connecticut birth control law was attacked as being unconstitutional. The case was dismissed partly because the court was not convinced that the law was being enforced so as to actually impair any rights of the petitioner.