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## Alien Land Cases in United States Supreme Court

In four cases involving statutes of Washington and of California the Supreme Court of the United States has sustained the power of the states, under existing treaties with Japan, to prevent Japanese subjects from becoming lessees of agricultural land,<sup>1</sup> from becoming stockholders in a corporation authorized to own agricultural land,<sup>2</sup> and from making so-called "cropping contracts" for cultivating such land.<sup>3</sup> The major issues involved in these decisions have already been treated in the pages of this Review<sup>4</sup> and the discussion here will content itself with an exposition and analysis of the Supreme Court opinions in the recent cases. The most serious problem was presented by the "cropping-contract" case from California. In this case the Supreme Court quite patently misinterpreted the California statute of 1920<sup>5</sup> and inadequately distinguished the decision of the Supreme Court of California in the *Okahara Case*<sup>6</sup> which put upon that statute a binding interpretation. Whether these intellectual mishaps rendered the Supreme Court decision erroneous is another and more difficult question. This, however, is of speculative rather than of practical significance, for the California statute of 1923<sup>7</sup> explicitly interdicts such cropping contracts.

### I.—THE QUESTION OF INJUNCTIVE RELIEF.

The issue in each of these cases arose through a bill brought by a citizen and alien jointly to restrain state officers from threatening interference with the carrying out of proposed contracts. Justices McReynolds and Brandeis dissented in each case on the ground that

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<sup>1</sup> *Terrace v. Thompson* (1923) 263 U. S. 197, 68 L. Ed.—, 44 Sup. Ct. Rep. 15; *Porterfield v. Webb* (1923) 263 U. S. 225, 68 L. Ed. —, 44 Sup. Ct. Rep. 21.

<sup>2</sup> *Frick v. Webb* (1923) 263 U. S. 326, 68 L. Ed. —, 44 Sup. Ct. Rep. 115.

<sup>3</sup> *Webb v. O'Brien* (1923) 263 U. S. 313, 68 L. Ed. —, 44 Sup. Ct. Rep. 112.

<sup>4</sup> See 10 *California Law Review*, 56, 94, 494.

<sup>5</sup> Cal. Stats. 1921, p. lxxxvii.

<sup>6</sup> In the *Matter of Okahara* (1923) 66 Cal. Dec. 15, 216 Pac. 614.

<sup>7</sup> Cal. Stats. 1923, p. 1020.

there was no justiciable question and that the case should therefore have been dismissed. They have dissented in earlier cases on the same ground, but the majority of the court seems to be convinced that this is an appropriate method of raising constitutional issues. The practice was employed in a number of cases without being questioned in the Supreme Court. The Arizona anti-alien statute,<sup>8</sup> the Adamson Law<sup>9</sup> and the first federal Child Labor Law<sup>10</sup> came before the court in similar proceedings. The War Prohibition Act was sustained in a proceeding against a federal district attorney and Mr. Justice Brandeis wrote the opinion in *Ruppert v. Caffey*<sup>11</sup> without objecting to the way in which the issue came before him. On the strength of these and other cases<sup>12</sup> the Supreme Court in *Kennington v. Palmer*<sup>13</sup> enjoined the attorney general from seeking to enforce the Lever Act. This seems to be the first decision outside of rate cases in which the point of procedure was explicitly adjudicated by the Supreme Court. Mr. Justice McReynolds filed no indication of dissent. Chief Justice White did not discuss the matter but contented himself with referring in the margin to the cases in which the practice had developed Topsy-like without evoking comment. Now that the practice is approved by so large a majority of the court, it should cease to provoke further dissent which may deprive the quondam objectors of full freedom in expressing themselves on the substantive issues raised thereby.

Obviously the practice has great advantages. It would have been most unfortunate if no proceeding to test the constitutionality of the Adamson Law could have been started until after the law had become in force and been violated. Even with this method of raising the objections to the War Prohibition Act, the decision rejecting part of the Government's interpretation of the statute was not rendered until after the Act had been succeeded by superseding legislation. It is far from business-like to have a statute that may ultimately be declared unconstitutional standing meanwhile on the books as a continuing menace to all inhibited transactions. This sort of

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<sup>8</sup> *Truax v. Raich* (1915) 239 U. S. 33, 60 L. Ed. 131, 36 Sup. Ct. Rep. 7.

<sup>9</sup> *Wilson v. New* (1917) 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. Rep. 298.

<sup>10</sup> *Hammer v. Dagenhart* (1918) 247 U. S. 251, 62 L. Ed. 1101, 38 Sup. Ct. Rep. 529.

<sup>11</sup> (1920) 251 U. S. 264, 64 L. Ed. 260, 40 Sup. Ct. Rep. 141.

<sup>12</sup> *Adams v. Tanner* (1917) 244 U. S. 590, 61 L. Ed. 1336, 37 Sup. Ct. Rep. 662; *Hamilton v. Kentucky Distilleries Co.* (1919) 251 U. S. 146, 64 L. Ed. 194, 40 Sup. Ct. Rep. 106; *Ft. Smith & Western R. R. Co. v. Mills* (1920) 253 U. S. 206, 64 L. Ed. 862, 40 Sup. Ct. Rep. 526.

<sup>13</sup> (1921) 255 U. S. 100, 65 L. Ed. 528, 41 Sup. Ct. Rep. 303.

suspended inanimation will actually prevent many enterprises that may not constitutionally be forbidden. It leaves business men uncertain what to do and promotes insecurity where security is important. Injunctions against prosecuting officers seem much more desirable modes of raising constitutional issues than injunctions by stockholders against corporations<sup>14</sup> or defenses to actions for specific performance by those who have agreed to buy for certain uses forbidden by the legislation in issue.<sup>15</sup> Under both procedures, contracts are devised for the express purpose of testing the constitutionality of the statute by which they are inhibited. Conceivably such a contract might be made and a judicial proceeding started by parties who desired the legislation to be sustained and who hired able lawyers to write feeble briefs on their behalf. This is equally possible in test cases started in other ways. Others genuinely opposed may initiate other proceedings and introduce their advocates as *amici*. Any complaint that the suit is one against the state has long since been answered by the decisions holding that, if the action of the state officer is unwarranted by the statute because the statute is unconstitutional, the action is not against the state but against the unjustified officer.<sup>16</sup> There may have been some difficult metaphysics about this in the beginning, but, unlike most metaphysics, its difficulties have been resolved by adjudication. This leaves the only objection one of equity practice, and equity practice ought of all things to be sensible.

To this unsolicited wisdom of the writer there remains only to add the wisdom of Mr. Justice Butler in justifying the injunctive proceedings in the cases under review. He recognizes that the unconstitutionality of the statute is not alone ground for equitable relief, but that it must be clear that the remedy at law is inadequate. He adds, however, that "the legal remedy must be as complete, practical and efficient as that which equity could afford."<sup>17</sup> Manifestly the chance of a later gamble on getting the statute annulled or suffering imprisonment and forfeiture is not as adequate a remedy as advance advice as to what can be done. As Mr. Justice Butler puts it:

"No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforce-

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<sup>14</sup> Pollock v. Farmers' Loan & Trust Co. (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. Rep. 912.

<sup>15</sup> Buchanan v. Warley (1917) 245 U. S. 60, 62 L. Ed. 149, 38 Sup. Ct. Rep. 16.

<sup>16</sup> Ex parte Young (1908) 209 U. S. 123, 155, 162, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441.

<sup>17</sup> Terrace v. Thompson (1923) 263 U. S. 197, 214.

ment of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. . . . They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."<sup>18</sup>

## II.—THE CALIFORNIA STATUTE OF 1920 AND THE CROPPING CONTRACT

The California statute of 1920 puts its prohibition in backhanded fashion. The only prohibition contained in the pertinent second section is found in the words "and not otherwise." We have to discover what ineligible aliens may not do by discovering what others may do. This second section reads as follows:

"All aliens other than those mentioned in section I of this act [aliens eligible to citizenship] may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner, and to the extent, and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."<sup>19</sup>

To get the straight sense, this may be transformed to read: "No alien who is ineligible to citizenship may, except as allowed by treaty between the United States and the country of which he is a citizen, acquire, possess, enjoy and transfer real property, or any interest therein." Another version might be: "All aliens ineligible to citizenship are forbidden, except as allowed by treaty etc., to acquire, possess, enjoy and transfer real property, or any interest therein."

<sup>18</sup> *Ibid.*, 215-216.

<sup>19</sup> Cal. Stats. 1921, p. lxxxvii.

This may be thought of as a prohibition with an exception in favor of treaty rights or as a prohibition with two elements in its definition. In either case the legal results are identical. If we take one of the elements of the prohibition to be the acts not sanctioned by appropriate treaty, we still have the other element of the acts enumerated in the statute. Clearly the statute does not forbid everything not sanctioned by treaty. To bring the ineligible alien within its prohibition, it must be shown also that in doing the thing not sanctioned by treaty he may be said to acquire, possess, enjoy or transfer real property or some interest therein.

As a purely verbal matter an alien might be said to possess or enjoy real property without acquiring any technical interest therein. Certainly the additional reference to an "interest" would seem designed to add something to what went before rather than to qualify it. Therefore, even if the word "interest" were to be interpreted in some technical fashion, one who had acquired no technical interest in the land might still have contract rights which enabled him to "possess" or "enjoy" it. On the other hand a technical restriction might be given to the words "possess" and "enjoy" as well as to the word "interest." This in substance is what the California Supreme Court did in *In the Matter of Okahara*<sup>20</sup> decided on June 28, 1923. After holding that the cropping contract there involved did not amount to an interest in the land, Judge Seawell said as to the two other words under consideration:

"'Possess' used in reference to land titles and estates means to own; have as a belonging; property. . . . The word 'enjoy' is one frequently found in instruments of transfer and means to make such use of the thing transferred as is consistent with the tenure by which it is held."<sup>21</sup>

This says that to enjoy requires something more than to have fun with or to have some advantage from; it demands some use incident to some holding of the land. Unless there is some technical holding of the land or technical interest therein, there is no enjoyment within the meaning of the statute; for the phrase "to enjoy" is also a technical word of art. A similar attitude must have been held by the three federal judges who sat in the district court when *O'Brien v. Webb*<sup>22</sup> came before it, for they

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<sup>20</sup> *Supra*, n. 6.

<sup>21</sup> *In the Matter of Okahara* (1923) 66 Cal. Dec. 15, 20.

<sup>22</sup> (1921) 279 Fed. 117.

decided that the cropping contract there involved did not violate the California statute. Thereby they were relieved from passing on the question, whether the statute infringed upon treaty rights or upon the Fourteenth Amendment.

This case came to the Supreme Court of the United States on appeal from the District Court, and in *Webb v. O'Brien*<sup>23</sup> Mr. Justice Butler ordered the reversal of the decision below. It is difficult to tell what was the basis of his action. He considers the California decision in the Okahara Case and undertakes to distinguish it on two grounds. Both grounds seem wholly untenable. Without analysis he says that "the contract in that case differs in important particulars from the one before us."<sup>24</sup> The California Supreme Court, however, in the Okahara Case had declared:

"In form and in substance this contract follows closely a contract considered and upheld by the United States District Court, Northern District of California, in the case of *O'Brien v. Webb, supra*, and we entertain no doubt but that it was patterned after that contract and its drafters were aided by the discussion of the question therein made."<sup>25</sup>

Clearly therefore the California Supreme Court thought that the O'Brien contract and the Okahara contract were alike immune from the California statute. No one contests that a state court's interpretation of a state statute is to be accepted and followed by the Supreme Court of the United States.

To comprehend the other reason which Mr. Justice Butler gives for not following the Okahara Case we should have his words in full. After quoting from the Okahara opinion to the effect that the cropping contract confers no interest in real property, he continues:

"The court held that the contract did not violate § 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but in the view we take of this case, we need not determine whether, within the meaning of the act, the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by § 10, but it is whether appellees have shown they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the state.

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<sup>23</sup> *Supra*, n. 3.

<sup>24</sup> *Webb v. O'Brien* (1923) 263 U. S. 313, 325.

<sup>25</sup> In the Matter of Okahara (1923) 66 Cal. Dec. 15, 18.

The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, enjoyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied."<sup>26</sup>

Here is confusion. From parts of the paragraphs quoted it might be thought that the Supreme Court did not care whether the proposed contract was forbidden by the statute so long as there was no federal right to make such contracts. Then, however, Mr. Justice Butler insists that "the act," meaning plainly the California statute, "denies the privilege because not given by the treaty."<sup>27</sup> The California court, however, holds that the statute does not deny the privilege, even if not given by the treaty, unless it amounts to the enjoyment of an interest in land. On this question the California court is the authorized mentor of the Supreme Court. If, therefore, Mr. Justice Butler in denying the injunction thought that the statute actually forbade the proposed contract, and not merely that the legislature might by some other statute constitutionally forbid it, he is guilty of an obvious blunder.

When Mr. Justice Butler says that "the question in this case is not whether the proposed contract is prohibited by § 10",<sup>28</sup> he seems about to distinguish the Okahara Case on the ground that it involved only the conspiracy section which is confined to a conspiracy "to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof."<sup>29</sup> This would have been unwarranted, for the Okahara Case held very clearly that the conspiracy there involved would not, if fully consummated, have created any possession or enjoyment in violation of the prohibitory clause of section two. This blunder Mr. Justice Butler avoids in favor of the blunder that that statute forbids all contracts not secured to the alien by treaty. If it were not for this one unfortunate sentence introduced in the succeeding paragraph, we should have understood him to go on the ground that the only question was whether the immunity claimed by the alien was secured to him by the Constitution or by treaty. Possibly he meant to base his decision on this ground and intended his final paragraph merely as corroboratory. Let us, then,

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<sup>26</sup> Webb v. O'Brien (1923) 263 U. S. 313, 325-326.

<sup>27</sup> Passage cited in note 26, supra.

<sup>28</sup> Ibid.

<sup>29</sup> Cal. Stats. 1921, p. lxxxix.

cast the mantle of charity over his slip and inquire whether, in spite of it, his judgment denying the injunction is warranted.

It is established that a lower federal court having a case before it on federal grounds may decide the case on a state ground, as the district court did when in *O'Brien v. Webb*<sup>30</sup> it held that the California statute did not forbid the proposed contract. On appeal the Supreme Court also may take its stand on state ground whenever this leads to a desirable disposition of the case. When there is involved a money judgment, the Supreme Court should not sustain a judgment unauthorized by either federal or state law. The *O'Brien* case, however, involved no money judgment. It was a bill to enjoin a state officer from making threats. It was started in the federal court on the ground that the threats were in contravention of the federal Constitution and a national treaty. The Supreme Court found no such contravention. It held, as it was within its power to hold, that the state might frown upon such contracts if it wished. There was therefore no secure right to federal relief against the threats in issue. It seems, then, that the Supreme Court might properly have confined itself to the decision of the federal question and denied the injunction against the state attorney-general, leaving the complainants to fight out in the state courts any remaining state issues. This would have been a sensible enough disposition of the *O'Brien* Case even if at the time of the decision in the Supreme Court the California statute of 1920 was all that applied to the situation. It would have been much more sensible than it was to say erroneously that the statute of 1920 denies the privilege because not given by the treaty.

There is another element in the situation which satisfies us that the Supreme Court perhaps unwittingly blundered into a sensible disposition of the procedural problem in the case. The Act of 1920 was amended by the Act of 1923, approved on June 20, 1923. This explicitly forbids cropping contracts.<sup>31</sup> The *O'Brien* case was argued in the Supreme Court on April 23, 24, 1923. Hence the Supreme Court may not have been aware of the later

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<sup>30</sup> *Supra*, n. 22.

<sup>31</sup> The amendment to section 2 adds the words "cultivate" and "occupy" to those in the Act of 1920, and refers also to having "in whole or in part the beneficial use thereof." Section 8 of the Act of 1923 provides for the forfeiture of "any leasehold or other interest in real property less than a fee, including cropping contracts which are hereby declared to constitute an interest in real property less than the fee." Cal. Stats. 1923, ch. 441, pp. 1020, 1021, 1023.

California statute of June 20, 1923, when it decided the case on November 19, 1923. The statute, however, if duly called to the attention of the Supreme Court, would justify the denial of the injunction. An injunction speaks *in futuro*, and it would do O'Brien and Inouye no good to enjoin General Webb from threatening to enforce the superseded statute of 1920 when he would remain free to enforce the superseding statute of 1923. All that the two complaining gentlemen suffered by any Supreme Court misapprehension was their right to costs.

### III.—THE ALIEN LAND LAWS AND THE TREATY WITH JAPAN

It is elementary that the treaty-making power of the national government may prescribe the privileges of aliens with respect to lands in the United States<sup>32</sup> and that any state statute in conflict with a national treaty is inapplicable.<sup>33</sup> In *Terrace v. Thompson*<sup>34</sup> the Supreme Court interpreted the existing treaty with Japan<sup>35</sup> and found that it conferred no privilege of leasing agricultural land. It does confer the "liberty . . . to lease land for residential and commercial purposes."<sup>36</sup> This by the aid of the maxim *expressio unius exclusio alterius* may readily be taken to negative a liberty to lease land for any other purposes. Of course this maxim is without absolute or universal validity and it has to lock horns with the competing maxim *ex abundantia cautelarum*. The Supreme Court uses now one maxim and now the other as best befits its judgment in the particular controversy. Such is one of the delights of that universal right reason which is the law. The issue is one of judgment rather than of the dictionary or the grammar. In the present cases the judgment of the Supreme Court seems to be a reasonable one and it is enough to quote what it says.<sup>37</sup> It is but a step farther

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<sup>32</sup> *Hauenstein v. Lynham* (1880) 100 U. S. 483, 25 L. Ed. 628.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Supra*, n. 1.

<sup>35</sup> 37 U. S. Stats. at L. 1504-1509.

<sup>36</sup> Quoted in *Terrace v. Thompson* (1923) 263 U. S. 197, 222.

<sup>37</sup> "The only provision that relates to owning or leasing land is in the first paragraph of Article I, which is as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

to affirm in the cropping contract case of *Webb v. O'Brien*<sup>38</sup> that "the treaty gives no permission to enjoy, use or have the benefit of land for agricultural purposes."<sup>39</sup>

#### IV.—THE INHIBITIONS OF THE FOURTEENTH AMENDMENT

The other constitutional issue which these alien land laws raise is whether they deprive any person of rights or privileges secured by the Fourteenth Amendment. It is settled that aliens may invoke

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For the purpose of bringing *Nakatsuka* within the protection of the treaty, the amended complaint alleges that, in addition to being a capable farmer, he is engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, interstate and foreign commerce, and, instead of purchasing such farm products, he has produced, and desires to continue to produce, his own farm products for the purpose of selling them in such wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing farm products for such trade he will be prevented from engaging in trade and the incidents to trade, as he is authorized to do under the treaty.

To prevail on this point, appellants must show conflict between the state act and the treaty. Each State, in the absence of any treaty provision conferring the right, may enact laws prohibiting aliens from owning land within its borders. Unless the right to own or lease land is given by the treaty, no question of conflict can arise. We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or subjects of either in the territories of the other. The right to 'carry on trade' or 'to own or lease and occupy houses, manufactories, warehouses and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade' cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices in our opinion to negative the claim asserted by appellants that it conflicts with the state act.

But if the language left the meaning of its provisions doubtful or obscure, the circumstances of the making of the treaty, as set forth in the opinion of the District Court (*supra*, 844, 845), [274 Fed. 841, 844, 845] would resolve all doubts against the appellants' contention. The letter of Secretary of State Bryan to Viscount Chinda, July 16, 1913, shows that, in accordance with the desire of Japan, the right to own land was not conferred. And it appears that the right to lease land for other than residential and commercial purposes was deliberately withheld by substituting the words of the treaty, 'to lease land for residential and commercial purposes' for the more comprehensive clause contained in the earlier draft of the instrument, namely, "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes." (263 U. S. 197, 222-224.)

<sup>38</sup> *Supra*, n. 3.

<sup>39</sup> 263 U. S. 313, 323. In applying the same conclusion to the right to own stock in an agricultural corporation, Mr. Justice Butler in *Frick v. Webb*, *supra*, n. 2, at page 334 declared: "The right to 'carry on trade' given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties."

the protection of the Amendment<sup>40</sup> although the protection need not necessarily be the same for aliens as for citizens.<sup>41</sup> The laws in question of course deny the legal capacity of citizens to grant as well as that of aliens to receive, and in each of the four cases under review one of the complainants was a citizen. Conceivably it might be held that the restraint upon citizens is unconstitutional even though the aliens may not successfully complain of any frustration of their hopes. To defeat the alien it might be sufficient to show that his alienage disentitles him to the protection claimed. To defeat the citizen it might be necessary to show that there is an adequate public advantage in suppressing alien holdings. Mr. Justice Butler hardly gives adequate consideration to the problem when he confines himself to saying that "the Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease."<sup>42</sup> His circular statement is safe enough, as are all circular statements, but the denial of the complaint of the alien does not necessarily settle that of the citizen.

Though this may smack of somewhat arid logic, no one is likely to contest it in so far as it is confined to the complaint of the alien that he is selected for a discriminatory exclusion in violation of the equal-protection clause. There may be no vice in excluding some aliens rather than all aliens and yet be abundant vice in restraining citizens from making contracts which they deem advantageous. It is clear, therefore, that the rejection of the alien's complaint of unconstitutional discrimination does not get us far. The question still remains why alien ownership of agricultural land, or alien cultivation of such land under a cropping contract present so serious a public menace that citizens may be deprived of the advantages that free bargaining may give them. On this question, we shall seek the judicial light after disposing of the subsidiary issue of discrimination.

#### A.—THE EQUAL-PROTECTION COMPLAINT

The Washington statute sustained in *Terrace v. Thompson*<sup>43</sup> confined its inhibition to aliens who have not in good faith declared

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<sup>40</sup> *Yick Wo v. Hopkins* (1885) 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; *Truax v. Raich* (1915) 239 U. S. 33, 60 L. Ed. 131, 36 Sup. Ct. Rep. 7.

<sup>41</sup> *Patsone v. Pennsylvania* (1914) 232 U. S. 138, 58 L. Ed. 539, 34 Sup. Ct. Rep. 281.

<sup>42</sup> 263 U. S. 197, 221.

<sup>43</sup> *Supra*, n. 1.

their intention to become citizens.<sup>44</sup> The California statute sustained in *Porterfield v. Webb*,<sup>45</sup> *Webb v. O'Brien*<sup>46</sup> and *Frick v. Webb*<sup>47</sup> was still milder and affected only aliens ineligible to citizenship.<sup>48</sup> Both statutes permit some aliens to own and lease land; both, therefore, discriminate against some aliens in favor of other aliens and in favor of all citizens. Neither state regards mere alienage as a sufficient sign of sepsis. Washington diagnoses all alienage as a suspicious symptom and imposes a quarantine until the prophylaxis of first papers. California confines her fears to chronic incurable alienage externally imposed; she sees no menace in a voluntary acute alienage readily remedied by the application of New Thought. Since in neither state is there drawn a sharp line between citizenship and alienage, the discrimination cannot find complete justification in any common-law attitude toward all aliens or in any state power over all aliens. No such power has been exercised. Whatever power the state has over all aliens has been exercised over less than all. If those who have been selected for suffering can complain of the discrimination on the ground that others equally noxious have been more favorably treated, they may rightfully require some other justification than the fact that they are aliens.

Evidently the Supreme Court deems it necessary to justify the favors accorded to other aliens, for Mr. Justice Butler declares that "the inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or against eligible aliens who have failed to declare their intention."<sup>49</sup> He notes earlier that a number of statutes have conferred privileges and imposed duties on declarant eligibles that are not extended to nondeclarant eligibles, and he observes that "the alien's formally declared bona fide intention to renounce forever

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<sup>44</sup> The pertinent sections of the Washington constitution and the Washington statute are quoted in 263 U. S. 197, 212-213.

<sup>45</sup> *Supra*, n. 1.

<sup>46</sup> *Supra*, n. 3.

<sup>47</sup> *Supra*, n. 2.

<sup>48</sup> Section 1 of the statute gives to aliens eligible to citizenship the same powers over real property as those possessed by citizens, "except as otherwise provided by the laws of the state." Section 2 reads as follows:

"All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise." (263 U. S. 225, 232.)

<sup>49</sup> 263 U. S. 197, 219-220.

all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared."<sup>50</sup> If the ineligible cannot complain because citizens are favored, he cannot complain because the favor is extended to the pollywog who will soon become a frog. Obviously he is not discriminated against because the nondeclarant eligible is not favored. Nevertheless, perhaps in anticipation of a future action brought by a nondeclarant eligible, Mr. Justice Butler observes that "it is clearly within the power of the State to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class,"<sup>51</sup> and that "reasons supporting discrimination against aliens who may but who will not naturalize are obvious."<sup>52</sup> These affirmations are preceded by an approving incorporation of a selection from the opinion of the district court. To mere affirmation this adds something of specification when it says:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens."<sup>53</sup>

This apprehension does not unduly exalt the resourcefulness of those who are prone to call themselves 100% Americans. It overlooks the power of Congress to halt immigration in season to save several sections of soil for those who need legislation to help them. One wonders, too, just what is meant by interest in the state and power to work effectually for its welfare. Ineligible aliens could not of course hope to become effective political supporters of the Farm Bloc, and from the standpoint of this group it may be desirable to have the farms in the possession of voters. If the voters are crowded off the farms and become law professors or laborers, their allegiance to the state may take a form different from that of the agricultural group. Yet an increase in the number of

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<sup>50</sup> *Ibid.*, 219.

<sup>51</sup> *Ibid.*, 221.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 220-221.

Japanese farmers does not disfranchise the citizens whom they displace and the ineligible alien can hardly acquire added interest in the state or greater power to work for its welfare by being legislated into landlessness. These judicial affirmations of the "obvious" need to be supplemented by some demonstration or assertion that ineligible aliens and nondeclarant eligibles are more of a menace on the land than in the factory, shop and kitchen. Such assertion appears a little later when Mr. Justice Butler observes that "the quality and allegiance of those who own, occupy and use the farm lands within its border are matters of highest importance and affect the safety and power of the state itself."<sup>54</sup> Again we are not told why. One sees readily that allegiance has a close relation to matters within the scope of national authority, but its peculiar relation to fruit raising is less evident.

If we grant that political reasons justify favoring citizens it is easy to find justification for favoring also those soon to acquire this status. Thus the favorable discrimination in the Washington statute stands or falls with the wisdom of drawing the line between citizens on the one hand and confirmed aliens on the other. Yet if Mr. Justice Butler is justified in saying that "reasons supporting discrimination against aliens who may but who will not naturalize are obvious,"<sup>55</sup> he sets something of a task for himself when he comes to the discrimination against those who cannot become citizens in favor of those who can but do not choose to do so. His monition on the menace of those who have not renounced allegiance to a foreign power makes it hard to justify the favor extended by California to those whose recusance is voluntary. It would be an exaggeration to accord him unstinted praise for his method of meeting the difficulty when, in comparing the Washington and the California favors, he confines himself to saying:

"There the prohibited class was made up of aliens who had not in good faith declared intention to become citizens. The class necessarily includes all ineligible aliens and in addition thereto all eligible aliens who have failed so to declare. In the case before us the prohibited class includes ineligible aliens only. In the matter of classification, the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that the

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<sup>54</sup> *Ibid.*, 221.

<sup>55</sup> *Ibid.*

failure of the California Legislature 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.”<sup>56</sup>

“There’s a Reason”, says the learned Justice, but he seems not to have it so clear in his mind at the moment as to be able to tell us what it is. In *Terrace v. Thompson*,<sup>57</sup> however, in discussing the different discrimination of the Washington statute, he points somewhat more clearly to considerations which might justify California in favoring those who do not choose to naturalize. After observing that the classification in the Washington statute “is based on eligibility and purpose to naturalize”, he continues:

“Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, 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. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants’ contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws,—those who may and those who may not become citizens. 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 as defined in the act.”<sup>58</sup>

This adds to “There’s a Reason” the further admonition: “Ask Congress; it knows.” Doubtless most of the readers of this article who can surmise what Congress might give for reasons will find it in their hearts to respond: “They satisfy.” It is perhaps sufficient here to say that Mr. Justice Butler’s two opinions disclose no satisfactory reasons, since when taken together they destroy the only reason suggested. They proceed along the path of political allegiance. They tell us that it is obvious that one who chooses not to

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<sup>56</sup> In *Porterfield v. Webb*, 263 U. S. 225, 233.

<sup>57</sup> *Supra*, n. 1.

<sup>58</sup> 263 U. S. 197, 220.

be naturalized may be put in the same class as one who cannot be naturalized, and thus imply that the former as a farmer is as much of a menace as the latter. Then they bid us to trust Congress for the conclusion that one who is a voluntary alien may be accorded more favorable treatment than one who is an alien by compulsion. They say that the Japanese in Washington are not discriminated against on account of their race or color because those of other races and other colors who choose not to become naturalized are treated in like fashion. In California they are not treated in like fashion. Here, then, the reason fails. In the opinion in the California case, race and color are not mentioned. They might, however, be mentioned with safety, for they are not mentioned in the Fourteenth Amendment. It is in the Fifteenth Amendment that the words "race" and "color" occur, and there they relate only to the rights of citizens of the United States to vote.

Enough has been said to show the artificiality of seeking to justify the discrimination against ineligible aliens on purely political grounds. If under the equal-protection clause we must, as Mr. Justice Butler seems to assume, justify discriminations that are favorable as well as those that are unfavorable, the political justifications fail when we come to discrimination in favor of aliens who with the opportunity to take steps toward citizenship prefer not to do so. It must seriously be questioned also whether political considerations underlie any of the discriminations in the alien land laws. Incapacity for suffrage can hardly be regarded as a menacing sign of lack of interest in the state or lack of power to work for its welfare when women were so long left unfranchised and yet not thought of as a menace on the land. The state is a community as well as a political entity, and interest in and work for the welfare of the community are not precluded by exclusion from political power as they are not ensured by possession of political power. Foreign allegiance is a bird of different feather, but foreign allegiance is not California's line of demarcation. Moreover it is hard to see how from any distinctly state point of view foreign allegiance is of more significance on the farm than in the mine or factory. There is an incomplete *sequitur* in the assumption that proper canons for the exercise of national power are necessarily proper canons for the exercise of state power.

This is not to say that the canons for the exercise of state power are necessarily different from those for the exercise of national power. It is quite possible that there is something in common in

the test of a desirable citizen and the test of a desirable farmer. It would of course be monstrous for a state to withhold all means of livelihood from aliens whom Congress chooses to admit, as the Supreme Court has fully recognized.<sup>59</sup> Yet it is still open to proof that reasons motivating denial of citizenship may be sufficient reasons for exclusion from certain occupations. A Maryland court was of the opinion that even in 1890 there was a sufficient relation between the Constitution and the liquor traffic so that the legislature might wisely confine saloon-keepers to "those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a Court of Justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness."<sup>60</sup> So it may be with farming. That the President and the Senate have some such idea may be inferred from their failure to include farming in the occupations listed in the Treaty with Japan. Again, however, such reasons can not be deemed purely political. Thus we are still left with our conclusion that Mr. Justice Butler's references to political distinctions afford no adequate justification for California's choice of farming as the one occupation in which noneligible aliens are restricted or for California's favor to the nondeclarant eligible as contrasted with the ineligible.

There is, however, a more fundamental question which remains for answer. Do we need any justification for favorable discrimination? If there are adequate reasons for excluding the noneligible alien, what concern is it of his whether others who might also have been excluded have been left to their own devices? Does the discrimination in favor of others render more onerous the discrimination against him? Some favorable discriminations undoubtedly have this effect. Sometimes a restraint is less irksome if it is more general. Barbers forbidden to work on Sunday can hardly care that legal writers may still ply their trade on that special day, but they may seriously object to an exception in favor of barbers who work in hotels. They may very wisely wish that all possible Sunday shaves be saved for Monday. When the complaint is made on the ground of discrimination, should it not appear that the person restrained is really prejudiced because the restraint is not

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<sup>59</sup> Cases cited in note 40, *supra*.

<sup>60</sup> *Trageser v. Gray* (1890) 73 Md. 250, 254, 20 Atl. 905.

wider? Should one be entitled to relief under the equal-protection clause on the ground of unfavorable discrimination when one would not be a bit happier if the discrimination were removed by making the restraint universal?

From the cases it is clear enough that discriminatory restraint can run afoul of the equal-protection clause even though all that the complainant really objects to is the restraint. Quite often it seems that courts place their decisions on the ground of unconstitutional discrimination where their aversion is really to the restraint on individual liberty and yet the restraint is not such as to make it wanting in due process of law under established precedents. An effort to systematize the decisions under the equal-protection clause is not likely to meet with much success. The cases represent a congeries of particular judgments rather than any uniform line of doctrine. Yet it seems clear that a discriminatory restraint such that the restraint would not be mitigated by extension of it to others requires much less justification than one which imposes additional hurt because of the discrimination. What the ineligible alien really objects to is that he loses desired access to the land rather than that some other aliens do not. When, Sampson-like, he seeks to share his fate with others, he deserves but slight consideration. Mr. Justice Butler's justifications for the favorable treatment accorded to other aliens may not be very good and still be good enough for practical purposes. In the absence of hampering treaties, the alien land laws might be extended to all aliens. It would be going rather far to say that California, because it had done less than it might, had done more than it could.

One discrimination which the ineligible alien did not see fit to complain of is that between agricultural land and other land. Some ingenious advocate might have urged that an ineligible alien suffered an unconstitutional injury under the equal-protection clause because he was restrained only in respect to agricultural land and not in respect to all land. Such an absurdity would hardly be worth mentioning but for the fact that a similar one has had the august sanction of the Supreme Court. In *Truax v. Corrigan*<sup>61</sup> Chief Justice Taft lays down that employers are denied the equal protection of the laws by being foreclosed from enjoining picketing employes when they still may pursue that remedy against others.

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<sup>61</sup> (1921) 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

Certainly the employer is not prejudiced because his loss of injunctive relief is partial rather than complete; and the minority of the court were justified by all the precedents in declaring that the plaintiff can not complain of a discrimination from which he does not suffer. The employer is himself treated differently in different situations and the essence of his equal-protection objection is that he is not treated as harshly in all cases as he is in some. Yet Chief Justice Taft asserts that equal protection means equal protection against all similarly situated as well as for all similarly situated. This is one of the clearest cases in which an inhibition disliked for intrinsic reasons not sufficient to declare it unconstitutional under the due-process clause is found wanting under the equal-protection clause on fantastic reasoning. In logic this was no more absurd than it would have been to grant the ineligible alien relief under the equal-protection clause because he suffers only in respect to agricultural land rather than in respect to all land. It certainly would have been unwarranted for the court to have pursued such logic for the benefit of those who lack "interest in, and the power to effectually work for the welfare of, the state."

It may be questioned whether the equal-protection issue was worth the preponderant attention which it receives in Mr. Justice Butler's opinions. His discussion follows a terse rejection of the due-process complaint. This is by far the more fundamental one from the standpoint of the suffering alien. His interest in what happens to him is far more vital than his interest in what does not happen to somebody else. It is clear enough that citizens could not be kept from acquiring an interest in agricultural land. Once it is established that an alien has no due-process objection to such exclusion, the discrimination against him in favor of citizens is readily justified. It needs but little additional justification to sustain the discrimination in favor of embryo citizens. Yet Mr. Justice Butler adduces reasons of a political character which fail completely when he comes to the discrimination in favor of aliens who might renounce their foreign allegiance but do not choose to do so. In so doing he calls in question the character of the political justification on which the due-process issue was decided. He invites inquiry whether the reason relied on to justify the discrimination and the restraint was the real reason motivating the legislation or merely a fortunate excuse.

## B.—THE DUE-PROCESS OBJECTION

If the canons of equal-protection are amorphous, those of due-process are almost equally so. The problem in each case is one of comparing the detriment to the individual with the benefit to the public. If the injury is slight the compensating benefit need not be so great as where the injury is more serious. So, too, if the legal quality of the individual interest is precarious, it requires less justification to curb it or qualify it than it does to deal adversely with an interest of higher legal order. Thus corporations which depend for their continued existence on the grace of the state have less protection against burdensome regulation than does an individual. Inheritances which might be prohibited may be taxed more whimsically than property generally. Drastic regulations of foreign commerce are sustained where equally drastic regulations of interstate commerce would be seriously suspected, since Congress might put an embargo on all foreign commerce but not on all interstate commerce. In pre-arid times it was fully recognized that the power to forbid the liquor traffic carried with it a power to impose all sorts of drastic and vexatious restrictions on any traffic that was permitted. Where the enterprise or the enterpriser is in a general state of constitutional insecurity, courts are not very fussy in finding justification for restraints less onerous than others that might constitutionally be imposed. Thus constitutional complaints are sometimes dismissed because the complainant is not entitled to much consideration, without any careful inquiry into the question whether what has been done to him has sufficient inherent justifications of its own.

In this class of cases fall those with which we are now dealing. The alien was something of a pariah at common law and it has always been assumed in this country that "each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."<sup>62</sup> This recital leads Mr. Justice Butler easily to the affirmation that "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."<sup>63</sup> This rests the due-process part of the decision solely on the inherent weakness in the position of the alien. It is only when

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<sup>62</sup> *Terrace v. Thompson* (1923) 263 U. S. 197, 217.

<sup>63</sup> *Ibid.*, 218.

Mr. Justice Butler comes to the consideration of the equal-protection question and to the dismissal of *Truax v. Raich*<sup>64</sup> that he adduces the consideration that "the quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."<sup>65</sup> We have already dealt with the inadequacy of this as a justification for the California discrimination in favor of nondeclearant eligible aliens. Its weakness in that connection has slight, if any, bearing upon the due-process complaint of the noneligible alien. If the alien is really a menace on the farm, it does not matter from a due-process standpoint that California has refrained for the moment from dealing with all the menace that it might. Legislation is not wanting in due process of law merely because it is less general or less complete than it might be.

A tight technician might see added difficulties in the restraint on alien ownership of stock in corporations authorized to own agricultural land, which was sustained in *Frick v. Webb*.<sup>66</sup> Are we not assured that the property of the corporation is wholly distinct from the property of the stockholder? Are we not frequently warned of the danger and the confusion which will result if we intrusively pierce the veil of the corporate entity? We are. Still the courts do it whenever they think it is a good thing to do. Jural prestidigitation finds this one of the easiest exemplifications of "Now you see it, now you don't." No logical difficulties disturb the performer of the feat. The manipulation is a simple exercise of judgment and of will. Nothing more was needed in the present case than Mr. Justice Butler's two assertions that "as the state has the power to . . . prohibit, it may adopt such measures as are reasonably appropriate and needful to render exercise of that power effective"<sup>67</sup> and that "it may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens."<sup>68</sup> With this there can be no legitimate quarrel. It would certainly be absurd to characterize alien landholding as a menace and then to find in the sheerest of technicalities an insuperable due-process objection to a statute which is essential if the menace is to be suppressed.

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<sup>64</sup> *Supra*, n. 8.

<sup>65</sup> *Terrace v. Thompson* (1923) 263 U. S. 197, 221.

<sup>66</sup> *Supra*, n. 2.

<sup>67</sup> *Frick v. Webb* (1923) 263 U. S. 326, 333, quoted from *Crane v. Campbell* (1917) 245 U. S. 304, 307, 62 L. Ed. 304, 38 Sup. Ct. Rep. 98.

<sup>68</sup> *Frick v. Webb* (1923) 263 U. S. 326, 334.

The more difficult due-process question was presented by the cropping-contract case of *Webb v. O'Brien*.<sup>69</sup> Mr. Justice Butler treats it as follows:

"The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. The case differs from *Truax v. Raich*, 239 U. S. 33. In that case, a statute of Arizona making it a criminal offense for an employer of more than five workers, regardless of kind or class of work or sex of workers, to employ less than eighty per cent. native born citizens of the United States was held to infringe the right, secured by the Fourteenth Amendment, of a resident alien to work in a common occupation—cooking in a restaurant. The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farmlands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the State directly affects its strength and safety. *Terrace v. Thompson*, *supra*. We think it within the power of the state to deny to ineligible aliens the privilege so to use agricultural lands within its borders."<sup>70</sup>

With the difference to the alien between being excluded from one occupation and being excluded from all, we may be satisfied without further comment. The difference between the cropping contract and contracts of employment generally is equally manifest. The difference, like most differences, is one of degree; but it is one of considerable degree. The alien's constitutional position may be strong enough to save him from state-imposed starvation and still be weak enough to afford him no refuge from interdiction of certain forms of agricultural enterprise.

Distinctions, however, should be more than stated. They should be analyzed and justified. Mr. Justice Butler's declaratory diction

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<sup>69</sup> *Supra*, n. 3.

<sup>70</sup> *Webb v. O'Brien* (1923) 263 U. S. 313, 324.

does not venture into these further enterprises. This "take-it-from-me" temper has more justification in opinions sustaining legislation than in opinions declaring statutes unconstitutional, but it still has something of an unsatisfactory flavor. We must wonder why the question of allegiance has anything to do with the case when those whose un-allegiance or perhaps dis-allegiance is voluntary are left without restraint and when those restrained from farming are left free for other pursuits. We must wonder what is the ineligible alien's peculiarly defective qualification for farming as compared with other occupations. Mr. Justice Butler gives no hint that ineligible aliens are such mal-adroit cultivators of the soil that they are likely to turn it into waste places and in consequence to become charges on public charity. In short, he tells us substantially nothing that can be dignified by the name of a reason. We get our only helpful pointers from the reference to the canons chosen by Congress in designating ineligible aliens and from the fact that the treaty-making power has put agricultural enterprise in a class by itself.

If the Supreme Court chooses to refuse to satisfy the curiosity of Californians, I may be pardoned for following its example. It would be ungracious for a visitor to suggest that a substantial justification for the particular picking on farming might be that the ineligible alien is competent rather than incompetent. No one unfamiliar with local conditions would be fitted to pass judgment on such a matter. Yet one who is curious about constitutional issues might well wish to speculate on the hypothetical question whether the police power of the state extends to excluding a class from some pursuit for the reason that in that particular calling they have shown themselves unusually efficient. Our anti-trust legislation has behind it the idea that there may be a menace in extreme effectiveness in individually successful methods of competitive enterprise. Much of our labor legislation proceeds upon a recognition that the economically strong must be curbed for the protection of the economically weak. Legislation against fraud restrains those with a type of superior endowment for the benefit of others who lack the acumen to perceive the wiles of the smart. A protective tariff seeks to bolster up the weak by putting barriers against the strong. Even in horse racing we put weights upon the fleet. An aversion to letting the devil take the hindmost is common in legislation as in life. This is often sought to be justified or rationalized by a profession that it springs from no mawkish sentimentality for the hindmost but from a conviction that the welfare of the hindmost is vital to

the welfare of us all. Hence our hypothetical constitutional question will find legislative and judicial precedents in favor of an affirmative answer. If such an answer be given, it is in turn a precedent for other legislation such as a minimum-wage law which has behind it a widely felt need that the general public welfare is served by protecting those with inferior bargaining power from the bargains which those with superior power might induce.

In so far as the restraint upon the alien is justifiable merely because of his alienage, these other considerations need not enter. Yet it seems that some genuine realistic menace should be found in the inhibited form of alien cultivation in order to justify the restraint upon citizens who lose the opportunity to contract as they desire. Freedom of contract has been so exalted in some recent Supreme Court opinions and is so often extolled as one of the inalienable and fundamental constitutional rights of American citizens that Messrs. Terrace, Porterfield, O'Brien and Frick may well be wondering why Mr. Justice Butler has given them no better reasons for the frustration of their hopes. Perhaps in their hearts they know, without being told. If perchance their self interest blinds them to a full realization, there may still be others who appreciate the significance and the weight of possible considerations underlying the recent Supreme Court judgments which failed to find expression in the opinions. These considerations are not a fine flowering of a secure constitutional concept of liberty of contract. The cases recognize that important social ends may sometimes be better served by restraint of contract than by liberty of contract. The land legislation before us is of the type often denounced as socialistic. It is restraint upon individuals for an assumed general good. So is practically all legislation. Perhaps a fuller realization of this in connection with legislation widely welcome may serve to shut off some of the loose talk about similar legislation less pleasing. It may thereby turn us from denunciatory shibboleths to a more careful and more practical analysis of the competing benefits and burdens and the contending merits and defects to be found in other legislation which comes before us for judgment.

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