Washington University Law Review

Volume 87 | Issue 5

2010

Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship

Rose Cuison Villazor

REDISCOVERING *OYAMA V. CALIFORNIA*: AT THE INTERSECTION OF PROPERTY, RACE, AND CITIZENSHIP

ROSE CUISON VILLAZOR[*]

ABSTRACT

Oyama v. California *was a landmark case in the history of civil rights. Decided in January 1948,* Oyama *held unconstitutional a provision of California's Alien Land Law, which allowed the state to take an escheat action on property given to U.S. citizens that had been purchased by their parents who were not eligible to become citizens. At the time, the country's naturalization law prohibited Japanese nationals from becoming U.S. citizens. Thus, the Alien Land Law applied primarily to Japanese nationals and Japanese Americans. Critically, the Supreme Court in* Oyama *recognized that the state's attempted taking of a citizen's property because his father was Japanese constituted a violation of his equal protection rights. In so doing,* Oyama *created a paradigm shift in the treatment of property rights of Japanese Americans.*

Despite its significance, Oyama *has received surprisingly little attention in legal scholarship. Leading constitutional and property law casebooks have virtually ignored the case. This Article seeks to correct that oversight. As this Article argues,* Oyama *fills a neglected void in our collective historical understanding of race, property law, and citizenship. Equally important, it provides a timely normative and prescriptive response to contentious contemporary debates about the validity of state*

---

* Associate Professor of Law, Hofstra University School of Law. Columbia Law School, LL.M., American University Washington College of Law, J.D. I would like to thank Joseph Singer, Greg Robinson, Christina Duffy Burnett, Robert Chang, Gabriel J. Chin, Anthony Colangelo, Nathan Cortez, Jessica Dixon, Paul Finkelman, Jason Gillmer, Neil Gotanda, Ernesto Hernandez, Kevin Johnson, Olati Johnson, Jeff Kahn, Sonia Katyal, Stephen Lee, Hiroshi Motomura, Melissa Murray, Xuan-Thao Nguyen, Huyen Pham, Carla Pratt, Tom Romero, Victor Romero, Juliet Stumpf, Rick Su, Joshua Tate, Jenia Turner, Leti Volpp, and Rodney Villazor for commenting on earlier drafts of this Article. I also benefitted from feedback I received from participants at the Conference of Asian Pacific American Law Faculty (CAPALF), LatCrit XIII, Property Works-in-Progress Conference and faculty workshops at Hofstra University Law School, Lewis & Clark Law School, Pace Law School, SMU Dedman School of Law, Texas Wesleyan School of Law and Touro Law School. I especially extend my gratitude to Fred Yoshihiro Oyama, the named petitioner in *Oyama v. California*, 332 U.S. 633 (1948), who graciously allowed me to interview him for this Article. Finally, I thank Mark E. Vandermeulen (SMU '10) for outstanding research assistance. This Article received support from Hofstra Law School and the Southern Methodist University Dedman School of Law Clark J. Matthews II Faculty Research Endowment Fund. All errors are my own.

and local law restrictions on leaseholds against a select group of noncitizens, namely undocumented immigrants. By calling attention to the historical and contemporary contributions of this largely unnoticed case, this Article argues why Oyama *should be included in the canons of property and constitutional laws.*

TABLE OF CONTENTS

INTRODUCTION

> *I was aware that my rights were being violated but if that's what the President wanted us to do—then we must evacuated [sic]. It was my intention to prove my loyalty and looked forward to joining the service. That is—until the property was escheated. My desire to join the service was to defend my country and, more specifically, to defend my home. When they took our home, I changed my attitude completely. I could never be hostile to the U.S.A.—but I was bitterly disappointed and felt like a man without a country.*
>
> —Fred Yoshihiro Oyama.[1]

Today, two seemingly disparate areas of law—property and immigration—are colliding. In the past several years, a number of municipalities have enacted local ordinances that prohibit the ability of undocumented immigrants[2] to enter into a residential lease in an apartment or residential building located within their borders.[3] Among these is the City of Farmers Branch's Ordinance 2952 ("Ordinance 2952"), which required all persons to declare that they are U.S. citizens or nationals or provide an identification number that establishes "lawful presence" in the United States in order to obtain a residential occupancy license before signing an apartment or other residential lease.[4] Stating that "persons who

1. Letter from Fred Oyama to Rose Cuison Villazor (July 30, 2008) (on file with *Washington University Law Review*) (Response to Question No. 6, "How did you feel about [the executive order that mandated the exclusion of all persons of Japanese ancestry from the West Coast]? How did you feel about leaving your home?").

2. This Article uses the phrase "unauthorized immigrants," "unauthorized noncitizens," "undocumented immigrants," and "undocumented noncitizens" interchangeably instead of the pejorative term "illegal alien" to refer to the population of immigrants who do not have valid immigration status in the United States. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276 (1997) ("The most damning terminology for noncitizens is 'illegal alien' . . . Illegal aliens is a pejorative term that implies criminality, thereby suggesting that the persons who fall in this category deserve punishment, not legal protection.") (citation omitted).

3. *See, e.g.*, Farmers Branch, Tex., Ordinance No. 2952, § 1(B)(5) (Jan. 22, 2008) (limiting the right to obtain a license to lease a residence to U.S. citizens, U.S. nationals, or those who can show evidence of "lawful presence in the United States"); Farmers Branch, Tex., Ordinance No. 2903, § 3(2) (May 22, 2007) (requiring each member of a tenant family to submit evidence of "citizenship or eligible immigration status" prior to entering a lease); Riverside, N.J., Ordinance 2006-16, § 5 (July 27, 2006) (prohibiting renting property to "illegal aliens"); Escondido, Cal., Ordinance No. 2006-38 R, § 16E-1 (Oct. 10, 2006) (proscribing "harboring [of] illegal aliens"); Hazleton, Pa., Ordinance 2006-40, § 7 (Dec. 13, 2006) (same); County of Cherokee, Ga., Ordinance No. 2006-003, § 18-503 (Dec. 5, 2006) (same).

4. Farmers Branch, Tex., Ordinance No. 2952, § 1(B)(5)(i).

are not lawfully present in the United States" are not eligible for certain state and local benefits including residential licenses,[5] Ordinance 2952 created a licensing scheme that required the city to verify a person's lawful immigration status with the federal government before that person could live within the city.[6]

The attempts of Ordinance 2952 and similar local restrictive housing laws that use unauthorized immigration status to deny the ability of undocumented noncitizens to rent property have expectedly invited contentious litigation.[7] Central in these lawsuits is the question of whether

5. *Id.* pmbl. ("WHEREAS, pursuant to Title 8, United States Code Sections 1621, *et seq.*, certain aliens not lawfully present in the United States are not eligible for certain State or local public benefits, including licenses . . . ."); *id.* § 1(B)(1) ("Prior to occupying any leased or rented single-family residence, each occupant must obtain a residential occupancy license.").

6. *Id.* § 1(D) (explaining the procedures that the city's building inspector must follow to verify whether a tenant who failed to declare his or her citizenship is "an alien lawfully present in the United States").

7. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, Nos. 3:08-CV-1551-B, 3:03-CV-1615, 2010 WL 1141398 (N.D. Tex. Mar. 24, 2010) (*Villas* II) (lawsuit involving validity of Farmers Branch Ordinance 2952); Villas at Parkside Partners v. Farmers Branch, 577 F. Supp. 2d 85 (N.D. Tex. 2008) (lawsuit regarding validity of Ordinance 2903). On a broader scale, these local restrictive housing laws are part of larger state and local efforts to curb illegal immigration within their borders. By passing these laws, some sub-federal governments seek to challenge the long-held principle that the federal government has exclusive authority to regulate immigration law. *See* Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 570 (2008) ("[T]he trend in state and local immigration regulation in the twenty-first century . . . [is] in significant tension with a doctrine articulated by the Supreme Court in the late nineteenth century—that immigration control is the exclusive responsibility of the federal government . . . ."). The challenges to the federal exclusivity principle in immigration law have manifested in different forms. On the one hand are laws that rely on inherent state and local government police powers to exclude undocumented immigrants and, in so doing, aim to bolster the federal government's enforcement goals. *See, e.g.*, Farmers Branch, Tex., Ordinance No. 2952 ("[I]t is the intent of the City of Farmers Branch to enact regulations that are harmonious with federal immigration law and which aid in its enforcement . . . ."); Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211–23-216 (2003) (prohibiting employers from hiring undocumented workers by relying on the federal immigration law's definition "unauthorized aliens"); Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv., Ch. 112 § 2 (West) (proscribing employers from hiring undocumented workers because their continued employment "impede[s] and obstruct[s] the enforcement of federal immigration law" and thus, the law seeks to discourage "illegal immigration"). Despite their stated consistency with federal law, these laws have been subject to preemption challenges. *Compare* Chamber of Commerce v. Edmondson, 594 F.3d 742, 766–67 (10th Cir. 2010) (holding that provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007 that imposed sanctions on employers who employ unauthorized noncitizens are preempted) *and Villas* II, 2010 WL 1141398 (holding that federal law preempts Farmers Branch Ordinance 2952) *with* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 864 (9th Cir. 2009) (holding that Arizona's law that allowed for the revocation of business licenses by employers who hired undocumented workers was not preempted by federal law). *See also* Fonseca v. Fong, 84 Cal. App. Rptr. 3d 567 (Cal. Ct. App. 2008) (upholding state law requiring city police officers to notify the federal government when they have custody of a noncitizen suspected of violating drug laws). On the other hand are laws, also grounded on state and local government authority and autonomy, which seek to be more inclusive of undocumented immigrants. These types of laws have also been subjected to preemption lawsuits. *Compare* City of

the local laws are unlawfully regulating immigration law, which has long been held to fall under the exclusive domain of the federal government,[8] or whether the laws are regulating property and housing, which are areas that traditionally fall within the domain of state and local governments.[9] The lawsuits have also focused on the civil rights implications of the laws. Invoking the Equal Protection Clause of the Fourteenth Amendment,[10] plaintiffs have argued that the laws discriminate on the basis of race or national origin.[11] A number of scholars agree, commenting that many of these laws are problematic because they are directed primarily against Latina/os.[12] Indeed, evidencing fears of the "Browning" of their towns,[13] political leaders and supporters favoring these local housing restrictions have indicated their intent to exclude Latina/os from their neighborhoods regardless of their immigration status.[14] That is, although designed to limit

---

New York v. United States, 179 F.3d 29 (2d Cir. 1999) (holding that New York City's noncooperation policy of not reporting the immigration status of individuals to federal officials was preempted) *and* Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004) (holding that state law that provided in-state tuition for undocumented college students was not preempted).

8. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties."); Rodríguez, *supra* note 7, at 570 (discussing the federal exclusivity principle in immigration law).

9. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022–23 (discussing traditional police powers of states to regulate property); Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (noting that regulation of property falls within the traditional police powers of states); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 476–78 (2004) (explaining that state and local governments enact property laws under their police powers).

10. U.S. Const., Amend. XIV, § 1.

11. *See, e.g.*, Complaint at 18, Reyes v. City of Farmers Branch, No. 3:08-cv-01615-O (N.D. Tex. Sept. 12, 2008), *available at* http://maldef.org/assets/pdf/ordinance2952_complaint091208.pdf (challenging the constitutionality of Farmers Branch Ordinance 2952 on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment because the law had the "purpose and intent to discriminate against Latinos on the basis of race and national origin").

12. *See* Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 9–11 (2007) (noting that the Hazleton ordinance targeted Latino immigrants); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1126–27 (2009) (discussing that anti-immigrant ordinances have been passed in places that have experienced increased Latino migration); Tom I. Romero, II, *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER RACE & JUST. 13, 23 (2008) ("At the heart of many of the anti-immigration ordinances and related legislation is an attempt to control and concentrate the movement of specifically the Latino community, regardless of citizenship status."); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 80–81 (2009) (explaining that anti-illegal immigrant ordinances are shown to be anti-Mexican).

13. *See* Oliveri, *supra* note 12, at 80–81; Romero, *supra* note 12, at 23–24.

14. *See infra* Part III (discussing legislative history of Farmers Branch Ordinance 2903 and

undocumented noncitizens' right to property, the laws have the consequence of affecting the property rights of U.S. citizens as well.

Although fairly novel in recent memory, the intersection of property, race, immigration, and citizenship that these local ordinances reflect is far from new. In particular, the current discussion of these local housing ordinances has overlooked the ways in which these laws parallel alien land laws that states passed in the early twentieth century. These alien land laws, which prohibited noncitizens who were statutorily ineligible to apply for U.S. citizenship to own or lease property,[15] primarily targeted Japanese. In 1923, the Supreme Court upheld the validity of these laws on the grounds that states traditionally have authority to regulate the property rights of noncitizens.[16]

Ultimately, these state property laws succumbed to equality principles in *Oyama v. California*[17] when the Supreme Court struck down the application of California's Alien Land Law to U.S. citizens. As the Court noted, California's Alien Land Law did more than deny noncitizens who were not eligible to become citizens from owning land. The law also restricted the rights of U.S. citizens to own property if their noncitizen parents purchased the land on their behalf.[18] Accordingly, the Supreme Court invalidated the law as applied to Fred Oyama, a Japanese American, concluding that by denying him his right to own property because of his father's national origin, the state violated his right to equal protection and "privileges as an American citizen."[19]

This Article explores the interplay between property, race, and citizenship in *Oyama* and analyzes the case's historical, doctrinal, and theoretical contributions to the canons of property and constitutional laws.[20] Overall, the Article has two broad aims. Its primary goal is to fill a

---

Ordinance 2952 indicating racialized purposes of the law).

15. *See infra* Part I (discussing the passage of alien land laws).

16. Terrace v. Thompson, 263 U.S. 197, 222 (1923) (affirming Washington's alien land law); Porterfield v. Webb, 263 U.S. 225, 233 (1923) (upholding California's alien land law); Webb v. O'Brien, 263 U.S. 313, 322–24 (1923) (affirming California's alien land law); Frick v. Webb, 263 U.S. 326, 333–34 (1923) (affirming California's alien land law).

17. 332 U.S. 633 (1948).

18. *See infra* Part I (explaining the racialized purpose of the alien land laws against Japanese).

19. *See Oyama*, 332 U.S. at 640.

20. This Article is part of a larger project of exploring how cases and laws that have been overlooked in property and immigration legal scholarship shed new light on our understanding of the legal construction of race and citizenship. *See, e.g.*, Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008) (analyzing federal cases that upheld blood quantum land alienation restrictions in the U.S. territories and exploring their broader implications on the legal construction of race and political indigeneity); Rose Cuison Villazor, *Reading Between the (Blood) Lines*, 83 S. CAL. L. REV. 473 (forthcoming 2010) (exploring linkages

gap in the historical narrative of property rights by highlighting how this largely unnoticed case deepens, as this Article argues, our understanding of property and equal protection. Secondarily, the Article seeks to link this overlooked history to contemporary housing restrictions against undocumented immigrants.

Oyama was a landmark case in the history of equal protection and property rights in the United States.[21] Decided four years after *Korematsu v. United States*,[22] which upheld the constitutionality of E.O. 9066,[23] *Oyama* helped to turn the tide against ongoing public discrimination directed at the recently interned Japanese families. Specifically, although California enacted the Alien Land Law in the early 1900s, it did not significantly enforce it until well into the internment of Japanese and after their release from concentration camps.[24] This more vigorous enforcement of the law demonstrated the state's ongoing quest to expel Japanese from California through the use of a state property law. Thus, *Oyama*'s protection of a Japanese American's right to own property returned some measure of security against California's relentless efforts to exclude the Japanese community. Regrettably, *Oyama* did not address the question of

---

between blood quantum, race, property rights, and sovereignty in legal efforts to address the effects of racial subordination and colonial subjugation of indigenous peoples and considering import of territorial cases and laws in the Commonwealth of the Northern Mariana Islands on larger efforts to promote indigenous peoples' right to self-determination) (on file with *Washington University Law Review*); Rose Cuison Villazor, Racially Inadmissible Wives: Uncovering Immigration Law's Restrictions on Interracial Marriages (unpublished manuscript) (on file with author) (examining how the convergence of immigration law, the War Brides Act, and military regulations functioned like the federal counterpart of state antimiscegenation laws by restricting the ability of U.S. citizen soldiers to marry Japanese women during post-World War II period and the implications of their intersections on the meaning of citizenship).

21. *See infra* Part I.

22. 323 U.S. 214 (1944).

23. *See id.* at 217–18. *Korematsu* is considered one of the worst Supreme Court opinions in the history of constitutional jurisprudence. *See* BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW WITH 100 COURT AND JUDGE TRIVIA QUESTIONS 69 (1997); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights during Wartime*, 2 INT'L J. CONST. L. 296, 311 (2004) ("*Korematsu* is excoriated as one of the two or three worst moments in American constitutional history."). The evacuation ultimately led to the internment of more than 20,000 Japanese. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 4 (2001); FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 161–63 (1976).

24. *See infra* Parts I and II and accompanying notes (explaining the enforcement of the Alien Land Law). As Keith Aoki eloquently explained, the enactment of the alien land laws in the early 1900s directly related to the internment of Japanese. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 68 (1998) ("The Alien Land Laws allowed, promoted and indeed encouraged a linkage between race, nationality and denial of civil rights that culminated in the internment of Japanese Americans. Accordingly, the denial of civil rights to Asian immigrants 'ineligible for citizenship' under Alien Land Laws paved the way for the denial of civil rights to Japanese-American citizens . . . .").

whether the Alien Land Law violated the equal rights of noncitizen Japanese. In so doing, it left open the authority of state and local governments to continue to use their police powers to regulate noncitizens' access to property.[25] Nevertheless, *Oyama* stalled the state's continued discrimination against Japanese landholding.[26] Importantly, it provided support for the striking down of California's Alien Land Law a few years later.[27]

More broadly, by recognizing the racialized effect of the Alien Land Law's differential treatment against U.S. citizen children of Japanese nationals, *Oyama* paved an important path towards fulfilling the promise of equality in property ownership that the Supreme Court later enshrined in *Shelley v. Kraemer*.[28] Indeed, *Shelley*, which was decided four months after *Oyama* by the same set of Supreme Court justices and also authored by Chief Justice Vinson, relied on *Oyama* for the proposition that the denial of equal enjoyment of property rights by a state on the basis of a person's race and ancestry constituted an equal protection violation.[29]

Unlike *Korematsu* and *Shelley*, *Oyama*'s place within equal protection jurisprudence has been overlooked in pedagogical and scholarly literature.[30] For example, leading constitutional law and property law

---

25. *See infra* Part III (explaining that state and local governments may continue to regulate noncitizens' access to property as long as they do not discriminate based on race). Whether state and local government regulation of noncitizens' property rights constitute unlawful immigration regulation, however, is an entirely different issue than is preliminarily explored *infra.* A full analysis of determining the appropriate balance between federal immigration law and local property regulation is beyond the scope of this Article.

26. Namba v. McCourt, 204 P.2d 569, 577 (Or. 1949) (stating that *Oyama v. California* "in fact, ended the Alien Land Law"); Note, *Constitutional Law: Equal Protection of the Laws: Presumption of Intent to Evade Escheat in California Alien Land Law*, 36 CAL. L. REV. 320, 324 (1948) ("The Attorney General of California has interpreted [*Oyama*] as ending the practical utility of the alien land law, and has indicated his intention to dismiss all the escheat cases pending before the California courts.").

27. Fujii v. California, 242 P.2d 617 (Cal. 1952) (relying on *Oyama v. California* to invalidate the Alien Land Law).

28. 334 U.S. 1 (1948) (holding that judicial enforcement of private racial covenants would violate the Equal Protection Clause of the Fourteenth Amendment).

29. *See id.* at 21 (citing *Oyama v. California*, 332 U.S. 633 (1948)).

30. There are notable exceptions. *See, e.g.*, Aoki, *supra* note 24, at 52–64; Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497, 500–09 (2001); Brant T. Lee, *A Racial Trust: The Japanese YWCA and the Alien Land Law*, 7 ASIAN PAC. AM. L.J. 1, 18–20 (2001); Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 32–39 (2005); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 274–75 (1997). These articles, however, did not conduct an extensive analysis of *Oyama* and its overall place within property and equal protection jurisprudence. As this Article argues, greater attention should be given to *Oyama* itself because of its unique contributions to our understanding of property, race, and citizenship. Other scholars have

casebooks include both *Korematsu* and *Shelley* but do not even refer to *Oyama*.[31] This Article intends to correct this oversight. As this Article contends, *Oyama* has much to offer our collective knowledge of equal protection, property, immigration, and citizenship jurisprudence.

First, *Oyama* constitutes an important piece of the larger story of non-whites' struggle for equal access to property in the early to mid-1900s. The conventional understanding of discrimination in property law is that racial barriers to property rights resulted in unequal citizenship. Both *Shelley* and *Buchanan* tell this dynamic of using equality principles in order to vindicate the equal citizenship rights of African Americans.[32]

---

recently conducted deeper analyses of cases that have been marginalized in the scholarly literature that also revealed underappreciated conceptions of race, citizenship, and civil rights. *See, e.g.*, Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009) (examining Ozawa v. United States, 260 U.S. 178 (1922)); Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006) (analyzing cases where white neighbors used nuisance doctrine to maintain residential segregation); Darrell A. H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999 (2008) (examining Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and the application of the Civil Rights Act of 1866 in private discrimination of sale of property).

31. For constitutional law books that fail to include, refer, or cite *Oyama*, see RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT (2008); PAUL BREST ET AL., CONSTITUTIONAL DECISIONMAKING (5th ed. 2006); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (16th ed. 2007). *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1315–16 (3d ed. 2000) (mentioning *Oyama*). The leading property casebook, JESSE DUKEMINIER ET AL., PROPERTY (6th ed. 2006), similarly does not include *Oyama. But see* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 20 (4th ed. 2006) (discussing *Oyama* in the notes). I note here that casebooks on race and the law do include *Oyama. See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 429 (2d ed. 2007); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 102 (5th ed. 2004). As I argue in this Article, however, *Oyama* should also be covered in "mainstream" pedagogical literature.

32. Told in this way, the relationship between property, race, and citizenship is explored from a mainly Black/White lens. *See* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1215 (1997). This Article does not claim that discussions of race should not begin with an examination of how law constructed race along a Black/White binary construction. As Neil Gotanda explained, the "American racial classification practice has included a particular rule for defining the categories black and white." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* CRITICAL RACE THEORY, THE KEY WRITINGS THAT FORMED THE MOVEMENT 257, 258 (Kimberle Crenshaw et al. eds., 1995). But as Juan Perea has cautioned, the Black/White paradigm leads to the marginalization of concerns of other people of color. *See* Perea, *supra*, at 1215. To be sure, much about the meaning and criticism of the Black/White paradigm still needs to be unpacked. This Article's exploration of *Oyama* and the alien land laws seeks to be part of that larger conversation about the need to examine the ways in which the construction of race and racial subordination affected different groups. Notably, the Article underscores Bob Chang's call for further examination of the racialization of Asian Americans. *See* Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1265 (1993) (pointing out the need to include the varied experiences of Asian Americans with discrimination within the larger discourse of race and the law); *see also* Carbado, *supra* note 30, at 636 (noting law's role in constructing Asians as a racial group).

Oyama reveals a different, yet equally compelling, story of the relationship between property, race, and citizenship. Specifically, *Oyama* reconfigures the dynamic by illustrating how the Alien Land Law deployed citizenship to deny individuals, specifically Japanese, the right to own property. As *Oyama* acknowledged, racial equality ultimately proved to be the sword that cut through the subordination of persons through the use of racialized citizenship laws. Accordingly, examining *Oyama* and the dismantling of barriers to property faced by Japanese—resident aliens and U.S. citizens alike—thus expands our overall conception of the intersection between race, property ownership, and equal citizenship.

Second, *Oyama* facilitates revisiting the disjunction between citizenship and noncitizenship in land ownership and the broader limitations on state authority over the property rights of noncitizens. Although *Oyama* dictated that states might no longer enact laws that discriminated against citizens on the basis of race, it left unresolved the question of the extent to which states may restrict the ability of noncitizens to acquire a property interest. By evading this question in *Oyama*, the Supreme Court let stand its earlier opinions, which upheld the discriminatory treatment of Japanese ineligible noncitizens in land ownership.[33] Critically, it missed the opportunity to address two overlapping issues of that time: why citizenship should be a basis in the first instance in acquiring a property right and when a state limitation on a noncitizen's property rights has gone beyond the permissible boundaries of state police powers and shifted towards a form of unauthorized regulation of immigration law.

This latter point leads to the third reason why examining *Oyama*'s legacy is relevant today. The Supreme Court's failure to address the father's discrimination claim left untouched the power of states to regulate noncitizens' property rights. This broad power informs current claims by local governments that they have the authority to use their police powers to pass local housing restrictions that deny noncitizens, particularly those without authorized immigration status, the ability to rent property. When these laws are viewed through the lens of *Oyama*, the case reveals how these contemporary uses of local property laws—targeted mainly against Latina/o immigrants—may be understood to be the alien land laws of our time. *Oyama* forces a re-examination of the intersections of immigration,

33. Terrace v. Thompson, 263 U.S. 197, 220–21 (1923) (affirming Washington's alien land law); Porterfield v. Webb, 263 U.S. 225, 233 (1923) (upholding California's alien land law); Webb v. O'Brien, 263 U.S. 313, 322–24 (1923) (affirming California's alien land law); Frick v. Webb, 263 U.S. 326, 333 (1923) (affirming California's alien land law).

citizenship law, race, and property law evident in these local housing ordinances and offers normative and prescriptive responses to them. At a minimum, *Oyama* shows the ease with which these contemporary property restrictions against noncitizens may become discriminatory against their U.S. citizen children. Even broader, the case offers an opportunity for courts to revisit what the Supreme Court neglected to do by determining whether states may continue to control noncitizens' property rights. Indeed, courts may choose to take the issues a step further by providing equal protection to the rights of unauthorized noncitizens to acquire a property interest, even if they are, technically, not members of the American polity.[34]

Accordingly, this Article calls for recognizing *Oyama*'s important historical and contemporary contribution to our understanding of race, property and citizenship. Acknowledging *Oyama*'s critical role in history fills some of the gaps in our pedagogical and scholarly understanding of the struggle for equality in property law and equal citizenship. More broadly, the Article's analysis of the citizen/noncitizen distinction in property rights attempts to demonstrate the need to not only reconsider firmly entrenched views about state regulation of property rights of noncitizens, but also to address their contemporary implications.

Part I examines the historical background, facts of the case, and Supreme Court opinion in *Oyama.* This Part explains where *Oyama* fits within the larger historical struggle for equal access to land ownership and how the case contributes to equal protection jurisprudence in property law. Part II analyzes the ways in which immigration and naturalization law shaped the development of property rights of noncitizens. This Part illustrates the neglected story of how the property rights of immigrants who were neither racially constructed as White or Black diminished as a result of laws that were, ironically, designed to expand the citizenship and property rights of racialized persons. Part III probes deeper into the heart of property law and analyzes the limits that *Oyama* imposed and liberated on the power of states to construct property rights. In so doing, this Part underscores the undertheorized citizen/noncitizen distinction in land rights and power of states to limit noncitizens' property rights that are implicated from the *Oyama* opinion. Part IV examines contemporary local ordinances against undocumented immigrants and explores the implications of

34. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS, ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 5 (2004) (stating that the term "illegal alien" constitutes a "*new legal and political subject*, whose inclusion within the nation was simultaneously a social reality and a legal impossibility—a subject barred from citizenship and without rights").

Oyama's prescription to equality in property on these ordinances. The Conclusion calls for greater pedagogical and scholarly attention to *Oyama* in order to have a more robust understanding of how race and citizenship have shaped our historical and contemporary knowledge of property rights and equality.

I. *OYAMA V. CALIFORNIA* AND THE CALIFORNIA ALIEN LAND LAW

Property law has long been understood to regulate relations among persons.[35] When viewed from the lens of U.S. racial history, this conception of property law would be incomplete without recognizing its critical role in the political, economic, and social ordering of people of color's prescribed place in society. For many who have been "raced,"[36] property law long constituted an important tool in their historical subordination,[37] especially for those African Americans who were themselves considered property.[38] Cases such as *Buchanan v. Warley*[39] and *Shelley v. Kraemer*[40] illustrate starkly the ways in which the promise of equality in property rights have long been denied and the ways in which the Supreme Court has sought to remove unconstitutional barriers to the realization of equal rights to own, enjoy, use, and transfer property.[41]

Oyama v. California[42] is a neglected yet important part of the historical narrative of the protracted struggle for equality in property law. As this

35. JOSEPH SINGER, INTRODUCTION TO PROPERTY 2 (2d ed. 2005) ("Property concerns relations *among people,* not relations between people and things.").

36. As critical race theorists have argued, race is socially and legally constructed. *See, e.g.*, IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 10 (1996) ("[T]o say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race."); Gotanda, *supra* note 32, at 258.

37. *See* Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1523 (1991) (asserting that "race is at the heart of American property law"); Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 321 (2005) (explaining the ways that property law has been shaped by race); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (stating that property rights are "contingent on, intertwined with, and conflated with race"). Elsewhere, I have also argued how property laws facilitated racial and political subordination. *See* Rose Cuison Villazor*, Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 821–24 (2008).

38. Dred Scott v. Sandford, 60 U.S. 393 (1857).

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

40. Shelley v. Kraemer, 334 U.S. 1 (1948).

41. *See id.* at 1 (holding that court enforcement of private covenants designed to discriminate against persons of "Negro or Mongolian" descent constitutes state action in violation of the Equal Protection Clause of the Fourteenth Amendment), *Buchanan*, 245 U.S. at 82 (holding that a city ordinance prohibiting racial integration on neighborhood blocks violated the Fourteenth Amendment by denying citizens the equal right to acquire and enjoy property and equal protection of the law).

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

Part elucidates, the case demonstrates how race, property, immigration, and citizenship law functioned to construct the meaning of equality in property rights and citizenship. By striking down the section of California's Alien Land Law that annulled a citizen's right to own property because of his father's ancestry, *Oyama* represents a triumphant victory against racially discriminatory property laws that coalesced with immigration and nationality law and treated Japanese Americans as second-class citizens.

A. Historical Context

Similar to many immigrants who have been cast as racially inferior,[43] Japanese encountered discrimination in various aspects of their life. On the federal level, numerous pieces of legislation plus executive actions made it difficult for Japanese to gain entry into this country.[44] In California, state laws hindered them from educating their children[45] and, as this Article examines, acquiring property.[46] Indeed, many Californians saw restrictions in property rights as a crucial method of deterring Japanese from coming to the state. In proposing the bill that ultimately became California's Alien Land Law of 1913,[47] the state attorney general stated:

---

43. *See* Johnson, *supra* note 2, at 281 (stating that although "[a]lienage status has not always been linked to race," the term "alien" has over time "become equated with racial minorities").

44. *See* CHUMAN, *supra* note 23, at 30–37 (detailing immigration laws that were passed between 1907 and 1924 to exclude Japanese from entering the country). For example, the Immigration Act of February 20, 1907, which led to the exclusion of contract workers, was directed at Japanese laborers. *See id.* at 30–33. The United States and Japan entered into what became known as "Gentlemen's Agreement," which required Japan to limit the number of Japanese migrating to the United States. *See id.* at 33–36. Moreover, in 1924, Congress passed the Immigration Quota Law, also known as the "Japanese Exclusion Act," which excluded those persons "ineligible to citizenship" from entering the country. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153, *repealed by* Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, tit. IV, § 403(a)(23), 66 Stat. 163, 279. During post-World War II, the exclusion of those ineligible for citizenship led to the denial of entry of Japanese wives of U.S. citizens who sought admission to the U.S. under the War Brides Act of 1945. *See* Bonham v. Bouiss, 161 F.2d 678 (1947) (upholding the exclusion of "a woman of one-half white, one-half Japanese blood" because, despite being a war bride, she was inadmissible under immigration law based on her ineligibility for citizenship).

45. *See* CHUMAN, *supra* note 23, at 20 (explaining that on October 11, 1906, the San Francisco Board of Education adopted a resolution to segregate Japanese students in the public school system).

46. *See id.* at 41 (noting that other anti-Japanese legislation that have been proposed included limiting their right to marry, vote and run for public office).

47. *See id.* at 46–48. Although the Alien Land Law was enacted in 1913, several proposals to limit land ownership by Japanese farmers were introduced a few years earlier. *See id.* at 41–43 (explaining, for instance, that the Alien Land Bill of 1909 which required noncitizens who purchased property to file for citizenship within five years or lose property was directed at Japanese because they were ineligible for citizenship).

> It is unimportant and foreign to the question, whether a particular race is inferior. The simple and single question is, is the race desirable. . . . It [the law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land.[48]

Critically, white farmers specifically wanted to prevent the "Issei" or first-generation Japanese immigrants from owning land.[49] The law prohibited "aliens ineligible for American citizenship" from acquiring, owning, occupying, or leasing lands for more than three years or transferring agricultural land.[50] Since Japanese were not able to naturalize under the law, the phrase "aliens ineligible to citizenship" thus constituted a euphemism employed to cover up the law's underlying discriminatory intent.[51]

The Alien Land Law provided that land acquired by persons who were ineligible for citizenship would escheat, or transfer to the state, after the government proved that the land was in fact bought to evade the law.[52] Notably, all escheat actions undertaken by the state, albeit not a substantial number, were against Japanese, evidencing the Alien Land Law's intent to drive Japanese away from California.[53]

Despite the restriction on real property ownership, Japanese landholding increased.[54] Legal loopholes in the law facilitated circumvention of its proscriptions and state authorities were disinclined to prosecute.[55] In 1920, however, a ballot initiative intended to strengthen the law overwhelmingly passed in California.[56] The 1920 voter initiative exemplifies the ways in which the initiative process can have a particularly subordinating effect on noncitizens because of their inability to participate

48. CHUMAN, *supra* note 23, at 48 (quoting a speech made by the state attorney general about the Alien Land Law of 1913).

49. *See* Aoki, *supra* note 24, at 39.

50. Oyama v. California, 332 U.S. 633, 636 (1948); CHUMAN, *supra* note 23, at 49.

51. CHUMAN, *supra* note 23, at 48.

52. *See id.* at 49.

53. *See id.* at 48.

54. *See* Aoki, *supra* note 24, at 56 (noting that ownership of lands by Japanese actually increased after 1913 because Japanese noncitizens placed purchased lands in trusts and guardianships for their U.S.-born children, formed corporations that owned land under its corporate name, or put lands under the names of friends or U.S. citizen relatives).

55. *See id.*; *see also* Robinson & Robinson, *supra* note 30, at 33 (explaining that legal loopholes enabled Japanese noncitizens to acquire property in some form).

56. *See* Aoki, *supra* note 24, at 57.

in the election process.[57] The law proscribed "aliens ineligible to citizenship" from being placed under guardianships or trusteeships,[58] prevented all agricultural lands from being leased,[59] and prohibited corporations owned by a majority of persons who were ineligible to be naturalized from owning real property,[60] all of which had previously enabled Japanese noncitizens to acquire property.[61] The enhanced Alien Land Law led to the decrease of Japanese ownership of lands.[62]

Without doubt, the Alien Land Law's differential treatment of persons ineligible for citizenship in general and Japanese noncitizens in particular implicated the Equal Protection Clause of the Fourteenth Amendment. Decades before the state passed the Alien Land Law, the Supreme Court decided *Yick Wo v. Hopkins*,[63] which established that the Equal Protection Clause protected persons, including noncitizens, against laws that may on their face appear neutral but are applied or administered in an unequal or discriminatory manner.[64] Moreover, as in *Yick Wo*, the alien land laws concerned property interests as well.[65] Despite *Yick Wo*'s pronouncement of equality, constitutional challenges to the Alien Land Law failed.[66] Specifically, in a series of cases decided within the same week, the Supreme Court held that the alien land laws of California and Washington did not violate the Equal Protection Clause of the Fourteenth Amendment.[67]

---

57. Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1268–71 (2008) (discussing how voter initiatives have a particularly negative impact on immigrants because they are unable to participate in the democratic process and thus they become susceptible to subordination).

58. *See* 1920 Alien Land Law, California Initiative (Nov. 2, 1920).

59. *See id.*

60. *Id.*

61. *See* Aoki, *supra* note 24, at 56–57.

62. *See* CHUMAN, *supra* note 23, at 49–50; Robinson & Robinson, *supra* note 30, at 34; Aoki, *supra* note 24, at 59.

63. 118 U.S. 356 (1886).

64. *See id.* at 374 (holding that the San Francisco ordinance that was race-neutral was administered in a discriminatory manner against Chinese immigrants and was thus unconstitutional).

65. *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts about* Yick Wo, 2008 U. ILL. L. REV. 1359, 1373 (explaining that *Yick Wo v. Hopkins* was a case that concerned the protection of property rights regardless of race that was protected by the Due Process Clause).

66. *See id.* at 1378–84 (exploring why *Yick Wo* has had limited impact on racial equality cases). *But see* Thomas W. Joo, Yick Wo *Revisited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427, 1436–40 (critiquing Chin's arguments).

67. Terrace v. Thompson, 263 U.S. 197 (1923) (holding that Washington's Anti-Alien Land Law, which prohibited all aliens ineligible for citizenship from leasing agricultural land for more than five years was constitutional); Porterfield v. Webb, 263 U.S. 225 (1923) (holding that California's prohibition on leaseholds of a term of five years by aliens ineligible for citizenship did not violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment); Webb v. O'Brien, 263 U.S. 313 (1923) (holding that California's Alien Land Law prohibited sharecropping between

Significantly, the Supreme Court's analyses in these cases emphasized federalism principles while simultaneously ignoring equal protection implications of the laws. The Fourteenth Amendment, according to the Court in *Terrace v. Thompson*,[68] did not "take away from the State those powers of police that were reserved at the time of the adoption of the Constitution,"[69] which include the power of the state to "deny to aliens the right to own land within its borders."[70] Indeed, as discussed in more detail in Part III *infra*, states have long been recognized to have the authority to regulate noncitizens' property rights. That states may not exercise this authority in a racially discriminatory matter was made clear in *Yick Wo*.[71] Yet, the Supreme Court's opinion in *Terrace* and its progeny ignored the racial implications of the laws. At the outset, the Court expressly recognized that the naturalization law limited the right to become citizens to "free white persons and persons of African nativity or descent."[72] Noting this, the Court acknowledged that although immigrants from European countries were eligible for citizenship, those from Japan and China were not.[73] Yet, the Court emphasized that states could appropriately rely on such classifications as Congress might enact in exercising its state police powers in allocating property rights.[74] That the property restrictions impacted Japanese and thus were race-based was, according to the Supreme Court, "without foundation."[75] Because the law applied to "[a]ll persons of whatever color or race who have not declared their intention in good faith to become citizens,"[76] the law did not offend the Equal Protection Clause.[77] Thus, through *Terrace* and its progeny, the Supreme Court enabled the alien land laws to continue to restrict land ownership to Japanese.

---

citizen and Japanese farmer); Frick v. Webb, 263 U.S. 326 (1923) (holding that California's Alien Land Law, which prohibited aliens ineligible for citizenship from owning shares of stock of corporation was consistent with the Fourteenth Amendment); *see also* Part III.B *infra* and accompanying notes (providing a more in-depth discussion of these cases).

68. *Terrace*, 263 U.S. at 197.

69. *Id.* at 217.

70. *Id.*

71. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) ("[T]he denial of equal justice is still within the prohibition of the Constitution.").

72. *Terrace*, 263 U.S. at 220.

73. *Id*.

74. *Id.* at 220–21; *see* Chin, *supra* note 65, at 1383 (explaining that the alien land laws were upheld on the principle that because Congress can discriminate based on race, so too can the states).

75. *Terrace*, 263 U.S. at 220.

76. *Id.*

77. *Id.* at 221.

In California, as well as other states, the formal restriction on Japanese landholding did not necessarily halt all land transactions that involved Japanese buyers. Private sale of land continued[78] and the state minimally enforced the law. In fact, between 1913 and 1942, the state undertook only fourteen escheat actions,[79] illuminating that both private and public actors openly ignored the law. This is not to say, of course, that the Alien Land Law did not impact the nature of one's ownership. To the contrary, the law had the practical effect of putting a cloud on the title of property owned by Japanese Americans. In particular, the Alien Land Law turned property that would normally be held in fee simple into one that became subject to an escheat action by the state.[80] Moreover, Japanese Americans had the burden of disproving the presumption that the purchase of the property was not done in violation of the law.[81]

After the bombing of Pearl Harbor and the evacuation of Japanese from California and other states, California sought to more forcefully enforce the Alien Land Law. As a result of legislative initiative to fund escheat suits, the Attorney General filed more escheat actions than before 1942. Specifically, five years after 1942, it undertook fifty-nine escheat actions.[82] Importantly, all these actions—similar to the ones prior to 1942—involved lands owned by Japanese.[83] Many of these escheat actions were filed at the behest of white farmers who argued for more vigorous enforcement of the law.[84] This is a crucial point because it demonstrates a methodical public and private approach to rid the state of Japanese that the internment ultimately failed to do. Specifically, as the facts of the case illustrate, the state utilized property law to ensure the exclusion of Japanese from its borders.

---

78. Indeed, a California appellate court had held that land transactions entered into by private parties were not necessarily void under the Alien Land Law. *See* Suwa v. Johnson, 203 P. 414, 415 (Cal. Dist. Ct. App. 1921) (rejecting attempt by lessor to invalidate a lease he entered into with lessee because the lease violated California's Alien Land Law holding that only the Attorney General of the state may void the transaction).

79. *See* ROBINSON, *supra* note 23, at 33.

80. *See* 1920 Alien Land Law, *supra* note 58.

81. *See id.*

82. *See* Oyama v. California, 332 U.S. 633, 661 (1948) (Murphy, J., concurring).

83. *See id.*

84. *See* Aoki, *supra* note 24, at 59 n.59

B. Facts of the Case

In 1934, Kajiro Oyama purchased six acres of agricultural land and placed the title of the land in his son Fred's name.[85] At the time, Fred was only six years-old.[86] Similar to other ineligible alien parents who bought property for their children, Kajiro petitioned a local court to become Fred's guardian in order for him to have legal authority to manage the property. The court granted his guardianship application.[87] When Fred was nine-years-old, his father purchased another two acres of land in his name.[88]

Buying agricultural property for young children may seem odd to many, but for Japanese families like the Oyamas, it was the only way that they could own land. Notably, such purchases were far from clandestine. Kajiro's purchases displayed the public manner with which some land transactions were made in the 1930s. Both land transactions were not only known but approved by the court. Kajiro's petition for guardianship after acquiring six acres in 1934 demonstrated that the local court understood that Fred's "ownership" was a legal fiction. Kajiro was the de facto owner, even if the law did not recognize him as the legal owner. It also shows that the court acquiesced to the purchase by approving the guardianship petition.[89]

Moreover, as noted previously, the Alien Land Law did not prevent all Japanese from acquiring property. Kajiro Oyama, for example, purchased both properties well past the enactment of the 1920 law. The subsequent purchase occurred in 1937 and was similarly placed under Fred's name. Like the earlier transaction, this one was noted in public newspapers and hearings.[90] Thus, despite the apparent violations of the Alien Land Law, local government officials were not only aware, but condoned, the private transactions.[91]

Eventually, the Oyama property became subject to escheat proceedings. In August of 1944, the state petitioned to acquire the properties on the ground that the purchases were done with intent to

85. *See Oyama,* 332 U.S. at 636.
86. *Id.*
87. *Id.* at 637.
88. *Id.*
89. *Id.* at 636–37.
90. *Id.* at 637.
91. *See id*; *see also* Comment, *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1024 (1947) ("The courts themselves on occasion winked at devices clearly designed to avoid the stringency of the laws.") [hereinafter Comment, *Alien Land Laws*].

violate and evade the Alien Land Law.[92] By this time, E.O. 9066 had gone into effect and the Oyamas had been residing in Utah for about two years.[93] Although Fred had title to the land, both he and Kajiro were named defendants to the escheat action.[94]

Through their counsel, both defendants argued against the constitutionality of the law. First, they argued that the Alien Land Law deprived Fred Oyama of his right as an American citizen to equal protection of the law.[95] Second, they contended that the law also denied Kajiro, despite being a noncitizen, of the equal protection of the law.[96] Finally, they asserted violation of the Due Process Clause on the grounds that the state had brought an action to take property after the expiration of the statute of limitations.[97]

The California Superior Court, however, agreed with the state and eventually upheld the validity of the relevant provisions of Alien Land Law.[98] Specifically, it found that Kajiro had the beneficial use of the land, and that the conveyances were "subterfuges effected with intent to prevent, evade or avoid escheat."[99] It based its findings in part on the testimony of two witnesses.[100] First, a white neighbor of the Oyamas, who ended up taking care of the property while the Oyamas were away, testified for the state that Kajiro "was running the boy's business."[101] Second, the state called a court clerk to testify about the records that had been filed with the court regarding the conveyance of the two properties.[102]

Notably, neither the court nor Oyama's lawyer called Kajiro to the stand to testify.[103] Kajiro had driven in from Utah and was in fact present at the hearing.[104] When asked by the court as to whether Kajiro would

92. *Oyama*, 332 U.S. at 637; *see also* Comment, *Alien Land Laws*, *supra* note 91, at 1017 ("The states, inspired by war strengthened anti-Japanese sentiment, have undertaken a revitalized campaign to enforce the prohibitions against the holding of agricultural land by aliens ineligible for citizenship—which, in effect, means the Japanese.").

93. *See Oyama*, 332 U.S. at 637 (noting that the Oyama family was evacuated in 1942).

94. In addition to Fred Oyama and his father, Kajiro Oyama, another named defendant was June Kushino. *See id.* at 635.

95. *Id.*

96. *Id.*

97. *Id.* at 635–36.

98. *Id.* at 638–39.

99. *Id.*

100. *Id.* at 638.

101. *Id.*

102. *Id.*

103. *See* Transcript of Record at 98, Oyama v. California, 332 U.S. 633 (1948) (No. 44-371).

104. *See id.*

testify, his lawyer explained that he did not speak English well and thus could not provide testimony.[105] Not knowing what Kajiro might have said, it is difficult to know with certainty whether his testimony could have helped to rebut the presumption that he intended to evade the Alien Land Law.[106] The trial judge inferred, however, that Kajiro's "testimony would have been adverse to his son's cause."[107]

The California Supreme Court subsequently affirmed the lower court.[108] It held, among other things, that the state could "constitutionally exclude ineligible aliens from any interest in agricultural land."[109] As to Fred's property rights, the court did not find any constitutional violation, contending that the property never vested in him and had passed directly to the state.[110]

The Oyamas and their organizational supporters, particularly the Japanese American Citizens League, then decided to launch another challenge to California's Alien Land Law by petitioning for certification by the U.S. Supreme Court.[111] Although the Supreme Court had previously upheld the constitutionality of the Washington and California alien land laws decades before, they hoped to extend the new reasoning that the Supreme Court had developed in recent cases involving Japanese Americans to the area of property ownership. Ironically, both *Korematsu* and *Hirabayashi v. United States*,[112] which upheld the validity of the military's exclusion and curfew orders against Japanese,[113] led to a more restrictive analysis of classifications that are based on race.[114] Because of the correlation between ancestry and property restrictions, the Alien Land Law's constitutionality ultimately went before the Supreme Court again.

---

105. *See id.*

106. Additionally, Fred Oyama himself could have testified, but his father did not ask him to attend. *See* Letter of Fred Oyama to Rose Cuison Villazor (July 30, 2008) (Response to Question No. 12, "Do you recall being asked to attend [the escheat] trial?"); Telephone Interview with Fred Yoshihiro Oyama, July 12, 2008.

107. *Oyama*, 332 U.S. at 639.

108. *Id.* at 639–40 (primarily relying on the trial court's findings and inferences).

109. *Id.* at 639 (relying primarily on *Terrace* and and progeny).

110. *See id.* at 640.

111. *Oyama v. California* was in fact a test case. According to Fred Oyama, the Japanese American Citizens League and American Civil Liberties Union "reviewed hundreds of cases, if not thousands, and felt that our particular legal profile had the best chance of winning." Letter of Fred Oyama to Rose Cuison Villazor (July 30, 2008) (Response to Question No. 13, "How did your father obtain a lawyer to represent him and you at [the escheat] trial?").

112. 320 U.S. 81 (1943).

113. Korematsu v. United States, 323 U.S. 214, 217–18 (1944); *Hirabayashi*, 320 U.S. at 92.

114. *See* Robinson & Robinson, *supra* note 30, at 30–31 (contending that both *Hirabayashi* and *Korematsu* provided the foundation for the doctrine of strict scrutiny).

C. Supreme Court Opinions

Collectively, there were five separate opinions in *Oyama*—the majority, two concurring opinions, and two dissenting opinions. The petitioners appealed and the parties briefed the same three constitutional issues they raised in the lower courts.[115] In the end, the *Oyama* opinions expressed the Justices' conception of the intersections among race, citizenship, and property, but in varying degrees and significance.

The majority opinion, authored by Chief Justice Vinson, only addressed the first issue raised on appeal. Specifically, it held that the state discriminated against Fred "solely on his parents' country of origin" and that there was no "compelling justification" to support such discrimination.[116] The use of this "constitutional test" was crucial, for it was an early application of what later emerged to be strict scrutiny.[117]

Chief Justice Vinson based the conclusion on a "federal statute" that was "enacted before the Fourteenth Amendment, but vindicated by it."[118] Citing 42 U.S.C. § 1982, the majority held that states must "accord to all citizens the right to take and hold real property."[119] In the instant case, the state violated the equal protection rights of Fred, an American citizen, in a number of ways. First, unlike other U.S. citizen children in California, Fred had to overcome a statutory presumption that the land purchased for him by his father and placed under his name did not constitute a bona fide gift to him at all.[120] Other U.S. citizen children did not have such a burden and, in fact, had the opposite benefit of having their gifts deemed presumptively valid, requiring the right to property to be disproved by whoever was attacking its validity.[121]

Second, under the law in question, Fred's father's ineligibility for citizenship counted as further evidence that the purchase was done in violation of the law.[122] By contrast, other U.S. citizens' gifts were deemed valid gifts regardless of their parents' eligibility for citizenship.[123] Third, Fred had to disprove evidence that his father failed in his duties as the guardian of the property.[124] Overall, Chief Justice Vinson wrote that the

115. *Oyama*, 332 U.S. at 635–36.
116. *Id.* at 640.
117. *See* Robinson & Robinson, *supra* note 30, at 30–31.
118. *Oyama*, 332 U.S. at 640.
119. *Id.*
120. *Id.* at 642.
121. *Id.* at 641.
122. *Id.* at 642.
123. *Id.*
124. *Id.* at 642–43.

"cumulative effect . . . was clearly to discriminate against Fred Oyama" because "[h]e was saddled with an onerous burden of proof which need not be borne by California children generally."[125]

Critically, Chief Justice Vinson wrote that the only basis for the discriminatory treatment of Fred was the fact that his father was Japanese.[126] Land purchased for children of foreigners who were not Japanese resulted in indefeasible estates; by contrast, land bought by Japanese parents had a type of a determinable estate.[127] Paradoxically, the majority opinion relied on what is now a famous quote from *Hirabayashi v. United States* to support its conclusion: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[128] Ultimately, the majority held that when a state's landholding policy conflicts with the rights of an American citizen to own land, "the rights of a citizen may not be subordinated merely because of his father's country of origin."[129] Having decided the first issue, the majority opted not to address the two remaining issues concerning the property rights of noncitizens and the allegation of an unconstitutional taking.

Unlike the majority opinion, the concurring opinions separately written by Justices Black and Murphy directly addressed the equal protection argument of Kajiro Oyama. Justice Black, joined by Justice Douglas, opined that the Alien Land Law constituted a blatant violation of the Equal Protection Clause of the Fourteenth Amendment.[130] According to Justice Black, the Fourteenth Amendment prohibits states from denying to "some groups on account of their race or color, any rights, privileges, and opportunities accorded to other groups."[131] Indeed, he would have overturned the previous cases that upheld the Alien Land Laws.[132] Moreover, Justice Black believed that the state was infringing on Congress's "exclusive power over immigration."[133] Explaining that the California Supreme Court recognized that the Alien Land Law was intended to discourage Japanese from entering California, Justice Black

125. *Id.* at 644.
126. *Id.*
127. *Id.* at 645.
128. *Id.* at 646 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
129. *Id.* at 647.
130. *Id.* (Black, J., concurring) ("The California law in actual effect singles out aliens of Japanese ancestry . . . ."). Justice Black also contended that the Alien Land Law violated the U.S.-Japanese Treaty of 1911. *See id.* at 648.
131. *Id.* at 649.
132. *Id.*
133. *Id.*

stated that the law created barriers "designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country."[134] Finally, Justice Black argued that the law was inconsistent with the U.S. pledge to human rights under the U.N. Charter.[135]

Justice Murphy, joined by Justice Rutledge, also agreed that the Alien Land Law should be overturned, but his opinion more vigorously criticized the racist purpose of the law to discriminate against Japanese.[136] Importantly, he expressed the view that the protection against racial discrimination was not contingent on citizenship status. His lengthy opinion highlighted the relationships among nativism, racism, citizenship, and property law that were designed to "discourage the Japanese from entering California and to drive out those who were already there."[137] Moreover, he focused on the way in which the state was able to utilize the racialized federal naturalization law to "exclude Japanese aliens from the ownership and use of farm land."[138] Importantly, Justice Murphy emphasized that the Equal Protection Clause of the Fourteenth Amendment protected *any* person, including Japanese immigrants who were ineligible for citizenship, from discrimination by the states.[139]

---

134. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 68 (1941)).

135. *Id.* at 649–50. Justice Black's invocation of the U.N. Charter in his concurrence marked the first time that the charter made an appearance in a Supreme Court opinion. *See* Judith Resnick, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry,* 115 YALE L.J. 1564, 1600–04 (2006) (discussing litigation efforts to use the U.N. Charter as legal basis for invalidating racially restrictive covenants and California's Alien Land Law).

136. *Id.* at 651 (Murphy, J., concurring) ("The California statute in question, as I view it, is nothing more than an outright racial discrimination."). For a fuller examination of Justice Murphy's powerful and lengthy concurrence, see Randall Kennedy, *Justice Murphy's Concurrence in* Oyama v. California*; Cussing Out Racism*, 74 TEX. L. REV. 1245 (1996).

137. *Oyama*, 332 U.S. at 657 (Murphy, J., concurring).

138. *Id.* at 660 ("Congress supplied a ready-made vehicle for discriminating against Japanese aliens, a vehicle which California was prompt to grasp and expand to purposes quite beyond the scope or object of the Congressional statute.").

139. *Id.* at 663. Justice Murphy expressed six specific reasons that the Alien Land Law failed to meet the Constitutional standards of equal protection: 1. California's supposed adoption of Congress's racial distinctions with regard to citizenship for use in property ownership was unreasonable, 2. use of eligibility for citizenship was irrational in determining loyalty, as evidenced by the lengthy duration of many ineligible aliens' presence in the United States, 3. the idea that ineligible Japanese could take over all agricultural land in California was "statistically absurd," *id.* at 667, and therefore not a rational justification for racial discrimination, 4. highly efficient farming and a lower standard of living were not rational justifications for such discrimination because of the inherent characteristic of competition in the American marketplace and the need for more than a lower standard of living as a justification for perpetuating such a low standard, 5. the use of half-truths and misrepresentations about Japanese have been exposed and "form no rational basis" for statutory regulation, and 6. the cultural, physical and linguistic differences between Japanese and Americans did not evidence some racial characteristic making them unfit to own agricultural land. *Id.* at 663–72. It should be noted that Justice Murphy also agreed that the Alien Land Law violated the U.N. Charter. *See id.* at 674 (stating that the Alien Land Law contravenes the nation's pledge "through the United Nations Charter, to promote respect for, and

The dissents, written by Justices Reed and Jackson, opined that the Alien Land Law did not violate equal protection principles. Justice Reed believed that the state was validly exercising its police power to restrict the landownership rights of noncitizens.[140] He opined that the Court could not set aside the judgment without invalidating the Alien Land Law.[141] Justice Jackson contended that he did not think that the judgment was correct unless the Court was prepared to invalidate the Alien Land Law.[142]

In sum, the Supreme Court held that the State of California's attempted taking of Fred Oyama's property by enforcing the Alien Land Law against him because of his father's ancestry constituted a form of race discrimination. In so doing, it immediately led to the end of the enforcement of the Alien Land Law[143] and became part of a historical shift in the treatment of Japanese in California. Specifically, several months after the Supreme Court decided *Oyama*, voters rejected a proposed initiative that would have amended the Alien Land Law.[144] *Oyama* also led to the invalidation of the alien land law in Oregon the following year.[145] Eventually, the California Supreme Court declared the Alien Land Law unconstitutional in *Sei Fujii v. California*.[146]

Beyond the *Oyama* opinion's invalidation of property barriers that denied Japanese Americans their right to equal access to property, *Oyama* also more broadly contributed to nullifying discriminatory property laws that similarly precluded other people of color, particularly African Americans, from owning property. Specifically, four months after the Supreme Court decided *Oyama,* the Court handed down its decision in *Shelley v. Kraemer.*[147] In *Shelley*, the Supreme Court relied on *Oyama* to invalidate private racial covenants that prohibited the occupancy of property by "any person not of the Caucasian race."[148] The Court explained that it had recently held in *Oyama* that state laws that "denied

observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion").

140. *Id.* at 674.

141. *Id.* at 684.

142. *Id.*

143. *See Constitutional Law: Equal Protection of the Laws: Presumption of Intent to Evade Escheat in California Alien Land Law*, *supra* note 26, at 324 ("The Attorney General of California has interpreted it as ending the practical utility of the alien land law, and has indicated his intention to dismiss all the escheat cases pending before the California courts.").

144. Aoki, *supra* note 24, at 64.

145. *See* Namba v. McCourt, 204 P.2d 569, 575–79 (Or. 1949) (relying in part on *Oyama v. California* to invalidate Oregon's alien land law).

146. 242 P.2d 617, 630 (Cal. 1952).

147. 334 U.S. 1 (1948).

148. *Id.* at 5.

equal enjoyment of property rights to a designated class of citizens of specified race and ancestry" constituted a violation of the Equal Protection Clause.[149] *Oyama* thus played a central role in ensuring that private discrimination would not find legal manifestation through judicial enforcement of these racial covenants.[150]

In short, *Oyama* affirmed the constitutional and statutory guarantees of equal access to property regardless of race. California's Alien Land Law demonstrated the potent way that race, property law, immigration, and citizenship operated to subordinate persons on account of their ancestral and racial background. *Oyama* thus generally served to restore the constitutional mandate of equality in property law and specifically halted the enduring discrimination faced by Japanese families even after they were released from their internment. More broadly, it provided important precedent in civil rights law.[151]

II. EXPLORING *OYAMA*'S CONTRIBUTIONS TO THE INTERSECTION OF PROPERTY, RACE, AND CITIZENSHIP

As the foregoing analysis highlighted, California's Alien Land Law demonstrates the ways in which race, property, immigration, and citizenship law intersected to determine the meaning of equal access to land ownership. This Part aims to unpack the complicated interrelations among these areas of law recognized in *Oyama*. In so doing, it asserts *Oyama*'s unique contributions to doctrinal and theoretical understanding of property rights, citizenship, and race. First, it adds to current discussions of the positive and negative attributes of relying on citizenship as a basis of rights. By protecting the rights of Fred Oyama, the U.S. citizen son, the Supreme Court unequivocally affirmed the importance of citizenship.[152] Yet, the Court's failure to address the equal protection claim

149. *Id.* at 21.

150. *See id.*; Robinson & Robinson, *supra* note 30, at 39–45 (positing the influence of *Oyama v. California* on *Shelley v. Kraemer* and subsequent civil rights cases).

151. *Shelley v. Kraemer* has been described as one of the most important civil rights cases before *Brown v. Board of Education*. *See* Dennis J. Hutchinson, *Introduction:* Brown *in the Supreme Court*, 6 J. APP. PRAC. & PROCESS 11, 13 (2004) (describing *Shelley v. Kraemer* as the "most important case to that point involving racial discrimination after World War II").

152. The significance, if any, of citizenship has long been a contested topic of discussion. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53–54 (1975) (commenting that "we live under a Constitution to which the concept of citizenship matters very little"); Saito, *supra* note 30, at 272 ("The importance of citizenship depends on one's perspective. On the one hand, in a world of nation states, being a citizen of some state is extremely important, and rendering a person stateless is considered a violation of the most basic of human rights. On the other hand, the U.S. Constitution extends many protections to 'persons' rather than citizens . . . ."). For recent work that examines the

of Kajiro Oyama, Fred's noncitizen father, conveys the drawbacks of grounding one's rights on citizenship.

Second, *Oyama* deepens our understanding of the historical struggle for equality in property law faced by racialized persons. Scholars have long explored how racism operated in property law in ways that denied people of color equal citizenship. This account of the development of property rights, however, provides only a partial story of the way in which the property and citizenship rights of Asian Americans in general, and Japanese Americans in particular, were constructed. In the end, *Oyama* illustrates that a more robust account of the relationships among property, citizenship, and racism can be made when we examine how immigration and nationality law interjected in the development of equality in property rights.

A. Property Rights as Core Citizenship Rights

1. Restoring the Property Rights of the (Alien) Citizen

No doubt that the most important doctrinal lesson from *Oyama* is the affirmation of equal access to property as a right of citizenship regardless of one's race or ancestry.[153] The case demonstrates the powerful way in which the racist Alien Land Law erased Japanese Americans' membership within the polity and turned them into what Mae Ngai calls "alien citizens."[154] The "alien citizen," Professor Ngai explains, "is an American citizen by virtue of her birth in the United States but whose citizenship is suspect, if not denied, on account of the racialized identity of her immigrant ancestry."[155] Here, the Alien Land Law ascribed the foreigner status of Japanese Americans' parents to their children and subsequently erased their formal citizenship and an important right of citizenship—the right to equal access to property.[156]

---

importance of citizenship, see PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 81 (2008) ("[I]n fact, citizenship makes very little difference."); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 19 (2006) (discussing various definitions of citizenship); Jonathan Weinberg, *The End of Citizenship?*, 107 MICH. L. REV. 931 (2009) (challenging Peter Spiro's claim that citizenship is in decline).

153. *See* Oyama v. California, 332 U.S. 633, 647 (1948) ("[T]he rights of a citizen may not be subordinated merely because of his father's country of origin.").

154. Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2521 (2007).

155. *Id.* ("Racism thus creates a problem of misrecognition for the citizen of Asian or Latino descent and, more recently, the citizen who appears to be 'Middle Eastern, Arab or Muslim.'").

156. *See* Saito, *supra* note 30, at 307–10 (explaining the construction of Asian Americans as "perpetual outsiders").

The nonrecognition of Japanese Americans' citizenship was not without cost. As Keith Aoki noted, the imposition of alien status made it possible for them to be removed from their homes and placed in concentration camps in the 1940s.[157] From the context of the Alien Land Law, the law's ascription of foreignness on Japanese Americans[158] made it easy for the government to deny them their rights to equal access to own property and enjoy the benefits of property ownership that other American children enjoyed. When compared to other U.S. citizens, many Japanese Americans were unable to benefit from the transfer of wealth typically associated with land ownership that was available to other American children as a result of their parents' inability to purchase property.[159] Additionally, for those Japanese Americans like Fred Oyama whose parents had chosen to buy property for them, the nature of their property ownership also showed their unequal citizenship status. Unlike other American citizens whose parents were eligible for citizenship and consequently able to purchase land for them as gifts and confer them with property in the nature of fee simple absolute, Japanese Americans' parents could only give them what amounted to some type of a defeasible fee. Specifically, it appears that Fred Oyama had a property interest that was akin to a fee simple subject to a condition subsequent because, although the purchase of the property initially appeared to be a fee simple absolute, it was one that could be taken away by the state through an escheat action. As the facts of *Oyama* evidenced, any property could in principle be escheated by the state at any time, no matter how long a Japanese American had owned the property.[160]

Indeed, the state's ability to take ownership of the property through the escheat action may arguably be described as a form of expatriation or loss of citizenship.[161] Scholars have long pointed out how the loss of one's

157. Aoki, *supra* note 24, at 68 ("The "Alien Land Laws provided a bridge that sustained the virulent anti-Asian animus that linked the Chinese Exclusion Act of 1882 with the internment of Japanese-American citizens pursuant to Executive Order 9066.").

158. *Id.* at 66 ("The Alien Land Laws ideologically affirmed the 'foreign-ness,' and hence, 'disloyalty' of the Issei and their American citizen children . . . .").

159. *See* Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 382–84 (2008) (explaining that intergenerational transfer of wealth is tied to property ownership and that ongoing racial disparities in poverty relates to racial inequities in home ownership).

160. *See* Oyama v. California, 332 U.S. 633, 637 (1948).

161. Under the Immigration and Nationality Act, there are at least two ways by which one could lose her citizenship. One way is through the revocation of one's citizenship obtained by naturalization. *See* 8 U.S.C. § 1451(a) (2006). The other is through a citizen's voluntary act that she intends to relinquish her citizenship, which applies to both "native-born or naturalized citizens." *See* 8 U.S.C. § 1481 (2006).

property may constitute a loss of one's self.[162] In this instance, the loss of Fred Oyama's property as a result of the escheat action constituted a form of taking of his own citizenship. When asked about his reaction to the state's escheat action, Fred Oyama explained that he felt like a "man without a country."[163] Coming from an American who at the time had to leave his home state as a result of E.O. 9066,[164] Fred's statement about the loss of his property powerfully evinced his view of the correlation between the denial of property rights and removal of one's formal membership to the polity. Indeed, when placed within the context of the tremendous loss of property precipitated by E.O. 9066,[165] the state's heightened enforcement of the Alien Land Law through the escheat actions while Japanese Americans were interned and upon their return[166] further demonstrated their functional loss of citizenship.[167] The state's coordinated action to drive them away from their homes conveyed that, despite being Americans, they did not belong.

The *Oyama* Court's protection of the property rights of U.S. citizens of Japanese ancestry thus constituted the affirmation of formal and substantive right of equal citizenship that had been denied to Japanese Americans by California. As the Supreme Court aptly explained, where there is a "conflict between the State's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States. . . . [T]he rights of a citizen may not be subordinated merely because of his father's country of origin."[168] By

162. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) ("One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.").

163. Letter from Fred Oyama to Rose Cuison Villazor (July 30, 2008) (on file with Washington University Law Review) (Response to Question No. 6, "What was your reaction to [the order to intern all persons of Japanese ancestry]? How did you feel about leaving your home?").

164. *See supra* Part I (explaining that the Oyama family left California for Utah).

165. *See* CHUMAN, *supra* note 23, at 242–43 (approximating that the total economic loss due to the internment was about $700,000,000); Aoki, *supra* note 24, at 64 n.67.

166. More than sixty percent of the Japanese interned were U.S. citizens. *See* ROBINSON, *supra* note 23, at 4.

167. Admittedly, expatriation is not an exact analogy because this process of losing one's citizenship presumes one's voluntary desire to do so and Fred Oyama did not want to lose his property. Under the regulations, the loss of one's citizenship must be done affirmatively with the specific intention to lose one's citizenship. *See* 8 U.S.C. § 1481 (2006). The other way in which one can lose citizenship—denaturalization—is similarly inapposite here because that procedure relates to persons who have been naturalized U.S. citizens and not to a person who acquired citizenship by birth. *See* 8 U.S.C. § 1451(a) (2006). My only point here is to show how the taking of one's property can be tantamount to a loss of some form of one's sense of citizenship or belonging.

168. Oyama v. California, 332 U.S. 633, 647 (1948).

invalidating the Alien Land Law as applied to them, *Oyama* removed the mask that covered Japanese Americans' citizenship and marked them as "foreign" U.S. citizens. Indeed, as at least one scholar noted, the *Oyama* opinion was arguably the Supreme Court's way of atoning for its mistake in *Korematsu.*[169]

2. Ignoring the Noncitizen's Property Rights

Although the *Oyama* Court boldly restored the citizenship rights of Japanese Americans, it missed the critical opportunity to invalidate the racially discriminatory treatment of noncitizens of Japanese ancestry by opting not to address the equal protection claim of Kajiro, the noncitizen father. In so doing, the *Oyama* opinion demonstrates the troubling consequences effected by relying on citizenship as a basis for rights. As citizenship scholars have noted, the concept of citizenship presumes the validity of noncitizenship and, by extension, the validity of laws that treat them unequally.[170] Recognizing one's right as a privilege of citizenship on the one hand means that, on the other hand, another person may be appropriately denied the same right due to her lack of formal memership status.[171]

A theoretical examination of the citizen/noncitizen distinction in property ownership reveals a complex relationship between citizenship and equality. On the one hand, grounding one's rights based on citizenship is normatively questionable, as revealed in *Oyama.* By recognizing equality in property rights as a privilege of U.S. citizenship[172] and not personhood as guaranteed in the Fourteenth Amendment, the *Oyama* Court facilitated discriminatory property laws against Japanese noncitizens to continue.[173] Although escheat actions stopped in cases involving lands owned by U.S. citizens, noncitizen Japanese were still prohibited from owning their own land.[174] It took a few more years before the Alien Land Law as applied to noncitizens was held unconstitutional.[175]

---

169. *See* Robinson & Robinson, *supra* note 30, at 39 n.50 (citing C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947, at 283 (1948)).

170. *See* BOSNIAK, *supra* note 152, at 3 ("If citizenship is treated as the highest measure of social and political inclusion, can people designated as *noncitizens* as a matter of status be among the universe of the included?").

171. *See id.*

172. *See Oyama*, 332 U.S. at 647.

173. Indeed, the California Alien Land Law as applied to noncitizen Japanese was not repealed until several years after *Oyama*.

174. 1 CAL. GEN. LAWS, Act 261 § 1 (Deering 1944).

175. Fujii v. California, 242 P.2d 617, 620 (Cal. 1952).

Indeed, Justice Murphy's concurrence conveyed precisely why the Supreme Court needed to address the equal protection rights of Fred Oyama's noncitizen father. As he pointed out, the California Alien Land Law was "nothing more than an outright racial discrimination" that deserved "constitutional condemnation."[176] It was irrelevant to him that the Alien Land Law affected noncitizens. In his view, the law's denial of the right to property was "racist in its origin, purpose or effect," which offended the Fourteenth Amendment.[177]

Thus, while *Oyama* should be heralded as an important civil rights story, this celebratory recognition must be tempered by the Supreme Court's failure to provide protection for noncitizens who continued to encounter racism in property law.[178] Under this critical view of *Oyama,* equal protection principles would be meaningless if they only applied to U.S. citizens. The right of persons to equal access to property, regardless of citizenship status, recognizes that the right to property—right to a home, right to shelter—is a right of personhood.[179] The result in *Oyama* thus provides a cautionary example of conditioning property rights on a status such as citizenship.

B. Expanding the Narratives of Racialized Property Laws

In addition to ushering a nuanced undertanding of citizenship's role in property law, *Oyama* also offers a more complete picture of the broader struggle for racial equality in property ownership in legal history. Property law has long been a site for the relegation of people of color to second-class citizenship. Yet, to fully understand property law's role in the history of racial subordination, it is important to ensure that narratives about racialized experiences take into account the varied ways in which race operated to subjugate people of color. Examining the link between the denial of equal property rights and second-class citizenship through the lens of *Oyama*, for instance, reveals the neglected story of how the subordination of the property rights of Japanese Americans differed from other racialized groups.[180] Ultimately, *Oyama* expands not only our

176. *Oyama*, 332 U.S. at 650 (Murphy, J., concurring).

177. *Id.*

178. Although the attorney general of California stopped all enforcement of the Alien Land Law after the Supreme Court decided *Oyama*, the law nonetheless prevented ineligible noncitizens to own property.

179. Radin, *supra* note 162, at 959.

180. Indeed, the intersection of property law, citizenship, and immigration law is an under-attended area of law that ought to be explored further.

understanding of the development of property rights but also law's construction of race and citizenship.

1. Struggle for Equality in Property

History illuminates law's crucial role in foreclosing the right of equal citizenship and property to African Americans and other people of color. The Supreme Court demonstrated this point starkly in *Dred Scott v. Sandford*[181] when it rejected the citizenship and property claim of Dred Scott, maintained his slave status and, in the same vein, recognized John Sandford as the citizen master with the protected property right of Mr. Scott.[182] Ultimately, Congress expressly reversed *Dred Scott* by enacting the Thirteenth Amendment,[183] which abolished slavery, and the Fourteenth Amendment[184] to the U.S. Constitution, which conferred citizenship upon the former slaves.

In recognition of the importance of property ownership as a citizenship right, Congress also enacted the Civil Rights Act of 1866, which is presently codified in 42 U.S.C. § 1982,[185] to ensure that all citizens of the United States in any state have the same right to purchase property as is enjoyed by white citizens.[186] As scholars have noted, the historical background to this law demonstrates that it was originally intended to protect the citizenship rights of the newly freed slaves by ensuring their right to enter into a contract and purchase property like white citizens.[187]

---

181. 60 U.S. 393 (1856).

182. *Id.* at 426, 452–54.

183. U.S. CONST. amend. XIII.

184. U.S. CONST. amend. XIV.

185. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–1982 (2000)). The law was subsequently reenacted in 1870 after the Fourteenth Amendment to further protect the civil rights of African Americans. *See* 42 U.S.C. § 1982 (2006) (reenacting § 1978 of the Revised Statutes which codified § 1 of the Civil Rights Act of 1866); Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 422–23 (1968) (explaining that 42 U.S.C. § 1982 originated from the Civil Rights Act of 1866). *See also* Miller, *supra* note 30, at 1032–38 (providing a historical discussion of the Civil Rights Act of 1866).

186. Buchanan v. Warley, 245 U.S. 60, 78 (1917). The entire text of 42 U.S.C. § 1982 provides that, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

187. Robert J. Kaczorowski, *Congress's Power To Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 206–07 (2005) (discussing the intention of the 1866 Civil Rights Act to apply to African Americans); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1367 n.210 (2007); James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 495 (1999); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. REV. 1, 11–14 (1995).

The Supreme Court underscored this historical intent when it decided *Buchanan v. Warley*.[188] Relying on the concept of equal citizenship, the Court invalidated public residential segregation laws to affirm the rights of African Americans to have the same access to property as white citizens.[189] By aiming to remove the use of race in the public regulation of property law, the Court's opinion in *Buchanan* constituted a significant victory for equal access to property ownership and, by extension, equal citizenship.

As history made evident, *Buchanan* did not necessarily lead to the full attainment of equal citizenship in property ownership.[190] It took several more years before the Supreme Court utilized *Buchanan*—and *Oyama* as previously discussed—to bolster the right of African Americans to equality in property by holding unenforceable private racial covenants in *Shelley v. Kraemer*.[191] And, it would take another twenty years before the Supreme Court recognized that the Civil Rights Act of 1866 applied to private racial discrimination in the sale of property.[192] Indeed, that same year, Congress had to pass the Fair Housing Act of 1968[193] to further invalidate racially discriminatory practices that continued even after the Supreme Court decided *Shelley*.[194] Finally, today, racial disparities in housing indicates that racism continues to play a crucial role in denying African Americans and other people of color equal access to property and,

188. *Buchanan*, 245 U.S. at 78–79.

189. *Id.* at 78–79 ("Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color.").

190. One argument that may help to explain the limits of *Buchanan* is through the lens of interest convergence. The case involved the ability of a white seller to sell his property to whoever he wanted, including an African American family. *Id.* at 69–71. Using Derrick Bell's interest-convergence theory, one could argue that the Supreme Court invalidated the racial segregation law because it affected a white family's ability to alienate property. The case has had restrained impact, however, in protecting the property rights of people of color. See Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980), for an articulation of interest-convergence theory.

191. 334 U.S. 1, 11 (1948). For a fuller discussion of *Shelley,* see Carol M. Rose, *The Story of* Shelley v. Kraemer, *in* PROPERTY STORIES 169 (GERALD KORNGOLD & ANDREW P. MORRISS eds., 2004).

192. *See* Jones, 392 U.S. at 413 (holding that 42 U.S.C. § 1982 "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment"); Miller, *supra* note 30, at 1017–18 (discussing the majority's opinion in *Jones*).

193. 42 U.S.C. §§ 3601–3619, 3631 (2006).

194. *See* Villazor, *supra* note 37, at 823 n.144; Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1619–28 (2007); Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L. 97, 104 (2007).

by extension, equal citizenship rights.[195] As this brief discussion of the racialized history of property rights development illustrated, the intersection of race and property law functioned to subordinate racial minorities and deny them equal citizenship.

2. Immigration and Naturalization Law's Interjection

Yet, an analysis of the denial of property and equal citizenship on account of race would be incomplete without recognizing how other forces subordinated the property rights of other racialized groups.[196] In the case of Japanese Americans, immigration and naturalization law interjected in ways that impacted property rights differently from other people of color. Specifically, the Civil Rights Act of 1866 interacted with the 1875 naturalization law to legally construct the scope of equality in property law in the nineteenth and early twentieth century.

The first naturalization statute limited the privilege of attaining U.S. citizenship to "free white person[s]."[197] After the passage of the Fourteenth Amendment, which provided that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States,"[198] Congress amended the naturalization statute to also allow persons of African nativity or ancestry to apply for citizenship.[199] Eventually, Congress extended the right of citizenship in 1940 to immigrants from the Western Hemisphere,[200] in 1943 to persons from China,[201] and in 1946 to immigrants from the Philippines and India.[202] Eventually, in 1952 Congress formally lifted the last racial bars to naturalization when it passed the Immigration and Nationality Act.[203]

---

195. Roithmayr, *supra* note 159, at 375–76; Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 351–53 (2009) (examining ongoing racial discrimination in homeownership).

196. It should be noted, for example, how colonialism facilitated the loss of property and sovereignty of indigenous peoples in the United States. *See* Villazor, *supra* note 37, at 808–14.

197. Act of March 26, 1790, ch. 3, 1 Stat. 103.

198. The Fourteenth Amendment intentionally overturned *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which held that the framers of the Constitution did not intend for persons of African descent to acquire U.S. citizenship.

199. The racial requirements for citizenship to the first naturalization cases that demonstrated the law's role in socially constructing race. *See* HANEY-LÓPEZ, *supra* note 36, at 35–53.

200. 54 Stat. 1140 (1940).

201. 57 Stat. 601 (1943).

202. 60 Stat. 416 (1946).

203. 8 U.S.C. § 1101 (2006). But, the 1952 Act retained restrictive quotas that imposed limitations on a country-of-origin basis and consequently operated to restrict the number of Asian immigrants. These limitations were removed in 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911–12. It should be noted, however, that arguably, the Immigration and Nationality Act continues to

Discussions of the passage of the 1875 naturalization law, however, have marginalized the ways in which this fundamentally shaped the property rights of noncitizens. Without doubt, the enactment of the naturalization law theoretically opened up the right to own, lease, and purchase property to African Americans.[204] Yet, at the same time, it legally narrowed the property rights of those persons who fell outside of the Black/White requirement of citizenship. California exemplifies the formal constriction of the right to property caused by the naturalization law. The original Constitution of California provided that foreigners who were bona fide residents of the state would enjoy the same rights to property as native born citizens.[205] Section 671 of the California Civil Code, which was enacted a few years before that original Constitution was adopted, similarly provided that citizens and foreigners would have equal rights with respect to the acquisition of property.[206] Yet, in 1879, after Congress amended the naturalization law in 1875, California passed a new constitution.[207] Article 1 of the new constitution provided that only "[f]oreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof . . . shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens."[208] Conditioning property rights on citizenship—then open only to whites and those of African descent—meant that noncitizens who could not naturalize were precluded from enjoying the rights and privileges of property. Critically, although facially "neutral," California's law intended to deny Asian immigrants, particularly Chinese immigrants, the right to own land.[209]

---

include a racial restriction. *See* 8 U.S.C. § 1359 (2006) ("Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."); Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301, 314–16 (2009) (contending that 8 U.S.C. § 1359 constitutes an immigration racial restriction).

204. By conferring citizenship on former African slaves, they were no longer considered property. Additionally, the law provided that they will have the right to acquire property.

205. *See* CAL. CONST. of 1849, art. 1, § 20.

206. CAL. CIV. CODE § 671 (West 2010) ("Any person, whether a citizen or alien, may take, hold, and dispose of property, real or personal, within this State.").

207. The original California constitution, which was adopted in November of 1849, prior to California achieving statehood in 1850, was totally superseded by the current constitution adopted in 1879. *See* Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1429 (2004) (noting that the 1879 California Constitution replaced the 1849 constitution).

208. CAL. CONST. art. 1, § 17, *repealed by* CAL. CONST. art. 1, § 20.

209. *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1944–46 (2000) (discussing various anti-Chinese proposed legislation

Although the law directly targeted Chinese, it is possible that this law could have been applied to Japanese who later immigrated to California who, similar to Chinese, experienced both public and private discrimination. Specifically, since Japanese were not considered "white" for purposes of the 1875 citizenship law—as later held by the Supreme Court in *Ozawa v. United States*,[210] it is probable that Kajiro Oyama, as a foreigner who was neither White nor Black, would have been deemed ineligible to own property under the state constitution.[211] Apparently, the constitutional restriction insufficiently assured those white farmers who were threatened by Japanese farmers that they might lose California land to Japanese.[212] Consequently, they lobbied for the passage of the Alien Land Law and its more vigorous enforcement after 1942.[213] Thus, although the Civil Rights Act of 1866 formally enlarged the prized right of property to the newly freed slaves and now citizens of the United States, it did not expand the property rights of those aliens who fell outside of the binary racial requirement of citizenship.[214] Indeed, it foreclosed those rights to them.

In sum, including *Oyama* in the property law canon expands our understanding of the entangled relationship of race, citizenship, and property law. The Supreme Court's dismantling of the Alien Land Law's discriminatory impact on Japanese Americans constituted an important triumph in the protracted history of struggle for equality in property rights faced by Japanese Americans. *Oyama* uncovers a more complex picture of how property rights developed, particularly how immigration, race, and citizenship shaped the conception of property rights of racialized citizens.

---

during the California constitutional convention).

210. 260 U.S. 178, 198 (1922).

211. *Cf. id.* at 198 ("The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side."). For a fuller exploration of *Ozawa v. United States* and its role in the racialization of Japanese, see Carbado, *supra* note 30, at 636 (stating that the "inability of Japanese people to become citizens—their unnaturalizability—was not a *natural* fact but a *legally produced* reality" and that "Takao Ozawa was not born yellow[;] [h]e became yellow—at least in part by law").

212. *See* Aoki, *supra* note 24, at 38–39.

213. *See id.* at 67–68.

214. *See* Perea, *supra* note 32, at 1215. Interestingly, the companion statute to Section 1982 of the Civil Rights Act of 1866—Section 1981—provided equal protection to all *persons* in making and enforcing contracts. *See* 42 U.S.C. § 1981(a) (2006) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."). By contrast, Section 1982's protection is limited to citizens. *See* 42 U.S.C. § 1982 (2006).

III. EXAMINING THE BOUNDARIES OF STATE POLICE POWERS IN REGULATING NONCITIZENS' PROPERTY RIGHTS

The previous discussions examined how *Oyama* provides a more complex understanding of the ways in which property law, immigration, race, and citizenship shaped relations among persons. Scholarly and pedagogical discussions of these laws would thus benefit tremendously from further exploration of *Oyama*'s doctrinal contribution to law's construction of the underlying link between property and citizenship. In this Part, I show that an examination of *Oyama* prompts an opportunity to go even deeper into property law by revisiting a question that the case left unanswered: when does a state's restriction on a noncitizen's property right constitute a violation of equality principles? Put differently, why should a state be required to treat all citizens equally, but be allowed to place restrictions on noncitizens' ability to acquire a property interest? These questions were raised before the Supreme Court in *Oyama* in order to seek to overturn its earlier opinions in *Terrace* and progeny. Although the Supreme Court in *Oyama* had the opportunity to reconsider the application of the Equal Protection Clauses on these laws, the majority chose not to do so.[215]

As a result, the Supreme Court let stand its previous opinions upholding the validity of alien land laws in Washington and California[216] and, importantly, left unresolved the equal protection implication of state restrictions on land ownership by noncitizens. It also evaded the question of whether the Alien Land Law constituted a regulation of immigration law, an area of law that has long been considered to fall within the purview of the federal government.[217] These questions, as Part IV makes clear, remained contested and are now at the center of doctrinal debates about when property regulation has shifted towards unlawful immigration regulation.[218] Reconsidering the limits of states' powers in land tenure

215. *See* Oyama v. California, 332 U.S. 633, 647 (1948) (explaining that it chose not to address the question of whether "the Alien Land Law denies ineligible aliens the equal protection of the laws . . . .").

216. As discussed in Part I *supra*, the Supreme Court upheld the validity of the alien land laws in a trilogy of cases. *See supra* note 61 (discussing Terrace v. Thompson, 263 U.S. 197 (1923), Porterfield v. Webb, 263 U.S. 225 (1923), Webb v. O'Brien, 263 U.S. 313 (1923), and Frick v. Webb, 263 U.S. 326 (1923)).

217. De Canas v. Bica, 424 U.S. 351 (1976). Recent scholarship, however, seeks to challenge the view that the federal government should have exclusive authority to regulate immigration law. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787; Rodríquez, *supra* note 7.

218. *See infra* Part IV.

matters, particularly the regulation of noncitizens' property rights is thus particularly necessary to more fully understand the legal debates about the validity of these contemporary state and local laws.[219]

Accordingly, this Part considers some of the questions left unanswered by the *Oyama* Court. It tackles these questions by examining and comparing various alien land laws in history to explore their underlying reasons for conditioning the acquisition of property rights on citizenship.[220] Ultimately, the Part argues that an analysis of these laws yields a normative theory that may help distinguish permissible from impermissible state property restrictions grounded on noncitizenship.

A. State Regulation of Noncitizens' Property Rights

At the outset, it is crucial to emphasize that courts have long recognized that states have the authority to restrict the ability of noncitizens to own property. Rules that limit the alienability of property were, as they are still today, generally disfavored under the common law.[221] Yet, restraints on the alienability of lands to owners who were not U.S. citizens were not only common practice, but were in fact deemed necessary steps toward integrating a noncitizen into the U.S. polity.[222] Inalienability property rules based on noncitizen status originated from the English feudal system,[223] were subsequently adopted in the colonial and post-Revolutionary period,[224] and ultimately accepted as appropriate property restrictions by judges up until the nineteenth century.[225] By the middle of the nineteenth century, many states codified what were then long-recognized common law restrictions on property rights.[226]

---

219. *See id*.

220. Although there has been scholarship on various alien land laws, there has not been substantive examination of how general alien land laws that restricted the ability of noncitizens to own property differed from the anti-Japanese alien land laws of the early to mid-1900s. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 427 n.112 (2005) (explaining that these laws "have not been studied in relationship to one another"). Additionally, to date, no one has sought to connect both the general alien land laws and California's Alien Land Law to contemporary restrictions on property rights of noncitizens.

221. *See* SINGER, *supra* note 31, at 10 ("It is a fundamental tenet of the property law system that property should be 'alienable,' meaning that it should be transferable from one person to another.").

222. Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 156 (1999) (quoting Crane v. Reeder, 21 Mich. 24, 67 (Mich. 1870)).

223. *Id.* at 157.

224. *Id.* at 159.

225. *Id.* at 159, 167.

226. *Id.* at 169–71.

The origins of state restrictions on foreigners' ability to own land may be traced to the feudal system, which recognized the King not only as the head of the state, but also the owner of all the lands in England.[227] As ruler and owner of the entire kingdom, the King gave estates of land to various subjects, particularly lords, who in turn pledged fealty to the King and provided him with goods or services, such as the provision of protection for the empire.[228] The exchange of allegiance to the King for land ownership formed the basis of restrictions on the ability of foreigners to own property in England.[229] Without fealty to the King, foreigners could not acquire any land.[230] This feudal based restriction was later adopted in the British common law, which similarly prohibited foreigners from owning lands by purchase or inheritance.[231] Purchased lands were subject to escheat by the state, and inherited lands were considered void *ab initio*.[232]

The early British colonists implemented the rule against a foreigner's ownership of land when they settled in North America.[233] These rules proved problematic, however, as a result of acquisition of lands by non-English residents who did not owe allegiance to the King.[234] Ultimately, these dilemmas led to naturalization as a method of removing one's prescribed disability to own property and essentially correcting a defective title.[235] Nevertheless, disputes over ownership of lands between British and non-British subjects continued and eventually led to problems that helped facilitate the American Revolution.[236]

Despite their collective break from England, the American states continued to impose prohibitions on land ownership by foreigners. As Polly Price has documented, the general restriction on noncitizens' property rights pervaded the common law. Cases that were decided during this period illustrated the extent to which one's lack of citizenship affected the ability of a person to acquire and transfer land.[237] Noncitizens who did

227. *Id.* at 157.
228. *Id.*
229. *Id.*
230. *Id.*
231. James R. Mason, Jr., Note, *"PSSST, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VAND. J. TRANSNAT'L L. 453, 457 (1994); Price, *supra* note 222, at 157.
232. *See id.* at 457; Price, *supra* note 222, at 160–62.
233. Price, *supra* note 222, at 153; Mason, *supra* note 231, at 458.
234. *See* Mason, *supra* note 231, at 458.
235. *See id.*
236. *See id.*
237. *See* Price, *supra* note 222, at 160–66.

not naturalize essentially had a defeasible estate during their lifetime, because at any point, the state could acquire the property through a proceeding known as "inquest by office."[238] Other foreigners who died without a will had their lands escheat to the state, even if they had heirs who were U.S. citizens.[239] Even some U.S. citizen heirs of aliens who were devised property under a will found themselves unable to inherit the land.[240] Finally, heirs of U.S. citizens who happened to be aliens were at times deemed to lack "inheritable blood" and unable to acquire property left for them by their citizen relative.[241]

Thus, in the early common law, noncitizen status constituted a bar to acquiring property.[242] The lack of citizenship and inability to own land mutually served to reinforce one's nonmembership in the community.[243] Consequently, naturalization became a method by which one gained the right to own land.[244]

In the nineteenth century, states subsequently codified and modified the common law restriction on foreigners' ability to own land.[245] For example, noncitizens who swore allegiance to the State of South Carolina were allowed to have a form of life estate in that the state would not exercise its right to forfeit ownership during the foreigner's lifetime.[246] A North Carolina statute enabled property owned by foreigners who failed to become U.S. citizens to pass to distant relatives who were U.S. citizens if their heirs were noncitizens, thus, ultimately keeping the property from going to the state.[247]

As with the common law, the motivation behind these laws was the desire of states to encourage foreigners to become citizens and thus, become formal members of the state. Some state constitutions, for example, expressly conditioned one's ability to own land on the

238. *See id.* at 160.
239. *Id.* at 163.
240. *See id.* at 164.
241. *See id.*
242. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 620 (1812) ("[I]t is now settled that a British subject born before, cannot, since the revolution, take lands by descent in the United States.").
243. *See* Price, *supra* note 222, at 157–60 (discussing the historical linkage between allegiance to the United States and landholding).
244. *See* discussion *infra* Part III (explaining that states required residents to become citizens before becoming eligible to own property).
245. Price, *supra* note 222, at 170.
246. *See id.* at 170–71 (describing a South Carolina law that allowed foreigners to keep their lands during their lifetime by pledging their loyalty to the state).
247. *See id.* at 171 (explaining the North Carolina law that enabled U.S. citizen relatives to inherit property of noncitizens).

foreigner's intent to become a citizen.[248] A few western states enticed foreigners to settle in their states by affording them rights to property as if they were citizens, demonstrating that although the immigrants were noncitizens,[249] they acquired property rights that arguably made them substantive members of the new states. Of course, as discussed in Part II, it must be recalled that some of these laws defined noncitizens according to federal naturalization law.[250] Yet, generally speaking, at least under the common law and the early nineteenth century state statutes, the primary stated reason for limiting noncitizens' access to property rights was their failure to choose to become citizens. Critically, the lack of citizenship was a disability that could be overcome.

In short, states have long enjoyed the ability to determine what rights, if any, noncitizens may have with respect to the acquisition of property within the state's jurisdiction. As the Supreme Court aptly stated in one of the early cases regarding the land rights of foreigners, restraints on ownership of land on noncitizens are "nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted."[251] Importantly, this historical tradition points to the scope of what local governments may do with respect to the property rights of noncitizens within their jurisdictions, including the potential to encourage a person's membership to the polity through property ownership or possession.

B. Comparison to the California Alien Land Law

The question of whether the California Alien Land Law and a similar law, Washington's Alien Land Law, constituted appropriate types of noncitizen property restrictions was brought before the Supreme Court in 1923. As noted previously, the Supreme Court ruled in *Terrace v. Thompson*[252] and three other cases[253] that they did.[254] In *Terrace*,

248. *See id.* at 168–69 (discussing the constitutions of North Carolina and Pennsylvania, which encouraged foreigners to take the oath of allegiance or intent to become a citizen prior to gaining the right to own real property).

249. *See id.* at 169 (discussing the 1850 constitution of Michigan which accorded equal property rights to citizens and noncitizens).

250. *See supra* Part II and accompanying notes.

251. Mager v. Grima, 49 U.S. 490, 493 (1850). Indeed, the California Supreme Court relied on the state's "right to regulate the tenure and disposition of real property within its boundaries" when it upheld the constitutionality of the Alien Land Law. People v. Oyama, 29 Cal. 2d 164, 174 (Cal. 1946).

252. 263 U.S. 197 (1923).

253. Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v.

petitioners contended that the Washington Alien Land Law violated the Equal Protection Clause because the law's proscription against noncitizen landholding "divided [aliens] into two classes—those who may and those who may not become citizens, one class being permitted, while the other is forbidden, to own land."[255] The Supreme Court rejected their argument, relying on the power of states to determine the necessary measures for the protection and promotion of "safety, peace and good order of its people."[256] Moreover, the Supreme Court emphasized that one's lack of citizenship suggested her lack of loyalty to the state. Quoting from the Washington Supreme Court, the Supreme Court explained,

> It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries.[257]

While emphasizing the state's authority to control noncitizens' property rights, the Supreme Court completely obscured in *Terrace* how the alien land laws that targeted against Japanese fundamentally differed from the earlier common law and nineteenth century restrictions on noncitizens' land ownership rights. Regrettably, the *Oyama* Court did not address this crucial point as well. First, unlike the California Alien Land Law, their earlier counterparts were intended to encourage citizenship. The laws served as a reminder that one could have declared her allegiance to the nation and become an American citizen. In other words, the earlier alien land laws may be viewed to have operated to integrate noncitizens into the American polity.

In contrast to the intent of the earlier alien land laws to encourage noncitizens to become members of the polity, the California Alien Land

---

Webb, 263 U.S. 225 (1923).

254. *See Terrace*, 263 U.S. at 217; *Porterfield*, 263 U.S. at 232–33; *Webb,* 263 U.S. at 321–23; *Frick*, 263 U.S. at 333.

255. *Terrace*, 263 U.S. at 216. Thus, the equal protection claim of the noncitizen in *Terrace* is different from the argument made in *Oyama* in that the latter claimed a violation of the Equal Protection Clause on the basis of race. *See* Brief for Petitioners at 8, Oyama v. California, 332 U.S. 633 (1948) (No. 44), 1947 WL 44264 ("The Alien Land Law is race legislation aimed directly at the Japanese and . . . [u]se of the term 'aliens ineligible to citizenship' is merely a guise.").

256. *Terrace*, 263 U.S. at 217. The Court further explained that the state was merely relying on classifications already established by Congress and thus, the "state properly may assume that the considerations . . . are substantial and reasonable." *Id.* at 220.

257. *Id.* (quoting Terrace v. Thompson, 274 F. 841, 849 (W.D. Wash. 1921)). The Supreme Court also agreed with the Washington Supreme Court's conclusion that without the alien land law, "it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens." *Id.* at 220–21 (quoting *Terrace*, 274 F. at 849).

Law functioned to expressly exclude noncitizens whom the state deemed racially inferior. The law worked in tandem with similarly exclusionary federal immigration laws to ensure that Japanese formally and functionally remained outsiders in the country. Thus, unlike the former laws designed to persuade membership to the political system, the Alien Land Law sought to perpetuate exclusion.[258]

Critically, unlike the earlier alien land laws, the California Alien Land Law intended to discriminate on the basis of race. Justice Murphy's stinging dissent emphasized this point in his concurring opinion.[259] He opined that,

> Moreover, there is nothing to indicate that the proponents of the California law were at any time concerned with the use or ownership of farm land by ineligible aliens other than those of Japanese origin. . . . The Alien Land Law, in short, was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien.[260]

Justice Murphy, however, did not have the support of the majority of the Supreme Court to articulate the position that noncitizen Japanese should also be entitled to own property and, importantly, that the basis of the restriction should be not because of their race or ancestry. Accordingly, although *Oyama* radically restricted states' powers with respect to the treatment of U.S. citizens of Japanese descent, it failed to delineate the boundaries of states' powers over noncitizens' rights and why their property rights should be treated differently from U.S. citizens.

C. Towards an Integrationist Theory of Property

Oyama's acquiescence of the citizen/noncitizen distinction in property rights points to the need to develop a framework that could explain not only why citizenship or some other accepted form of membership within a polity should be a necessary condition of property ownership, but also how a state may appropriately construct limitations on nonmembers' property rights. Here, this Part introduces a normative theory that arises

---

258. *See* Volpp, *supra* note 220, at 427–28 n.112.

259. For fuller exploration of Justice Murphy's strong criticism of laws in the 1940s that racially discriminated against Japanese including Executive Order 9066 and California's Alien Land Law, see Kennedy, *supra* note 136; Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243 (2000).

260. Oyama v. California, 332 U.S. 633, 660–62 (1948) (Murphy, J., concurring).

from the common law's ability to arguably integrate noncitizens into the polity by enticing them with land ownership vis-à-vis naturalization. This theory, what this Part refers to here as the "integrationist theory of property," might provide a way of balancing a state's interests in protecting the general safety and welfare of her residents and also recognize the need to include those noncitizen persons already within the state's borders as full members of their polity.

Property law's integrationist approach is arguably already reflected in contemporary state property restrictions on noncitizens' ability to own and lease property. For example, some states prohibit ownership of land by noncitizens if they are not residents of the state.[261] The principle is that although one is a noncitizen, she may still become a participant within the state by becoming a resident. Seven states have this "resident alien" rule.[262] Consistent with an integrationist approach, these restrictions show that the conditioning of property ownership based on noncitizenship relates to ensuring that owners of property ultimately become members of the state community.[263]

Interestingly, four states—Georgia, Kentucky, New Jersey, and Pennsylvania—have "friendly alien" property rules.[264] In Georgia, a "friendly alien" can own land as if she were a US citizen.[265] Pennsylvania allows a "friendly alien" to purchase property, though limited to 5000 acres.[266] Under the Kentucky[267] and New Jersey rules,[268] foreigners not

261. HAW. REV. STAT. §§ 206-9(c)(1) (LexisNexis 2008), 516-33(b) (LexisNexis 2006); KY. REV. STAT. ANN. §§ 381.290–340 (LexisNexis 2002); MINN. STAT. ANN. § 500.221 (West 2002); MISS. CODE ANN. § 29-1-75 (2008); N.H. REV. STAT. ANN. § 477:20 (2001); OKLA. STAT. tit. 60, § 122 (1994); S.C. CODE ANN. § 43-2A-5 (2004).

262. Twelve states have what I label a "no distinction" rule. The laws of these states express that noncitizens would be treated as if they were citizens with respect to ownership of land. ALA. CODE § 35-1-1 (1991) (Alabama); CONN. GEN. STAT. ANN. § 47-7(a) (West 2009) (Connecticut); DEL. CODE ANN. tit. 25, § 306 (2009) (Delaware); IND. CODE ANN. § 32-22-2-5 (West 2002) (Indiana); ME. REV. STAT. ANN. tit. 33, § 451 (1999) (Maine); MASS. GEN. LAWS ANN. ch. 184, § 1 (West 2003) (Massachusetts); MICH. COMP. LAWS ANN. § 554.135 (West 2005) (Michigan); R.I. GEN. LAWS § 34-2-1 (1995) (Rhode Island); TENN. CODE ANN. § 66-2-101 (West 2004) (Tennessee); UTAH CODE ANN. § 75-2-111 (West 1993) (Utah); WASH. REV. CODE ANN. § 64.16.005 (West 2005) (Washington); W. VA. CODE ANN. § 36-1-21 (West 2005) (West Virginia).

263. In Iowa, Missouri, and South Dakota, foreigners must be residents in order to be eligible to purchase agricultural land. IOWA CODE § 91.3 (1996); MO. ANN. STAT. §§ 442.571, 442.586 (West 2000); S.D. CODIFIED LAWS § 43-2A-5 (2004). In South Dakota, if a non-resident becomes a bona fide resident, she may own lands. § 43-2A-5. Otherwise, nonresident aliens may own no more than 160 acres of land. S.D. CODIFIED LAWS § 43-2A-2 (2004). What constitutes a "bona fide resident" is based on state law.

264. GA. CODE ANN. § 1-2-11 (2000); KY. REV. STAT. ANN. § 381.320 (LexisNexis 2002); N.J. STAT. ANN. § 46:3-18 (West 2003); 68 PA. CONS. STAT. ANN. § 28 (West 2004).

265. GA. CODE ANN. § 1-2-11 (2000).

266. 68 PA. CONS. STAT. ANN. § 28 (West 2004).

only have to be residents of the state, but they must also be subjects of countries that are friendly to the state.[269] Of course, these laws can prove to be problematic because of their potential to invite prejudiced thinking about what noncitizens might be considered not "friendly" or, in other words, an "enemy alien." Yet, the underlying notion of encouraging residency shows the laws' ability to formally integrate noncitizens into the state even if they are not U.S. citizens.

Notably, there are still some laws that show distrust to the noncitizen but these laws may arguably also aim to protect core local interests. Acreage limitations, for instance, seem to address these concerns. Limitations on how much land a noncitizen may purchase show the state's willingness to allow them to invest in the state, but similarly protect U.S. citizens and other residents' interests in their land.[270] Thus, acreage limitations are at times combined with types of lands, as in Nevada where only U.S. citizens and legal permanent residents may own 160 acres or more of public land or South Dakota where nonresident aliens are limited to 160 acres of agricultural land.[271]

Indeed, state restrictions on property ownership based on citizenship may ultimately be removed and instead impose limitations on land use. Many state laws currently express that one's alien status is no longer a bar to inheriting property within the state.[272] Still, some states impose land use

267. KY. REV. STAT. ANN. § 381.320 (LexisNexis 2002). Note also that in Kentucky, one must become a United States citizen in eight years or the property escheats. KY. REV. STAT. ANN. § 381.300 (LexisNexis 2002).

268. N.J. STAT. ANN. § 46:3-18 (West 2003).

269. KY. REV. STAT. ANN. § 381.320 (LexisNexis 2002); N.J. STAT. ANN. § 46:3-18 (West 2003). Thus, today resident foreigners from Iraq, Afghanistan, and North Korea would arguably be unable to own land in Kentucky and New Jersey. *See also* N.D. CENT. CODE § 47-10.1-02 (1999).

270. Acreage limitations from as little as five acres in Missouri to as big as 500,000 acres in South Carolina aim to ensure that land in these states owned by foreigners are circumscribed. *See* MO. ANN. STAT. §§ 442.560, 442.566(1) (West 2000); S.C. CODE ANN. § 27-13-30 (2007).

271. *See* NEV. REV. STAT. ANN. § 324.120 (West 2000); *see also* S.D. CODIFIED LAWS § 43-2A-2 (2004). Other acreage limitations include Arizona and Louisiana laws, which provide that noncitizens may own only up to 640 acres of land, a Pennsylvania law, which limits noncitizens' ownership of land to 5000 acres provided that such noncitizens must be an "alien . . . not . . . at war" with the United States, and a California law, which proscribes foreigners from owning more than 150,000 acres of land unless it is used for agricultural educational purposes. ARIZ. REV. STAT. ANN. § 37-240(A) (2003); LA. REV. STAT. ANN. § 41:1216 (2006); 68 PA. CONS. STAT. ANN. § 28 (West 2004); CAL. PUB. RES. CODE § 8105 (West 2001).

272. ALASKA STAT. § 13.12.111 (2007); DEL. CODE ANN. tit., 25 §§ 306–08 (2009); FLA. STAT. ANN. § 732.1101 (West 2004) (but may be subject to regulation?—still good law as of now); ME. REV. STAT. ANN. tit. 18-A, § 2-112 (1999); MINN. STAT. ANN. § 524.2-111 (West 2002); MISS. CODE ANN. § 89-2-23 (2008) (must be citizen of either Syria or Lebanon); NEB. REV. STAT. § 76-405 (2003) (all such acquired land must be sold within five years of receipt); N.J. STAT. ANN. § 3B:5-12 (West 2003); N.M. STAT. ANN. § 45-2-111 (2009); N.Y. REAL PROP. LAW § 15 (McKinney 2006); N.C. GEN. STAT. ANN. § 64-3 (West 2008) (unless no reciprocity); 68 PA. CONS. STAT. ANN. § 22 (West 2004), 20 PA.

restrictions such as mining and timber constraints[273] or even owning property that may be used as an airport.[274] And still, others have retained a possibility of regulation where a noncitizen's property rights may ultimately be made subject to state regulation.[275] Finally, some states restrict noncitizens' property rights in the form of disclosure, registration, and reporting requirements.[276]

In brief, *Oyama* left untouched an important part of state regulatory powers. Here, the proposed modest normative approach that promotes integration of noncitizens and contemplates the needs of local residents may provide one way of establishing a limit on the authority of states to regulate noncitizens' property rights. So long as states do not utilize an impermissible factor such as race in determining property rights, as California did in its Alien Land Law, states may arguably continue to restrict noncitizens' access to property within their borders. At least one challenge to this approach, as the next Part considers, is how to address circumstances when seemingly "nonracial" factors, such as unauthorized immigration status, are in practical terms functioning to discriminate on the basis of race.

IV. IMPLICATIONS ON CONTEMPORARY STATE AND LOCAL "ANTI-ILLEGAL" IMMIGRANT LAWS

Thus far, the previous sections explored *Oyama*'s contributions to our understanding of the relationships among race, citizenship, and property. Part II illustrated how *Oyama* expands our knowledge of racism's harmful effects on the property rights of Japanese Americans. Part III further explained the ways in which states may condition property rights based on

---

CONS. STAT. ANN. §§ 2104(8), 2518 (West 2004); TEX. PROP. CODE ANN. § 41 (Vernon 2000); VA. CODE ANN. § 64.1-4 (2007); WASH. REV. CODE ANN. § 64.16.005 (West 2005); W. VA. CODE ANN. § 36-1-21 (LexisNexis 2005); WYO. STAT. ANN. § 2-4-105 (2009) (but must be reciprocal).

273. ALASKA STAT. § 38.05.190 (2007) (noncitizens are prohibited from mining in Alaska unless reciprocal laws in foreign country); MONT. CODE ANN. § 77-3-305 (2009) (noncitizens are prohibited from mining coal in Montana unless reciprocal laws in foreign country); N.Y. PUB. LANDS LAW § 81 (McKinney 1993) (only U.S. citizens can apply to mine in New York); TEX. TAX CODE ANN. § 23.77(2) (Vernon 2008) (noncitizens prohibited from timber production in Texas); *see* OR. REV. STAT. ANN. § 517.010 (West 2003) (noncitizens are prohibited from mining in Oregon).

274. GA. CODE ANN. § 6-3-20.1 (1995).

275. FLA. CONST. art. 1, § 2; KAN. CONST. bill of rights, § 17; MISS. CONST. art. 4, § 84; NEB. CONST. art. I, § 25; WYO. CONST. art. 1, § 29 (guaranteeing rights to only resident aliens).

276. 765 ILL. COMP. STAT. ANN. 50/3 (West 2001) (must report within ninety days); IOWA CODE ANN. § 9I.8 (West 2008) (must file by March 31 of every year); OHIO REV. CODE ANN. § 5301.254 (West 1994) (must register within thirty days if nonresident owns more than three acres); WIS. STAT. ANN. §§ 710.02(4),(7) (West 2001) (reporting required if files with the federal government).

noncitizenship as long as such restrictions do not racially discriminate. Overall, the foregoing analyses employed *Oyama* to reconstruct our historical comprehension of property rights as they related to citizenship and race.

This final Part shifts the conversation to current legal issues and considers *Oyama*'s contemporary implications on local housing restrictions designed to exclude unauthorized immigrants. As noted in the Introduction, in the last few years, various towns and states have enacted laws that illustrate how immigration, race, and property law are once again converging. By threatening landlords with penalties, fines, and loss of lease license, these ordinances aim to deter undocumented immigrants from residing within their borders.

Using *Oyama* as a frame of reference, this Part examines these local ordinances and considers how *Oyama* sheds new light on ways of thinking about these laws. In particular, this Part highlights normative and prescriptive approaches that may be explored in future challenges to these laws. Part IV.A conducts a comparative analysis of local housing restrictions against undocumented immigrants and California's Alien Land Law and reveals the striking parallels between them. Situated against current frustration with illegal immigration, these modern limitations on undocumented immigrants' lease rights facially seek to enforce immigration law. Closer examination of these laws, however, reveals their racialized intent to exclude Latina/os, regardless of immigration status, from particular jurisdictions. Thus, as Part IV.B more fully explains, similar to the alien land laws, these contemporary housing restrictions also implicate the property rights of U.S. citizens, including U.S. citizen children. Accordingly, Part IV.B considers the ways in which *Oyama*'s legacy of protecting the rights of citizens may help counteract contemporary local housing restrictions against undocumented tenants.

A. "Illegal" Immigrant Relief Acts—The New Alien Land Laws

Currently, an estimated eleven million undocumented immigrants live in the United States.[277] Despite calls for legislation that will not only

277. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 2 (2006), http://pewhispanic.org/files/reports/61.pdf (reporting that the number of undocumented immigrants in the United States is approximately 11.1 million); Michael Hoefer et al., Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006*, at 1 (Aug. 2007), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf ("[t]here were an estimated 11.6 million unauthorized immigrants living in the United States as of January 2006."). It should be

determine the status of undocumented immigrants but also discourage the migration of new unauthorized noncitizens through stricter border protection, Congress has failed to pass comprehensive immigration reform.[278] Frustrated by Congress's legislative inaction, several cities enacted laws that sought to limit the influx of undocumented immigrants to their municipalities. In 2006 alone, states and local governments adopted more than 550 state laws and eighty local ordinances in an ad hoc attempt to limit illegal immigration.[279] Initiated by San Bernardino, California and popularized by Hazleton, Pennsylvania,[280] some of these ordinances have been entitled "Illegal Immigrant Relief Acts" (IIRAs). Expressly promulgated to discourage undocumented immigrants from residing in the towns that enacted them, at least some IIRAs also sought to prevent the ability of undocumented immigrants to gain employment within the towns.[281] At large, these IIRAs and other local housing restrictions are part of a larger trend today of government actors limiting individual property rights in order to enforce immigration law. More narrowly, these laws demonstrate the contemporary intersection of property and immigration law.

---

noted that the number of unauthorized immigrants may be lower than currently estimated because there are unauthorized immigrants who have been included in these estimates even though they have claims to legal status. *See* DAVID A. MARTIN, MIGRATION POLICY INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 1–8 (2005), http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf (arguing for estimates of unauthorized immigrants to take into account those immigrants with claims to legal status such as those spouses and children of legal permanent residents).

278. Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1 (reporting that proposed federal legislation that "called for the biggest changes to immigration law in more than 20 years, offering legal status to millions of illegal immigrants while trying to secure borders" failed to "move toward final passage.").

279. Dianne Solis, *Cities, States Tackle Illegal Immigration on Their Own: Conflicting Laws and a Bitter Divide Emerge*, DALLAS MORNING NEWS, Aug. 26, 2006, at 1A.

280. For additional information about the Hazleton, Pennsylvania ordinance, see McKanders, *supra* note 12.

281. *See infra* Part IV.A. Interestingly, many of these laws have been passed in small towns that have experienced an increased population of Latino residents. For example, in Hazelton, Pennsylvania, the total population decreased from 24,730 in 1990 to 23,329 in 2000, but the Latino/Hispanic population grew from 249 to 1132 in that same time frame (an increase from one percent to nearly five percent of the total population). Other examples include Farmers Branch, Texas, which had an increase in the Latino population from 4895 to 10,241 between 1990 and 2000 (going from twenty percent to over thirty-seven percent), Riverside, New Jersey where the total population grew by only seventeen people between 1990 and 2000 while the Latino population grew by 114 people, Avon Park, Florida, which saw its Latino population nearly triple in that decade rising from 6.9% to 18.7%, Escondido, California where the Latino population more than doubled from 25,380 (1990) to 51,693 (2000) and Valley Park, Missouri, which also nearly doubled its Latino population in that decade. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS REPORT (1990); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, U.S. CENSUS REPORT (2000).

Notably, closer examination of these local housing ordinances illustrates their striking similarities to the anti-Japanese alien land laws. First, local towns, and increasingly, state governments, are using a "neutral" immigration language as the basis for denying property rights.[282] Second, legislative history and surrounding circumstances demonstrate that the IIRAs target a racial group, in this case, mainly Latino immigrants.[283]

1. "Neutral" Language

Similar to the alien land laws, IIRAs employ an immigration-related category to restrict noncitizens' property rights. Specifically, IIRAs use terms such as "citizenship or eligible immigration status,"[284] "either a U.S. citizen or an alien lawfully present"[285] and "illegal alien[s]"[286] to deny a noncitizen who lacks valid immigration status the ability to rent property.[287] Although these terms appear neutral, they are analogous to the "impartial" label "ineligible to citizenship" of the California Alien Land Law.

An examination of two related ordinances passed in the City of Farmers Branch, Texas—Ordinance 2903[288] and Ordinance 2952[289]—illustrates the ways in which municipalities today have utilized property

282. *See infra* Part IV.A.1.

283. *See infra* Part IV.A.2.

284. Farmers Branch, Tex., Ordinance No. 2903, § 3(B)(1) (May 22, 2007).

285. Hazleton, Pa., Ordinance 2006-40, § 7 (Dec. 13, 2006); *see also* Farmers Banch, Tex., Ordinance No. 2952 § 1(B)(5) (Jan. 22, 2008).

286. Riverside, N.J., Ordinance 2006-16, § 5 (July 27, 2006) (prohibiting renting property to "illegal alien[s]"); Escondido, Cal., Ordinance No. 2006-38 R, § 16E-1 (Oct. 10, 2006) (proscribing "harboring [of] illegal aliens"); County of Cherokee, Ga., Ordinance No. 2006-003, § 18-503 (Dec. 5, 2006) (same).

287. The use of citizenship or legal status in obtaining a leasehold is not new. The U.S. Department of Housing Urban Development (HUD) requires evidence of citizenship or immigration status to qualify for HUD's Section 8 housing program, which provides for "a uniform and non-discriminatory certification process for citizenship and immigration status." *See* Farmers Branch, Tex., Ordinance No. 2903, § 1 (May 22, 2007) (referencing 24 C.F.R. §§ 5.001–5.504 (2008), which outline the general HUD provisions including the requirement of citizenship or legal immigration status for assistance). It should be emphasized, however, that Ordinance No. 2903 was broader in scope because it applied to rental agreements in the private apartment market.

288. Ordinance 2903 repealed two earlier versions, Ordinances 2892 and 2900. *See* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 861–62 (N.D. Tex. 2008) (explaining that Ordinance 2903 replaced Ordinances 2892 and 2900). The city council repealed the earlier ordinances because a "state court issued a temporary restraining order enjoining implementation of Ordinance 2892 . . . finding that [it] 'may have been approved and adopted in violation of the Texas Open Meetings Act.'" *Id.* at 861.

289. Farmers Branch, Tex., Ordinance No. 2952, § 1(B)(5) (Jan. 22, 2008), *available at* http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf.

law in tandem with federal immigration law to restrict the property rights of undocumented immigrants. Although they differ in some ways, they both demonstrate the intent of denying undocumented immigrants the ability to reside within the city.[290]

The Farmers Branch City Council adopted Ordinance 2903 on January 22, 2007[291] and, in a local election held on May 12, 2007, nearly seventy percent of Farmers Branch voters approved the ordinance.[292] Ordinance 2903 solely targeted rental lease agreements.[293] Under the ordinance, the owner or property manager must obtain evidence of citizenship or eligible immigration status prior to entering into any new leases or rental renewals from each tenant family.[294] Indeed, the law required each resident—except for family members who are minor children or sixty-two years of age or older—to submit such evidence.[295] United States citizens or nationals may submit a signed declaration of U.S. citizenship or U.S. nationality along with the presentation of a U.S. passport "or other appropriate documentation in a form designated" by the Immigration and Customs Enforcement Department ("ICE").[296] "Non-citizens" (defined as persons who are neither a citizen nor a national) must sign a declaration of eligible immigration status,[297] "[a] form designated by ICE as acceptable evidence of immigration status,"[298] and "[a] signed verification consent form."[299] The owner or property manager would then have to review the original forms to verify U.S. citizenship or immigration status and retain photocopies for at least two years after the end of the lease.[300] Any

290. *See id.* at pmbl. ("WHEREAS, aliens not lawfully present in the United States, as determined by federal law, do not meet such conditions as a matter of law when present in the City of Farmers Branch . . . .").

291. *See Villas at Parkside*, 577 F. Supp. at 861 (stating that the Farmers Branch City Council repealed Ordinance 2892 and adopted Ordinance 2903). Around that same time, Farmers Branch also passed Resolution No. 2006-130, entitled "Resolution Declaring English as the Official Language of the City of Farmers Branch." To date, twenty-seven states have passed laws declaring English to be the official language. Howard Witt, *English-only Movement Worries Latino*, SAN JOSE MERCURY NEWS, Oct. 15, 2006.

292. The ordinance provided for an election that would enable the voters of Farmers Branch to approve or reject the law. *See Villas at Parkside*, 577 F. Supp. 2d at 861. On May 12, 2007, the results of the election showed that 4058 of the voters voted in favor of the law and 1941 voted against it. *Id.* *See also* Stephanie Sandoval, *Immigrant Proposal Wins Easily*, DALLAS MORNING NEWS, May 13, 2007, at 1A.

293. *See Villas at Parkside*, 577 F. Supp. 2d at 861.

294. Farmers Branch, Tex., Ordinance No. 2903, §§ 2, 4(i) (May 22, 2007).

295. *Id.* § 3(B)(3).

296. *Id.* § 3(B)(3)(i).

297. *Id.* § 3(B)(3)(ii)(a).

298. *Id.* § 3(B)(3)(ii)(b).

299. *Id.* § 3(B)(3)(ii)(c).

300. *Id.* § 3(B)(4)(i).

violation of the law would constitute a misdemeanor, carrying a maximum penalty of $500 for each day "on which a violation occurs or continues."[301]

Ordinance 2952 emerged in the wake of Ordinance 2903 while the latter was embroiled in litigation.[302] While waiting for a court to decide the constitutionality of Ordinance 2903, Farmers Branch decided to pass Ordinance 2952. Similar to its earlier counterpart, Ordinance 2952 aimed to limit the ability of undocumented immigrants to live in Farmers Branch. It differed, however, in at least two respects. First, the city sought to create a residential occupancy license that all persons age eighteen or older would need to obtain prior to "occupying any leased or rented single-family residence"[303] or "any leased or rented apartment."[304] The ordinance proscribed landlords from renting their homes or apartments to persons who did not have a residential occupancy license.[305] Charging a fee of five dollars for the issuance of the license, the city mandated all occupants to submit to a building inspector an application that included a signed declaration of one's U.S. citizenship or nationality. A person who was not a U.S. citizen or national had to provide to a building inspector an "identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States."[306] A person, however, could still obtain a license after declaring that she did not know of any federally-issued identification number.[307]

Second, Ordinance 2952 differed from Ordinance 2903 by placing the obligation on the city and not private landlords the obligation of verifying a tenant's authorized immigration status.[308] That is, the ordinance requires the building inspector, a local employee, to contact the federal government to determine her lawful presence by submitting the occupant's identity and other information.[309] Establishing procedures that the building inspector must follow concerning the verification process, Ordinance 2952 ultimately mandates revocation of the residential occupancy license to both occupant and landlord or lessor if the federal government reports that the occupant lacks lawful presence.[310]

---

301. *Id.* § 6.
302. *See infra* Part IV.B.1.
303. Farmers Branch, Tex., Ordinance No. 2952, § 1(B)(1).
304. *Id.* § 3(B)(1).
305. *Id.* § 1(C)(4); *see also id.* § 3(C)(4).
306. *Id.* § 1(B)(5); *see also id.* § 3(B)(5).
307. *Id.* § 1(B)(5); *see also id.* § 3(B)(5).
308. *Id.* § 1(D); *see also id.* § 3(D).
309. *Id.* § 1(D)(1).
310. *Id.* § 1(D)(4).

As the foregoing discussion made clear, both Ordinance 2903 and 2952 condition one's ability to rent property on proof of valid immigration status. Notably, by limiting a noncitizen's access to property, both ordinances are analogous to the alien land laws. Admittedly, in at least two respects, the ordinances differ from the alien land laws both with regard to the nature of the property restriction as well as the type of immigration status at issue. The form of property restriction under both ordinances—limiting the right to rent property—is distinct from the restriction under the California Alien Land Law which proscribed the right to own property. The difference between the type of property interest at stake—ownership and lease—is, of course, not an inconsiderable difference.[311] The right to own property, particularly in the nature of fee simple absolute, is considered a "bigger stick" within the bundle of property rights than the right to rent property.[312]

Nevertheless, the ability to rent property confers an individual and her family with important attributes of membership in the community in the same way that the right to own property has historically provided a person with membership rights.[313] For instance, and perhaps most important today, the right to reside in a community either vis-à-vis home ownership or renting someone else's property enables one's child to acquire a public education. Indeed, as Goodwin Liu has argued, the right to equal educational opportunity is linked to notions of membership in a community.[314]

Moreover, the California Alien Land Law's "ineligible to citizenship" provision is recognizably distinguishable from the restriction based on "immigration status" under Ordinances 2903 and 2952. The first, of course, focuses on a noncitizen's inability to become a formal member of the country. The latter refers to a noncitizen who is considered here without proof of valid status because she either entered the country without authorization or overstayed her authorized visitation. Unlike the noncitizen ineligible for citizenship, the undocumented immigrant is not

311. Indeed, home ownership is "held in high cultural esteem, as American as apple pie and baseball." D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006).

312. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1473 (1996) (calling fee simple absolute ownership "capacious" and best "captures the concept of property rights that are contextually defined"). *Cf.* Des Moines City Ry. Co. v. City of Des Moines, 159 N.W. 450, 453 (Iowa 1916) ("An estate which may last forever is a fee. If it may end on the happening of a merely possible event, it is a determinable or qualified fee.").

313. *See supra* Part III.

314. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 344–48 (2006).

authorized to remain in the country and consequently has limited claim to remain in the country.

Despite these acknowledged differences, the intersection between immigration law and property law is evident. Both Ordinance 2903 and Ordinance 2952, like the California Alien Land Law, utilize an immigration-related category to limit a noncitizen's property right. Similar to California, the City of Farmers Branch invoked its police powers to pass the law.[315] Claiming local authority over the regulation of property law, Farmers Branch argued that ultimately, the housing restrictions fell within the traditionally held powers of the city to protect the safety and welfare of its citizens.[316] Critically, this position articulates the earlier arguments of California and Washington regarding their authority to restrict noncitizens' rights to own property that the Supreme Court upheld in *Terrace* and did not revisit in *Oyama.*

2. Legislative History Demonstrates Racial Bias

The Farmers Branch ordinances are also comparable to California's Alien Land Law upon further examination of their legislative history and intended effect to exclude racialized noncitizens. Because Ordinance 2903 is the precursor to Ordinance 2952, they share the same legislative origin. In passing Ordinance 2903, the Farmers Branch City Council expressed that "in response to the widespread concern of future terrorist attacks following the events of September 11, 2001, landlords and property managers throughout the country have been developing new security procedures to protect their buildings and residents."[317] Consequently, it concluded that a necessity existed to "adopt citizenship and immigration certification requirements for apartment complexes to safeguard the public"[318] and "to promote the public health, safety, and general welfare of the citizens of the [City of Farmers Branch]."[319]

Yet, closer analysis of both Ordinance 2903 and Ordinance 2952's common legislative history reveals evidence of animus against undocumented immigrants, specifically Latino immigrants. In this way, Ordinance 2903 is analogous to the California Alien Land Law's goal of

315. *See* Farmers Branch, Tex., Ordinance No. 2952 (Jan. 22, 2008) ("[T]he City of Farmers Branch is authorized to adopt ordinances pursuant to its police power to protect the health, safety, and welfare of its citizens . . . .").

316. *See id.*

317. Farmer's Branch, Tex., Ordinance No. 2903 (May 22, 2007).

318. *Id.*

319. *Id.*

excluding Japanese Americans from California. Farmers Branch City Council member Tim O'Hare, the sponsor of the original bill,[320] summed up the general consensus: Farmers Branch will be "better off without illegal immigrants because they have caused an increase in crime, lowered property values and lowered standards in local schools."[321] Mr. O'Hare claimed that real estate agents and teachers have told him in private that undocumented immigrants have hurt the city.[322]

Additional statements from Mr. O'Hare illustrate that by "undocumented immigrants," he meant Latinos. He stated in particular, for example, that the city's commercial center "just kept filling up with Spanish-speaking businesses and restaurants . . . You don't need seven or eight Mexican restaurants in one center. . . . If you have 10 restaurants three blocks from your house, do you want all of them to be Italian?"[323] Other supporters of Ordinance 2903 indicated their concern about declining quality in public schools due to undocumented immigrants, particularly those with limited English proficiency.[324] Indeed, the student population increased by twenty-two percent in the past ten years, and the amount of limited English-speaking students doubled from twelve percent to twenty-four percent.[325] Finally, some residents have expressed concerns about undocumented immigrants showing "a general lack of respect" and "are part of drug and gang problems."[326]

Those who supported restrictions on housing for undocumented immigrants shared similar sentiments when the Farmers Branch City Council enacted Ordinance 2952. In helping to unanimously pass the ordinance, Council member David Koch explained that the city was

---

320. Mr. O'Hare is now the mayor of Farmers Branch. *See* Brandon Formby & Ian McCann, *Tim O'Hare Wins Farmers Branch Mayor's Race*, DALLAS MORNING NEWS, May 11, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/051108dnmetimmigmayors.e9ebdfc7.html.

321. Thomas Korosec, *Backers Hope Laws Reverse Suburb's Decline*, HOUSTON CHRONICLE, Nov. 19, 2006, at A15 (reporting on a previous interview with Tim O'Hare).

322. Patrick McGee, *Public Opinion Doesn't Follow the Numbers*, FORT WORTH STAR-TELEGRAM, Feb. 5, 2007, at 11A. O'Hare claims to dispute the negative effect of illegal aliens is "just plain ignorant." *See id.*

323. Patrick McGee, *Texas City Divided over Illegal Immigration*, CHARLESTON GAZETTE AND DAILY MAIL, Jan. 27, 2007, at 1C. Mr. O'Hare adds, "you look at who's in the school, and you can figure it out pretty quick . . . [t]here's no question Farmers Branch has a lot of illegal immigrants here." *Id.*

324. McGee, *supra* note 322, at 11A. "A lot of times, the teachers are focusing on the students who don't speak English very well," said Farmers Branch resident Rick Johnson. *Id.* Tom Bohmier pointed to the soaring student population due to the over-packing of illegal immigrants into apartments. *See id.*

325. *See id.*

326. McGee, *supra* note 323, at 1C.

"willing to stop the insanity . . . of doing nothing, the insanity of turning a blind eye towards illegal immigration and impact."[327] Another Council member, Jim Smith, expressed the desire to also ban employers from hiring undocumented workers.[328]

Collectively, these statements illuminate animus toward unauthorized immigrants in ways reminiscent of the sentiments expressed during the enactment of California's Alien Land Law.[329] The animosity against Latinos becomes even more prominent when one examines the local interests that the ordinance is asserted to protect. The rise of unauthorized immigrants in Farmers Branch, for example, has been blamed for declining property values, increased crimes and lower educational system. Yet, studies have shown that, in fact, property values have gone up, crimes have decreased and the educational system has improved in Farmers Branch.[330]

B. Oyama's Legacy

The unmistakable similarities between the California Alien Land Law and IIRAs call for an examination of how *Oyama* contributes to contemporary analysis of these laws. Ultimately, as this Part contends, *Oyama* serves to remind us of how apparently "neutral" laws designed to restrict noncitizens property rights may easily curb the rights and privileges of citizens on the basis of race or national origin. Thus, through the lens of citizenship, *Oyama* offers a warning signal of the ease with which local housing laws may easily slip from denying housing to undocumented immigrants to also excluding Americans.

Contemporary litigation and doctrinal framing of the underlying legal issues surrounding the IIRAs have focused primarily on how these local laws violate the preemption doctrine.[331] Strategically, relying on the

327. *See* Stephanie Sandoval, *Farms Branch Bans Illegal Immigrants from Renting Houses*, DALLAS MORNING NEWS, Jan. 23, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012308dnmetfbrentals.2c1fcca.html (critiquing the city for not adequately addressing illegal immigration).

328. *See id.* (proposing the imposition of penalties to employers who continue to hire undocumented workers).

329. They are also similar to expressions of anti-Latino hatred by California voters in the early 1990s when Proposition 187 was being debated. *See* Johnson, *supra* note 57, at 1285–91.

330. McGee, *supra* note 322, at 11A.

331. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 865–76 (N.D. Tex. 2008) (conducting a preemption analysis of Farmers Branch IIRA); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 517–33 (M.D. Pa. 2007) (providing a preemption analysis of Hazleton IIRA). For the most part, this approach has been effective because courts have generally accepted the argument that the local governments that have passed the IIRAs are in fact preempted by Congress's

preemption doctrine is preferable because of the difficulty of proving discrimination claims.[332] Moreover, the application of the preemption doctrine, as previously discussed, has successfully led to the invalidation of some state and local laws that target unauthorized noncitizens.[333]

Yet, the struggle between federal and state/local control over immigration is far from settled and suggests the need to continue to examine equal protection law's ability to address the validity of IIRAs and other local housing restrictions against undocumented immigrants. Indeed, recent federal appellate court decisions reflect a conflict in the courts about the preemption doctrine and the scope of immigration regulation.[334] Consequently, opponents of the IIRAs will need to continue considering other avenues for challenging their constitutionality.[335] *Oyama* offers possibilities for considering how citizenship and equality norms may be utilized to invalidate these contemporary racial barriers to equal property rights.

1. Preemption Doctrine

The preemption doctrine, rooted in the Supremacy Clause,[336] establishes the power of Congress to preempt state and local laws, specifically those that are expressly preempted by federal law or those that are by implication interfere with or conflict with federal law.[337]

---

plenary power over immigration. *See Villas at Parkside*, 577 F. Supp. 2d at 876; *Lozano*, 496 F. Supp. 2d at 517–34.

332. *See* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1844 (2008) (explaining the difficulties of proving discrimination claims in both race and sex discrimination cases).

333. *See supra* Part IV.

334. *Compare* Chamber of Commerce v. Edmondson, 594 F.3d 742, 766–67 (10th Cir. 2010) (concluding that Oklahoma state law that enacted sanctions on employers who employed unauthorized noncitizens was preempted), *with* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 864 (9th Cir. 2009) (stating that Arizona's law that enabled the state to revoke business licenses was not preempted by federal law).

335. A few scholars have already explored the validity of IIRAs in contexts other than the preemption doctrine. *See, e.g.*, Oliveri, *supra* note 12 (considering IIRAs under the Fair Housing Act); L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479 (2008) (analyzing IIRAs under the Equal Protection Clause of the Fourteenth Amendment); Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041 (2007) (examining IIRAs under various laws including the First Amendment, Fair Housing Act, and Title VI of the Civil Rights Act of 1964).

336. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

337. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").

Accordingly, courts have employed the preemption doctrine to invalidate state and local laws that seek to regulate immigration law and implicate Congress's sole authority to control immigration.[338] In the seminal case, *De Canas v. Bica*, the Supreme Court recognized that only Congress may expressly determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[339] To determine whether a state or local law is preempted by Congress's power to regulate immigration law, *De Canas* established three tests to determine a law's validity: whether a law constitutes an impermissible regulation of immigration law, whether a law is occupying a field over which Congress expressly intended to govern, and whether the law serves as an obstacle to accomplishing Congress's goals.[340]

Although these particular preemption doctrinal tests developed many years after the Supreme Court decided *Oyama*, the Court did have occasion to address the federalism tension between state property law and federal immigration law in the decades before *Oyama*.[341] In particular, in the series of 1923 Supreme Court cases that upheld the validity of the alien land laws of Washington and California, the Court recognized that the laws were passed under the traditional power of the states to regulate property law.

Indeed, the conflict arose a few months after *Oyama* in *Takahashi v. Fish and Game Commission*.[342] Typically invoked to support the exclusive congressional power in immigration law,[343] *Takahashi* in fact clarified the appropriate boundary between state property law and federal immigration law. In this case, the Court examined whether a California law that prohibited the issuance of a fishing license to a person ineligible for citizenship constituted a violation of his equal protection rights under the Fourteenth Amendment.[344] The Court invalidated the law, holding that the law conflicted with the power of Congress to regulate immigration law.[345]

---

338. *See, e.g.*, De Canas v. Bica, 424 U.S. 351 (1976).

339. *Id.* at 355.

340. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768 (C.D. Cal. 1995).

341. *See, e.g.*, Terrace v. Thompson, 263 U.S. 197, 217 (1923).

342. 334 U.S. 410 (1948).

343. *See, e.g.*, Complaint, Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 3:07-CV-0061-L); Complaint, Villas at Parkside Partners v. City of Farmers Branch, Nos. 3:08-CV-1551-B, 3:03-CV-1615, 2010 WL 1141398 (N.D. Tex. Mar. 24, 2010).

344. *See Takahashi*, 334 U.S. 410.

345. *Id.* at 419 (stating that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration" law).

Yet, the Supreme Court carefully distinguished the restriction of the Fourteenth Amendment on the provision of fishing licenses by a state[346] from "state laws barring aliens ineligible to citizenship from land ownership."[347] Although it cited *Oyama* to hint that its earlier opinion in *Terrace v. Thompson* and subsequent cases had become questionable,[348] the Court nevertheless emphasized that a state's right to determine the property rights of noncitizens was "a power long exercised and supported on reasons peculiar to real property."[349]

The Supreme Court's recognition of the authority of states to regulate noncitizens' property acknowledged in the foregoing cases, however, have not been fully considered in contemporary cases analyzing the validity of the IIRAs. Similar to litigation of the alien land laws, the central question examined in lawsuits against current local housing restrictions is whether the laws are valid exercises of state and local government police powers. Ultimately, because the IIRAs directly affect the rights of immigrants, they have been challenged under the preemption doctrine.[350] And, as noted earlier, these lawsuits have been largely effective. For instance, landlords and tenants who argued against the constitutionality of Ordinance 2903 and Ordinance 2952 prevailed in their claim that the law was preempted.[351] In *Villas at Parkside Partners v. City of Farmers Branch* (*Villas* I), the district court held that Ordinance 2903 constituted an impermissible regulation of immigration law.[352] Employing *De Canas*, the court concluded that the ordinance "adopted federal housing regulations used to determine noncitizens' eligibility for assistance" which in effect functioned to regulate immigration law.[353] Accordingly, the court permanently enjoined the ordinance.[354]

In holding that Ordinance 2903 was preempted, the court carefully distinguished the law from other local ordinances that have been upheld

346. *See id.* The Supreme Court also relied on Section 1981 of the Civil Rights Act of 1866. *Id*. at 419–20.

347. *Id.* at 422 (citing Terrace v. Thompson, 263 U.S. 197 (1923) and progeny).

348. *See id.*

349. *Id.*

350. *See* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 865–74 (N.D. Tex. 2008) (*Villas* I); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 517–33 (M.D. Pa. 2007).

351. *Villas* I, 577 F. Supp. 2d at 879 (granting permanent injunction of Farmers Branch Ordinance 2903); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (granting preliminary injunction of Farmers Branch Ordinance 2903).

352. *Villas* I, 577 F. Supp. 2d at 869.

353. *See id.*

354. *See id.* at 879.

recently by other courts.[355] In particular, the court in *Arizona Contractors Association v. Candelaria*[356] upheld a state law that prohibited employers from hiring undocumented employees.[357] In that case, the court held that the law was not preempted because the Immigration Reform and Control Act, according to the court, expressly authorized the law.[358] Similarly, in *Gray v. City of Valley Park*,[359] the court also upheld the constitutionality of a law that punished employers for hiring unauthorized immigrant workers.[360] Like the court in *Arizona Contractors*, the *Gray* court concluded that the Valley Park ordinance was consistent with the preemption doctrine.[361] In distinguishing the employment-related laws upheld in *Gray* and *Arizona Contractors* from Ordinance 2903, the court in *Villas at Parkside* emphasized that Ordinance 2903 applied to landlords, not employers.[362]

Recently, a district court struck down Ordinance 2952 and, in doing so, similarly invalidated the law under the preemption doctrine. In *Villas at Parkside Partners v. City of Farmers Branch* (*Villas* II),[363] the district court utilized the three tests under *De Canas* to conclude that the ordinance was expressly and impliedly preempted by the Congress's immigration powers.[364] First, the court held that although the ordinance

355. Gray v. City of Valley Park, Mo., No. 4:07CV00881 ERW, 2008 WL 294294, at *31 (E.D. Mo. Jan. 31, 2008) (affirming local law that proscribed the employment of undocumented workers); Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1061 (D. Ariz. 2008) (same).

356. *See Ariz. Contractors Ass'n*, 534 F. Supp. 2d at 1043.

357. *Id.* at 1052.

358. *Id.* at 1045–46.

359. No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (regarding a law that suspends business licenses of employers who knowingly recruit, hire, or employ undocumented workers).

360. *Id.* at *31.

361. *Id.* at *19.

362. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 865 (N.D. Tex. 2008). Additionally, the court stressed that the laws challenged in *Gray* and *Arizona Contractors* used a federal program established by the Department of Homeland Security, whereas Ordinance 2903 relies on classifications promulgated by the Department of Housing and Urban Development. *See id.* at 865–66.

363. Villas at Parkside v. City of Farmers Branch, Nos. 3:08-CV-1551-B, 3:03-CV-1615, 2010 WL 1141398 (N.D. Tex. Mar. 24, 2010).

364. *See id.* at *14–19. In conducting its preemption analysis, the court noted that its analysis turned not on the parties' divergent characterizations of Ordinance 2952 but rather on the "governing legal standards." *Id.* at *13 (explaining that the "parties [had] starkly differing characterizations of the Ordinance").

In addressing the ways in which the parties described the purpose of Ordinance 2952, the court illuminated the intersection between property and immigration. The court explained: "Plaintiffs argue the Ordinance is the latest in a series of attempts by the City to regulate the presence of illegal aliens; the City counters that the Ordinance, though touching on immigration, is instead a regulation of rental housing." *Id.* at *13.

relies upon federal immigration classifications of noncitizens, it nevertheless constitutes "invalid regulation of immigration" because it uses those classifications in ways not "authorized or contemplated by federal law."[365] Specifically, according to the court, the ordinance's new requirements imposed additional local requirements on those noncitizens who desired to live in Farmers Branch. Rejecting the city's arguments that the local housing restriction was akin to valid local laws that deny public benefits or constrain employment of undocumented noncitizens, the court explained that "[r]estrictions on residence directly impact immigration in a way that restrictions on employment or public benefits do not."[366] Unlike the context of laws regarding public benefits or employment of noncitizens that may be based on expressed provisions of the Immigration and Nationality Act, Ordinance 2952 lacks such authority or source of congressional law.[367]

Evidently, the preemption doctrine has been successful in halting these local restrictive housing laws. From a broad perspective, federalism concerns have taken part in confirming the prominence of federal regulation of immigration and its impact on local governments' invocation of their police powers to refuse noncitizens the privilege of residing in their jurisdictions. By holding that the federal government preempts local governments from imposing such restrictions not contemplated by the federal law, courts have employed the preemption doctrine to curb the continued collision between property and immigration law.

Oyama's acquiescence of the citizen/noncitizen distinction in property ownership, however, establishes that the current preemption approach to these local housing ordinances is far more complex than contemporary legal analyses provide. That is, courts have not included in their consideration of the laws the long acknowledged power of states to limit noncitizens' property rights. Arguably, *Oyama* signals the need to incorporate this long history within the preemption analysis to prevent legal decisions that may sweep too broadly and eviscerate an important and historically recognized state right. The exercise of this right, when done appropriately in ways that integrate noncitizens, could serve a powerful way of complementing—not violating—the federal government's immigration regulatory powers.[368]

---

365. *Id.* at *16.
366. *See id.*
367. *See id.*
368. Thus, property law's integrationist approach contributes to current discussion of how state and local governments may be involved in the regulation of immigration law in ways that do not

Importantly, *Oyama* serves as a reminder that restrictive local housing laws do not only affect noncitizens. They also implicate the property interests of citizens, particularly U.S. citizen children, whose concerns have not been fully explored in current litigation. This final part thus aims to highlight one of the crucial lessons from *Oyama*—the need to protect citizen children's property rights.[369]

2. Promoting Equal Access to Property

Perhaps the most relevant question that emerges after understanding the connections between the IIRAs and the Alien Land Law is whether *Oyama*'s prescriptions against discriminatory property barriers would be applicable in this context. That is, might *Oyama*'s recognition of the equal protection rights of Japanese American children apply today to U.S. citizen children whose property rights are implicated by laws denying their undocumented immigrant parents from renting property?

To be clear, plaintiffs involved in challenging IIRAs have contended that these laws violate their equal protection rights on the basis of race or national origin because the laws are directed against those persons of Latino descent. For example, in *Lozano v. Hazleton*,[370] the court addressed the plaintiffs' claim that the City of Hazleton's local ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[371] Illustrating the difficulty with which violations of equal protection principles are proven today,[372] the court explained that the plaintiffs were unable to "demonstrate discriminatory intent in passing the amended IIRA."[373] In *Villas* I[374] as well as *Villas* II,[375] the plaintiffs similarly raised equal protection violations. Neither *Villas* I nor *Villas* II, however, addressed

undermine the federal government's plenary authority over immigration. Accordingly, property law's function in broader discussions of federal/state/local immigration regulation should be explored further. *See, e.g.*, Huntington, *supra* note 217, at 789; Rodríguez, *supra* note 7, at 569; Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008).

369. This is not to suggest that citizenship must be the fundamental basis for the conferral and enjoyment of rights. This Part simply points out the need to consider the effects of local housing restriction laws and other IIRAs on U.S. citizens.

370. 496 F. Supp. 2d 477 (M.D. Pa. 2007).

371. *See Lozano*, 496 F. Supp. 2d at 538 (explaining that plaintiffs contended that the city ordinance would use "race, ethnicity or national origin in determining whether a complaint under the Ordinance is 'valid'").

372. *See* Mayeri, *supra* note 332, at 1844.

373. *Lozano*, 496 F. Supp. 2d at 540.

374. 577 F. Supp. 2d 858 (N.D. Tex. 2008) (*Villas* I).

375. Nos. 3:08-CV-1551-B, 3:03-CV-1615, 2010 WL 1141398 (N.D. Tex. Mar. 24, 2010) (*Villas* II).

their claims and instead focused its analysis primarily on their preemption argument.[376]

The legal rejection or nonrecognition of these equality claims evidences an unfortunate trend. The preemption doctrine, although successful in invalidating these laws, fails to address the racialized purpose and intent of these laws that fuel anti-Latino sentiment and message of non-inclusion of Latinos/as in these cities.[377] An examination of the *Oyama* opinion and the underlying history and purposes of the California Alien Land Law, as this Article has done, shows that indeed, the IIRAs are the new Alien Land Laws of our time.[378] The legacy of *Oyama* in promoting equal access to property regardless of race or ancestry thus alerts us to the need to rethink law's elision of the varied ways in which the IIRAs exclude noncitizens, primarily because they are Latino.

In the end, *Oyama* prescribes two possible doctrinal moves to correct the inequities that result from the IIRAs. The first is the use of 42 U.S.C. Section 1982 to challenge the IIRAs in much the same way as Fred Oyama successfully did sixty years ago.[379] In particular, U.S. citizen children of undocumented immigrants could arguably use Section 1982 to contend that they have been deprived of their equal access to property as white citizens. The fact that the property interest at stake here—lease of a resident—and not ownership in fee simple absolute of land should not diminish in any way the citizen's right to equal treatment in property law.[380] Today, as scholars and policy makers have explained, one's choice of residence directly relates to decisions about where to send her children to school.[381] Thus, the ability of a U.S. citizen's parent to rent an apartment or a house in turn confers the child with the necessary residency

376. *See Villas* I, 577 F. Supp. 2d at 864–76; *Villas* II, 2010 WL 1141398, at *12–19.

377. *Cf.* Oyama v. California, 332 U.S. 633, 652, 659 (1948) (Murphy, J., concurring) (explaining that the "arrival of the Japanese fanned anew the flames of anti-[Asian] prejudice" and that "[t]he fires of racial animosity were thus rekindled and the flames rose to new heights").

378. *See supra* Part IV.A.

379. *See supra* Part I.

380. Continued racial disparities in home ownership, which cause many African Americans and Latinos to rent homes, signal the need to further explore the implications of racial barriers in the acquisition of property. *See* Roithmayr, *supra* note 159, at 383 (noting that the 2000 Census showed that seventy-one percent of whites owned homes but only forty-six percent of African Americans and Latinos were homeowners).

381. *See* Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 BYU L. REV. 557, 563 (explaining that because parents know that their choice of residence helps to determine where their kids will go to school, they typically buy or rent a house in the right school district). *See also* Roithmayr, *supra* note 159, at 385–86 (stating that many potential home buyers pay attention to school and school finance systems because of their impact on property values).

requirement to attend public school. Indeed, many families strive to live in neighborhoods that are zoned in good school districts.[382] *Oyama*'s protection of the property rights of citizens might thus be applied in the particular context of ensuring that a U.S. citizen Latino child is given equal access to a home and an education in the same way that other citizens are.[383]

Even more, courts could also look to *Oyama,* specifically the concurring opinion of Justice Murphy, to do something that the Supreme Court failed to do. Specifically, courts could consider ways of extending equal protection to noncitizens seeking access to property.[384] Indeed, Justice Murphy's view of the general applicability of the Equal Protection Clause to persons and not citizens would further support providing protection to noncitizens who are undocumented immigrants and seek equal access to property. It could even be considered the logical extension of *Plyler v. Doe*, which held that the right to an education may not be denied to a child because of her immigration status.[385] If the restriction on rental leases based on undocumented status precludes an immigrant child from obtaining an education, the restriction could be interpreted to run afoul of *Plyler.*[386] In fact, in both *Oyama* and *Plyler*, the Supreme Court expressed the view of the unfairness of punishing children for the mistakes that their parents had made.[387]

Thus, at minimum, courts could turn to *Oyama* as an avenue for invalidating the IIRAs because of the need to affirm the rights of a U.S. citizen to acquire a property interest through a lease. More broadly, *Oyama* encourages the extension of equal protection principles to noncitizens, even those who are unauthorized to be here.

---

382. *See* Roithmayr, *supra* note 159, at 385–86.

383. As the Supreme Court explained in *Plyler v. Doe*, 457 U.S. 202 (1982), "education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship." *Id.* at 222–23 (quoting Brown v. Board of Education*,* 347 U.S. 483, 493 (1954)).

384. *See supra* Part I and accompanying notes (examining Justice Murphy's concurrence).

385. *Plyler*, 457 U.S. 202 at 230 (explaining that the denial of public education to undocumented children violated the Equal Protection Clause of the Fourteenth Amendment).

386. *See id.*

387. *See id.* at 238 (Powell, J., concurring) (noting that the undocumented immigration children were "excluded only because of a status resulting from the violation by parents or guardians of our immigration laws"); Oyama v. California, 332 U.S. 633, 642–44 ("Fred Oyama had to counter evidence that his father was remiss in his duties as guardian. . . . [T]he father's deeds were visited on the son; the ward became the guarantor of his guardian's conduct.").

CONCLUSION

Both historically and today, the convergence of property, immigration, and race had shaped the development of equal protection and conceptions of race and citizenship. Yet, much about the intersection of these laws remains undertheorized. Indeed, on a broader level, our understanding of race and racism continues to be limited. As U.S. Attorney General Eric Holder stated in a much-publicized speech over a year ago, we are a "nation of cowards" because "we, average Americans, simply do not talk enough with each other about race."[388] Whether or not one agrees with his statement, the controversy that it generated[389] demonstrates starkly the need to examine more fully the historical and ongoing role of race in law and society.[390]

One starting point for instantiating a deeper conversation about race and its varied relations to the law is to consider the cases that are included in the first year curriculum.[391] Although such discourses are neither uncontroversial nor easy,[392] they prompt opportunities to interrogate the historical and contemporary linkages among law, race, and other factors that promoted subordination.

As this Article argued, *Oyama* is one such case that should be included in the property and constitutional canons. *Oyama* has much to offer our collective knowledge of property, equal protection, race, and citizenship jurisprudence. The case constitutes an important piece of the larger story of non-whites' struggle for equal access to property in the early 1900s. Indeed, it presents narratives of discriminatory laws that have been elided

388. Editorial, *'A Nation of Cowards'? The Attorney General's Speech on Race*, WASH. POST, Feb. 21, 2009, at A12.

389. Helene Cooper, *Attorney General Chided for Language on Race*, N.Y. TIMES, Mar. 8, 2009, at A26 (reporting that President Barack Obama "would have used different language" and that "[h]is remarks ignited protest, particularly from conservatives"); Stephen L. Carter, *We're Not 'Cowards,' We're Just Loud*, N.Y. TIMES, Feb. 25, 2009, at A27 (agreeing with Mr. Holder's statements); *All Things Considered*: *Holder's Cowards' Comments Examined* (NPR radio broadcast Feb. 20, 2009), *available at* http://www.npr.org/templates.story/story.php?storyId=100939348 ("[S]ome have applauded Eric Holder's courage. Others took offense to his description of Americans as cowardly.").

390. Calls for scrutiny of the relationship between law and race are, of course, not new. Indeed, legal scholars who helped develop critical race theory more than twenty years ago advocated for deeper analysis of the link between the two. *See generally* CRENSHAW, *supra* note 32, at xiii–xxxii. Yet, the interconnections between race and law remain underexplored in legal scholarship. *See* Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1234 (2002) ("[T]he ways in which race plays a role in legal education and legal scholarship remain insufficiently understood.").

391. *See* Harris, *supra* note 390, at 1234; Ansley, *supra* note 37, at 1520.

392. Indeed, they are to the contrary. *See* Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 653–55 (2008) (explaining the challenges of discussing race matters in law school classes).

in conventional discussion of discrimination typically framed along a "Black/White paradigm." Specifically, *Oyama* uncovers how people of color who fell outside of this binary construction also have been racialized and subordinated. In the case of Japanese Americans, property law intersected with immigration and nationality law in ways that perpetuated their foreignness and second-class citizenship by denying them an important right of citizenship—the right to own property. Examining *Oyama* and the dismantling of barriers to property faced by Japanese, resident aliens, and U.S. citizens alike thus expands our overall conception of the link between property ownership and equal citizenship.

Moreover, examining *Oyama*'s legacy provides useful perspective to contemporary property restrictions today. The burgeoning state and local laws that limit the property rights of a select group of noncitizens, namely undocumented immigrants, raise contemporary questions of race, property, and citizenship. Ultimately, *Oyama* prescribes that courts should take a more vigilant approach in their examination of these laws by considering whether immigration status is being used as a proxy for race.