The End of California's Anti-Asian Alien Land Law: A Case Study in Reparations and Transitional Justice

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ABSTRACT

For nearly a century, California law embodied a rabid anti-Asian policy, which included school segregation, discriminatory law enforcement, a prohibition on marriage with Whites, denial of voting rights, and imposition of many other hardships. The Alien Land Law was a California innovation, copied in over a dozen other states. The Alien Land Law, targeting Japanese but applying to Chinese, Koreans, South Asians, and others, denied the right to own land to noncitizens who were racially ineligible to naturalize, that is, who were not White or Black. After World War II, California's policy abruptly reversed. Years before Brown v. Board of Education, California courts became leaders in ending Jim Crow. In 1951, the California legislature voluntarily voted to pay reparations to people whose land had been escheated under the Alien Land Law. This article describes the enactment and effect of the reparations laws. It also describes the surprisingly benevolent treatment by courts of lawsuits undoing the secret trusts and other arrangements for land ownership intended to evade the Alien Land Law. But ultimately, the Alien Land Law precedent may be melancholy. California has not paid reparations to other groups who also have conclusive claims of mistreatment. Reparations in part were driven by geopolitical concerns arising from the Cold War and the hot war in Korea. In addition, anti-Asian immigration policy had succeeded in halting Japanese and other Asian immigration to the United States. Accordingly, one explanation for this remarkable act was that there was room for generosity to a handful of landowners with no concern that the overall racial arrangement might be compromised.

DOI: https://doi.org/10.15779/Z383775W4G

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INTRODUCTION

From the earliest days of statehood, California had a policy of driving out Asian people. California law used a variety of techniques to oppress Asians, from direct controls on immigration,[1] prohibition of employment of "Mongolians,"[2] discriminatory licensure,[3] testimonial disqualification,[4] and the traditional Jim Crow methods of selective enforcement of facially neutral laws,[5] school segregation,[6] prohibition of interracial marriages,[7] and denial of voting rights.[8] California also encouraged the federal government to enact, enforce, and strengthen Asian Exclusion from immigration. Denial of land ownership and other economic opportunities was another important part of anti-Asian policy.[9]

California's Alien Land Law was a model for the nation, adopted in as many as 15 states, from Delaware to Oregon.[10] Although the existence of land laws is well known, their end has gone almost unnoticed in the legal literature.[11] As this article explains, years before *Brown v. Board of Education*,[12] when public and private racial discrimination were perfectly legal in many spheres of American life, California in 1951 reversed course and paid reparations to Asian Californians whose land it had taken by

1. Lin Sing v. Washburn, 20 Cal. 534, 577-78 (1862) (striking down California tax on Chinese designed to prevent their migration).

2. *In re* Tiburcio Parrott, 1 F. 481, 485 (C.C.D. Cal. 1880) (statute prohibiting corporations from employing "Mongolians" invalid).

3. *In re* Chang, 24 P. 156 (Cal. 1890) (noncitizens of Chinese race ineligible for bar admission), *abrogated by In re* Chang, 344 P.3d 288 (Cal. 2015).

4. People v. Hall, 4 Cal. 399 (1854) (Chinese people may not testify against White persons).

5. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

6. Tape v. Hurley, 6 P. 129, 129 (Cal. 1885). *See also* Joyce Kuo, Note, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 181 (1998).

7. Perez v. Lippold, 198 P.2d 17 (Cal. 1948) (invalidating anti-miscegenation law).

8. CAL. CONST. of 1879, art. II, § 1 ("no native of China, no idiot, insane person, or person convicted of any infamous crime . . . shall ever exercise the privileges of an elector.").

9. *See generally* Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271 (2020).

10. *Id*. at 1293 (citing Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947)). *See also* Bruce A. Castleman, *California's Alien Land Laws*, 7 W. LEG. HIST. 25 (1994); Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 152 (1999). For an insightful discussion of the effects of the laws, see Masao Suzuki, *Important or Impotent? Taking Another Look at the 1920 California Alien Land Law*, 64 J. ECON. HIST. 125 (2004) https://www.jstor.org/stable/3874944 [https://perma.cc/3Y2X-QYU9]. *See also* CECELIA TSU, GARDEN OF THE WORLD: ASIAN IMMIGRANTS AND THE MAKING OF AGRICULTURE IN CALIFORNIA'S SANTA CLARA VALLEY, chapters 4-5 (2013).

11. One exception in the history literature is Mark Brilliant, who discussed reparations in his history of civil rights reform in the era. MARK BRILLIANT, THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978 132 (2010).

12. 347 U.S. 483 (1954).

"escheat" under the Alien Land Law.[13] The repudiation of the Alien Land Law came not only from the courts, but also from the voters, who declined to ratify it in a referendum, and from the legislature, which authorized payments even though it was not legally required to do so, and even in the face of some doubt that it had the power.

In later years, California and federal courts had to address the aftermath of the Alien Land Law. When the Alien Land Law was in effect and enforced, Asians developed stratagems to control land while avoiding escheat. Subsequently, family members and business partners insisted that technical, legal owners were not necessarily the true beneficial owners. Instead, some claimed, land had been placed in the names of straw owners, or held in secret trusts, in order to allow Asians to own or control land. After the Alien Land Law was invalidated, they wanted the law to give effect to the true arrangement, even though it had been implemented to frustrate laws which were valid at the time of the transaction. Under the doctrine of "illegal contracts," courts generally do not aid parties to crimes. Yet, all courts facing such claims apparently agreed that the techniques were legitimate efforts to evade invalid laws, and gave effect to secret, previously illegal arrangements.

Part I discusses the California Alien Land Laws and their treatment in the Supreme Court. It also discusses the reparations campaign of the Japanese American community, the changing views of lawmakers, and the reaction to historical events that made reparations possible. Part II analyzes the end of the laws, and the legislature's decision to pay reparations. Part III discusses the tax and trust consequences resulting from strategies employed by Asians to avoid the consequences of the law, such as holding property in the names of straw buyers.

I. CALIFORNIA'S ANTI-ASIAN ALIEN LAND LAWS.

The rights of non-Whites to own real property in the United States have always proved precarious. As for tribal nations, the right of indigenous people to hold their land was subject to the pleasure of the national government.[14] In the Nineteenth Century, the Homestead Acts and their predecessors distributed federal land using racial classifications; in a bitter

13. Escheat is the name for the legal doctrine by which the government takes title to real or person property when there is no legitimate owner. *See, e.g,* Hamilton v. Brown, 161 U.S. 256, 263 (1896) ("In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."); Mkt. St. Ry. Co. v. R.R. Comm'n, 171 P.2d 875, 884 (Cal. 1946) ("Although a state may by statute claim abandoned or unclaimed property, in the absence of an appropriate statute of escheat, title is acquired by the first occupant, or by the first finder, who reduces it to possession.") (citations omitted).

14. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2007); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century Lift Your Weapons*, 40 ARIZ. L. REV. 425, 427 (1998).

irony, although much of the land had been taken from native people, they were often ineligible to participate in the land giveaways.[15] Although the Court struck down racial zoning targeting African Americans,[16] some states resisted,[17] and in any event messages were sent.[18] Many individuals of disfavored races and religions were denied the right to own land through racially restrictive covenants.[19] In the 20th century, discrimination dispossessed many Black farmers from their land.[20] Racial discrimination in federal loans and other aspects of housing policy is now well known.[21]

Asian immigrants and their descendants bore a burden tailored to them in particular. In the late 19th century through the mid-20th century, California and many other states were hostile to immigration from Asia, yet sought White immigrants. A complementary network of federal and state law restricted their presence and economic activity. To encourage Whites while excluding Asians, states borrowed from federal naturalization law, which was racially restrictive between 1790 and 1952.[22] Under the Naturalization Act of 1790, "free white persons" were invited to become citizens.[23] In1870, persons of African nativity and descent were made eligible.[24] In 1934, Justice Cardozo wrote for a unanimous Court: "'White persons,' within the meaning

15. Kribs v. Millen, 20 Pub. Lands Dec. 300, 302, 1895 WL 890, at *3 ("half breed Indian" was "not entitled to the provisions of the general homestead law"). However, some statutes did treat "half breed Indians" as White. *Claim of Daniel F. Bradford*, 10 U.S. Op. Atty. Gen. 380 (1862) (discussing statute granting privileges to "every white settler or occupant of the public lands, American half-breed Indians included").

16. Buchanan v. Warley, 245 U.S. 60 (1917).

17. *See* City of Richmond v. Deans, 37 F.2d 712, 713 (4th Cir.) (invalidating segregation ordinance even though "zoning ordinance here under consideration bases its interdiction on the legal prohibition of intermarriage and not on race or color"), *aff'd per curiam*, 281 U.S. 704 (1930); Tyler v. Harmon, 104 So. 200, 200 (La. 1925) (upholding "ordinance of the city of New Orleans, providing for segregation of the residences of white and colored persons"), *adhered to*, 107 So. 704, 705 (La. 1926), *rev'd per curiam*, 273 U.S. 668 (1927). *See also* Jones v. Oklahoma City, 78 F.2d 860 (10th Cir. 1935) (although prosecuted, defendants failed to successfully invoke federal jurisdiction for challenge to comprehensive segregation statute).

18. JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013).

19. RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013); CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1967).

20. PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICANS IN THE AGE OF CIVIL RIGHTS (2013); Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. 894 (2016).

21. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). *See also, e.g.*, GENE SLATER, FREEDOM TO DISCRIMINATE: HOW REALTORS CONSPIRED TO SEGREGATE HOUSING AND DIVIDE AMERICA (2021); Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020).

22. 8 U.S.C. 1422 now provides: "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married." The prohibition on racial discrimination was added by the Immigration and Nationality Act of 1952, ch. 477, title III, ch. 2, § 311, 66 Stat. 239.

23. Naturalization Act of 1790, 1 Stat. 103.

24. Naturalization Act of 1870, 16 Stat. 254.

of the statute, are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. The term excludes the Chinese, the Japanese, the Hindus, the American Indians, and the Filipinos."[25] Since the 1970s, the Court has limited the right of states to discriminate against noncitizens. But before that, the Court held that federal racial discrimination justified parallel discrimination by states: "[t]he state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable."[26]

Over time, California law increasingly restricted the right of Asians to own land. While California's 1849 Constitution allowed all noncitizens who were bona fide residents to own land,[27] the 1879 version guaranteed equal rights only to those "of the white race or of African descent."[28] However, no statute actually deprived noncitizens of other races of the ability to hold title to land until 1913. California's first Alien Land Law, enacted in 1913, allowed "aliens eligible to citizenship under the laws of the United States" to own land.[29] All other aliens could own land only to the extent they had a treaty right to do so "and not otherwise" and could lease agricultural lands for a term not exceeding three years.[30] Land acquired in violation of the prohibition would "escheat to and become and remain the property of the State of California."[31]

The California Supreme Court explained that "[t]he object sought to be attained by these statutory provisions. . . is . . . to discourage the coming of Japanese into this state."[32] The legislature noted that "Japanese, as well as American authorities concede the unassimilability of the two races" and pointed out "the impossibility of a white community holding its own either in increase of numbers or in economic competition against the racial advantages and birth rate of the Japanese."[33] Not surprisingly, restrictions on land ownership were accompanied by successful pressure on the United States to ban Asian immigration outright. After the Chinese Exclusion Act of 1882, Japanese were restricted by the Gentlemen's Agreement of 1907-08, Asian Indians and other natives of continental Asia by the Immigration Act of 1917.

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25. Morrison v. California, 291 U.S. 82, 85–86 (1934) (citations omitted).

26. Terrace v. Thompson, 263 U.S. 197, 220 (1923). *See also* Cockrill v. California, 268 U.S. 258, 262 (1925) ("The fact that in California all privileges in respect of the acquisition, use, and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence.").

27. CAL. CONST. 1849, Art. I, § 17 ("Foreigners who are, of who may hereafter become bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens.").

28. CAL. CONST. 1879, Art. I, § 17.

29. 1913 Cal Stats. Ch. 113, §1 at 206.

30. *Id*. § 2 at 207.

31. *Id*. § 5, at 207.

32. *In re* Yano's Estate, 206 P. 995, 1001 (Cal. 1922).

33. 1921 Cal. L. Ch. 3, 1774, 1775.

Again, federal and state laws worked hand in hand. In 1913, California's Alien Land Law leveraged the federal naturalization restriction by limiting land ownership to "aliens eligible to citizenship. The federal Immigration Act of 1924, in turn, borrowed the California formulation by barring the immigration of "aliens ineligible to citizenship."[34] As legal scholar Keith Aoki has noted, the land laws were but a part of a larger racial policy.

While the Alien Land Laws and the judicial opinions that upheld them were an important component of the nativist fervor that gripped the American legal imagination during the 1920s, they were merely a prelude to the enactment of the severe federal Immigration Act of 1924 that excluded immigration from Japan as well as southern and eastern Europe.[35]

This view was recognized at the time; in upholding Washington's land law in 1921, a three-judge U.S. District Court explained:

> The more homogeneous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last 50 or 75 years now warrant a different policy; but there is no law or treaty that yet has said 'the twain shall meet,' or that, if citizenship be accorded these Orientals, the danger is past of our becoming a 'mechanical medley of race fragments.'[36]

Thus, excluding Asians from land ownership was part of the larger effort to promote White citizenship.

California's Alien Land Law was made more restrictive over time. A 1920 California initiative eliminated the ability of ineligible noncitizens to lease land,[37] provided that they could no longer be even minority shareholders in companies owning land,[38]and prohibited them from acting as trustees for eligible owners—such as their own children born in the United States,[39] in each case unless a treaty granted the right to do so. The law imposed onerous reporting requirements on trustees, backed by fine and imprisonment.[40] The 1913 and 1920 laws governed the right of an ineligible

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34. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

35. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As A Prelude to Internment*, 40 B.C. L. REV. 37, 62 (1998). For a discussion of the nativist sentiment in Congress in the first quarter of the 20th century, see Katherine Benton-Cohen, *Inventing the Immigration Problem: The Dillingham Commission and Its Legacy* (2018).

36. Terrace v. Thompson, 274 F. 841, 849 (W.D. Wash. 1921) (three-judge court).

37. 1921 Cal. Stats. lxxxiii, Initiative 1, § 2.

38. *Id*. at § 3.

39. *Id*. at § 4. In what was a rare win for Asians in this period, the California Supreme Court struck down this provision.

> Our conclusion is that the provisions of the Initiative Act of 1920, forbidding the appointment of an alien resident, ineligible to citizenship, as guardian of the farming land of his native-born child, and authorizing the removal of such parent, if previously appointed as such guardian, are invalid.

In re Yano's Estate, 206 P. 995, 1001 (Cal. 1922).

40. 1921 Cal. Stats. lxxxiii, Initiative 1, § 5.

noncitizen to "acquire, possess, enjoy and transfer real property, or any interest therein;" a 1923 revision extended the disability, adding to the prohibited categories the right to "use, cultivate, occupy or . . . have in whole or in part the beneficial use thereof."[41]

In 1923, the U.S. Supreme Court upheld California's laws.[42] In *Porterfield v. Webb*,[43] the Court validated the basic prohibition, finding it reasonable for California to allow racially eligible noncitizens to own land while denying the privilege to ineligible noncitizens: "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."[44] In *Webb v. O'Brien*,[45] the Court upheld the prohibition on leasing land: "The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed."[46] And in *Frick v. Webb*,[47] the Court approved the prohibition on stock ownership, ruling that California "may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens."[48]

The Alien Land Law liberally employed evidentiary presumptions to aid vigorous enforcement.[49] Section 9 of the 1920 Initiative facilitated escheat actions by creating three presumptions that a transaction was fraudulent. The most often litigated was a provision creating a presumption that a transaction was fraudulent if an ineligible noncitizen paid for the land, but title was taken in the name of a person eligible to hold it. This was sometimes a White attorney or friend, but more commonly was a child or other family member born in the United States, and therefore a citizen and not individually disqualified.[50] The U.S. Supreme Court unanimously upheld the provision in 1925: "The inference that payment of the purchase price by one from whom the privilege of acquisition is withheld, and the taking of the land in the name of one of another class, are for the purpose of getting the

41. 1923 Cal. Stats. Ch. 441, 1021.

42. The Court's main decision that day upheld Washington's land law. Terrace v. Thompson, 263 U.S. 197 (1923).

43. Porterfield v. Webb, 263 U.S. 225 (1923).

44. *Id*. at 233.

45. Webb v. O'Brien, 263 U.S. 313 (1923).

46. *Id*. at 326.

47. Frick v. Webb, 263 U.S. 326 (1923).

48. *Id*. at 334.

49. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979) ("Legislatures typically enact permissive inferences in order to assist prosecutors in proving criminal offenses when the prosecution's best evidence on one of the elements is (a) wholly circumstantial and (b) not entirely convincing").

50. 1921 Cal. Stats. lxxxiii, Initiative 1, § 9(a). Section 9(b) presumed fraud if title was taken in the name of a corporation majority-owned by ineligible aliens. 1921 Cal. Stats. lxxxiii, Initiative 1, § 9(b). Section 9(c) presumed fraud based on the execution of a mortgage in favor of an ineligible noncitizen if the mortgagee was given possession, control, or management of the property *Id*. at § 9(c).

control of the land for the ineligible alien is not fanciful, arbitrary, or unreasonable."[51]

In 1927, the legislature added two new presumptions.[52] The new section 9(b) "provides in substance that, when it has been proved that the defendant has been in the use or occupation of real property and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense."[53] That is, a prima facie case of a civil or criminal violation of the Alien Land Law could be established by proving possession of land and Asian race, with no evidence that the defendant was in fact a noncitizen.[54] The U.S. Supreme Court found this unproblematic.[55]

However, in *Morrison v. California*, in an attempt to protect Whites from prosecution, the Court struck down the new Section 9(a). California courts had construed 9(a) applicable to White defendants alleged to have wrongfully sold property to an ineligible noncitizen. The Court feared that innocent Whites might be convicted for unknowingly dealing with Asians whom they might never have met face to face. They assumed that guilty knowledge of a White defendant could be readily proved:

> In the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him. There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the courtroom and will draw their own conclusions. If more than this is necessary, the People may call witnesses familiar with the characteristics of the race, who will state his racial origin.[56]

However, when the race of an allegedly ineligible noncitizen could not be proved, it would be unfair to hold a White person accountable:

> The only situation in which the shifting of the burden can be of any substantial profit to the state is where the defendant is of mixed blood, the White or the African so preponderating that there will be no external evidence of another. But in such circumstances the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused. One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime.[57]

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51. Cockrill v. California, 268 U.S. 258, 261 (1925).

52. Cal. Stats. 1927 Ch. 528, 881.

53. Morrison v. California, 291 U.S. 82, 87–88 (1934).

54. People v. Morrison, 13 P.2d 800, 803 (Cal. Ct. App. 1932), *app. dism'd per curiam for want of a substantial federal question*, 288 U.S. 591 (1933).

55. *Id*. Such a disposition constitutes a ruling on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

56. *Morrison*, 291 U.S. at 94.

57. *Id*.

Anti-Asian policies culminated in the incarceration of Japanese Americans during World War II, with devastating economic and social consequences. Alien Land Law amendments in 1943 and particularly in 1945 reflected the California legislature's increased wartime interest in rigorous enforcement of the law. One 1945 enactment eliminated the statute of limitation on escheat actions,[58] another appropriated $200,000 to the attorney general to fund enforcement,[59] and a resolution requested the California Secretary of State and county district attorneys to investigate noncitizens managing trust property for U.S. citizens along with "any recommendations he may wish to make concerning needed or desirable changes in the law on this subject."[60] Finally, the legislature placed a proposition on the 1946 ballot to ratify the Alien Land Law, which would eliminate any question regarding whether legislative additions were consistent with the original initiative.[61]

1945 would be the high-water mark of support for the Alien Land Law, and arguably for racial segregation imposed by law in general. Afterwards, division on the issue became apparent.

In 1946 in *People v. Oyama*,[62] Justice Edmunds held for himself and Schauer, Shenk, and Spence that a plot of land in San Diego County titled in the name of a U.S. citizen minor, Fred Oyama, was really owned by his ineligible non-citizen parents, and thus subject to escheat.[63] But the Court was divided; Justice Traynor concurred solely based on the force of precedent,[64] and Justice Carter dissented without opinion from denial of rehearing.[65] These votes were the first suggestions that the validity of the Alien Land Law might be legally controversial.

The People themselves, however, did not have an appetite to enforce the Alien Land Law. In 1946, by a vote of 1,143,780 to 797,067, California voters rejected Proposition 15, the legislature's ballot proposition which would have amended and re-ratified the 1920 Alien Land Law and all subsequent legislative amendments.[66] It would be too much to say that Californians had become committed anti-racists; in the same election the voters also rejected Proposition 11, a Fair Employment Practices Act by

58. 1945 Cal. Stat. c. 1136 p. 2177.

59. 1945 Cal. Stat. c. 1458 pp. at 2739-40.

60. 1945 Cal. Stat. c. 30 p. 2957.

61. 1946 Cal. Stat. cxlvi (reporting defeat of Proposition 15, placed on the ballot by 1945 Cal. Stats. Res. Ch. 139, p. 3147).

62. People v. Oyama, 173 P.2d 794 (Cal. 1946), *rev'd sub nom.* Oyama v. California, 332 U.S. 633 (1948). *See generally* Rose Cuison Villazor, *Rediscovering* Oyama v. California: *At the Intersection of Property, Race, and Citizenship*, 87 WASH. U.L. REV. 979 (2010).

63. 173 P.2d at 796, 804.

64. *Id*. at 804.

65. *Id.*

66. *Initiative Election Report*, SANTA CRUZ SENTINEL NEWS, Dec. 25, 1946, at 12.

more than two to one.[67] But the appetite of the people of California for punishing Japanese Americans had, apparently, waned.[68]

The next year, in *Takahashi v. Fish and Game Commission*,[69] the *Oyama* majority of the California Supreme Court upheld a prohibition on commercial fishing licensure for Japanese persons. As the majority noted, the U.S. Supreme Court had already upheld the classification in other contexts.

> The basis of the classification regarding real estate is the same as the one upon which the statute here in controversy rests. By one statute, the state prohibits the ownership of land by ineligible aliens. In the other enactment the legislature has declared that such persons shall not take fish from its waters.[70]

But three of the seven justices were unpersuaded; Justices Traynor, Gibson, and Carter dissented.

There were important signals in other areas of California law. In 1947, the U.S. Court of Appeals for the Ninth Circuit affirmed a decision prohibiting segregation of Mexican-American students in public schools.[71] California could have sought certiorari in the U.S. Supreme Court, or amended the segregation law to correct the defect the court identified—state law authorized racial segregation only of "Indian children, and children of Chinese, Japanese, or Mongolian parentage,"[72] so there was no authority to segregate others. But instead, Governor Earl Warren urged the legislature to abolish segregation, stating: "I personally do not see how we can carry out the spirit of the United Nations if we deny fundamental rights to our Latin

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67. *Id*. See also 1946 Cal. Stat. cxlvi (reporting defeat of Proposition 11)

68. Several scholars have noted the incongruity of the results of these two propositions. Prof. Mark Brilliant explained:

> On the one hand, the defeat of Proposition 15 indicated waning support for statutory segregation . . . . On the other hand, the defeat of Proposition 11 suggested a threshold for just how much racial liberalism a majority of the state's voters would accept. With the outcomes of Propositions 11 and 15, California found itself at a civil rights crossroads. Rejecting state-sanctioned discrimination was one thing; erecting state-sanctioned antidiscrimination was quite another—or so the majority of Californians who opposed both Propositions 11 and 15 suggested.

MARK BRILLIANT, THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941-1978 118 (2010). Daniel HoSang offered this explanation: "On the one hand, raising charges of extremism, attacking the spurious logic of biologically determined racial hierarchies, and appealing to national traditions of fair play and tolerance certainly had significant political resonance. Not only did such appeals secure the defeat of Proposition 15, they also shaped and made possible the repeal of a host of formally discriminatory policies." DANIEL HOSANG, RACIAL PROPOSITIONS: BALLOT INITIATIVES AND THE MAKING OF POSTWAR CALIFORNIA 46 (2010). "On the other hand, invocations of tolerance, when expressed through appeals to political Whiteness, proved quite accommodating to defenses of prevailing relations of apartheid." *Id*. at 47.

69. Takahashi v. Fish & Game Comm'n, 185 P.2d 805, 807, 815-816 (Cal. 1947), *rev'd*, 334 U.S. 410 (1948).

70. *Id*. at 812.

71. Mendez v. Westminister Sch. Dist. of Orange Cty., 64 F. Supp. 544, 546 (S.D. Cal. 1946), *aff'd en banc*, 161 F.2d 774 (9th Cir. 1947).

72. *Id*. at 551 n.5 (quoting CAL. EDUC. CODE § 8003)).

American neighbors."[73] The legislature complied.[74] The racial reform movement continued to have successes in 1948. Almost two decades before the U.S. Supreme Court would act in *Loving v. Virginia*,[75] the California Supreme Court struck down the state's prohibition on interracial marriage over the dissents of the die-hard defenders of racial segregation, Justices Schauer, Shenk, and Spence.[76] For its part, the U.S. Supreme Court barred judicial enforcement of racially restrictive covenants in *Shelley v. Kraemer*.[77]

1948 was also a turning point for the Alien Land Law. On January 19, 1948, the U.S. Supreme Court reversed *Oyama*, holding that U.S. citizen Fred Oyama had been discriminated against based on racial presumptions which did not apply to other minors receiving gifts of land from their parents.[78] "Fred Oyama lost his gift, irretrievably and without compensation, solely because of the extraordinary obstacles which the State set before him."[79] Justices Reed, Burton and Jackson dissented.[80] Notably, the justices holding the balance of power, Chief Justice Vinson and Justice Frankfurter, declined the invitation of concurring justices Black, Douglas, Murphy, and Rutledge to void the Alien Land Law entirely. A majority would only find that it was unconstitutional for a U.S. citizen of Asian racial ancestry to lose a parental gift when citizen children of other races would not.

The Supreme Court also granted review and reversed *Takahashi* later that year, no longer content to allow the states to piggy-back on federal discrimination. The majority explained: "It does not follow . . . 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."[81] While Congress has the power to regulate immigration and foreign relations, "[u]nder the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."[82]

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73. Drew Pearson, *A.F.L. Seeks Senate Votes*, SUN-TELEGRAM SAN BERNARDINO, May 11, 1947, at 30.

74. 1947 Cal. Stat. c. 737 p. 1792.

75. 388 U.S. 1 (1967).

76. Perez v. Lippold, 198 P.2d 17, 35 (Cal.1948) (Shenk, J., dissenting) ("The power of a state to regulate and control the basic social relationship of marriage of its domiciliaries is here challenged and set at nought by a majority order of this court arrived at not by a concurrence of reasons but by the end result of four votes supported by divergent concepts not supported by authority and in fact contrary to the decisions in this state and elsewhere.")

77. 334 U.S. 1, 20 (1948).

78. Oyama v. California, 332 U.S. 633 (1948).

79. *Id*. at 644.

80. Jackson's dissent is noteworthy, as he would have held the wartime incarceration of Japanese Americans unconstitutional, suggesting some sympathy for their rights. Korematsu v. United States, 323 U.S. 214, 242 (1944) (Jackson J., dissenting), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

81. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–19 (1948).

82. *Id*. at 419.

However, in *Takahashi*, as in *Oyama*, the U.S. Supreme Court declined to invalidate the Alien Land Law even though it used precisely the same classification. Justices Murphy and Rutledge proposed invalidating it, but instead the majority distinguished the land cases: "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. They cannot be extended to cover this case."[83] Again, in this period, the U.S. Supreme Court's restrictions on racial classifications and on state discrimination against noncitizens had not yet been fully developed. There seem not to have been the votes on the U.S. Supreme Court to strike down the Alien Land Law as a whole.

Later in 1948, with the benefit of the U.S. Supreme Court's opinions in *Oyama* and *Takahashi*, the Justices on the California Supreme Court sent a significant signal that they questioned the constitutionality of the Alien Land Law. *Palermo v. Stockton Theatres*[84] was a suit challenging the validity of a lease for a theater, and the California Supreme Court interpreted the law liberally in favor of the Japanese lessee. The U.S. treaty with Japan allowed the lease of property for commercial purposes, and the Alien Land Law allowed ineligible noncitizens the right to own land to the extent provided by a treaty. However, the U.S. abrogated the treaty with Japan in January 1940, and, after abrogation, the lessees exercised an option to renew the lease in accordance with its terms. The building owner claimed that the lease was void; the treaty having been abrogated, so too were the lessee's rights. But the Court held that property rights were fixed at the time the lease was signed, when the treaty was still in effect.

Equally significant was the fact that Chief Justice Gibson, and Justices Carter and Traynor contended that a better reason for finding for the Japanese litigants was that "the statute here involved is clearly unconstitutional."[85] The majority's decision not to reach the issue unambiguously indicated that the law was unsettled.

Meanwhile, the U.S. Supreme Court's *Oyama* reversal had substantial practical consequences in California. After the decision, Oyama's lawyer A.L. Wirin reported that 90 percent of the escheat cases pending in trial courts relied on the presumption the Court struck down;[86] that is, they involved Asian immigrants who had purchased land in the names of their U.S. citizen children who were not prohibited from owning it. California Attorney General Fred N. Howser decided to dismiss all pending cases. He explained:

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83. *Id*. at 422.

84. 195 P.2d 1, 2-3 (Cal. 1948).

85. *Id*. at 10 (Carter, J., and Traynor J., concurring); *id*. at 9 (Gibson, C.J., concurring) ("I am in full agreement with the additional ground for reversal set forth in the concurring opinion of Mr. Justice Carter and Mr. Justice Traynor."). The dispute was evidently bitter; seven appeals followed, primarily about costs awardable in the initial suit. Stockton Theatres, Inc. v. Palermo, 360 P.2d 76, 76 (Cal. 1961).

86. *90 Pct. Affected*, SAN BERNARDINO DAILY SUN, Jan. 20, 1948, at 1.

> There is little if anything left of our Alien Land Law. I see no alternative other than to dismiss the cases on file as the presumption has been obliterated. The burden to be carried by the state is equivalent to impossible. In any event, the attitude expressed by the court in my opinion is such that if we were to succeed in arriving again before the supreme court as it is now constituted, they would no doubt invalidate our law as unconstitutional.[87]

After the Supreme Court's *Oyama* ruling, the major litigation surrounding the Alien Land Law did not involve escheat actions brought by the state, but, rather, challenges to the Alien Land Law. One suit was brought by Sei Fujii, a USC law graduate whose race prevented him from becoming a lawyer[88] just as it denied him the right to own land.[89] Fujii bought a parcel of land in Los Angeles County in July, 1948, and then sued the State "for the purpose of obtaining a determination whether or not an escheat has occurred under the provisions of the Alien Land Law."[90]

The other suit was brought in 1949 by the Masaoka family of Los Angeles; brothers Mike and Joe Grant were prominent leaders in the Japanese American community.[91] The tenor of the media coverage is suggested by a *New York Herald Tribune* article, which noted, in its headline, that "4 of Brothers Testing California's Alien Law Won 30 Medals in Last War."[92] Superior Court Judge Thurmond Clarke struck down the law:

> Five Americans of Japanese ancestry seek to make a gift of a home to their widowed mother who was born in Japan, but who has lived in the United States continuously since 1905. Five of her six sons served in the United States Army in World War II. One of them was killed in action in France and the other four were all wounded seriously. The sons propose to pay for the home partially through disability benefits received from the Government. There can be no question of the loyalty of the plaintiffs to the United States. Nonetheless, under the terms of the Alien Land Law, these sons may not make a gift of land to their mother; indeed if the law is valid, the mother loses her home and the sons their investment.[93]

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87. *Howser Asks Dismissal of All Cases Brought Under Calif. Alien Land Law*, NW. TIMES, Feb. 4, 1948, at 1. *See Jap Land Cases to be Dismissed*, CALEXICO CHRON., Feb. 17, 1948, at 1.

88. *In re* Chang, 24 P. 156, 157 (Cal. 1890) (Chinese person inadmissible to the bar), *abrogated by In re* Chang, 344 P.3d 288 (Cal. 2015).

89. The California Supreme Court posthumously admitted Mr. Fujii to the bar in 2017. Admin. Ord. 2017-05-17, 394 P.3d 488 (Cal. 2017).

90. Fujii v. State, 217 P.2d 481, 481–82 (Cal. Ct. App. 1950).

91. *Masaoka Family Members Will Test Validity of Calif Alien Land Law*, NW. TIMES, Dec. 10, 1949, at 1. MIKE MASAOKA & BILL HOSOKAWA, THEY CALL ME MOSES MASAOKA: AN AMERICAN SAGA (1987).

92. Jack Fosie, *5 Nisei Fight Land Ban*, N.Y. HERALD TRIB., Jan. 14, 1951, at A5.

93. *Alien Land Law Held Unlawful*, NW. TIMES, Mar. 18, 1950, at 1.

Given the geopolitical circumstances at the time, the decision was national and international news and was reported in outlets as diverse as the *South China Morning Post*[94] and the *Daily Worker*.[95]

Mr. Fujii's suit led to a Superior Court ruling that the Alien Land Law was valid; the Court of Appeal disagreed, holding that the anti-discrimination provisions of the U.N. Charter invalidated the California provision of its own force.[96] This decision was also national news and was controversial because of the implication that general principles in a treaty could invalidate federal and state laws.[97] Arthur Krock of *The New York Times*, for example, noted the sweeping and shocking implications: "all forms of local segregation would instantly be illegal and the Federal Government would be obliged to penalize them. And, automatically, no employer or labor union could exclude (from employment and membership respectively) any applicant who could attribute the exclusion to racial, religious, sex or color discrimination, etc."[98] Perhaps it is not surprising that the California Supreme Court rejected the conclusion that the U.N. Charter was controlling.[99] However, it voided the California provision on another ground: "the California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis."[100] Three months later, the California Supreme Court affirmed the *Masaoka* ruling based on *Fujii*.[101]

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94. *Alien Law: California Court Decision*, S. CHINA MORN. POST, Mar. 20, 1950, at 11.

95. *Void California Anti-Japanese Land Law*, DAILY WORKER, Mar. 30, 1950, at 8.

96. Fujii v. State, 217 P.2d 481, 488 (Cal. Ct. App. 1950) ("A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers. It is incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property."), *rehearing denied*, 218 P.2d 595, 596 (Cal. Ct. App. 1950), *affirmed on other grounds*, 242 P.2d 617 (Cal. 1952).

97. Walter Trohan, *Land Law of 8 States Periled by Coast Ruling: Fear Decision Menaces U.S. Way of Life*, CHI. TRIB., June 5, 1950, at 3 ("Fears have been expressed on the floor of congress that the decision, if sustained, could open the door to foreign encroachment on national and state sovereignty."); Gladwin Hill, *U.N. Pact Assailed as 'Supreme Law*, N.Y. TIMES, May 11, 1950, at 19; Gladwin Hill, *U.N. Charter Voids a California Law*, N.Y. TIMES, Apr. 26, 1950, at 16; *U.N. Charter Invalidates Alien Land Law*, 2 STAN. L. REV. 797 (1950).

98. Arthur Krock, *In the Nation: More on Treaty Supremacy Over Existing Laws*, N.Y. TIMES, May 23, 1950, at 27.

99. They explained:

> The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law.

Fujii v. State, 242 P.2d 617, 622 (Cal. 1952).

100. *Id*. at 630.

101. Masaoka v. People, 245 P.2d 1062, 1062 (Cal. 1952) (per curiam).

In a bitter dissent, Justice Schauer, joined by Justices Shenk and Spence, insisted that neither the dissenters nor California officials were bound by the *Fujii* decision, which, in Schauer's view, was wrong:

> The fact remains that the statute as enacted still is valid according to published decisions of the Supreme Court of the United States. . . Until the high federal tribunal has reversed itself it still remains my duty as a justice of this court, as it likewise remains the duty of all affected law enforcement officers of this state, to uphold and enforce the law as enacted.
>
> And it well may be called to the attention of those who would break down these principles in order to favor a minority group in a particular case that such groups are the last ones who in wisdom should seek such an end. Their safety, their only ultimate protection, depends upon staunch enforcement of the constitutional processes and guarantees.[102]

Nevertheless, future governor Edmund G. Brown, who had become Attorney General of California by the time of the decision, elected not to seek review of *Fujii* in the U.S. Supreme Court and called the law "California's last legal remnant of racial discrimination."[103]

As suggested by the invocation of the U.N. Charter in *Fujii*, an important part of the context of this period of reform is the Cold War conflict with the U.S.S.R., along with the hot war in Korea. If the United States were indeed in an existential struggle with the global Communist conspiracy, then all branches of government would have to think carefully before alienating large portions of the world's population.[104] In the Immigration and Nationality Act of 1952, Congress removed the last legal remnant of the Naturalization Act of 1790 as it put citizenship on a race-neutral basis.[105] The classification upon which the Alien Land Law operated, aliens racially ineligible to citizenship, ceased to exist. The voters repealed the Alien Land Law in 1955.[106]

II. REPARATIONS FOR THE ALIEN LAND LAW

In the late 1940s and early 1950s, in California and the United States as a whole, comprehensive regimes of racial segregation were formally eliminated, in the areas of immigration, naturalization, employment, school segregation, and racial restrictions on marriage. The law also opened up the right to land ownership by invalidating restrictive covenants and the Alien

102. *Id*. at 1064 (Schauer J., dissenting).

103. *California Drops Fight to Curb Aliens*, WASH. POST, May 13, 1952, at 5.

104. These points are made in, for example, Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) and Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

105. Immigration and Nationality Act of 1952, Pub. L. 82-414, Ch. 477, § 311, 66 Stat. 163, 239 *codified at* 8 U.S.C. § 1422 ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.").

106. Cal. Stats. 1955, ch. 316, p. 767; Stats. 1955, ch. 1550, p. 2831, and approved as Proposition 13 at the general election held Nov. 6, 1956.

Land Laws. Many of these restrictions had economic consequences which continued beyond their formal elimination. Reform of these race laws raised the question of how far reform would go. In the case of the Alien Land Law, the restriction was not merely ended, it was undone.

While the *Masaoka* and *Fujii* suits were proceeding in the courts, the California legislature passed and, on July 24, 1951, Governor Earl Warren signed A.B. 2611, which provided for reparations to U.S. citizens who had lost their land, that is, primarily to the U.S. citizen children affected by the presumption found unlawful in *Oyama*. The assembly's vote was 57 to 0,[107] and in the senate, initially, 32 to 4;[108] the next day, however, three senators recorded as voting "no" stated that the record was incorrect and that "my final vote was 'aye' on this measure,"[109] making the tally unanimous but one. A.B. 2611 added Section 9.5 to the Alien Land Act:

> Sec. 9.5. The provisions of subdivision (a) of Section 9 of this act, . . . having been declared unconstitutional by the United States Supreme Court, upon claim of any United States citizen defendant in an escheat action who made a compromise settlement or whose property was escheated prior to such decision, or his successor in interest, there shall be refunded the total amount paid by such defendant to the State under compromise or realized by the State from him or from his property under this act.[110]

Legislative history from the 1950s is limited, but there is a fair amount to be gleaned from the various department and committee reports made to the Governor as he considered whether to sign the bill. The Department of Finance reported favorably on A.B. 2611, but it raised a concern that the refund might be considered an unconstitutional gift of public money. Nonetheless, Director of Finance James Dean concluded that "there is at least a moral obligation in the State" to repay the money.[111] A Department of Justice memorandum analyzed the constitutionality of the refund in more detail. First, the Department of Justice concluded that even after *Oyama*, some of California's escheats under the law might still be constitutional.[112] After all, the Supreme Court invalidated only the specific presumption of fraud when land is bought for a U.S. citizen child and paid for by an ineligible noncitizen parent. Moreover, *Fujii* and *Masaoka* remained pending before the California Supreme Court;[113] the California Department of Justice

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107. 1 J. Cal. Assembly 5721 (1951). https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/DailyJournal/1951/Volumes/51_jnl_vol3.PDF.

108. 3 J. Cal. Senate 3716 (1951).

109. *Id*. at 3743.

110. 2 Cal. Laws 4035, Ch. 1714 (1951).

111. Letter from James S. Dean, Director of Finance to Gov. Earl Warren dated July 6, 1951, LEG. HISTORY ON A.B. 2611 FROM THE CAL. STATE ARCHIVES.

112. Memorandum from Department of Justice to Gov. Earl Warren on A.B. 2611dated July 12, 1951, LEG. HISTORY ON A.B. 2611 FROM THE CAL. STATE ARCHIVES ("DOJ Memo")

113. *Id*. at 1 (discussing then-pending cases that would be reported as Fujii v. State, 242 P.2d 617 (Cal. 1952); Masaoka v. People, 245 P.2d 1062 (Cal. 1952)).

considered it possible that the residue of the Alien Land Law might be upheld.

The primary concern of the Department of Justice mirrored that of the Department of Finance—whether A.B. 2611 would authorize an unconstitutional gift of public money. Possibly, a defendant would win an escheat action, in which case the defendant would lose nothing and would have no claim to reparations under A.B. 2611. Only if the defendant lost something, only if the State won money or property, would there be a basis for a refund claim.[114] Accordingly, the Department observed that "[t]here has been in every case where relief is to be given under this bill, including those cases where the unconstitutional portion of the statute was relied upon, either a compromise settlement or a trial and judgment rendered in favor of the state."[115] The Department cited *County of Los Angeles v. Surety Corp.*[116] for the proposition that "judgment rendered under an unconstitutional statute when it becomes final is conclusive as to the parties."[117] Thus, even if the Alien Land Laws were unconstitutional, a proposition neither the U.S. nor California supreme courts had yet endorsed, that would not mean that final escheats and payments were legally infirm.

That created a conundrum. The state technically acquired ownership of the property at issue (whether money or land)[118] in valid final judgments. When the state acquired the property, it became public property (or public funds). The fact that these judgments carried out a manifestly unjust law did not change the illegality of the state's making gifts of public funds or property. Fortunately, the Department found an analysis which stated refunds for the property and compromise settlements would not amount to a gift.

California law held that a moral obligation alone would not overcome the prohibition on state gifts.[119] However, the California Supreme Court had held that the government could spend its resources to benefit "the general well-being of society" or "promote the public welfare."[120] Moreover, the

114. DOJ Memo, *supra* note 112, at 2.

115. *Id*.

116. Los Angeles Cty. v. Seaboard Sur. Corp. of Am., 34 P.2d 191 (Cal. App. 1934).

117. DOJ Memo, *supra* note 112, at 2. This seems to have been the general rule at the time. *See Validity and effect of judgment based upon erroneous view as to constitutionality or validity of a statute or ordinance going to the merits*,167 A.L.R. 517 (Originally published in 1947) ("The unconstitutionality of a statute is not a ground for a collateral attack on a judgment based upon the statute.") (citing, inter alia, Chicot County Drainage Dist. V. Baxter State Bank, 308 U.S. 371 (1940)). For an analysis of another significant situation testing the validity of contracts for transactions which became illegal, see Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493, 499 (1994).

118. DOJ Memo, *supra* note 112, at 2.

119. *See* Veterans' Welfare Bd. v. Riley, 208 P. 678, 683 (Cal. 1922) ("Our own decisions consistently hold that an appropriation of public funds based upon a moral obligation as a consideration is a gift within the meaning of the Constitution.") (citing Veterans' Welfare Bd. v. Riley, 206 P. 631 (Cal. 1922)).

120. DOJ Memo, *supra* note 112, at 3.

California Supreme Court held that forgiving a particular tax debt based on a good-faith debate about the law's meaning served the public purposes of allowing authorities to focus on fresh claims and to potentially prevent a taxpayers' bankruptcy or insolvency.[121] The Department of Justice concluded that the legislative refund served the public purpose of improving "international and interracial good will."[122] The debate over an unconstitutional gift replicates and refutes the contemporary concern that reparations for slavery or other wrongs might be unconstitutional because those wrongs were legal at the time of enactment.[123]

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121. California Emp. Stabilization Comm'n v. Payne, 187 P.2d 702, 705-06 (Cal. 1947).

122. DOJ Memo, *supra* note 112, at 3-4.

123. *See* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 127 (2004) ("There remains a critical problem with an unjust enrichment claim for slavery: that slavery was legal at the time."); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 516–17 (2003) ("Moreover, the statute of limitations continues to pose a significant problem."); Bob Carlson, *Why Slavery Reparations Are Good for Civil Procedure Class*, 47 ST. LOUIS U. L.J. 139, 141 (2003) ("However, slavery reparations have far greater hurdles to overcome than previous suits did because the acts alleged in the complaint took place over 139 years ago, there are no living survivors, and slavery was legal at the time."); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 711 (2004) ("Conservatives may raise a number of objections to the claim that American society today is implicated in the wrongful discrimination practiced by past generations. First, society's past discrimination was arguably not wrongful in light of prevailing norms. That is, it may be unfair to blame society, in hindsight, for practices that were legal at the time and widely perceived as morally permissible."); Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for A Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 101 (2004) ("While certainly unjust, it is unclear how one can recover for a situation that was legal at the time it existed."); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 159 (2004) ("The formal legality of American slavery poses a substantial obstacle to a tort claim for slavery reparations."); Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. TOL. L. REV. 673, 677 (2011) ("A reparations action brought at law in quasi-contract or tort against a slave owner or a private corporation that at one time profited from the slave trade is doomed to fail for several reasons. First, slavery was a lawful form of ownership in parts of the United States until the Thirteenth Amendment was ratified in 1865, and thus the slave trafficker and the slave owner could not have been unjustly enriched by their involvement with slavery."); Robert A. Sedler, *Claims for Reparations for Racism Undermine the Struggle for Equality*, 3 J. L. SOCIETY 119, 131 (2002) ("Once we recognize that slavery was fully legal throughout the United States prior to the promulgation of the Thirteenth Amendment in 1865, we realize that any legal claim for reparations for slavery will fail. The same is true of a legal claim for reparations for the harm caused to the Nation's African-American citizens by the racism following in the wake of slavery. The federal government is immune from suit for the claims, the claims are almost certainly barred by the statute of limitations, and all or virtually all of the conduct characterized as racism was fully legal at the time it occurred."); Butzlaff v. Van Der Geest & Sons, 115 Wis. 2d 535, 539, 340 N.W.2d 742, 744 (Ct. App. 1983) ("Seven circuit courts of appeal now follow the rule that, absent malice or bad faith, damages cannot be recovered for a violation of civil rights from private parties acting pursuant to a statute presumed valid at the time."). *But see* Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 580 (1975) ("The government's duty to redress injustices is clearest when the government itself causes an injury that is illegal at the time it is caused, but its power to rectify injustice is hardly limited to these situations. It may compensate for injustices that it caused, say by the laws of slavery, that were legal at the time they were inflicted; and it may compensate for injustices suffered at the hands of private individuals, whether or not those injustices amount to a general social practice.").

The Office of Legislative Counsel also approved A.B. 2611. Notably, their Report was signed by Deputy Legislative Counsel Delbert E. Wong, who would later become California's first Chinese American judge.[124] Writing for the Joint Legislative Budget Committee, Alan Post noted that the Assembly amended the bill to reduce the original rate of interest from 6 percent interest to only 3 percent. Although 3 percent probably roughly accounted for inflation during the lost time, it probably did not reflect possible increases in land value over the period of escheatment. Nonetheless, the Legislative Budget Committee found the bill to be equitable, and recommended approval.[125]

Individuals also reached out to the Governor. California Senator Gerald O'Gara not only voted to pass the bill but wrote to the Governor asking him to sign it. He wrote with some feeling; "Since the payments and forfeits were made under an unconstitutional provision, A.B. 2611 seeks to correct the injustice which that provision created."[126] However, perhaps in deference to Governor Warren's personal involvement with escheats as California Attorney General, Senator O'Gara described the injustice delicately, describing escheats only as "made under an unconstitutional provision."[127]

A staff memorandum to the Governor contained names of the variety of people and institutions supporting the bill.[128] They included Los Angeles County Supervisor (and Democratic party activist) John Anson Ford,[129] major California businessmen H. S. Scott, "President of [the] General Steamship Corporation,"[130] and F. J. Harkness of the United Packing Company[131] (one of the largest fruit packing companies in the San Joaquin Valley).[132] Also supporting the bill was the California Federation for Civic

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124. John Thurber, *Delbert E. Wong, 85; First Chinese American Judge in the Continental US*, L.A. TIMES, Mar. 12, 2006 http://articles.latimes.com/2006/mar/12/local/me-wong12 [https://perma.cc/AC53-Y8VD].

125. Letter from Alan Post, Legislative Auditor, Joint Legislative Budget Committee, to Beach Vasey, Legislative Secretary, Governor's Office, dated July 3, 1951, LEG. HISTORY ON A.B. 2611 FROM THE CAL. STATE ARCHIVES.

126. Letter from Sen. Gerald O'Gara to Gov. Earl Warren dated. July 6, 1951, LEG. HISTORY ON A.B. 2611 FROM THE CAL. STATE ARCHIVES.

127. *Id*. See also AL. STATE ARCHIVES: STATE GOVERNMENT ORAL HISTORY PROGRAM. ORAL HISTORY INTERVIEW WITH HON. GERALD J. O'GARA, at 19 (1987). http://archives.cdn.sos.ca.gov/oral-history/pdf/ogara.pdf [https://perma.cc/26JM-ET96].

128. Memorandum from Warren Marsden & Beach Vasey to Gov. Earl Warren dated July 19, 1951, at 2, LEG. HISTORY ON A.B.2611, CAL. STATE ARCHIVES. ("Memo to Governor")

129. *Id*. For background on Supervisor Ford, see *John Anson Ford*. N.Y. TIMES. (Nov. 5, 1983). http://www.nytimes.com/1983/11/05/obituaries/john-anson-ford.html [https://perma.cc/K35Q-ETN6].

130. Memo to Governor, *supra* note 128, at 2. The corporation remains in operation today. GENERAL STEAMSHIP AGENCIES. *About* Us, https://www.gensteam.com/about-us.html [https://perma.cc/V5TT-PVQP].

131. Memo to Governor, *supra* note 128, at 2.

132. FRESNO PLANNING AND DEVELOPMENT DEPARTMENT: HISTORIC PRESERVATION COMMISSION AGENDA, at 24, http://www.fresno.gov/NR/rdonlyres/F5EEC1AF-2446-4C07-86D7-9CB103E494BD/0/HPCStaffReportsApril272015.pdf [https://perma.cc/9WEP-Y5X3].

Unity,[133] an organization that dealt with discrimination, immigration, segregation, and other civil rights issues.[134] Similarly, the Sacramento-Nevada District Methodist Church, represented by Dillon W. Throckmorton, expressed support. Reverend Throckmorton reminded the Governor that they had "adopted a resolution recommending the repeal of the Alien Land Law and the return of the forfeits to the citizens of Japanese ancestry who were penalized by the law."[135] The memo noted that there were many more letters "from various individuals and organizations representing the interests of Japanese-Americans," all supporting A.B. 2611. No one wrote in opposition.[136]

After reviewing (and annotating) these reports, Governor Warren signed A.B. 2611 into law on July 24, 1951.[137] The bill became Chapter 1714 of the California Laws of 1951.

Twenty claims for refunds were filed under Chapter 1714. These claims involved more than twenty claimants.[138] When any defendant in an escheat proceeding filed a claim for refund, the law required that everyone else who had been named as a defendant in that proceeding had a right to notice, allowing them to file adverse claims.[139] In this way, the legislature tried to ensure that everyone who had a stake in the refund had their day in court.

After the 1952 California Supreme Court decisions in *Masaoka* and *Fujii* invalidated the Alien Land Law entirely, the California Attorney General "suggested" to the claimants that they reduce their claims to judgment. [140] All claims were reduced to judgment, except one, which led to another bill.

The legislative records tell the story. The Governor reviewed assembly Bill 3512 in June 1953. Earl Warren, still Governor and not yet Chief Justice, requested a recommendation on the bill from State Controller Robert C. Kirkwood. Kirkwood explained that the bill was introduced at the request of Stockton attorney Lafayette Smallpage. The unresolved claim was made by Sue Ishida. Sue Ishida and her lawyer, Mr. Smallpage had both been named as defendants in the underlying escheat proceeding, and were competing for the refund.[141]

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133. Memo to Governor, *supra* note 128, at 2.

134. ONLINE ARCHIVE OF CALIFORNIA. *Finding Aid to the California Federation for Civic Unity Records, 1945-1956*. ONLINE ARCHIVE OF CALIFORNIA. http://www.oac.cdlib.org/findaid/ark:/13030/tf9f59p0fm/ [https://perma.cc/VC59-BNNU].

135. Memo to Governor, *supra* note 128, at 2.

136. *Id.*

137. Letter from Beach Vasey to Assemblymember George Collins dated July 24, 1951, LEG. HISTORY ON A.B. 2611 FROM THE CAL. STATE ARCHIVES.

138. Memorandum from Deputy Attorney General William J. Power to Gov. Earl Warren dated June 25, 1953, at 2-3, LEG. HIST. ON A.B. 3512, CAL. STATE ARCHIVES ("Power Memo").

139. *Id.*

140. Letter from Controller Robert C. Kirkwood to Gov. Earl Warren dated June 22,1953 at 1, LEG. HIST. ON A.B. 3513, CAL. STATE ARCHIVES ("Kirkwood Letter").

141. *Id*. at 1-2.

Ms. Ishida's claim under A.B. 2611 had not been granted for two reasons. First, her escheat proceeding had resulted in a compromise settlement, and Mr. Smallpage, not Ms. Ishida, paid that settlement to the state.[142] Second, A.B. 2611 only allowed U.S. citizens to file claims, perhaps based on the fact that the presumption the U.S. Supreme Court invalidated in *Ozawa* disadvantaged citizens. Ms. Ishida, a first-generation Japanese American, was not a citizen even though the racial restriction on naturalization no longer existed. The Attorney General's office determined that as a non-citizen she was ineligible for a refund.[143] Mr. Smallpage was a U.S. citizen, and could have filed a claim under A.B. 2611, but he was in Europe during the 6-month window for filing. As a result, he did not learn that a claim was even possible until after the window had closed under the original law.[144]

A.B. 3512 would extend A.B. 2611's window to file a claim through April 1, 1954 and enable noncitizens to file claims, as long as they had been named as defendants in the escheat proceeding. However, Kirkwood did not expect any claimants other than Mr. Smallpage to file under this extension since all prior claims were resolved.[145] The procedure and substance of A.B 3512 were the same as A.B. 2611. The Controller estimated the payout to be about $33,250.[146]

Deputy Attorney General Power's report on A.B. 3512 discussed the details of the procedure, reiterating that the bill allowed the court to equitably determine who should recover money "without regard to the technicalities of title."[147] Under A.B. 3512, any defendants in an escheat action might "petition the court for redress," regardless of their nationality.[148] Power believed that the effect of A.B. 3512 would be that "all money or property acquired by the State under the Alien land law will have been returned to its owners."[149]

The Department of Finance's report reiterated many of the same general facts as the other departments. It noted that there are "two other possible claimants," although they did not file claims under A.B. 2611.[150] The report did not explain whether those people were possible claimants to the Smallpage/Ishida property in particular or just other people named as

142. *Id.* at 1.
143. Power Memo, *supra* note 138, at 1.
144. Kirkwood Letter, *supra* note 140, at 1.
145. *Id.* at 2.
146. *Id.*
147. Power Memo, *supra* note 138, at 1.
148. *Id*. at 2
149. *Id*.
150. Memo from Department of Finance to Gov. Earl Warren dated June 26, 1953, LEG. HISTORY ON A.B. 3512 FROM THE CAL. STATE ARCHIVES.

defendants in some other escheat action. It did state that their "whereabouts are unknown."[151]

The Department of Finance report also noted a difference between the two laws. Under A.B. 2611, the State Controller had to wait to make payments until the California Supreme Court gave the order. A.B. 3512 would "enable the equities of this matter" to be determined by the Sacramento County Superior Court.[152] If nothing else, a decision by a single judge rather than a panel was likely to expedite the resolution of claims.

The Governor's staff memorandum again reviewed citizens' views.[153] Despite its limited impact on the public, several people wrote supporting A.B. 3512. The Committee for Justice to Japanese Americans provided information about the Ishida family, noting that Ishida was widowed and had two sons that served in the U.S. Armed Forces.[154] Smallpage also supported the bill, noting that it would "benefit clients of his."[155] This was an odd claim, considering that, as it turned out, he would make a personal claim during extended claims-filing period and win it for himself by defeating his client's claim.

Joe Grant Masaoka and "June Fugita" also supported A.B. 3512.[156] They stated that they had been "granted an interview with the Governor" in 1951 to support A.B. 2611. Joe Grant Masaoka, one of the Masaoka brothers involved in the land law litigation, had been active in defending Japanese-Americans' rights for many years, in both California and Colorado. He was the Regional Director of the Japanese American Citizens League in Denver from 1942-1951, and the Japanese American Research Project Administrator for the University of California, Los Angeles, from 1964-70.[157] He was deeply involved in the Ishida family's case, as evidenced by the numerous materials still archived in UCLA that reference the "Ishida land escheat case,"[158] a manuscript titled "The claim of Sue Ishida," and "transcripts of interviews with Gladys and Sue Ishida" from 1942, among other things.[159]

While no record of a "June Fugita" was uncovered, there is a likely alternative candidate. Jun Fujita was a prominent Japanese American photojournalist from the Issei generation and therefore lived through many years of anti-Asian policy.[160] He was also personally familiar with the

151. *Id.*

152. *Id*.

153. Memorandum from Beach Vasey and A.E. Nichols to Gov. Earl Warren dated July 7, 1953, at 2, LEG. HISTORY ON A.B. 3512 FROM THE CAL. STATE ARCHIVES.

154. *Id*.

155. *Id*.

156. *Id*.

157. JAPANESE AMERICAN RESEARCH PROJECT (JARP) COLLECTION, FINDING AID FOR THE JOE GRANT MASAOKA PAPERS, 1964-1970, 3 (2001).

158. *Id.*

159. *Id.* at 5.

160. Taylor Moore, *Behind the Lens of a Trailblazing Chicago Photojournalist*, CHI. MAG. (Jan. 21, 2020, 2:48PM), https://www.chicagomag.com/arts-culture/January-2020/New-exhibition-book-honor-Jun-Fujita-Chicagos-Japanese-American-Renaissance-Man/ [https://perma.cc/2QFE-2JGM]; *Jun*

difficulties of the Alien Land Laws: for many years, he had wanted a place to retreat into nature. However, when he found a location, his partner (Florence Carr, a "Euro-American") had to purchase the land on his behalf because of Minnesota's citizenship requirement for land ownership.[161] Fujita was reportedly granted U.S. citizenship in 1954 through a private bill.[162] It is at least plausible that this is the Jun Fujita who met with and wrote to Governor Warren about refunding money taken under the Alien Land Law.

Finally, one Clarence Comer from Fresno, California, also wrote to support the bill, explaining that it would "complete the refund program."[163] Possibly the same Clarence Comer from Fresno was interviewed in *The Fresno Bee*: *The Republican* about his experiences as a G.I., in 1944. He was 24 at the time of the interview. Apparently, he enlisted in 1941, and started just in time to see action at Pearl Harbor.[164] He was familiar with Japan, relatively sympathetic to the Japanese, and might have taken an interest in the surrounding politics.

The Governor Warren signed A.B. 3512 into law on July 11, 1953.[165] Sue Ishida and Lafayette Smallpage finally got their day in court. While the State of California gave back the money obtained during the escheat action, Ms. Ishida was disappointed with the Superior Court's finding that the refund should go to Mr. Smallpage.[166]

The California Court of Appeal's description of the underlying transaction and the escheat action reveals how Asians evaded the Alien Land Law. In 1926, Lafayette Smallpage and his mother, Carrie Smallpage, purchased a piece of land called the Vaccaro property. However, Henry Ishida, Sue Ishida's husband, retained 55 percent of the beneficial interest in the property. Mr. Smallpage purchased another property, the West property, in 1940. Again, Henry Ishida retained 55 percent of the beneficial interest.[167]

In 1940, Henry Ishida died, leaving his estate to his wife. Sue and her daughter Gladys shared his beneficial interest in the properties and both met with Mr. Smallpage to figure out what to do with them. The Superior Court

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Fujita, POETRY FOUNDATION, https://www.poetryfoundation.org/poets/jun-fujita [https://perma.cc/HD3K-C3BE] (last visited May 9, 2015).

161. National Park Service, National Register of Historical Places Registration Form, Sec. 8, at 4-5 (1996) https://npgallery.nps.gov/NRHP/GetAsset/NRHP/96001351_text [https://perma.cc/6PDP-3HTU].

162. Mari Matsuda, *Planet Asian America*, 8 ASIAN L.J. 169, 177 n.32 (2001).

163. Memorandum from Beach Vasey, *supra* note 153, at 2.

164. *Merry Fijians Gory Tales Fail to Scare GI Joes*, THE FRESNO BEE: THE REPUBLICAN, Oct. 11, 1944, at 17. *See also Clarence Comer*, THE OKLAHOMAN, http://www.legacy.com/obituaries/oklahoman/obituary.aspx?n=clarence-comer&pid=163598365 [https://perma.cc/UXU4-T6DJ] (last visited May 9, 2015).

165. Letter from Beach Vasey to Assemblymember John J. McFall dated July 11,1953, LEG. HISTORY ON A.B. 3512, FROM THE CAL. STATE ARCHIVES.

166. *See* Smallpage v. Winafred Orchards Co., 316 P.2d 751 (Cal. App. 1957) (rejecting Ms. Ishida's contentions against the trial court's judgment in favor of Mr. Smallpage).

167. *Id*. at 753.

found that Mr. Smallpage offered to buy their interests, or to sell his interest to them—whichever they preferred. The Ishidas sold their interests to Smallpage for $16,500. The Ishidas and Smallpage had separate attorneys in this transaction.[168]

California filed an escheat petition against the Vaccaro and West properties in 1942. Legal title remained in the name of Smallpage, but Sue Ishida was also named as a defendant. Mr. Smallpage negotiated a compromise with the State, paying $25,000 to keep the properties. Several years later, he sold properties for $82,000.[169]

Sue Ishida claimed to have been taken advantage of by Smallpage in the 1940 sale, and therefore that she was entitled to part or all of the refund. A.B. 3512 provided that the court should decide who deserved the refund "without regard to the technicalities of title, and shall give weight to the equitable merits of the various claims," and that "the fact that the payment to the State was made by any particular claimant shall not be controlling."[170] California law at the time was clear that attorneys bore the burden of proving that transactions with clients were fair.[171] Nonetheless, the superior court awarded the refund to Smallpage, finding that he had not violated his fiduciary duty in the 1940 transaction. The California Court of Appeal found that the trial court's decision was supported by substantial evidence, especially when it was viewed in the light most favorable to the prevailing party.[172]

III. REFORMATION AND RESOLUTION OF SUBTERFUGES

Under A.B. 2611 and A.B. 3512, persons whose land was escheated could seek refunds. Under *Oyama* and *Fujii*, the Alien Land Law was void, and no future escheats could occur. Because the U.S. Congress made naturalization race-neutral in 1952, there were no people in the category of "aliens ineligible to citizenship" based on race.[173] Nevertheless, important questions remained unresolved. What was to happen to land allegedly held in secret trusts or in the names of nominees designed to avoid escheat when the Alien Land Law was valid and in force? Many plots of land were held by U.S. citizen children, or non-Asian lawyers and business partners. Did they have to give it back?

Cases decided while the Alien Land Law was in effect held that participants in secret trusts had entered into illegal contracts, so they were "in pari delicto," in equal fault. Neither law nor equity would aid any of the parties. For example, in 1929, in a unanimous decision, the California

168. *Id*.
169. *Id*.
170. *Id*. at 752 (internal citation omitted).
171. *See, e.g.,* Hawkins v. Faries, 121 P.2d 20, 21–22 (Cal. App. 1942) (citing *In re* Estate of Witt, 245 P. 197, 202 (Cal. 1926)).
172. *Smallpage*, 316 P.2d at 754.
173. *See supra* note 22.

Supreme Court held in *Takeuchi v. Schmuck*[174] that "[i]t has long been a rule of law that courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy either by decreeing specific performance or awarding damages for breach."[175] Accordingly, they refused to order repayment of a $500 deposit made by a U.S. citizen of Japanese ancestry for the purchase of a home. The trial court found "legal title to the said property should be held by the daughter [who paid the $500], but the entire beneficial interest vested in the father, an alien ineligible to citizenship, in violation of the provisions of the Alien Land Law."[176] The Court urged the seller to repay the $500 as a matter of morality but refused to so order:

> While the law will not, upon grounds of public policy, afford relief to either party to an illegal transaction such as this one is shown to be, it is, nevertheless, proper to say that in the forum of good conscience the defendants are not justified in retaining possession of the money in suit. They were conspirators in an attempt to violate the statute in the same sense as were the Japanese father and daughter with whom they dealt, and their conduct, because of their citizenship, was more culpable than was the conduct of the ineligible alien or his daughter, who was of alien blood. The law, however, in this class of cases, provides no remedy for either of the offending parties.[177]

Similarly, in 1935, a unanimous court in *Babu v. Petersen*[178] reversed a quiet title judgment in favor of a White nominee holder who had persuaded the trial court that her deed was valid, but the mortgage she paid for the purchase price was void. The correct rule was that "all of the parties to this action are in pari delicto, and the court will not aid any of them to consummate their illegal design. It is a cardinal rule of equity that in such a case the law will leave them where it found them."[179]

How would the courts treat past transactions once the Alien Land Law had been voided? Solid authority suggested that the validity of a contract turned, as the U.S. Supreme Court had ruled, on "the law of the State at the time the contract was entered into."[180] A California statute enacted in 1872 and continuously in force since provides that "[t]he object of a contract must

174. Takeuchi v. Schmuck, 276 P. 345 (Cal. 1929).

175. *Id.* at 346.

176. *Id.* at 345.

177. *Id*. at 347. A student note criticized the case. *See* M. Philip Davis, *Quasi-Contracts: Benefits Conferred by Contract Illegal by Alien Land Law,* 18 CAL. L. REV. 75, 81-82 (1929) ("Not only does such a holding fail to do justice between the particular parties, but it operates as a temptation to the unscrupulous to encourage ignorant, uneducated Japanese to enter into such contracts, for it allows the unscrupulous to accept payments under the contracts and then keep the land without obligation to refund.").

178. Babu v. Petersen, 48 P.2d 689 (Cal. 1935).

179. *Id*. at 695.

180. Bethell v. Demaret, 77 U.S. 537, 540 (1870).

be lawful when the contract is made."[181] Throughout the relevant period, "the law here is, and should be, that a contract, or provision in a contract, which contravenes public policy when made is not validated by a later statutory change in that public policy."[182] Application of these doctrines would suggest that courts would not reform or participate in the partition of secret trusts. It is at least interesting, then, that with little explanation, in subsequent years, California and federal courts treated the Alien Land Law as if it had always been void. The Alien Land Law had been comprehensively rejected by the people who refused to ratify it, the California Supreme Court, which held it unconstitutional, and the legislature, which elected to refund all actions taken pursuant to it. This utter repudiation seemed to warrant declining to apply a legal doctrine which otherwise would have controlled. Accordingly, transactions condemned in *Takeuchi v. Schmuck* and *Babu v. Peterson* were treated as perfectly legitimate, ordinary, and enforceable.

Two types of cases appear in the reports. One type explored whether a transfer was a trust or whether it was a bona fide sale or outright gift. Other cases involved the question of whether a nominal owner was the sole owner, or also a trustee for other beneficiaries.

Singh v. Banes,[183] a 1954 case, involved "members of the Hindu faith, and natives of India," former partners who had been in the agricultural land business in Butte County.

> Over a period of twenty years the two evaded the Alien Land Law by conveying the land from time to time to third persons, taking back fictitious notes, mortgages and deeds of trust, thus lending a semblance of validity to their possession, use and ownership of the land. The partners remained in possession and exercised the rights and privileges of owners. Nothing was ever paid on the notes and mortgages executed by them and from time the land would be reconveyed in lieu of foreclosure and a new series of transactions would be initiated sometime within the period of two years, during which the law permitted them, for purposes of sale, to hold title after foreclosure.[184]

The Court of Appeal upheld a trial judgment that the last move in this game of musical chairs, a conveyance to the Caucasian wife of one of the partners "was a bona fide sale to her . . . and that she had fully paid the purchase price and owned the property free of any claims, equitable or otherwise."[185] The appellate court noted that the trial court, regarding the Alien Land Law as valid at the time of trial "would then have considered that all of the parties knew the penalties declared by the law which they were deliberately violating and all richly deserved to be left exactly where their felonious

181. CAL. CIV. CODE § 1596.

182. Interinsurance Exch. Of Auto. Club of S. Cal. v. Ohio Cas. Ins. Co., 373 P.2d 640, 642 (Cal. 1962); *see also* Willcox v. Edwards, 123 P. 276, 278 (Cal. 1912).

183. Singh v. Banes, 277 P.2d 89, 90 (Cal. Ct. App. 1954).

184. *Id.* at 90.

185. *Id.*

activities placed them."[186] But by the time of appeal, the court gave no hint that the prior illegality had any impact on the rights of the parties or the duties of the courts. The principle that courts would not sully their hands with illegal contracts was for some reason inapplicable. The decision of Asians to evade the Alien Land Law was, by then, recognized as legitimate.

Similarly, in a 1959 decision, the Court of Appeal noted that one party to a divorce, Dr. Fong, was not a citizen of the United States, but his children, Richard and Edward, were. To avoid the effects of the Alien Land Law, Dr. Fong used various devices to permit him to acquire property. Dr. Fong made down payments on some of the properties as 'loans' to the persons, who then received record title but never repaid the 'loans'. Some of the properties were deeded to the sons and other, with the understanding that the property was held in trust for Dr. Fong and would be placed in his name whenever he wanted.[187]

While certainly one and possibly both parties to the marriage participated in this subterfuge, that seemed to have no impact on the court's ruling.

Another factual question presented by the cases was whether a formal owner, usually a child who was a U.S. citizen, was an exclusive beneficiary of a gift, or whether other family members were also equitable owners because the transfer was a trust. Typical is *Kaneda v. Kaneda*,[188] a case decided by the Court of Appeal in 1965. Kojiro Kaneda, a native of Japan, had paid for a lot in Palo Alto in 1928, but title was taken in the name of his attorney, Frank Hoge. All agreed that Hoge took the land in trust. In 1941, Hoge conveyed the land to Yukio and Tamotsu Kaneda, two of Kojiro's eight children. Kojiro died in 1942. The question was whether Hoge held the land in trust for Kojiro, in which case all of the children would be entitled to a share, or only for Yukio and Tamotsu, in which case they would own it outright. As seemed to be common in these sorts of cases, the question of property ownership divided the family. Against his own interest, Tamotsu argued every child should get a share. Yukio disagreed, wanting half of the land, not an eighth of it. The Court of Appeal upheld the trial court's finding of a resulting trust for Kojiro's heirs.

One of Yukio's arguments was that "there could be no resulting trust" because "Kojiro was an alien ineligible to own land in California and therefore under the Alien Land Act was prohibited from owning property here."[189] The appellate court was unimpressed by the argument; the claim that a brother who tries to cheat his siblings should be allowed to do so because his parent was legitimately discriminated against because of his race

186. *Id.* at 92-93.
187. Fong v. Fong, 333 P.2d 797, 801 (Cal. Ct. App. 1965).
188. Kaneda v. Kaneda, 235 Cal. App. 2d 404, 407-08 (Ct. App. 1965).
189. *Id.* at 413.

should fail by the same rule that "one accused of killing his parents cannot be heard to plead for mercy on the ground that he is an orphan."[190]

The appellate court thought that ownership of the property might be permitted under the treaty between the U.S. and Japan, but seemed to have deeper concerns: "Knowledge of grave injustices done under the guise of the Alien Land Act added to the above facts lead to the conclusion that the trial court did not err in finding a resulting trust in favor of Kojiro."[191] Another Court of Appeal decision affirmed a judgment in favor of a Korean national to terminate a partnership involving real property. The court noted that "[t]itle could not be taken in the name of the plaintiff because of the Alien Land Law restrictions. Title however was taken in the name of the defendant,"[192] but this was presented as a background fact in the opinion, and there was no indication that it had operative legal significance.

In the U.S. Tax Court, Richard Louie prevailed on his claim that he was only liable for tax on 25 percent of the gain on a Fresno property sold in 1950, even though the legal title was exclusively in his name. The Tax Court agreed that Louie held the property in trust for himself and three other family members:

> petitioner's mother . . . was made trustee of property of her husband because she was a citizen and he an alien Chinese. Under the law of the State of California, as it then appeared upon the statute books, neither legal nor equitable title to property could validly repose in a Chinese national. It was thus entirely reasonable for petitioner's father to create a trust and the evidence in this respect is convincing and uncontradicted. That the Alien Land Law which occasioned the creation of the trust was declared unconstitutional after the death of petitioner's father and mother, merely removes the necessity for our consideration of the influence of a conveyance which is contrary to effective local law.[193]

In *Sonoda v. United States*,[194] plaintiff Mary Taki Sonoda won a claim for damages under the Japanese American Evacuation Claims Act based on loss of farmland – 160 acres at Niland and another 320 acres in the Imperial Valley – she sold at fire-sale prices before being subject to a curfew, and then incarcerated at the Poston camp in Arizona. The Commissioner of the Court of Claims took into account that "while she was nominally the owner of the Imperial farm, she was in reality a straw figure and [her father] Tom was the indispensable party to its operation."[195] The Commissioner noted that "the Alien Land Law of California in effect at that time precluded Tom from acquiring the land in his own name. Legal advisers suggested a

190. People v. Weidert, 705 P.2d 380, 393 (Cal. 1985) (Lucas J., concurring in part and dissenting in part).

191. *See* Kaneda, 45 Cal. Rptr. at 446.

192. En Taik Ha v. Kang, 187 Cal. App. 2d 84, 87 (Ct. App. 1960).

193. Louie v. Comm'r, 15 T.C.M. (CCH) 586, 590 (1956) (citations omitted).

194. Sonoda v. United States, 154 Cl. 130 (1961).

195. *Id*. at 136-37.

circumvention of the law by conveyance to others and ultimately 'to Mary through Tom as her guardian.'"[196]

CONCLUSION

In 1985, California Supreme Court Justice Stanley Mosk would contend that "[w]e have come a long way since the days of alien land laws."[197] There is at least substantial truth to this claim. The decision to repay Japanese Americans who had lost their land was remarkable. Every non-White person who had lost property had done so with due process of law, including an opportunity for a judicial trial. In addition, the U.S. Supreme Court to this day has never held that the land laws were unconstitutional because they were racially discriminatory. Thus, even though the legislature had not been compelled to act, and despite the strong possibility that they could not have been (because of sovereign immunity and the lawfulness of the takings at the time), the legislature chose to right what it had come to regard as wrongs. The legislature was supported by the voters who declined to support the Alien Land Law in 1945 and ultimately repealed it, and the courts, which sent strong signals of disapproval, and ultimately invalidated the Alien Land Law, a decision in which the executive branch acquiesced by not appealing.

Reparations for Japanese Americans was not limited to compensation for lost land. A federal statute in 1948 offered compensation for some property losses of Japanese Americans incarcerated during the War,[198] and Congress awarded monetary compensation for the incarceration itself in 1988.[199] There was also compensation for lost employment.[200]

All of this compensation was richly deserved. Yet, this country's long history of racial regulation raises the question of why there were reparations for the Alien Land Law when there have not been for other wrongs, which were longer-lasting, affected more people, and resulted in injury and death, not "just" financial loss? To be sure, there was also some public recognition that "[o]ur war-time treatment of Japanese aliens and citizens of Japanese

196. *Id*. at 152.

197. Wong v. Tenneco, Inc., 702 P.2d 570, 580 (Cal. 1985) (Mosk J., dissenting) (citations omitted).

198. The Japanese-American Claims Act, Pub. L. No. 80-886, 62 Stat. 1231 (1948), offered compensation for some economic losses to those incarcerated.

199. Civil Liberties Act of 1988, Pub. L. 100–383, 102 Stat. 904, codified at 50a U.S.C. § 1989b et seq.

200. 5 U.S.C. § 8332(l). 5 U.S.C. § 8332(l).; A Washington law authorized compensation for Japanese American civil service employees who were fired at the beginning of the war. Louis Fiset, *Redress for Nisei Public Employees in Washington State after World War II*, 88 Pac. N.W.Q. Q. No.1 21, 30 (Winter 1996/1997) (discussing WASH. REV. CODE § 41.04.580 (compensation for municipal employees); WASH. REV. CODE § 41.68.020 (compensation for state employees); In addition, California, Oregon, and Washington authorized honorary degrees for students whose education was interrupted by incarceration. CAL. EDUC. CODE § 66020(a); OR. REV. STAT. § 352.306; WASH. REV. CODE ANN. § 28B.20.130(11).

descent on the West Coast has been hasty, unnecessary and mistaken."[201] At the same time, there are few defenders of repudiated policies like Jim Crow, the genocide of indigenous peoples in the United States, and slavery, but that rejection has not led to compensation. While a full discussion of the theory and history of reparations is beyond the scope of this paper, one reparations scholar offered the following explanation as a summary of why Japanese Americans have been successful in ways that African Americans have not.

The African American claim faces two major difficulties. First, it is difficult to frame the call for reparations in a convincing manner because many of the victims are long since dead, there are too many of them, and they cannot easily be identified. Second, the causal chain between past harms and present victims is too long and too complex, with too many actors and events implicated. By contrast, the Japanese American claim for reparations was easily framed. Both victims and perpetrators were easily identifiable, and the event took place over a short, finite period. The harm was clear, and the causal chain was short and lacking in complexity.[202]

Another factor might be the contemporary international political situation.[203] Segregation was counter-productive, a blunder, given the Cold War contest for hearts and minds around the world, which was explicitly acknowledged by the Department of Justice.[204] Another reason for the success might be the determinate and small number of claimants, all identifiable from court records, and a readily calculable and limited amount of loss.

However, California and the United States have not come a long way since those days. The United States remains fundamentally shaped by an anti-Asian policy. During the decades of open immigration, the United States and the states discouraged and then flatly prohibited the immigration of Asians. A key idea behind the California Alien Land Law was that Asians might own all of the real estate in the country: "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 noncitizens."[205] This idea was similar to those of earlier anti-Chinese agitation, which the Supreme Court noted was based on a

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201. *See, e.g.,* Eugene v. Rostow, *The Japanese American Cases-A Disaster*, 54 YALE L.J. 489, 489 (1945).

202. Rhoda E. Howard-Hassmann, *Getting to Reparations: Japanese Americans and African Americans*, 83 SOCIAL FORCES (NO. 2) 823, 835 (2004).

203. *See* Dudziak, *supra* note 104, at 62 ("At a time when the U.S. hoped to reshape the post-war world in its own image, the international attention given to racial segregation was troublesome and embarrassing.").

204. *See supra* note 105; *see also supra* note 63 (Governor Earl Warren explaining support for school desegregation decision).

205. Mott v. Cline, 253 P. 718, 724 (Cal. 1927) (quoting Terrace v. Thompson, 274 F. 841, 850 (W.D. Wash. 1921) (three-judge court)). *See also* Webb v. O'Brien, 263 U.S. 313, 324 (1923) ("Conceivably, by the use of such [share- cropping] 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.").

conclusion "that that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[206] While some mid-century critics of the Alien Land Laws rejected anti-Asian prejudice on principle, they also regularly observed that the threat of Asian invasion and Asian property domination had passed.

In his *Oyama* concurrence, Justice Murphy contended that because of their age and the immigration ban, Japanese farmers presented no threat and could present no threat in the future.

> The nature of the Japanese alien segment of the California population is significant. In 1940 there were 33,569 Japanese aliens in that state, but the number is now smaller, the best estimate being about 25,000. The 33,569 figure represents those who entered before 1924, when Congress prohibited further immigration of aliens ineligible for citizenship.While the Alien Land Law has undoubtedly discouraged some from becoming farmers, the number who would normally be non-farmers remains relatively substantial. The farmers, actual and potential, among this declining group are numerically minute. The existence of a few thousand aging residents, possessing no racial characteristic dangerous to the legitimate interests of California, can hardly justify a racial discrimination of the type here involved.[207]

Likewise, the *Fujii* majority of the California Supreme Court observed:

> According to 1940 census figures, the alien Japanese population of California was 33,569. Immigration of persons ineligible to citizenship was halted by the Exclusion Act of 1924, 43 Stats. 161, 8 U.S.C.A. § 213(c), hence Japanese aliens in the state in 1949 were necessarily of mature years, and their number must have been materially less than in 1940 due to death, changes of residence, deportation and other causes.[208]

The Oregon Supreme Court decision invalidating its land law made a similar point:

> With the enactment in 1924 of the Exclusion Act, 8 U.S.C.A. § 213(c), immigration from Japan ended. Accordingly, all Japanese nationals who are now in Oregon are at least twenty-five years of age, and manifestly, many of them are in middle life or beyond. It is with them that our Alien Land Law deals. According to the 1940 census, there were then 1,617 Japanese aliens in Oregon. Very likely death, the effects of evacuation and other causes have reduced that number materially.[209]

None of this is to say that all, or even many, of the jurists, legislators, and voters were disingenuous when they ended the Alien Land Law and other anti-Asian policies. It may be that some to all of them were attempting to make substantial changes politically palatable. Nevertheless, it is telling that

206. Ping v. United States, 130 U.S. 581, 595 (1889).
207. Oyama v. California, 332 U.S. 633, 667–69 (1948).
208. Fuiji v. State, 242 P.2d 617, 628 (Cal. 1952).
209. Namba v. McCourt, 204 P.2d 569, 573 (Or. 1949).

even at this point, they saw the need to underscore the likelihood that there would be little real change as a result of the decisions.

California's Alien Land Law had been enacted to restrict the economic lives of Asians, based on a desire to minimize Asian presence in the state. The network of laws worked, limiting the number of Japanese immigrant farmers and contributing to a wave of anti- Asian public policy which led to the comprehensive exclusion of Asians in 1924. As late as 1960, Asians remained only about one half of one percent of the U.S. population.[210] Reparations for the California Alien Land Law had been made to members of a group which had, by successful policy innovation, nearly been eliminated from the country. As such, the California Alien Land Law is at best an uncertain precedent for the political possibility of reparations for groups whose status is not settled.

210. U.S. Census Bureau, *The Asian Population: 2000* (Feb. 2002).