Limitations on Alien Investment in American Real Estate

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The changing circumstances of international trade, particularly increased prices for crude petroleum, have caused an unprecedented flow of American dollars into foreign hands. This phenomenon has inspired domestic concern over the eventual disposition of these funds: Will aliens, by investment in the United States, acquire unwarranted influence over her economic, social, and political life? This concern has produced congressional proposals to restrict alien investment in all types of businesses.[1]

The concern has focused on a variety of enterprises, from banking to transportation.[2] Perhaps because of the essential historical role played by land acquisition and ownership in the advancement and democratization of our frontiers, foreign acquisition of land has been a particularly sensitive subject. Alien purchases of property in the thickly settled areas of Hawaii and in the farmlands along the Carolina coasts, for instance, have excited much adverse comment.[3]

The prospect of a return of American dollars to their native shores in the form of capital investment has not uniformly inspired mistrust, however. Some have viewed it, without preju-

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1. This is the thrust of a series of bills proposed in Congress over the past few years. *See, e.g.*, S. 3955, 93d Cong., 2d Sess. (1974). They culminated in legislation establishing an inquiry into foreign investment that will be completed in May 1976. Foreign Investment Study Act of 1974, 88 Stat. 1450.

2. *E.g.*, recent concern over Kuwaiti deposits in a large New York bank and over Iranian loans to Pan American airlines.

3. *See* N.Y. Times, Aug. 15, 1974, § 2, at 32, col. 1.

dice toward its origins, as a source of potential prosperity. Thus some states actively encourage foreign investment as well as trade and maintain offices abroad for that purpose.

Neither suspicion nor encouragement of foreign investment in the United States is new. On the one hand, Congress once legislated to exclude the English aristocracy from American land ownership,[4] and various states did the same with regard to Orientals.[5] Moreover, state property laws, deriving from a common English heritage, retain varying degrees of the ancient common-law restrictions on alien land ownership. On the other hand, as a developing nation the United States depended on European capital for the development of its industry and trade. The current ambivalence toward a resurgence of alien investment is a predictable continuation of these dual tendencies.

This Article is concerned with legal restrictions on alien investment in land. It surveys existing state and federal restrictions and then examines the validity under the federal Constitution and treaties of those laws and of proposals for further limitations. It concludes with a detailed summary and recommendations for the most effective means of implementing further limitations, should they prove necessary.

For a number of reasons the law relating to land ownership by aliens is different from and considerably more complex than the law respecting other foreign investments. First, real property law, in contrast to personal property and securities law, rests on feudal origins. The common law of personal property, which governed most aspects of trade and commerce, drew no distinctions on the basis of nationality. Nor do the modern codifications. The same applies to the law of intangibles. Real property law, on the other hand, was originally concerned with maintenance of military loyalty to feudal lords, and thus with the exclusion of aliens. Second, because it has remained the jealously guarded domain of the states, real property law has been relatively immune to movements toward uniformity, while personal property law and the law of intangibles have acquired a substantial national uniformity. Finally, investment in land has been more stringently regulated than any other form of alien investment, except for that in the defense, transportation, and communication industries.

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4. *See* text accompanying notes 19-21 *infra*.
5. *See* text accompanying notes 25-43 *infra*.

I. HISTORICAL BACKGROUND

The present state of law affecting foreign investment in land is best understood in the light of a brief examination of its history.[6] History can pull the confusing and sometimes inconsistent provisions of state laws into a comprehensible, although not a comprehensive, whole. The law of real property in the United States derives from English feudal law. In that country the feudal system evolved, after the Norman Conquest, into a complex hierarchical form of landholding and government. At the top of a pyramid stood the King, who held title to every foot of English soil. Beneath him were the lords to whom he or his predecessors had granted possession of certain lands in return for an agreement to furnish the King with specified goods or services, usually including a number of armed knights to serve him in foreign campaigns. The lord's promise was secured by an oath of fealty, or loyalty, to the King. These lords in turn granted land to other men who in turn agreed to provide knights or other payment, likewise secured by an oath of fealty. Justice was dispensed by the manorial lords and, ultimately, by the King. Designed, as it was, to secure allegiance to the crown through military service, the system obviously could tolerate no alien landholders, and so they were excluded.

Despite some minor amelioration of this rule—aliens were later permitted to take real estate by purchase, but not by inheritance[7]—it remained the law of England until 1870. Eventually, the rule could be avoided by simply using domestic trustees to hold legal title to the land. The chancery courts, which were not bound by feudal notions, would normally enforce the equitable interest of the trust beneficiary regardless of his nationality, and the common-law courts would not look beyond the trustee's citizenship in determining compliance with the formal requirements of real property law. Still, the old rule continued to create problems for the unwary until it was abolished by statute.[8]

Early American land law was based upon this English heritage. The common-law exclusion of aliens generally prevailed. Indeed, in the colonial era some states apparently re-

6. For a more thorough exposition of this history, see Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15 (1962) [hereinafter cited as Sullivan].

7. 2 W. BLACKSTONE, COMMENTARIES *249-50.

8. Naturalization Act of 1870, 33 & 34 Vict., c. 14, § 2.

stricted land ownership by citizens of other states, a practice which the Constitution prohibited by the privileges and immunities clause.[9] And during and shortly after the American Revolution some states expropriated the holdings of English subjects, since they had become aliens and, worse yet, enemies. The continuing rights of English landowners were recognized by treaty in 1794.[10] The supremacy of the treaty over one of the expropriation acts was established in 1812, in *Fairfax's Devisee v. Hunter's Lessee*.[11]

Since they are state law, American rules restricting alien land ownership have not developed uniformly. There has, however, been a uniform tendency toward dilution or abolition of the common-law exclusion of aliens. In part this has been accomplished through legislation. Pennsylvania statutes are illustrative.[12] Originally excluding aliens without exception, they were progressively qualified, first to grant aliens inheritance rights,[13] then to permit resident aliens to purchase 500 acres,[14] and finally to permit purchases up to 5000 acres.[15] And in part the relaxation has been accomplished through judicial interpretation of the common law. Some courts read the English precedents to hold that an alien did not forfeit his land automatically, but only after the official institution of an inquest *ex officio*.[16] Thus only state officials, not private escheators, could institute forfeiture proceedings, and their forbearance might be expected in certain circumstances. Other courts interpreted the precedents to deal only with the inheritance, not the purchase, of land, and thus limited the application of the exclusion.[17]

9. U.S. CONST. art. IV, § 2. The right to "take, hold and dispose of property, either real or personal" is included within the scope of this provision in the formative dictum of Justice Washington in Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823).

10. The Treaty of Amity, Commerce and Navigation with Great Britain, Nov. 19, 1794, art. IX, 8 Stat. 116, T.S. No. 105.

11. 11 U.S. (7 Cranch) 603 (1812).

12. PA. STAT. ANN. tit. 68, §§ 21-32 (1965).

13. *Id.* § 22 (originally enacted as Supplement of Feb. 23, 1791, Pa. Laws 1791, ch. MDXVII).

14. *Id.* § 25 (originally enacted as Act of Feb. 10, 1807, Pa. Laws 1807, ch. XVII).

15. *Id.* § 28 (originally enacted as Act of March 24, 1818, Pa. Laws 1818, ch. CLVII). A later Pennsylvania statute provides that aliens may purchase land not exceeding 5000 acres in area and not producing more than $20,000 in net annual income. *Id.* § 32 (originally enacted as Supplement of May 1, 1861, Pa. Laws 1861, No. 405).

16. 2 W. BLACKSTONE, COMMENTARIES *293. Sullivan, *supra* note 6, at 16-17, develops this history well.

17. Governeur's Heirs v. Robertson, 24 U.S. (11 Wheat.) 332 (1826); 2 J. KENT, COMMENTARIES *61-63.

Three major developments within the past century interrupted this liberalizing tendency: the exclusion of extensive alien land ownership in the frontier territories of the Great Plains and in several Midwestern states, the exclusion of Orientals from land ownership on the Pacific Coast in the period between the two world wars, and the exclusion of inheritance of land by residents of "Iron Curtain" countries. None of these exceptions is now significant, but they shed light on the present question.

In the quarter century following the Civil War, Americans swarmed into the territories of the Great Plains and the Rocky Mountains to settle. They homesteaded or bought land for farming and gradually turned these areas into states. However, these yeoman farmers and ranchers and their shopkeeping brethern were not the only new arrivals. Some foreign investors, members of the English nobility prominent among them, began acquiring large ranches. This development engendered a number of fears in the frontier territories.[18] Would the foreigners seek to establish themselves as landlords of the European type? Would the creation of ranches of such a nature jeopardize the acquisition of statehood? Was the area in danger of becoming an economic colony of Great Britain?

Congress responded sympathetically. The Territorial Land Act of 1887 forbade extensive alien landholding in the organized territories, except by immigrant farmers who had applied for citizenship.[19] Other laws restricted the acquisition of homesteads or other federal government land by aliens or alien-controlled businesses.[20] Most of these federal laws are now of reduced significance, because the territories have been organized into states, and relatively little homestead land remains. Restrictions on alien acquisition of federal mineral lands have a continuing importance, however, since much mineral-rich land, including offshore oil resources, is publicly owned.[21]

18. Sullivan, *supra* note 6, at 30-32.
19. 48 U.S.C. §§ 1501-07 (1970).
20. 43 U.S.C. § 161 (1970), 43 C.F.R. § 2511.1 (1974) (homesteads); 43 U.S.C. § 315 *et seq.* (1970), 43 C.F.R. §§ 4121.1-1(a)-(c) (1974) (grazing). Grazing rights are important in some Western areas, since many ranches are not economically viable if permission to use neighboring federally owned lands is withheld.
21. *See* Mining Law of 1872, § 1, 30 U.S.C. § 22 (1970) (applicable to "all valuable mineral deposits" but not those containing petroleum products); Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* (1970) (applicable to petroleum products and other minerals). Restrictions on

A group of Midwestern states enacted laws similar to the Territorial Land Act at about the same time.[22] These laws prohibited alien ownership except by immigrant farmers, who constituted a substantial portion of the population in some of these states. Eventually a few of the statutes were repealed or nullified by constitutional amendment in order to foster foreign investment.[23] In other states, however, the laws remain on the books.[24]

The second wave of anti-alien legislation illustrates one of the more deplorable aspects of American history, the systematic discrimination against persons of Oriental ancestry.[25] Land laws were only part of a pattern. Immigration laws contained similar provisions.[26] The detention of Japanese and Japanese-Americans in concentration camps during the Second World War was the culmination of this discrimination.

Motivated by racial intolerance or by a fear of undue competition from allegedly overzealous Oriental farmers, legislatures in Pacific Coast states passed laws prohibiting alien Orientals from owning land. California, which had legislatively abolished the condition of citizenship for landholding,[27] reintroduced it in this modified form in 1913.[28] The legislation spread eastward, finding its way into the statute books of states as far east as Kansas.[29]

These laws were commonly framed to exclude from land ownership "aliens ineligible for citizenship." Since Orientals

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alien ownership also exist in more recent enactments dealing with offshore oil development, 43 U.S.C. § 1331 *et seq.* (1970), and with geothermal steam resources. 30 U.S.C. § 1015 (1970).

22. Sullivan, *supra* note 6, at 31-32. At one time 13 states enacted legislation prohibiting aliens from acquiring land. U.S. PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 482-83 (1968).

23. For a discussion of individual state statutes, see text accompanying notes 50-121 *infra*.

24. *See* Sullivan, *supra* note 6.

25. *See* Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61 (1947); McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947).

26. *See* note 30 *infra*.

27. Amendments to the Code of California 1873-74, ch. 612, § 100 (codified at CAL. CIVIL CODE § 671 (1954)) *quoted in* Blythe v. Hinckley, 180 U.S. 333, 337 n.1 (1901).

28. Cal. Stats. ch. 113 (1913). The restrictions on alien land ownership were made more severe by an initiative law approved by the voters in 1920. 1921 Cal. Stats. Ex. Sess. lxxxvii.

29. KAN. STAT. ANN. § 59-511 (19).

were the only racial class excluded from citizenship by the federal immigration laws,[30] the practical effect was immediate. Moreover, the statutes themselves were highly detailed, prohibiting not only direct ownership of land but also every imaginable form of avoidance technique.[31]

The United States Supreme Court upheld the validity of these laws in 1923.[32] Finding nothing to offend the equal protection clause,[33] the Court based its decision on the power of a state to define and delimit property rights.[34]

The demise of this body of legislation began with a Supreme Court decision invalidating a California statutory provision creating a presumption that land acquired by a citizen from funds provided by an ineligible alien was acquired on behalf of the alien in violation of the statute and thus subject to forfeiture. The Court held the presumption to be discriminatory and violative of a minor Oriental's right, as a citizen by birth, to own land anywhere in the United States.[35] Four concurring Justices asserted that the basic legislation prohibiting alien ownership might also be susceptible to challenge.[36]

That challenge never reached the Supreme Court.[37] Perhaps motivated by the Court's new stance, perhaps by the record of racial atrocities that emerged from World War II, the states with legislation discriminating against landholding by Orientals

30. Free white persons had long been eligible for citizenship. Act of March 26, 1790, ch. 3, 1 Stat. 103. *See also* Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256 (persons of African nativity or descent eligible). Statutory amendments further restricted the categories until they eventually became primarily applicable only to Japanese. Act of Oct. 14, 1940, ch. 876, § 303, 54 Stat. 1140 (races indigenous to Western Hemisphere eligible); Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 601 (Chinese eligible); Act of July 2, 1946, ch. 534, 60 Stat. 416 (Filipinos and Indians eligible).

31. *E.g.*, an alien could not acquire a leasehold interest, Terrace v. Thompson, 263 U.S. 197 (1923); nor could the alien have the conveyance made to a citizen, if the consideration was paid by the ineligible alien. Oyama v. California, 332 U.S. 633 (1948).

32. Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923).

33. Terrace v. Thompson, 263 U.S. 197, 219-22 (1923).

34. *Id.* at 216-18 (citing Hauenstein v. Lynham, 100 U.S. 483, 484, 488 (1880); Blythe v. Hinckley, 180 U.S. 333, 340 (1901); Phillips v. Moore, 100 U.S. 208, 212 (1879)).

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

36. *Id.* at 647 (Black & Douglas, JJ., concurring); *id.* at 650 (Murphy & Rutledge, JJ., concurring).

37. But the Court did strike down similar restrictions in commercial fishing licenses the same year. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

have either repealed or judicially invalidated their laws since the war. Most important in this regard were California, where the legislature repealed the act in 1953 and provided compensation for those whose land had been forfeited in the interim;[38] Oregon, where the state supreme court invalidated the act as violative of constitutional guarantees;[39] and Washington, where provisions of the state constitution were repealed by referendum in 1966.[40] Other legislation lost its significance with the 1952 amendment of the federal immigration law,[41] which eliminated the class of "ineligible aliens."[42] Apparently meaningless remnants of the law remain in a few states.[43]

The third major wave of legislation arose during the "Cold War." These state statutes actually operated upon probate, rather than property, law and were designed to prevent the diversion of American wealth to totalitarian governments, rather than to prevent land ownership by individual aliens. They permitted state courts to impound the proceeds of inherited lands where it appeared that an alien heir would not have the full and real enjoyment thereof.[44] These provisions created a number of problems for the courts. How should a judge determine whether an alien beneficiary would receive the full and real enjoyment of his property? A superficial inquiry into the foreign nation's statutes would almost always produce an affirmative answer, and an inquiry directed to the consular or diplo-

38. Cal. Stats. 1953, ch. 1816. The act was repealed after the state supreme court had declared it invalid in Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

39. Kenji Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949). *See also* State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955).

40. WASH. CONST. amend. 42. WASH. REV. CODE ANN. § 64.16.005 (Supp. 1974) implements this amendment by providing that any alien may hold, convey, or devise any interest in land as if he were a native citizen.

41. Immigration and Nationality Act, ch. 477, § 311, 66 Stat. 239 (1952) (codified at 8 U.S.C. § 1422 (1970)).

42. There still are some aliens ineligible for citizenship, notably resident aliens who have claimed exemption from military service pursuant to treaty, 8 U.S.C. § 1426 (1970); 50 U.S.C. APP. § 454(a) (Supp. IV, 1974), and others who do not meet other criteria for grant of citizenship. *See* 8 U.S.C. §§ 1423-1427 (1970). State laws seem never to have been applied to any of these classes.

43. ARIZ. REV. STAT. ANN. §§ 33-1201 to -1207 (1974); KAN. REV. STAT. ANN. § 59-511(19) (inheritance).

44. For an exposition of this legislation and its impact, see Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962); Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 NW. U.L. REV. 221 (1957).

matic officials of the foreign state could hardly be expected to produce a negative one. So probate courts entered into a series of independent inquiries, often contradicting or ignoring foreign statutes and diplomatic officials.

In *Zschernig v. Miller*,[45] the Supreme Court severely restricted this approach, characterizing the independent inquiries as an invasion of the federal government's exclusive rights in the field of foreign relations. It has been widely supposed that the decision nullified the statutes, but many of them remain on the books,[46] and some of them have been upheld by state and lower federal courts willing to distinguish *Zschernig* on the basis of technical differences in the legislation or its application.[47]

The general tendency for the past quarter century has been to reduce or eliminate barriers to alien ownership of real estate, indeed in some cases the laws have been modified to stimulate foreign investment.[48] Other than the Cold War inheritance legislation, there appear to be only two new state laws increasing the burdens on alien investors. These laws, adopted by Iowa and Nebraska in 1975, merely add public reporting requirements to those states' existing restrictions on alien ownership.[49]

II. EXISTING LEGISLATION AFFECTING ALIEN OWNERSHIP

Land law is principally state law.[50] The states, through reception of the common law or through their own judicial or statutory innovations, define and delimit the rights of real estate ownership. The federal law in this field, with two significant exceptions, is of only peripheral interest. The exceptions concern the property, real and personal, of enemy or hostile aliens. The Alien Property Custodian Regulations,[51] promulgated under authority of the Trading with the Enemy Act,[52] provide that the property of enemy aliens shall vest in a federal official in

45. 389 U.S. 429 (1968).
46. *See* text accompanying notes 108-19 *infra*.
47. *See* note 172 *infra* and accompanying text.
48. S.C. CODE ANN. § 57-103 (1962), for example, extends permitted alien landholding to 500,000 acres (in place of the previous 500). This extension reportedly was made so that a pulp mill could locate within the state. Sullivan, *supra* note 6, at 40.
49. Iowa Laws 1975, ch. 133, §§ 7-8; Neb. Laws 1975, LB 203, § 2.
50. *See* Hauenstein v. Lynham, 100 U.S. 483, 484 (1880); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817).
51. 8 C.F.R. pts. 501-10 (1975).
52. 50 U.S.C. APP. § 1 *et seq.* (1970).

time of declared war. The Foreign Assets Control Regulations,[53] promulgated under the same statute, subject all property transactions by aliens of listed nations to prior approval and clearance from the Treasury Department. Both sets of regulations rest upon the war and foreign relations powers of the federal government. They are described in greater detail in connection with their possible preemptive effect upon state law.[54]

Other federal laws deal with a host of land-related questions, generally involving the right to obtain or exploit federally owned resources, such as homestead land,[55] grazing land,[56] mineral land,[57] or geothermal steam resources.[58] The states have similar bodies of law dealing with the disposition of their property.[59] Frequently these laws, both state and federal, have provisions excluding some or all aliens from directly obtaining public lands or rights. The description and evaluation of these laws are beyond the scope of this inquiry.

State laws both define the entities that can be "owned" and provide recognition for ownership. In this sense, state laws defining property rights are different from those restricting personal liberties. In general, our system allows an individual to do anything that he is not forbidden to do, but in the sphere of property relations, he may do only what he is allowed to—own, buy, sell, lease, and so on. The law *creates* property rights, while it *limits* freedoms.[60] This seemingly esoteric dis-

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53. 31 C.F.R. pt. 500 (1975). Related regulations are the Cuban Assets Control Regulations, *id.* pt. 515, and the Rhodesian Sanctions Regulations, *id.* pt. 530.

54. *See* text accompanying notes 200-08 *infra*.

55. 43 U.S.C. § 161 (1970); 43 C.F.R. § 2511.1 (1974).

56. 36 C.F.R. §§ 231.3-6 (1975); U.S. Forest Service, *Manual*; §§ 2231.14-.18 (1969).

57. 30 U.S.C. §§ 22-26 (1970) (development of certain "valuable minerals" on public domain land); *id.* § 181 (leases of public domain land for development of coal, oil, and similar minerals); *id.* § 352 (leases of non-public domain land for all types of minerals); 42 *id.* § 2061 *et seq.* (1970) (special rules for uranium); 43 *id.* § 1331 (offshore oil leases). All contain some restraint on alien exploitation.

58. 30 U.S.C. § 1001 *et seq.* (1970).

59. *E.g.*, ARIZ. CONST. art. X, § 11; ALASKA STAT. § 38.05.190 (1973); ARIZ. REV. STAT. ANN. § 37-240 (1974); IDAHO CODE § 58-313 (1976); ORE. REV. STAT. §§ 273.255, 517.010, 517.044 (1973).

60. Some would find a "natural" or "social contract" right to property that logically precedes the creation of governmental institutions. *E.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 25-51, 123-27 (P. Laslett ed. 1960). Even conceding this idea in an inchoate, generalized sense, the fine definitions of property rights must be drawn by the

tinction has a practical impact, for courts are more willing to tolerate discrimination by the legislature in the exercise of its definitional power, *e.g.*, in creating property rights, than in the exercise of its regulative power, *e.g.*, restraining personal liberty.[61] In the first case, but for the legislative enactment, there would be nothing; in the second case, there would be unfettered freedom.

The state laws presently affecting foreign ownership of real estate fall into three major types: (a) those that directly affect ownership by foreign individuals, (b) those that affect foreign corporate ownership, and (c) those that affect ownership by foreign individuals through the laws relating to inheritance. In a majority of states there is no restriction on foreign ownership of real estate. In all but five, the restrictions are so trivial, or so easily avoided, as to be meaningless.

A. Restrictions on Alien Individuals

The statutes of the dozen states that substantially restrict ownership of land by alien individuals can be subdivided into three major categories: (1) those in which the prohibition is general, (2) those that limit the amount or value of holdings, and (3) those that limit the time of holding. No two of the statutes are the same.

Four states, Connecticut,[62] Mississippi,[63] New Hampshire,[64] and Oklahoma,[65] generally exclude aliens from land ownership. Three of these states provide an exception for aliens residing within their own borders; Connecticut, for aliens residing anywhere in the United States. Two of the states[66] further

state, either by legislation or judicial declaration. Most judicial discussion of this point has focused on the power of states to enact prospective legislation affecting the obligation of contracts. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (finding the obligation of contracts to be derived from state law, over Chief Justice Marshall's dissent grounding the obligation in natural law principles).

61. The Supreme Court pointed out this distinction most clearly in upholding the anti-alien land laws in 1923. In Terrace v. Thompson, 263 U.S. 197, 221 (1923), the Court distinguished Truax v. Raich, 239 U.S. 33 (1915), in which it had held a restriction on the employment of aliens unconstitutional, describing land ownership as a "privilege."

62. Conn. Gen. Stat. Ann. §§ 47-57, -58 (1960).

63. Miss. Code Ann. § 89-1-23 (1973).

64. N.H. Rev. Stat. Ann. § 477.20 (1968).

65. Okla. Const. art. 22, § 1; Okla. Stat. Ann. tit. 60, §§ 121-23 (1971).

66. Conn. Gen. Stat. Ann. § 47-57 (1960) (citizens of France); Miss. Code Ann. § 89-1-23 (1973) (citizens of Syria and Lebanon).

provide special treatment for the citizens of specified nations, a provision that is of dubious constitutional validity.[67] Connecticut allows nonresident spouses or lineal descendants of deceased, lawful alien holders to take and hold indefinitely,[68] while Oklahoma permits nonresident alien heirs to hold real estate for five years.[69]

On their faces, these statutes extend to all kinds of real property—residential, commercial, industrial, or agricultural—except the Connecticut rule, which exempts mining property from its prohibition.[70] In form these are the most far-reaching of the state restrictions.

Four other states, Iowa,[71] Minnesota,[72] Pennsylvania,[73] and Wisconsin,[74] have significant acreage restrictions. The Iowa and Wisconsin laws limit nonresident aliens to 640 acres, a tract large enough, however, for most nonagricultural and many agricultural uses. Iowa also exempts all land within municipal boundaries. Minnesota provides a much more restrictive rule, limiting alien holdings to 90,000 square feet, about two acres, or the size of a city block. It also provides, however, a series of exceptions: for aliens applying for citizenship, for aliens who have acquired by inheritance or corporate distribution, and for settlers on small farms.[75] Pennsylvania provides a broader exception, exempting alien ownership of land not exceeding 5000 acres in area and not providing more than $20,000 in net annual

67. *See* text accompanying note 174 *infra*.
68. CONN. GEN. STAT. ANN. § 47-57 (Supp. 1976).
69. OKLA. STAT. ANN. tit. 60, § 123 (1971).
70. CONN. GEN. STAT. ANN. § 47-58 (1960).
71. IOWA CODE § 567.1 (Supp. 1975). *See also* IOWA CONST. art. 1, § 22.
72. MINN. STAT. § 500.22(1) (1974).
73. PA. STAT. ANN. tit. 68, § 32 (1965).
74. WIS. STAT. §§ 710.01, .02 (1973). *But cf.* WIS. CONST. art. 1, § 15 ("No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property.").
75. Minnesota also expressly provides that the statutory restrictions do not apply if a treaty grants greater rights to an alien. MINN. STAT. § 500.22(1) (1974). This is substantively unimportant, since a treaty would prevail over state law in any event, Missouri v. Holland, 252 U.S. 416 (1920), but it is significant in procedural and political terms. Procedurally, it means that a challenge to a state statute by a treaty-protected alien is only to its application and not to its basic validity, thus excluding the possibility of a three-judge court under 28 U.S.C. § 2281 (1970). *See Ex parte* Bransford, 310 U.S. 354, 361 (1940). Politically, it reflects the state legislature's acknowledgement of its limited role in the disposition of these issues.

income. This exception would permit extensive holding of nonproductive land for investment or development.

In three of these states, then, the impact of the legislation is almost exclusively on agriculture and related activities. The exclusion of urban land, either expressly or by maximum-size limitations, means that most alien investment in residential, industrial, or commercial property is not affected. Certain other land-intensive activities, such as mining, housing developments, and the very largest industrial undertakings, might also be limited. Only Minnesota, with its more restrictive limitation, would preclude most foreign commercial and industrial developments. Even there, individual residential and recreational purchases would not be affected.

Finally, Illinois,[76] Indiana,[77] Kentucky,[78] and Nebraska[79] put time limits on alien ownership. In general, the limitation periods range from five to eight years,[80] but there are exceptional circumstances that will extend the limitation period.[81] Again, a substantial number of landholdings are excepted from the restrictions. Indiana apparently exempts holdings of up to 320 acres, and in Nebraska the time restrictions do not apply to land within three miles of a city's limits. In all but Nebraska an alien can take any real property interest, so long as he disposes of it within the prescribed period; in Nebraska the alien may only take a leasehold interest not exceeding the statutory period.

These laws have varying impacts on different kinds of real estate investment. The Nebraska law affects mainly farmland, but in Nebraska this is a severe restriction. The Indiana and Nebraska laws appear designed to encourage alien immigrants to become citizens, since the time restrictions they impose coincide with the five-year period prescribed by federal law for acquisition of citizenship.[82] The law in all these states except Nebraska could potentially affect all kinds of land investment.

76. ILL. REV. STAT. ch. 6, §§ 1-2 (1975).
77. IND. CODE § 32-1-8-2 (1973).
78. KY. REV. STAT. ANN. §§ 381.300, .330 (1970).
79. NEB. REV. STAT. §§ 76-402, -414 (1971).
80. ILL. REV. STAT. ch. 6 § 2 (1975) (six years); IND. CODE § 32-1-8-2 (1973) (five years); KY. REV. STAT. ANN. §§ 381.300, .330 (1970) (eight years); NEB. REV. STAT. § 76-402 (1971) (five years).
81. In Kentucky a *resident* alien may hold land for a residence, trade, or business for 21 years, KY. REV. STAT. ANN. § 381.320 (1970), and special rules apply for the alien spouse or children of a United States citizen. *Id.* § 381.310.
82. 8 U.S.C. § 1427(a) (1970).

In addition to these 12 states, there is another handful in which a search of the statutes reveals merely nominal restrictions on alien ownership. Four states purport to exclude alien enemies from property ownership,[83] a provision that is undoubtedly preempted by federal legislation.[84] Two others, Arizona[85] and Wyoming,[86] retain remnants of the old "eligibility for citizenship" laws, although these are both practically irrelevant and clearly unconstitutional.[87] Finally, there is the peculiar provision in South Carolina, which limits each alien to a half million acres of land.[88]

B. Restrictions on Corporations

Since the corporate form of operation is now a common form of business enterprise in this country, restrictions on individual investors will not affect a primary form of alien investment. Moreover, since the corporate form is readily available to the alien investor, it would be a simple avoidance device if only individual alien ownership were prohibited. Yet only a few states substantially restrict land acquisition and holding by such corporations. Two states, Iowa[89] and Nebraska,[90] exclude from most land ownership corporations in which aliens hold a majority of stock. In Wisconsin this rule applies if nonresident aliens hold more than 20 percent of the stock.[91] These laws include a

83. Ga. Code Ann. § 79-303 (1973); Md. Ann. Code art. 21, § 14-101 (1973); N.J. Stat. Ann. § 46:3-18 (Supp. 1975) ("alien friends" permitted to hold real estate); Va. Code Ann. § 55-1 (1974).

84. *See* text accompanying notes 200-09 *infra*.

85. Ariz. Rev. Stat. Ann. § 33-1201 (1974).

86. Wyo. Const. art. 1, § 29; Wyo. Stat. Ann. § 34-151 (Supp. 1975) (applies, on its face, only to nonresident ineligible aliens).

87. *See* text accompanying notes 35-43 *supra*.

88. S.C. Code Ann. § 57-103 (1962).

89. Iowa Code §§ 491.67, 567.1, 567.2 (1975). The statute applies both to corporations incorporated outside of the United States and to corporations in which half or more of the stock is owned by nonresident aliens. A new statute requires reporting by alien corporations. Iowa Laws 1975, ch. 133, § 7.

90. Neb. Rev. Stat. §§ 76-402 to -414 (1971). The prohibition applies to a corporation if a majority of its stock is owned by aliens, if a majority of the directors are aliens, or if its executive officers are aliens. *Id.* § 76-406. Moreover, any corporation not incorporated in Nebraska can acquire at most a five-year leasehold interest in Nebraska real estate lying three miles beyond a city's limits. *Id.* §§ 76-402, -414. Furthermore, a new statute requires annual reporting by corporations that have acquired at least a leasehold interest in agricultural land. Neb. Laws 1975, LB 203. One of the express purposes of the act is "to protect against alien ownership of Nebraska agricultural land." *Id.* § 1.

91. Wis. Stat. § 710.02 (1973).

variety of narrow exceptions.[92]

Two other states, Arizona[93] and Minnesota,[94] prohibit corporations organized outside of the United States from holding real estate. The common law of some other states may be interpreted to extend the rules against individual aliens to such corporations.[95] Further, New York conditions the power of any out-of-state corporation to hold land upon reciprocity,[96] but the creation of a New York subsidiary avoids the impact of the statute. And South Carolina limits alien corporations, like alien individuals, to 500,000 acres each,[97] a virtually meaningless limitation. A formal prohibition on corporate ownership by aliens in Pennsylvania[98] has been largely eaten away by provisions of the state's corporation code.[99]

The family farm acts of eight states in the upper Midwest and Great Plains are also relevant here.[100] These laws limit or prohibit investment in agricultural land by corporations owned by numerous shareholders or engaged in substantial nonagricultural activities.[101] Moreover, because they define agricultural land[102] broadly, if at all, these statutes may affect nonagricultural corporate activities also. On the other hand, in only two states, Minnesota and North Dakota, are the acts drafted in a

92. *E.g.*, in Iowa lenders may hold foreclosed land, IOWA CODE § 567.2 (1975); in Nebraska common carriers, manufacturers, filling stations, and bulk stations are exempt in some (but not all) circumstances, NEB. REV. STAT. §§ 76-412, -413 (1971); Wisconsin grants a 640-acre exemption. WIS. STAT. § 710.02 (1973).

93. ARIZ. REV. STAT. ANN. § 10-107(D) (Supp. 1975).

94. MINN. STAT. § 500.22(1) (1974).

95. *See* Society for the Propagation of the Gospel v. New Haven, 21 U.S. (8 Wheat.) 464, 489-91 (1823).

96. N.Y. GEN. CORP. LAW § 221 (McKinney 1943).

97. S.C. CODE ANN. § 57-103 (1952).

98. PA. STAT. ANN. tit. 68, § 21 (1965).

99. *Id.* tit. 15, § 2203(b)(1) (1967) (repealing as to corporations for profit); *id.* § 8103(b) (repealing as to corporations not for profit); *id.* §§ 8102, 8103(g) (repealing as to nonprofit corporations).

100. Iowa Laws 1975, ch. 133; KAN. STAT. ANN. §§ 17-5901, -5902 (1974); MINN. STAT. § 500.24 (Supp. 1975); Mo. Acts 1975, act 114; N.D. CENT. CODE § 10-06-01 (1960); OKLA. STAT. tit. 18, §§ 951-54 (Supp. 1975); S.D. CODE § 47-9A-3 (1974); WIS. STAT. § 182.001 (1973).

101. Most of the statutes grant exemptions to corporations that engage primarily in agriculture and that have a limited number of shareholders, and to closely held "family farm corporations."

102. When applied, this concept is very broad. *E.g.*, MINN. STAT. § 500.24(2) (Supp. 1975) (prohibiting nonexempt corporations from acquiring an interest in "land used for farming or capable of being used for farming"). Statutory exceptions permit industrial development on agricultural land acquired by corporations, subject to limitations. *See, e.g., id.* § 500.24(2)(h).

manner that would severely inhibit the formation of a personal holding corporation to circumvent the statutes applying to alien individuals.[103]

The paucity of realistic state restrictions on corporate ownership probably is attributable to the state of corporate law when the anti-alien restrictions were enacted. Unlike individuals, corporations have only those rights conferred upon them by the laws of the state in which they are operating, unless they are engaged in interstate commerce or otherwise exempt from state jurisdiction.[104] Apparently, the legislators responsible for the current anti-alien restrictions thought that they could limit alien land ownership through the corporate form by simply excluding undesired corporations or by denying corporations generally the power to own lands. However, the states no longer effectively screen the corporations created under their laws or admitted to do business within their boundaries. Moreover, corporate purpose clauses have been expanded to permit virtually all legitimate businesses,[105] and corporate land ownership is frequently expressly authorized.[106]

C. Effect of Individual and Corporate Restrictions

When the restrictions on ownership by alien individuals and corporate ownership are taken together, only five states have substantial restrictions on alien ownership of land. All five are in the upper Midwest-Great Plains region: Iowa, Minnesota, Nebraska, Oklahoma, and Wisconsin. Iowa and Wisconsin limit both aliens and alien-controlled corporations to 640 acres. Minnesota and Oklahoma impose more severe restrictions on individuals, but limit alien corporations principally through the provisions of their family farm legislation, thus also leaving nonagricultural land open to alien corporate investment. Nebraska's is the most complex of these statutes, but it too leaves alien investment within municipal boundaries and in certain other areas unregulated.

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103. North Dakota has a flat prohibition, N.D. Cent. Code § 10-06-01 (1960); Minnesota requires a majority of the shareholders to reside on the farm or actively engage in farming. Minn. Stat. § 500.24(1)(d) (Supp. 1975).

104. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

105. *See, e.g.*, ABA-ALI Model Bus. Corp. Act § 3 (1974) ("any lawful purpose or purposes, except for the purpose of banking or insurance").

106. *See, e.g., id.* § 4(d).

Thus, if the alien investor is free to use either the personal or corporate form, he may invest in most urban and rural land in the United States—whether for industrial, commercial, or residential use. The only substantial obstacles he faces are the laws of five states regarding farmland, or large tracts of any land.

If the alien investor is constrained to use the corporate form for taking title, he may still invest in urban land anywhere in the United States, but, because of the operation of the family farm acts, the list of states in which he cannot buy agricultural land expands to eight states with the addition of Missouri, North Dakota, and South Dakota.

If, for tax or other reasons,[107] the alien investor is constrained to use a non-American corporate form for taking title, the list of potential danger areas expands still further and begins, in Arizona, Minnesota, and, potentially, New York, to affect urban, as well as agricultural, real estate.

D. Restrictions on Inheritance

More than a dozen states have restrictions on inheritance of real estate by aliens. While these restrictions do not directly affect alien investment, they do restrict one means of alien acquisition of land. Moreover, they may discourage potential investors, alien or not, who would wish to be able to devise their holdings to aliens. Most of the restrictions fall into two categories: those that depend on a finding that the alien's nation will deprive him of his inheritance, and those that depend on a finding that the alien's nation would not permit a United States citizen to inherit property from one of its citizens.

Five states, Connecticut,[108] Massachusetts,[109] New Jersey,[110] New York,[111] and Wisconsin,[112] condition the probate court's order of distribution to a nonresident alien beneficiary on a demonstration that he will receive the true benefit of the inheritance. Some of these statutes impose the burden of proof on the heir. In New York, for instance, if the heir fails to carry the burden, the assets of the estate are either put into escrow, paid into some public fund for the possible eventual benefit of

107. *See* Forry, *Planning Investments from Abroad in United States Real Estate*, 9 Int'l Lawyer 239 (1975).
108. Conn. Gen. Stat. Ann. § 45-278 (Supp. 1976).
109. Mass. Ann. Laws ch. 206, § 27B (1969).
110. N.J. Stat. Ann. § 3A:25-10 (1953).
111. N.Y. Surr. Ct. Pro. Law. § 2218(3) (McKinney Supp. 1975).
112. Wis. Stat. § 863.37 (1973).

the heir, or, in certain circumstances, converted into the "necessities of life" and sent to the heir abroad.[113] Some of the statutes, New Jersey's, for instance, are silent on the question of proof. The New Jersey courts limit themselves to a routine reading of the foreign statutes in such cases.[114] They do so apparently to avoid unconstitutionality under *Zschernig v. Miller*,[115] the 1968 Supreme Court decision limiting the permissible scope of state judicial inquiries into the treatment of inheritances by foreign states.

These statutes are relics of the more frigid periods of the Cold War, when certain Eastern European countries virtually confiscated inheritances by means of taxes and other levies. Their concentration in the Eastern seaboard resulted from the high incidence of first-generation Eastern European immigrants resident there. Their constitutional validity in light of the *Zschernig* decision is discussed below.

The second major group of statutory restrictions on inheritance by aliens operates only if Americans are denied the right to inherit real estate in the alien's home country. These statutes have roots both in the ancient real property law, which denied inheritance rights to aliens unless specially granted by treaty or legislation, and in the treaty practice of the United States, which has sought to ensure inheritance rights on a reciprocal basis. They are found in Iowa,[116] Nebraska,[117] Wyoming,[118] and North Carolina.[119] A few other states impose minor restrictions of various types.[120]

In contrast to these restrictions on inheritance by aliens, some statutes allow an alien heir a substantial period of time in which to dispose of property that would otherwise be held in violation of general restrictions on alien ownership.[121]

113. N.Y. SURR. CT. PRO. LAW. § 2218(3) (McKinney Supp. 1975).
114. *In re* Kish's Estate, 52 N.J. 454, 246 A.2d 1 (1968).
115. 389 U.S. 429 (1968).
116. IOWA CODE § 567.8 (1975).
117. NEB. REV. STAT. § 4-107 (1974). In Nebraska general anti-alien laws also apply, so a resident alien unprotected by treaty rights may have his real estate inheritance escheated by the state if he does not dispose of it within five years. *See id.* § 76-405 (1971).
118. WYO. STAT. ANN. § 2-43.1 (Supp. 1975).
119. N.C. GEN. STAT. § 64-3 (1975). Two states have recently repealed similar laws. Cal. Stats. 1974, ch. 425, § 1 (repealing Cal. Stats., ch. 1042, § 1); Mont. Laws 1974, ch. 365, § 2 (repealing Mont. Laws 1951, ch. 31, § 1).
120. *E.g.*, KAN. STAT. ANN. § 59-511 (19) ("eligibility for citizenship" test).
121. KY. REV. STAT. ANN. § 381.330 (1970) (eight years); NEB. REV.

III. CONSTITUTIONAL AND TREATY LIMITATIONS

A variety of constitutional doctrines and international obligations imposed on the United States by both bilateral and multilateral treaties stand as potential challenges to many of the above-discussed statutes and to other types of restrictions that might be imposed on alien land ownership by the federal and state governments. In many instances particular treaty provisions will protect particular aliens and thus render constitutional consideration unnecessary. This section considers the various types of actual and possible legislation in light of the applicable constitutional and treaty provisions.

A. Equal Protection

Equal protection must stand at the outset of this discussion, because it binds both federal and state governments[122] and because of its significance in the recent development of protections for individual liberties.[123] The equal protection clause clearly protects aliens[124] as well as citizens. Its application to aliens, however, has been directed toward resident aliens, not nonresident investors. For instance, equal protection concerns mingled with due process considerations in the cases that finally struck down the anti-Oriental laws in the late 1940's and early 1950's.[125]

Current equal protection doctrine establishes two levels of constitutional protection. If a law employs "suspect" classifications or affects fundamental rights, the "higher test" applies and the state or federal government must show a compelling public interest to validate the law.[126] All other classifications

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Stat. § 76-405 (1971) (five years for resident aliens); Okla. Stat. tit. 60, § 123 (1971) (five years).

122. *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

123. *See generally* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

124. Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

125. *See* Oyama v. California, 332 U.S. 633 (1948); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955); Kenji Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).

126. Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); Loving v. Virginia, 388 U.S. 1, 10 (1967); McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964).

are judged by a "lower test," which merely requires a rational relationship between the classification and its intended purpose.[127] Since the higher test is very difficult to satisfy, and the lower test is very easy to satisfy, the critical question is which test is applicable.

The Supreme Court has recently included classifications based on alienage in its list of suspect categories.[128] It argued that aliens are one of those "discrete and insular" minorities whose rights merit special protection[129]—a proposition hard to deny, given the formal political impotency of aliens. If alienage is truly a suspect classification, virtually all of the state anti-alien laws would fall, since the heavy burden of persuasion placed on the states could hardly be met by the governmental interests underlying most restrictions on alien land ownership. An examination of the cases treating alienage as a suspect basis of classification illustrates, however, that the judicial language has swept wider than the decisions themselves.

Graham v. Richardson[130] is the first of these recent cases. There Arizona and Pennsylvania had denied welfare benefits to resident aliens on the ground that they were not citizens. In striking down the statute, Justice Blackmun stated for the Supreme Court: "[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[131] Thus he propelled the level of scrutiny from the lower test, which had prevailed in many of the older decisions,[132] to the higher one. Despite the broad language of this dictum, it is difficult to conceive of its application to nonresident aliens. Indeed, Justice Blackmun's description of the facts of the case repeatedly emphasized the permanency of the

127. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-27 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Lindsley v. National Carbolic Gas Co., 220 U.S. 61, 78 (1911).

128. *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

129. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing United States v. Caroline Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)).

130. 403 U.S. 365 (1971).

131. *Id.* at 371-72.

132. *See* Ohio *ex rel.* Clarke v. Deckenbach, 274 U.S. 392 (1927) (pool room license); Frick v. Webb, 263 U.S. 326 (1923) (land laws); Webb v. O'Brien, 263 U.S. 313 (1923) (land laws); Porterfield v. Webb, 263 N.S. 225 (1923) (land laws); Terrace v. Thompson, 263 U.S. 197 (1923) (land laws); Patstone v. Pennsylvania, 232 U.S. 138 (1914) (game licenses).

plaintiffs' residence and their substantial relations to the United States.[133]

Sugarman v. Dougall[134] is a similar case. A New York statute excluded all aliens from most civil service positions. The plaintiffs were resident aliens who had been employed by a nonprofit corporation operating under the auspices of the Office of Economic Opportunity (OEO). When OEO functions diminished in the late 1960's, the New York welfare department took over operation of the corporation. It discharged the employees on the basis of the state law. The state first attempted to defend the statute on the ground that it ensured loyalty to the state from employees responsible for the formulation and execution of government policy. Pointing out that the statutory prohibition did not apply to all policy-making positions, and did apply to many positions that did not involve policymaking, the Court concluded that the state's justification did not withstand close judicial scrutiny under the equal protection clause. The state also argued, on the basis of two earlier Supreme Court cases,[135] that its law could be justified on the broad ground that a state may confine public employment to its citizens simply in order to limit distribution of the state's resources to its members. The Court rejected this proposition, noting that the "special public interest" doctrine on which it was based had been grounded on a distinction between rights and privileges that the Court had rejected in more recent decisions.[136] This rejection of the right-privilege distinction is significant in the present context because many of the laws restricting alien land ownership are based on the state's traditional interest in defining the rights and privileges to real property within its jurisdiction.[137]

Finally, in *In re Griffiths*,[138] a companion case to *Sugarman v. Dougall*, the Court held that a Connecticut law excluding aliens from membership in the state bar denied equal protection. Again it treated alienage as a suspect classification, but again plaintiff was a resident. Indeed, she had completed her legal education in the United States.

133. 403 U.S. at 367-76.
134. 413 U.S. 634 (1973).
135. Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915).
136. Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).
137. *See* text accompanying notes 60-61 *supra*.
138. 413 U.S. 717 (1973).

Some courts have sought to justify a distinction between resident and nonresident aliens in the language of the fourteenth amendment, which guarantees equal protection only to persons "within [the] jurisdiction"[139] of the particular state. They argue that a nonresident, not being present within the state, is not subject to its jurisdiction and therefore cannot claim constitutional protection.[140] Such logic should fail even in formal terms, because the alien is in fact being subjected to the jurisdiction by implementation of the prohibition. Moreover, a nonresident alien admitted to the United States on a tourist visa might personally appear in the adjudicating tribunal and thus subject himself to the state's jurisdiction in every sense of the word.

The justification must be sought in more fundamental terms. The rights protected by the higher test in equal protection doctrine have been basic human rights: either protection from racial and religious discrimination, as in the case of the suspect classifications,[141] or protection of first amendment rights, as in the fundamental freedoms cases.[142] Although these rights may have proprietary elements, they are not primarily rights of an economic nature. Indeed, the lower-level test is sometimes imprecisely characterized as a test for economic and social legislation.[143] The statutes that have been struck down as unconstitutionally discriminating on the basis of alienage adversely affected the ability to survive—through welfare benefits, employment by the state, and eligibility for a profession—of persons permanently residing in the United States and for most purposes indistinguishable from American citizens. Inasmuch as land ownership seems equally basic to such persons, as applied to them, state statutes restricting ownership of land are almost certainly also unconstitutional. Many states have recognized this by providing full or partial exemptions from their laws for resident aliens.[144]

But what about the alien investor who is not a resident and is making an investment purely for economic motives? It is

139. U.S. CONST. amend. XIV, § 1.
140. *E.g.*, Shames v. Nebraska, 323 F. Supp. 1321, 1333 (D. Neb. 1971).
141. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
142. *E.g.*, Dunn v. Blumstein, 405 U.S. 331 (1972).
143. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 484-86 (1970).
144. CONN. GEN. STAT. ANN. § 47-57 (1960); IOWA CONST. art. 1, § 22, IOWA CODE § 567.1 (1975); KY. REV. STAT. ANN. § 381.320 (1971); MISS. CODE ANN. § 89-1-23 (1972); N.H. REV. STAT. ANN. § 477.20 (1968); OKLA. CONST. art. XXII, § 1, OKLA. STAT. tit. 60, § 122 (1971); WIS. CONST. art. I, § 15; WYO. CONST. art. I, § 29.

difficult to classify his claims in the same category with a welfare claimant's bid for medical assistance or a permanent resident's effort to enter a gainful profession. It is, indeed, difficult to categorize his claim as one of fundamental concern. Although he is clearly a member of a minority group, he is not part of an "isolated minority" meriting special judicial protection, for he, unlike the permanent resident alien who has abandoned his homeland, can expect the diplomatic support of his national government. Thus, despite the broad language in some of the cases, his claim may be reduced to one judged by the "lower" constitutional standard. Under this standard, legislation restricting his ownership of land is likely to be upheld against equal protection. There is clearly a rational relationship between the legislative classification, excluding aliens, and its ostensible immediate purpose, exclusion of alien influence from the state. Whether this purpose is one that the states may legitimately pursue is a question of substantive due process and of the exclusivity of the federal foreign relations and commerce powers, topics that are discussed below.

Equal protection doctrine also applies, at least in an attenuated form, against the federal government.[145] Thus federal courts have held unconstitutional discriminations against aliens in federal civil service regulations[146] and in disaster loan programs.[147] However, the major federal regulations restricting property ownership by aliens are much more readily defended against equal protection attack than are state laws, whether applied to residents or to nonresidents. Based on the defense power, the Alien Property Custodian Regulations and the Foreign Assets Control Regulations are selective in their operation. Unlike state laws that employ wholesale proscriptions of most or all aliens on the ground that some might present a danger to local economy or security, the regulations single out citizens of certain nations for restrictive treatment. They do so both to protect the interests of the United States from hostile activities within its borders and to protect the interests of the individual aliens from potentially more severe state actions.[148] Transac-

145. *See* cases cited in note 122 *supra*.

146. Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir.), *cert. granted*, 417 U.S. 944 (1974); Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974) (appeal pending).

147. Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974) (appeal pending).

148. The latter purpose was not entirely altruistic; in part its moti-

tions with aliens of listed nationalities are prohibited by the general rule[149] but may be exempted by license.[150] While the details of this system are not, at least in peacetime, wholly free from constitutional doubt under the due process clause, they exhibit a close relation between discrimination and statutory purpose, thus avoiding the over-inclusiveness that characterizes state laws restricting alien land ownership and renders their validity under the equal protection clause dubious.[151]

What, then, is the impact of the equal protection doctrine on existing and potential legislation? The outlines are clear. It forbids wholesale discrimination against resident aliens by the state and federal governments. This pertains equally to the general prohibitions and restrictions on alien ownership and to legislation dealing with alien inheritances. Thus, the doctrine is hardly significant for existing state laws, since many of these already exempt residents.

The equal protection clause would not appear to be an obstacle to legislation restricting the rights of the nonresident foreign investor or of the foreign investment company, whether chartered here or abroad. A nonresident alien may be unable to rely upon the higher test if his proprietary interest is not coupled with some other more fundamental personal right, and he will have little chance of convincing a court that the restrictions imposed on him are not rationally related to the purpose of excluding foreign influence.

B. Sustantive Due Process

Although substantive due process arguments are today generally regarded as the last resort of a doomed cause, they may

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vation appears to have been the preservation of a corpus of German assets for reparations payments or for negotiation purposes.

149. Alien Property Custodian Regulations, 8 C.F.R. § 505.1 (1976); Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1975).

150. 8 C.F.R. § 505.1 (1976); 31 C.F.R. § 500.203(c) (1975). Such licenses may either be general, *id.* § 500.801(a); *e.g.*, *id.* § 500.507(a) (all resident citizens of the United States who are nationals of designated foreign countries solely because formerly domiciled there licensed as unblocked nationals); *see* 8 C.F.R. § 501.50 (1976); or specific. 31 C.F.R. § 500.801(b) (1975); *see* 8 C.F.R. § 501.50 (1976).

151. The regulations operate by presumptions against all aliens of a given nationality; the exempting licenses are then a matter of administrative discretion, thus providing the alien with no legal protection. While this submission to administrative discretion may be of dubious value in times of international tension, it is, for the alien, far preferable to flat state rules.

have a clarifying effect in the present area. Substantive due process was one of the doctrines state courts relied on in invalidating anti-Oriental legislation.[152] To satisfy current substantive due process requirements, the state need show only a rational relationship between the purpose of the law and a legitimate state interest.[153] The close connection between equal protection and due process is apparent. Equal protection addresses the legitimacy of the classification; substantive due process addresses the legitimacy of the purpose of the law; in combination, they address the legitimacy of the purpose of the classification.

There can be no question that the state statutes at issue here bear a rational relationship to an articulated state interest; the only question is the legitimacy of that interest. The traditional affirmative answer has been drawn from the definitional powers of the states in real estate law.[154] Under this view, the purpose may be no more than the need for some system of state law. Such a reliance on definitional powers can hardly be considered a satisfactory modern justification for the unequal exercise of these powers. A state cannot justify a discrimination against women, for example, merely on the basis that it needs some provisions in its probate code to determine priority in appointment of administrators.[155] A discrimination against aliens must likewise have some more substantial basis than the mere need for some rule in the particular situation. Nor does a purely historical justification—that aliens have always been the subject of such discrimination—suffice.

If such traditional answers to the "purpose" questions are rejected, one reaches the true purpose of the legislation: to exclude or restrict alien influence in the local economy. One thus immediately confronts the federal powers over foreign relations and foreign commerce, and must determine their impact upon the local legislation. Thus, although modern due process doctrine provides no real limitation on state legislation, it serves to compel a clear articulation of the purposes of the laws and thus to make possible a proper constitutional examination of them under other applicable tests.

152. *E.g.*, Kenji Namba v. McCourt, 185 Ore. 579, 609-10, 204 P.2d 569, 581-82 (1949) (argument mixed with equal protection and supremacy clause objections).

153. North Dakota State Bd. of Pharmacy v. Snyder's Drugs, 414 U.S. 156, 164-67 (1973); Nebbia v. New York, 291 U.S. 502 (1934); *see* Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963).

154. Hauenstein v. Lynham, 100 U.S. 483, 484 (1880).

155. Reed v. Reed, 404 U.S. 71 (1971).

C. FOREIGN RELATIONS

Arguments based on the federal foreign relations power have been directed primarily at the inheritance restriction statutes emanating from the Cold War. They may have a broader impact, however.

No state may conduct an independent foreign policy. For the purposes of foreign affairs the United States is, in the eyes of the Constitution, a single nation, without separate states.[156] Thus, a state may not enter into independent negotiations or agreements with other nations about property, probate, or any other matters.[157] All such international affairs must be carried on by the federal government.

Is state regulation of the rights of aliens to hold real estate such an impermissible exercise of power? This depends, in part, on the perspective from which one looks at the state laws. Viewed as definitions of property rights, they are statutes of purely local concern, focusing on the land and the peculiar legal relationships surrounding it.[158] Viewed as measures affecting aliens, they become of international concern because they focus not on the land but on relationships beyond national boundaries.

The Supreme Court has spoken twice on this question in the past 30 years. In *Clark v. Allen*,[159] a decedent who died in 1942 left her property by will to German nationals, cutting off her heirs-at-law, who were California residents. The parties in interest to the litigation were the wartime Alien Property Custodian, who succeeded to the rights of the German nationals under the Trading with the Enemy Act, and the California heirs-at-law, who claimed that the inheritance of the Germans was barred by a California statute that required a showing of reciprocal inheritance rights in the foreign country. The Court, speaking through Justice Douglas, held that part of the property was subject to disposition under the terms of a treaty between the United States and Germany.[160] The Court dealt with the prop-

156. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

157. *See* U.S. CONST. art. 1, § 10.

158. They have long been justified on this basis. *See* Terrace v. Thompson, 263 U.S. 197, 217-18 (1923); Blythe v. Hinckley, 180 U.S. 333, 341-42 (1901).

159. 331 U.S. 503 (1947).

160. The real estate was subject to disposition under the treaty in *Clark*, while the personal property was not. It is the Court's treatment of the distribution of the personal property that is of interest here, because that portion of the opinion deals with the relative priority of state

erty not subject to the treaty provisions in a summary manner,[161] holding that it was not an interference with the foreign relations power of the federal government for a state to condition inheritance rights on reciprocity. Noting that it had once ruled that it was not an interference with the foreign relations power for a state to grant aliens property rights that they had not previously enjoyed,[162] the Court implicitly reasoned that the states could likewise condition or take away these rights.[163] The Court recognized that such state laws might have an incidental or indirect effect in foreign countries, but concluded that this alone did not cause them to "cross the forbidden line" into the exclusive domain of the federal government.[164]

In *Zschernig v. Miller*,[165] nearly 20 years later, the Court, again speaking through Justice Douglas, substantially modified this position. Looking to the fact that in applying an Oregon statute the courts of that state had cast aspersions upon the veracity of diplomatic certificates and generally engaged in searching political inquiries, the Court invalidated the statute as applied.

Justice Douglas stated that the forbidden inquiries infected all elements of Oregon's law, which included both reciprocity provisions[166] and a provision seeking to ensure the beneficiaries the true benefit of the inheritance,[167] although only the latter was technically in issue. Pointing to a number of cases in which Oregon courts had acted in an undiplomatic, if not injudicious, manner,[168] he concluded:

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent

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and federal law in this field when no treaty applies, regardless of whether the property is real or personal.

161. 331 U.S. at 516-17.
162. Blythe v. Hinckley, 180 U.S. 333 (1901).
163. 331 U.S. at 517.
164. *Id.*
165. 389 U.S. 429 (1968).
166. There were two provisions with respect to reciprocity in the Oregon law. One conditioned inheritance rights on reciprocity of rights for American heirs abroad; the other conditioned inheritance on the right of Americans who inherited abroad to repatriate the proceeds without restriction. ORE. REV. STAT. §§ 111.070(1)(a), (b) (1957), *repealed*, Ore. Laws 1969, ch. 5991 § 305, *quoted in* Zschernig v. Miller, 389 U.S. 429, 430 n.1 (1968).
167. ORE. REV. STAT. § 111.070(1)(c) (1957), *repealed*, Ore. Laws 1969, ch. 591 § 305, *quoted in* Zschernig v. Miller, 389 U.S. 429, 430 n.1 (1968).
168. 389 U.S. at 435-37. *See also id.* at 437-39 n.8.

> and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.[169]

Although two Justices would have overruled or limited *Clark v. Allen*,[170] the majority stopped short of this measure. Thus the *Zschernig* case arguably can be limited to its facts.

The state and lower federal courts have seized upon this limited interpretation of *Zschernig* as a ground for upholding statutes similar to Oregon's. Although in two cases they have invalidated reciprocity statutes on grounds similar to those advanced by Justice Douglas,[171] in a number of other cases they have either expressly upheld state statutes by comparing the probing factual inquiries undertaken by the Oregon courts and described in the footnotes of the *Zschernig* opinion with the restrained reading and application of foreign law involved in the cases before them,[172] or avoided a constitutional ruling because of the procedural posture of the case.[173] Nonetheless, *Zschernig* has had an effect within the scope of its facts. The propriety of reciprocity clauses and reality of provisions designed to ensure enjoyment of inheritances by named beneficiaries are now judged by more rigorous standards. The courts that have upheld such laws, however, have generally imposed on state judges in probate cases a requirement that the examination of foreign law go no farther than a reading of the statutes.

What, then, is the modern practical impact of the doctrine of the exclusivity of federal power over foreign relations? Does it require anything more than judicial restraint in conducting inquiries into alien law? Perhaps so.

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169. *Id.* at 440 (citing Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962); Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents*, 25 S. CAL. L. REV. 297 (1952)).

170. 389 U.S. at 441, 443 (Stewart & Brennan, JJ., concurring).

171. Mora v. Matton, 303 F. Supp. 660 (N.D. Ohio 1969); *In re* Kraemer, 267 Cal. 2d 198, 81 Cal. Rptr. 287 (1969).

172. Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972); Bjarsch v. DiFalco, 314 F. Supp. 127 (S.D.N.Y. 1970); Goldstein v. Cox, 299 F. Supp. 1389 (S.D.N.Y. 1968), *appeal dismissed*, 396 U.S. 471 (1970); *In re* Kish's Estate, 52 N.J. 454, 246 A.2d 1 (1968); *in re* Estate of Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S. 2d 681 (1968); *In re* Johnston, 190 S.E.2d 879 (N.C. Ct. App. 1972).

173. Gordun v. Fall, 287 F. Supp. 725 (D. Mont. 1968).

First of all, the doctrine undoubtedly invalidates the most blatant examples of national favoritism present in the statutes. Mississippi's preference for Syrians and Lebanese, for instance,[174] smacks too much of independent foreign policy, albeit one dictated by reasons long obsolete, to withstand constitutional challenge. Connecticut's preference for French citizens,[175] on the other hand, may be redeemed by its historical background; the federal government requested its enactment.[176] These, however, are trivial examples.

Of the more common types of prohibition none seems to involve the active interference with foreign relations that the court criticized in *Zschernig*. They either call for simple exercise of mechanical rules or for merely a formal inquiry into whether foreign law operates reciprocally. Even the type most susceptible to challenge, the Cold War inheritance laws, seems to have survived *Zschernig* if properly applied.

The foreign relations power may, however, still have an impact, not in the invalidation of existing law but as a restraint on potential state legislation. Interest in anti-alien legislation has been rekindled by an altered international economic situation. So long as foreign investment was perceived as an economic oddity, old laws might have continued in force, but few legislatures were prepared to waste time on new legislation.

The revival of interest is primarily attributable to the likelihood of substantial Japanese and Arabian investment here. American economic relationships with Japan and the Arab countries, as with other countries, are a complex whole capable of meaningful regulation only at the federal level. The whole has at least two dimensions. In the first place, it cannot be geographically fragmented; a local prohibition in one region will frustrate any effort to negotiate a general solution that might be more satisfactory nationally. In the second place, it cannot be

174. MISS. CODE ANN. § 89-1-23 (1972). There is an interesting remedial problem in this connection. If the "special status" is void, other aliens would probably have no standing to sue; the only potential plaintiffs with an interest in challenging the law would be the next class of resident heirs, excluding nonresident aliens. In the common situation there are none, so the resident claimant is the state, but it may be precluded from arguing the substantive invalidity of its own laws.

175. CONN. GEN. STAT. ANN. § 47-57 (1960).

176. *See* Sullivan, *supra* note 6, at 19 n.24. The United States undertook an obligation to recommend such laws to the states by a treaty with France in 1853. Even in this regard, the present validity of such laws is questionable; the underlying treaty has long been superseded by other international obligations.

fragmented by type of investment. Investment in land is obviously not the only type that presents the dangers associated with foreign investment. Indeed, land investment may be the least dangerous form today. Investment in business enterprises or mere deposits in banks may present more risks of undue foreign influence than investment in a fixed and observable asset like land.

Under these circumstances, insofar as state legislatures take assumed dangers into account in passing legislation, are they not treading in the prohibited field of foreign policy? Insofar as they do not, are they not interfering with the proper exercise of the foreign policy power by enacting legislation that may have an ill-considered effect on the foreign relations of the United States? They can be rescued from this dilemma by leaving the subject-matter where it more properly lies—with the federal government. Since state legislatures are fundamentally not well informed on international trade, on monetary and economic matters, or on the implications of their decisions for American policy, they should not act in this field.

To borrow a test from another field of constitutional law, is it not enough to invalidate a law that its "purpose or primary effect"[177] is to exclude one or a few foreign groups from participation in the local economy so that it impairs our relations with those nations? By this test virtually any new restrictive state legislation would fall.

D. Foreign Commerce

The federal powers over interstate and foreign commerce must also be considered in this context. Although the static character of real estate traditionally exempted its regulation by the states from commerce clause limitations,[178] modern economic conditions may bring this view into question. Congress has enacted federal regulatory legislation for some land transactions,[179] and the courts have extended the securities laws to others.[180] Such legislation is thus far limited to special aspects

177. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (first amendment establishment clause).

178. *See* note 158 *supra* and accompanying text. States could not discriminate against citizens of other states, because of the privileges and immunities clause. U.S. Const. art. IV, § 2.

179. Housing and Urban Development Act, 15 U.S.C. §§ 1701-20 (1970); 24 C.F.R. § 1700 *et seq.* (1975).

180. SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. C.M. Joiner

of such transactions and clearly does not preempt the field. Nevertheless, it illustrates the point that land investment can no longer be considered a purely local phenomenon subject to the exclusive control of the state in which the land is located.

The federal commerce power extends over foreign, as well as interstate, commerce.[181] Indeed, in some respects, foreign commerce appears to receive greater protection from state regulation than does interstate commerce.[182] Does a state, by discriminating against foreign purchasers of land, discriminate against foreign commerce? Is this not precisely the kind of interference with foreign commerce that the commerce clause was designed to avoid: the division of the economy along state lines? Two separate responses may be offered to justify state laws in the face of these challenges.

The first response excludes land ownership from the scope of "commerce." It finds in regulation of land ownership not a regulation of commerce, but a definitional exercise of state power over an inherently local matter.[183] It was on this theory that nineteenth-century litigation focused on the subordinate question of whether the federal government could even displace these state laws through affirmative use of the treaty power,[184] rather than on the more fundamental question whether the laws regulated commerce. Yet, whether one uses Chief Justice Marshall's classic "intercourse"[185] test or the more modern justifications for federal legislation,[186] it is clear that at least some aspects of interstate land acquisition are "in commerce" in the constitutional sense. In the case of alien purchasers, the purchase money comes from out of state, the profits flow out of state, and the entrepreneur deals from outside of the state.

Are states that seek to insulate their land from alien purchase on firmer bases constitutionally than those that sought to

Leasing Corp., 320 U.S. 344 (1943). *See also* SEC, Securities Act of 1933 Release No. 5347 (1973).

181. U.S. CONST. art. 1, § 8, cl. 3.

182. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

183. *See* note 154 *supra* and accompanying text.

184. *See* Hauenstein v. Lynham, 100 U.S. 483 (1880); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812).

185. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824): "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches . . . ."

186. For example, the interstate (or postal) movement of offers, sales documents, and consideration.

forbid out-of-staters to buy milk,[187] grain,[188] or natural gas?[189] The nineteenth-century justification of these measures as part of the inherent or definitional powers of the states cannot claim support from modern economic reality. If this justification is set aside, what redeeming features, if any, would render the state statutes restricting alien land acquisition valid despite their impact on commerce outside the state?[190] Their purpose and effect is not within the generally redeeming "police power" fields of safety, health, or general social welfare.[191] Rather, they are economic measures aimed at controlling the structure of the local economy by excluding certain competitors.

Although these laws thus appear vulnerable to attack under the commerce clause, two considerations, one formal and one practical, may be offered to save them from invalidity. First, the federal government has negotiated and ratified a number of treaties in recent years that presume the validity of state legislation excluding alien ownership of real estate and provide for the orderly disposition of alien inheritances.[192] By so doing, the federal government seems to have tacitly approved state restrictions in these areas. This approval should be sufficient to immunize those restrictions from challenges that they interfere with the proper exercise of a federal power.[193]

The more practical limitation is that in fields in which state regulation is traditional the courts have been reluctant to invalidate state legislation solely on the basis of the negative implications of the commerce clause.[194] Thus, even where the subject of state regulation may be well within the scope of interstate commerce, federal legislation would be necessary to displace state law.

187. H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949).

188. Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922).

189. Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

190. The argument that such effects are "pre" or "post" interstate commerce is here put aside. Other than as a convenient rule of thumb, such notions are no longer part of effective constitutional law. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 140-42 (1970).

191. *E.g., id.* at 143; Breard v. Alexandria, 341 U.S. 622, 640 (1951).

192. *See* treaties cited in note 226 *infra*.

193. *Cf. In re* Rahrer, 140 U.S. 545 (1891) (inapplicability of commerce clause in light of federal statute).

194. The classic exception is United States v. South Eastern Underwriters, 322 U.S. 533 (1944), but Congress quickly acted to restore state jurisdiction in the McCarran Act, 15 U.S.C. §§ 1011-15 (1970).

E. PREEMPTION AND SUPREMACY

Affirmative federal legislation has an impact on two aspects of the present subject. One concerns resident aliens, the other is more general.

Congress has the power under the commerce clause[195] to control immigration and the admission of aliens to the United States. The states may not impose their own "immigration controls" to exclude aliens whom the federal government chooses to admit.[196] Such aliens are entitled to legal privileges equal in most respects with those of citizens.[197] If the states can exclude them from certain economic activities by either direct or indirect legislation, such as land laws, the states can in effect defeat the privilege of free admission that the federal government has granted them. Thus the federal immigration laws can be coupled with the supremacy clause[198] to provide protection for the rights of resident aliens.[199]

Affirmative federal legislation has long displaced state law in another important field—trading with enemy and hostile aliens. Two sets of federal regulations, both stemming from the Trading with the Enemy Act,[200] affect the property rights of such aliens and displace contrary state legislation. These are the Alien Property Custodian Regulations[201] and the Foreign Assets Control Regulations.[202]

The Alien Property Custodian Regulations take effect in time of declared war. They had significant impact during the Second World War. They permit the Alien Property Custodian to vest in himself the rights and titles of enemy aliens to property within the United States.[203] Such an act supersedes any contrary disposition under state law because of the supremacy clause. With the recent trend away from formally declared

195. U.S. CONST. art. I, § 8, cl. 3.
196. Henderson v. Mayor of City of New York, 92 U.S. 259 (1876).
197. Thus, *e.g.*, they enjoy the right to private employment, Truax v. Raich, 239 U.S. 33 (1915); to welfare benefits, Graham v. Richardson, 403 U.S. 365 (1971); to public employment, Sugarman v. Dougall, 413 U.S. 634 (1973); to admission to the bar, *In re* Griffiths, 413 U.S. 717 (1973).
198. U.S. CONST. art. VI, para. 2.
199. *See* Graham v. Richardson, 403 U.S. 365, 376-80 (1971).
200. 50 U.S.C. APP. § 1 *et seq.* (1970).
201. 8 C.F.R. pts. 501-10 (1976).
202. 31 C.F.R. pt. 500 (1975). *See also* Cuban Assets Control Regulations, *id.* pt. 515; Rhodesian Sanctions Regulations, *id.* pt. 530.
203. *See* 8 C.F.R. § 504.1 (1976). *See also* 50 U.S.C. APP. § 6 (1970).

wars, both these regulations and similar state laws[204] are probably without significance.

The Foreign Assets Control Regulations adopt a different tack. They "freeze" or "block" the assets of citizens or entities of listed countries. The list can be easily varied by publication of an amended regulation.[205] The effect of the "freezing" or "blocking" is to prohibit transactions with respect to the property.[206] In the case of real estate, the nominal owner cannot sell it. The ability to conduct any business on it or take profits derived from it will also be limited, since the proceeds of transactions may themselves be blocked assets.

Because of their flexibility and broader scope, the latter set of regulations has had more practical significance in recent years. As situations of extreme hostility develop, nations can be added to the proscribed list without a formal declaration of war.[207] Yet licenses for specific transactions can be issued regardless of citizenship.[208] For example, although the regulation formally applies to all Vietnamese citizens, refugees may nevertheless be exempted from its operation by general or specific license. State laws operating purely on the basis of citizenship lack similar malleability. Moreover, various credit and contractual rights of the proscribed nations, as well as formal property rights, can be attached.[209]

Do these two sets of regulations and their parent act set forth a sufficiently complete body of legislation to preempt state legislation in the field? Strangely, this question seems not to have been explored in any of the recent litigation.

The standards for judging federal preemption of a legislative field are set forth in a line of Supreme Court cases. The most significant of these, *Hines v. Davidowitz*,[210] dealt with state efforts to control alien activity, in that case through a registration requirement. *Hines* sets forth a three-pronged test: "The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the

204. *See* note 83 *supra* and accompanying text.
205. It presently includes Cambodia, North Korea, North Viet Nam, South Viet Nam, and the People's Republic of China. 31 C.F.R. § 500.201 (1975); 40 Fed. Reg. 19,202 (May 2, 1975).
206. 31 C.F.R. §§ 500.201-.204 (1975).
207. *See, e.g.*, 40 Fed. Reg. 19,202 (May 2, 1975) (addition of South Viet Nam and Cambodia by regulation).
208. *See* note 150 *supra*.
209. *See* 31 C.F.R. § 500.201(a)(1) (1975).
210. 312 U.S. 52 (1941).

law, are all important in considering . . . whether supreme federal enactments preclude enforcement of state laws on the same subject."[211] Although somewhat modified over time, the three elements of this test remain touchstones for judging preemption. Chief Justice Warren echoed them, albeit in a different order, in *Pennsylvania v. Nelson*:[212] (1) Is the scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it? (2) Do the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject? (3) Does enforcement of the state statute present a serious danger of confict with the administration of the federal program?

Whichever version of the tests is used here, the federal law in this area would not appear to preempt most state legislation, notwithstanding the fact that the regulations deal with questions of foreign affairs and defense, areas in which the presumption of preemption is much stronger than in other fields.[213] First, although the statutory foundation for the regulations dates back to the First World War, when state regulation of alien real estate ownership was more prevalent than today, Congress has not expressed nor the courts inferred any intention to displace state legislation. Indeed, congressional ratification in the intervening period of a number of treaties that assumed the existence of valid state laws restricting alien property ownership is strong evidence of the absence of such an intention.[214]

Second, the legislation is not so pervasive as to indicate the wholesale invalidity of state laws. The regulations deal with a very limited subject—enemy alien property in time of declared war or extreme hostility. As such they supersede state statutes dealing with enemy aliens.[215] But their silence with regard to the vast range of other potential alien owners cannot lead to the

211. *Id.* at 70.
212. 350 U.S. 497, 502-10 (1956).
213. Hines v. Davidowitz, 312 U.S. 52, 63 (1941).
214. *See* treaties cited in note 226 *infra*.
215. The Alien Property Custodian Regulations permit the responsible federal official to vest property in himself, while state laws appear to operate automatically. Thus state interests could attach to the real property of enemy aliens before the federal government could act. Surprisingly, in World War II the federal law seems to have been applied, rather than state laws. In any event, a state would have to initiate some kind of proceeding to escheat property or otherwise divest the previous owner, giving the federal officer an opportunity to make a vesting order.

conclusion that Congress intended to grant those others an untrammeled right to acquire real estate.

Third, there seems to be little problem in meshing federal and state enforcement. The federal regulations provide for vesting title to alien-held assets in a federal official and for prohibiting unlicensed transactions. State laws limiting real estate ownership cannot interfere with these purposes. If the alien owns property, one regulation acts to vest it in a federal official (and thus exempt it from further state legislative effects) and another serves to prevent the alien from conveying it to anyone else, including the state! The only questions that arise are of the *ipso instante* variety, as in *Clark v. Allen.*[216] If alien heirs are wholly barred from ownership by state law, then they never have a vested interest for the Alien Property Custodian to take over or for the Treasury to "block." If they take, however briefly, then the federal law will apply, precluding application of the restrictive state provisions. Since the purpose of the Alien Property Custodian Regulations is, at least in part, to preserve the assets for possible post-war restitution or other disposition, the federal claim seems to have priority.

Thus, preemption appears to operate only with regard to resident and enemy aliens. Otherwise federal law is not so pervasive as to exclude state legislation.

F. Treaty Obligations of the United States

The treaty obligations of the United States affect both federal and state law. Under the Constitution, treaties are a part of the "supreme law of the land"[217] and thus override inconsistent state legislation.[218] Many states expressly recognize this limitation in their statutes[219] or judicial decisions[220] by purporting to provide rules only for cases not governed by treaty. Even without such express limitations, treaties will invalidate conflicting state laws.

Treaties do not bind the federal government in the same sense. A treaty creates an obligation of the United States under international law, but it does not create a total constitutional impediment to further national legislation. The President may

216. 331 U.S. 503, 516-17 (1947).
217. U.S. Const. art. VI, para. 2.
218. In this field the classic case is Hauenstein v. Lynham, 100 U.S. 483 (1880).
219. *E.g.*, Minn. Stat. § 500.22(1) (1974).
220. *E.g.*, Erickson v. Carlson, 95 Neb. 182, 145 N.W. 352 (1914).

terminate many treaties in accordance with their terms, or negotiate their elimination with other nations. The United States can also repudiate a binding treaty, although this constitutes a breach of international law for which the United States is internationally responsible. While Congress does not have direct, formal power to terminate a treaty, the courts regard subsequent inconsistent legislation as implicitly repealing the domestic legal effect of a treaty.[221] Since such a situation would normally constitute a breach of international law, the courts will attempt to construe the legislation to avoid such a breach. Thus if Congress enacted legislation inconsistent with United States treaty obligations to certain countries, the courts would normally construe such legislation as applying only to citizens of other countries and would require express language or clear implication before finding a breach of an international obligation.[222]

The relevant treaty obligations fall into two major categories. Of greatest significance in specifically conferring rights on aliens are the many bilateral treaties of friendship, commerce, and navigation. These are in effect with most of the major investing nations. They have clear and precise provisions relating to land ownership and related rights. In contrast, the obligations arising under multilateral agreements, especially those under the Organization for Economic Co-operation and Development (OECD), tend to be more general, reflecting governmental principles rather than the specific rights of aliens.

The United States currently is a party to approximately[223] 40 bilateral treaties of friendship, commerce, and navigation.[224] The treaties cover a variety of problems, from the rights of ships of each country to enter the other's harbors to the rights of consuls to visit their imprisoned fellow citizens. In general, they tend to regulate private and commercial rights rather than political matters. Their provisions regarding land ownership rights, though clear and precise, are only incidental.

These bilateral treaties fall into two major groups. Those negotiated before World War II tend to be selective, apparently

221. Reid v. Covert, 354 U.S. 1, 18 (1957); Moser v. United States, 341 U.S. 41, 45 (1951).

222. *Cf.* Cook v. United States, 288 U.S. 102, 120 (1933); Chew Heong v. United States, 112 U.S. 536 (1884).

223. The State Department lists 43 such treaties, but some are of questionable practical applicability, *e.g.*, the treaties with Latvia or South Viet Nam.

224. For a general discussion of their provisions, see Note, *The Rising Tide of Reverse Flow*, 72 MICH. L. REV. 551, 568-77 (1974).

covering only those issues that had generated difficulty between the parties.[225] The bilateral treaties negotiated since that time[226] tend to be more comprehensive. They tend to deal

225. These fall into two subgroups: a series of treaties with Latin American republics negotiated in the mid-nineteenth century, and other treaties. The Latin American treaties are: Treaty of Friendship, Commerce and Navigation with Argentina, July 27, 1853, 10 Stat. 1005, T.S. No. 4; Treaty of Peace, Friendship, Commerce and Navigation with Bolivia, May 13, 1858, 12 Stat. 1003, T.S. No. 32; Treaty of Peace, Amity, Navigation and Commerce with New Granada (Columbia), Dec. 12, 1846, 9 Stat. 881, T.S. No. 54; Treaty of Friendship, Commerce and Navigation with Costa Rica, July 10, 1851, 10 Stat. 916, T.S. No. 62; Treaty of Friendship, Commerce and Navigation with Paraguay, Feb. 4, 1859, 12 Stat. 1091, T.S. No. 272. Honduras was added to this group in 1927. Treaty of Friendship, Commerce and Consular Rights with Honduras, Dec. 7, 1927, 45 Stat. 2618, T.S. No. 764.

The other pre-1945 treaties still in force are: Treaty of Peace, Friendship, Commerce and Navigation with Borneo, June 23, 1850, 10 Stat. 909, T.S. No. 33; Treaty of Commerce and Navigation with Iran, Dec. 3, 1938, 54 Stat. 1790, T.S. No. 960; Treaty of Friendship, Commerce and Consular Rights with Latvia, April 20, 1928, 45 Stat. 2641, T.S. No. 765; Treaty of Commerce, Friendship and Navigation with Liberia, Aug. 8, 1938, 54 Stat. 1739, T.S. No. 956; Treaty of Peace and Friendship with Morocco, June 28, 1786, 8 Stat. 100, T.S. No. 224-1; Treaty of Friendship, Commerce and Consular Rights with Norway, June 5, 1928, 47 Stat. 2135, T.S. No. 852; Treaty of General Relations with Saudi Arabia, Nov. 7, 1933, 48 Stat. 1826, E.A.S. No. 53; Treaty of Friendship and General Relations with Spain, July 3, 1902, 33 Stat. 2105, T.S. No. 422; Treaty on Consuls with Sweden, June 1, 1910, 37 Stat. 1479, T.S. No. 557; Treaty of Friendship, Commerce, Establishments, and Surrender of Criminals with Switzerland, Nov. 25, 1850, 11 Stat. 587, T.S. No. 353, 1763 (subsequently amended); Treaty of Commerce and Navigation with Turkey, Oct. 1, 1929, 46 Stat. 2743, T.S. No. 813; Treaty of Commerce with Serbia (Yugoslavia), Oct. 14, 1881, 22 Stat. 963, T.S. No. 319; Treaty of Commerce with Great Britain, July 3, 1815, 8 Stat. 228, T.S. No. 110; Treaty with Great Britain on Tenure and Disposition of Real and Personal Property, Mar. 2, 1899, 31 Stat. 1939, T.S. No. 146. Parts of the treaties with Great Britain are specifically applicable to Australia and New Zealand, Supplementary Treaty with Great Britain on Tenure and Disposition of Property, May 27, 1936, 55 Stat. 1101, T.S. No. 964; and Canada. Accession of Canada to the Convention of Mar. 2, 1899, Oct. 21, 1921, 42 Stat. 2147, T.S. No. 663.

226. Treaty of Friendship, Establishment and Navigation with Belgium, Feb. 21, 1961, [1963] 2 U.S.T. 1284, T.I.A.S. No. 5432; Treaty of Friendship, Navigation and Commerce with Denmark, Oct. 1, 1951, [1961] 1 U.S.T. 908, T.I.A.S. No. 4797; Treaty of Utilization of Defense Installations with Empire of Ethiopia, May 22, 1953, [1954] 1 U.S.T. 749, T.I.A.S. No. 2964; Treaty of Friendship, Commerce and Consular Rights with Finland, Dec. 4, 1952, [1953] 2 U.S.T. 2047, T.I.A.S. No. 2861; Convention of Establishment with France, Nov. 25, 1959, [1960] 2 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation with Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1829, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation with Greece, Aug. 31, 1951, [1954] 2 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Amity, Economic Relations and Consular Rights with Iran, Aug. 15, 1955, [1957] 1 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce and

systematically with the same list of problems, in essentially the same manner, and sometimes in the same language.

The treaties do not have a generic effect on state law. In order to rely on one of them, an individual must be able to show that it applies to him, *i.e.*, that he is a citizen of the relevant country, that the treaty has been duly ratified, and that it has become part of the internal law of the United States. Thus one cannot say that a state statutory provision is wholly void as a result of a particular treaty, but only that it is inapplicable to certain aliens. However, since the more recent group of treaties has a core of common provisions, the effect of multiplying individual inapplicabilities may be to deprive a state law of any but nuisance value.

In general, the more recent treaties permit aliens to engage in a wide range of commercial and industrial activities within the United States, subject only to the same restrictions that apply to citizens of the United States.[227] In return, American citizens receive these same rights abroad. The formulation of these activities is exceptionally broad. The treaties commonly contain provisions guaranteeing rights in all commercial, industrial, financial, and other business activities. Moreover, the treaties are liberal in terms of the forms of business enterprise permitted.

Navigation with Ireland, Jan. 21, 1950, [1950] 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation with Israel, Aug. 23, 1951, [1954] 1 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation with Italy, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, [1953] 2 U.S.T. 2217, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation with Republic of Korea, Nov. 28, 1956, [1957] 2 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Establishment and Navigation with Luxembourg, Feb. 23, 1962, [1963] 1 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Amity, Economic Relations and Consular Rights with Muscat and Oman, Dec. 20, 1958, [1960] 2 U.S.T. 1835, T.I.A.S. No. 4530; Treaty of Friendship, Commerce and Navigation with the Netherlands, Mar. 27, 1956, [1957] 2 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation with Nicaragua, Jan. 21, 1956, [1958] 1 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Friendship and Commerce with Pakistan, Nov. 12, 1959, [1961] 1 U.S.T. 110, T.I.A.S. No. 4683; Treaty of Amity and Economic Relations with Thailand, May 29, 1966, [1968] 5 U.S.T. 5843, T.I.A.S. No. 6540; Treaty of Amity and Economic Relations with Togo, Feb. 8, 1966, [1967] 1 U.S.T. 1, T.I.A.S. No. 6193; Treaty of Amity and Economic Relations with Vietnam, April 3, 1961, [1961] 2 U.S.T. 1703, T.I.A.S. No. 4890. Of these, the treaties with Ethiopia and Iran least conform to the pattern set by the others.

227. Take, as an example, the provisions of only one of these treaties, that with the Netherlands. Treaty of Friendship, Commerce and Navigation with the Netherlands, March 27, 1956, art. VII, para. 1, [1957] 2 U.S.T. 2043, T.I.A.S. No. 3942.

Aliens are frequently entitled not only to act in their own names and in the names of corporations organized in their home nations, but also to form local corporations.[228]

In addition to granting rights to conduct business, these treaties commonly confer expressly the right to acquire land necessary for the operation of permitted businesses.[229] In some instances, these rights are limited to the acquisition of leasehold interests. Even where not so limited, however, these rights should not be taken to guarantee absolute rights to own real estate. There are both express and implicit limitations in most of the treaties. Most of them expressly reserve to the United States the right to limit or exclude alien activity in the exploitation of land and natural resources.[230] This reservation, if exercised, could apparently prohibit aliens from engaging in agriculture, mineral resource development, and real estate speculation and development. The treaties often expressly recognize state land law,[231] but, on the other hand, the modern ones generally protect the inheritance rights of aliens. If state law prohibits alien ownership, the treaties commonly guarantee a treaty-alien a specified period, usually three to five years, in which to dispose of inherited property.[232] This protection is a double-edged sword, for although it ameliorates the confiscatory effect of state escheat laws, it also implicitly recognizes the general permissibility of state restrictions on alien land ownership. The repeated renegotiation of these treaties as of late and their consistent ratification by the Senate may be taken as further indication of federal acquiesence in such restrictions, and perhaps as negating any general argument that the treaties preempt state law.

One further feature of these treaties deserves note. Many of them contain "most favored nation" clauses that guarantee citizens of the relevant nation the most favorable treatment afforded any alien in the United States.[233] To take only one currently relevant example, the treaty with Saudi Arabia, a "temporary" executive agreement executed in 1933, has such a provision.[234] So Saudi Arabians can claim equal treatment with Danes, who are entitled to form American companies to exploit

228. *E.g., id.*
229. *E.g., id.* art. IX, para. 1.
230. *E.g., id.* art. VII, para. 2. Restrictions may also be imposed in other enumerated cases.
231. *E.g., id.* art. IX, para. 1(b).
232. *E.g., id.* para. 4.
233. For the far-reaching potential of such provisions, see Note, *supra* note 224, at 589.
234. Treaty of General Relations with Saudi Arabia, Nov. 7, 1933,

mineral resources,[235] or with citizens of Argentina, who are entitled to hold land by virtue of a provision in the 1853 treaty with that nation.[236]

The older bilateral treaties are more specific in their provisions and more limited in their scope. They normally focus on the inheritance problem, which apparently was a persistent issue in the early part of this century. Many of them go no farther.

Although it must be emphasized that treaty rights depend upon particular provisions, the broad impact of the bilateral treaties can be summarized. They legitimate most alien ownership of urban land—industrial, commercial, and residential—but they do not generally extend to ownership of land for agricultural development or for exploitation of natural resources. Their impact on state legislation restricting land ownership by alien individuals and corporations is thus limited. They preclude operation of state statutes in most urban situations, which the statutes commonly except anyway, but do not limit their effect on agricultural or other rural land. The treaties also generally legitimate state anti-alien inheritance laws applicable to treaty-aliens, but at the same time mitigate them by eliminating their most severe consequences.

The multilateral agreements entered into by the United States have more of an impact on the general articulation of public policy and on proposed or future legislation than on existing statutes. Although an intermediate state appellate court once held that the United Nations Charter invalidated a state anti-alien statute,[237] its decision on this point was later reversed.[238] There seems to be nothing in the Charter that prohibits preferences based on nationality.

The only significant multilateral agreement dealing with foreign investment is the *Code for the Liberalisation of Capital*

art. II, 48 Stat. 1826, E.A.S. 53. Indeed, there is little else in this executive agreement.

235. Treaty of Friendship, Commerce and Navigation with Denmark, Oct. 1, 1951, art. VII, para. 1, [1951] 1 U.S.T. 908, T.I.A.S. No. 4797.

236. Treaty of Friendship, Commerce and Navigation with the Argentine Republic, July 27, 1853, art. IX, 10 Stat. 1005, T.S. No. 5. This provides that citizens of Argentina shall enjoy rights as native citizens in the acquisition of "property of every sort and determination," and thus apparently confers upon them the right to hold real estate.

237. *See* Sei Fujii v. State, 217 P.2d 481 (Cal. Dist. Ct. App. 1950).

App. 1950).

238. Sei Fujii v. State, 38 Cal. 2d 718, 720-25, 242 P.2d 617, 619-22 (1952). The state supreme court invalidated the statute on fourteenth amendment grounds.

Movements of the Organisation for Economic Cooperation and Development.[239] The organization itself was created by a multilateral international agreement,[240] which the United States accepted by executive agreement. The Capital Movements Code, which reflects only one aspect of the organization's work, was adopted by a decision of the OECD's governing body, in which the United States concurred.

The Code deals with all forms of capital movement, including investments in real estate. Its aim is the progressive elimination of all barriers to capital movement[241] but its impact on real estate law is minimal. In the first place, state laws are expressly excepted from the operation of the Code,[242] although the federal government undertakes to attempt to persuade (but not to compel) states to conform to its dictates. Thus the Code has no direct legal effect on present state legislation and only a quasi-political effect on potential state action. Indeed, the exception for state legislation is further evidence of federal acquiescence in state anti-alien legislation.

The Code seeks to prevent participant nations from imposing new restrictions on capital movements.[243] There is, however, a provision that might, at least formally, permit such restrictions on land investment or development. The Code subdivides capital movement into two categories. A participant country could exclude the operation of the Code as to the transactions contained in List A only by making a reservation at the time of committing itself to adherence to the Code. A country can exclude application of the Code to transactions in List B by making a new reservation at any time.[244] The sale of land is included in List A, but the purchase or development of land is included in List B. Thus, technically, the United States could, at any time, make an additional reservation to the Code excluding land purchase and development from its operation, and then impose controls on foreign land ownership.[245]

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239. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (1969 ed.).

240. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, [1961] 2 U.S.T. 1728, T.I.A.S. No. 4891.

241. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 239, art. 1(a).

242. *Id.* annex C.

243. *Id.* art. 1(e).

244. *Id.* art. 2(b), annex A.

245. Controls may also be imposed during economic crises. *Id.* art. 7.

Such formal legal logic, however, runs contrary to the entire purpose of the Code and the OECD. While such a new reservation would not breach formal international law, it would certainly impair both the atmosphere of economic cooperation among participant nations and the bargaining position of the United States, which has consistently sought to improve, rather than restrict, opportunities for its investment abroad. Furthermore, the Code itself, while permitting such reservations, places a variety of inhibitions on their exercise, including periodic review by the governing body of the OECD and a political obligation to seek to reduce or remove the barriers as soon as possible.[246] Thus, while the Code would not create any legal barriers to the adoption of new federal regulations restricting alien land ownership, it would constitute a serious political obstacle.

IV. CONCLUSIONS

Current state and federal legislation restricting alien ownership of real estate and the limitations imposed on such legislation by constitutional doctrine and international treaties and agreements present a confusing picture. Concrete conclusions can be reached only in the context of individual cases, because the precise effect of the law in question, the scope of constitutional protection, and the applicability of international limitations will depend on the facts of each case. Nevertheless, general conclusions about the validity and effectiveness of present laws and of proposals for new legislation can be drawn.

A. Existing State Law

There is little in present state law that effectively and validly excludes foreign investment in real estate. The bark of state regulation is much worse than its bite. Except with regard to agricultural land, present laws prohibiting alien ownership of real estate have little more than nuisance value. They contain traps for the unwary and for those least able to protect themselves, but they present little impediment to serious foreign investors.

First of all, because of either their terms or constitutional limitations, they do not exclude resident aliens from property ownership.[247] Second, by their own terms or because of treaty

246. *Id.* arts. 1, 12.
247. *See* text accompanying notes 122-51, 195-99 *supra*.

limitation, they do not commonly apply to urban, commercial, industrial, or residential real estate.[248] Most of them exempt such property; if they do not, treaty rights will protect many aliens from their enforcement. Thus their impact is primarily in the land-intensive agricultural and natural resources fields. Third, most of the statutes are easily avoided by well-recognized conveyancing devices, especially the use of an insulating corporation or other business entity.[249] An investor with competent legal advice can thus avoid the statutory language and usually accomplish his objectives. Fourth, even where state law appears to present an insuperable obstacle to investment, the largest foreign investors are frequently able to obtain legislative exemption from the operation of the laws.[250] The promise of increased local employment and productivity is difficult for any legislature to resist.

It is apparent, then, that although the laws are not a serious obstacle to foreign investment, they do contain pitfalls for the uninitiated and the powerless. The small investor is likely to be at a disadvantage as compared to the large, the alien from a nation with a favorable treaty relationship with the United States is at an advantage as compared to those from other countries, and the uncounseled alien is at a disadvantage as compared to the alien with adequate legal counsel. The obscurity of the legislation probably aggravates this last problem. For instance, a resident alien who rents his residence and returns to the nation of his citizenship for a substantial period might unknowingly lose his residence status and place his ownership rights in jeopardy.

In these respects the most oppressive of the various types of state laws are those relating to inheritance. It is no accident that the reported cases in this area involve Syrians, Lebanese, and East Europeans, not English, French, or Dutch.[251] The more affluent nations have negotiated treaties protecting the inheritance rights of their citizens on a reciprocal basis. Aliens of other countries are left at the mercy of distant courts administering a strange law. The wealthy and informed individual, even from these countries, can avoid the impact of the inheritance laws by careful estate planning. Only the alien heirs of the less

248. *E.g.*, statutes cited in notes 71-73 *supra*; *see* text accompanying notes 228-29 *supra*.
249. *See* text accompanying notes 89-106 *supra*.
250. Sullivan, *supra* note 6, at 38.
251. *See* cases cited in note 172 *supra*.

astute, or the less well advised, suffer the consequences of the law.

Constitutional limitations only nibble at the edges of this body of state law, invalidating restrictions on resident aliens, enemy aliens, and the selective foreign policy of a few states.[252] Treaty law further limits the impact of state law,[253] but again leaves the core intact. Although there is a potential for further judicial development of constitutional limitations, the peculiar history that has made real estate law a special matter for state legislation is probably too strong to be wholly overturned by general constitutional arguments.

B. Present Federal Legislation

The principal federal legislation does not deal with the same matters as do the state laws. Its foundation is the control of enemy and hostile alien assets in order to further the defense and foreign relations interests of the United States. It is far more flexible than state law, for the federal government, unlike the states, can and does designate the citizens of specified nations for adverse treatment under these laws. The federal regulations are also far more flexible in providing for administrative mitigation of the formal requirements in appropriate cases.[254]

Other federal legislation, especially that dealing with the disposition of federal land through sale or lease, presents as complicated a picture as state law.[255] Many of these provisions are subject to inhibitions similar to those affecting state law, especially equal protection limitations and the problem of avoidance through use of corporate devices.

C. Potential State Legislation

The same constitutional and practical limitations that impede the effectiveness of present state laws on alien real estate investment would also cripple most potential state legislation. Such legislation holds little promise of genuine control of foreign investment in real estate, except in the field of agriculture.

Any new laws would have to be carefully drawn in light of the limitations discussed above. They cannot apply to residents,

252. *See* text accompanying notes 122-51, 174, 195-216 *supra.*
253. *See* text accompanying notes 217-46 *supra.*
254. *See* text accompanying notes 52-54, 203-09 *supra.*
255. *See* text accompanying notes 55-58 *supra.*

nor can they apply to many investments by nonresident aliens who enjoy certain treaty protections. This excludes state control of residential, commercial, or industrial land ownership by most aliens. To apply restrictions only to aliens not protected by treaty rights would serve little purpose, since these are not generally the potential investors. Thus the sole range of significant impact would be the ownership of agricultural land and natural resources.

Of these latter possibilities, restrictions on ownership of agricultural land would be the most easily defensible. Like the anti-alien laws of the 1880's and the present corporate farming laws of some states, such restrictions, presently in effect in some states, might be viewed as part of a pattern of protection for an existing social structure.[256] Although they thus partake of state economic protectionism and isolationism and might be considered burdens on commerce, they possess arguably redeeming features in their attempt to stabilize social conditions in rural communities.

Restrictions in the natural resources field would be more difficult to defend. Whether mining or oil land is owned by British Petroleum or Texaco has little impact on the health, welfare, safety, or social conditions prevailing in nearby communities. The Supreme Court's resistance to state legislation aimed merely at retaining the state's resources for itself[257] should apply equally to legislation aimed at prohibiting one class of outsiders from developing a state's resources.

Moreover, state restrictions on natural resource development by aliens would probably affect both foreign relations and foreign commerce. Their impact would fall principally upon investors in a few foreign nations that presently have substantial monetary surpluses available for investment. Insofar as the action of some states increased the concentration of these dollar deposits in other states, it might contribute to a national problem rather than solve a local one. State restrictions might also make meaningful national agreements between the United States and these surplus-laden nations more difficult to negotiate.

The ancient power of states to define property rights may be strong enough to uphold the generally ineffective present

256. On this point see my forthcoming article on corporate farming legislation in the *University of Toledo Law Review*, summer 1976.

257. *See* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

restrictions on alien land ownership, but it is a slender reed upon which to rest a substantial new system of restrictions. Such power is not beyond limitation by other constitutional doctrines. To rest the jurisdiction of a state solely on the ground that "it has always been done that way before" may not suffice if new national burdens are created thereby. Yet to rest the same jurisdiction on a more candid basis, dislike or fear of aliens, invites constitutional invalidity. There is little scope for new state legislation in this field.

D. Potential Federal Legislation

Adoption of new federal legislation is more a question of domestic and international desirability than one of legal limitation. Some constitutional limits, most significantly the equal protection of resident aliens, do apply. The fact that land law has historically been state law would be no impediment to the adoption of federal law; despite the definitional character of state law, a valid federal law would override it. Nor should there be any question that regulation of foreign assets is within federal competence as an implementation of the foreign commerce power.

The most significant legal questions are international.[258] Long-standing national policy has favored freedom of foreign investment in the United States. A change in our own laws in this regard would mean a change in our international political stance. While the change might be technically justifiable in the light of the escape clauses of OECD rules, it would seriously undermine the main thrust of that organization. Moreover, the treaties of friendship, commerce, and navigation contain significant exceptions for certain foreigners. Unless the United States is prepared to repudiate or restrict these exceptions, any new legislation will have only a limited impact.

If new rules are to be adopted, federal law is preferable to state law as the means. Only the federal government has sufficiently comprehensive authority to regulate the whole range of foreign investments: bank deposits, portfolio investments, direct investments, and land investments. Individual state efforts would inevitably lead to avoidance mechanisms, which would defeat the purpose of the law, or to diversion of foreign investment to other states or other sectors, which would simply com-

258. *See* text accompanying notes 217-46 *supra*.

pound the problem there. Only the federal government has authority to deal with the problem in sufficient breadth to effectively control nominee holdings and out-of-state corporations. Moreover, if new federal law is to be adopted, it should not single out real estate for special treatment, but deal with all foreign investment in a comprehensive way. Land has no particular quality that requires separate treatment.

The political and economic desirability of such legislation is beyond the scope of this Article. Studies currently underway are seeking to determine the extent of foreign investment in the United States.[259] So long as such investment does not obtain a dominant position in critical industries or otherwise constitute a threat to the nation, the need for new legislation is doubtful. Alien-owned businesses are subject to substantive regulation in the same manner as American businesses. Alien ownership of major industries has not impeded the United States from taking effective measures for its own protection in time of war;[260] far less should the mere fact of alien investment prevent sensible substantive policy in time of peace.

E. Summary

State law does not, and cannot, have a major effect on foreign investment in real estate in the United States, except possibly in agricultural land. Even there, its impact is minor. Federal law has not attempted to restrict alien land ownership in any comprehensive way. While constitutional and practical arguments indicate that any new restrictions should be imposed by federal rather than state governments, the necessity or desirability of such new legislation has not yet been demonstrated.

259. Foreign Investment Study Act of 1974, 88 Stat. 1450. The studies are being conducted by the Commerce and Treasury Departments and will be submitted in May, 1976.

260. Alleged German ownership of General Analine permitted the Alien Property Custodian to take it over and operate it during World War II.