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An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate

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“PSSST, Hey Buddy, Wanna Buy a Country?” An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate

ABSTRACT

This Note surveys the complex scheme of federal and state laws addressing foreign ownership of United States real property that has developed over the course of the last two centuries, precipitated by several important events. The Note then critically analyzes the traditionally invoked economic and policy justifications for regulating alien land ownership. The author concludes that sound economic principles militate against rather than in support of such regulation and that policy justifications, although representing valid concerns in some cases, have been used to produce overbroad regulations. The author suggests, therefore, a rethinking of the United States approach to alien land ownership, abandoning all restrictions except those narrowly tailored to advance specific policy concerns

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I. INTRODUCTION

The development of the United States approach to foreign investment, particularly investment in real property, in the United States has been marked by varying levels of xenophobia.¹ Restrictions on the ability of aliens to hold and own land were embedded deeply in the common law of England and found their way to the United States along with the first English settlers.² Since this common law beginning, popular support of government regulation of alien ownership of United States land has fluctuated according to the circumstances existing at particular times.³

1. James A. Frechter, Note, *Alien Land Ownership in the United States: A Matter of State Control*, 14 BROOK. J. INT'L L. 147, 147 (1988).

2. Charles H. Sullivan, *Alien Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15, 15 (1962). Sullivan's article presents an excellent discussion of the development of alien land laws in the United States. See also Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621 (1976) (presenting an exceptional discussion of the historical background of alien land laws in the United States).

3. See discussion *infra* notes 39-65 and accompanying text.

Although there is presently no strong movement to tighten restrictions on alien ownership of United States land, this issue again may capture public attention in the not too distant future for several reasons. First, the economies of the states of the world are becoming much more interdependent.⁴ This increasing global interdependence undoubtedly will lead to increased foreign investment in United States land.⁵ Second, economic and political turmoil in many parts of the world may accelerate foreign investment in United States real estate. Traditionally, foreigners have viewed investment in the United States, particularly investment in United States real estate, as a safe haven in tumultuous times.⁶ Third, the recent passage of the North American Free Trade Agreement (NAFTA) will likely spark increased investment in United States land by Canadian and Mexican entities.⁷ Finally, President Clinton, as a Democrat, may increase emphasis on protectionist measures with regard to foreign investment in the United States.⁸ When these factors are considered together, the likelihood of increased regulation of foreign investment in the United States seems great. Real estate, as a primary vehicle for foreign investment, may be a target of such regulation.

This Note examines the economic and political policies underlying United States alien land ownership laws at the federal and state levels. The Note analyzes these laws to evaluate their economic and political legitimacy and to determine whether they are merely anachronisms held over from a simpler time. First, the Note presents a brief history of alien land laws, beginning with their roots in feudal England. Next, the Note outlines the current status of federal and state alien land regulation. From this background discussion, the Note embarks on an analysis of the economic and political policies underlying foreign land ownership laws, focusing on the desirability of alien land regulation as applied to modern alien land ownership situations.

4. See Fidel Ramos, *Gravitational Pull of Mutual Benefit*, WASH. TIMES, Nov. 14, 1993, at B3.

5. See Kuo-Tsai Liou, *Foreign Direct Investment in the United States: Trends, Motives, and the State Experience*, AM. REV. OF PUB. ADMIN., Mar. 1993, at 1 ("The current interest in foreign investment focuses not on incoming portfolio investment in U.S. stocks and bonds but on incoming direct investment . . .").

6. Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091, 1123 (1983).

7. Richard Alm, *U.S. Winning Fight for Foreign Capital*, DALLAS MORNING NEWS, Dec. 20, 1993, at ID.

8. See Lyndsay Griffiths, *U.S. and EC to Square Off On Trade*, REUTER EUROPEAN BUS. REP., Mar. 18, 1993.

The Note concludes that the economic justifications for alien land ownership regulation are weak and that the policy justifications are valid only in a couple of very narrow cases. The Note suggests, therefore, that the United States rethink its approach to alien land ownership, recognizing the substantial benefits that derive from investment of that sort.

II. HISTORICAL OVERVIEW OF REGULATION OF FOREIGN OWNERSHIP OF UNITED STATES REAL PROPERTY

A. *The Feudal Origins of and Common Law Approach to Modern Alien Land Ownership Laws*

Current United States alien land ownership laws find their genesis in the feudal laws of medieval England.⁹ Under the feudal system, arising in England after the Norman Conquest, the King was the owner of all land.¹⁰ The sovereign, however, granted possession of portions of his land to lords who, in return, furnished goods or services to the King.¹¹ Often, these lords satisfied their debts to the King by providing him with knights to assist in protecting the realm.¹² Therefore, land ownership was intertwined intricately with protection of the kingdom. Because land ownership and security of the realm were so interrelated and because foreigners owed no allegiance or fealty to the Crown and therefore had no interest in protection of the kingdom, alien land ownership was prohibited.¹³

The feudal rule against alien land ownership was carried over into British common law.¹⁴ Thus, under the common law an alien could not take title to real property by operation of law.¹⁵ At least in theory, however, an alien could take title to land by operation of the parties,¹⁶ subject to the state's ability to divest

9. Sullivan, *supra* note 2, at 15.

10. *Id.* at 16.

11. *Id.*

12. *Id.*

13. *Id.*

14. See 2 WILLIAM BLACKSTONE, COMMENTARIES *249; Morrison, *supra* note 2, at 623.

15. See BLACKSTONE, *supra* note 14, at *249; *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Blight's Lessee v. Rochester*, 20 U.S. (7 Wheat.) 535 (1822).

16. Operation of the parties included purchase, gift, or devise. Sullivan, *supra* note 2, at 16.

title from the alien in an action known as "inquest of office."¹⁷ The common law went as far as to hold that once title to land had passed through an alien, regardless of the method in which title passed to or from the alien, the greatest interest that a subsequent acquirer, whether alien or citizen, could hold was a defeasable one.¹⁸ If a citizen land owner died leaving alien heirs, or if the operation of dower or curtesy caused aliens to be next in line to the descent of real property, the alien would be skipped and the next person in line who was eligible to own land, meaning a citizen, would take title to the property instead.¹⁹ If a land owner died without eligible heirs, his lands would escheat immediately to the state without the necessity of an inquest of office.²⁰ To summarize, "the prevailing common law rule, derived from English feudalism, was that aliens as such were disabled from holding land either by purchase or descent; their title was subject to defeasance by escheat in the case of purchase, or was void altogether in the case of descent."²¹

B. *The United States Experience With Alien Land Ownership Laws*

The common law of England naturally carried over to the British colonies in the North American.²² The common law approach to alien land ownership, however, soon proved to be quite problematic in the North American colonies.²³ Non-English residents of the colonies suffered from severe disability in the area of land ownership.²⁴ The only way for aliens to remedy this disability was through an expensive and time consuming process

17. BLACKSTONE, *supra* note 14, at *193; *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 603. "Inquest of office" was an inquiry made under the authority of the king about any circumstances that entitled the king to possession of property. Purchase of land by an alien, for example, entitled the king to possession of that land. BLACK'S LAW DICTIONARY 792 (6th ed. 1990).

18. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 603. Although this was the English view, there is strong state authority that the United States position is that a citizen grantee can receive indefeasible title from an alien grantor. See, e.g., *Estate of Wilson*, 237 N.W. 2d 835, 837 (Neb. 1976).

19. BLACKSTONE, *supra* note 14, at *249; Sullivan, *supra* note 2, at 16.

20. Sullivan, *supra* note 2, at 17.

21. William B. Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407, 408-09 (1978) (citations omitted).

22. Sullivan, *supra* note 2, at 15.

23. 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, 684-85 (1980).

24. *Id.* at 685; Sullivan, *supra* note 2, at 26-27.

of naturalization or denization.²⁵ Aliens who lacked the time or money to pursue these courses of action were without remedy.²⁶ A further problem with the common law approach was that many aliens acquired land without the prerequisites of naturalization or denization, never realizing that their titles were defective.²⁷

As the alien population in the colonies increased, so did the incidence of land title problems associated with the common law restrictions on alien land ownership.²⁸ Colonists attempted to remedy many of these title problems by seeking quiet title or confirmation of title from the English Crown.²⁹ The Crown, reluctant to encourage increased alien immigration into the colonies, moved very slowly in responding to these requests and finally banned altogether the naturalization measures and quiet title bills enacted by the colonial assemblies.³⁰ These actions proved to be a major precipitating factor in the break of the American colonies from the British Crown and the eventual establishment of the United States as an independent state.³¹

25. BLACKSTONE, *supra* note 14, at * 373-75. Black's Law Dictionary defines denizen as

a person who, being an alien by birth, has obtained letters patent making him an English subject. The King may denize, but not naturalize, a man; the latter requiring the consent of parliament. . . . A denizen holds a position midway between an alien and a natural-born or naturalized subject, being able to take lands by purchase or devise . . . but not able to take lands by descent.

BLACK'S LAW DICTIONARY 434 (6th ed. 1990).

26. Bell & Savage, *supra* note 23, at 685; Sullivan, *supra* note 2, at 28.

27. Bell & Savage, *supra* note 23, at 685; Sullivan, *supra* note 2, at 28.

28. Bell & Savage, *supra* note 23, at 685.

29. Evidence of the need for such measures is present in a letter dated May 29, 1769 from Governor Moore of New York to the British government defending the New York bill to quiet title. Governor Moore said the intent of the bill was

. . . to quiet the minds of several people who held Estates originally made by Aliens who through their ignorance of the laws of the land had neglected to get Acts of Naturalization passed in their favour & although their possessions had passed by several descents to their children, and Collateral branches of their families born within this province [New York], yet, as the title was originally deficient, it might occasion in future some difficulties to the possessors.

8 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 169 (E.B. O'Callaghan ed., 1857).

30. 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS (1670-1776) § 239 (Leonard Woods Labaree ed., 1935).

31. The Declaration of Independence voices displeasure at the manner in which the King responded to alien land problems plaguing the colonies in at least two sections. Paragraph 4 states:

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be

After the United States gained independence, a gradual movement toward the removal of common law restrictions on alien land ownership began.³² The new states, however, found it difficult to break completely with their common law heritage and, therefore, retained some restrictions on alien land ownership.³³ Although these restrictions generally represented more flexible versions of their common law predecessors, they remained quite burdensome.³⁴ Today, no state retains the common law restrictions on alien land ownership in their pure form.³⁵

Because control over land ownership regulation is primarily vested in the states,³⁶ laws governing land ownership in the United States have not developed in a uniform fashion. Early United States Supreme Court decisions clearly hold that regulation of land ownership is an area distinctly of state concern.³⁷ States have liberally exercised their prerogative in this area, and, therefore, a confusing array of state laws that "display a bewildering Alice-in-Wonderland variety" has developed.³⁸ Although the federal government does regulate foreign ownership of United States land to a limited degree, for the most part such regulation is still the province of the states.

The development of federal and state laws regulating alien land ownership was influenced, to a greater or lesser degree, by four major developments. First, the fact that many Europeans joined in the rush to settle what is now the midwestern United States and the Great Plains during the last half of the nineteenth

obtained; and when so suspended, he has utterly neglected to attend to them.

THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776). Paragraph 9 states:

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

Id. para. 9.

32. Morrison, *supra* note 2, at 624; Sullivan, *supra* note 2, at 29. Britain altogether abolished its rule against alien land ownership in 1870. Naturalization Act of 1870, 33 & 34 Vict., ch. 14(2) (Eng.).

33. Bell & Savage, *supra* note 23, at 685-86; Sullivan, *supra* note 2, at 28-29. Moreover, British subjects who remained in the newly liberated colonies were now aliens, and all of the colonies enacted measures designed to divest these British subjects of their United States land. Sullivan, *supra* note 2, at 29 n.62.

34. Bell & Savage, *supra* note 23, at 686.

35. Sullivan, *supra* note 2, at 17.

36. Morrison, *supra* note 2, at 629.

37. See, e.g., *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 270 (1817).

38. John T. Allen, Jr. & David B. Olausson, *Problem Areas Concerning Foreign Investment in Real Estate*, 61 CHI. BAR REC. 263, 263 (1980).

century gave rise to fear that these areas would not be considered for statehood or even might become colonies of European states.³⁹ After the Civil War, great westward expansion began. The availability of land in the territories fueled this expansion and attracted not only United States settlers, but also wealthy European, primarily British, investors.⁴⁰ The purchase by these European investors of large tracts of land in the newly opened territories concerned the federal government to such a degree that Congress responded by passing the Territorial Land Act of 1887.⁴¹ This Act prohibited the holding of large tracts of land by aliens not intending to become naturalized citizens of the United States.⁴² Several midwestern states followed suit by enacting similar alien land ownership laws of their own.⁴³ Some of these laws remain in force today.⁴⁴

The second round of increased regulation of alien land ownership in the United States occurred during the first half of this century, particularly between the two World Wars. Racial bigotry and fear of Asian farmers, mostly in California, led to a spate of laws aimed at denying Asians the right to hold land.⁴⁵ This legislation gained momentum and spread from California to other western and midwestern states.⁴⁶ The Supreme Court upheld these laws in 1923, holding in *Terrace v. Thompson*⁴⁷ that states had the power to "define and delimit property rights" within their borders.⁴⁸ The advent of the conflict with Japan in World War II accelerated the trend toward regulations of this sort.⁴⁹ After the war, the Supreme Court retreated from the hard line position of *Terrace*⁵⁰ and hinted that if the question were squarely presented, it might entirely reverse its position regarding state

39. Morrison, *supra* note 2, at 625.

40. *Id.*

41. 48 U.S.C. §§ 1501-07 (1988).

42. 48 U.S.C. § 1501 (1988).

43. Morrison, *supra* note 2, at 626; Sullivan, *supra* note 2, at 32. At one time, thirteen states enacted legislation prohibiting aliens from acquiring land. Morrison, *supra* note 3, at 626 n.22 citing Paul W. Gates, HISTORY OF PUBLIC LAW DEVELOPMENT 482-83 (1968).

44. Morrison, *supra* note 2, at 626; Sullivan, *supra* note 2, at 32.

45. Morrison, *supra* note 2, at 626; Sullivan, *supra* note 2, at 32-33. For an excellent discussion of anti-Japanese sentiment during the first half of the twentieth century and the laws it sparked, see Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7 (1947).

46. Morrison, *supra* note 2, at 626; Sullivan, *supra* note 2, at 34.

47. 263 U.S. 197 (1923). See also *Porterfield v. Webb*, 263 U.S. 225 (1923) (a companion case to *Terrace* reaching a similar result).

48. *Terrace*, 263 U.S. at 217.

49. Sullivan, *supra* note 2, at 34.

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

land laws that discriminated against Asians.⁵¹ Following the Supreme Court's lead, states voluntarily began to repeal their discriminatory land laws.⁵² However, remnants of these laws remain on the books in a few states.⁵³

The third development that affected alien land holding laws in several states was the rise of the Communist Bloc after World War II.⁵⁴ Some states were concerned with preventing the "diversion of American wealth to totalitarian governments"⁵⁵ and felt that alien landowners from communist jurisdictions would not really receive the benefit of their ownership anyway.⁵⁶ States that reacted to the rise of Communism usually legislated in the area of probate rather than property law,⁵⁷ but the result of the legislation was to limit the ability of aliens from communist states to enjoy United States land ownership. In essence, the rule that emerged from this round of legislation was that state courts could impound the proceeds of inherited lands when "it appeared that an alien heir would not have full and real enjoyment thereof."⁵⁸ Determining whether a potential heir would receive the full and real enjoyment of the relevant property, however, proved problematic. Many states looked to the laws of the alien heir's state or questioned authorities of that state's government regarding this issue, but these inquiries were seldom reliable. Eventually state courts began making independent inquiries regarding a potential heir's ability to receive full and real enjoyment of inherited lands.⁵⁹ These inquiries necessarily embroiled state governments in foreign relations, an area in which the United States Constitution gives the federal government exclusive authority.⁶⁰ The Supreme Court eventually reacted to this encroachment by severely restricting the ability of

51. *Id.* at 647 (Black and Douglas, JJ., concurring), 650 (Murphy and Rutledge, JJ., concurring).

52. Morrison, *supra* note 2, at 627-28.

53. *See, e.g.*, KAN. STAT. ANN. § 59-511 (1983) (concerning the rights of an alien not qualified for citizenship to "transmit and inherit" real estate).

54. Morrison, *supra* note 2, at 628. For a general discussion of changes in alien land laws resulting from the rise of the Iron Curtain, see Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962); Austin Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 NW. U. L. REV. 221 (1957).

55. Morrison, *supra* note 2, at 628.

56. Berman, *supra* note 54, at 262.

57. Morrison, *supra* note 2, at 628.

58. *Id.*

59. *Id.* at 628-29.

60. U.S. CONST. art. I, §§ 8, 9, and 10.

states to inquire independently into foreign states' laws.⁶¹ The Court's response to this issue has not eliminated the problem, however, and many states retain laws prohibiting alien heirs from inheriting land within their borders if the alien will not receive the full and real enjoyment of the property.⁶²

Finally, interest in alien land regulation intensified in the 1970s as the states of the world began moving toward more integrated economies. Increases in foreign investment in the United States sparked fear that the United States might soon be owned entirely by foreigners.⁶³ Policy makers reacted to these concerns by attempting to establish guidelines and disclosure requirements regarding foreign investment in the United States.⁶⁴ Although most legislation during this latest round of increased regulation was federal, some states followed with disclosure requirements and restrictions of their own.⁶⁵

Thus, from a common law beginning that dictated almost total exclusion of aliens from land ownership, the United States has significantly eased restrictions on foreign ownership of United States lands. Important restrictions still exist, however, in the form of responses to perceived problems that have arisen during the development of the United States. The laws of the various states and the United States reflect these origins and responses to problems in a variety of ways, forming a confusing patchwork of alien land ownership regulations.

III. CURRENT FEDERAL REGULATIONS

Current federal regulation of alien land ownership takes a variety of forms. Most of the regulation is aimed at protecting United States agricultural and natural resources.⁶⁶ Some of the regulation, however, is designed to govern land ownership by aliens from states hostile to the United States⁶⁷

61. *Zscherig v. Miller*, 389 U.S. 429 (1968).

62. *See, e.g., Shames v. Nebraska*, 323 F.Supp 1321 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972); *Bjarsch v. DiFalco*, 314 F.Supp 127 (S.D.N.Y. 1970). Lower courts justify their stance by giving *Zscherig* a very narrow interpretation.

63. *Morrison, supra* note 2, at 621.

64. *See infra* notes 85-91 and accompanying text.

65. *See, e.g., ARK. CODE ANN. 2-3-102--110* (1987) (requiring any foreign party acquiring any interest in agricultural land, absent the application of a listed exception, to register with the circuit clerk of the county where the land is located); *VA. CODE ANN. § 3.1-22.24* (1983) (requiring any foreign person owning, acquiring, or transferring any interest in agricultural land to report to the Commission of Agriculture and Consumer Service).

66. *See infra* notes 79-91 and accompanying text.

67. *See infra* notes 73-78 and accompanying text.

A. *The Territorial Land Act of 1887*

Congress enacted the Territorial Land Act of 1887⁶⁸ in response to a wave of alien absentee ownership⁶⁹ and depressed agricultural conditions⁷⁰ in midwestern states during the last half of the nineteenth century. This Act prohibits aliens who have not declared their intent to become United States citizens from holding land in territories of the United States.⁷¹ Although this regulation now has no effect in the fifty states,⁷² it still prevents non-declaring aliens from purchasing real property in the numerous United States territories.

B. *The Trading With the Enemy Act of 1970*

The Trading With the Enemy Act of 1970⁷³ and the two bodies of regulation issued under it, the Alien Property Custodian Regulation⁷⁴ and the Foreign Assets Control Regulations,⁷⁵ are Congress' attempt to control property transactions involving aliens and governments that might be hostile to the United States. The Alien Property Custodian Regulations charge the United States Attorney General with the responsibility of managing property belonging to enemy aliens during the time of war or declared emergency.⁷⁶ The Foreign Assets Control Regulations require aliens from designated states to obtain prior Treasury Department approval before conducting transactions

68. 48 U.S.C. §§ 1501-07 (1988).

69. Absentee land ownership was such a major concern of farmers of this time period that both major political parties addressed this issue in their 1884 platforms. THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 124, 131 (Thomas Hudson McKee ed., 1892).

70. James A. Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 251 (1980). See Anderson, *A Survey of Alien Land Investment in U.S., Colonial Times to Present*, 8 U.S. DEPT. OF COMMERCE, REPORT TO CONGRESS ON FOREIGN DIRECT INVESTMENT IN U.S. L-2, L-14, cited in Huizinga, *supra*, at 251.

71. 48 U.S.C. § 1501 (1988).

72. Morrison, *supra* note 2, at 625.

73. 50 U.S.C. app. §§ 1-44 (1988).

74. 8 C.F.R. §§ 501-10 (1978). See discussion *infra* note 77.

75. 31 C.F.R. 500-01 (1993).

76. 50 U.S.C. app. § 6 (1988). The Alien Property Custodian Regulations now have been merged with the Foreign Asset Control Regulations.

involving "blocked" property.⁷⁷ These regulations typically affect only a small amount of alien land investments at any one time.⁷⁸

C. Controlling Exploitation of Federally Owned Lands

Alien land laws at the federal level include those designed to protect United States natural resources. This category of federal regulation restricts alien exploitation of natural resources on public lands to aliens who intend to become United States citizens.⁷⁹ Regulation in this area affects resources as diverse as homestead lands,⁸⁰ grazing lands,⁸¹ lands containing mineral deposits,⁸² off-shore oil tracts,⁸³ and lands containing geothermal steam resources.⁸⁴ This legislation and regulation is designed to prevent pillaging of United States natural resources by foreign governments, individuals, and businesses.

D. The International Investment Survey Act of 1976 and The Agricultural Foreign Investment Disclosure Act of 1978

In the early 1970s, Congress became concerned about the increasing amount of foreign investment in United States land, particularly farmland.⁸⁵ In response to increasing pressure generated primarily by the farm lobby, Congress passed the

77. At present, the following states must obtain Treasury Department approval before conducting transactions involving certain types of property: Cambodia, North Korea, North and South Vietnam, Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-.205 (1993); Cuba, Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-.205 (1993); Iran, Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101-.905 (1993); Libya, Libyan Sanctions Regulations, 31 C.F.R. §§ 550.101-.807 (1993); Panama, Panamanian Transactions Regulations, §§ 565.201-.205 (1993); Kuwait, Kuwait Assets Control Regulations, §§ 570.101-.807 (1993); Haiti, Haitian Transactions Regulations, §§ 580.101-.901 (1993). The list of states subject to the Foreign Assets Control Regulations can change rapidly.

78. A. PETER MUTHARICA, *Acquisition and Ownership of Property*, in *THE ALIEN UNDER AMERICAN LAW*, ch. 5, 2-3 (1980).

79. Frechter, *supra* note 1, at 156.

80. 43 C.F.R. § 2511.1(b)(3) (1993).

81. 43 U.S.C. § 315 *et. seq.* (1988), 43 C.F.R. § 4110.1(a) (1993) (establishing qualifications for grazing use on public land).

82. 30 U.S.C. §§ 22 and 181 *et. seq.*; 43 C.F.R. 3102.1-.2 (1993).

83. 43 U.S.C. § 1331 *et. seq.* (1988).

84. 30 U.S.C. § 1015 (1988); 43 C.F.R. § 3203.1 (1993).

85. See HOUSE AGRIC. COMM., *AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT OF 1978*, H.R. REP. NO. 1570, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 2914.

International Investment Survey Act of 1976 (IISA)⁸⁶ and two years later followed up by passing the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).⁸⁷ Although neither of these acts in any way prohibits foreign investment in United States real property, both impose significant reporting and disclosure requirements.⁸⁸ Both acts define those persons and entities subject to their provisions in broad terms to require disclosure by as large a group of alien owners as possible.⁸⁹

86. 22 U.S.C. §§ 3101-3108 (1988), amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 306(b)(1), 98 Stat. 2948, 3009 (1984). The Act has been renamed The International Investment and Trade in Services Survey Act. *Id.*

87. 7 U.S.C §§ 350I-3508 (1988). Regulations issued under the Act may be found at 7 C.F.R. §§ 781.1-5 (1993).

88. Reporting requirements for the IISA are contained in numerous regulations, but authority for these regulations is contained in the Act itself. 22 U.S.C. § 3104(b)(2) (1988). Reporting requirements for the AFIDA are contained in the Act itself and in various regulations issued thereunder. 7 U.S.C § 350I (1988). Authority for requiring other information by regulation under AFIDA is found at 7 U.S.C. § 350I(b)(8) (1988).

89. IISA defines "person" as:

any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency).

22 U.S.C. § 3102(3).

AFIDA defines "foreign person" as:

(A) any individual-

- (i) who is not a citizen or national of the United States;
- (ii) who is not a citizen of the Northern Mariana Islands or the Trust Territory of the Pacific Islands; or
- (iii) who is not lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act (citation omitted);

(B) any person, other than an individual or a government, which is created or organized under the laws of a foreign government or which has its principal place of business located outside of all the States;

(C) any person, other than an individual or a government -

- (i) which is created or organized under the laws of any State; and
- (ii) in which, as determined by the Secretary under regulations which the Secretary shall prescribe, a significant interest or substantial control is directly or indirectly held - (I) by any individual referred to in subparagraph (A); (II) by any person referred to in

Furthermore, failure to comply with the reporting and disclosure requirements of these acts results in significant penalties.⁹⁰ The IISA and AFIDA, therefore, provide the federal government with information useful in monitoring foreign investment in United States real property and the effects of that investment.⁹¹

E. *The Foreign Investment in Real Property Tax Act of 1980*

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA),⁹² like IISA and AFIDA, was not designed to restrict foreign investment in United States real estate. Rather, the purpose of the act was to equalize the tax treatment of foreign and United States real property investors.⁹³ Prior to enactment of FIRPTA, gains from the disposition of real property held by foreign investors were subject to taxation only if "effectively connected" to a United States trade or business.⁹⁴ FIRPTA, however, subjects all income from dispositions of United States real property interests to federal taxation.⁹⁵ The act treats all dispositions of

subparagraph (B); (III) by any foreign government; or (IV) by any combination of such individuals, persons, or governments; and

(D) any foreign government.

7 U.S.C. 3508(3) (1988).

90. IISA provides for a fine of up to \$10,000 and imprisonment for up to one year for failure to comply with the Act's reporting requirements. 22 U.S.C. § 3105 (1988). Penalty provisions under AFIDA can be found at 7 C.F.R. § 781.4 (1993) and are tied to the nature of the violation and the value of the subject property.

91. IISA's statement of purpose is found at 22 U.S.C. § 3101 (1988). AFIDA does not contain a specific statement of purpose, but while considering the bill the House Committee on Agriculture remarked:

[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 the family farms and rural communities in this country. Clearly, such information if [sic] needed before a reasonable, responsible analysis of the situation can be made.

H.R. REP. NO. 1570, *supra* note 85, at 11, *reprinted in* 1978 U.S.C.C.A.N. at 2920.

92. 26 U.S.C. §§ 861, 871, 882, 897, 6039C, 6652 (1988).

93. Frechter, *supra* note 1, at 158.

94. See generally, Note, *Foreign Investment in United States Real Estate: Congress Acts to Reduce Incentives*, 7 INT'L TRADE L.J. 150 (1981-1982).

95. 26 U.S.C. § 897(a)(1) (1988). This section provides:

(a) General Rule.

(i) Treatment as Effectively Connected with United States Trade or Business.

For purposes of this title, gain or loss of a nonresident alien individual or a foreign corporation from the disposition of a United States real property interest shall be taken into account-

real property interests in the United States by foreign individuals and corporations as "effectively connected" with United States trade or business and, therefore, as subject to federal taxation.⁹⁶

IV. CURRENT STATE REGULATIONS

State restrictions on alien land ownership take an astonishing variety of forms. All of these restrictions represent either holdovers from the common law approach to alien land ownership or arose as a result of a perceived need at a particular time. This discussion samples some of the more pervasive methods states have employed to regulate alien land ownership.

A large number of states either specifically guarantee that aliens enjoy the same rights as citizens regarding land ownership or make no specific mention of regulation of land ownership by aliens. Alabama, for example, statutorily guarantees all aliens the same treatment in property transactions as Alabama citizens receive.⁹⁷ The states that constitutionally or statutorily guarantee land ownership rights to aliens do not restrict ownership in any manner; therefore, aliens who own property in these states are subject only to federal requirements.

Although some states, of which Arizona is an example, do not mention alien property ownership in their constitutions or statutes, that omission does not necessarily mean that these states will treat alien and citizen ownership of real property the same. If a question arises in these jurisdictions, it is conceivable that state courts would resurrect the common law, placing severe limitations on alien land ownership.⁹⁸

(A) in the case of a nonresident alien individual, under section 871(B)(I), or

(B) in the case of a foreign corporation, under section 882(a)(1), as if the taxpayer were engaged in a trade or business within the United States during the taxable year and as if such gain or loss were effectively connected with such trade or business.

Id.

96. *Id.*

97. ALA. CODE § 35-1-1 (1975). "An alien, resident or nonresident, may take and hold property, real and personal, in this state, either by purchase, descent or devise, and may dispose of, and transmit the same by sale, descent or devise as a native citizen." *Id.*

98. Mary P. Azevedo, *Foreign Direct Investment in U.S. Real Estate: A Survey of Federal and State Entry Level Regulation*, N.C. J. L. & COM. REG., Winter 1982, at 27, 35.

Another group of states places restrictions on the amount, type, or time length of alien investment in lands within their borders. Most such laws are aimed at nonresident aliens and attempt to draw a distinction between aliens who intend to become naturalized citizens and those who do not. Indiana, for example, requires aliens not intending to become naturalized citizens to dispose of all property in excess of 320 acres within 5 years of acquisition.⁹⁹ In Kentucky, real estate of a nonresident alien not intending to become a citizen may escheat to the state after eight years.¹⁰⁰ Nebraska limits the period that aliens and foreign corporations may hold land more than three miles outside of a city or village to five years upon penalty of escheat.¹⁰¹ Missouri, along with a large number of other states, forbids nonresident alien ownership of agricultural land altogether.¹⁰² These statutes primarily represent modern remnants of nineteenth century laws.

Another group of states limits alien land ownership on the basis of whether the alien in question is from a friendly state. New Jersey, for example, grants "alien friends" the same property ownership rights as it grants to native citizens.¹⁰³ Another group

99. IND. CODE ANN. § 32-1-8-2 (Burns 1980) provides, "If any alien shall acquire . . . above three hundred and twenty acres and such excess shall remain unconveyed at the end of five (5) years after the acquisition thereof, then such excess shall escheat to the state . . ." *Id.*

100. KY. REV. STAT. ANN. § 381.300(1) (Michie/Bobbs-Merrill 1970) provides, "[E]xcept as otherwise provided in this chapter, the real estate of an alien may be escheated to the state at any time after the expiration of eight (8) years after the time he acquires title thereto." *Id.*

101. Nebraska's statute is written as a broad escheat provision. NEB. REV. STATE § 76-401 (1943). This escheat provision is immediately narrowed by several exceptions, one of which is for property within three miles of a city or village. *Id.* § 76-414 (1943).

102. JEREMY D. SMITH, THE FOREIGN INVESTOR'S GUIDE TO U.S. REAL ESTATE 160 (1990). Aliens and foreign businesses, and persons acting as trustees and fiduciaries thereof, are prohibited from acquiring agricultural land in Missouri. MO. ANN. STAT. § 442.571. (Vernon 1986). Exceptions to the prohibition are provided, *inter alia*, for land held by a resident alien of the United States, "provided it is divested within two years after loss of residency status . . ." *Id.* at § 442.586.

103. New Jersey's statute provides:

Alien friends shall have the same rights, powers and privileges and be subject to the same burdens, duties, liabilities and restrictions in respect of real estate situate in this State as native-born citizens. Any alien who shall be domiciled and resident in the United States and licensed or permitted by the government of the United States to remain in and engage in business transactions in the United States, and who shall not be arrested or interned or his property taken by the United States, shall be considered an alien friend within the meaning of the act.

N.J. STAT. ANN. § 46:3-18 (West Supp. 1986).

of states, including New York, requires that the alien owner be the person who actually receives the benefit of the property ownership.¹⁰⁴ Still others require that the state of which the alien owner is a citizen grant reciprocal property ownership rights to United States citizens. North Carolina, for example, has enacted this type of statute.¹⁰⁵ These several types of statutes seem driven by a desire to prevent subjects of hostile or protectionist governments from receiving the benefits of ownership of land in these states.

Many states require alien landowners to report their holdings of state land, particularly agricultural and public lands, to the state. For example, Virginia requires any foreign person owning, acquiring, or transferring any interest in agricultural land to report this fact to the State Commissioner of Agriculture and Consumer Service.¹⁰⁶ Statutes of this sort are patterned largely after IISA and AFIDA and are designed to alert state officials to the magnitude of alien ownership of state lands.

Finally, some states limit the manner in which property ownership may devolve to aliens or the form in which aliens may take ownership. Iowa, for example, allows resident aliens to take ownership interests in all state lands except agricultural lands,¹⁰⁷ and extends this prohibition, absent the applicability of a listed exception,¹⁰⁸ to corporations and other entities in which nonresident aliens own a majority interest. Laws of this type are designed primarily to effectuate other alien landholding restrictions that are already in force.¹⁰⁹

104. In appropriate circumstances, including where it appears that an alien beneficiary would not have the benefit, use, or control of money or property due him, the surrogate court may direct that the money or property due such alien beneficiary be paid into the court for the benefit of the alien or other person who may later become entitled to it. N.Y. Surr. Ct. Proc. Act 2218 (McKinney Supp. 1986); SMITH, *supra* note 102, at 162.

105. The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents . . .

N.C. GEN. STAT. § 64-3 (1985).

106. VA. CODE ANN. § 3.1-22.24 (Michie 1950).

107. IOWA CODE ANN. § 567.3(1) (1992).

108. *Id.* at § 567.3(3), .4, .5 (1992).

109. Iowa's purpose, for example, appears to be to eliminate the ability of a nonresident alien to avoid the state's alien land holding restrictions by using the

The foregoing is merely a sample of the variety of state statutes regarding alien ownership of real property. Because many variations on these themes exist, the examples provided should not be considered the exclusive modes of alien land regulation employed by the states. Because each state's approach is unique, careful study of a particular state's provisions is necessary before proceeding with an alien land transaction within that state.

Overarching all state laws concerning alien landholding are numerous federal treaties that specifically deal with land ownership issues. It is important to remember that the federal government's treaty making power preempts state law.¹¹⁰ Therefore, any state law that is contrary to a current federal treaty should be disregarded.

V. ECONOMIC AND POLITICAL EFFECTS OF ALIEN LAND OWNERSHIP LAWS

A. Reasons For Foreign Investment in United States Real Estate

There are numerous reasons for foreign investment in United States real estate. First, the United States presents a stable political climate in which to invest.¹¹¹ The potential for government meddling and even outright expropriation of lands owned by foreigners continues to be a threat to real estate investors in many parts of the world.¹¹² The risk of government expropriation of lands in the Philippines, for example, makes many investors consider the risk of investing there too great.¹¹³

corporate form to take title to the property rather than taking title as an individual.

110. The United States Constitution says that treaties are part of the "supreme Law of the Land." U.S. CONST. art. VI. Some states recognize the federal government's superior treaty-making power explicitly in their statutory schemes. See, e.g., MINN. STAT. ANN. § 500.221 (West 1990). Even without this explicit recognition, however, treaties will override conflicting state laws. *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1879).

111. Kenneth J. Yadvish, Note, *A Proposed Model Code Concerning Alien Acquisition and Ownership of Real Property in the United States*, 3 INT'L PROP. INVESTMENT J. 89, 90 (1986); SMITH, *supra* note 102, at 1. "A country in which there is political unrest or in which there is a threat of having the investment nationalized (without adequate compensation) is . . . less attractive to invest in than a country offering political stability and a guarantee of property rights." Friedrich Schneider & Bruno S. Frey, *Economic and Political Determinants of Foreign Direct Investment*, 13 WORLD DEV. 161, 161 (1985).

112. See Yadvish, *supra* note 111, at 90; SMITH, *supra* note 102, at 4-5.

113. SMITH, *supra* note 102, at 5.

The United States, however, presents a far different environment to world investors. Because the United States government and major United States institutions for the most part favor foreign investment,¹¹⁴ the threat of government expropriation in the United States is virtually nonexistent.

Second, the United States continues to offer a favorable economic environment to foreign investors.¹¹⁵ Investors favor economic stability because it allows them to predict potential returns much more accurately. Predictability, in turn, helps investors assess risk. The United States economy also offers a broad investment landscape, including opportunities in virtually any type of real estate.¹¹⁶ Economic stability, coupled with the immense size and diversity of the United States economy and the variety of property types that it has to offer, make United States real estate a favored vehicle for world investors. In short, foreign investors believe the United States economy will experience sustained economic growth in the long run and, therefore, target the United States for investment.

Third, the United States has a ready supply of relatively inexpensive land.¹¹⁷ Because available investment quality land represents a scarce commodity in many parts of the world, the price of land in the United States is much lower than it is for comparable land in other places.¹¹⁸ Real estate prices in the United States are also lower compared to land prices in other states because of recent declines in the United States dollar's value on the world's currency markets.¹¹⁹ This decline gives foreign currencies more purchasing power in the United States and thus further decreases the effective price of United States real estate for foreign investors. The availability and price of the United States real estate, therefore, presents a powerful draw to foreign investors.¹²⁰

114. Morrison, *supra* note 2, at 667; Yadvish, *supra* note 111, at 90-91.

115. Yadvish, *supra* note 111, at 90.

116. *Id.*

117. *Id.*

118. *Id.*

119. Stephen Koeppe, *For Sale: America; From Manhattan's High-Rises to Oregon's Forests, the Big Buy Out is On*, TIME, Sept. 14, 1987, at 52 ("while prices of real estate and commercial properties may seem high to most Americans, everything with a dollar-denominated price tag looks like a tremendous steal to holders of other, stronger currencies.").

120. *Id.*

Fourth, the ease of entry into the United States real estate market provides an incentive for foreign investors.¹²¹ United States real estate markets offer a wide array of financing alternatives that may not be available in other states. Foreign investors, therefore, find it easier to enter and finance real estate purchases in the states where they can avoid the entry barriers and financing obstacles present elsewhere.¹²² In fact, many states of the United States maintain offices overseas designed specifically to promote foreign investment in the United States.¹²³ This solicitation attracts numerous investors because it informs them of the excellent opportunities in the United States real estate market.

Finally, the prevalent use of the English language around the world makes it easier for foreign investors to invest in United States real estate.¹²⁴ If an alien investor does not speak English it is usually quite easy to find an English interpreter to facilitate the transaction, giving foreign investors a greater level of comfort when dealing with United States real estate than they might experience in other places where more obscure languages might become a barrier to completion of a transaction.¹²⁵

The foregoing analysis of the attractiveness of United States real estate investment centers primarily on investment incentives. Of course, many alien property owners acquire United States real estate not as an investment, but as a home. Many of the same reasons for the attractiveness of United States real estate investment also apply to aliens seeking a new residence. A stable political and economic environment, ready availability of land, ease of entry and financing, and ease of understanding all combine to make the United States an attractive place in which to purchase a home. This attractiveness, in turn, leads to greater participation by aliens in United States real property markets.

121. *Inflows of Japanese Investment Continued with Only Moderate Drop in 1990*, Study Says, BNA INT'L TRADE DAILY, Apr. 8, 1991 [hereinafter *Inflows*].

122. SMITH, *supra* note 102, at 96.

123. For instance, Georgia, Michigan, New York, South Carolina, and Virginia maintain offices in Brussels, Tokyo, and London; Alabama and North Carolina maintain offices in Switzerland; and Maine and Wisconsin maintain offices in Frankfurt. Morrison, *supra* note 2, at 680 n.8 (citing THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY PROBLEMS AND OBSTACLES 33-34 (1974)). Among the states, foreign investment has emerged as a top priority of their economic development policy because it brings fresh capital and new jobs into the states. Liou, *supra* note 5, at 1.

124. Yadavish, *supra* note 111, at 90.

125. See *id.*

B. *Advantages to the United States of Foreign Investment in United States Real Estate*

Foreign investment in United States real estate provides many advantages, some of which pertain to foreign investment in the United States economy in general while others apply specifically to foreign real estate investment. Economic advantages to foreign investment in United States land are, in general, pervasive and far-reaching.

First, foreign investment provides capital for the United States economy.¹²⁶ Foreign capital was a primary force in the development of the United States,¹²⁷ and it still helps offset the United States trade deficit, holds domestic interest rates down, and provides new plants and technology.¹²⁸ Foreign real estate investment is critical because it is a necessary prelude to much of this capital investment.¹²⁹

Second, foreign investment can often work a dramatic turnaround for failing United States businesses or can provide additional dynamism to companies that are already doing well.¹³⁰ This boost to business can manifest itself in a variety of ways. In many instances, foreign investment creates or strengthens jobs. Additional jobs means additional money spent at the local level and, therefore, an increase in the demand for ancillary services such as grocery stores, dining establishments, entertainment facilities, and the like.¹³¹ Further, foreign investment in United States business often leads to the introduction of new management techniques and new manufacturing or production technologies.¹³² The introduction of these new techniques often

126. See Kent Gilbreath, *Foreign Investment Here Rational and Healthy*, HOUS. CHRON., Dec. 7, 1992, at A19.

127. Koepf, *supra* note 119, at 52. ("The U.S. economy has long based its prosperity in large part on the free flow of capital across international borders. In the mid-19th century, European investments helped finance the building of America's railroads. . . . Later, Europeans put their money into American ranching, farming and mining. After the turn of the century, foreigners helped buttress . . . U.S. Steel . . .").

128. *Debate; Foreign Investment is Good For the USA*, USA TODAY, Oct. 3, 1989, at 6A; see generally *Foreign Investment in the United States: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 100th Cong., 2d Sess. 211-28 (1988) [hereinafter *Hearings*] (statement of Dr. Edward M. Graham) (discussing in broad terms the benefits to be gained from foreign direct investment).

129. SMITH, *supra* note 102, at 1-2; see also Sullivan, *supra* note 2, at 37.

130. Koepf, *supra* note 119, at 52.

131. Sullivan, *supra* note 2, at 38; Yadvish, *supra* note 111, at 91.

132. Joyce Barrett, *Bills Reflect Pros and Cons of Foreign Investment*, METALWORKING NEWS, July 9, 1990, at 4.

dramatically revitalizes a dying business or industry.¹³³ The addition of new management and operations techniques, along with a new management philosophy and style, often make stagnated businesses more competitive.¹³⁴ Added competitiveness benefits the local economy as well as the national and world economies by providing goods and services less expensively and more efficiently than before the foreign investment.

Third, foreign investment in United States real property increases efficient property use and preservation.¹³⁵ Foreign property owners, after all, are investors and want their investments to perform satisfactorily. If a foreign investor is willing to devote more time and attention to a particular property than is a domestic investor, then the foreign investor will use the property more efficiently. More efficient property use increases not only that property's value, but also increases the value of surrounding property.¹³⁶ Additionally, foreign investors, like all investors, seek reasonable returns from their United States real estate holdings. Long-term returns are maximized only by effective management, preservation, and use of property. Through profit maximizing efforts, therefore, alien investors may provide an element of property preservation and use that an idle domestic owner might not have achieved.

Fourth, foreign investment in United States real estate increases the demand for the real estate and thus increases its value to current domestic owners.¹³⁷ United States property owners, therefore, may benefit when property is bought by foreign investors at what appear to be inflated prices. Many foreign investors are willing to pay a premium for prime United States property, and this premium goes to the domestic seller. Many

133. Koepp, *supra* note 119, at 52; see also Barrett, *supra* note 132, at 4.

134. Barrett, *supra* note 132, at 4. According to Douglas P. Woodward, an economist with the University of South Carolina, among the benefits derived from foreign investment are "new management techniques and technologies, job creation, capital investment, and increased competitiveness." *Id.*

135. See Kaplan, *supra* note 6, at 1126-27; see also SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND III 53 (Comm. Print 1979).

136. Values of comparable surrounding properties are determined in part by recent sale prices of similarly situated nearby properties. If an alien owner increases the sale price of his or her property, based on the market data or sales comparison approach to land appraisal, similarly situated properties also increase in value. See WADE E. GADDY & ROBERT E. HART, REAL ESTATE FUNDAMENTALS 179 (1984); see also Kaplan, *supra* note 6, at 1126.

137. See Yadvish, *supra* note 111, at 108 (arguing that alien landholding restrictions suppress the market demand for United States property and thereby suppress the price that domestic sellers are able to realize from sale of their property); see also *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939).

United States landowners look favorably on foreign investment for precisely the reason that higher prices paid by foreign investors bring economic benefits to them personally and health to the local economy in general.¹³⁸

Fifth, at the macroeconomic level, increased foreign investment in United States property provides more tax revenue and a higher tax base than existed before the investment.¹³⁹ Property taxes are generally assessed based on the market value of individual parcels of property.¹⁴⁰ By increasing the value of real property, foreign investment indirectly increases the tax revenue received from these properties. Thus, foreign investment indirectly benefits government by adding to the revenues collected by taxing authorities.¹⁴¹

Finally, the higher the level of foreign investment in the United States, the larger the stake foreign individuals, governments, and businesses have in the growth of the United States economy.¹⁴² In the increasingly global economy, states and governments are becoming more aware that economies do not stand alone, but must rise or fall together. "It is truly a symbiotic situation with different nations' economic health feeding off the health of other nations."¹⁴³ Foreign investment in the United States, therefore, may enhance international economic cooperation to the benefit of the United States economy and the economy of the world as a whole.

C. *Perceived Detriments To Foreign Investment in United States Real Estate*

Opponents of foreign investment in the United States advance a number of reasons why such investment is undesirable. Most of these reasons, at base, simply voice the populist fear that foreigners are taking over the United States.¹⁴⁴

138. See PETER H. LINDERT, *INTERNATIONAL ECONOMICS* 570 (1991) ("After a time . . . farmers came to hope fervently that they could sell as much farmland as possible to wealthy foreigners.") (emphasis in original).

139. Yadavish, *supra* note 111, at 91.

140. *Id.*

141. *Id.* Property tax increases, however, are not the only revenue-generating benefit derived from alien land investment. Support and ancillary services are usually increased to provide for the increased level of use that a newly alien-acquired property normally generates. Sales activity from these increased services also generates additional tax revenue. See Sullivan, *supra* note 2, at 38.

142. Gilbreath, *supra* note 126, at 19.

143. *Id.*

144. This populist anxiety is exemplified by a statement made by Congressman John Bryant (D. Texas). "America has been selling off its family

Following is a discussion of the most frequently advanced arguments that foreign investment, especially foreign investment in United States real estate, should be curtailed.

First, foreign investment is perceived as posing a risk to national security.¹⁴⁵ Proponents of this argument contend that foreign interests do not necessarily coincide with United States interests¹⁴⁶ and that, ultimately, significant foreign ownership of United States real property will result in a security risk that is too great to allow unrestricted alien ownership of United States land.¹⁴⁷

Second, opponents of alien investment in the United States assert that foreign investment results in the export of United States technology.¹⁴⁸ The argument is that foreign investors will strip United States companies of their technology and, therefore, their ability to add value. United States companies would be reduced to nothing more than assembly plants for foreign owners.¹⁴⁹ Proponents of this view see alien investment in United States property as facilitating the technology export and, therefore, advocate strict regulation and oversight of alien investment in United States land.¹⁵⁰

Finally, some argue that foreign investment tends to displace domestic production and causes profits to flow overseas.¹⁵¹ According to this theory, in the long run, foreign investment is detrimental to United States industry because it causes the United States to lose much of its productive wealth to foreign competitors.¹⁵² Proponents of this theory argue for increased regulation of foreign investment in United States industry and, therefore, increased regulation of foreign investment in United

jewels to pay for a night on the town, and we don't know enough about the proud new owners." Koepp, *supra* note 119, at 52; see also *Hearings*, *supra* note 128, at 112-32 (statement of Professor Susan Tolchin discussing the negative aspects of foreign direct investment); see generally MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA* (1988) (arguing that the United States is giving up its political and economic independence by allowing excessive foreign investment within its borders).

145. *New Foreign Investors' Association to Oppose Protectionist Measures*, BNA DAILY REPORT FOR EXECUTIVES, Mar. 16, 1988, at DER No. 51.

146. *Id.*

147. *Buy America While Stocks Last*, THE ECONOMIST, Dec. 16, 1989, at 63. [hereinafter *Buy America*]. Polls conducted in 1989 indicated that four-fifths of Americans favor stricter rules governing foreigners attempting to buy United States companies. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* ("The machinery needed to block foreign buyers is already in place.")

151. Barrett, *supra* note 132, at 4.

152. *Id.*

States real property to counter the negative effects of profit export and production displacement on the United States economy.

On the whole, the subject of foreign investment in United States real estate is rife with controversy. Opponents contend that the United States is being sold off while proponents counter with assertions that the United States needs foreign investment to maintain its rate of growth and to ensure economic stability. The question that arises is whether this debate is merely rhetorical or whether one or both sides have valid concerns about foreign investment in United States real estate. The following sections of this Note analyze the debate over foreign real estate investment in the United States from economic and political policy standpoints and attempt to discern whether such investment and the existing laws governing it ultimately benefit or harm the United States.

D. *Economic Analysis*

A fundamental principle of economics is that, absent fraud, deception, or misunderstanding on the part of one of the trading parties, both parties to a voluntary exchange will be better off after the exchange than either party was before the exchange.¹⁵³ Otherwise one of the parties will refuse to trade.¹⁵⁴ This principle, however, has not always been understood in international economics, and for years, governments thought that if one party to a transaction profited handsomely, then the other party necessarily lost in that transaction. Governments supported this view by pointing to the fact that trade, per se, does not create anything new and that, therefore, the total quantity of resources bartered in the exchange is the same before and after the exchange has occurred. If one party to the trade received a benefit, the argument ran, the other party must have lost.¹⁵⁵ This view, however, failed to take into account the possibility of mutual gain from the trade. In other words, both parties could possibly exit the exchange in a better position than either was in before the transaction. Mutual gain is possible because each party to the exchange may receive resources that are uniquely valuable to that party given that party's particular situation at a given time. The failure to consider the possibility of mutual gain has led governments to enact trading policies designed to protect

153. WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 4 (4th ed. 1988).

154. *Id.*

155. *Id.* at 382.

their own resources while attempting to exploit the resources of other states.¹⁵⁶

Many modern alien land laws are premised on this exact reasoning. The Territorial Land Act of 1887,¹⁵⁷ for example, is based on the proposition that foreign absentee ownership of United States territorial lands is undesirable. Congress feared that absentee landowners would rob the territories of their natural resources without providing a corresponding benefit to the region.¹⁵⁸ This conclusion, however, ignores the concept of mutual gains from voluntary exchange. If a landowner will be disadvantaged by a given real estate transaction with foreign investors, economic common sense dictates that the landowner will refuse to proceed with the trade.

Another basic economic principle applicable to alien land investment is that when a resource, in this case land, is moved to a more highly productive use everyone benefits.¹⁵⁹ If real estate is not being put to its most productive use, it follows that the current economic distribution of property is wasteful. The current distribution is wasteful because by changing the distribution of property, gains can be recognized. In other words, the current use is less efficient than the use achievable by redistribution would be. If an alien investor is willing to put the property to more efficient use, sound economics indicates that the alien investor should be encouraged rather than impeded in the quest to gain control of the property. Once the foreign investor moves the resource to a more efficient use, everyone in the economy is better off than before the alien land transaction occurred.

Many alien land laws at both federal and state levels are designed to protect domestic owners, particularly domestic farmers, from foreign competition.¹⁶⁰ By protecting domestic owners from external competition, these land laws are, in effect, fostering inefficiency in United States land use patterns. If a foreign investor is shut out of the market for a particular parcel of land, the market for that land is restricted. If this restriction has the effect of preventing land from being put to its highest productive use, then the restrictive regulation artificially

156. In the words of Adam Smith, this represents a state's attempt at "begging all their neighbours." ADAM SMITH, *THE WEALTH OF NATIONS* 519 (Edwin Cannon ed., 1976).

157. 48 U.S.C. §§ 1501-07 (1988).

158. See *discussion supra* notes 68-72 and accompanying text.

159. Yadavish, *supra* note 111, at 109.

160. Virtually all of the state laws restricting ownership of agricultural lands to United States citizens or resident aliens fall into this category. See, e.g., IOWA CODE ANN. § 567.3(1) (West 1992).

suppresses land values¹⁶¹ and therefore directly harms the constituents it was designed to aid.

A third relevant economic principle is that investments are not generally undertaken unless some economic benefit conceivably can be achieved on the investment. Under this principle, alien investors would not be attracted to United States land unless they perceived potential economic gain to be derived from the investment. That aliens are interested in United States land implies that there are efficiencies to be gained by allowing alien investors to take control of United States property if they are willing to pay more for the right to control the property than are domestic land purchasers. That an alien investor is willing to pay more than domestic investors leads to the conclusion that the alien investor has a more valuable and therefore a more economically efficient use for the property.¹⁶²

Many alien land laws are based on the premise that United States production will be harmed by allowing unrestricted foreign investment in domestic lands. Land laws designed to protect United States farmers are prime examples. If United States farmers in fact can put land to more efficient use, domestic investors would be willing to pay a higher price for land than would foreign investors. That is, if United States farmers were worthy, because of their more efficient use of land, of protection from foreign interests, the land would be worth more in the hands of the domestic farmers, and alien investors would be outpriced. By being allowed to languish in an atmosphere of protection generated by federal and state alien land laws, the United States farming industry is allowed to function at inefficient levels. Stated simply, the economic argument against regulation of foreign ownership of United States land is this: Efficient use of United States land is beneficial to the United States economy. Land is worth the most in the hands of the most efficient user. If domestic owners are putting land to its most efficient use, United States land will not be attractive to foreign investors, in which case alien land ownership regulation would be irrelevant. If domestic owners are not using land efficiently, foreign investment is desirable because it would force domestic owners to use the land more efficiently or put it in the hands of those who would use it more efficiently. In this case, the effect of alien land ownership regulation would be harmful to United States economic interests.

161. Yadvish, *supra* note 111, at 108.

162. *Id.* at 109.

The possibility of alien investment affecting persons not party to the transaction, "externalities"¹⁶³ in the language of economics, presents the only viable economic justification for alien land ownership restrictions. Many states, particularly farm-belt states, have enacted alien land ownership regulations to address externality problems.¹⁶⁴ Abuse of agricultural land, for example, could affect future owners of land by rendering the land useless for years. Externalities can occur, however, with domestic owners as easily as with foreign owners.¹⁶⁵ A more effective way to prevent negative externalities from affecting land ownership decisions is to provide incentives, or disincentives as the case may be, for desired land use patterns. Such incentives could take the form of increased taxation of undesirable behavior with corresponding tax relief or government subsidy for desirable behavior. Alien land laws aimed at externalities, therefore, do not address the true underlying problem and should be replaced with taxing schemes which do achieve the desired result. A tax and subsidy scheme uses market devices to achieve the desired result and therefore represents a much more efficient method of addressing externality problems.

At bottom, it appears that no economic rationale exists for the majority of alien land regulations in place in the United States. All of the arguments advanced in favor of alien land ownership laws, with the possible exception of those laws designed to address economic externalities, allow inefficiencies to creep into United States land use patterns. By fostering and protecting these inefficiencies, alien land ownership laws prevent United States property from being put to its highest and most efficient use. Because alien land ownership regulation is for the most part economically inefficient, such government intervention harms all participants in the economy.

E. Political Policy Analysis

Many political reasons have been advanced to support alien land laws. While there are policy reasons for the existence of some limited forms of alien land ownership restriction, most such regulations are based on outdated and obsolete reasoning.

163. There are two types of externalities that may be generated by alien land ownership. Beneficial externalities, those that provide an economic or social benefit, are not the focus of alien land laws. Detrimental externalities, on the other hand, are a concern for legitimate policy-makers.

164. See Sullivan, *supra* note 2, at 34.

165. *Id.* at 36.

Following is an analysis of some of the most commonly advanced policy arguments favoring alien land ownership restrictions.

One of the primary policy reasons advanced for alien land laws is the argument that too much alien investment in United States lands will jeopardize national security.¹⁶⁶ There is indeed good reason to fear alien investment in some types of United States real property for national security reasons. Lands containing deposits of minerals and ores crucial to national defense, such as uranium deposits in the southwestern United States, should be shielded from alien control.¹⁶⁷ Further, prohibiting hostile aliens, such as Iraqis during the Persian Gulf War, from owning United States lands is another valid restriction on alien land ownership and control.¹⁶⁸ Confiscating enemy owned lands during times of intergovernmental hostility provides United States negotiators with a powerful bargaining chip when negotiating for an end to hostilities.

The problem with the national security rationale for alien land ownership regulation is that it may be expanded to encompass properties not truly crucial to national defense.¹⁶⁹ The national security argument could conceivably be expanded to reach virtually any alien owned property. This argument, thus, sweeps too broadly in its unlimited form.

The national defense argument fails to take into account the interest that aliens have in protecting their investments once made in United States property.¹⁷⁰ In truth, alien land investment may make national security more certain by more closely linking the well-being of the United States with the interest of foreign nationals and governments. Also, the national security argument fails to consider that land is an immovable resource. In times of true national emergency, the government can easily evict foreign owners and reclaim the alien's property if alien ownership really does present a national security risk. Thus,

166. See *supra* notes 145-47 and accompanying text.

167. A number of federal statutes attempt to achieve this end. The Mining Act of 1872, 30 U.S.C. § 22 (1988), governs the mining of uranium and other hard minerals on United States land. This Act contains an explicit provision concerning aliens. The Atomic Energy Act of 1954, 42 U.S.C. § 2099 (1988), gives the Nuclear Regulatory Commission the authority to regulate and license the mining of uranium, and allows the Commission to deny a license if granting it could somehow threaten national security. The Outer Continental Shelflands Act forbids foreign investment in source materials located on the outer continental shelf. 43 U.S.C. § 1341(e) (1988).

168. The Trading with the Enemy Act of 1970 allows the federal government to take control of such properties. See *supra* notes 73-78 and accompanying text.

169. BAUMOL & BLINDER, *supra* note 153, at 399-400.

170. See Gilbreath, *supra* note 126, at A19.

while valid national security concerns point to the necessity of some alien ownership regulation, for the most part this argument stretches much too broadly and fails to take into account that real estate is unique in that it is easily reclaimed and cannot be taken with the owner.

In times past alien land laws acted as an adjunct to United States immigration policy.¹⁷¹ When the federal government wished to encourage immigration it loosened alien land ownership restrictions to coincide with government give away of massive amounts of land in the plains states. Conversely, when the government wished to curtail the immigration rate, an increase in alien land restrictions would help achieve this goal.¹⁷² Alien land laws probably do not have any great effect on immigration rates today because great government giveaways of land are now a thing of the past. Therefore, increases in the amount of regulation of alien land ownership cannot be justified on immigration policy grounds.

During the heyday of the Cold War, many states enacted inheritance legislation aimed at denying citizens of communist regimes access to land.¹⁷³ Such regulation is needed much less today, with the fall of many of the communist governments around the world, than it was in times past. Communism presents far less of a threat now than it did when these regulations were passed. Increases in alien land regulation, therefore, cannot be justified as a means to combat communism.

In reality, alien land laws present several severe political problems. State alien land regulations may infringe on the federal government's foreign policy and treaty making ability. Although federal treaties are superior to inconsistent state laws,¹⁷⁴ provisions of state laws often do not explicitly contradict federal treaties, but only operate in addition to them.¹⁷⁵ Thus, alien investors are subject both to federal treaties and state land holding laws. Alien investors may face different requirements in different states. This arrangement only operates to confuse the investing landscape in the United States, even when the federal government has attempted, by treaty, to simplify it.

The most serious negative policy implication of alien land ownership laws is that such measures may evoke a protectionist

171. Sullivan, *supra* note 2, at 40.

172. See *id.* at 40-41.

173. See *supra* notes 54-62 and accompanying text.

174. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

175. See Fisch, *supra* note 21, at 421-23 (asserting that some of the most restrictive state alien land laws are unaffected by most bilateral treaties of friendship, commerce, and navigation).

attitude from foreign states. If this occurs, United States investors abroad may see their ability to operate in foreign real estate markets severely curtailed. Limiting investor ability, whether United States or alien, can only lead to increased world polarization which, in the long-run, can only lead to increased international friction.¹⁷⁶ Therefore, although some limited public policy rationales exist to justify alien landholding regulation, for the most part policy reasons behind many of the existing laws have now become obsolete.

VI. CONCLUSION

Almost no one will now dispute that the markets of the world are combining into an ever expanding global economy. "Technology and economics are tightening the bonds that link us together. What happens in one place on the globe is likely to affect life in many other places. As a result global cooperation is more urgent than ever."¹⁷⁷ The most visible form of this economic interdependence to most United States citizens is foreign investment in United States real estate.¹⁷⁸ During the 1980s, foreign investment in the United States rose dramatically.¹⁷⁹ This increased level of foreign investment in turn sparked concerns that the United States was being bought up by its off shore rivals, and Congress reacted by beginning consideration of a number of bills designed to limit or at least regulate foreign investment in the United States.¹⁸⁰ The great irony in all of this maneuvering over foreign investment is that for years the United States has been a leading player in foreign investment.¹⁸¹ The fact is that the United States is greatly dependent on foreign investment for economic growth. Huge amounts of foreign capital are needed to finance the United States trade and account deficits. The United

176. In fact, one state's protectionist attitude may provoke a foreign government into implementing protectionist measures of its own aimed at the United States as a whole, rather than just the offending state. Yadavish, *supra* note 111, at 104-05; see also *Bethlehem Steel v. Bd. of Comm'rs*, 276 Cal. App. 2d 221 (1969).

177. Robert B. Reich, *At Munich, Nations Look Inward*, USA TODAY, July 6, 1992, at 11A.

178. Gilbreath, *supra* note 126, at A19.

179. Barrett, *supra* note 132, at 4. Foreign direct investment in the United States rose seventeen-fold during the 1980s. Cheryl Tate, *The Constitutionality of State Attempts to Regulate Foreign Investment*, 99 YALE L.J. 2023, 2023 (1990).

180. Barrett, *supra* note 132, at 4; Tate, *supra* note 179, at 2023.

181. Gilbreath, *supra* note 126, at A19.

States also needs the technology and foreign skills acquired through foreign investment.¹⁸² Much of the foreign capital, technology, and skill cannot be gained without foreign investment in United States real estate. Therefore, foreign investment in United States real property should be viewed not as a threat to the national economy, but as a necessary and desirable side-effect of the interrelation of the world's economies. Just as the rest of the world needs the United States, the United States needs the rest of the world. This mutual dependence necessitates recognition of "economic interdependence" rather than "economic imperialism."¹⁸³

Much of the recent concern over foreign investment in United States real estate is a result of well-publicized Japanese investment in large well-known real estate projects in this country.¹⁸⁴ A large segment of the United States public believes that Tokyo is taking the United States by storm and that eventually the United States will be little more than a colony of Japan. The truth, however, is that Japan traditionally has not been the big buyer of United States real estate.¹⁸⁵ British, Dutch, and Canadian investments in United States real estate are at least as substantial as Japanese investments.¹⁸⁶ Japanese investment is perceived so negatively for at least two reasons. First, the concentration and magnitude of Japanese investment in United States property and businesses over the last several years have made Japanese investment highly conspicuous.¹⁸⁷ Second, misunderstanding and fear of Asian culture may have much to do with the negativity resulting from recent Japanese investments in the United States. British, Canadian, and Dutch investment in United States property is not seen as detrimental to the United States economy because these countries share common tradition and history with the United States. Much of the recent criticism, then, can be viewed as nothing more than a symptom of the ignorance of the the United States public about the Japanese culture. Economically, Japanese investment in United States real estate is just as beneficial as British, Dutch, or Canadian investment.

182. *Buy America*, *supra* note 147, at 63.

183. *Id.*

184. James Bates & Karl Schoenberger, *Chastened Yen Heads for Home*, L.A. TIMES, Apr. 3, 1992, at A1.

185. *Inflows*, *supra* note 121.

186. *Id.*

187. Bates & Schoneberger, *supra* note 184.

The recent world recession has had a profound impact on the United States economy.¹⁸⁸ The wave of foreign investment in the United States during the last decade has tapered dramatically in the first few years of this decade.¹⁸⁹ Even with lower real estate prices in the United States, foreign investors seem to be in a retrenchment mode.¹⁹⁰ A withdrawal of foreign capital could have a serious impact on the already weakened United States economy. Yet, fears still persist that foreign, particularly Japanese, investors are buying too much of United States concerns.¹⁹¹ The probable effect of this thinking will be that United States policymakers will continue on a course of increased regulation of foreign investment in United States real estate. If this occurs, the exodus of foreign capital will only increase, which could severely exacerbate current economic problems in the United States. A more prudent course would be to encourage foreign investment and embark on a program of attempting to attract capital investment, whether by real estate buying or other means, in an effort to grow out of the recession. Only in this way will all the benefits of foreign investment¹⁹² be fully realized.

The simple truth is that the perceived detriments to foreign investment in United States real estate¹⁹³ for the most part reflect incorrect interpretations of economic reality. The United States and the world benefit from increased levels of foreign investment. Real estate that is currently not in productive use or not contributing to the tax base of the local economy can be put to more efficient use. More efficient use in turn will lead to more jobs and greater demand for ancillary services. In addition, foreign investment can help sagging United States businesses regain vitality and competitiveness. As more people are put to work and the United States economy grows, the demand on welfare programs will decrease. All in all then, foreign investment in United States real estate is a positive thing for the economy. For this reason, it is an activity that should be encouraged, not

188. Tom Walker, *It's Better Game When We All Play Ball Together*, ATLANTA J. & CONST., June 11, 1992, at A14.

189. *See id.*

190. Bates & Schoenberger, *supra* note 184.

191. *Id.*

192. *See supra* notes 126-43 and accompanying text. Presidents Reagan and Bush recognized the benefits to be gained from foreign investment and adopted stances actively encouraging it. International Investment Policy Statement, 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983); Message to the Congress Transmitting the 1990 Economic Report, 26 WEEKLY COMP. PRES. DOC. 180, 183 (Feb. 6, 1990).

193. *See supra* notes 144-52 and accompanying text.

criticized. Existing and proposed alien land laws may, and in fact can be expected to, have a chilling effect on foreign real estate investment in the United States and should, therefore, be looked at with suspicion.

There are many possible economic detriments to increased regulation of foreign real estate investment other than the indirect ones mentioned in the preceding paragraph. Not only may foreign investors pull out of the United States real estate market if the environment becomes too regulated, but increased protectionist measures raise the threat of retaliation by foreign governments to United States investment within their borders.¹⁹⁴

The United States holds a respectable share of the global economy. Although that share is smaller than in times past, this fact is merely an indication that other states' economies are growing and maturing. At the end of World War II, the United States stood as the lone economic super-power because it was the only major world economic system not bombed into rubble.¹⁹⁵ Because foreign economies grew from virtually nothing in the mid 1940s, it is to be expected that they will capture a share of United States business, including purchases of United States real estate. Although it is understandable that people will be concerned about the increased level of investment in United States lands, increased investment is not an unexpected phenomenon and should be viewed accordingly.

In fact, many economies of the world have borne high levels of foreign investment with no adverse consequences.¹⁹⁶ The truth is that the more foreign investors a particular state's economy has, the more other parts of the world will have a vested interest in seeing to it that the economy does well.¹⁹⁷ Thus, foreign investment in United States real estate is an activity to be encouraged so that other governments will want to ensure that the United States economy succeeds instead of an activity that should be discouraged and stifled in any way possible.

For the most part alien land laws were enacted during more rural and agrarian times.¹⁹⁸ As such, they are anachronisms in

194. *Yes, You Are the Superpower*, THE ECONOMIST, Feb. 24, 1990, at 11 [hereinafter *Superpower*]; Koeppe, *supra* note 119, at 52.

195. *Superpower*, *supra* note 194; Koeppe, *supra* note 119, at 52.

196. *Superpower*, *supra* note 194; Koeppe, *supra* note 119, at 52. In fact, during its early history, the United States shouldered huge amounts of foreign investment. See MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914, 48 (1989) (presenting an excellent discussion of foreign investment in the United States during its early history).

197. Gilbreath, *supra* note 126.

198. Sullivan, *supra* note 2, at 35.

today's more industrial society.¹⁹⁹ Alien land laws seemed to be hastily enacted to counter some compelling need of the moment and few appear to have been enacted in response to a calculated policy.²⁰⁰

Alien land laws present some serious negative policy implications. First, protectionism may invite other states to treat United States investors the same and may cause foreign investors to exit the market in the United States.²⁰¹ Although this is exactly the effect sought by such laws, as discussed previously, these results can have severe negative impacts on the United States economy. Second, alien land laws make the real estate investment environment less certain to foreign investors, and this provides a disincentive to investment in the United States, resulting in negative economic consequences for the United States. Third, large, sophisticated foreign investors have the ability and know-how to circumvent most alien land laws, and, therefore, the only people really affected by such laws are small foreign investors who do not have the resources to skirt the regulations.²⁰² Finally, alien land laws lead to land use inefficiencies.²⁰³ These inefficiencies lead to lower market prices for United States landholders.

For the most part, alien land laws provide at best marginal benefit to this country. Most economic and political rationales advanced to justify the myriad alien land laws at the state and federal level do not support these laws in the face of substantial problems the laws create. The only justifiable economic basis for alien land laws comes from the possibility of externalities skewing the market mechanism. These externalities, however, can best be dealt with by taxing, not by regulating alien ownership of United States lands. Policy rationales for alien land regulation are valid only in the limited areas of national security and dealing with hostile states. By restricting policy-based regulation to these areas, the United States would hold true to its free market heritage.

In light of the foregoing analysis it appears that much should be done in the area of alien land regulation. Federal and state laws and regulations based on economic considerations should be discarded altogether. Laws designed to deal with market externalities should be replaced by taxing mechanisms that do

199. *Id.* at 34. See also Gilbreath, *supra* note 126.

200. Sullivan, *supra* note 3, at 34-35.

201. *Id.* at 40.

202. Yadavish, *supra* note 111, at 106.

203. *Id.* at 108.

not limit alien investment, but instead address the broader source of externalities. Alien land laws originating from political considerations should be closely examined to determine if the laws are related to national security or are designed to facilitate dealing with potentially hostile governments. Laws based on these concerns should be carefully examined, and redrafted as necessary, to ensure that they do not sweep too broadly and do not unnecessarily impede international investment in real property.

Legislators and policymakers should keep in mind that the United States system is based on the free exchange of ideas and trade between persons and governments. Many alien land laws and regulations currently in force impede this exchange. By restructuring the way the United States deals with alien investment in United States real property, the United States could take a giant step toward reclaiming one of the principles that made it great and thereby help ensure the continued vitality of the United States well into the next millennium.

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