MEMORANDUM

To:
From: Kali Hague, Brian Main, and Bryan Cox, Prof. Jeffrey Jackson, Washburn University School of Law
Re: Right of aliens to acquire and inherit agricultural land in the Republic of Georgia.
Date: October 24, 2011

QUESTION PRESENTED

Under the United States Constitution does a legal alien enjoy the same rights as a U.S. citizen in acquiring and holding agricultural land?

INTRODUCTION

The property rights and equal protection provisions of the Constitutions of the United States of America and the Republic of Georgia are significantly similar in terms of the substantive rights they protect, though they arrive at this point through different philosophical conceptualizations of the nature of rights. Both Constitutions protect property rights, with exceptions for public use; both seek to provide equal protection to citizens; and both contain language that permits the argument that the national government has some power to treat non-citizens differently from citizens. The primary operative difference between the two is present only because of the special considerations of a federal political structure in the United States.

Because of the strong similarities, the experience and jurisprudence of the United States, described in more detail below, may provide assistance to the Georgian Constitutional Court in its continuing development of Georgian jurisprudence.

COMPARISON OF THE CONSTITUTIONS

A. Protection of Property Rights

Both the U.S. Constitution and Georgian Constitution guarantee property rights. The Georgian Constitution's guarantee is phrased as a expansive and absolute protection against

interference with the property rights of individuals in the first clause. Geor. Const. art. 21. The guarantee found in the U.S. Constitution is stated among several other protections in the Fifth Amendment. It reads, in relevant part: "No person shall… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Both Constitutions provide for the abrogation of property rights by the government. The Georgian Constitution allows restriction of property rights "for the purpose of the pressing social need." Geor. Const. art. 29, cl. 2. The U.S. Constitution provides for similar abrogation inherently within its formulation of property rights, only precluding deprivation of property *without due process of law*. U.S. Const. amend. V.

On the face, the U.S. Constitution's guarantee of due process is a procedural guarantee – deprivation of property *with* due process of law is permissible. But substantive guarantees have been interpreted to be included in this protection. *See e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a state statute banning inter-racial marriage as a violation of substantive due process). A substantive guarantee prohibits the government, even with appropriate judicial or legislative procedure, from depriving an individual of property or liberty for a particular reason – usually where that deprivation is arbitrary or infringes on fundamental rights. *See id.*

Unlike the U.S. Constitution, the Georgian guarantee is more clearly a substantive as well as procedural one. The exceptions to property rights are stated with both a substantive requirement – "for the purpose of the pressing social need" – and a procedural requirement – "in accordance with a procedure established by law." Geor. Const. art. 21, cl. 2.

Finally, in the case of deprivation of this right, both constitutions require compensation for property that is taken; the Georgian Constitution requiring "appropriate compensation," and the

U.S. Constitution requiring "just compensation." Geor. Const. art. 21, cl. 3; U.S. Const. amend V.

B. Equal protection

The U.S. Constitution bars state governments from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Importantly, this is a restriction upon the *state governments*, and not upon the federal government. However, the federal government is also restricted in similar manner as states are restricted under the Equal Protection Clause, but the source of this restriction is found in the Due Process Clause of the Fifth Amendment instead. As will be discussed, however, the equal protection found in this amendment does not fully extend to aliens, due to the plenary power over immigration held by Congress. *See* U.S. Const. art. 1, sec. 8.

The Georgian constitution includes these protections throughout its text. In general, when stating a right, the Georgian Constitution states that "everyone" or "every person" has the right. More specifically, the Georgian Constitution guarantees social, economic, and political equality to every *citizen* of Georgia. Geor. Const. art 38. To ensure that these rights extend to non-citizens as well, the Georgian Constitution also declares that foreign citizens have the same rights and obligations as citizens of Georgia. Geor. Const. art. 47, cl. 1. In so doing, however, the Georgian Constitution qualifies the protection, permitting "exceptions envisaged by the Constitution and law." *Id.* The legislature is also granted authority over immigration. Geor. Const. art. 3 cl. 1(a).

Thus, both Constitutions guarantee equal protection of the law to aliens in general, but provide for exceptions for the national government to regulate differently for one reason or another. The exceptions to equal protection in American jurisprudence is somewhat more court-made, but effectively matches the textual provisions of the Georgian Constitution.

C. Negative vs. Positive Rights

The U.S. and Georgian Constitutions express rights in different forms. The Georgian Constitution expresses rights as positive things that individuals possess. In contrast, the U.S. Constitution expresses rights as negative proscriptions that limit what the government can and cannot do.

The U.S. expression in terms of "negative rights" is a result of history and political structure. The founders of the United States believed that they possessed certain rights that constrained what the sovereign could or could not do. *See* Jeffrey D. Jackson*, Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, 62 Okla. L. Rev. 167, 171 (2010).* They believed that these rights existed in fact, whether given them by the King or not, because they were "inherited from English constitutional and common law." *Id.* at 171. The English constitution was unwritten; implementing a *written* constitution was a new experiment for the new American nation. Ever before, rights had not required enumeration; one concern was whether, in enumerating certain rights, those not mentioned may be inadvertently abandoned. *See generally* The Federalist No. 84 (Alexander Hamilton). However, as a reaction to the violations of certain rights by the English King that led to the American Revolution, the Bill of Rights was ratified and became part of the U.S. Constitution. For this reason, however, these protections take the form of restrictions upon the powers of the government – establishing so-called "negative rights."

The Georgian Constitution, on the other hand, expresses a positivist statement of rights not as negative proscriptions, but positive things held by the people. *See* Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 Ga. J. Int'l & Comp. L. 1, 24 (2004). It establishes and defines rights in their full, which it need not do if those rights were thought to already exist. Additionally, where the

document recognizes that other rights exist, it identifies human-created sources as the source of those rights – "universally recognized rights, freedoms and guarantees of an individual and citizen," which "stem inherently from the principles of the Constitution." Geor. Const. art. 39.

While these differences exist at the very foundation of each nation's constitutionalism, they are unlikely to cause the implementation of the Constitutions to diverge; though the Constitutions each begin with fundamentally different conceptualization of rights and phrase rights differently, they arrive at the same effect, as we have seen.

APPLICATION OF U.S. CONSTITUTION

Legal aliens do not enjoy the same rights as U.S. citizens in acquiring and holding agricultural land because the U.S. Constitution allows distinctions to be made between aliens and citizens. While a state law prohibiting legal resident aliens from acquiring and holding agricultural land might contravene the Fourteenth Amendment's Equal Protection Clause, the same would not be true of a federal law that accomplishes the same effect. The United States Congress and President have plenary power over immigration, under which laws relating to aliens are often categorized. Additionally, judicial review over foreign policy decisions, many of which relate to aliens, is limited. The Supreme Court exercises deference to immigration laws that discriminate on the basis of alienage because it recognizes the common presence of overriding national interests that support the discrimination. While the Fifth Amendment's Due Process Clause incorporates an equal protection guarantee similar to the Fourteenth Amendment's Equal Protection Clause, Federal legislation need only pass a "rational basis" constitutional test.

A. The United States Supreme Court Would Probably Overturn a State Law Excluding Aliens from Agricultural Land Ownership.

In the United States, state laws that discriminate against aliens are subjected to either a rational basis test or a strict scrutiny review. The level of scrutiny the Supreme Court applies greatly effects whether a state law is overturned as unconstitutional.

1. A State Law Prohibiting all Aliens from Owning Agricultural Land Would Likely be Subjected to Strict Scrutiny Review

In the past, some states have enacted laws which prohibit aliens from owning agricultural land. Many of these laws, however, have now been repealed. Even the few that remain are little-used, and, as will be explained below, are of dubious constitutionality.

Traditionally, state laws discriminating against aliens were only subjected to a rational basis test. *See Graham v. Richardson*, 403 U.S. 365, 371 (1971). More recently, some laws discriminating against aliens have been subjected to strict scrutiny. *Graham*, 403 U.S. at 372. This heightened scrutiny, however, is not applied against state laws prohibiting aliens from being "cloaked . . . with substantial discretionary powers" to perform a "fundamental obligation of government." *Ambach v. Norwick*, 441 U.S. 68 at 74 (1979). Thus, states can pass laws prohibiting aliens from holding public office, or performing a task "that goes to the heart of representative government," such as being a police officer or a public school teacher. *Id*. at 75-76 (quoting *Sugarman v. Dougal*, 413 U.S. 634, 647 (1973)).

Farmers, unlike police officers and teachers, are not "cloaked" with discretionary power to influence and develop society. While a farmer can clearly *affect* society, the occupation of farming is not intended to *influence* society. Thus, a state law preventing aliens from acquiring or holding agricultural land would not fit within this exception, and would likely be subjected to strict scrutiny review.

2. A State Law Prohibiting all Aliens from Owning Agricultural Land Would Probably Not Survive a Strict Scrutiny Review

To survive a strict scrutiny review, a law must be "narrowly tailored" to further a compelling governmental interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Narrow tailoring is required to ensure classifications created by a discriminatory law are not illegitimate manifestations of prejudice or stereotypes. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

In order to *protect* society, a state government may have a compelling interest in prohibiting alien ownership of agricultural land. States have a compelling interest in reserving agricultural land for individuals who have an allegiance to the state. *See Terrace v. Thompson*, 263 U.S. 197, 221 (1923). In *Terrace*, however, justifications for upholding an alien land law, suggesting an ineligible alien has no allegiance to a state, appear to be based on prejudice and stereotypes. *See id*. at 220. An alien that lives in, works in, and has children in a state likely has some allegiance to that state. *Oyama v. Cal.*, 332 U.S. 633, 666 (1948) (Murphy, J. concurring); *see also Fujii v. State*, 38 Cal.2d 718, 733 (1952).

Reserving privileges for citizens is a violation of the equal protection clause of the Fourteenth Amendment. *Graham*, 403 U.S. at 374 (*citing Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). Even when the privilege deals with "distribution of limited resources," such as agricultural land, a state law discriminating against aliens may be invalidated under strict scrutiny review. *Id*. at 372, 75.

3. Precedent From 1923 Upholding a State Alien Land Law is Not Valid Today

Today, the Supreme Court would subject a state alien agricultural land law to a higher level of scrutiny than it did in 1923. *Terrace* was decided under a rational basis test using the rationale that "states have wide discretion" to create classifications of people within its

jurisdiction. *Porterfield v. Webb*, 263 U.S. 225, 233 (1923). Today, the same law would likely be subjected to strict scrutiny review, under which a state would have "narrow discretion" to create classifications of people. *Graham*, 403 U.S. at 372 (classifications distinguishing citizens from aliens are suspect).

Old "justifications" for upholding state alien land laws are not valid today. In *Terrace*, the Supreme Court determined a federal law classification "in and of itself furnishes a reasonable basis" to justify the same classification in a state law. *Terrace*, 263 U.S. at 220. Additionally, the court speculated that, absent an alien land law, "every foot of land within the state might pass to the ownership or possession of noncitizens." *Id*. at 220-21 (*quoting Terrace v. Thompson*, 274 Fed. 841, 846 (W.D. Wash. 1921)). Both arguments have since been specifically discredited. *See Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 418-19 (1948) (a state cannot adopt a classification made by the Federal Government unless the state government had the power to create the classification itself); *Fujii*, 38 Cal.2d at 734 ("Whatever justification there may have been for fear [of aliens owning all the land in a state], [c]hanges in the naturalization and immigration laws . . . have reduced that possibility to the vanishing point.").

B. The United States Supreme Court Would Probably Uphold a Federal Law Excluding Aliens from Agricultural Land Ownership

However, although a state law prohibiting aliens from owning agricultural land would be of dubious constitutionality, the same would not be true of Federal law doing the same. The Federal Government can discriminate against aliens in ways a state cannot. The Federal Government has plenary power over the naturalization of aliens. The Federal Government may also discriminate between citizens and aliens. This discrimination does not violate the Fifth Amendment's Due Process Clause in the United States Constitution because the clause allows a distinction to be drawn between groups that are not similarly situated like citizens and aliens.

1. Plenary Power

The Federal Government has plenary power over naturalization which allows the Government to occupy the entire field and exclude States from enacting their own legislation.

The U.S. Constitution gives Congress the power to establish a "uniform Rule of Naturalization." U.S. Const., art. 1, §8(4). The same plenary power applies when there are strong foreign policy interests. *U.S. v. Lopez-Flores*, 63 F.3d 1468, 1474 (9th Cir. 1995). Because Congress has plenary power, judicial review is limited, and the courts will be hesitant to overturn legislation. *Id.* Congress's plenary power allows the Federal Government to enact legislation that the States could not enact. *Id.* at 1473.

2. Fifth Amendment Equal Protection

The Federal Government is held to a different equal protection standard than the States when it enacts legislation that discriminates against aliens. The Federal Government need only meet a rational-basis test to enforce the legislation because the Government has plenary power over aliens.

The Fifth Amendment's Due Process Clause, which applies to the Federal Government, encompasses the Fourteenth Amendment's Equal Protection Clause that applies to the States. *Bolling v.* Sharpe, 347 U.S. 497, (1954). States are held to a stricter standard of judicial scrutiny than the Federal Government for laws that classify on the basis of alienage. *Lopez-Flores*, 63 F.3d at 1473. Federal classifications based on alienage are analyzed under rational basis review because "immigration and foreign relations are paramount federal concerns." *Id.* at 1475; *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). The Federal Government may have "overriding national interests" that provide justifications for citizenship requirements that could not be enforced as a state-enacted law. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976). In

summing up a number of Supreme Court cases, *Harisiades v. Shaughnessy*, 342 U.S. 580, 588, 589 (1952), stated:

> "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Similarly, in *Hampton*, the Court noted that if a policy had been mandated by the President or Congress, the Court "might presume that any interest which might rationally be served by the rule did in fact give rise to its adaption." 426 U.S. at 103.

In the United States, the Federal Government probably has the power to prevent an alien from owning agricultural land because the Federal Government can distinguish between aliens and citizens without violating the Fifth Amendment. *Id.* 101. The Federal Government would have to pass a rational-basis test by showing a legitimate interest in restricting alien land ownership, but when it is the Federal Government imposing citizenship requirements, the courts presume that there is a valid national interest for the restriction. *U.S. v. Lopez-Flores*, 63 F.3d at 1475; *Hampton*, 426 U.S. at 105.

The Federal Government does not violate the Fifth Amendment's equal protection when the Government makes distinctions between citizens and aliens. For legislation to be constitutional when it discriminates against aliens it must pass a rational-basis test which is the lowest level of judicial scrutiny.

CONCLUSION

Because of the similarities of substantive rights laid out in the respective national Constitutions, inspection and understanding of American jurisprudence on this issue presents an

opportunity to assist Georgian Constitutional practitioners in establishing their own strong constitutional jurisprudence.

Under the U.S. Constitution, the Federal Government holds plenary power over naturalization and foreign policy which allows it to exercise much broader control over alien rights and limitations than the States. Because the Federal Government has plenary power, the courts are hesitant to overturn Federal legislation and instead apply a rational basis standard of judicial review. The Fifth Amendment's Due Process Clause does not prevent the Federal Government from discriminating against aliens because the Federal Government may make distinctions based on citizenship. There are strong foreign policy interests in federal legislation governing aliens which the courts decided is best left to the legislature. Because of the Federal Government's strong interests in naturalization and foreign affairs, a law such as the one at issue would likely be upheld as constitutional, were it to be passed by the United States Congress.