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The Dormant Commerce Clause: A Limit on Alien Land Laws

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THE DORMANT COMMERCE CLAUSE: A LIMIT ON ALIEN LAND LAWS

I. INTRODUCTION

As the real estate industry has gradually globalized, foreign ownership in United States real estate has dramatically increased.[1] Foreign investors seeking a safe haven for their capital find the United States real estate market particularly attractive.[2] This increase in foreign investment in United States real estate has attracted public attention and raised concern about the consequences. It was this concern that prompted Congress to undertake a number of studies to investigate the situation.[3] The reaction by some of the states to the increase in foreign investment has not been as restrained. While state laws restricting foreign ownership of real property have existed continually throughout our history,[4] the dramatic increase in foreign investment in the 1970s and 1980s prompted a number of states to tighten their restrictions.[5] Over the years, states have enacted a wide variety of laws regulating alien ownership of real property. It may be helpful if, at the outset, the general nature of these laws are described. The

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1. From 1981 to 1989 foreign investment in U.S. commercial real estate increased fourfold and stood at $35.85 billion in 1989. Yet this represents only 2% of the total value of U.S. commercial property in 1988. *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, FOREIGN INVESTMENT CONCERNS IN THE U.S. REAL ESTATE SECTOR DURING THE 1980S 2 (1991).

Foreign investors own only slightly more than 1% of U.S. agricultural land as of 1990. This percentage level has remained relatively steady from 1981 through 1990. *See* J. PETER DEBRAAL, U.S. DEP'T OF AGRICULTURE REPORT, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 1990 viii.

2. This is due to numerous factors: (1) the stability of the government; (2) the size of the market and number of opportunities; (3) the tendency for the property to appreciate in value faster than the inflation rate; (4) relatively lower prices in terms of foreign currency in periods when the dollar is in decline; and (5) the developed capital market with relatively low interest rates. *See* Stephen E. Roulac, *Advising Foreign Investors in U.S. Real Estate*, 9 REAL EST. L.J. 108, 109-12 (1980).

3. *See infra* notes 130-41 and accompanying text.

4. *See infra* notes 18-40 and accompanying text.

5. *See* IOWA CODE ANN. § 567.3(1) (West Supp. 1989); NEB. REV. STAT. §§ 76-402, 76-414 (1986); WIS. STAT. ANN. § 710.02 (West Supp. 1989).

laws can be divided into statutes that: (1) restrict ownership by foreign individuals; (2) distinguish between resident and non-resident aliens; (3) restrict ownership by foreign corporations; (4) affect foreign ownership through the laws of inheritance; (5) place limits on the number of acres that can be owned; (6) place limits on the value (in dollars) of the property holding; (7) place limits on the period of time the land may be held; (8) distinguish between urban land and agricultural land; and finally (9) distinguish between public[6] and privately owned land.[7]

Because of the wide variety of possible restrictions, no two states have enacted identical laws. Some commentators have argued that this patchwork of state laws creates a barrier of confusion to many investors.[8] Others have argued that many of the state laws are easily circumvented and should be replaced by federal legislation.[9] Still others have argued that, no matter what effect these laws may have, "control over alien land ownership is an inherent state power, and any attempt to supplant this power must overcome the strong presumption of exclusive state control."[10]

This Note will examine the constitutionality of alien land laws under the dormant commerce clause.[11] Alien land laws raise numerous other constitutional issues including: foreign relation power,[12] pre-emption,[13] equal protection,[14] and su-

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6. The statutes use the term "public" land to refer to land that is being sold by a governmental entity.

7. *See infra* notes 45-58 and accompanying text discussing the nature of current alien land laws in the United States. *See also* Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 16-26 (1962) (Professor Sullivan was one of the first authors to classify states according to the nature of their alien land laws); AMERICAN BAR ASSOCIATION-COMMITTEE ON FOREIGN INVESTMENT IN U.S. REAL ESTATE, FOREIGN INVESTMENT IN U.S. REAL ESTATE, A COMPREHENSIVE GUIDE, 69-112 (Timothy E. Powers ed., 1990) (providing a relatively complete list of the current U.S. alien land laws) [hereinafter COMPREHENSIVE GUIDE].

8. *See generally* Andrew J. Starrels, *A Proposal for Uniform Regulation of Foreign Investment in American Real Estate*, 18 CORNELL INT'L L.J. 147 (1985).

9. *See generally* Ronald L. Bell & Jonathan D. Savage, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MARSHALL L. REV. 679 (1980).

10. James A. Frechter, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOK. J. INT'L L. 147, 148-49 (1988).

11. *See infra* notes 145-239 (discussing the dormant commerce clause).

12. U.S. CONST. art. I, § 8.

13. U.S. CONST. art. VI, cl. 2.

14. U.S. CONST. amend. XIV, § 1.

premacy.[15] These issues will be discussed only to the extent necessary to show that the constitutional limitations they pose have little effect on the alien land laws currently in place and thus illustrate the importance of the dormant commerce clause as a potential limit to state power in this area.

Part I of this Note provides an overview of the history of alien land laws and the constitutional challenges these laws have faced in the past. Part II examines the nature of the state and federal governments' power to regulate land ownership. It first points out that, while the states have broad power to regulate land ownership, there are constitutional limits to this power. It also discusses the current federal regulations governing foreign investment in real property and argues that the federal laws do not pre-empt the state laws in this area. Part III begins by providing the constitutional framework the Supreme Court has constructed to analyze state laws that burden interstate and foreign commerce. This Note will then argue, as a threshold matter, that foreign investment in United States real estate is properly analyzed under the dormant commerce clause. Finally, the Note will argue that the facially discriminatory nature of alien land laws renders them invalid under the dormant commerce clause test the Supreme Court has adopted.

It is important to clarify what this Note will not address. It is not the aim of this Note to pass judgment on the policy issues involved with alien land laws. Specifically, it will not attempt to determine whether the diverse needs of the several states are best served by regulations made at the local level, or whether the country would be better served by uniform federal regulations.[16] Nor will it address the question of whether state restrictions on foreign ownership of land unwisely interfere with the federal government's ability to formulate and carry out a national economic policy with respect to foreign

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15. U.S. CONST. art. VI, cl. 2.

The following articles have attempted a comprehensive constitutional analysis of alien land laws: Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621 (1976); William B. Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407 (1978); Bell & Savage, *supra* note 9; Frechter, *supra* note 10.

16. For two opposing views, see Frechter, *supra* note 10 (arguing that real property law should be an exclusive state function); Starrels, *supra* note 8 (arguing that the states should adopt a uniform national standard).

investment in the United States. This Note will also not attempt a critical analysis of the Supreme Court's decisions with respect to the dormant commerce clause.[17] The approach this Note will take is to analyze and synthesize primarily Supreme Court Commerce Clause decisions, accepting the Court's reasoning at face value, and applying the Court's reasoning to state laws that restrict foreign ownership of land.

II. HISTORY OF ALIEN LAND LAWS

The present state of alien land laws can best be understood after a brief discussion of their history. The law of real property in the United States is derived from English feudal law, which was designed to secure allegiance to the crown through military service.[18] This system did not lend itself to alien land ownership and thus aliens were not permitted to own land.[19] Later English law permitted aliens to take real property by purchase, but not by inheritance.[20] This system remained the law until 1870 when it was abolished by statute and aliens were granted full property rights.[21]

Early American colonies adopted the English common law and excluded aliens from land ownership.[22] However, beginning with the United States independence and extending to the late nineteenth century, there was a "uniform tendency toward dilution or abolition of the common law exclusion of alien" land ownership through legislation and judicial interpretation.[23] The abolitionist trend slowed during the late 1800s when the first wave of alien land laws swept over the nation. Congress passed the Territorial Land Act of 1887,[24] which forbade extensive alien landholding in the organized territories, except by immigrant farmers who had applied for citizen-

17. For a critical analysis of the Supreme Court's dormant commerce clause decisions, *see generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that in dormant commerce clause cases the Court should only be concerned with preventing economic protectionism).

18. *See* Morrison, *supra* note 15, at 623.

19. *See* Morrison, *supra* note 15, at 623.

20. *See* Morrison, *supra* note 15, at 623.

21. *See* Morrison, *supra* note 15, at 623.

22. *See* Morrison, *supra* note 15, at 623.

23. Morrison, *supra* note 15, at 624.

24. 48 U.S.C. §§ 1501-08 (1988). Note that this law is presently of little significance because the territories have been organized into states.

ship. This federal law was enacted in response to fears of large European-type landlords, the potential for large foreign- owned ranches to jeopardize statehood for the territories, and the perceived danger of becoming an economic colony of Great Britain.[25] Eleven states passed similar laws.[26] The state laws were seen as a necessary response to a depressed agricultural condition and a "guard against the [perceived] danger of absentee ownership of farm land."[27]

A second wave of alien land laws was prompted by a growing anti-Japanese sentiment in the early 1900s. Japanese immigrant farmers in California, Oregon and Washington were subjected to racial prejudice and accusations of unfair competition.[28] Legislatures in Pacific coast states and as far east as Kansas passed laws prohibiting alien "Orientals" from owning land.[29] "These laws were commonly framed to exclude from land ownership 'aliens ineligible for citizenship.' Since "Orientals" were the only racial class excluded from citizenship by federal immigration laws, the practical effect was immediate."[30]

In 1923 the Supreme Court held that these discriminatory laws did not violate either the Equal Protection Clause[31] or the Due Process Clause.[32] After World War II, however, there was a distinct trend to repeal discriminatory alien land laws. Dicta in two Supreme Court decisions indicated that discriminatory alien land laws directed at Japanese aliens were vulnerable to attack on equal protection grounds.[33] Challenges to these laws never reached the Supreme Court. Most states,

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25. *See* Morrison, *supra* note 15, at 625.

26. Colorado, Illinois, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Texas and Wisconsin. *See* Sullivan, *supra* note 7, at 30-31 & n.68.

27. *See* James A. Huizinga, Note, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251 & n.4 (citing Anderson, *A Survey of Alien Land Investment in U.S. Colonial Times to Present*, 8 U.S. DEP'T OF COMMERCE REPORT TO CONGRESS ON FOREIGN DIRECT INVESTMENT IN U.S. L-2).

28. *See* Huizinga, *supra* note 27, at 252.

29. *See* Morrison, *supra* note 15, at 626.

30. Morrison, *supra* note 15, at 626-27.

31. U.S. CONST. amend. XIV, § 1.

32. U.S. CONST. amend. XIV, § 1. *See* Terrace v. Thompson, 263 U.S. 197, 216-19 (1923). *See also* Porterfield v. Webb, 263 U.S. 225 (1923); Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923).

33. *See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 425 (1948); Oyama v. California, 332 U.S. 633, 647 (1948) (Black & Douglas, JJ., concurring); *id.* at 650 (Murphy & Rutledge, JJ., concurring).

recognizing that the laws were potentially unconstitutional and racially motivated, either repealed[34] or judicially invalidated the laws.[35] Other legislation lost its significance with the 1952 amendment of the federal immigration law.[36]

A third wave of alien land laws sprang up during the Cold War. Many states passed legislation that limited the rights of foreigners to receive land by inheritance.[37] The laws were designed to prevent the diversion of American wealth to communist totalitarian governments rather than to prevent land ownership by aliens.[38] However, in *Zschernig v. Miller*,[39] the Supreme Court severely limited this practice when it struck down an Oregon statute that conditioned a foreign citizen's right of inheritance on a showing of reciprocal rights granted to United States citizens by the alien's country. The Court held that the law was an unconstitutional intrusion by the state into the field of foreign affairs.[40]

The most recent wave of legislation occurred in the 1970s. A number of states reacted to a surge in foreign investment in farmland by restricting the situs and amount of land that could be purchased.[41] The new legislation also appears to have been due to an emotional response to media reports about the increased foreign direct investment in the United States.[42] The reports tended to generate xenophobia, causing a negative attitude toward foreign investment in general,[43] in addition to

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34. *See* Morrison, *supra* note 15, at 627-28.

35. *See, e.g.*, Fuji v. State, 242 P.2d 617 (Cal. 1952); State v. Oakland, 287 P.2d 39 (Mont. 1955); Namba v. McCourt, 204 P.2d 569 (Or. 1949).

36. The amendment eliminated the last remaining class of aliens ineligible for citizenship. Immigration and Nationality Act, ch. 477, § 311, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1422 (1988)).

37. *See* Morrison, *supra* note 15, at 628.

38. *See generally* Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962); William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643 (1985).

39. 389 U.S. 429 (1968).

40. *Id.* at 432. State courts, in searching for reciprocity under these statutes, conducted detailed examinations of foreign states' policies, often passing judgment on foreign governments' practices. *See, e.g., In re* Belemecich's Estate, 192 A.2d 740 (Pa. 1963).

41. *See* IOWA CODE ANN. § 567.3(1) (West Supp. 1989); NEB. REV. STAT. §§ 76-402, 76-414 (1986); WIS. STAT. ANN. § 710.02 (West Supp. 1989).

42. *See, e.g.*, Nancy Yoshihara & Roger Smith, *Real Estate A Big Draw for Foreigners*, L.A. TIMES, May 31, 1978, at part 1, 1; *The Selling of America*, TIME, May 29, 1978, at 71; Robert Lindsey, *Foreign Investors Rush to Aquire U.S. Property as Haven for Funds*, N.Y. TIMES, May 14, 1978, at A1.

43. Steve Frazier, *National Sentiment Against Land Holding of Foreigners*

increasing the perception that United States family farmers were threatened.[44]

Today, almost half of the states have laws that, to varying degrees, restrict the rights of aliens to own real property.[45] These laws range from complete prohibitions[46] to simple reporting requirements.[47] The vast majority of the laws apply only to nonresident aliens and foreign corporations.[48] However, six states still restrict resident aliens to varying degrees.[49] The most prohibitive restrictions involve the acquisition of agricultural land by nonresident aliens and foreign corporations. A number of states have enacted laws that, aside from a few exceptions, completely prohibit ownership of agricultural land by nonresident aliens and foreign corporations.[50] Other states[51] have enacted reporting requirements that parallel the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA)[52] or have limited the number of acres of agricultural land that can be owned.[53] Restrictions on non-agricul-

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Strikes Chord in Oklahoma, WALL ST. J., July 7, 1980, at 13.

44. *See* Huizinga, *supra* note 27, at 253.

45. *See* COMPREHENSIVE GUIDE, *supra* note 7, at 73-133 (providing a relatively complete list of alien land laws).

46. *See, e.g.*, IOWA CODE ANN. § 567.3(1) (West Supp. 1989).

47. *See* VA. CODE ANN. § 3.1-22.24 (Michie 1993).

48. *See* ALASKA STAT. § 09.25.010(b) (1983); ARK. CODE ANN. § 2-3-102-10 (Michie 1987); IOWA CODE ANN. § 567.3(1) (West Supp. 1989); KY. REV. STAT. ANN. § 381.300(1) (Michie/Bobbs-Merrill 1972 & Supp. 1988); MINN. STAT. ANN. § 500.221 (West Supp. 1990); MISS. CODE ANN. § 89-1-23 (1972 & Supp. 1988); MO. ANN. STAT. § 442.571 (Vernon 1986); MONT. CODE ANN. §§ 72-2-214, -306 (1989); N.H. REV. STAT. ANN. § 477:20 (1983) (*see also In re* Estate of Constan, 384 A.2d 495 (N.H. 1978)); N.C. GEN. STAT. §§ 64-3, 64-4 (1987); N.D. CENT. CODE § 47-10.1-01, 02 (Supp. 1989); OHIO REV. CODE ANN. § 5301.254 (Anderson 1989); OKLA. STAT. ANN. tit. 60, §§ 121-127 (West 1971 & Supp. 1990); PA. STAT. ANN. tit. 68, §§ 41-47 (Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 43-2A-1, -6 (1983 & Supp. 1989); VA. CODE ANN. § 3.1-22.24 (Michie 1983); WIS. STAT. ANN. § 710.02 (West Supp. 1989).

49. *See* ILL. ANN. STAT. ch. 6, paras. 1, 2 (Smith-Hurd 1975 & Supp. 1989); IND. CODE ANN. §§ 32-1-8-2, 32-7-1-3 (Burns 1980 & Supp. 1989); NEB. CONST. art. I, § 25; NEB. REV. STAT. § 76-404-414 (1986); NEV. REV. STAT. § 517.010 (1985); OKLA. STAT. ANN. tit. 60, §§ 121-127 (West 1971 & Supp. 1990); S.C. CONST. art. 3, § 35; S.C. CODE ANN. §§ 27-31-10, -30 (Law. Co-op. 1977).

50. *See* IOWA CODE ANN. § 567.3(1) (West Supp. 1989); MO. ANN. STAT. § 442.571 (Vernon 1986); N.D. CENT. CODE §§ 47-10.1-01, -02 (Supp. 1989); OKLA. STAT. ANN. tit. 60, §§ 121-127 (West 1971 & Supp. 1990).

51. ARK. CODE ANN. §§ 2-3-102, -110 (Michie 1987); ILL. ANN. STAT. ch. 5, paras. 601-608 (Smith-Hurd 1993); VA. CODE ANN. § 3.1-22.24 (Michie 1983).

52. 7 U.S.C. §§ 3501-3508 (1983). *See infra* notes 130-33 and accompanying text for a discussion of AFIDA.

53. PA. STAT. ANN. tit. 68, §§ 41-47 (Purdon Supp. 1989); S.D. CODIFIED LAWS

tural real property include: complete prohibitions,[54] limits on the number of acres that can be owned,[55] limits on the number of years the property may be held for,[56] and reporting requirements.[57] Additionally, a number of states still have laws that affect the right of aliens to receive testamentary dispositions.[58]

III. THE STATE AND FEDERAL GOVERNMENTS' CONCURRENT POWER TO REGULATE LAND OWNERSHIP

A. States' Power and Limitations

Most Supreme Court decisions pertaining to the states' power to regulate land ownership have concerned challenges to state laws regarding testamentary transfers of real property.[59] The holdings indicate that the state's power to control the disposition of property within their borders is a deeply rooted tradition. In 1825, the Supreme Court in *McCormick v. Sullivant*,[60] stated that "[i]t is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."[61] In *United States v. Fox*,[62] fifty years later, the Court stated that "[t]he power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer . . . is undoubted."[63] In

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ANN. §§ 43-2A-1, -6 (1983 & Supp. 1989).

54. *See* MISS. CODE ANN. § 89-1-23 (1972 & Supp. 1988).

55. *See* IND. CODE ANN. § 32-1-8-2 (Burns 1980); WIS. STAT. ANN. § 710.02 (West Supp. 1989).

56. ILL. ANN. STAT. ch. 6, para. 1, 2 (Smith-Hurd 1975 & Supp. 1989); KY. REV. STAT. ANN. § 381.300(1) (Michie/Bobbs-Merrill 1972 & Supp. 1988).

57. *See* OHIO REV. CODE ANN. § 5301.254 (Anderson 1989).

58. *See, e.g.*, MONT. CODE ANN. §§ 72-2-214, -306 (1989); N.H. REV. STAT. ANN. § 477:20 (1938); N.C. GEN. STAT. §§ 64-3, 64-4 (1987); *see also In re* Estate of Constan, 384 A.2d 495 (N.H. 1978) (prohibiting nonresident aliens from inheriting property).

59. *See infra* notes 60-66 and accompanying text.

60. 23 U.S. 192 (1825).

61. *Id.* at 202 (case concerns a dispute about the ownership of land that was the subject of a testamentary disposition).

62. 94 U.S. 315 (1876).

63. *Id.* at 320. This case involved a question of whether New York had the power to prohibit a testamentary disposition of real property to the United States government. The Court held that it is within the states' power to regulate who may be the beneficiary of a testamentary gift of real property. *Id.*

United States v. Burnison,[64] the Court upheld *Fox*, stating that the Tenth Amendment[65] ensured the states' "power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries."[66] Thus, one could argue that these decisions create a presumption of state control in this area.

However, states are not as free to regulate land transfers and ownership as these holdings might indicate. The Supreme Court has consistently held that the states' power to regulate land ownership is directly and indirectly limited by the Consti-

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64. 339 U.S. 87 (1950) (case involved the same facts as *Fox* except the state involved was California).

65. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Early interpretation of the Tenth Amendment held that regulation of purely intrastate activities was reserved to the states and hence any federal regulation in these areas was beyond the commerce power. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (regulation of manufacturing is an exclusive state function); Hammer v. Dagenhart, 247 U.S. 251 (1918) (regulation of the labor conditions in production is an exclusive state function).

However, the Court has since completely discarded that interpretation. In United States v. Darby, 312 U.S. 100 (1941), the Court held that the "[Tenth A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that . . . its purpose was other than to allay fears that the new national government might seek to exercise powers not granted . . . ." *Id.* at 124. The Court concluded that the Tenth Amendment does not deprive the "national government of authority to resort to all means for the exercise of granted powers which are appropriate and plainly adopted to the permitted end." *Id.* The Court has thus allowed the federal government to regulate areas traditionally controlled by the states. *See* United States v. Oregon, 366 U.S. 643 (1961) (Court rejects Tenth Amendment challenge to federal law that conflicts with state escheat laws). In 1976, however, the Court in National League of Cities v. Usery, 426 U.S. 833 (1976), held that the Tenth Amendment prohibited the federal government from regulating in any way that would impair the states' ability to perform their "traditional governmental functions." *Id.* at 852. Thus, the Court found that the Tenth Amendment prevented the Congress from extending the federal minimum wage and maximum hours standards to cover employees of state and local governments. *Id.* at 851-52. In the cases following *Usery* the Court found it very difficult to distinguish those functions which are traditional governmental functions from those that are not. *See* United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982); EEOC v. Wyoming, 460 U.S. 226 (1983). Finally, in 1985, the Court in Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985), expressly overruled *Usery*, holding that Congress has the power pusuant to the Commerce Clause to apply commercial regulations to the state and local governments and that state sovereignty is adequately protected by the "procedural safeguards inherent in the structure of the federal system." *Id.* at 552.

66. United States v. Burnison, 339 U.S. 87, 92 (1950).

tution. It is generally understood that the Equal Protection Clause is a direct limitation on the state's power to enact laws that discriminate against resident alien land ownership. In *Oyama v. California*,[67] the Supreme Court, for all practical purposes, overruled *Terrace v. Thompson*[68] by indicating in dictum that the California law, which prohibited aliens ineligible for citizenship from owning land, was unconstitutional on equal protection grounds.[69] However, very few states currently impose restrictions on resident alien land ownership.[70] The state laws that do are certainly susceptible to a constitutional challenge on equal protection grounds. The vast majority of current alien land laws restrict only nonresident aliens and foreign corporations.[71] It is unclear whether these laws are equally susceptible to a constitutional challenge on equal protection grounds. Other authors have discussed this issue in detail and come up with conflicting conclusions.[72] The arguments of these authors will not be restated here. Though it is worth noting that in *Lehndorff Geneva, Inc. v. Warren*,[73] the only recent case to address this issue, the Wisconsin Supreme Court held that a Wisconsin law that restricted nonresident aliens from owning more than 640 acres of land did not violate the Equal Protection Clause.[74] The state argued that absentee ownership of land by nonresident aliens can be detrimental to the welfare of the community where the land is located.[75] The court, applying a low level of scrutiny, held that "[t]his ratio-

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67. 332 U.S. 633 (1948).

68. 263 U.S. 197 (1923). *See supra* notes 28-32 and accompanying text.

69. *Terrace* was not completely overturned because only four of the Justices comprising the majority would have held the statutory classification race-based, and therefore unconstitutional on its face. *See* Oyama v. California, 332 U.S. 633, 650. *See supra* note 33 and accompanying text.

70. *See supra* note 49 and accompanying text.

71. *See supra* note 48 and accompanying text.

72. *See* Andrew W. Wilson, Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135, 147-49 (1982) (arguing that the Court should not distinguish between resident and nonresident aliens and apply a strict scrutiny standard to alien land laws that restrict the rights of either class). *Cf.* Frechter, *supra* note 10, at 171 (arguing that the Supreme Court has never actually restricted the states' power to enact alien land laws based on equal protection even though they have had the opportunity to do so).

73. 246 N.W.2d 815 (Wis. 1976).

74. *Id.* at 825.

75. *Id.*

nale is not so 'patently arbitrary' as to require us to reject it."[76] In arriving at its decision to apply a low level of scrutiny, the court distinguished the Wisconsin law, which only applied to nonresident aliens, from state laws which discriminate against all aliens.[77] It found that the Supreme Court's reasons for applying a heightened level of scrutiny where resident aliens were concerned are absent where nonresident aliens are concerned.[78] In brief, the Wisconsin court reasoned, first, that it is the class of resident aliens that are similarly situated to citizens who are protected and not aliens worldwide, and therefore, a lower level of scrutiny is justified for laws that only discriminate against nonresident aliens.[79] Second, unlike the state laws that the Supreme Court has struck down using a heightened level of scrutiny—laws which limited resident alien's right to work[80] or receive other public benefits[81]—the Wisconsin law only restricted the investment opportunity for nonresident aliens.[82] Therefore, the court reasoned that the Wisconsin law did not conflict with the federal government's immigration policy to admit aliens into the country.[83] The Wisconsin court further justified its use of a lower

76. *Id.*

77. *Id.* at 820-21.

78. *Id.* at 821.

79. Citing Graham v. Richardson, 403 U.S. 365 (1971), the Wisconsin court argued that resident aliens, like citizens, equally bear the burdens of society such as paying taxes and serving in the military. Additionally, resident aliens, like citizens, may be long-standing members of the community and contributors to the welfare of the state where they reside. Therefore, it would be unfair to withhold some of society's benefits from one of these two similarly situated groups when they bear society's burdens equally. Thus, laws that distinguish between the two classes receive heightened scrutiny. *Id.*

80. The Court cited to Traux v. Raich, 239 U.S. 33 (1915) (Court struck down an Arizona law which required most employers to hire 80% qualified electors or native born citizens); Sugarman v. Dougall, 413 U.S. 634 (1973) (Court struck down a New York statute that disqualified aliens from competitive civil service jobs); *In re* Griffith, 413 U.S. 717 (1973) (Court struck down a Connecticut law that excluded aliens from the practice of law); Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 821-22 (Wis. 1976).

81. The Court cited Graham v. Richardson, 403 U.S. 365 (1971), where the Supreme Court struck down an Arizona law that conditioned the receipt of welfare benefits on longtime residency or citzenship. 246 N.W.2d at 821.

82. 246 N.W.2d at 822.

83. The Supreme Court has reasoned that state laws that interfere with the right to work or receive public benefits conflict with the federal government's immigration policy because a state is depriving resident aliens of a privilege that the federal government has conferred by admission into the country. *See* Graham v.

level of scrutiny by falling back on the states' traditional power concerning land use and the history of state regulation of alien land ownership.[84] Suffice it to say that there is a good chance that alien land laws that restrict only nonresident aliens would withstand an equal protection challenge if the Supreme Court were to address the issue.

The Court has also identified two indirect constitutional limitations on the states' power to regulate alien land ownership. The first is the federal government's exclusive power over foreign affairs.[85] The negative implication of the affirmative grant of power over foreign affairs to the federal government is that states may not enact laws that intrude in this area.[86] As discussed earlier,[87] in *Zschernig v. Miller*,[88] the Supreme Court struck down an Oregon statute that prohibited nonresident aliens from inheriting property unless the foreigners' own country granted United States citizens the right to inherit property under their laws. The Court found the statute unconstitutional because it "impair[ed] the effective exercise of the Nation's foreign policy"[89] and thus constituted an unlawful intrusion by the state into the field of foreign affairs.

However, the vast majority of current alien land laws are not likely to be significantly affected by the Court's holding in *Zschernig*. Only four states have reciprocity statutes similar to the one in *Zschernig*.[90] Case law in these states has followed the holding in *Zschernig* and thus limited the effect of these statutes.[91] The remainder of the states' alien land laws do not contain reciprocity provisions or any other provisions that would require the state courts to inquire into the policies of

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Richardson, 403 U.S. 365, 376; Takahashi Fish and Game Comm'n, 334 U.S. 410, 420 (1947). The Wisconsin court argued that federal immigration policy is not implicated when a state law merely limits the scope of the investment opportunities open to nonresident aliens. 246 N.W.2d at 822.

84. 246 N.W.2d at 822-24.

85. *See infra* note 106.

86. Additionally, the Constitution expressly prohibits states from entering into agreements or compacts with foreign countries. U.S. CONST. art. I, § 10, cl. 3.

87. *See supra* notes 39-40 and accompanying text.

88. 389 U.S. 429 (1968).

89. *Id.* at 440.

90. *See* MONT. CODE ANN. § 72-2-214 (1989); NEB. REV. STAT. §§ 4-107 (1987), 30-2312 (1985); N.C. GEN. STAT. § 64-3 (1987); WYO. STAT. § 34-15-101 (Supp. 1989).

91. *See, e.g.*, Gorun v. Fall, 287 F. Supp. 725 (D. Mont. 1968).

foreign governments as was the case with the statute at issue in *Zschernig*.

The second indirect constitutional limitation on the states' power to enact alien land laws that the Court has identified is the Supremacy Clause[92] with respect to United States treaties. Under the Supremacy Clause, valid treaties supersede state law, even in areas that the federal government has previously left to states to regulate.[93] A state statute denying nationals of other countries specific rights granted to them under international treaties would be invalid. For example, in *Havenstein v. Lynham*,[94] a provision of a treaty between the United States and the Swiss confederation was sufficient to override conflicting provisions in a Virginia alien land law that prohibited an intestate disposition to aliens who had no intention of becoming residents of Virginia.[95]

The United States is currently a party to numerous bilateral treaties of Friendship, Commerce and Navigation (FCN).[96] Many of these treaties include provisions that grant land ownership rights to citizens and business entities of the nation that is the treaty partner.[97] Additionally, some FCN treaties extend land ownership rights to certain countries with most-favored-nation (MFN) status.[98] MFN status allows the signatory equivalent rights to those extended in treaties with all other MFN treaty signatories. Because some FCN treaties extend land ownership rights to countries with MFN status, it follows that all other MFN treaty partners enjoy the same land ownership rights. However, FCN treaties do little to restrict

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92. U.S. CONST. art. VI, cl. 2.

93. *See* Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (establishing supremacy of a United States-Great Britain treaty over a Virginia law that expropriated land held by loyalist); Missouri v. Holland, 252 U.S. 416 (1920) (treaty between the United States and Great Britain that protected migratory birds found to supersede state law conflicting with the treaty.).

94. 100 U.S. 483 (1879).

95. *Id. See also* Kolovrat v. Oregon, 366 U.S. 187 (1961); Nielson v. Johnson, 279 U.S. 47 (1929); Sullivan v. Kidd, 254 U.S. 433 (1921); Geofroy v. Riggs, 133 U.S. 258 (1890).

96. *See* Morrison, *supra* note 15, at nn.225-34 (providing an extensive list of FCN treaties).

97. *See, e.g.*, Treaty of Friendship, Commerce and Navigation with Netherlands, March 27, 1956, U.S.-Neth., art. IX, ¶ 1, 8 U.S.T. 2042, 2056 [hereinafter FCN-Netherlands].

98. *See* FCN-Netherlands, *supra* note 97.

the most prohibitive alien land laws. As discussed earlier,[99] the most prohibitive alien land laws are directed at agricultural land. The FCN treaties that grant land ownership rights, specifically reserve the right to limit the extent to which aliens may exploit the land or other natural resources.[100] An example of the FCN treaties' limitation is found in *Lehndorff Geneva Inc. v. Warren*,[101] in which the Wisconsin Supreme Court held that the state's alien land law[102] did not conflict with an FCN treaty with West Germany because the treaty reserved the right to limit the exploitation of land and the plaintiffs intended to use the land for agricultural purposes.[103] Thus, while the Supremacy Clause prohibits the states from applying alien land laws to foreign entities protected by FCN treaties, where the law does not relate to the exploitation of land, it does not interfere with the enforcement of the more restrictive laws relating to the exploitation of land.[104]

B. Federal Government's Power to Regulate Land Transactions and the Potential Pre-emption of State Laws

The federal government also has the power to regulate land transactions. This includes the power to impose alien land laws upon the states. This authority rests on the commerce power,[105] foreign affairs power[106] and, to a limited extent, on the taxing power.[107] Congress has exercised this authority

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99. *See supra* notes 50-53 and accompanying text.

100. *See, e.g.*, FCN-Netherlands, *supra* note 97, art. VII, ¶ 2.

101. 246 N.W.2d 815 (Wis. 1976).

102. Wis. Stat. Ann. § 710.02 (West Supp. 1989) (prohibiting nonresident aliens and foreign corporations from acquiring more than 640 acres of land).

103. *Lehndorff*, 246 N.W. 2d 815, 818-19. Note also that a FCN treaty that conflicts with a state law does not invalidate the law completely; rather, the state law will not apply to the entity protected by the treaty.

104. *See supra* notes 45-58 and accompanying text describing the nature of alien land laws.

105. U.S. CONST. art. I, § 8, cl. 3.

106. The foreign affairs power is a combination of Congress's powers to provide for a common defense, declare war and raise armies, regulate foreign commerce and maritime activities, impose duties, and establish a uniform naturalization law. U.S. CONST. art. I, § 8.

The President is given the power to make treaties and to appoint ambassadors (subject to legislative advice and consent), and to serve as Commander-in-Chief of the armed forces. U.S. CONST. art. II, § 2.

107. U.S. CONST. art. I, § 8, cl. 1.

a number of times as will be briefly discussed below.[108] However, before discussing the specific federal statutes, the question that must be addressed with respect to federal laws that regulate land transactions involving aliens is whether they pre-empt the state laws in the same area. Whether a state law is pre-empted is an issue of congressional intent.[109] Several Supreme Court decisions indicate that Congress will be deemed to have pre-empted a field only where either its intent is unmistakable, or "the nature of the regulated subject matter permits no other conclusion."[110] In determining congressional intent when Congress has not expressly manifested one, the Court has articulated a number of factors to be considered: (1) the pervasiveness of the federal scheme, (2) the need for uniformity, and (3) the danger of conflict between state laws and the administration of the federal program.[111] Additionally, if an area is traditionally left to state control the Court is less likely to find that the state laws have been pre-empted.[112] On the other hand, it has been pointed out that "if the field is one that is traditionally deemed 'national' the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself."[113]

Pursuant to the foreign affairs power, the federal government has enacted two regulations that pertain to alien ownership of land. The first is the Alien Property Custodian Regulations,[114] which was promulgated under authority of the Trading with the Enemy Act (TEA).[115] It provides that the property of enemy aliens shall vest in a federal official in time of de-

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108. *See infra* notes 115-44 and accompanying text.

109. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.4, at 314 (4th ed. 1991).

110. Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

111. *See* Pennsylvania v. Nelson, 350 U.S. 497, 502-10 (1956); Hines v. Davidowitz, 312 U.S. 52, 70 (1941).

112. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[I]n a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the state [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress.").

113. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-27, at 500 (2nd ed. 1988). *See* Hines v. Davidowitz, 312 U.S. 52 (1941) (the enforcement of Pennsylvania's Alien Registration Act was preempted by the federal Alien Registration Act because of the important national interest in regulating aliens and more generally, in governing foreign affairs).

114. 26 C.F.R. § 303.1; 28 C.F.R. § 167; 31 C.F.R §§ 520.101, 520.102 (1992).

115. 50 U.S.C. §§ 1-44 (1988).

clared war. The second is the Foreign Asset Control Regulation,[116] which was also promulgated under the TEA. It declares that all property transactions by aliens of listed nations require prior approval and clearance from the Treasury Department.[117]

It seems fairly clear that the regulations enacted pursuant to the foreign affairs power do not pre-empt alien land laws. First, Congress has not expressly manifested an intent to preempt state legislation.[118] Second, the regulation is not pervasive. It only concerns a minuscule amount of property—the property of aliens of a few select countries[119] and the property of enemy aliens in time of declared war.[120] Lastly, the regulations do not raise questions of uniformity or pose any risk of conflict with state laws.[121]

The Commerce Clause is a second source of power from which Congress has enacted statutes that pertain to alien ownership of land. The Supreme Court has identified three broad areas that the government can regulate based on the Commerce Clause. "First, the use of channels of interstate or foreign commerce . . . second, protection of the instrumentalities of interstate commerce . . . [and] third, those activities affecting commerce."[122] Foreign investment in real property clearly falls within the third category.[123] Under the "affecting commerce"[124] rationale, the Court has upheld federal regulation of a wide range of extremely local *intrastate* activity that

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116. 31 C.F.R. § 500 (1992).

117. *See* Morrison, *supra* note 15, at nn.200-08 and accompanying text for a more detailed discussion of these regulations.

118. Morrison, *supra* note 15, at 655.

119. The only countries currently listed are North Korea, Cambodia, and Vietnam. 31 C.F.R. § 500.201 (1992).

120. This regulation is not currently applicable.

121. *See* Morrison, *supra* note 15, at 653-56 for a detailed discussion about the lack of preemptive effect these federal laws have.

122. Perez v. United States, 402 U.S. 146, 150 (1970).

123. *See infra* notes 196-215 and accompanying text (discussing the issue of whether foreign investment in real property constitutes commerce).

124. The Supreme Court first articulated the "affecting commerce" rationale in NLRB v. Jones & Laughlin Steel Corp, 301 U.S. 1 (1937). The Court upheld the National Labor Relations Act and the labor board's order against an employer's unfair interference with union activities, by construing the commerce clause to permit federal regulation of anything having a substantial effect upon interstate commerce regardless of its source. *Cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Court held that the commerce clause power did not permit the Congress to regulate labor conditions).

has traditionally been governed by state law.[125]

Federal regulation of foreign real estate investment has been traditionally limited to land holdings that are already under federal control. These laws regulated foreign ownership of geothermal steam resources,[126] homesteads[127] and grazing land.[128] Since 1976, however, the federal government has enacted two statutes pursuant to the Commerce Clause, and one pursuant to the taxing power,[129] that regulate foreign investment in real estate not under federal control.

The AFIDA[130] was enacted pursuant to the Commerce Clause power. The law requires foreign persons who acquire or transfer any interest in United States agricultural land to submit a report to the Secretary of Agriculture.[131] A copy of the report is sent to the state where the land is located. The legislative history of AFIDA articulates a need for further information and data collection regarding the extent and effects of foreign ownership of United States farmland.[132] It is

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125. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (Court upheld federal quotas on amount of grain that could be produced, even when quota applied to grain consumed on the farm where it was raised, based on the "cumulative effect" of many farmers growing wheat for home consumption); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964) (in both cases the Court upheld Title II of the 1964 Civil Rights Act which bans discrimination in places of public accommodation, thus regulating the activities of local establishments); Perez v. United States, 402 U.S. 146 (1971) (Court upheld a federal anti-loan-sharking provision of the Consumer Credit Protection Act as applied to an individual whose loan-sharking activities occurred entirely within one state).

126. 30 U.S.C. § 1015 (1988).

127. 43 U.S.C. § 161 (1988) *repealed by* Pub. L. 94-579, title VII, § 702, 90 Stat. 2787.

128. 43 U.S.C. § 315(b) (1988).

129. U.S. CONST. art. I, § 8, cl. 1.

130. 7 U.S.C. §§ 3501-3508 (1988). *See* David A. Richards, *Reporting and Disclosure Requirements for the Foreign Investor in U.S. Real Estate*, 25 REAL PROP. & TR. J. 217, 220 (1990) (provides a detailed description of the statute, its history, and its compliance requirements).

131. The report must include the legal name and address of the person holding the interest, the country of his or her citizenship, the nature of the legal entity (if not a person or a government), the country in which the entity is organized, and the entity's principal place of business. The report must also include the type of interest held, the legal description of and consideration paid for the land, the purposes or intended purposes for its use, information about the transferee if it is the foreign party, and any other information the Secretary of Agriculture may require. 7 U.S.C. § 3501(a) (1988).

132. H.R. REP. NO. 1570, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2914:

not intended to erect foreign investment barriers and is consistent with the longstanding government policy of preserving the free flow of transnational investment capital.[133]

The International Investment and Trade in Services Survey Act of 1976 (IITSSA)[134] was passed pursuant to the commerce power and is administered by the Commerce Department. It requires the filing of reports with respect to the direct or indirect acquisition by a foreign person of a voting interest of ten percent or more in a United States business enterprise, including real estate.[135] Unlike AFIDA reports, only aggregate data is available to the states and the public. Raw data collected pursuant to IITSSA is not available and is closely guarded.[136] Like AFIDA, IITSSA is not intended to prohibit or discourage foreign investment; the federal intent is merely to make sure that the information is available for study so that any impact foreign investment may have can be determined.[137]

"[T]he lack of any solid, reliable data on foreign investment in U.S. agricultural land makes it difficult, if not impossible, to determine if such investment does, in fact, pose a threat to the United States as a whole, or to the family farms and rural communities in this country. Clearly, such information [is] needed before a reasonable, responsible analysis of the situation can be made."

Id. at 2920.

Other members of Congress wanted to enact stricter federal regulations with respect to foreign investment in agricultural land. They cited a number of potential threats, including: the danger to local economies from absentee-owned farms, danger to soil conservation programs, foreign influence on production and marketing of specialized crops, and the potential for higher food prices. *See* H.R. REP. NO. 1570, 95th Cong., 2d Sess. 7-8, *reprinted in* 1978 U.S.C.C.A.N. 2914, 2917.

133. *See* Julius L. Katz, *Foreign Direct Investment in the United States - Advantages and Barriers*, 11 CASE W. RES. J. INT'L L. 473, 481-82 (1979).

134. 22 U.S.C. §§ 3101-3108 (1988) (amended 1990). *See* Richards, *supra* note 130, at 223 (providing a detailed description of the statute, its history, and its compliance requirements).

135. IITSSA did not apply to real estate until after AFIDA was passed and the reporting forms were first published in June 1979. *See* Richards, *supra* note 130, at 223.

136. 22 U.S.C. § 3104(c). It has been suggested that "this may reflect congressional recognition that agricultural assets profoundly implicate national sovereignty concerns and [therefore] warrant closer [state] monitoring." *See* Cheryl Tate, Note, *The Constitutionality of State Attempts to Regulate Foreign Investment*, 99 YALE L.J. 2023, 2027 (1990).

137. *See* 22 U.S.C. § 3101(c) ("Nothing in this act is intended to restrain or deter foreign investment in the United States . . . .").

The most recent federal regulation pertaining to foreign investment in United States real estate is the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA).[138] FIRPTA eliminates a long-standing tax advantage for foreign investors in United States real estate. Before its enactment, gains from the disposition of real property by nonresident aliens or foreign corporations had to be "effectively connected" to a United States trade or business to be subject to United States taxation.[139] Under this requirement, many real estate transactions conducted from abroad escaped taxation.[140] FIRPTA places all income from the disposition of United States real property interests[141] under the taxing power of the federal government. FIRPTA essentially treats nonresident aliens or foreign corporations as if they were engaged in trade or business within the United States, thus all the profit from United States land sales are considered a taxable source of income within the United States.

FIRPTA, like AFIDA and IITSSA, is not intended to discourage or restrict foreign investors. Its purpose is to put foreigners on the same footing as United States citizens and to generate revenue for the federal government.[142]

It does not appear that AFIDA, IITSSA, or FIRPTA, either individually or as a group, pre-empt the state's alien land laws. First, Congress did not manifestly express an intention to preempt existing state laws in the area. Second, it does not appear that Congress regulated so pervasively as to conclude that it left no room for state action. AFIDA and IITSSA act only as an information gathering mechanisms and not as actual regulatory restrictions. FIRPTA is a revenue generating statute that is only tangentially related to the regulation of alien landholding. Third, the three statutes do not evince a congressional intent that the area requires uniform regulation, though the

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138. 26 U.S.C. §§ 861(a)(5), 897, 6039C, 6652(f) (1988).

139. 26 U.S.C. §§ 871(a)(2), 882(a)(1), 864(c) (1988); *See* Patricia A. Matnias, Note, *Foreign Investment in United States Real Estate: Congress Acts to Reduce Incentives*, 7 INT'L TRADE L.J. 150, 151 (1981-82).

140. *Id.* at 151-52.

141. U.S. real property interest includes any interest in mines, wells, or other natural resources located in the United States or the Virgin Islands. 26 U.S.C. § 897(c)(1)(A)(i) (1988).

142. *See* William D. Metzger, *Foreign Investors Real Property Tax Act: Historical Perspective and Critical Evaluation*, 5 W. NEW ENG. L. REV. 161, 163 (1982).

question of uniform regulation has been vigorously debated.[143] Fourth, it does not appear that the state laws which generally impose prohibitions, restrictions or reporting requirements on alien ownership of real property pose a danger of conflicting with the information gathering or tax collecting required by the federal statutes. Finally, because the regulation of land ownership is an area traditionally controlled by states,[144] the Court may require an even clearer indication that the Congress intended to pre-empt the field.

IV. THE DORMANT COMMERCE CLAUSE

A. The Constitutional Framework Established to Analyze State Statutes that Burden Interstate Commerce

The Constitution specifically grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ."[145] Although the Commerce Clause is an affirmative grant of power to Congress, courts interpret its dormant powers or "negative implications"[146] to strike down state laws that interfere with the free flow of interstate or foreign commerce even when Congress has not acted. If a court invalidates a state law on the grounds that it unconstitutionally interferes with the free flow of commerce, Congress is free to pass legislation that gives the state the power to regulate in the way the court found unconstitutional. Congress is not overturning the court, it is merely stating its position as to how it chooses to regulate.[147] The Supreme Court recognized early on, however, that States have concurrent power to regulate

143. *See* Fretchter, *supra* note 10, at 178 (arguing that uniform federal legislation governing alien land ownership would be injurious to state sovereignty, cumbersome and impractical to implement, and unable to address the legitimate and diverse concerns of the several states). *See* Starrels, *supra* note 8, at 177-78 (arguing that the states should adopt uniform federal regulations concerning alien land ownership because the current system is "ineffective and can operate as an unnecessary disincentive to investment activity that in many situations could be beneficial").

144. *See supra* notes 59-66 and accompanying text.

145. U.S. CONST. art. I, § 8, cl. 3.

146. *See* TRIBE, *supra* note 113, § 6-2, at 403.

147. *See* Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) (Congress may "redefine the distribution of power over interstate commerce . . . [by] permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.").

interstate commerce provided that national uniformity is not required and the law does not conflict with federal legislation.[148] In *Cooley v. Board of Wardens*,[149] the Supreme Court upheld a Pennsylvania statute that required ships in interstate or foreign commerce to use local pilots when navigating in state waters. The Court distinguished between those areas of commerce that "are in their nature national, or admit only of one uniform system, or plan of regulation, [and] may justly be said to be of such a nature as to require exclusive legislation by Congress"[150] and those areas where "local necessities"[151] demand diverse regulations. Since *Cooley*, the Court has attempted to balance the local needs of the states and the overriding national requirement of freedom from interference in interstate and foreign commerce.

When analyzing state laws that may unlawfully burden interstate commerce, the Supreme Court has distinguished between "outright protectionism and more indirect burdens on the free flow of trade."[152] Protectionist legislation that facially discriminates against out-of-staters is subject to a "virtually per se rule of invalidity."[153] Legislation that evenhandedly impacts on both those in-state and out-of-state may survive constitutional scrutiny.[154] However, statutes that are facially neutral, but in their practical applications have a discriminatory effect, will trigger a heightened scrutiny.[155] In *Pike v. Bruce Church, Inc.*,[156] the Court articulated the balancing test to be used when legislation is evenhanded:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local

148. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
149. *Id.*
150. *Id.* at 319.
151. *Id.*
152. Lewis v. BT Investment Managers, 447 U.S. 27, 36 (1980).
153. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).
154. *See* CTS Corp. v. Dynamics Corp of America, 481 U.S. 69 (1987); Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).
155. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). *See infra* note 157 (discussing the facts in *Hunt*).
156. 397 U.S. 137 (1970).

> purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[157]

Where state legislation is facially discriminatory, the Supreme Court has set forth a per se rule of invalidity. In *Philadelphia v. New Jersey*,[158] the Court struck down a New Jersey law that prohibited the importing of solid or liquid waste into the state. The opinion declined to decide whether the main purpose of the law was environmental, as New Jersey claimed, or economic protectionism, as the plaintiffs claimed, holding that the purpose was not constitutionally relevant. Justice Stewart, writing for the 7-2 majority stated that:

> [W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, [the statute] violates this principle of nondiscrimination.[159]

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157. *Id.* at 142. In *Pike*, the Court struck down an Arizona law requiring local fruit growers to pack their high-quality fruit locally in the interest of promoting the reputation of Arizona products. Although the state action in *Pike* advanced an admittedly legitimate local interest, it imposed a clearly excessive burden on commerce by requiring business operations to be performed in Arizona that could more efficiently be performed out of state.

In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), the Court struck down a facially neutral North Carolina statute that had a discriminatory effect and economic protectionist motive. The statute raised the cost of marketing Washington apples and stripped away Washington growers' competitive advantage while leaving local growers unaffected. The Court held that when a discriminatory effect is found, the burden of proof in the *Pike* balancing test falls on the state, which must "justify [the statute] both in terms of the local benefits . . . and the unavailability of nondiscriminatory alternatives." *Id.* at 353.

158. 437 U.S. 617 (1978).

159. *Id.* at 626-27.

In Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980), the Court may have backed off a little from the per se rule. Yet the Court did strike down a Florida law that prevented an out-of-state bank or bank holding company from owning an in-state investment advisory firm. While the strong language the Court used in condemning the law indicated that the Justices could have easily found the law per se invalid, they instead conducted a balancing analysis. The Court found that the state's purported objectives may have been legitimate, but they did not justify the "heavily disproportionate burden" the statute placed on out-of-state banks. *Id.* at 43. Additionally, the Court thought there were nondiscriminatory

The Supreme Court has identified one exception to the per se rule for facial discrimination. If the state can show that the facially discriminatory barrier to out-of-state goods is motivated by bona fide health or safety concerns that cannot be adequately addressed by a nondiscriminatory alternative, the Court will uphold the law based on the state's traditional police powers.[160]

Recently the Supreme Court put into question the continuing viability of the *Pike* balancing test for nondiscriminatory laws though reaffirmed the view that discriminatory laws are the primary focus of dormant commerce clause scrutiny. In *CTS Corp. v. Dynamics Corp. of America*,[161] the Court overturned a Seventh Circuit Court of Appeals decision and upheld an Indiana anti-takeover law against challenges based on preemption[162] and the dormant commerce clause. The Indiana law was neutral on its face, but in its practical effect would apply most often to out-of-state entities.[163] The important aspect of the Court's opinion in *CTS*, for the purpose of this Note's dormant commerce clause discussion, is the methodology the Court uses to arrive at its decision. First, the Court stated that "[t]he principle objects of dormant commerce clause

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alternatives. *Id.*

160. *See* Maine v. Taylor, 477 U.S. 131 (1986) (Maine imposed a total ban on the importation of out-of-state bait fish on the grounds that the out-of-state fish contained parasites that threatened their own fish, which were not infested. The Court upheld the ban because a nondiscriminatory alternative did not exist.).

161. 481 U.S. 69 (1987).

162. The lower courts held that the Indiana anti-takeover law was preempted by the Williams Act, which governs certain aspects of hostile corporate stock tender offers. *Id.* at 84.

163. The Court rejected Dynamics argument that the statute is discriminatory because it would apply most often to out-of-state entities. The Court stated: "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 88 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978); Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-72 (1981)). Furthermore, they rejected the Court of Appeal's reasoning that even if the law was not discriminatory it violated the dormant commerce clause because of its potential to hinder tender offers, thereby burdening interstate commerce. The Supreme Court reasoned that "the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law . . . . By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce." *Id.* at 89-90.

scrutiny are statutes that discriminate against interstate commerce."[164] After concluding that the statute regulated evenhandedly, the Court stated that statutes that may subject activities to inconsistent regulations in different states are also a main focus of dormant commerce clause limitations.[165] The Court found that "the Indiana Act poses no such problem."[166] The Court did not follow-up the above analysis with the *Pike* balancing test as one might expect, and therefore, there is some question as to the tests continuing viability. Thus, if a statute is found to be either facially discriminatory, or that it will subject an activity to inconsistent regulations, then the law is invalid and the court should not attempt to balance the state and federal interests.[167] If a statute regulates evenhandedly, it is currently in question whether the Court will balance the state and federal interests.

B. The Dormant Commerce Clause Applied to Foreign Commerce

This Note argues that state laws restricting foreigners from owning real property violate the dormant commerce clause. In the past, there has been some debate about whether state laws that interfere with *foreign* commerce are subject to the same dormant commerce clause analysis as state laws that interfere with *interstate* commerce.[168] However, when one considers the difference in the underlying purpose between the two clauses it becomes clear why the test is not identical. The

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164. *CTS*, 481 U.S. at 87 (citing Philadelphia v. New Jersey, 437 U.S. 617 (1975); Lewis v. BT Investment Managers, 447 U.S. 27 (1980)).

165. *Id.* at 88. (citing Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986); Edgar v. Mite Corp., 457 U.S. 624 (1982)).

166. *Id.* at 89.

167. *See* Campeau Corp. v. Federated Department Stores, 679 F. Supp. 735, 738 (S.D. Ohio 1988) (Court interprets the *CTS* Court's dormant commerce clause methodology to be, "[o]nly if the state law is not invalid according to the above criteria [nondiscriminatory and no risk of inconsistent regulations] must the court consider if the burden on interstate commerce outweighs the putative local benefits of the regulations.").

Justice Scalia, in a concurring opinion, stated that the *only* things that the Court should consider are: (1) if the law "discriminates against interstate commerce" and (2) "if it creates an impermissible risk of inconsistent regulation by different States." And that the *Pike* balancing test should be undertaken rarely if at all. *CTS*, 481 U.S. at 95 (Scalia, J., concurring).

168. *See* Huizinga, *supra* note 27, at 269 n.87.

interstate Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that plagued relations among the colonies and later among the states under the Articles of Confederation."[169] In contrast, the foreign Commerce Clause[170] appears to have been included in the constitution because of the framers' deep concern about the need for a uniform national policy with respect to foreign trade and foreign relations.[171]

There are far fewer dormant commerce clause cases concerning foreign commerce, thus, the Supreme Court has not had the same opportunity to develop as structured an analysis to confront them. *Japan Line, Ltd. v. County of Los Angeles*[172] is the leading case that articulates the Court's reasons why the two clauses do not receive the same scrutiny and why interferences in foreign commerce should receive greater scrutiny.[173]

The Court, in *Japan Line*, struck down a California ad valorem property tax, as applied to cargo containers used exclusively in foreign commerce, as violative of the dormant commerce clause. First, the Court expressly rejected the argument that the "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved."[174] Justice Blackmun writing for the 8 to 1 majority stated that, "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry

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169. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

170. The term "foreign Commerce Clause" refers to the part of the Commerce Clause that states: "Congress shall have the power to . . . regulate commerce with foreign nations . . . ." U.S. CONST. art. I, § 8, cl. 3.

171. It is difficult to say with certainty what the Framers' intention was with respect to the foreign commerce clause because there was little or no disagreement about its inclusion in the Constitution. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 444-45 (1941); E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION (1898).

172. 441 U.S. 434 (1979).

173. There are other cases that involve foreign commerce where the Court has suggested that the regulation of foreign commerce is a function entrusted solely to the federal government. *See* Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48, 56-57 (1932) ("It is an essential attribute of the power [to regulate foreign commerce] that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action."); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875) (the imposition of burdensome "conditions on those engaged in active commerce with foreign nations must of necessity be national in . . . character").

174. 441 U.S. at 446.

is required."[175] The Court then turned to a four part test[176] used to determine whether a state tax on interstate commerce is constitutional. The Court held that a state tax on the instrumentalities of foreign commerce must be scrutinized according to two additional considerations—"the enhanced risk of multiple taxation"[177] and the possibility that a "state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."[178] The Court gives three reasons why greater scrutiny is necessary when taxing instrumentalities of foreign commerce. First, "[f]oreign commerce is preeminently a matter of national concern";[179] second, "there is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater"[180] than the scope of the interstate commerce power; and third, it was "the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[181] The Court concluded that the ad valorem tax would risk retaliation against the entire nation and "prevent[] this Nation from speaking with one voice in regulating foreign commerce."[182]

The dormant commerce clause test for state *taxation*[183] that may unconstitutionally interfere with foreign commerce is somewhat different than the dormant commerce clause test for state *regulations* that may interfere with foreign commerce. Yet the same principles that underlie the heightened scrutiny for taxation of foreign commerce, discussed in *Japan Line*, have been applied to state regulation of foreign commerce. For example, in *South-Central Timber Development, Inc. v.*

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175. *Id.*

176. A state tax does not violate the dormant commerce clause provided it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 444-45 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

177. *Id.* at 446.

178. *Id.* at 448.

179. *Id.*

180. *Id.*

181. *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

182. *Japan Line* 434 U.S. at 450-51.

183. *See supra* note 176 and accompanying text.

Wunnicke,[184] the Court invalidated an Alaska law that required buyers of timber from state-owned land to partially process the timber inside Alaska before exporting it.[185] After rejecting the state's argument that the law was valid under the "market participant"[186] exception, Justice White, writing for the plurality, stated:

> Because of the protectionist nature of . . . [the law] and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual per se invalidity of laws that "bloc[k] the flow of interstate commerce at a State's borders"[187] . . . We are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction. It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that "the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments."[188]

Thus, in conformity with *Japan Line*, the court in *Wunnicke* applied a heightened scrutiny to a state regulation that interfered with foreign commerce.

It appears that the courts will apply the per se rule of invalidity for facially discriminatory laws, which was laid down by the Supreme Court in *Philadelphia v. New Jersey*,[189] an *interstate* commerce case, to laws that discriminate against *foreign* commerce. In *Campeau Corp. v. Federated Department*

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184. 467 U.S. 82 (1984).

185. This case concerns foreign commerce since there is virtually no interstate market in Alaska timber because of the high shipping costs associated with shipment between American ports. Consequently, over 90% of Alaska timber is exported to Japan. *Wunnicke*, 467 U.S. at 86 n.4.

186. *See* Hughes v. Alexandria Scrap Corp, 426 U.S. 794, 810 (1976); Reeves Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (When the state is acting as a buyer or seller, in other words, as a "market participant," the dormant commerce clause places no limitation on its activities.).

187. *Wunnicke*, 467 U.S. at 100 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)) (citations omitted).

188. *Id.* at 100 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) and citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)) (citations omitted).

189. 437 U.S. 617 (1978).

Stores,[190] a district court struck down an Ohio antitakeover statute. This case is particularly relevant to alien land laws because it concerns foreign ownership and investment in assets located in the United States. The law severely restricted foreign corporations from acquiring control of businesses with substantial interests in Ohio. The implicit reasoning of the court was that if states are prohibited from facially discriminating against interstate commerce, and *Japan Line* stands for the proposition that foreign commerce receives even greater scrutiny then interstate commerce, then facial discrimination against foreign commerce is certainly also invalid.[191] The court went on to find that the law would also increase the risk that a foreign corporation would be subject to inconsistent regulations from different states.

Thus, the Supreme Court's approach to state regulations that interfere with foreign commerce would likely be to incorporate the heightened scrutiny discussed in *Japan Line*[192] into the framework established to analyze state laws that interfere with interstate commerce.[193] In other words, facially neutral laws will be analyzed under the *Pike* balancing test,[194] and the federal interest in "speaking with one voice" with re-

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190. 679 F. Supp. 735 (S.D. Ohio 1988).

191. *See Campeau*, 679 F. Supp. at 738. ("The Commerce Clause not only prohibits states from discriminating against trade with other states within the United States, it prohibits states from discriminating against trade with foreign countries."). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 236 (1972) (Henkin noted that the Court would probably apply the same dormant commerce clause standard developed for interstate commerce to foreign commerce).

In the past the Supreme Court has invalidated state laws that discriminate against foreign commerce, though the cases preceded the modern dormant commerce clause analysis. For example, in Hale v. Bimco Trading Co., 306 U.S. 375 (1939), the Supreme Court ruled unconstitutional a Florida statute imposing large inspection fees on cement imported from foreign countries while similar state products were not subject to such charges. The state argued that the inspection of foreign cement was necessary for the public safety. The court rejected this contention and stated that "discrimination against foreign commerce by the onerous extraction of an inspection fee," admittedly designed to curb foreign competition, was an unconstitutional assumption of national power by the state. Furthermore, the Court stated that it would not be "easy to imagine a statute more clearly designed to circumvent what the Commerce Clause forbids." *Id.* at 380-81.

192. *See supra* notes 172-83 and accompanying text.

193. This assumes that the Supreme Court would agree with the district court's analysis in *Campeau*. This is arguably a safe assumption considering the Court's decision in Hale v. Bimco, 306 U.S. 75 (1939), discussed *supra* note 191, and the cases cited in *supra* note 173.

194. *See supra* notes 157-58 and accompanying text.

gard to foreign commerce will be factored into the equation, thus making it more difficult for a state's interest to outweigh the national interest. This depends on whether *CTS* marked the end of the use of the balancing tests. When the law is facially discriminatory, as was the case in *Campeau*,[195] the court will apply the per se rule of invalidity without actually reaching the question of whether the country needs to "speak with one voice."

C. The Dormant Commerce Clause Applied to Alien Land Laws

1. Threshold Question: Is Foreign Investment in Real Property Foreign Commerce?

A threshold question in determining whether state laws that restrict foreign investment in real property located in the United States violate the dormant commerce clause is whether foreign investment in land constitutes foreign commerce, or at least has a significant effect on foreign commerce. Some have argued that land ownership is a matter of purely local concern because real estate is fixed within the several states and thus outside the definition of commerce.[196] However, commerce has been broadly defined to "comprehend every species of commercial intercourse between the United States and foreign nations"[197] that is at some stage extraterritorial.[198] The extraterritorial aspect of foreign investment in United States real property exists because foreign investment almost inevitably includes the international flow of currency into this country, and international banking operations to exchange foreign currencies and transmit funds to local property sellers. In addition, United States real estate brokers advertise local lands for sale in foreign newspapers and engage the service of foreign real estate brokers.[199] Thus, state regulations that restrict foreign real estate investment do have a significant effect on transactions that are extraterritorial in nature.

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195. *See supra* notes 190-91 and accompanying text.
196. *See* Frechter, *supra* note 10, at 161-65.
197. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824).
198. Veazie v. Moor, 55 U.S. 568, 573 (1852).
199. *See* Huizinga, *supra* note 27, at 263.

However, it has been argued that the extraterritorial aspect of foreign investment in United States real property is merely incidental to the transaction. Furthermore, it is argued that "[s]uch incidents alone cannot give birth to [foreign commerce or] a transaction that 'affects' foreign commerce when the transaction would otherwise be beyond the purview of the Commerce Clause."[200] This argument ignores the broad definition the courts have consistently given to interstate and foreign commerce,[201] and the variety of local activities that Congress has regulated under the Commerce power, including real property transactions.[202] Most importantly, it ignores a line of decisions that have held state laws are properly analyzed under the dormant commerce clause if Congress has concurrently regulated that area. Such is the case with respect to foreign investment in United States real property.

When there are concurrent federal and state regulations, two Supreme Court cases make clear that the state regulations are subject to dormant commerce clause scrutiny. In *Philadelphia v. New Jersey*,[203] the Supreme Court addressed the lower court's holding that there are two definitions of commerce for constitutional purposes—"'a very sweeping concept' of commerce,"[204] when the federal government bases its regulatory power on it, and a "much more confined . . . reach" when relied on by the Court "to strike down or restrict state legislation."[205] The Supreme Court completely rejected this notion of a dual definition and held that if Congress has the power to regulate an activity pursuant to its commerce power, then "[s]tates are not free from constitutional scrutiny when they restrict [that activity]."[206]

The Court reaffirmed its reasoning in a case where it faced a slightly different version of this argument. In *Lewis v. BT Investment Managers Inc.*,[207] the appellant, and the amici supporting its position, argued that the statute, which restrict-

200. *See* Frechter, *supra* note 10, at 164.
201. *See supra* notes 197-198 and accompanying text.
202. *See supra* note 125 and accompanying text.
203. 437 U.S. 617 (1978).
204. *Id.* at 621 (quoting Philadelphia v. New Jersey, 348 A.2d 505, 514 (N.J. 1978)).
205. *Id.*
206. *Id.* at 622-23.
207. 447 U.S. 27 (1980). *See supra* note 159 (discussing the facts of *Lewis*).

ed ownership of investment advisory businesses, "affects only matters of local character that have insufficient interstate attributes to bring federal constitutional limitations into play."[208] The Court agreed that bank and financial activities are of "profound local concern"[209] and historically have been regulated by the states. However, the Court reasoned that banking and finance also have important interstate attributes that have justified extensive federal regulation in this area. Citing *Philadelphia v. New Jersey*,[210] the Court concluded that "the same interstate attributes that establish Congress' power to regulate commerce also support constitutional limitations on the powers of the States."[211]

The conclusion one can draw from these decisions is that the Court will defer to congressional determinations about what constitutes commerce or what has a significant impact on commerce when deciding if the dormant commerce clause places a limit on state laws.[212]

As discussed earlier, pursuant to its commerce power, Congress has enacted two statutes that regulate foreign investment in United States real estate: AFIDA[213] and IITSSA[214]. Thus, because Congress has decided to regulate the ownership of land by foreigners,[215] there can be little doubt that the dormant commerce clause is a potential limitation on state laws that restrict foreign ownership of real property.

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208. *Id.* at 37.

209. *Id.* at 38.

210. 437 U.S. 617 (1978).

211. 447 U.S. at 39.

212. Since the Supreme Court's decision in Katzenbach v. McClung, 379 U.S. 294 (1964), it has generally deferred to congressional decisions provided that there is any rational basis upon which Congress could have found some relation between its regulation and interstate commerce.

213. 7 U.S.C. §§ 3501-3508 (1988). *See supra* notes 130-33 and accompanying text.

214. 22 U.S.C. §§ 3101-3108 (1988) (amended 1990). *See supra* notes 134-37 and accompanying text.

215. While AFIDA and IITSSA do not regulate ownership in the sense that they do not specify who can or cannot own land, they do impose conditions on real property transactions that lead to ownership, thus indirectly regulating ownership.

2. Application of the Dormant Commerce Clause Test to Alien Land Laws

State laws that restrict or prohibit foreign ownership of real property in the United States are per se invalid under the dormant commerce clause test described in this Note. The laws are facially discriminatory,[216] and in some states their main aim is economic protectionism.[217] Based on the Supreme Court's application of the interstate dormant commerce clause test as applied to foreign commerce in *Wunnicke*,[218] and the per se rule of invalidity applied to facial discrimination against foreign commerce in *Campeau*,[219] the facially discriminatory character of alien land laws makes them per se invalid. The fact that some laws have protectionist motives only adds strength to this argument.

It has been argued that the country need not "speak with one voice" with respect to alien ownership of United States real property.[220] Even if one accepts this position, under the dormant commerce clause test as applied to state interference with foreign commerce, the question about the "need to speak with one voice" is never reached. Once it is determined that the law is facially discriminatory, it violates the per se rule, thereby eliminating the need for further inquiry.

It has also been suggested that alien land laws do not violate the dormant commerce clause because the federal government seems to have implicitly recognized the state's power to limit foreign ownership of real property in several Treaties of Friendship.[221] For example, a United States treaty with Netherlands grants "rights in real property permitted by the applicable laws of the States . . . ."[222] Thus one could argue

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216. *See supra* notes 45-58 and accompanying text (describing the nature of the current laws).

217. *See* Fisch, *supra* note 15, at 413 (noting that one of the main reasons Missouri enacted its current alien land laws was to eliminate foreign competition for local farmland).

218. See supra notes 184-88 and accompanying text.

219. *See supra* notes 190-91 and accompanying text.

220. *See* Frechter, *supra* note 10, at 178 (arguing that uniform federal legislation governing alien land ownership would be injurious to state sovereignty, cumbersome and impractical to implement, and unable to address the legitimate and diverse concerns of the several states).

221. *See* Morrison, *supra* note 15, at 652.

222. *See* FCN-Netherlands, *supra* note 97, art. IX, para. 1(b), 8 U.S.T. at 2056. A detailed discussion about treaty provisions relating to real property ownership is

that alien land laws are removed from dormant commerce clause scrutiny because Congress has not been silent about the regulation of foreign commerce in this area and has approved of the state's power to regulate foreign ownership of land.

The Supreme Court, however, has not allowed the states to escape dormant commerce clause scrutiny so easily. In *Wunnicke*,[223] the Court discussed the only two ways that state regulations can escape the reach of the dormant commerce clause. The first is the "market participant" exception,[224] which does not apply to alien land laws unless state owned land is involved. The second is if Congress has expressly stated its position and its intent to remove the state law "from the reach of the dormant commerce clause [is] unmistakably clear . . . ."[225]

Under the "express statement" requirement, the Court has struck down numerous state statutes that regulated areas where congressional legislation demonstrated Congress' deference to state laws. For example, in *Sporhase v. Nebraska*,[226] the Court struck down a state law that imposed burdens on interstate commerce in ground water. The Court rejected the state's argument that Congress had authorized the interfer-

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provided in Morrison, *supra* note 15, at 656-63; Fisch, *supra* note 15, at 421-23.

223. 467 U.S. 82 (1984).

224. *See supra* note 186 and accompanying text.

225. 467 U.S. at 91. The court in *Wunnicke* explained the underlying reason for the "express statement" requirement:

> [W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state . . . ." On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce . . . . The need for affirmative approval is heightened by the fact that Alaska's policy has substantial ramifications beyond the Nation's borders. The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.

Id. at 92 & n.7 (quoting South Carolina State Hwy. Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1958)).

226. 458 U.S. 941 (1982).

ence, despite thirty-seven federal statutes and a number of interstate agreements that demonstrated Congress' deference to state water laws. The Court noted that in cases where congressional consent was found, there was an "express statement" of an intent to insulate the state law from dormant commerce clause attacks.[227]

Similarly, in *New England Power Co. v. New Hampshire*,[228] the Court rejected the state's argument that its restriction on the flow of privately owned and produced electricity was authorized by the Federal Power Act which states: "[the act] shall not . . . deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."[229] The Court stated that there was nothing in the legislative history of the statute "evincing a Congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause.'"[230]

Finally, in *Wunnicke*, the Court rejected Alaska's claim that its regulation of foreign commerce[231] was exempt from dormant commerce clause scrutiny because of a parallel federal statute with similar goals. The Court stated that "[t]he fact that the state policy in this case appears to be consistent with federal policy . . . is an insufficient indicium of congressional intent."[232]

Based on the "express statement" requirement, it can hardly be said that a short statement in a Treaty of Friendship acknowledging the fact that state restrictions on landholding exist, is an express statement "evincing a congressional intent 'to alter the limits of State power otherwise imposed by the Commerce Clause.'"[233] Furthermore, unlike the Alaska statute in *Wunnicke* where the state regulation was consistent with federal policy, restrictions on foreign investments, such as alien land laws, conflict with the federal policy of maintaining a relatively unrestricted flow of foreign capital into the United

227. *Id.* at 960.
228. 455 U.S. 331 (1982).
229. 16 U.S.C. § 824(b)(1) (1988).
230. 455 U.S. at 341 (quoting United States v. Public Utilities Comm'n of California, 245 U.S. 295, 304 (1953)).
231. *See supra* notes 184-88 and accompanying text.
232. *Wunnicke*, 467 U.S. at 92.
233. *New England Power Co.*, 455 U.S. at 341.

States.[234]

The treaty provision should be considered an acknowledgment of the traditional role states have played in regulating land ownership but this is not necessarily an approval of the role or the laws. Nor is it an "express statement" of congressional intention to limit its power in any manner, including the application of the dormant commerce clause to alien land laws if they are challenged on that basis.

Another potential defense to a dormant commerce clause challenge to alien land laws is that the laws fit into the health and safety exception the Court articulated most recently in *Maine v. Taylor*.[235] The states could argue that alien land laws are a proper exercise of the state's police power to protect the health and safety of their citizens. They could first argue that absentee ownership of land by nonresident aliens can be potentially detrimental to the community where the land is located because they will not contribute economically or in a civic manner to the community.[236]

In response to this argument one could argue, first, that there is no guarantee that United States citizens or resident aliens will live in the community where the land is owned and thus would also not contribute in any way to the community. Second, both residents and nonresident would be required to pay the same property taxes which is presumably the primary revenue generated by land ownership. Third, no one is obligated to engage in civic minded activity and thus nonresident aliens should not be singled out for this reason. Fourth, while the nonresident alien would not work or reside in the community, there is no reason to believe that the land would not be leased to a resident that would contribute to the community.

The second argument that could be advanced by states is that nonresident aliens' ownership of agricultural land could jeopardize the state's or nation's food supply because as non-

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234. *See* Katz, *supra* note 133, at 481-82. *See also supra* notes 130-44 and accompanying text (federal statutes in this area also indicate an open policy toward foreign investment in real property).

235. 477 U.S. 131 (1986). *See supra* note 160 and accompanying text for a discussion of this case.

236. *See* Lehndorff Geneva v. Warren, 246 N.W.2d 815, 825 (Wis. 1974) (Wisconsin justified its alien land law on this basis when defending against an equal protection challenge). *See supra* notes 73-84 and accompanying text for a discussion of this case.

citizens and nonresidents they are more likely to make production decisions based solely on profit maximization without considering the state's or national interests.[237] Additionally, if land is purchased for speculative reasons, it is possible that the land may not be farmed at all.

In response it could be argued that there is little doubt that profit maximization is the primary if not sole concern of domestic farmers. In fact, corporations dominate many areas of the agricultural industry.[238] The boards of these corporations have a duty to their shareholders to maximize profits. With respect to land that is left fallow, it is just as likely that a domestic speculator would decide not to farm the land. Furthermore, the federal government pays out millions of dollars each year in farm subsidies to induce farmers not to grow certain crops. There seems to be little harm in a land owner voluntarily not farming his land. If states are truly concerned about the possibility that nonresident alien will not farm the land, they could tax land that is not in production at a higher rate than land that is farmed, thereby creating a nondiscriminatory alternative that would provide an incentive to farm the land and address the state's concern.

A third argument that states could advance is that foreign land speculators pay such high prices for the land that local farmers cannot compete with them. The response to this argument is simply that it is not a health or safety concern. It is a state discriminating against competition by foreign investors to the advantage of local investors. This form of economic protectionism has never been tolerated.[239]

V. CONCLUSION

This Note argues that the dormant commerce clause is the strongest avenue of attack that a foreign investor interested in challenging alien land laws can take. The Note reasons, first, that alien land laws are subject to dormant commerce clause limitations. Second, state laws that interfere with foreign commerce are reviewed under a higher standard of scrutiny than

237. *See* Huizinga, *supra* note 27, at 267; Fisch, *supra* note 15, at 413.

238. *See Is the Family Farm Fading Away? Numbers Say No*, CHI. TRIB., Feb. 22, 1988, at C3.

239. *See supra* note 191 discussing Hale v. Bimco, 306 U.S. 75 (1939).

state laws that interfere with interstate commerce. Third, since state laws that facially discriminate against interstate commerce are per se invalid, then state laws that interfere with foreign commerce must also be invalid. Finally, since alien land laws are facially discriminatory and burden foreign commerce, they must be invalid.

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