

## A Proposal for Uniform Regulation of Foreign Investment in American Real Estate

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## A PROPOSAL FOR UNIFORM REGULATION OF FOREIGN INVESTMENT IN AMERICAN REAL ESTATE

In almost any society with a formal economy, ownership of real property is a valuable sign of wealth. Real property in the United States is particularly important because it attracts investment money from beyond domestic boundaries. In the U.S., real property is not merely an indicia of or a means to acquire wealth, but also a secure and stable way to maintain wealth. Foreign investors often rely on U.S. real estate investments to avoid precarious political or financial climates and view the U.S. economy more favorably than that of other countries.

This influx of foreign money can rejuvenate U.S. real estate markets. Foreign land investment also benefits the national economy as a whole, increasing tax revenues, providing jobs, and offsetting large exports. Nevertheless, foreign investment raises fears of foreign takeovers and can stimulate federal and state attempts to regulate foreign investment. Foreign land investment presents a particularly complex issue due to the inherent conflict between the perceived dangers and desired economic benefits of foreign land ownership. For these reasons, developing a regulatory system that will reconcile the conflict may lie beyond traditional means of land investment regulation.

This Note evaluates the current system of regulating foreign investment in U.S. real estate and concludes that innovation is necessary to address the dangers and benefits of foreign land investment. Section I analyzes the current status of foreign land investment. Section II surveys current foreign land investment regulation on federal and state levels. Section III analyzes the question of whether the current statutory framework furthers the interests of the United States and its citizens and concludes that the lack of uniformity among foreign land investment statutes causes confusion, obstructs beneficial investment, and prevents the states from furthering their interests. Section IV poses a solution to these problems in the form of a foreign land investment law that would be flexible to accommodate local needs yet provide national uniformity through its adoption by the states. The achievement of national uniformity and local flexibility would help attract foreign investment to areas where it will have a beneficial effect and would discourage foreign investment from areas where it will be harmful. Section V outlines a model for such a uni-

form law that would address the problems of foreign land investment and remedy the failings of current regulation.

## I. THE PRESENT STATUS OF FOREIGN LAND INVESTMENT

### A. THE AMOUNT AND EXTENT OF LAND HOLDINGS

Foreign investment in U.S. real property is often both economically desirable and problematic. Investment draws needed capital into this country, thereby expanding tax bases and offsetting trade deficits. Yet, many Americans are concerned that foreign ownership of U.S. real estate surrenders control of an extremely vital and basic resource into the hands of foreigners. Foreign ownership may also disrupt domestic land markets by increasing land prices to levels at which many U.S. investors cannot afford to purchase land.<sup>1</sup>

Recent investment activity in U.S. real estate<sup>2</sup> has thrived despite these fears and the non-uniformity of state and federal attempts to minimize incentives. At the end of 1974, foreign investors owned 4.9 million acres of U.S. real property, and foreign-owned U.S. enterprises leased 63 million acres.<sup>3</sup>

Recent figures indicate that the amount of foreign investment in U.S. real estate is increasing. Despite a decline in total foreign invest-

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1. See *The Foreign Land Grab Scare*, TIME, Jan. 8, 1979, at 40.

2. The term "real estate investment" has several meanings. Technically, it means the purchase and sale of real property solely for the property's investment value. The U.S. Department of Commerce and other informational sources describe a real estate investment as a sub-category of "foreign direct investment." Other types of investment may also involve real property and thereby affect land ownership patterns. Because this Note evaluates the effects of foreign investment activity upon land use patterns and local communities, a broader definition of land investment is appropriate. Therefore, this Note defines "real estate investment" as any investment activity that involves, even tangentially, the purchase and sale of real estate. For example, although the location of a Volkswagen automobile plant in Pennsylvania is technically an industrial or manufacturing investment by a West German corporation, this Note considers this activity to be a real estate investment. See *infra* notes 102, 107 and accompanying text.

A "benchmark survey" of foreign investment by the Department of Commerce in 1974, pursuant to the Foreign Investment Study Act, Pub. L. No. 93-479, 88 Stat. 1450 (1974), discovered 829 affiliates classified in real estate investment or in combined offices of real estate, insurance, finance, and law. This survey did not, however, include several activities that have a significant effect on real estate, such as hotel and resort operation within the real estate. See 1 U.S. DEPT. OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, REPORT TO CONGRESS 55 (1976) [hereinafter cited as FOREIGN DIRECT INVESTMENT]; 2 U.S. DEPT. OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, BENCHMARK SURVEY (1976) [hereinafter cited as BENCHMARK SURVEY]. The recent history of investment in Hawaii demonstrates the relation between hotel and resort operation and real estate investment. Between 1972 and 1975, foreign real estate investment in Hawaii increased from less than \$100 million to \$585 million. Most of this increase can be attributed to investment in resort hotels, condominiums, subdivisions, and tract housing. FOREIGN DIRECT INVESTMENT, *supra*, at 185.

3. FOREIGN DIRECT INVESTMENT, *supra* note 2, at 104.

ment in 1981-82, the percentage of foreign investment in U.S. real estate grew. In 1981, foreign investors spent sixteen cents of every dollar on real estate. In 1982 this figure increased to twenty-seven cents of every dollar.<sup>4</sup> Nonetheless, a precise determination of current foreign holdings in U.S. land is quite difficult. Difficulties in calculation arise primarily because the most accurate records of land ownership are found at state and local levels, and few states require foreign investors to disclose their landholdings.<sup>5</sup> Moreover, many foreign investors own and operate their U.S. real estate holdings through domestic holding companies or subsidiaries.

According to U.S. government figures, foreign investment in U.S. real estate in 1979 totalled \$4.2 billion.<sup>6</sup> The actual extent of foreign investment, however, is significantly greater than these figures indicate because of foreign investors' use of U.S. corporations and tax havens. For example, investors from the Middle East reportedly have invested over a billion dollars in U.S. property, a figure that far exceeds the official amount.<sup>7</sup>

Investment in real estate by foreign interests occurs throughout the U.S. with capital from all areas of the world. In fact, common perceptions of Arab sheiks with large bankrolls dangerously understate the foreign land investment issue. The most active nations in the U.S. real estate investment scheme are the United Kingdom and Canada.<sup>8</sup> Other important investing nations include the Netherlands, France, and the Latin American countries.<sup>9</sup> The Middle East and Asia also actively invest in the U.S. real estate market.<sup>10</sup>

A stable political climate, a constant population, economic growth, markets that are understandable to most European investors, and the universality of the English language attract foreign investors to the United States.<sup>11</sup> Real property in the U.S. provides a more

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4. Turpin, *U.S. Land is the Best Bet*, L.A. TIMES, Oct. 16, 1983, pt. VII (Real Estate), at 1, 12 (statement of Paul Nussbaum, senior partner of Schulte, Roth & Zabel, a New York law firm that represents many major European investors).

5. FOREIGN DIRECT INVESTMENT, *supra* note 2, at 183.

6. See *International Investment in U.S. Real Estate: Who, Where, and How*, 41 URB. LAND, May 1982, at 3, 5 (recounting U.S. Dep't of Commerce statistics) [hereinafter cited as *International Investment*]. The \$4.2 billion breaks down as follows: office building investment property, 38% of the total, or \$1.6 billion; commercial/retail property, 33.7%, or \$1.43 billion; unimproved land, held presumably for speculation, 13.5%, or \$565 million; residential land, 8.3%, or \$350 million; and industrial land, 4.6%, or \$194 million. Other investments constituted the remaining \$66 million. *Id.* at 5.

7. *Id.* at 4.

8. FOREIGN DIRECT INVESTMENT, *supra* note 2, at 184.

9. *International Investment*, *supra* note 6, at 3.

10. *Id.*

11. Roulac, *Advising Foreign Investors in U.S. Real Estate*, 9 REAL EST. L.J. 108, 110-12 (1980); see *International Investment*, *supra* note 6, at 3-14 (report of discussion by panel on foreign investment which included members of foreign investment interests).

promising risk-return factor than other forms of investment, and the ownership of property is a way to establish a presence in a U.S. community.<sup>12</sup> American markets also enjoy attractive labor conditions, affordable raw materials, and specialized technologies.<sup>13</sup> Furthermore, environmental regulations, which constrain real estate development in Europe, have not yet had as dramatic an effect in the United States.<sup>14</sup> These factors create a push-pull effect, drawing investment capital into U.S. real estate markets and simultaneously pushing it out of foreign countries experiencing economic decline.<sup>15</sup>

Investment activity in U.S. real estate takes many forms in both urban and rural/agricultural contexts.<sup>16</sup> Some foreign investors deal exclusively in unimproved land, primarily for speculative purposes; others invest in many different types of holdings, largely in urban areas. Urban investment projects vary, ranging from residential uses, which include subdivisions, condominium projects and garden apartments, to commercial uses, which encompass office building management and shopping centers.<sup>17</sup> Foreign investors have also recently become involved in planned unit developments.<sup>18</sup>

Investment in U.S. agricultural land has also become more popular as the world food supply grows scarce.<sup>19</sup> Many nations, notably

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12. Roulac, *supra* note 11, at 110.

13. FOREIGN DIRECT INVESTMENT, *supra* note 2, at xiii.

14. *International Investment*, *supra* note 6, at 13 (statement of Pierre Hueber, Chief Operating Officer of Wilma Int'l, Antwerp, Belgium). These processes include pollution and noise limits, traffic regulations, restrictive land use policies, environmental design regulations, and rent controls. *Id.* at 13.

15. FOREIGN DIRECT INVESTMENT, *supra* note 2, at xiii.

16. This distinction between agricultural and non-agricultural land is not a perfect one. In fact, the fear of foreign investment in U.S. agricultural land arises to some extent out of a concern that urban investment practices will be applied to agricultural areas. Members of agricultural communities fear that foreign investors will transfer urban land issues and development to rural areas, destroying local economies and changing communities. *See infra* note 46 and accompanying text.

17. B. ZAGARIS, FOREIGN INVESTMENT IN THE UNITED STATES 285-300 (1980); *see also International Investment*, *supra* note 6, at 4-7.

The most popular urban real estate investment markets in the United States are New York City; Houston; Dallas; Chicago; San Francisco; Denver; Los Angeles; the Miami/Tampa/Palm Beach area; Washington, D.C.; and Atlanta. *International Investment*, *supra* note 6, at 5. The most popular agricultural investment markets are found in Tennessee, Georgia, and South Carolina. U.S. DEP'T OF AGRICULTURE, ECONOMICS, STATISTICS, AND COOPERATIVES SERVICE, AGRICULTURAL ECONOMIC REPORT NO. 447, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND 3 (1980) [hereinafter cited as AGRICULTURAL ECONOMIC REPORT].

18. A planned unit development (PUD) is a combination of different types of residential and commercial projects located in a single preplanned area. These developments often have common areas of planned open space, cluster housing, community shopping centers, and recreation facilities. PUDs have been a popular form of investment for foreigners from Iran and the Netherlands, and have been especially popular in the Washington, D.C. metropolitan area. *See* B. ZAGARIS, *supra* note 17, at 293.

19. *Id.* at 128.

West Germany, Japan, the Middle East, and Latin America, invest in agricultural real estate in the United States.<sup>20</sup> Agricultural investment is unlike urban investment in one particular respect—individuals generally undertake agricultural land investment on a much smaller scale than urban investment. Many foreigners who invest in U.S. farmland are wealthy European and Asian individuals seeking speculative gain.<sup>21</sup> Foreign investors in urban land are often professional land bankers, while agricultural investors hold U.S. farmland primarily as a source of secondary income. Foreign corporations, nonetheless, hold more than ten times the acreage that foreign individuals hold.<sup>22</sup> Individual investors, however, are much greater in number and are not heavily involved in urban investment.

Foreign investments in U.S. real estate may be structured in various ways. Most obviously, a foreign individual or corporation may buy a specific quantity of land and administer the investment from overseas.<sup>23</sup> An investor may also acquire real estate through a local subsidiary of a foreign corporation. In this way, foreign persons may still make investment decisions from abroad, but the actual investor is a domestic entity. Finally, foreigners may enter into partnerships or limited partnerships with domestic investors in order to acquire U.S. real property.

## B. THE EFFECT OF FOREIGN LAND HOLDINGS

The real effect of foreign ownership of U.S. land is difficult to ascertain. Nonetheless, foreign acquisition and holding of U.S. land prompt xenophobic feelings in many Americans.<sup>24</sup> Whether rationally justified or not, these xenophobic emotions are often manifested as fears of foreign takeovers, undue influence, and increased competition. The following are some of the most commonly cited reasons to fear foreign land investment:

- 1) Foreign land investment poses a threat to national security and sovereignty;

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20. *Id.* at 128-30.

21. *Id.* See also AGRICULTURAL ECONOMIC REPORT, *supra* note 17, at 5.

22. *Id.*

23. Nonresident alien investment activity creates popular fear and exposes the investor to the strictest forms of governmental regulation. See *infra* notes 57 & 103 and accompanying text.

24. Xenophobia is an unreasonable fear of foreigners. In this context, the term refers to the fear, misunderstanding, or mistreatment of foreigners as the basis for restricting foreign real estate investment. Legislation to curtail foreign land investment is xenophobic if it is not rationally related to a legitimate foreign threat. The term xenophobia was first applied to attitudes concerning foreign ownership of U.S. real property in a 1980 note. Note, *Our Land is Your Land: State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MAR. L. REV. 679, 679 (1980).

- 2) Foreigners are primarily interested in long-term capital appreciation instead of production or profit;
- 3) Foreign real estate investment will change the structure of local communities by neglecting indigenous institutions and businesses and by superimposing different labor patterns;
- 4) Foreign investment will increase prices through bidding wars in which the foreign investor has the advantage of large amounts of ready cash and will increase the complexity of ownership by adding more participants to the ownership process (see #5 below); and
- 5) Foreign land ownership will install absentee ownership, which dilutes the sense of local community and thereby decreases civic involvement and responsibility to the community.<sup>25</sup>

Most of these concerns do not arise out of pure xenophobia; they have some economic foundation. For example, the concern that foreign investors will price their domestic counterparts out of the U.S. market stems from foreign investors' willingness to pay higher prices for U.S. real estate. This willingness results from the attractiveness of U.S. land as compared to other foreign investment sources.<sup>26</sup> Furthermore, foreign real estate investors tend to focus their holdings in particular geographic areas, reducing real estate availability in these regions.<sup>27</sup> Ninety percent of all foreign land acquisitions are concentrated in twenty states.<sup>28</sup> Foreign ownership of the food supply may

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25. These arguments are synthesized in Atkinson & Jones, *Should Foreigners Own Our Land?*, reprinted in SENATE COMM. ON AGRICULTURE, NUTRITION AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND 57, 58-59 (Comm. Print 1979).

There is a fine line between xenophobic reactions and the objective, rational realities of foreign land investment. Nonetheless, the express policies of foreign investors support many of these factors. See, e.g., *International Investment*, supra note 6, at 7-14 (statements of six foreign investors active in U.S. real estate). Most foreign corporations prefer to invest in real property by means of all-cash deals, as opposed to mortgaging or joint ventures, and they prefer investments that promise strong capital growth. *Id.* These generalizations, however, are not without exception. Iqbal Mamdani challenges a common myth about Arab land investors: "[A]ll cash transactions are not attractive to our clients, although many prospective sellers assume that foreign investors, particularly from the Middle East, prefer this sort of transaction." *Id.* at 8 (emphasis supplied). See generally Meacher, *Foreigners Eye Condos . . . A Summer Test*, BARRON'S, June 16, 1980, at 12 (discussion by typical foreign investors in U.S. real estate).

26. In 1978, the price of prime European farmland, for example, was more than twice as high as that of U.S. farmland. H.R. REP. NO. 1570, 95th Cong., 2d Sess. 16 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS. 2914, 2925.

27. Note, *Monitoring Foreign Investment in United States Real Estate*, 2 B.U. INT'L L.J. 29, 32 (1983).

28. *Id.* at 32 (citing SENATE COMM. ON AGRICULTURE, NUTRITION AND FORESTRY, 95TH CONG. 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND 45 (Comm. Print 1979)). See Note, *Closing the Barn Door: A Suggested United States Response to International Restrictions of Foreign Acquisition of Agricultural Land*, 10 CAL. W. INT'L L.J. 536, 540 (1980).

pose a real threat to national security. Also, foreign investors' general lack of interest in production or profit can inhibit economic growth. Holding land for long-term capital appreciation does not stimulate the economy because it does not provide jobs, products, or services.

On the other hand, foreign real estate investment can rejuvenate depressed economies, both locally and regionally. The precarious dichotomy between the benefits and harms of foreign land investment requires that investment activity be closely monitored and carefully regulated when necessary.

## II. CURRENT STATUTORY ATTEMPTS TO REGULATE FOREIGN LAND INVESTMENT

The statutory treatment of foreign real estate investment at both the federal and state levels has failed to accommodate the dichotomy between the benefits and harms of foreign investment. The present status of state and federal regulation of alien land investment creates disincentives to investment in areas where foreign land ownership would be beneficial. To a lesser extent, state and federal laws often do not regulate or restrict foreign investment sufficiently when there is real danger of foreign control over U.S. land.

### A. FEDERAL STATUTES

Traditionally, federal regulation of foreign real estate investment has been very limited. The few federal statutes have been directed at specific types of land holdings that are clearly under federal control.<sup>29</sup> For example, federal laws regulate foreign ownership of geothermal steam resources<sup>30</sup> and homestead<sup>31</sup> and grazing land,<sup>32</sup> because the lands themselves are subject to federal control. Recently, however, Congress has enacted two significant statutes that may limit foreign real estate investment activity, the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA)<sup>33</sup> and the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).<sup>34</sup>

FIRPTA eliminates a long-standing tax advantage for foreign investors in U.S. real estate. Before its enactment, gains from the dis-

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29. See *infra* note 83.

30. 30 U.S.C. § 1015 (1982).

31. 43 U.S.C. § 161 (1976); 43 C.F.R. § 2511.1 (1983).

32. 43 U.S.C. § 315(b) (1976); 43 C.F.R. § 4110.1 (1983).

33. 26 U.S.C. §§ 861, 871, 882, 897, 6039C, 6652 (1982 & West Supp. 1983).

34. 7 U.S.C. §§ 3501-3508 (1982). See also International Investment Survey Act of 1976, 22 U.S.C. §§ 3101-3108 (1982) (authorizing President to conduct program for collecting information on foreign investment; President in turn delegated authority to collect data on agricultural, rural and urban land investment to the Department of Agriculture); Exec. Order No. 11858, reprinted in 15 U.S.C. § 78(b) (1982) (creating the Committee on Foreign Investment in the United States to monitor foreign investment activity).



position of real property by a nonresident alien or foreign corporation had to be "effectively connected" to a U.S. trade or business to be subject to U.S. taxation.<sup>35</sup> Under this requirement, many real estate investment transactions conducted from abroad escaped taxation.<sup>36</sup> Foreign investors could furthermore avoid U.S. taxation in three additional ways. First, they could exchange U.S. real property for like-kind foreign property that was not subject to U.S. taxation.<sup>37</sup> Second, they could enter into an installment sale contract after the year of the sale of real property.<sup>38</sup> Finally, the sale of corporate shares and the liquidation of entities holding U.S. real estate also escaped taxation.<sup>39</sup>

FIRPTA places *all income* from the disposition of a U.S. real property interest (USRPI)<sup>40</sup> under the taxing power of the federal government. Specifically, the Act declares that gain or loss by a nonresident alien or foreign corporation from the disposition of a USRPI is treated (1) as if the taxpayer were engaged in a trade or business within the United States and (2) as if the gain or loss were effectively

35. 26 U.S.C. §§ 871(a)(2), 882(a)(1), 864(c) (1982). See generally Note, *Foreign Investment in United States Real Estate: Congress Acts to Reduce Incentives*, 7 INT'L TRADE L.J. 150 (1981-82).

36. See Note, *Foreign Investment in United States Real Estate*, *supra* note 35, at 151-52.

37. I.R.C. § 1031 (1982). See Note, *Foreign Investment in United States Real Estate*, *supra* note 35, at 151.

38. I.R.C. § 453 (1982). See Note, *Foreign Investment in United States Real Estate*, *supra* note 35, at 152.

39. I.R.C. §§ 337, 332, 334(b)(2) (1982). See Note, *Foreign Investment in United States Real Estate*, *supra* note 35, at 152.

40. FIRPTA, 26 U.S.C. § 897(c)(1)(A), defines a United States Real Property Interest as:

- (i) an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands, and
- (ii) any interest (other than an interest solely as a creditor) in any domestic corporation unless the taxpayer establishes (at such time and in such manner as the Secretary by regulations prescribes) that such corporation was at no time a United States real property holding corporation during the shorter of —
  - (I) the period after June 18, 1980, during which the taxpayer held such interest, or
  - (II) the 5-year period ending on the date of the disposition of such interest.

The Code further articulates an exclusion:

An interest in United States real property does not include an interest in a corporation, if

- (i) as of the date of the disposition of such interest, such corporation did not hold any United States real property interests, and
- (ii) all of the United States real property interests held by such corporations at any time during the shorter of the periods described in subparagraph (A)(ii)—
  - (I) were disposed of in transactions in which the full amount of the gain (if any) was recognized, or
  - (II) ceased to be United States real property interests by reason of the application of this subparagraph to 1 or more corporations.

connected with that trade or business.<sup>41</sup> FIRPTA thus constitutes a declarative statement that investment in U.S. land is a "source" of income within the United States, and profit from land investment meets the "effectively connected" test.

FIRPTA has succeeded in equalizing the tax treatment of foreign and domestic investors in U.S. real estate. FIRPTA is not, however, intended specifically to discourage or restrict foreign investment.<sup>42</sup> It is neither a federal pronouncement on the merits of foreign land investment, nor a purported solution to all of the problems of foreign real estate investment.

The second recent federal enactment, AFIDA, requires foreign persons who acquire or transfer any interest<sup>43</sup> in U.S. agricultural land<sup>44</sup> to submit a report to the Secretary of Agriculture.<sup>45</sup> This requirement applies to the *future acquisitions* of U.S. agricultural land as well as to *current holdings* by foreign individuals and corporations. The legislative history of AFIDA articulates a need for further information and data collection regarding the extent and effects of foreign ownership of U.S. farmland.<sup>46</sup> Despite the most vocal fears of foreign takeovers, Congress did not find the negative effects of foreign agricultural land investment sufficient to justify any action stronger than a

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26 U.S.C. § 897(c)(1)(B).

41. 26 U.S.C. § 897(a)(1). FIRPTA, in § 897 places foreign investment gains and losses within the *characterization* rule for U.S. taxation purposes. That is, FIRPTA characterizes foreign investment in U.S. land as a U.S. trade or business subject to federal income taxation. The Act also amends the *source* rule of section 861 so that gain from the dispositions of a USRPI is now treated as income from a source within the United States. 26 U.S.C. § 861(a). See Klein, *An Analysis of the Foreign Investment in Real Property Tax Act of 1980: How it Works*, 54 J. TAX'N, 202, 206 (April 1981); Newton, *Foreign Investment in United States Real Property*, 34 TAX EXEC. 12 (1981).

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

43. AFIDA, at 7 U.S.C. § 3501(a), qualifies itself by exempting a security interest in agricultural land from the provisions of the Act.

44. "Agricultural land," is defined by AFIDA as "any land located in one or more states and used for agricultural, forestry or timber production purposes as determined by the Secretary [of Agriculture] under regulations to be prescribed by the Secretary," 7 U.S.C. § 3508 (1982).

45. 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 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) (1982).

46. [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.

H.R. REP. NO. 1570, 95th Cong., 2d Sess. 1 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2914, 2920.

disclosure requirement.<sup>47</sup> Thus, AFIDA is not very restrictive legislation.

Foreigners are not prohibited from acquiring or disposing of U.S. farmland under AFIDA. AFIDA's enactment, however, does indicate a congressional awareness of the growing concern with foreign investment in U.S. land, and it may indicate a tendency toward more active federal regulation. This Note nonetheless contends that federal attempts to regulate foreign investment in U.S. real estate have been and will remain of limited importance. The regulatory scheme concerning foreign land investment largely arises from state legislatures.

Two factors historically have deterred Congress from undertaking comprehensive regulation of foreign real estate investment. The first is the notion that regulation of foreign real estate investment falls within the exclusive province of state government,<sup>48</sup> because property law and the regulation of land ownership traditionally have been matters of state law.<sup>49</sup> Second, the federal interest in promoting the movement of international capital conflicts with a policy of restricting foreign real estate investment.<sup>50</sup> The federal government is interested

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47. See, e.g., H.R. REP. NO. 1570, 95th Cong., 2d Sess. 7-8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2914, 2917:

If farm income leaves the country and local businesses are bypassed in the purchase of agricultural inputs for the absentee-owned farming operations, the adverse effect on the economic and social vitality of rural communities is obvious. It is suggested that foreign investors may have little incentive to participate in land conservation programs so essential to the long-term productivity of the soil. Another danger cited is that concentrated foreign investment could, in a short time, permit foreign interests to have a controlling voice in the production and marketing of specialized crops with limited and geographically restricted production. . . . If foreign investment effects such changes in the structure of U.S. agriculture on a broad enough scale, it is argued, this may be reflected in higher food costs to consumers.

48. See *Hauenstein v. Lynham*, 100 U.S. 483, 484 (1879) (suit to recover inheritance brought by foreign next-of-kin to American intestate - law of alien property ownership is local law of Virginia, state in which property is situated).

The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily in the States, where the property is situated.

100 U.S. at 484.

See also Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 629 (1976).

49. *Id.*

50. See generally Commission to Study Foreign Investment in the United States Section of Corporation, Banking & Business Law, American Bar Ass'n, *A Guide to Foreign Investment Under United States Law* 1-21 (1979) [hereinafter cited as *A Guide to Foreign Investment*]. The federal interest has developed due, in large part, to the fact that foreign capital rapidly became a critical factor in the early development of the United States. *Id.* at 3. The American Colonies originated as exercises in foreign investment, and dependence of investment from abroad continued through American history. *Id.* at 2. This dependence has, however, generated fears of foreign investment and of undue foreign influence. These seemingly incongruous positions have resulted in a "go away, get closer" attitude toward foreign investment. This attitude is reflected in periodic fluctuations between nationalism,

in preserving the free flow of transnational investment capital and in promoting international relations.

Moreover, it is uncertain whether federal regulation in this area would significantly improve the current state regulatory system. Federal statutes, such as FIRPTA and AFIDA, have limited effectiveness. FIRPTA only equalizes the tax treatment of foreign and domestic land investors; AFIDA is merely a disclosure requirement and, as such, can be circumvented easily.<sup>51</sup> New federal legislation might succeed in achieving uniformity among the states,<sup>52</sup> but would sacrifice the flexibility that is available in a state system. This flexibility is tremendously valuable because it allows different approaches to foreign land investment in areas with different needs.<sup>53</sup>

## B. STATE STATUTES

State legislation is the most prevalent source of regulation of foreign land investment, and state laws concerning foreigners' investment in land are disparate and varied. These laws can significantly

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which represents fear of foreign influence, and investment attraction, which recognizes its importance. For example, following World War II, United States policies supported the free flow of international capital. These policies would seem to encourage foreign investment in American real estate. *See, e.g.,* Mutual Security Act of 1954, Pub. L. No. 83-665, § 413, 68 Stat. 832, 846 (1954):

The Congress recognizes the vital role of free enterprise in achieving rising levels of production and standards of living essential to the economic progress and defensive strength of the free world. Accordingly, it is declared to be the policy of the United States to encourage the efforts of other free nations to increase the flow of international trade, to foster private initiative and competition, to discourage monopolistic practices, to improve the technical efficiency of their industry, agriculture and commerce, and to strengthen free labor unions; . . .

*See also, A Guide to Foreign Investment, supra, at 9.*

Foreign investment in American real estate became more attractive in the 1970's, due to the declining value of the U.S. dollar. It also generated public concern about "foreign takeovers." *See U.S. Realty Continues to Tempt Foreigners*, BUS. WK., Oct. 1, 1979, at 51-54; *Foreigners Scramble for a Piece of America*, U.S. NEWS & WORLD REP., Dec. 6, 1982, at 80. *See also supra* notes 26-28 and accompanying text. As a result, the most recent federal attempts to regulate foreign investment have resulted from a popular concern about the influence of foreign capital, *notwithstanding* continuous governmental willingness to attract such investment.

51. *See generally* Azevedo, *Foreign Direct Investment in U.S. Real Estate: A Survey of Federal and State Entry Level Regulation*, 7 N.C. J. INT'L L. & COM. REG. 27, 30-31 (1982);

[I]t is unlikely that the Secretary of Agriculture in fact could compel a foreign holding company to disclose the "true" holders of control of U.S. agricultural property if the representatives of the holding companies were outside the federal government's jurisdiction.

*Id.* at 30 (example at page 31).

52. *But see* Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MAR. L. REV. 679, 714-715 (1980) (concluding that federal legislation would provide uniformity and preempt conflicting state law, but addressing neither the need for flexibility nor the concern for local communities' needs).

53. *See infra* note 74.

encourage or discourage foreign investment. This section describes the current array of state statutory and constitutional provisions concerning foreign land investment.

The states that treat foreign land investors most favorably grant these investors all ownership rights enjoyed by citizens. States may convey these rights in the form of a statute, such as the Idaho Code, which expressly grants to any person, citizen, or alien, the right to hold and dispose of real or personal property.<sup>54</sup> Alternatively, some states place this type of guarantee in their constitutions. The California Constitution, for example, states that "non-citizens have the same property rights as citizens."<sup>55</sup>

Other states have attempted to exclude foreign land ownership altogether. For example, Oklahoma traditionally has fostered a harsh anti-alien policy, including a constitutional proscription against alien land ownership.<sup>56</sup> Historically, nearly every state at some time has

54. IDAHO CODE § 55-103 (1979) ("Any person, whether citizen or alien, may take, hold and dispose of property, real or personal."). See also DEL. CODE ANN. tit. 25, § 306 (1975) ("All real and personal property situate in this State may be taken, acquired, held and disposed of by an alien in the same manner as by a citizen of this State."); MICH. COMP. LAWS ANN. § 554.135-136 (West 1967); ME. REV. STAT. ANN. tit. 33, § 451 (1978); 1977 MASS. ANN. LAWS ch. 184, § 1 (Law. Co-op. 1977); N.M. STAT. ANN. § 47-1-4 (1978); N.Y. REAL PROP. LAW § 10 (McKinney 1968); R.I. GEN. LAWS § 34-2-1 (1984); TENN. CODE ANN. § 66-2-101 (1982); W. VA. CODE § 36-1-21 (1985); N.H. REV. STAT. ANN. § 477:20 (1983).

55. CAL. CONST. art. I § 20 (non-citizens have the same property rights as citizens). These rights are also provided for in the civil code. See CAL. CIV. CODE § 671 (West 1982) ("Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state"); See also ALA. CONST. of 1901 art. I, § 34 (1975) (foreigners who are, or may become residents of this state enjoy the same rights in respect to . . . property as native born citizens); COLO. CONST. art. II, § 27 (Aliens, who are or may hereafter become bona fide residents of this state, may acquire, inherit, possess, enjoy and dispose of property, real or personal, as native born citizens); FLA. Const. art. I, § 2 (all natural persons are equal before law and have inalienable rights, among which [is] the right to . . . acquire, possess and protect property, except ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law); MICH. CONST. art. 10, § 6 (Aliens who are residents of this state shall enjoy the same rights and privileges in property as citizens).

56. See OKLA. CONST. art. 22, § 1. But see OKLA. STAT. ANN. tit. 60, § 122 (West 1971). The Oklahoma Constitution, at art. 22, § 1, *supra* provides: "No alien or person who is not a citizen of the United States, shall acquire title to or own land in this state . . ." The Oklahoma constitutional provision provides, however, that "This shall not apply . . . to aliens or persons not citizens of the United States who may become bona fide residents of this state: And provided further that this section shall not apply to lands now owned by aliens in this state." The Oklahoma Statutes clarify and expand the exception in the Constitution. After codifying the constitutional provision at OKLA. STAT. ANN. tit. 60, § 121, the Oklahoma law states at § 122: "This article shall not apply to lands now owned in this state by aliens . . . nor to any alien who is or shall take up bona fide residence in this State: and any alien who is or shall become a bona fide resident of the State of Oklahoma shall have the right to acquire and hold lands in this State upon the same terms as citizens of the State . . . during the continuance of such bona fide residence of such alien in this State . . ." (emphasis supplied).

Thus, while Oklahoma possesses the reputation among many commentators and lawmakers for being strongly anti-alien, it actually is no more restrictive than the several

considered or enacted anti-alien investment legislation. In the early twentieth century, for example, many Western states prohibited alien land ownership, particularly by aliens of East Asian descent. Many states enacted laws excluding "aliens ineligible for citizenship" from owning land; Asians were the only racial class ineligible for citizenship.<sup>57</sup>

The vast majority of state alien land holding laws lie between the two extremes of xenophobic prohibition and sweeping guarantees. Most states regulate foreign land investment with more moderate measures than outright prohibition. In order to accomplish these goals, most states draw distinctions between different types of foreign land investment. For example, many states distinguish between resident and nonresident aliens, often categorically prohibiting land investment by the latter. Twenty-one states base their statutory distinctions in the treatment of land ownership and investment on alien residence.<sup>58</sup> The effect of these regulatory distinctions varies from for-

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states which prohibit or regulate nonresident alien land investment. *See also infra* note 58 and accompanying text.

57. *See Morrison, supra* note 48, at 626-27. *See* KAN. STAT. ANN. § 59-511 (1981). *See generally* Morrison at 626-28; *See also* Comment, 10 CALIF. L. REV. 241 (1921-22). In California, immigration of Japanese and other people of Asian heritage increased after 1900, and the immigrants began to conduct farming operations in the Central Valley of California. Popular pressure called for legislation which would curb the influx of immigrants. California voters approved an initiative in 1913, and again in 1920, that made eligibility for landholding rights depend upon eligibility for U.S. citizenship. At the time, federal immigration laws prevented Japanese aliens from obtaining citizenship. The California law was declared valid by the United States Supreme Court in *Porterfield v. Webb*, 263 U.S. 225 (1923), and thus became a model for other racist and xenophobic legislation throughout the West. The California statute was finally repealed in 1955. 1913 CAL. STAT. 113, *repealed by* 1955 CAL. STAT. 1550.

58. *See* ALASKA STAT. § 22.15.110(4) (1982) (district judges and magistrates must report all conveyances of real property to nonresident aliens); CONN. GEN. STAT. ANN. § 47-58 (West 1978) (nonresident aliens may acquire and hold real estate for mining purposes but lose land if not so used for 10 consecutive years); HAWAII REV. STAT. § 206-9(c)(1) (1976) (land held by state board of land and natural resources may only be sold to U.S. citizens or aliens resident in Hawaii at least five years); IND. CODE ANN. § 32-1-8-2 (Burns 1980) (aliens acquiring lands of more than 320 acres must either become citizen of U.S. or convey lands within five years, or face escheat to state); IOWA CODE ANN. § 567.3 (West Supp. 1983) (nonresident alien, foreign business or foreign government may not purchase or acquire agricultural land, unless the land is acquired by devise or descent, or does not exceed 320 acres and is acquired for immediate use other than farming); KY. REV. STAT. ANN. § 381.320-30 (Baldwin 1979) (resident alien may hold lands for purpose of residence or business for up to twenty-one years; nonresident alien who inherits land may hold and alienate land up to eight years after settlement of decedent's estate); MINN. STAT. ANN. § 500.221 (West Supp. 1984) (no individual may acquire interest in agricultural land unless citizen or resident alien of United States; no corporation or similar entity may acquire interest in agricultural land unless 80% of each class of stock issued and outstanding or 80% of ultimate beneficial interest of entity is held by citizens or permanent resident aliens of United States); MISS. CODE ANN. § 89-1-23 (1973) (resident aliens may acquire and hold land as citizens of state; nonresident aliens may not acquire or hold land unless held for less than 20 years as security for or in satisfaction of debt); MO. ANN. STAT. §§ 442.571, 442.586 (Vernon Supp. 1985) (no alien individual or foreign corporation may

bidding nonresident aliens from holding land to merely subjecting nonresidents to a reporting requirement similar to AFIDA.<sup>59</sup>

Another common distinction between agricultural and non-agricultural land holding appears in some alien land investment laws. Missouri, for example, allows aliens to hold non-agricultural land interests.<sup>60</sup> The Missouri Code forbids nonresident aliens from holding more than five acres of agricultural land for longer than two years,<sup>61</sup> unless the land is to be used for a non-agricultural purpose.<sup>62</sup> Ten states make some distinction between agricultural and non-agri-

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hold agricultural land unless such alien has or shall take up bona fide residence in the United States); N.H. REV. STAT. ANN. § 477:20 (1983) (an alien resident in the state may take, purchase, and hold real estate, which may descend as if he were a citizen); N.D. CENT. CODE § 47-10.1-02 (Supp. 1983) (person who is not a citizen of the United States or Canada and not permanent resident of U.S. may not acquire agricultural land; business or corporate entity may not acquire agricultural land unless ultimate beneficial interest held by U.S. citizen or permanent resident alien of U.S.; prohibition does not apply to agricultural land acquired for security or enforcement of debt or for use as an industrial site); OHIO REV. CODE ANN. § 5301.25.4 (Page 1981) (nonresident alien acquiring land in excess of three acres or with market value greater than \$100,000 must file report with Secretary of State; any corporation business entity that is created outside Ohio or has its principal place of business in a foreign nation, in which nonresident alien has at least 10% of stock, must file report with Secretary of State, provided land is greater than \$100,000 in value or more than three acres); OKLA. STAT. ANN. tit. 60, §§ 121, 122 (West 1971) (no alien may acquire title to land in state unless he is or shall become a bona fide resident of state or was an owner of land at time statute was enacted); 68 PA. CONS. STAT. ANN. §§ 41, 43 (Purdon Supp. 1984) (nonresident alien or foreign government shall not acquire interest in agricultural land exceeding 100 acres, unless citizen, foreign government, or subject of country whose rights in land are secured by treaty, or unless bona fide resident of some state or territory of United States); S.D. CODIFIED LAWS ANN. § 43-2A-2 (1983) (no alien not a resident of state, or of state or territory of United States, and no foreign government shall acquire agricultural land exceeding 160 acres, unless property rights acquired by devise or inheritance, held as security for indebtedness, or secured by treaty); WIS. STAT. ANN. § 710.02 (West 1981) (alien not resident of state or of state or territory of United States, or corporation not created under laws of United States may not acquire, hold or own more than 640 acres of land; no corporation more than 20% of the stock of which is owned by nonresident alien may hold more than 640 acres of land); WYO. STAT. § 34-15-101 (1977) (nonresident aliens not eligible for citizenship may not acquire, possess, enjoy, use, transfer, or inherit real property unless foreign country of which nonresident alien is citizen allows citizens of United States a reciprocal right).

States which condition alien land ownership rights upon residence in the state must necessarily recognize residence in another state of the United States as meeting this requirement by reason of the full faith and credit clause of the U.S. Constitution. U.S. CONST. art. IV, § 1. Moreover, denying citizens of one state the right to own property in another state would violate equal protection guarantees. U.S. CONST. amend. XIV.

59. CONN. GEN. STAT. ANN. §§ 47-57, 47-58 (West 1983) (nonresidents, other than citizens of France, may only hold real estate for mining purposes and may lose land if not so used for 10 consecutive years). See also OHIO REV. CODE ANN. § 5301.254 (Page 1981). See also *supra*, notes 43-47, and accompanying text.

60. MO. ANN. STAT. § 442.560 (Vernon Supp. 1985).

61. *Id.* § 442.586.

62. *Id.* § 442.591. See also IOWA CONST. of 1857, art. I, § 22 (1846); IOWA CODE ANN. § 567.1 (West 1950); (aliens residing in Iowa have same rights as citizens; nonresidents may acquire and hold property within city or town limits and may also acquire up to 320 acres outside of city limits).

cultural or urban property.<sup>63</sup> As in the case of residential distinctions, the severity of these laws varies considerably.<sup>64</sup>

Some states also regulate foreign corporate ownership of real estate. Many states, for example, apply their nonresident alien investment restrictions to all corporations that are substantially owned or controlled by foreigners.<sup>65</sup> Some states prohibit corporations organized outside the United States from owning land.<sup>66</sup> A few states have restrictions on corporate land ownership that apply to both domestic and foreign corporations.<sup>67</sup> In all, thirteen state codes include some distinction between domestic and foreign corporations with respect to

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63. See ILL. ANN. STAT. ch. 5, § 603 (Smith-Hurd Supp. 1984-85) (any foreign individual or corporation with substantial foreign control carrying any interest in agricultural land must report to state officials); IOWA CODE ANN. § 567.1 (West Supp. 1984-85); MINN. STAT. ANN. § 500.221 subd. 2 (West Supp. 1984) (nonresident aliens and corporations, partnerships, and associations more than 20% of which is owned by aliens may not purchase any interest in agricultural land); MO. ANN. STAT. §§ 442.560, 442.566 (Vernon Supp. 1985); NEB. REV. STAT. §§ 76-402, 76-414 (1981) (aliens and foreign corporations may not hold lands outside city or village limits); N.D. CENT. CODE § 47-10.1-02 (Supp. 1983) (no nonresident alien may acquire direct or indirect interest in agricultural land; partnerships, and legal entities barred from holding agricultural land unless interest in entity is held by citizens resident aliens); OKLA. CONST. art. 22, § 1 (West 1981); OKLA. STAT. ANN. tit. 18, § 951 (West Supp. 1984-85) (foreign corporations may not engage in farming or ranching); 68 PA. CONS. STAT. ANN., § 41 (Purdon Supp. 1983-84) (nonresident aliens and foreign governments may not hold more than 100 acres of agricultural land unless acquired by devise, inheritance, or as security for debt); S.C. CODE ANN. § 12-43-220(d)(1)(B) (Law. Co-op. Supp. 1983) (property tax rate of 6% for agricultural land held by corporations which have nonresident alien shareholders whereas normal tax rate is 4%); S.D. CODIFIED LAWS ANN. § 43-2A-2 (1983) (no nonresident alien or foreign government may purchase more than 160 acres of agricultural land).

64. See *supra* note 63.

65. See, e.g. ALASKA STAT. § 38.05.190(4), (6) (1984) (alien individuals may acquire mineral rights if their country grants similar privileges to U.S. citizens; corporations more than half-owned by aliens restricted in acquisition of state mineral lands). See also IOWA CODE ANN. § 567.2 (West Supp. 1984-85) (foreign corporations, like alien individuals, may not purchase agricultural land); MINN. STAT. ANN. § 500.221 subd. 2 (West Supp. 1984) (corporations, partnerships, and associations more than 20% alien-owned may not purchase agricultural land); MISS. CODE ANN. § 29-1-75 (1972) (corporations and associations having nonresident alien participation may not purchase public land); MO. ANN. STAT. § 442.571 (Vernon Supp. 1985) (aliens and corporations controlled by nonresident aliens prohibited from acquiring tracts of agricultural land larger than five acres).

66. See, e.g., NEB. REV. STAT. § 76-402 (1981) (aliens and corporations not incorporated under the laws of Nebraska are prohibited from holding land for more than five years). But see NEB. REV. STAT. § 76-414 (1981) and § 76-404 (Cum. Supp. 1984) (prohibition of alien and foreign corporate land ownership does not apply to land within corporate limits of a city, to lands within three miles of city limits, to manufacturing and industrial lands or to oil and gas leases).

67. See NEB. REV. STAT. §§ 76-402, -406 (1981) (no corporation may permanently hold land if majority of directors are aliens or if majority of stock is owned by aliens); N.D. CENT. CODE §§ 10-06-01, -07 (1976 & Supp. 1983) (no corporation may engage in farming; domestic corporations may be exempted if family-run, small-scale farms); OKLA. STAT. ANN. tit. 18, § 951-955 (West Supp. 1983-84) (corporations generally may not engage in farming; exception for small family-run operations); W. VA. CODE § 11-12-75 (1983) (all corporations which acquire more than 10,000 acres of land in the state must acquire license and pay tax of \$0.05 per acre for each acre in excess of 10,000).



foreign investment in real property.<sup>68</sup> This distinction is significant for two reasons: first, corporate entities account for much of the foreign investment activity in U.S. land,<sup>69</sup> and second, if legislation is poorly drafted, a foreigner may use the corporate-individual distinction as an easy way to avoid regulation.<sup>70</sup>

Finally, some states regulate foreign real estate investment by placing ceilings on foreign investment rather than by drawing the statutory distinctions discussed above. In some cases, states limit the number of acres foreigners are entitled to hold.<sup>71</sup> In other cases, the limitation is a maximum number of years that an investor may hold land.<sup>72</sup> The severity of limitation also varies among these states.

Although state treatment of foreign real estate investment leads to few generalizations, some conclusions are noteworthy. First, notwithstanding a small number of limited federal statutes, the regulation of foreign investment in U.S. real estate is a creature of state law-

68. See ALASKA STAT. § 38.05.190(4), (6) (1984) (aliens and associations of aliens may acquire exploration and mining rights only if their country grants like privileges to U.S. citizens); ILL. ANN. STAT. ch. 17, § 2901 (Smith-Hurd 1981) (foreign corporations which may acquire property by foreclosure may not hold real estate longer than 5 years); IOWA CODE ANN. § 567.2 (West Supp. 1984-85) (corporation organized under laws of foreign countries, and alien individual, may not purchase agricultural land); MINN. STAT. ANN. § 500.221-2 (West Supp. 1984) (corporations, partnerships, and associations more than 20% owned by aliens may not purchase any interest in agricultural land); MISS. CODE ANN. § 29-1-75 (1972) (corporations and associations having any nonresident alien participation may not purchase public lands); MO. ANN. STAT. §§ 442.566, 442.571 (Vernon Supp. 1984) (corporations controlled by nonresident aliens prohibited from acquiring tracts of agricultural land larger than five acres); NEB. REV. STAT. §§ 76-402, -406 (1981) (no corporation may permanently hold land if majority of directors are alien, if executive directors are aliens, or if majority of stock is owned by aliens); N.D. CENT. CODE §§ 10-06-01, 10-06-04, 47-10.1-02 (Supp. 1983) (no corporation may engage in farming unless it is a small, domestic, family-run entity; foreign corporations and business entities may acquire agricultural land for industrial purpose); OKLA. STAT. ANN. tit. 18, § 951 (West Supp. 1984-85); OKLA. CONST. art. 22, § 2; 15 PA. CONS. STAT. ANN., § 2012 (Purdon Supp. 1984-85) (foreign corporations may hold lands as domestic corporations, thereby exempting them from 68 PA. CONS. STAT. ANN., § 41 (Purdon Supp. 1984-85), which limits alien acquisition of land to 100 acres); S.C. CODE ANN. § 27-13-30 (Law Co-op. 1976) (corporation controlled by aliens may own no more than 500,000 acres of land); S.D. CONST. art. 17, § 7 (no corporation shall hold real estate except for its legitimate business); WIS. STAT. ANN. § 710.02 (West Supp. 1984-85) (corporations and associations of which 20% or more of stock owned by nonresident aliens may not acquire or hold more than 640 acres).

69. See *supra* note 22 and accompanying text.

70. See *infra* notes 92-97 and accompanying text.

71. See, e.g., 68 PA. CONS. STAT. ANN. § 41 (Purdon Supp. 1983) (aliens may purchase and hold up to 100 acres of real property of any type in Pennsylvania). See also S.C. CODE ANN. § 27-13-30 (Law Co-op. 1976) (no alien or corporation controlled by aliens may own more than 500,000 acres of land). Foreign investors, acting individually or through corporate entities, are free to invest in as much as half a million acres of South Carolina land, either agricultural or urban.

72. See e.g., ILL. REV. STAT. ch. 6, §§ 1-2 (Supp. 1983) (aliens have full rights to acquire land, either by purchase or inheritance, but must dispose of it within six years or face forced sale by state). See also ARK. STAT. ANN. § 77.2201-2211 (1981) (alien investors must register real estate holdings with state after ten years).

making and will likely remain so. Second, current state foreign land investment regulations are complex and lack uniformity. States vary in the severity of their limitations.<sup>73</sup> Some states invite foreign investment capital to all forms of land, while others clearly state that foreign money in real estate is not welcome. Also, states have various means of attracting or dissuading investment.<sup>74</sup>

### III. THE NEED FOR CHANGE

The current status of federal and state regulation of foreign investment in U.S. real property demonstrates the need for change and innovation. Careful analysis of the failings of existing legislation and the interests that land investment laws should serve indicates that the proper remedy lies in a uniform foreign land investment law, which all states should adopt.<sup>75</sup> Before addressing such a law, however, it is important to analyze the need for statutory change and to outline the considerations that should inform any legislative innovation.

Sensible regulation of foreign investment in U.S. real property should balance the detriments and benefits of foreign land investment. Foreign land ownership is prevalent in many communities,<sup>76</sup> and the resulting local problems generally have been ignored. Effective regulation and, when necessary, restriction of foreign land investment should preserve the benefits to capital structure and local economies<sup>77</sup> that derive from investment while minimizing the potential damage from overinvestment.<sup>78</sup>

The current body of federal and state law does not adequately address these concerns. Furthermore, existing laws do not really address the true need for foreign land investment regulation—the need

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73. See Azevedo, *supra* note 51, at 35-47. Azevedo classifies state regulations into three categories: (1) states which are *non-restrictive*, either granting alien investors the rights of citizens or not mentioning any positive guarantee or restriction; (2) *mildly restrictive* states, whose restrictions “do not constitute a substantial barrier to most alien investors.” *Id.* at 36; and (3) *severely restrictive* states, with major “but not insurmountable” barriers to foreign land investment.

74. For example, a state with a very large amount of agricultural land might adopt a heavily restrictive alien land investment statute in the hope of preserving agricultural land, and preventing agribusiness from falling under foreign corporate control. See, e.g., IOWA CODE § 567.2 (West Supp. 1983) (“Nonresident alien, foreign business or foreign government may acquire . . . real property except agricultural land”); see also NEB. REV. STAT. § 76-414 (1981) (restrictions in NEB. REV. STAT. § 76-402, which prohibit aliens and foreign corporations from owning agricultural land, do not apply to lands within the corporate limits of cities and villages).

75. See *infra* notes 111-32 and accompanying text.

76. For example, Washington, D.C. is one of the most heavily invested urban areas in the United States. Foreign investors are involved in between 10-30 percent of all the commercial real estate development and acquisitions in Washington. Washington Post, Sept. 17, 1983, at E-21, col. c.

77. See *infra* note 107.

78. See *supra* note 25 and accompanying text.

to channel foreign capital into areas where it will be beneficial and away from areas where it might be detrimental. Instead, existing laws primarily reflect xenophobia.

#### A. THE SHORTCOMINGS OF FEDERAL LEGISLATION

In examining federal laws,<sup>79</sup> it is not clear that recent restrictions were promulgated as a result of genuine, objective concern for the problems that foreign investment in real property causes. In AFIDA, Congress sought to gather information, but the legislative history indicates an unsubstantiated preconception that foreign investment in farmland is harmful.<sup>80</sup> Similarly, Congress' motive in enacting FIRPTA stemmed less from a concern for the damaging effects of foreign investment than from a desire to eliminate long-standing tax loopholes that gave foreign investors a great advantage over their domestic counterparts.<sup>81</sup> Therefore, Congress did not actually enact FIRPTA

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79. Federal enactments, such as FIRPTA and AFIDA, are the source of the most completely documented legislative histories. It is more difficult to discern clear intent behind state laws. Nonetheless, this reasoning apparently applies to all existing alien land regulation.

80. If farm income leaves the country and local businesses are bypassed in the purchase of agricultural inputs for the absentee-owned farming operations, the adverse effect on the economic and social vitality of rural communities is obvious . . . . If foreign investment effects . . . changes in the structure of the U.S. on a broad enough scale, it is argued, this may be reflected in higher food costs to consumers. The contentions raise serious and complex questions that require careful and responsible analysis.

H.R. REP. NO. 1570, 95th Cong., 2d Sess. 7 *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2914, 2917.

*See also* statement of Hon. John Krebs, H.R. REP. NO. 1570, *supra*, at 29, 1978 U.S. CODE CONG. & AD. NEWS at 2937:

The effect [of foreign investors inflating the price of land by their willingness to pay prices above current market rates for U.S. agricultural land] on the family farmers can be disastrous, reducing the ability of young farmers to purchase farmland, and preventing marginal farmers from expanding in order to succeed in their present operations.

*Id.* *See also* statements of Hon. Charles E. Grassley, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, *supra* at 2936-38.

81. The report of the House Ways and Means Committee on FIRPTA noted that the purpose of the act was to equalize the tax treatment of foreign and domestic real estate investors:

The committee believes that it is essential to establish equity of tax treatment in U.S. real property between foreign and domestic investors. The committee does not intend the provisions of Title IX to impose a penalty on foreign investors or to discourage foreign investors from investing in the United States. However, the committee believes that the United States should not continue to provide an inducement through the tax laws for foreign investment in U.S. real property which affords the foreign investor a number of mechanisms to minimize or eliminate his tax on income from the property while at the same time effectively exempting himself from U.S. tax on the gain realized on disposition of the property.

H.R. REP. NO. 96-1167, 96th Cong., 2d Sess. 511, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5526, 5874.

to reduce incentives for foreign investment.<sup>82</sup>

Federal regulation suffers from systemic limitations greater in scope than the discrepancies between the purposes and effects of AFIDA and FIRPTA. There is great reluctance to regulate foreign investment at a federal level. This reluctance stems, at least in part, from the constitutional theory of enumerated and implied powers. Traditionally, federal lawmakers have felt that federal land use planning would be unconstitutional because it was not a power enumerated in the Constitution's grant of powers to Congress.<sup>83</sup> Land use planning was considered to be an inherent power, reserved to the states.<sup>84</sup> AFIDA and FIRPTA are recent exceptions to the federal practice of avoiding the foreign land investment issue.<sup>85</sup> Any widespread federal regulation of foreign land investment that is capable of remedying the shortcomings of existing legislation would probably be an unconstitutional abrogation of states' rights.<sup>86</sup>

## B. THE SHORTCOMINGS OF STATE LEGISLATION

State laws on foreign land investment present problems that are distinct in many ways from those arising from federal laws. State laws do not suffer the same failings as federal laws, but they do combine to

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82. *Contra Note, Foreign Investment in United States Real Estate: Congress Acts to Reduce Incentives*, 7 INT'L TRADE L.J. 150 (1982).

83. Recently, the federal government *has* engaged in land use planning and regulation, but only under specific constitutional grants of power such as the commerce clause or in geographical areas under federal control, such as geothermal steam resources, grazing lands, or homestead lands. *See supra* Section II(A). The area-specific approach to foreign land investment regulation has been utilized on the federal level with some success. The most recent example of this approach is found in the area of agricultural land, where it is fairly certain that a legitimate interest in the federal restriction of alien land control exists. *See supra* notes 17, 44-46, 37-39 and accompanying text. *See also* Committee Print, *supra* note 50. Other federal enactments have restricted the rights of foreigners to own federally controlled lands, such as geothermal steam resources, 30 U.S.C. § 1015 (1982); homestead land, 43 U.S.C. § 161 (1976); 43 C.F.R. § 2511.1 (1983); grazing land, 43 U.S.C. § 315(b) (1976); 43 C.F.R. § 4110.1 (1983); and mineral land, 30 U.S.C. §§ 22, 181 (1982). *See also* Morrison, *supra* note 48, at 630 & nn. 55-58. *See also supra* notes 48-50 and accompanying text.

84. Land-use planning has traditionally been seen as a local concern reserved to the states by the tenth amendment to the Constitution. For example, in *United States v. Certain Lands in the City of Louisville*, 78 F.2d 684 (6th Cir. 1935), the court held that the federal government did not have the power of eminent domain for purposes of slum clearance and urban renewal. Zoning was upheld as an exercise of the states' police power in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In the late twentieth century the federal government has increased its regulatory activity in this area. Under the authority of the commerce power, Congress has regulated environmental quality, housing, and many other areas that relate to urban planning. *See, e.g.*, Urban Growth & New Community Development Act of 1970, P.L. No. 91-609, 84 Stat. 1770 (1971) (included in Title VII of the Housing & Urban Development Act of 1970). Nonetheless, federal regulation in the area of land-use planning is still limited.

85. *See supra* notes 35-47 and accompanying text.

86. *See infra* note 127 and accompanying text.

present a complex, often conflicting statutory framework that may create a greater disincentive to investment than the individual laws themselves. In other words, state laws in the United States present foreign investors with an obstacle that may seem to be impenetrable by virtue of its complexity. In some instances, this disincentive may be misplaced, because it is not consciously directed at rationally controlling investment.<sup>87</sup> State law, in many cases, does not balance the harms and benefits of foreign investment, but instead grows out of xenophobia.<sup>88</sup>

There was little, if any, evaluation of the effects of foreign real estate investment when earlier alien land laws were enacted.<sup>89</sup> Discouragement, when explicitly intended, may be a desirable legislative goal, but the non-uniformity and misdirection of state law creates an unintended disincentive. A better approach would be to balance the economic attractions<sup>90</sup> and the potentially harmful local effects of foreign investment.<sup>91</sup>

Another problem with the existing state laws is that they are often weak and easily circumvented. In many cases, local incorporation in a state earns a foreign corporation resident status, and thereby avoids land ownership restrictions. For example, Illinois limits non-resident aliens who hold property to a maximum ownership period of six years, after which time the property must be transferred to a U.S. citizen.<sup>92</sup> Because the statute does not mention corporations and other legal entities, these "persons" are not subject to the six-year limitation.<sup>93</sup> Hence, a foreign individual may incorporate in Illinois (or any other state) solely for the purpose of holding real property which, if held by an individual, would have to be transferred after six years. Thus, the seemingly strong regulation does not reach investors who hold land as a corporation, partnership, or limited partnership. Cir-

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87. For example, AFIDA discourages foreign investment in agricultural land by placing disclosure requirements on agricultural land investment activity. This is an outgrowth of the arguably rational fear that a large portion of U.S. farmland may be under foreign control, and of a desire for more information. The *complexity* of state alien land laws, on the other hand, could serve to discourage all foreign land investment, including harmless or even beneficial investment areas where foreign land ownership is benign and capital rejuvenation helps revitalize depressed areas.

88. See *supra* note 24.

89. See, e.g., Atkinson & Jones *Should Foreigners Own Our Land?*, reprinted in SENATE COMM. ON AGRICULTURE, NUTRITION AND FORESTRY, 95TH CONG., 2D SESS., FOREIGN INVESTMENT IN UNITED STATES AGRICULTURAL LAND 57 (Comm. Print 1979) [hereinafter cited as Committee Print].

90. See Ricks and Racster, *Restrictions on Foreign Ownership of U.S. Real Estate*, REAL ESTATE ISSUES, Spring 1980, at 111, 112.

91. See *supra* note 25.

92. ILL. ANN. STAT. ch. 6, § 2 (Smith-Hurd 1975).

93. *Id.*

cumvention by incorporation is also possible in Connecticut,<sup>94</sup> Indiana,<sup>95</sup> Pennsylvania,<sup>96</sup> and Kansas.<sup>97</sup> An effective system of regulation must be strong enough to regulate many different types of foreign investment without being undermined by such simple evasion.

These concerns illustrate the need for flexible, conscientious local treatment of foreign land investment that also recognizes the particular needs of local communities. In addition, there must be some uniformity throughout the United States to facilitate investment activity in areas where it will be beneficial, or at least not harmful. Current federal and state regulation of foreign investment in U.S. real property is counterproductive to these goals.

Moreover, state laws are ineffective at curtailing all the harmful effects of foreign land investment. For example, although many states have built statutory schemes designed to prevent foreign takeovers of farmland, these statutes often ignore a more severe danger—excessive conversion of agricultural land to urban uses by foreign investment interests. The Iowa law, for example, forbids nonresident aliens from holding any agricultural land,<sup>98</sup> but is silent on the conversion of agricultural land to nonfarming uses by foreign investors. An effective foreign land investment law should avoid these statutory failings by incorporating forceful terms where necessary and by explicitly defining a foreign investor to include local corporate entities controlled by foreigners.<sup>99</sup>

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94. CONN. GEN. STAT. ANN. §§ 47-57, 58 (West 1978). See also Azevedo, *supra* note 51, at 37.

95. IND. CODE § 32-1-8-2 (Burns 1980). See also Azevedo, *supra* note 51, at 41; Morrison, *supra* note 73, at 77.

96. 68 PA. CONS. STAT. ANN. §§ 28, 32 (Purdon 1965); 15 PA. CONS. STAT. ANN. § 2012 (Purdon Supp. 1984).

97. KAN. STAT. ANN. § 59-511 (1976).

98. IOWA CODE ANN. §§ 567.1-567.4 (West 1984).

99. There is a significant amount of latitude in the strength with which an alien land investment law may be drafted. For example, AFIDA has a strong definition of a foreign investor, allowing few activities to avoid the law. AFIDA, at 7 U.S.C. § 3508, defines a "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 [8 U.S.C. §§ 1101- et. seq.];
- (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 [of Agriculture] under regulations which the Secretary shall prescribe, a significant interest or substantial control is directly or indirectly held —

State law does regulate foreign real estate investment adequately in some instances. In fact, state legislation *can* be the best solution to the issue of foreign land investment, notwithstanding the problems of non-uniformity<sup>100</sup> and inapplicability.<sup>101</sup> The harms and benefits of foreign land investment have their greatest impact on a local level;<sup>102</sup> thus, state law can balance the harms and benefits more effectively than a single body of federal law. The existing laws, however, do not presently recognize these local concerns.<sup>103</sup>

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- (I) by any individual referred to in subparagraph (A);
  - (II) by any person referred to in 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) (1982).

The act also broadly and explicitly defines a "person" as: "any individual, corporation, company, association, firm, partnership, society, joint stock company, trust, estate, or any other legal entity." 15 U.S.C. § 3508(4).

The methods of circumvention discussed in footnotes 92-97, *supra* may not be utilized to avoid the provisions of AFIDA. The Act anticipates the use of these entities for the avoidance of the statutory provisions. In drafting a uniform law, great care must be taken to assure that a strong definition of foreign investment, like that used in AFIDA, is adopted.

100. See *supra* notes 54-57, 73-74 and accompanying text.

101. See *supra* notes 88-91 and accompanying text.

102. One example of the effects of foreign investment is found in the recent investment in American manufacturing plants by foreign automobile manufacturers, e.g., Volkswagenwerks of Germany's automobile manufacturing plant in New Stanton, Pennsylvania. "Locally, many still question whether it will be the great economic stimulant for this rural region that people have been asked to believe. With employment at the plant, situated on the outskirts of New Stanton, expected to reach 45,000 . . . some people say the only thing they can see now is traffic jams, more motels and fast food businesses encroaching on a serene countryside." N.Y. TIMES, April 11, 1978, at 51.

Moreover, the peculiarities of foreign exchange rates and the instability of economic bases in other countries create risks in land investment which are not present for domestic investors. These risks are also felt on a local scale. The devaluation of the Mexican peso in 1982 affected Mexican land investment in Southern California so greatly that many large-scale residential developments went bankrupt. "Several financial analysts say that the 'Golden Mile'—the high-rise condominium canyon along Wilshire Boulevard between Westwood Boulevard and the Los Angeles Country Club [in Los Angeles, California]—sailed into financial straits partly because the devaluation and restrictions curbed Mexican spending just as property developers were counting on them as customers." *Peso: Quiet Immigrant; Wealthy Mexicans Invest in Southland*, Los Angeles Times, October 16, 1983, pt. VII (Real Estate), at 1.

Many of the projects in the strip of condominium developments described above are now bankrupt; many of the buildings are almost completely vacant, and some projects went sour and left merely a hole in the ground. It is unclear precisely what caused this phenomenon, but the large proportion of foreign investment involved in many of the projects probably played a major role. Domestic investment would have been just as susceptible to poor market planning or recessionary consumer reactions, but the peso devaluation is one example of how foreign investment compounded the negative effects on the local scale.

103. While blatant examples of racist legislation have virtually been eliminated from state statute books, the undercurrents of xenophobia remain. It is therefore critical to any discussion of alien land investment regulation that careful attention be paid to the possible harms and benefits of foreign investment, as well as the potential for irrational lawmaking. As noted *supra*, it is conceivable that foreign control of the U.S. food supply could prove

Although it is conceivable that foreign investment should be discouraged in *certain* areas, *some* foreign investment in U.S. real estate should be *encouraged*.<sup>104</sup> States and local communities might attract foreign investment through land-related incentives, such as property tax exemptions and favorable zoning variances.<sup>105</sup> Moreover, foreign investment may be detrimental to one geographic area and yet be beneficial to another. Land ownership regulation must reflect local concerns<sup>106</sup> and in fact should recognize geographic factors, such as

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detrimental to American interests. However, there is little evidence indicating that a foreign owner of an apartment, an office building, a shopping center, or any other form of urban land investment poses danger to American security. That is, while alien land investment restrictions may make rational sense in terms of protecting American agribusiness and preserving control of food supplies, there does not seem to be much danger in foreign control of most urban land uses. Of course, there may be particular urban areas to which foreign investment might be dangerous, and a good statutory scheme must be flexible enough to accommodate specific geographic areas and allow restriction or encouragement of foreign investment in specific areas. See *infra* notes 110-17 and accompanying text.

State legislatures, sitting amidst the "firing lines" of the foreign investment arena, are arguably more susceptible to pressures or persuasion by xenophobic or racist constituencies. This is evidenced clearly by the early alien land laws enacted in California and other western states. See *supra* note 57 and accompanying text. See also Morrison *supra* note 48, at 625-29.

For the most part, those laws which have restricted foreign investment activity in agricultural land have been more rational than those dealing with urban land, or those which have not made any type of distinction. In the agricultural sphere, there is a legitimate, albeit subjective, concern: control of the U.S. food supply by foreign interests could conceivably pose a threat to U.S. security. Moreover, there is evidence that foreign investors have different demands and harbor different strategies of investment than their U.S. counterparts. See generally Roulac, *supra* note 11. Therefore, laws like AFIDA are rationally founded, and when sensibly applied (as is AFIDA, which seeks only to gather information at this stage), are not objectionable.

104. The most common forms of encouragement offered to foreign investors are tax incentives given by local communities to attract investors. The recent activities of many foreign automobile manufacturers in establishing American assembly plants is a good example. While this type of land use (factories, assembly plants) may not suggest significant local benefits in the abstract, an entire manufacturing operation, including added jobs, services, revenue, etc., can revitalize declining communities. See, e.g., N.Y. TIMES, Apr. 11, 1978, *supra* note 102. See also *infra* note 107 and accompanying text. See generally THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 32-40 (1974) [hereinafter cited as THE CONFERENCE BOARD].

105. THE CONFERENCE BOARD, *supra* note 104, at 36.

106. Two of the most common examples of possible local concerns about foreign investment in real estate are *absenteeism* and *competition*. There may be cases in which the location of a landlord abroad changes the landlord-tenant relationship so greatly that foreign ownership should in fact be discouraged. In the residential context, tenants might not be able to contact a landlord in Europe or Asia, and would have to conduct business through a local representative. This complicates the tenural relationship and certainly increases price. In the commercial setting, the distance between tenant and absentee landlord hinders the negotiation and transaction processes.

Preservation of local markets is another concern which underlies the competition argument against foreign investment. The injection of foreign investors (often with large amounts of ready cash) into local markets can force smaller investors out of the market. Some critics also complain that since foreigners are often willing to pay a higher price for U.S. land, prices become severely inflated in areas where there is a lot of foreign land



unemployment rates or housing markets.<sup>107</sup>

An effective land investment law should be binary—composed of both a discouragement or restrictive element and an encouragement element. In this way, both incentive and regulatory activities could be tailored to the needs of local communities. Regulation would remain uniform and be accessible to foreign investors who are making location decisions. The solution is a uniform foreign land investment law, drafted by a committee of practitioners experienced in the fields of real estate law and international investment and then adopted by all the states. A uniform law would alleviate the problem of non-uniformity.<sup>108</sup> Moreover, a binary law would allow a tremendous degree of flexibility and could provide a superior means of meeting local needs than those that existing state codes provide. Such a law could successfully regulate foreign investment in areas in which federal and state attempts have failed.<sup>109</sup> The drafters of an effective uniform law could avoid the defects in current regulatory schemes if they first carefully examine the possible responses to foreign land investment.

The potential success of legislative reform depends upon its response to the concerns that implicate the need to change the present system. First, any change in current regulation must remain *flexible* enough to adequately provide for the needs of particular communities. At the same time, there must be *uniformity* of treatment among the states to avoid phantom disincentives. Moreover, a new statutory scheme must prevent the easy circumvention that many current laws permit.

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investment. See H.R. REP. NO. 1570, 95th Cong., 2d Sess. 6, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2914, 2916-17. See also Note, *supra* note 27, at 32.

107. Communities may find a benefit from foreign investment in light of three local factors which outweigh the negative forces of xenophobia. For example, the town of Pittston, Pa., was threatened with economic collapse several years ago when the area's coal mines closed. In 1969, however, Schott Optical Glass Co., a West German firm, opened a manufacturing plant in the town. In 1969, the plant had sixty employees. In 1978, it had six hundred. The city has not only survived the coal failure, but has prospered from foreign investment. City officials have hired a Swiss investment consultant to recruit other foreign companies, and in mid-1978 expected the opening of a Swiss machine company's local plant. The city also created a forty-two acre industrial park designated as an international trade zone, lengthened the local airport runway to accommodate jumbo jets, and worked to make the community more attractive to foreign investors. *The Selling of America: Foreign Capital Rushes Into U.S., Creating Jobs and Some Controversy*, TIME, May 29, 1978, at 70, 73. Any previous fears of foreign takeovers or damaging influence have long been overshadowed by the prosperity which foreign investments have brought the town.

108. The result, however, would not be total homogeneity. Rather, each state would be given the opportunity to adopt the uniform act, use its own law, or amend the uniform law to meet local needs. The possibility of conflict among state laws remains to the same extent. Nonetheless, a well-designed uniform statute could provide for most state concerns and prevent most state dissent. The optimal situation would leave a black-and-white system of states who have either adopted the uniform laws or have no restriction on alien land investment.

109. See *supra* notes 79-103 and accompanying text.

#### IV. A MODEL FOR A UNIFORM FOREIGN LAND INVESTMENT LAW

An effective statutory policy for foreign investment in U.S. real estate must recognize that foreign investment may be harmful in some areas but beneficial in others. Existing state and federal alien land laws have not done this; instead, they have chosen to implement either an encouragement or a discouragement policy, but not both. This Note, therefore, proposes a model uniform law that would distinguish between areas in which foreign investment should be discouraged and areas where it should be encouraged and that would provide a strong framework that will prevent the possibility of circumvention.

##### A. DESIGNATION OF ZONES

The first function of the uniform law would be to provide for the designation of geographic areas as either encouragement or discouragement zones. The task of designation would be delegated to groups of real estate investment experts, legal scholars, and international investment authorities assembled in panels or commissions for the purpose of determining the investment needs of specific regions.<sup>110</sup>

The result of this geographic designation would be two types of geographic zones, each with a distinct set of applicable policies. The discouragement zone would include all areas to which foreign investment activity poses a sufficiently significant threat to warrant regulation. The other zone would include areas in which foreign investment would be beneficial to local and regional interests.

In order to efficiently apply such a binary law, all potential areas must be designated as either encouragement or discouragement zones.

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110. An illustrative comparison exists in the designation proceedings under the National Historic Preservation Act (NHPA). NHPA, the preeminent federal law for protecting and preserving historically significant sites, establishes a detailed procedure for identification and protection of historic sites. 16 U.S.C. § 470 (1982). The Act provides for listing of significant historic sites, buildings and landmarks in the National Register of Historic Places, administered by the Secretary of the Interior. 16 U.S.C. § 470a (1982). One of the four methods of including a property in the National Register is nomination by the state historic preservation officer ("SHPO"), local governments, or individuals. *Id.* § 470a (a-d) (1982). Under this procedure, a state review board nominates properties to determine whether they meet the criteria for evaluation, and recommends that the state historic preservation officer approve nomination. These state, and sometimes local boards, are a helpful model for the type of commissions necessary for the evaluation of foreign land investment zones. Under the regulations in NHPA, the board designated by the SHPO must include persons who are professionals in the fields of history, archaeology, architectural history, and architecture. These experts are skilled in recognizing the necessary facts that make up the criteria for designation and also have knowledge of the local factors relevant to particular properties. *See generally* A HANDBOOK ON HISTORIC PRESERVATION LAW 197-207 (C. Duerksen ed. 1983).

This application of expertise and local interest to designation commissions would be beneficial to the procedural operation of a uniform law of foreign real estate investment.

Thus, there would be some difficulty in areas where the potential harms and benefits of foreign real estate investment are not clear. Nonetheless, all areas should be designated, and marginal areas should be made discouragement areas for procedural purposes and assigned the most lenient degrees of regulatory scrutiny.<sup>111</sup> In this regard, the designation as a discouragement area would create a procedural presumption against investment, because the immediate dangers of investment outweigh the potential benefits of benign investment.

#### B. FORMATION OF POLICY BY ZONE

Once an area has been designated, the uniform law would dictate the procedures for foreign investment activity within each zone. The provisions of the uniform law would establish guidelines and requirements for foreign investment in real estate located in discouragement zones and would outline strategies for attracting investment capital to encouragement zones. A uniform foreign land investment law could not by itself impose jurisdictional restrictions or incentive programs upon local communities. Instead, each state must adopt the law, but the uniform statute would provide state authorities with significant direction and would ensure uniformity of treatment of foreign investors throughout the United States.<sup>112</sup>

The uniform law is not limited to two investment area distinctions. Ideally, the law could develop a series of designations within each zone. For example, within a discouragement zone, a specific area may be extremely sensitive to foreign investment due to particular geographic or socio-economic factors.<sup>113</sup> In this type of area, the state could require investors to make frequent disclosure statements, to maintain local representatives or agents, and even to participate in community awareness and preservation programs. In less precarious areas, moderate provisions, such as disclosure requirements like those of AFIDA, would apply. By using variable designations dependent

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111. See *infra* note 114 and accompanying text.

112. This model for a uniform foreign real estate investment law necessarily operates on the assumption that all, or substantially all, of the states adopt the enactment. Realistically, however, the result would not be total homogeneity. Each state would be given the opportunity to adopt the uniform act as proposed, to adopt a version amended to meet local needs, or to use its own law. Thus, conflict among state laws remains a possibility. Nonetheless, a well-designed uniform statute could provide for most state concerns and prevent most state dissent. Then the optimal situation would result in a black-and-white system of states who have either adopted the uniform laws or have no restriction on alien land investment.

113. Extreme sensitivity to foreign investment may occur in an area with a severely limited resource, such as agricultural land or low-income rental housing, or in an area experiencing severe economic depression.

upon the particular socio-geographic<sup>114</sup> characteristics of an area, the statute would remain cognizant of the local characteristics of investment areas. Moreover, the law would retain flexibility through the use of variable designations within each discouragement zone.

Encouragement zones designated under the uniform law could be treated with the same flexibility and local emphasis as the discouragement zones. A strong encouragement designation could include provisions for tax incentives, inducement programs, and infrastructure attractions for foreign investors.<sup>115</sup> A more moderate encouragement designation might entail programs to provide foreign investors with information about investment opportunities in specific geographic areas that have been determined to be suitable for investment. The most passive encouragement designation would adopt a wholly *laissez-faire* attitude under which no statement of encouragement or restriction would be made.

It is important for the uniform law to include provisions for state or local bodies to make special designations under the authority of the state governments adopting the act. These designations would be analogous to the special permit system in a typical comprehensive zoning plan.<sup>116</sup> In such a system, a particular land use is allowed despite its nonconformity to other land uses in the area if specific requirements are met. Legal bodies could grant special conditional permits for specific foreign investment activities, conditioned upon specific requirements, such as contributions to economic or community needs, in otherwise restricted zones.

The uniform system would be designed for flexibility. Some areas, such as extremely delicate agricultural lands, could be wholly removed from foreign investment, provided such exclusion is constitutional.<sup>117</sup> Special permits and exceptions, however, could be kept to a minimum under this flexible system. The emphasis would not be on wholly outlawing or wholly promoting investment but on developing a

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114. The term *geography*, as used here, connotes a far broader meaning than is given in most grade school educations. Geography involves the study of not only the physical make-up of the earth's surface, but also includes the study of the living species, particularly man, which inhabit the earth, and the ways in which all species and physical structures interact. Geography is therefore a broad science, encompassing geology, physics, biology and botany, as well as sociology, anthropology, economics, political science, and history. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 948 (unabridged ed. 1976).

115. See *supra* note 107. Admittedly, most of these incentive programs must be promulgated by local governments such as Pittston, Pennsylvania, and will not become more available by virtue of inclusion in a uniform act. However, while the act cannot force a town to build a larger airport, it does offer foreign investors a centralized source in which to find examples of the types of incentives they may anticipate when making investment location decisions.

116. See A. RATHKOPF, THE LAW OF ZONING AND PLANNING, at § 12.06[1] (1980).

117. See *infra* notes 118-32 and accompanying text.

flexible policy of mixed encouragement and discouragement. This policy would be rationally related to the peculiar geographic realities of a given region, and it would be uniform in its general treatment of foreign real estate investors throughout the United States.

### C. CONSTITUTIONALITY OF A UNIFORM FOREIGN LAND INVESTMENT LAW

The proposed uniform law would be permissible under the Constitution of the United States.<sup>118</sup> A constitutional challenge to alien land regulation would probably arise only in the context of disincentives to foreign ownership of U.S. land. Such restrictive regulation would be subject to constitutional attack on equal protection<sup>119</sup> grounds, or as violations of the foreign relations<sup>120</sup> and foreign commerce powers<sup>121</sup> of the federal government.

The Supreme Court has never ruled on the constitutionality of domestic regulation of alien land ownership under the equal protection clause,<sup>122</sup> and the appropriate level of equal protection scrutiny<sup>123</sup>

118. For a discussion of the constitutional ramifications of alien land investment regulation that is beyond the scope of this Note, see Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HAST. L.J. 251 (1980-81); Morrison, *supra* note 48; Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135 (1982).

119. U.S. CONST. amend XIV, § 1.

120. *Id.* art. I, § 10.

121. *Id.* § 81.

122. *But see* Sugarman v. Dougall, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *aff'g Leger v. Sailer*, 321 F. Supp. 250 (E.D. Pa. 1970) (all three treating alienage as a suspect classification in other situations).

In *Graham*, the United States Supreme Court invalidated two state statutes that denied welfare benefits to resident aliens and aliens who had not resided in the United States for a specified number of years. *See* 62 PA. CONS. STAT. ANN. § 432(2) (Purdon 1968) (amended version at 62 PA. CONS. STAT. ANN. § 432 (Purdon Supp. 1984-85)); ARIZ. REV. STAT. ANN. § 46-233 (1956) (amended version at ARIZ. REV. STAT. ANN. § 46-233 (Supp. 1984-85)). Justice Blackmun's opinion invoked strict judicial scrutiny. 403 U.S. at 371-72.

The equal protection concept applies to "persons" as opposed to "citizens." *Id.* *Cf.* U.S. CONST. amend. XV, § 1, (preserving the right to vote to all *citizens* of the United States) (emphasis supplied). As such, aliens are entitled to these constitutional protections. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See* Zaritsky, *Foreign Ownership of Property in the U.S.: Federal and State Restrictions*, reprinted in Committee Print, *supra* note 25, at 191. The basic inquiry of equal protection analysis addresses the relationship between the purpose of a statute and the classification it makes. For a general discussion of legislative classifications and their role in equal protection analysis, see J.E. NOWAK, R.D. ROTUNDA, & J.N. YOUNG, *CONSTITUTIONAL LAW* 585-599 (2d ed. 1983) [hereinafter cited as NOWAK].

123. A regulation of foreign land ownership must have some level of relatedness between its statutory purpose and the differential treatment of foreign investors. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (equal protection applies to alien classifications). *See also* *Traux v. Raich*, 239 U.S. 33, 39 (1915). Equal protection analysis applies different types of scrutiny to these classifications, requiring different levels of relatedness. A law involving a "suspect classification" or a "fundamental right," *see* *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1958), invokes strict judicial scrutiny, *see* NOWAK, *supra* note

is unsettled. If strict judicial scrutiny were applied, as it arguably would be by analogy to other resident alien cases,<sup>124</sup> the regulation of ownership of U.S. land by resident aliens would have to be necessary to achieving a compelling governmental interest. If the more lenient, rational relationship standard were applied, as it most likely would be in the case of regulation of nonresident alien land holdings, then the regulation would only need to bear a rational relationship to its intended purpose.<sup>125</sup> Most laws are directed at nonresident aliens, to whom the rational relationship standard is most fitting.

A uniform foreign land investment law adopted by the various states would pass equal protection evaluation if the law were to apply to nonresident investors, because classification by residency will receive the more lenient scrutiny. In other words, regulation of nonresident investors will be upheld more easily because resident aliens are treated as citizens. Where regulations affect residents and nonresidents alike, however, resident investors would be protected by strict

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122, at 524. Strict scrutiny requires the government to show that a classification is justified by a compelling state interest. *Id.* Alienage is a suspect classification. *Graham v. Richardson*, 403 U.S. at 372.

124. However, Justice Blackmun emphasized in *Graham* the permanency of aliens' residence in the United States. His *Graham* opinion quoted the district court in the Eastern District of Pennsylvania: "aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." 403 U.S. at 376, quoting 321 F. Supp. at 253. (In *Shapiro v. Thompson*, 394 U.S. 618, 627 (1968), the Supreme Court held that economic interests were an insufficient foundation to justify denial of welfare benefits to persons who resided within a state for less than one year).

At least one commentator has relied upon this emphasis to conclude that *Graham's* rule applies only to *resident* aliens. Morrison, *supra* note 48, at 642-43. A nonresident alien investor in land may therefore face a lower constitutional standard than a resident alien. This distinction is significant, because many of the feared dangers of foreign real estate investment may be unique to investment by nonresident aliens. Absenteeism, and the problems which arise out of an international landlord-tenant relationship, is one example. *See supra* note 106. Similarly, the fears that foreign real estate investors will bring about neighborhood change as a result of injecting their native experiences and preferences into the American market seem diluted with respect to resident aliens. *Id.* As such, restrictions against detrimental foreign investment by nonresident aliens may pass equal protection analysis under the more lenient rational-relationship standard. *See NOWAK, supra* note 122, at 682-86.

Morrison cites those states which have given full or partial exceptions from their laws to resident aliens: Connecticut, Iowa, Kentucky, Mississippi, New Hampshire, Oklahoma, Wisconsin and Wyoming. Morrison, *supra* note 48, at 642 n.144. *See* CONN. GEN. STAT. ANN. §§ 47-57 (West 1978); IOWA CONST. art. I, § 22; IOWA CODE § 567.1 (1977); KY. REV. STAT. ANN. §§ 381.320 (Baldwin 1979); MISS. CODE ANN. § 89-1-23 (1972); N.H. REV. STAT. ANN. § 477:20 (1983); OKLA. CONST. art. XXII, § 1; OKLA. STAT. ANN. tit. 60, § 121, (West 1971); WIS. CONST. art. I, § 15; WYO. CONST. art. I, § 29. A state, therefore, might be able to regulate nonresident aliens under a lower level of constitutional scrutiny. Morrison, *supra* note 48, at 642-43.

125. Under rational relationship scrutiny, the state need only prove that the classification, excluding aliens, is rationally related to the purpose of the statute—i.e., the elimination of foreign influence.

scrutiny analysis, and the law would then have to further a compelling state interest.

Due process scrutiny would uphold a foreign land investment law if a legitimate purpose, such as protecting local investment interests, were articulated and if compensation were paid where necessary. Xenophobic fears or popular emotions, however, will not support a law through constitutional scrutiny.<sup>126</sup>

Alien land regulations must also withstand scrutiny under the foreign relations and foreign commerce powers of the federal government. These powers may be grouped together into one notion of the *supremacy* of the federal government. Land laws have traditionally been regarded as a purely local concern.<sup>127</sup> The authority for these laws is the state's police power and historical notions of state territorial autonomy. Yet, because these laws affect foreigners, they may also affect foreign relations. The federal government has exclusive power over foreign relations; a state cannot conduct its own foreign policy.<sup>128</sup> Like equal protection guarantees, the foreign relations power does not invalidate *all forms* of alien land restriction. There is a continuum along which degrees of local interest are weighed against the amount of foreign relations activity that a state undertakes.

The most blatant state interferences with U.S. foreign policy would be in jeopardy.<sup>129</sup> Nonetheless, although exclusivity of federal foreign policy power is constitutionally guaranteed, the degree to which this power constrains state power to regulate land ownership is subject to judicial interpretation.<sup>130</sup> Foreign investment laws could

126. Due process considerations are really of lesser concern: "The due process clause is not an effective limitation on state legislation, but it does compel a clear articulation of the purpose of the laws, and this makes a proper constitutional examination of them under the applicable tests." Morrison, *supra* note 48, at 645. Basically, regulation of alien land holdings must serve a clearly articulated legislative purpose. A court's willingness to strike down a statute for lack of such a purpose is unlikely, however, given the presently discredited notion of substantive due process, upon which such judicial action would rest. A more relevant due process consideration is that any regulation of domestic lands already held by aliens must not constitute an unjust taking; fair compensation for the loss of property rights already held by aliens must be paid by regulating state governments. U.S. CONST., art. I, § 10.

127. See *Terrace v. Thompson*, 263 U.S. 197, 217-18 (1923); *Blythe v. Hinckley*, 180 U.S. 333, 341-42 (1901).

128. *Zschernig v. Miller*, 389 U.S. 429, 440-1 (1968). "The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

129. Morrison, in fact, points to two statutes that designate specific land holding requirements for residents of certain countries as "smack[ing] too much of independent foreign policy." Morrison, *supra* note 48, at 649. See CONN. GEN. STAT. ANN. §§ 47-57 (1960) (France); MISS. CODE ANN. § 898-1-23 (1972) (Syria, Lebanon).

130. In *Clark v. Allen*, 331 U.S. 503 (1947), the Supreme Court held that a state may condition an alien's right to inherit property upon reciprocal provisions of the alien's home government toward U.S. citizens. The Court concluded that these state laws did not exces-

conceivably survive foreign relations scrutiny, provided they address land use concerns and do not affect federal policy too drastically.<sup>131</sup> Thus, the regulation of land investment activity, undertaken under the police powers of states, could arguably exist without treading upon federal ground.<sup>132</sup>

An effective law should avoid outright prohibition of foreign investment, which would likely interfere with foreign relations. The uniform law must not single out foreign countries for special treatment nor specifically address individual industries. If the enactment is legitimately aimed at protecting local interests, it will not violate provisions of federal supremacy. Moreover, the proposed act would have to articulate rationally the purposes of preventing harms from foreign land investment and encouraging beneficial investment. The provisions would also have to enunciate clearly the relationship between the provisions and these goals.<sup>133</sup>

## CONCLUSION

The present system of regulating foreign investment in U.S. real estate is ineffective and can operate as an unnecessary disincentive to

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sively interfere with the foreign relations power, and that states could condition or limit property rights. *Id.* at 517. The Court modified this position thirty years later in *Zschernig v. Miller*, 389 U.S. 429 (1968). There the Court invalidated an Oregon statute which conditioned inheritance rights on reciprocal rights of U.S. citizens to repatriate the proceeds of inheritance abroad. *Id.*, at 441. Although the Oregon statute in *Zschernig* was quite similar on its face to that in *Clark*, the Court found a basis for distinction in the way Oregon courts had applied the law. OR. REV. STAT. §§ 111.070(1)(a), (b) (1957), (*repealed by* 1969 Or. Laws 591, § 305), *quoted in* *Zschernig* 389 U.S. at 430 n.1 (1968). The Court voided the statute as construed, because it seemed to give preferential treatment to certain types of governments.

In short, it would seem that Oregon judges in construing § 11.1070 seek to ascertain whether "rights" protected by foreign law are the same "rights" that citizens of Oregon enjoy. If, as in the *Rogers* case [219 Or. 233, 347 P.2d 57 (1959)], the alleged foreign "right" may be vindicated only through Communist-controlled state agencies, then there is no "right" of the type § 111.070 requires. . . . The statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way.

*Zschernig*, 389 U.S. at 440. Preferential treatment is therefore one indication that a state law has moved away from the states' local power and entered the zone of foreign relations power. *See also* Morrison, *supra* note 48, at 647-48, arguing that *Zschernig* may be limited to its own facts because it stopped short of overruling *Clark*.

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

132. *But see* Morrison, *supra* note 48, at 649-50.

An alien land regulation promulgated by a state government must also withstand scrutiny under the commerce power of the federal government.

133. *See generally* Note, *Closing the Barn Door: A Suggested United States Response to International Restrictions on Foreign Acquisition of Agricultural Land*, 10 CAL. W. INT'L L.J. 536-63 (1980) for a more expansive discussion of this topic than is possible within the scope of this Note.



investment activity that in many situations could be beneficial. Legislative regulation of foreign land investment is necessary, but it must be uniform throughout the United States and must remain cognizant of the needs of individual communities. A conscientious uniform law could designate areas for discouragement or encouragement of foreign land investment and apply uniform, rational regulations to direct foreign investment activities in a profitable and beneficial way. This legislative innovation would be constitutionally permissible, despite equal protection or foreign relations power challenges. As global economies continue to make U.S. investments attractive and land investments particularly popular, the need for uniformity will intensify. The proposed uniform law would improve upon the current treatment of investors and misapplied methods of regulation, which deflect beneficial investment and fail to restrict harmful investment.

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