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# CONSTITUTIONAL LAW-EQUAL PROTECTION-VALIDITY OF STATE RESTRAINTS ON ALIEN OWNERSHIP OF LAND

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## COMMENTS

CONSTITUTIONAL LAW—EQUAL PROTECTION—VALIDITY OF STATE RESTRAINTS ON ALIEN OWNERSHIP OF LAND—In the short period of five years, action on three governmental fronts has solved one problem

of state legislation which seemed to violate a basic premise of the equal protection clause of the Fourteenth Amendment. Congress, the Supreme Court and the courts of last resort of two states have acted to destroy the effectiveness of state laws which prohibited ownership of land by aliens ineligible for citizenship. These laws incorporated whatever classification Congress established for naturalization purposes into state statutes determining rights to own land. This process has resulted in recent years in discrimination against Orientals, particularly Japanese.[1] The purpose of this comment is to trace the demise of certain of these statutes and to consider the broader question of whether state legislation which restricts alien ownership of land on other than racial grounds meets the requirements of the Fourteenth Amendment.

## I. *The Common Law*

The rules of the common law concerning the rights of aliens to hold land were laid down by the United States Supreme Court in a series of early decisions.[2] The principal rules derived from the common law are (1) that an alien may take land by deed or devise, (2) that an alien may not take land by descent or otherwise by "operation of law," (3) that an alien who takes land by deed or devise has a good title against everyone except the state which, by a proceeding known as "office found" may divest him of his title, (4) that an alien has no "inheritable blood" so that no person can take by descent who must take title exclusively through an alien.

The state governments have the power to control alien ownership of land within their respective borders[3] and, historically, have been free either to extend these common law rights,[4] or restrict them.[5]

[1] See McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 CALIF. L. REV. 7 (1947); Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 CALIF. L. REV. 61 (1947).

[2] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (11 U.S.) 603 (1812); Phillips v. Moore, 100 U.S. 208 (1879); Orr v. Hodgson, 4 Wheat. (17 U.S.) 453 (1819). The core of the common law rules is the idea that an alien cannot hold land against the claim of the state. The rule has been explained as a conclusion from the nature of the feudal system where an alien could not enter into the personal relation with the sovereign, 5 TIFFANY, REAL PROPERTY §1377 (1939), and as a generalization of the claims of English kings to seize the land of French enemies, POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 444-446 (1895).

[3] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch (11 U.S.) 603 (1812); Lessee of Levy v. M'Cartee, 6 Pet. (31 U.S.) 102 (1832); Chirac v. Chirac, 2 Wheat. (15 U.S.) 259 (1817).

[4] Beard v. Rowan, 9 Pet. (34 U.S.) 301 (1835).

[5] Mager v. Grima, 8 How. (49 U.S.) 490 (1850).

## II. *State Statutory Provisions*

Pursuant to the power to control ownership of land within their borders, the states have passed various types of legislation concerning aliens' rights to land during the 175-year history of this country. At the present time, a study reveals nine types of state statutory restrictions.

1. Twenty-one states have abolished the distinction between citizen and alien in regard to the acquisition, use and disposal of land.[6]

2. In five states, statutory limitations exist as to the amount of land that an alien may acquire under certain circumstances.[7]

3. Eight states limit the length of time that an alien may hold land lawfully acquired.[8]

4. Resident aliens are given rights equal to those of citizens in seven states.[9]

5. Four states have statutes which condition the right of an alien

[6] *Alabama:* Ala. Code (1940) tit. 47, §1; *Colorado:* 35 Colo. Stat. Ann. (1921) c. 7, §6; *Delaware:* Del. Rev. Code (1935) § § 3655 to 3657; *Georgia:* Ga. Code (1935) §79-303; *Maine:* Me. Rev. Stat. (1944) c. 154, §2; *Maryland:* Md. Ann. Code (Flack, 1951) art. 3, §1; *Massachusetts:* Mass. Gen. Laws (1932) c. 184, §1; *Michigan:* Mich. Comp. Laws (1948) §554.135; *Nevada:* Nev. Comp. Laws (1943, 1949 Supp.) §6365; *New Jersey:* N.J. Rev. Stat. (1937) §§3:3-13, 46:3-18; *New York:* 49 N.Y. Consol. Laws (McKinney, 1945) §10(2); *North Carolina:* N.C. Gen. Stat. (1949) §64-1; *North Dakota:* N.D. Rev. Code (1943) §§56-0116, 47-0111; *Ohio:* Ohio Gen. Code (Page, 1938) §10503-13; *Rhode Island:* R.I. Gen. Laws (1938) c. 432, §1; *South Dakota:* S.D. Code (1939) §56.0120; *Tennessee:* 5 Tenn. Code (Williams, 1934) §7187; *Utah:* Utah Code (1953) §74-4-24; *Virginia:* 8 Va. Code (1950) §55-1; *West Virginia:* W.Va. Code (1949) §3541. Vermont abolished the common law rules by judicial decision: State v. Boston, Concord & Montreal R.R. Co., 25 Vt. 433 (1853). The distinction between "friendly" and "enemy" aliens exists in some state laws, but is irrelevant for our purposes. For analysis of state statutory provisions along other lines of classification, see GIBSON, ALIENS AND THE LAW (1940), and 5 VERNIER, AMERICAN FAMILY LAWS §288 et seq. (1931).

[7] *Pennsylvania:* 68 Pa. Stat. Ann. (Purdon, 1931) §§22 to 60, 20 Pa. Stat. Ann. (Purdon, 1950) §180-17; *South Carolina:* 5 S.C. Code (1952) §§57-103, 57-104, 57-101; *Wisconsin:* Wis. Stat. (1951) §§234.22, 234.23; *Iowa:* Iowa Const., art. I, §22, Iowa Code (1950) §567.1 et seq.; *Minnesota:* Minn. Stat. (1949) §500.22.

[8] *Illinois:* Ill. Rev. Stat. (1951) c. 6, §§1 to 5; *Iowa:* Iowa Const., art. I, §22, Iowa Code (1950) § 567.1 et seq.; *Kentucky:* Ky. Rev. Stat. (1948) § 381.320; *Oklahoma:* Okla. Stat. (1951) §§84-229, 60-122; *Texas:* Tex. Civ. Stat. (Vernon, 1951) §2583, 1 Tex. Civ. Stat. (Vernon, 1947) §166 et seq.; *Nebraska:* 4 Neb. Rev. Stat. (1943) §76-402 et seq.; *Indiana:* Ind. Stat. Ann. (Burns, 1951) §56-504 et seq.; *Washington:* 11 Wash. Rev. Stat. (Remington, 1933) §10581 et seq.

[9] *Connecticut:* Conn. Gen. Stat. (1949) §7166 et seq.; *Iowa:* Iowa Const., art. I, §22, Iowa Code (1950) §567.1 et seq.; *Mississippi:* 1 Miss. Code (1942) §842; *New Hampshire:* 2 N.H. Rev. Laws (1942) c. 259, §19; *Oklahoma:* Okla. Stat. (1951) §§84-229, 60-122; *Texas:* Tex. Civ. Stat. (Vernon, 1951) §2583, 1 Tex. Civ. Stat. (Vernon, 1947) §166 et seq.; *Wyoming:* Wyo. Const., art. I, §29. However, in Wyoming there exists a statute restricting rights to eligible citizens, except for Chinese. Wyo. Comp. Stat. (1945) §66-401 et seq.

to inherit real property on the existence of reciprocal rights for American citizens in the nation of which the alien is a citizen.[10]

6. The common law appears to be in force in toto in one state, Oregon, and in part in other states.[11]

7. One state, Arkansas, has a statute based expressly on race, which prohibits Japanese from holding land, while granting full citizens' rights to other aliens.[12]

8. Five states grant full rights to aliens who have declared their intention to become American citizens.[13]

9. Nine states have statutes which grant full rights to aliens eligible for citizenship, and no rights to ineligible aliens. This type of statute has been under atttack for a number of years and will be discussed in detail below.[14]

These state laws are, of course, subject to the paramount power of the federal government to make treaties which can alter or increase the rights of alien nationals of the government with which the treaty is made.[15] Our concern, however, is with the impact of the Fourteenth Amendment on these various types of statutes, first as to racially dis-

[10] *Arizona:* Ariz. Code (1939) §39-111; *California:* Cal. Gen. Laws (Deering, 1944) Act 260, §1 et seq.; *Montana:* 6 Mont. Rev. Code (1947) §§91-418, 91-520; *Oklahoma:* Okla. Stat. (1951) §§84-229, 60-122. This type of statute has been upheld as not impinging on the federal government's power over foreign affairs or foreign commerce. Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431 (1947). See also In re Knutzen's Estate, 31 Cal. (2d) 573, 191 P. (2d) 747 (1948).

[11] In Namba v. McCourt, 185 Ore. 579, 204 P. (2d) 569 (1949), the Oregon court invalidated the state statutory scheme based on eligibility for citizenship. Ore. Comp Laws (1940) §61-101 et seq. Thereafter, the legislature repealed all of its regulation of alien ownership of land. Ore. Laws, 1949, c. 350. The common law as expressed in Quinn v. Ladd, 37 Ore. 261, 59 P. 457 (1899), would appear to be in force. This has been held to result on repeal of alien land laws in other jurisdictions. Donaldson v. State, (Ind. 1903) 67 N.E. 1029; Johnson v. Olson, 92 Kan. 819, 142 P. 256 (1914). See also, Hanafin v. McCarthy, 95 N.H. 36, 57 A. (2d) 148 (1948).

[12] Ark. Stat. (1947) §50-301 et seq. This statute probably violates the state constitutional requirement that all resident aliens be treated as citizens in regard to real property, art. 2, §20. Applegate v. Luke, 173 Ark. 93, 291 S.W. 978 (1927). It undoubtedly violates the equal protection provision of the Fourteenth Amendment. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948).

[13] *Indiana:* Ind. Stat. Ann. (Burns, 1951) §56-504 et seq.; *Kentucky:* Ky. Rev. Stat. (1948) §301.320; *Minnesota:* Minn. Stat. (1949) §500.22; *Missouri:* Mo. Rev. Stat. (1949) §§9.010 to 9.030; *Washington:* 11 Wash. Rev. Stat. (Remington, 1933) §10581 et seq.

[14] *Arizona:* Ariz. Code (1939) §39-111; *California:* Cal. Gen. Laws (Deering, 1944) Act 260, § 1 et seq.; *Florida:* Fla. Stat. (1951 Supp.) § 731.28, Declaration of Rights § 18 (all aliens, however, may take by descent); *Idaho:* Idaho Code (1948) §24-101 et seq.; *Kansas:* Kan. Gen. Stats. (Corrick, 1947) §59-511; *Louisiana:* La. Const., art. 19, §21; *Montana:* 6 Mont. Rev. Code (1947) §§91-520, 91-418; *New Mexico:* N.M. Stat. (1941) §75-121; *Wyoming:* see note 9 supra.

[15] See, for example, Santovincenzo v. Egan, 284 U.S. 30, 52 S.Ct. 81 (1931); Geofroy v. Riggs, 133 U.S. 258, 10 S.Ct. 295 (1890); Nielsen v. Johnson, 279 U.S. 47, 49 S.Ct. 223 (1929). For a study of inheritance rights granted by treaty, see Boyd, "Treaties Governing the Succession to Real Property by Aliens," supra p. 1001.

criminatory laws and, secondly, as to land laws dealing with "aliens" generally as a class and establishing rights to own land different from those enjoyed by citizens.

### III. *The General Impact of the Fourteenth Amendment*

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[16]

At the outset, it is clear that the type of state legislation we are considering here constitutes "state action,"[17] that aliens are "persons"[18] and that the term "property" includes the right to acquire, use and dispose of real property,[19] all within the meaning of the Fourteenth Amendment.

The due process and equal protection clauses clearly prohibit more obvious types of state action which might deprive aliens of certain definitely established rights to real property. For example, when the Montana state legislature changed the statutory conditions under which nonresident aliens would be entitled to take real property by descent, the state court held that rights which had vested under the earlier statute could not be affected by the later enactment.[20] Likewise, an ordinance of the County of San Francisco which required Chinese to move into a limited part of the county or get out altogether was held, in a scathing opinion, to be a violation of the Fourteenth Amendment, a federal statute concerning rights of citizens, and our then existing treaty with China.[21]

A California statute which prohibited an alien parent from acting as guardian as to that part of a minor's estate which the alien was ineligible under state law to hold in his own right was invalidated in 1922. The California Court of Appeals could find no rational relation between the fact of ineligibility for citizenship and the competency of a

[16] United States Constitution, Amend. XIV, §1.

[17] Takahashi v. Fish and Game Comm., 334 U.S. 410, 68 S.Ct. 1138 (1948).

[18] Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886), invalidated California legislation which in operation denied to Chinese aliens the right to carry on laundry business. Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915), invalidated a state statute requiring employers of more than five persons to employ at least eighty per cent American citizens.

[19] Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917), invalidated a city ordinance prohibiting Negroes from residing or owning residential property in certain sections of the city. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948), prohibiting court enforcement of racially discriminatory restrictive covenants in deeds of land.

[20] In re Nossen's Estate, 118 Mont. 40, 162 P. (2d) 216 (1945).

[21] In re Lee Sing, (C.C. Cal. 1890) 43 F. 359.

person to act as a guardian.[22] The Washington Supreme Court upheld such a statute on the grounds that the classification applied to all minors and persons attempting to be guardians and that the California interpretation did not face the practical facts of life.[23]

## IV. *Racially Discriminatory Statutes*

State legislation restricting the alien's rights to land has been before the United States Supreme Court a number of times. The attack on these statutes has been on the grounds that they violate the equal protection clause because the classifications used were "unreasonable."

The first case on this subject to be expressly decided by the Supreme Court was *Terrace v. Thompson* in 1923.[24] Under attack was a statute of Washington which denied to aliens who had not declared their intent to become citizens the right to own land within the state. The Court, speaking through Justice Butler, held the statute constitutional. Justice Butler premised his argument on the power of the state to deny aliens the right to own land within its borders. He said that the inclusion of good faith declarants in the same class with citizens was not an arbitrary or capricious discrimination against non-declarant aliens. A more detailed examination of the reasoning in this decision will be considered below. Although the Court did not consider the question of racial discrimination, the case is nevertheless significant in this context because it was held to control the decision in another case, *Porterfield v. Webb*,[25] before the Court at the same time.

That case involved a California statute which prohibited only aliens ineligible for citizenship from holding land in the state. It did not forbid aliens who were eligible but had not declared their intent to become citizens from holding land, as did the Washington statute involved in the *Terrace* case. The category of aliens ineligible for citizenship is clearly narrower than the category of aliens who have declared their intent to become citizens, at least in terms of the number of persons included. The Court held that the principles of the *Terrace* case were

[22] In re Yano's Estate, 188 Cal. 645, 206 P. 995 (1922).

[23] In re Fujimoto's Guardianship, 130 Wash. 188, 226 P. 505 (1924). The decision was written long before Chief Justice Vinson wrote in Cardozian language that the Fourteenth Amendment was not satisfied by "indiscriminate imposition of inequalities." Shelley v. Kraemer, 334 U.S. 1 at 22, 68 S.Ct. 836 (1948).

[24] 263 U.S. 197, 44 S.Ct. 15 (1923).

[25] 263 U.S. 225, 44 S.Ct. 21 (1923). Two other cases involving the California statute were decided at the same time, but add nothing to the constitutional doctrines established in Terrace and Porterfield, except to show that the Court was willing to uphold a good part of the ancillary legislation connected with the Alien Land Law. 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).

controlling and said: "In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification, the States have wide discretion. . . . It is not always practical or desirable that legislation shall be the same in different States. We cannot say that the failure . . . to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable."[26]

Thus the Court allowed a prior decision on a broader classification to control the question of the validity of a narrower classification which surely deserved independent examination.[27] The California Court of Appeals, only one year before this decision, had stated that the purpose of this same statute was to "discourage the coming of Japanese into this state. . . ."[28] The Supreme Court did not recognize this fact.

Two years later, the Court upheld as reasonable a provision of the same California statute that conveyances made to citizens where the purchase money was paid by ineligible aliens were presumed to have been made with intent to evade the statute and thus give beneficial ownership to one ineligible for ownership.[29] In 1948 this same presumption was held invalid under the circumstances involved in the case of *Oyama v. California*.[30] That case involved a conveyance from a citizen to the citizen son of an alien ineligible for citizenship and thus ineligible, in California, to own land. Purchase money was paid by the alien father. Chief Justice Vinson wrote an opinion to the effect that the son was deprived of equal protection because sons of other parents who purchased land for them had the benefit of a presumption of gift. The statutory presumption in this context deprived the son of an ineligible alien of the protection of the presumption of gift given to sons of other parents, thus denying equal protection. The opinion rejected the the argument that such discrimination was necessary to prevent evasion of the alien land law by holding that the method was unconstitutional, even "assuming for the purposes of argument only, that the basic prohibition is constitutional."[31]

[26] 263 U.S. 225 at 233, 44 S.Ct. 15 (1923).

[27] See analysis of the decision in Powell, "Alien Land Cases in United States Supreme Court," 12 CALIF. L. REV. 259 (1924), and McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 CALIF. L. REV. 7 (1947).

[28] In re Yano's Estate, 188 Cal. 645 at 658, 206 P. 995 (1922).

[29] Cockrill v. California, 268 U.S. 258, 45 S.Ct. 490 (1925).

[30] 332 U.S. 633, 68 S.Ct. 269 (1948).

[31] Id. at 646. The Chief Justice distinguished the Cockrill case (note 29 supra), in which the statutory presumption was upheld, on the ground that there, the purchase money had been paid by an alien not related to the grantee. The statutory presumption, in effect, created a purchase money trust in favor of the alien. This result was in line with general California law.

Justices Black, Douglas, Murphy and Rutledge concurred in the decision, but on the grounds that the statute was racially oriented and should be struck down as a denial of equal protection for that reason. Dissenting were Justices Reed, Burton and Jackson who believed that the presumption was reasonable and valid if the underlying statute was valid. They did not reach the basic constitutional question.

In the same year, 1948, the Supreme Court decided *Takahashi v. Fish and Game Commission.*[32] A California statute which in effect prohibited aliens ineligible for citizenship from commercial fishing in the waters off California was held invalid. The Court assumed that the object of the statute was either to conserve the fish in the coastal waters, or to protect citizens from competition by Japanese, or both. Congressional policy expressed in the naturalization laws was held irrelevant to a consideration of the rights of aliens to earn a living in the state. The equal protection clause applied, the Court said, to aliens as well as citizens. California's claim of a "special interest" in the fish as supporting their classification was rejected. The presumption of reasonableness expressed in the earlier land law cases was not present in the Court's analysis of this case. The principles of *Truax v. Raich,* to be discussed later, were clearly controlling.[33]

Finally, the Court met the argument that the statute should be upheld by analogy to the *Terrace* and *Porterfield* decisions. The Court said: "Assuming the continued validity of those [alien land law] cases, we think they could not in any event be controlling here. They rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property."[34]

The *Oyama* decision, coupled with the broad language concerning the rights of aliens in the *Takahashi* case, cast doubt on the continued validity of the 1923 cases. This doubt was so considerable that the courts of two states have since declared their state statutes which denied ineligible aliens the right to own lands to be unconstitutional.

In *Namba v. McCourt,* the Supreme Court of Oregon analyzed the old alien land law cases and compared them with the recent decisions as follows:

> "We do not believe that the present membership of the Federal Supreme Court discarded the principles of constitutional law which Mr. Justice Butler employed . . . , but think that it assigned

[32] 334 U.S. 410, 68 S.Ct. 1138 (1948).
[33] 239 U.S. 33, 36 S.Ct. 7 (1915). See discussion in Part V infra.
[34] 334 U.S. 410 at 422, 68 S.Ct. 1138 (1948).

> greater value to some rules and circumstances than he did. For instance, it assigned greater value than he to (1) the right of all aliens . . . to engage in ordinary occupations, (2) the freedom of all rights from impairment by legislation which is based upon . . . color, race or creed, and (3) the desirability . . . of having the Federal government alone enact special laws concerning the status of aliens. . . ."[35]

The California Supreme Court took the same approach in *Sei Fujii v. State*, deciding in 1952 that the statute which had been expressly upheld in 1923 was now unconstitutional.[36] The court said: ". . . the presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown, as here, that legislation actually discriminates against certain persons because of their race or nationality. This view . . . is irreconcilable with the approach previously taken by . . . [the United States Supreme Court] in the Porterfield case. . . ."[37]

Thus, by mid-1952, it was judicially established that the system of limiting alien ownership of land by reference to their eligibility for citizenship was unconstitutional because it discriminated against persons on the basis of race. It is certain that the more overt discrimination which appears in the Arkansas statute which prohibits Japanese from owning land will fall once it is tested.[38]

A few months after the *Sei Fujii* decision, state land laws based on the eligibility concept were rendered meaningless by an act of Congress. Included in the much discussed Immigration and Naturalization Act of 1952 (the McCarran-Walter Act) were provisions which eliminated race as a criterion for eligibility for citizenship.[39]

While the act certainly will not open wide the gates of the nation to those Oriental races formerly denied all rights to become citizens, the principle is now clear that race is not a relevant factor in determining eligibility for citizenship.

As the laws of California and other states have been administered solely on the basis of racial ineligibility,[40] they have been rendered

[35] Namba v. McCourt, 185 Ore. 579 at 604-605, 204 P. (2d) 569 (1949).
[36] 38 Cal. (2d) 718, 242 P. (2d) 617 (1952).
[37] Id. at 731.
[38] See note 12 supra.
[39] P.L. 414, c. 477, 82d Cong., 2d sess. (1952) §311. A comprehensive picture of the development of federal immigration and naturalization policies appears in H. Rep. 1365 (Feb. 14, 1952) appearing in 2 CONG. CODE & ADM. NEWS 1653 (1952). See especially on this point the discussion on p. 1679.
[40] McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 CALIF. L. REV. 7 (1947); Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 CALIF. L. REV. 61 (1947).

useless for the purpose of preventing certain racial groups from holding land. The only aliens now ineligible for citizenship who can lawfully be in the country are draft dodgers, deserters from the armed forces, and those who have declined to serve in the United States Armed Forces.[41] These classifications present no equal protection problem.

At present, the states where the California type alien land laws are in effect have laws as liberal as those states where no discriminatory legislation existed in the first place.[42]

## V. *Alienage as a Reasonable Classification in Land Laws*

While questions concerning the validity of racially discriminatory statutes have either been settled or become moot, the problem of land laws which discriminate against aliens on a non-racial basis, for economic reasons, from a strong sense of provincialism, or as a hangover from the common law is far from settled. This question has received little attention in the literature on the subject of alien land laws. The prime concern of the writers has been with racially oriented statutes.[43]

The thread running through the cases which involve the Fourteenth Amendment, particularly the equal protection clause, involves a concept of reasonable classification. A state will not be permitted to set up a legislative category that is deemed "arbitrary" and impose peculiar restrictions on persons within that category. A classification is deemed reasonable if some sort of "rational relation" can be found between the classification and the legitimate purposes of the legislation. The Supreme Court has never said that the classification of persons as "aliens" is unreasonable per se.[44]

The case of *Truax v. Raich,* decided in 1915, involved an allegation that legislation imposing certain limits on aliens as a class did not meet the requirements of the Fourteenth Amendment.[45] That case concerned an Arizona statute which required any employer of more than five persons to have at least eighty per cent of his employees American citizens. The statute was invalidated by the Supreme Court. The rationale of the case, that a state cannot lawfully impose limitations on

[41] See H. Rep. 1365 (Feb. 14, 1952), 2 CONG. CODE & ADM. NEWS 1740 (1952).

[42] See text in part II supra.

[43] On the general topic of racially discriminatory laws see articles cited in note 40 supra and the following notes and comments: 36 CALIF. L. REV. 320 (1948); 46 MICH. L. REV. 830 (1948); 22 So. CAL. L. REV. 177 (1949); 24 WASH. L. REV. 162 (1949); 56 YALE L.J. 1017 (1947).

[44] See Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 47 S.Ct. 630 (1927), for a statement of these constitutional principles in relation to the question of whether a city can refuse an alien a license to operate a billiard hall.

[45] 239 U.S. 33, 36 S.Ct. 7 (1915).

the ability of an alien to earn a living within its boundaries, was expressly held, however, not to impinge upon the power of a state to deal with titles to real property.

The concern of the Court was with the power of a state to impair an alien's ability to earn a living. This was considered as involving a claim that the state could exclude aliens altogether—a power held to exist solely in the federal government.

It may not be essential to the ability of an alien to earn a living that he be able to take and hold real property in the same manner as a citizen, but ownership of land is certainly related to the ability of any person to earn a living. A basic illustration of this point is the use of land for farming purposes. While an alien may be able to work on another's farm, if he owns land he has an opportunity to receive a larger return on his investment of energy and capital. This factor is surely an element in the ability of a person to earn a living. In the case of property held for rental purposes, it can reasonably be said that the ownership of property itself is a method of earning a living.

The *Truax* case makes clear that a state cannot restrict "non-essential" economic opportunities of aliens. The Arizona statute was invalidated even though it could be argued that it is not essential for an alien to work for an employer hiring more than five employees in order to earn his living. Furthermore, as we have seen, the Supreme Court, in the *Takahashi* case, has expressly rejected as grounds for restricting alien rights, the desire of a state to prevent competition by aliens against citizens.[46] Any impairment of an alien's ability to own land would seem bound up with this economic factor in some degree. The doctrine of the *Truax* case would not have to be pushed far in order to encompass the ownership of land as an ingredient in the right of an alien to earn a living.

The other aspect of constitutional law emphasized in the *Truax* decision was that state legislation concerning aliens could not invade the exclusive province of Congress by placing burdens on the freedom of a lawfully-admitted alien to reside in any state of the Union. This presents a question of legislative jurisdiction or power over the subject matter. It is analogous to questions arising under the commerce clause where state legislation may be invalidated as beyond the power of the state to act, even within its own territorial jurisdiction.[47] A case which seems clearly to illustrate this proposition is *Arrowsmith v. Voorhies,*

[46] See text at note 32 supra.

[47] See, for instance, Wabash, St. Louis & P. Ry. Co. v. Illinois, 118 U.S. 557, 7 S.Ct. 4 (1886); Buck v. Kuykendall, 267 U.S. 307, 45 S.Ct. 324 (1925).

where a Michigan statute denying the right of "undesirable aliens" as defined in the Federal Immigration Act to remain or work in the state was invalidated by a lower federal court.[48] The theory of this case was that the statute usurped the exclusive power of Congress over the control of aliens and immigration. So, to the extent that alien land legislation invades an area of exclusive federal power, it is invalid. This concept is especially significant in our illustration of the alien who wants to be a farmer. In this type of case, the inability to own land may well deter him from settling in a given state which has restrictions on his freedom.

Even without adopting the concept that a state is without legislative power to restrain alien ownership of land, it is possible to apply to this situation the doctrine that state legislation which conflicts with valid federal laws will be held invalid.[49] This could be done judicially by implying that the admission of aliens by Congress included the right on the part of such aliens to own real property in the states under the theory outlined above. The *Truax* decision included some of this type of analysis, as is indicated by the following language: ". . . the practical result [of the Arizona policy] would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."[50] This statement evidences a judicial interpolation of certain rights of aliens into the immigration statute.

Thus, the principles of the *Truax* case lend themselves readily as support for the conclusion that state statutes restricting the right of aliens to own land do not meet the requirements of the equal protection clause.

This constitutional question was faced by the Supreme Court in *Terrace v. Thompson*, the Washington land law case mentioned earlier in connection with racially discriminatory laws.[51] The court did not consider the racial aspects of the statute, but decided the case as a simple question of reasonable classification. The statute upheld in that case, it will be remembered, prohibited aliens who had not declared their intent to become citizens from holding land in the state.

[48] (D.C. Mich. 1931) 55 F. (2d) 310.

[49] See Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1940), for a discussion of the doctrines of conflict, or preemption. In this case a state alien registration statute was held to be invalid because of the comprehensive federal alien registration laws. And see later Supreme Court elaborations of this same idea in United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942); Allen-Bradley Local 1111 v. WERB, 315 U.S. 740, 62 S.Ct. 820 (1942).

[50] 239 U.S. 33 at 42, 36 S.Ct. 7 (1915).

[51] 263 U.S. 197, 44 S.Ct. 15 (1923). See text at note 24 supra.

Here, briefly, is the Court's analysis of the statute in that case. (1) In absence of treaty, a state has power to deny aliens the right to own land within its borders, and such legislation, applying to all aliens, is not arbitrary or capricious. (2) The inclusion of good faith declarants in the same legislative category with citizens did not unjustly discriminate against non-declarants. (3) Congress has unlimited power to govern eligibility for citizenship, but their legislation will be presumed reasonable and the state may rely on the federally-created classification.[52] (4) Aliens might otherwise own all the land within the state. (5) Aliens will lack interest in and power to work for the welfare of the state. (6) The state may consider the quality and allegiance of those who own land as affecting the safety of the state.

The Court's reasoning may be criticized in the light of thirty years' experience. (1) The power of the states to deny to all aliens the right to own land is, of course, subject to the Fourteenth Amendment,[53] and any expansion of the *Truax* case doctrine could cause the statute to be invalidated. The statement that the legislation is not "arbitrary or capricious" is a conclusion, avoiding an exploration of the facts which could lead to a conclusion of unreasonableness. And, inasmuch as the case before the Court did not involve a statute applying to all aliens, the Court's statements on that point are dictum. (2) The second point in the Court's reasoning assumes a rational relation between land ownership and the desire or ability of one to become a citizen. This is, at least, a debatable point. (3) Classifications by the Congress for naturalization or immigration purposes have no relation at all to classifications in state laws regulating ownership of property. This obvious point has been expressly pointed out by the Supreme Court.[54] (4) Aliens, as a matter of fact, have not overrun the land in the states where they are

[52] Compare this quotation from the Terrace case with the statement appearing in the Takahashi case, note 54, infra: "Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. . . . The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership. . . ." 263 U.S. 197 at 220.

[53] See notes 17, 18, and 19 supra.

[54] Compare this recent statement with the earlier position announced in the Terrace case, note 52 supra. "It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. The federal government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain,

permitted unfettered ownership. The argument is hardly more than frivolous. (5) The interest of an alien in the state may be considerable, especially if he has a family of citizen children, and might be even stronger if he owned land and thus felt the ties of a person protected by the state. Such ownership might well bring him into a closer social relation with the community and thus serve to integrate him into our society.[55] (6) The quality and allegiance of aliens lawfully admitted to this country would seem primarily to be a question for the federal government acting through the immigration and naturalization laws. Considering the limited number of aliens in the country and the fact that they are scattered throughout the nation, this problem seems one best solved on the national level.[56] (7) Aliens would, of course, be required to abide by laws, and to pay taxes. There appears to be no substantial basis for the position that aliens constitute an inherent danger to the national health, safety or morals.[57]

These arguments, taken in their totality, cast doubt on the validity of certain types of statutes considered earlier in section II. Statutes which, for instance, limit the amount of land an alien may hold, or the length of time he may hold it, would seem to bear little rational relation to any legitimate interest of the state. The type of statute which limits ownership rights to persons who have declared their intent to become citizens has some appeal in relation to a policy of encouraging aliens to become citizens once they have come to this country. The crucial question here, however, is whether the states should, by legislation, attempt to implement what they believe to be the policy of the federal government in the immigration and naturalization field, or whether

regulation of their conduct before naturalization and the terms and conditions of their naturalization. . . .Under the Constitution, the states are granted no such powers. . . .

"All of the foregoing emphasizes the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization. The state's law here cannot be supported in the employment of this legislative authority because of policies adopted by Congress in the exercise of its power to treat separately and differently with aliens from countries composed of peoples of many diverse cultures, races, and colors." Takahashi v. Fish and Game Comm., 334 U.S. 410 at 420 (1948).

[55] This argument is pressed in Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 CALIF. L. REV. 61 (1947).

[56] See Ferguson's comments on this point, note 55 supra, and Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399 (1940). See also the excellent discussion involving this and other related points, by Justice Redfield in his decision that the common law regarding the disabilities of alienage in relation to the holding of land did not apply in Vermont a century ago. State v. Boston, Concord & Montreal R.R. Co., 25 Vt. 433 (1853).

[57] See note 55 supra.

the formulation and implementation of such a policy should be left exclusively in the hands of Congress.

To the extent that the common law is in force in a given state, a problem is created by the force of historical legal ideas. If, however, the common law was unreasonably discriminatory, there would seem no good reason for maintaining it in face of the demands of the Fourteenth Amendment. The technique used in *Shelley v. Kraemer*, where the Supreme Court held that racially discriminatory restrictive covenants could not be enforced by the courts because of the equal protection clause, destroyed the effectiveness of previously existing common law rights.[58]

The problem that arises when a procedural device is attacked as a denial of due process does not seem so significant in the equal protection area. In the former case, the fact of long existence and use of the procedural system gives it a heavy weight in favor of its validity.[59] In the latter case, where the issue is substantive equal protection, the long existence of a certain legal situation is not so conclusive.[60] The substantive ideas of equal protection were not, of course, developed to anywhere near their present extent at the time the common law was adopted in this country.

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[58] 334 U.S. 1, 68 S.Ct. 836 (1948).

[59] See, for instance, Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433 (1921).

[60] The decision in Shelley v. Kraemer, for instance (note 58, supra) abruptly cut off a long time practice, operating under the sanctions of the common law rights of grantors.