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CONSTITUTIONAL LAW-EQUAL PROTECTION-ALIEN LAND LAW VIOLATES FOURTEENTH AMENDMENT

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CONSTITUTIONAL LAW—EQUAL PROTECTION—ALIEN LAND LAW VIOLATES FOURTEENTH AMENDMENT—Plaintiff, an alien Japanese, appealed from a judgment declaring an escheat of land purchased by him to the state pursuant to the California Alien Land Law[1] prohibiting aliens ineligible for citizenship from holding land. On appeal, *held,* reversed. The Alien Land Law is unconstitutional under the equal protection clause of the Fourteenth Amendment as an "instrument for effecting racial discrimination . . . [with] no circumstances justifying classification on that basis." *Sei Fujii v. State,* 38 Cal. (2d) 718, 242 P. (2d) 617 (1952).

Despite earlier United States Supreme Court decisions[2] directly upholding the validity of the alien land laws, the California court in the principal case followed the lead of the Oregon court in re-examining its alien land law and finding it unconstitutional.[3] While the Supreme Court, in recent decisions on which the principal case is based, has refused to reconsider the constitutionality of the alien land laws as unnecessary to its decisions, the Court has apparently undergone such a change in attitude that the earlier decisions might well be reversed if the Court were again directly faced with the necessity of determin-

[1] 1 Cal. Gen. Laws, Act 261 (Deering 1944, 1945 Supp.), now rendered obsolete by the Immigration and Nationality Act, Public Law 414, c. 477, §311 (1952).

[2] Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15 (1923), upholding the Washington Alien Land Law affecting all aliens who had not declared their intention of becoming United States citizens. This, of course, included ineligible aliens. Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21 (1923), upholding California's law affecting ineligible aliens only. Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112 (1923); Frick v. Webb, 263 U.S. 326, 44 S.Ct. 115 (1923).

[3] Kenji Namba v. McCourt, 185 Ore. 579, 204 P. (2d) 569 (1949).

ing the validity of the alien land laws.[4] By re-emphasizing the reasoning that state alien legislation may unlawfully interfere with Congress' plenary control over immigration and naturalization,[5] the Supreme Court seems to be attempting to reserve as much alien legislation as possible to the federal government. Instead of continuing to view a classification established by Congress in its plenary control over immigration and naturalization "in and of itself a reasonable basis" for a state law concerning alien land ownership,[6] the Supreme Court now holds that such classification may be a violation of equal protection when a state attempts to use it in a law concerning lawfully admitted aliens protected by the Fourteenth Amendment.[7] Two civil rights statutes passed shortly after the Civil War, the first giving all citizens the right to own property,[8] and the second giving all persons equal contract rights with white citizens and not permitting greater punishments or penalties upon aliens,[9] have been used with increasing frequency in recent cases.[10] It would seem that these statutes alone might be enough to invalidate such laws, but so far the Supreme Court has been content to use the statutes as merely another prop for its decisions. While the Fourteenth Amendment has long been held to guarantee to all persons the right to engage in the common occupations,[11] the Supreme Court has recognized the continuance of the common law right of the states to preserve their land from ownership by aliens[12] and their common resources from appropriation by non-state citizens[13] under the "special public interest doctrine."[14] The *Takahashi* case,[15] however, held that despite the ownership California might have in the fish off the coast, such ownership is inadequate to furnish the "special public interest" necessary to support the discrimination against aliens in keeping them from a common occupation open to all others. In so holding, the

[4] Oyama v. California, 332 U.S. 633, 68 S.Ct. 269 (1948), holding invalid a statutory presumption of intent to avoid escheat where consideration for land taken in the name of a citizen child was paid by his ineligible alien father as a denial of equal protection to the citizen son. Takahashi v. Fish and Game Comm., 334 U.S. 410, 68 S.Ct. 1138 (1948), holding invalid a California law denying the granting of commercial fishing licenses to ineligible aliens as a denial of equal protection.

[5] Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915); Takahashi v. Fish and Game Comm., supra note 4; Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1941), invalidating a Pennsylvania alien registration law as superseded by a subsequent federal law, and see especially Justice Stone's dissent at 74.

[6] Terrace v. Thompson, supra note 2.

[7] Takahashi v. Fish and Game Comm., supra note 4.

[8] 14 Stat. L. (1866) 27, §1, 8 U.S.C. (1866) §42.

[9] 16 Stat. L. (1870) 140 at 144, §16, 8 U.S.C. (1870) §41.

[10] Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886); Oyama v. California, supra note 4; Takahashi v. Fish and Game Comm., supra note 4. Compare the Court's language in Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847 (1948), with that in Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521 (1926). Statute mentioned, but not used, in decision of Hines v. Davidowitz, supra note 5.

[11] Yick Wo v. Hopkins, supra note 10; Truax v. Raich, supra note 5.

[12] Terrace v. Thompson, supra note 2.

[13] Patsone v. Pennsylvania, 232 U.S. 138, 34 S.Ct. 281 (1914).

[14] Truax v. Raich, supra note 5.

[15] Takahashi v. Fish and Game Comm., supra note 4.

Takahashi case leaves undisturbed the finding in *Patsone v. Pennsylvania*[16] that a state could preserve its wild animals from unnaturalized foreign-born residents by prohibiting their possession of rifles or shotguns, and instead relies on *Missouri v. Holland*,[17] dealing with the validity of the Migratory Bird Treaty Act, to the effect that ownership is a "slender reed" on which to base the claim of the state. Thus the Court seems to limit the "special public interest" doctrine to exercises of the police power not in conflict with the Fourteenth Amendment.[18] It, therefore, might well be expected that the Supreme Court would hold that the common law right of the state to control land ownership by aliens[19] is also limited by the Fourteenth Amendment and would not be sufficient to support the discrimination of the alien land laws in prohibiting ineligible aliens from engaging in what might be said to be the common occupation of agriculture with the equal opportunity to own the land:[20] ". . . all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."[21] Since the Supreme Court now requires a "compelling justification [to allow] discrimination based solely on . . . country of origin,"[22] it would appear that where racial discrimination is involved, the equal protection clause is taking precedence over the more ancient state police powers.[23] The reversal of position by the California court, as evidenced in the principal case, may well have been aided by the evidently increasing scrutiny by the Supreme Court of all state and federal action that discriminates against any racial group.

Sherman A. Itlaner, S.Ed.

[16] Supra note 13.

[17] 252 U.S. 416, 40 S.Ct. 382 (1920).

[18] Takahashi v. Fish and Game Comm., supra note 4; concurring opinion of Justice Murphy in Oyama v. State of California, supra note 4.

[19] Terrace v. Thompson, supra note 2; Truax v. Raich, supra note 5.

[20] Takahashi v. Fish and Game Comm., supra note 4; Oyama v. California, supra note 4, especially Justice Murphy's concurring opinion at 663; Terrace v. Thompson, supra note 2, at 215, 216, but see 221.

[21] Takahashi v. Fish and Game Comm., supra note 4, at 420.

[22] Oyama v. State of California, supra note 4.

[23] Kenji Namba v. McCourt, supra note 3; Takahashi v. Fish and Game Comm., supra note 4. For the older view see Terrace v. Thompson, supra note 2.