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Becky Lynn Bowen

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In 1976 the Wisconsin Supreme Court upheld the constitutionality of the Wisconsin Alien Land Law in *Lehndorff Geneva, Inc. v. Warren.*[1] The principal question in this case involved the validity of the state's classification scheme distinguishing the right of resident aliens to purchase real property from that of non-resident aliens. Concluding that the classification was not an "unreasonable" one because these two classes of aliens have substantially different economic and political interests, the court held that the classification did not violate the equal protection clause of the fourteenth amendment and that the Alien Land Law was therefore constitutionally valid.

Lehndorff Geneva, Inc. (LGI) is a Texas corporation whose entire stock is held by West German citizens. As general partner in Lehndorff Farms, Inc., a West German limited partnership which held options to purchase property in the state of Wisconsin, it sought a declaratory judgment as to the validity of section 710.02 of the Wisconsin statutes.[2] This statute limits the purchase of real property by non-resident aliens and by corporations twenty percent of whose stock is held by non-resident aliens to no more than 640 acres. Any purchase in excess of that results in automatic forfeiture to the state. LGI argued that the statute violated the constitutions of Wisconsin[3] and the United States[4] and contravened the Treaty of Friendship, Commerce and Navigation (FCN) between the United States and West Germany.[5]

LGI posed three questions regarding the Wisconsin statute: (1) Did it apply to limited partnerships? (2) How did the treaty with West Germany affect it? (3) Did it violate the equal protection clause? The Wisconsin court dispensed with the first question by holding that the statute not

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[1] 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

[2] Wis. Stat. § 710.02 (1977).

[3] Wis. Const. art. 1, § 1.

[4] U.S. Const. amend. XIV, § 1.

[5] Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter cited as FCN Treaty].

only limited the right of individuals, corporations and associations to hold real property, but also limited the right of limited partnerships to do so as well. The court reasoned that when the Wisconsin legislature enacted the Alien Land Law in 1887 it clearly intended to restrict the sale of Wisconsin land to all foreign individuals and companies. As late as 1975 the Wisconsin legislature had reaffirmed that sentiment by refusing to abolish the law. Though LGI made strong policy arguments citing the statute's incompatibility with Wisconsin's efforts overseas to encourage foreign investment within the state, these arguments did not convince the court to invalidate the legislation.

The U.S. Constitution provided the basis for the Wisconsin court's holding that the FCN treaty with West Germany did not affect the enforcement of the statute. Under Article VI, any treaty made between the United States and a foreign government is the "Supreme Law of the Land," binding upon all constitutions, laws and courts of the individual states.[6] The express terms of the treaty determine whether it governs the question before the court. Article VII, section 1 of the FCN treaty provides "national treatment" to foreign nations and companies "engaging in all types of commercial, industrial, financial and other activity for gain."[7] Although this clause alone could allow any number of types of foreign investment, a further reading reveals that the treaty does place some restrictions on West German buying power in the United States. Article VII, section 2 grants each party the right to limit those activities conducted for gain and, more specifically, the right to limit "exploitation of land or other natural resources."[8] Article IX deals even more specifically with the issue at hand by providing aliens with "national treatment with respect to *leasing* land, buildings, and other real property"[9] and with "other rights in real property permitted by the *applicable* laws of such other party."[10] Importantly for the present case, the treaty fails to deal specifically with the sale of real property. This omission renders state law on the issue controlling.

The regulation of real property conveyance is a matter for state law. The U.S. Supreme Court has said, "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated."[11] Unless a treaty in some manner proscribes this power, a state's regulation of its property is subject to little federal control. The only federal enactments which regulate real property ownership in any manner are the Alien Property

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[6] U.S. CONST. art. VI, cl. 2.

[7] FCN Treaty, art. 7, § 1.

[8] *Id.* § 2.

[9] *Id.* art. 9, § 1(a) (emphasis added).

[10] *Id.* § 1(b) (emphasis added).

[11] McCormick v. Sullivan, 23 U.S. (10 Wheat.) 192, 202 (1825).The Court's use of *country* was a reference to the *state* of Virginia.

Custodian Regulations[12] and the Foreign Assets Control Regulations.[13] These regulations have only the limited authority to control the property rights of enemy or hostile aliens.[14]

The Wisconsin court cited a treaty with the Netherlands to support its position on state autonomy in land law.[15] Under its provisions, the Dutch government would not restrict the sale of land to citizens of U.S. states which similarly do not restrict sales to foreigners; but to citizens of states which restrict land sales on the basis of alienage, the Dutch government could likewise restrict its sales.[16] The treaty with the Netherlands thus implicitly accepts the fact that each individual state has the power to regulate the privilege of foreigners to purchase land. By holding that the statute did not contravene the treaty with West Germany, the Wisconsin court intended to assert and preserve Wisconsin's autonomy in the regulation and sale of real property.

A number of cases not cited by the Wisconsin court support this strict interpretation of the FCN treaty. In *Terrace v. Thompson*[17] the U.S. Supreme Court held that "unless the right to own or lease land is given by the treaty, no question of conflict [between state law and treaty] can arise."[18] Similarly in *Frick v. Webb*[19] the Supreme Court reaffirmed the power of the individual states to "forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens"[20] so long as a treaty did not specifically accord aliens those rights. The FCN treaty with West Germany fails to grant non-resident aliens the right to purchase property in the United States. Since the treaty therefore does not conflict with state regulation of land conveyance, it follows that Wisconsin may restrict the sale of its land to aliens in any manner it chooses.

This broad conclusion by the Wisconsin court left LGI's final and most important argument, the constitutionality of the statute. For over half a century state legislatures have argued about whether or not a state law limiting the sale of land to certain persons violates the equal protection clause of the fourteenth amendment. In 1953 California led the vanguard in abolishing these restrictive land laws. Largely relying on the U.S. Supreme Court's holding in *Shelley v. Kraemer*[21] that

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[12] 8 C.F.R. pts. 501-10 (1977).

[13] 31 C.F.R. pt. 500 (1976).

[14] *See* Morrison, *Limitations on Alien Investment in American Real Estate,* 60 MINN. L. REV. 621, 629 (1976).

[15] 74 Wis. 2d at 376, 246 N.W.2d at 821.

[16] Treaty of Friendship, Commerce and Navigation, Mar. 26, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942, art. IX, para. 1, 2.

[17] 263 U.S. 197 (1923).

[18] *Id.* at 223.

[19] 263 U.S. 326 (1923).

[20] *Id.* at 334.

[21] 334 U.S. 1 (1947). The U.S. Supreme Court held that covenants restricting the sale of property based on race or color were unconstitutional.

restrictions based on race or color were unconstitutional, the California Supreme Court held in *Sei Fujii v. State*[22] that since its Alien Land Law primarily restricted the sale of land to Orientals, it was discriminatory on the basis of race as well as alienage. However, the California decision can be distinguished on this point from the present case. Since section 710.02 discriminates solely on the basis of alienage and not race, *Shelley v. Kraemer* does not determine its constitutionality. In assessing the validity of its Alien Land Law, the Wisconsin court therefore focused on the treatment of aliens alone.

The U.S. Supreme Court's decision in *Truax v. Raich*[23] was the first to challenge the power of a state to regulate its aliens. In that case an Arizona statute prohibiting employers from hiring less than eighty percent native Americans forced Raich, an Austrian cook, to leave his place of employment. The Court struck down the statute and held: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."[24] Citing *Yick Wo v. Hopkins*,[25] the court further contended that the due process and equal protection clauses of the fourteenth amendment were "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color or of nationality; and the equal protection of the laws [was] a pledge of the protection of equal laws."[26]

In 1948 two cases further undermined state regulation of alien rights. The U.S. Supreme Court held in *Oyama v. California*[27] that a U.S. born child could not be statutorily barred from receiving a gift of land from his ineligible alien parents. In *Takahashi v. Fish & Game Commission*,[28] where California had denied an ineligible alien the issuance of a fishing license, the Supreme Court held that "the power of a state to apply its laws exclusively to its alien inhabitants as a class was confined within narrow limits."[29] California based its restrictive fishing licensing on federal naturalization classifications and concluded that ineligible aliens could not fish in California waters. The Supreme Court held this practice to be a misapplication of the immigration and naturalization laws, because they were intended largely to allow the deportation of aliens likely to become "public charges" (paupers, professional beggars,

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[22] 38 Cal.2d 718, 242 P.2d 617 (1952).
[23] 239 U.S. 33 (1915).
[24] *Id.* at 42.
[25] 118 U.S. 356 (1886).
[26] 239 U.S. at 39.
[27] 332 U.S. 633 (1948).
[28] 334 U.S. 410 (1948).
[29] *Id.* at 420.

or vagrants).[30] Thus federal naturalization classifications were not automatically appropriate for purposes of state legislation.

If the federal naturalization classifications were improper for state use, the question remained as to what standard should be used for purposes of state legislation. In 1944 the Supreme Court stated in *Korematsu v. United States*[31] that any classification based on race or color alone would be "immediately suspect" and subject "to the most rigid scrutiny."[32] In abolishing the California Alien Land Law *Sei Fujii* necessarily extended that scrutiny to classifications based on alienage. Thus the Wisconsin Alien Land Law is also subject to close judicial scrutiny.

The Wisconsin court cited several U.S. Supreme Court cases supporting close judicial scrutiny of classification schemes based on alienage. *Graham v. Richardson*[33] involved Arizona and Pennsylvania statutes which contained minimum residency requirements for aliens receiving welfare benefits. The Supreme Court held these provisions unconstitutional for depriving aliens of basic needs similar to those discussed in *Truax*. As a class aliens were a "prime example of a 'discrete and insular' minority"[34] in need of public assistance. The Court reasoned that since aliens had to serve in the armed forces and pay taxes, both burdens of U.S. citizenship, they should receive the benefits as well.

In *Shapiro v. Thompson*[35] the Supreme Court recognized the right of interstate travel. Prior to *Shapiro* a question existed as to whether interstate movement was a privilege or a right. If the Court determined it a privilege, the state would have greater discretion in regulating interstate movement; if, however, it were a right, the equal protection clause would be immediately invoked to invalidate any state restriction. *Shapiro* eliminated the confusion by abolishing this distinction with regard to welfare benefits. Nonetheless the Court asserted that a state should not attempt to regulate a right in an effort merely to preserve the "fiscal integrity of its own programs. It may legitimately attempt to limit its expenditures. ... But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens."[36]

The Supreme Court in *Sugarman v. Dougall*[37] found that the New York statute requiring minimum residency for employment with the civil service violated the equal protection clause. However Justice Rehnquist in his dissent also recognized certain exceptions as instances when an alien could not invoke this constitutional provision. He noted eleven instances in which the Constitution clearly distinguishes citizens

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[30] 8 U.S.C. § 1182(a)(8), 1182(a)(15) (1970).
[31] 323 U.S. 214 (1944).
[32] *Id.* at 216.
[33] 403 U.S. 365 (1971).
[34] *Id.* at 372.
[35] 394 U.S. 618 (1969).
[36] *Id.* at 633.
[37] 413 U.S. 634 (1973).

from aliens, including election to public office and the uniform rule of naturalization. In his opinion these distinctions were not superfluous, but were included for the purposes of national security.[38]

The dissenting opinion in *Sugarman* laid the groundwork for the most recent Supreme Court decision cited by the Wisconsin court, *Mathews v. Diaz*.[39] In this case a federal medical insurance program contained a minimum residency requirement similar to those in the above three cases. The Court held that this requirement did not violate the equal protection clause. One possible reason that the Supreme Court distinguished *Diaz* from the earlier cases was that it involved a federal rather than state program. Since the federal government has greater discretion over alien regulation than the states through its naturalization and immigration laws, it may further exercise this authority in its other programs as well. The Court suggested a second and more plausible reason for upholding a statute discriminating within the class of aliens:

> In short it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence .... But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not.[40]

Affinity with the United States is thus a substantial factor in upholding statutory discrimination among aliens. Whereas aliens already residing in a state have shown that affinity by their prolonged period of residency, aliens having just arrived in the state do not. The restrictions in *Graham, Shapiro* and *Sugarman* were held unconstitutional largely because they served to discourage entry into or continued residency in the individual states. By denying aliens the right to work, to move and ultimately to survive in the various states, these restrictions made fulfillment of a required period of residency almost impossible. The denial of federal medical insurance benefits in *Mathews*, however, would not have such a detrimental effect. The Court reasoned that since aliens applying for these benefits would already be settled in one of the states, limiting federal benefits would not serve to discourage their continued residency in that state. A minimum period of residency for aliens for the receipt of federal medical insurance benefits was therefore constitutional.

Although *Shapiro* abolished the distinction between a privilege and a right with respect to welfare benefits, the *Mathews* affinity requirement for federal programs is similar to the "special public interest doctrine,"

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[38] *Id.*

[39] 426 U.S. 67 (1976).

[40] *Id.* at 82-83.

which created the distinction between privilege and right for state purposes. In 1915 Justice Cardozo said:

> To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.... The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship.[41]

Arguably resident aliens who have the required affinity under *Mathews* impliedly also contribute to the advancement and profit of the state's citizenry. The "special public interest doctrine" espoused by Justice Cardozo therefore continues to enjoy some validity. Under this doctrine the test for constitutionality is one of reasonableness.

So long as the discrimination within a statutory classification scheme is not arbitrary, a state may restrict not only the granting of privileges but by extension the granting of rights as well. The Wisconsin court adopted this view by citing several of its own cases supporting statutory classification schemes. *State v. Morgan,*[42] a 1966 case involving alleged discrimination against persons under the age of sixty-five, concluded that the tax break afforded the elderly was a clear example of a statutory classification based on a "regard for the public good" and worthy of "substantially different legislative treatment." In *State v. Ewald*[43] the Wisconsin court held that if the classification was a "natural and reasonable one" it did not violate the equal protection guarantee. Finally in *Simanco, Inc. v. Wisconsin Dept. of Revenue,*[44] again involving tax breaks, the court recognized "that the equal protection clause, unless apparent misclassifications [were] gross indeed, [was] of little moment in determining the constitutionality of a state tax."[45] So long as the classification is "neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there was no denial of the equal protection of the law."[46]

In the present case the state argued that absentee ownership was potentially detrimental to the welfare of the community. The Wisconsin court agreed that "limiting the benefits of land ownership to those who share in the responsibilities and interests of residency [was] not an

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[41] People v. Crane, 214 N.Y. 154, 108 N.E. 427 (Ct. App. 1915).

[42] 30 Wis. 2d 1, 139 N.W.2d 585 (1966).

[43] 63 Wis. 2d 165, 216 N.W.2d 213 (1974). In this case the alleged discrimination was against the male sex in the statutory definition of rape.

[44] 57 Wis. 2d 47, 203 N.W.2d 648 (1973).

[45] *Id.* at 55, 203 N.W.2d at 652.

[46] Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1909).

unreasonable exercise of legislative choice."[47] Basing its decision primarily on economic considerations, the court concluded that the statutory discrimination between resident and non-resident aliens was constitutional. Whereas a resident alien contributes to the advancement and profit of the community, a non-resident alien does not.

The foregoing analysis by the Wisconsin court has a firm foundation in federal case law and yet fails to answer directly the crucial issue raised by the case. Citing the 1975 vote of the Wisconsin legislature not to repeal the Alien Land Law, the court broadly asserted that such discrimination is reasonable but never treated the issue of why absentee ownership should be considered detrimental to the community. This omission is a substantial error by the court since a blanket assumption of reasonableness fails to uncover possible prejudices which might make the law unconstitutional. In *Sei Fujii,* the California court abolished, because of such underlying prejudices, its Alien Land Law.[48] Upon reviewing the grounds for enacting the law the California court determined in that case that racial prejudice had played the major role. Had the Wisconsin court gone further to discover the ground for the law's enactment, it might have found that considerations other than sound economic policy had motivated the legislature. In this sense the Wisconsin court's decision leaves the "reasonableness" of the statutory discrimination against non-resident aliens in doubt.

— BECKY LYNN BOWEN

[47] 74 Wis. 2d at 388, 246 N.W.2d at 825.

[48] Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).