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STATE REGULATION OF ALIEN LAND OWNERSHIP

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In the 1970's, due to a number of factors only one of which is the new-found wealth of the oil-producing nations, the volume of foreign direct investment in the United States has increased dramatically.¹ The magnitude of this capital inflow, while it is doubtless beneficial in many respects, has caused widespread alarm over the possibility of a loss of economic sovereignty. Over the last several years efforts have been made to establish a national system of control over such investment. These efforts are continuing, but so far without conspicuous success.²

An increasingly popular vehicle for foreign investment is land, including both developed and agricultural acreage.³ As a result the hue and cry has once again been raised in state legislatures against alien ownership of real estate. Although the debate over legislative proposals

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1. See, e.g., Friedman, N.Y. Times News Service, published in the Columbia (Mo.) Missourian, Feb. 16, 1975, at 9, col. 1. More recently, it has been noted that such purchases, specifically land, have been made largely by Europeans. See BUSINESS WEEK, March 27, 1978, at 79-80.

2. See note 1 *supra*. In 1 DEPT OF COMMERCE, REPORT TO THE CONGRESS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 240 (1976), made pursuant to the Foreign Investment Study Act of 1974, 88 Stat. 1450 (1974), the Department of Commerce recommended against comprehensive controls. For a discussion of earlier unsuccessful proposals, see Fenton, *Proposed Limitations on Alien Purchases of United States Securities*, 9 J. INT. L. & ECON. 267 (1974).

3. See, e.g., BUSINESS WEEK, March 27, 1978, at 79-80; St. Louis Post-Dispatch, Nov. 7, 1977, at 8A, col. 8; St. Louis Globe-Democrat, Sept. 2, 1977, at 18A, col. 1. Accurate statistics are hard to obtain, but, as BUSINESS WEEK reports, the U.S. General Accounting Office is engaged in a survey for the Senate Agriculture Committee to evaluate the magnitude of land purchases by aliens.

to limit such ownership has quite properly emphasized their economic, political and social consequences,⁴ the Constitution, laws, and treaties of the United States collectively impose severe limitations on the power of the states to act in this field which might render such legislation invalid.

Over half of the states still have on the books some form of restriction on alien land ownership, principally leftovers from a number of earlier waves of anti-alien sentiment in American history.⁵ In the Midwest, as one might expect, recent attention has been focused specifically on agricultural land. In 1977, for example, Minnesota revised its existing law to make restrictions applicable only to agricultural land.⁶ Missouri, which had repealed its previous alien land law in 1965 to make way for a significant foreign investment,⁷ has now rejoined the anti-alien ownership camp. After a bill aimed at broad restrictions failed in a previous session of the General Assembly,⁸ the current session has passed a law restricting ownership of agricultural land by nonresident aliens.⁹

The validity and usefulness of such proposals are subject to question in light of constitutional and treaty limitations. These limitations have taken two major forms: direct constitutional limitations under the equal protection and due process clauses of the fourteenth amendment, and indirect limitations imposed by actual or potential exercise of federal authority under the treaty-making power, Congress' powers to regulate foreign commerce and to provide for a uniform rule of naturalization, and the general power of the federal government to conduct foreign affairs. It is appropriate to begin with a sketch of the principal patterns of restriction exhibited by existing state laws.

I. PATTERNS OF EXISTING STATE REGULATION¹⁰

A. *In General*

At the beginning of the nineteenth century the prevailing common law rule, derived from English feudalism, was that aliens as such were

4. See, e.g., St. Louis Post-Dispatch, Feb. 19, 1978, at 6B, col. 1 (reporting debate in the Missouri Senate).

5. See Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 623-29 (1976); Sullivan, *Alien Land Laws: A Re-evaluation*, 36 TEMP. L.Q. 15, 26-34 (1962).

6. 1977 Minn. Laws, ch. 269, MINN. STAT. ANN. § 500.221 (Supp. 1978).

7. 1965 Mo. Laws at 632. See note 47 *infra*.

8. H.R. 972, 78th General Assembly, 1st Sess. (1975). That bill would have prohibited all foreign government-corporations from owning Missouri real estate and would have prohibited any corporation controlled by aliens or foreign governments from doing business in the state. It died in committee in the House.

9. Senate Substitute for S. 685, 79th General Assembly, 2d Sess. (1978), (approved April 28, 1978) amending § 442.560, RSMo 1969. The text of the bill is set forth as an appendix to this article.

10. For detailed surveys of state alien land laws, see Morrison, *supra* note 5; Sullivan, *supra* note 5; Note, *Foreign Investment in U.S. Realty*, 28 FLA. L. REV. 491 (1976); Note, *State Regulation of Foreign Investment*, 9 CORNELL INT. L.J. 83 (1975).

disabled from holding land either by purchase or descent;¹¹ their title was subject to defeasance by escheat in the case of purchase,¹² or was void altogether in the case of descent.¹³ At one time or another every American jurisdiction has adopted some constitutional or statutory provision dealing with the subject. England herself abolished the rule by statute in 1870,¹⁴ but the dominant view in the United States has been that the common law rule remains residually applicable absent complete positive regulation.¹⁵ Among common law states, only Vermont appears to have rejected the rule by case law, on the persuasive rationale that the common law rule was based on feudal obligations of fealty to the king, whereas American titles are allodial and imply no such obligation.¹⁶ It appears that the only other American jurisdiction to reject the common law rule without statute is Louisiana, which of course claims a civil law heritage.¹⁷

Eighteen jurisdictions now have constitutional or statutory provisions expressly abolishing the distinction between aliens and citizens concerning the right to take and hold real estate.¹⁸ The remaining thirty-two

11. 2 W. BLACKSTONE, COMMENTARIES *249.

12.

The case of an alien born is also peculiar; for he may purchase any thing; but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the crown.

Id. at *293 (emphasis in original). 2b E. COKE, COMMENTARY UPON LITTLETON (1853).

In England it appears that the alien, holding a defeasible title, could not convey any more than that, and the purchaser from an alien also was subject to an inquest of office. *See* 2b E. COKE, COMMENTARY UPON LITTLETON (1853); Sullivan, *supra* note 5 at 16. In the United States, however, the prevailing view has been that the state's power to declare escheat exists only so long as the alien himself holds the property. *See* Estate of Wilson, 195 Neb. 228, 230, 237 N.W.2d 835, 837 (1976) (the right of escheat expires on the death of the alien unless his heirs are also ineligible).

13. "Aliens, also, are incapable of *taking* by descent . . ." 2 W. BLACKSTONE, COMMENTARIES *249 (emphasis added).

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

15. *E.g.*, Fairfax v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); Donaldson v. State, 182 Ind. 615, 101 N.E. 485 (1913); Pembroke v. Huston, 180 Mo. 627, 79 S.W. 470 (1904); Stokes v. O'Fallon, 2 Mo. 32 (1828); 2 J. KENT, COMMENTARIES *54, *61-63.

16. State v. Boston, C. & M.R.R., 25 Vt. 433 (1853) (dictum).

17. *See* Succession of Herdman, 154 La. 477, 482, 97 So. 664, 665 (1923).

18. Alabama: ALA. CODE tit. 47, § 1 (1958); California: CAL. CONST. art. I, § 21; CAL. CIV. CODE § 671 (West 1954); Colorado: COLO. REV. STAT. § 15-11-112 (1973); Delaware: DEL. CODE tit. 25, §§ 306-308 (1975), tit. 12, § 507 (1974); District of Columbia: D.C. CODE §§ 19-321, 45-1501 (1973); Maine: ME. REV. STAT. tit. 33, § 451 (1978); Massachusetts: MASS. ANN. LAWS ch. 184, § 1 (1977); Michigan: MICH. CONST. art. 10, § 6; MICH. COMP. LAWS § 554.135 (1967); New Mexico: N.M. STAT. ANN. § 70-1-24 (1961); 1975 N.M. Laws, ch. 257, § 2-112; New York: N.Y. [REAL PROP.] LAW §§ 10(2), 15, 16 (McKinney 1968); North

show a bewildering variety of express or residual restrictions which cluster around one or more of the following factors: (a) the manner of source of acquisition (descent,¹⁹ purchase,²⁰ from the state²¹); (b) the nature of the holding (agricultural²² or rural,²³ or size of holding²⁴); (c) the status of the alien (nonresident of the state,²⁵ nonresident of the United States,²⁶ nondeclarant immigrant,²⁷ ineligible for citizenship,²⁸

Dakota: N.D. CENT. CODE § 47-01-11 (1960); Ohio: OHIO REV. CODE ANN. § 2105.16 (Page 1976); Rhode Island: R.I. GEN. LAWS § 34-2-1 (1969); South Dakota: S.D. COMPILED LAWS ANN. §§ 43-2-9, 2-112 (1967); Tennessee: TENN. CODE ANN. § 64-201 (1976), §§ 31-401, 31-402 (1977); Texas: TEX. [CIV.] CODE ANN. tit. 166a (Vernon 1969) TEX. [PROB.] CODE ANN. § 41(c) (Vernon 1956); Washington: WASH. REV. CODE ANN. § 64.16.005 (1967); West Virginia: W. VA. CODE § 36-1-21 (1966).

19. At least two jurisdictions retain some limitation on inheritance, while removing disability regarding purchase. NEV. REV. STAT. § 111.055 (1965) (taking in general, § 134.230 (1957) (descent, reciprocity); N.C. GEN. STAT. §§ 6401, 64-2 (purchase), 64-3, to -5 (1975) (inheritance, reciprocity for nonresident).

20. At least two jurisdictions appear to limit purchase, while removing limits on inheritance. 20 PA. CONS. STAT. §§ 2104(8), 2518 (1975) (inheritance); 68 PA. CONS. STAT. § 32 (1965) (purchase limited to 5,000 acres); WIS. STAT. ANN. §§ 710.01, 710.02 (West 1969) (nonresidents).

21. Five jurisdictions place some restriction specifically on acquisition of state lands: ALASKA STAT. § 38.05.190(4) (1977) (reciprocity required for mineral rights); ARK. STAT. ANN. § 10-926 (1976) (citizenship required to take tax-forfeited land); IDAHO CODE § 58-313 (1976) (no sale of state land to non-declarant aliens); MISS. CODE ANN. § 29-1-75 (1972); OR. REV. STAT. § 273.255 (1975) (only declarant aliens may apply to purchase state lands).

22. See MINN. STAT. § 500.221 (Supp. 1977).

23. See IOWA CODE ANN. § 567.1 (1974) (limit of 640 acres outside of corporate limits of any town or city); NEB. REV. STAT. § 76-414 (1976) (within 3 miles of corporate limits of towns and villages).

24. See IND. CODE ANN. § 32-1-8-2 (Burns 1973) (over 320 acres); IOWA CODE ANN. § 567.1 (1974) (over 640 acres); 68 PA. CONS. STAT. § 32 (1965) (5,000 acres); S.C. CODE § 27-13-30 (1976) (500,000 acres); WIS. STAT. ANN. § 710.02 (1969) (640 acres).

25. E.g., OKLA. STAT. tit. 60, § 122 (1971); N.H. REV. STAT. ANN. § 477.20 (1968).

26. See CONN. GEN. STAT. ANN. § 47-57 (West Supp. 1977); IOWA CODE § 567.8 (1951); MISS. CODE ANN. § 89-1-23 (1972); NEB. REV. STAT. § 76-402 (1943) (interpreted in *Estate of James*, 192 Neb. 614, 223 N.W.2d 481 (1974)); WIS. STAT. ANN. § 710.02 (1969).

27. E.g., KY. REV. STAT. § 381.290 (1972).

28. This was the formula used in the anti-oriental legislation of the 1910's and 1920's, subsequently declared unconstitutional by several states. Its California history is tellingly recounted by Justice Murphy concurring in *Oyama v. California*, 332 U.S. 633, 651 (1947). Arizona retains such a provision. ARIZ. REV. STAT. § 33-1201 (1974). See Lowe, *The Arizona Alien Land Law: Its Meaning and Constitutional Validity*, 1976 ARIZ. ST. L.J. 253. Wyoming also has such a provision. WYO. STAT. § 34-151 (1967) (inheritance). Under present immigration laws the category no longer has racial significance. See 8 U.S.C. § 1182 (1976).

citizen of a nation not affording reciprocal rights,²⁹ enemy alien³⁰); (d) the remedy for a prohibited holding (escheat³¹ or mandatory alienation within a specified period of time³²); (e) special conditions attached to an otherwise permissible holding (registration³³ or continuation of a particular use³⁴).

B. *The Missouri Experience*

The volatility of these regulations over two centuries may be illustrated by an examination of the Missouri experience. In 1816 the territorial legislature of Missouri adopted the common law of England as rules of decision absent contrary legislation.³⁵ In 1820 Missouri's first state legislature granted rights regarding realty, equal to those of citizens, to aliens who resided in the United States or its territories and had declared their intention to become citizens of the United States.³⁶ In 1828 the Missouri Supreme Court held that a nondeclarant alien widow could take dower on the basis of the unqualified reference to "widows" in the dower statute, there being no political reason in Missouri to read

29. This is the formula used in many of the so-called "Iron Curtain" statutes, dealing with inheritance by aliens and stemming from the Cold War. *See, e.g.*, ALASKA STAT. § 38.05.190(4) (1977); IOWA CODE § 567.8 (1951); KAN. STAT. § 59-511 (1976); MONT. REV. CODE § 91-520 (Supp. 1976); NEB. REV. STAT. § 4-107 (Supp. 1977); NEV. REV. STAT. § 134.230 (1957); N.C. GEN. STAT. §§ 64-3 to -5 (1975); WYO. STAT. § 34-151 (1967).

30. Six states purport to remove common-law disabilities only for aliens who are not enemies. 1962 Fla. Op. Att'y Gen. No. 062-105; GA. CODE ANN. § 79-303 (1973); KY. REV. STAT. § 381.290 (1972); MD. [REAL PROP.] CODE ANN. § 14-101 (1974); 68 PA. CONS. STAT. ANN. § 22 (Purdon 1965); VA. CODE § 55-1 (1950).

31. Historically, this has been the normal remedy. *See* note 12 *supra*; authorities cited note 15 *supra*. *See, e.g.*, ARIZ. REV. STAT. § 33-1206 (1974); IOWA CODE § 567.8 (1951); KAN. STAT. § 58-2238 (1976); KY. REV. STAT. ANN. § 381.300 (1972); MISS. CODE ANN. § 89-1-23 (1972); NEB. REV. STAT. § 76-408 (1976); NEV. REV. STAT. § 134.250 (1957); N.C. GEN. STAT. § 64-5 (1975); WIS. STAT. ANN. § 710.02 (1969); WYO. STAT. § 2-43.1 (Supp. 1975).

32. At least eight states impose time limits for holdings by certain aliens. ILL. ANN. STAT. ch. 6, § 2 (Smith-Hurd 1976) (6 years); IND. CODE ANN. §§ 32-1-7-2, -8-2 (Burns 1973); IOWA CODE ANN. § 567.1 (Supp. 1977); KY. REV. STAT. §§ 381.320 (1972) (21 years for resident aliens), .330 (8 years for nonresident aliens); MINN. STAT. § 500.221 (Supp. 1977) (1 year, followed by judicial sale); NEB. REV. STAT. § 76-411 (1976) (holding via lien, 10 years); OKLA. STAT. tit. 60, § 122 (1971); S.C. CODE § 27-13-30 (1976).

33. *See* IOWA CODE ANN. § 567.9 (Supp. 1977) (requires reports from nonresident aliens owning, or leasing agricultural land or farming outside city limits); MINN. STAT. ANN. § 500.221 (Supp. 1977) (requires nonresident aliens who already hold title to agricultural land to file annual reports).

34. *E.g.*, CONN. GEN. STAT. ANN. § 47-58 (1960) (allowing nonresident aliens to acquire land for mining or quarrying, but limiting the holding of such land without such use to 10 years).

35. 1816 Mo. Terr. Laws, ch. 154.

36. 1820 Mo. Laws, ch. 284.

any qualification into the statute or to insist on applying the English rule merely because it was not expressly overruled.³⁷

In 1835 the legislature extended the right to take and convey realty by descent or devise to all aliens resident within the state, but apparently withheld this right from aliens resident in the territories of the United States even though declarant.³⁸ In 1845 the right to hold realty as well as take and convey was included.³⁹ In 1855 nonresident aliens, who were still ineligible to own property by terms of the 1835 law, were authorized to sell and convey property acquired by devise or descent within three years after their decedent's death;⁴⁰ later in the same year the time was extended to three years after final settlement of the decedent's estate.⁴¹ In 1872 a statute was adopted which abolished altogether the distinction between aliens and citizens regarding real estate ownership and disposition.⁴²

In 1895, in a period of anti-alien sentiment in the farm states,⁴³ the legislature made it unlawful for nondeclarant aliens or foreign-country corporations to acquire or hold realty except by inheritance or by way of judicial collection of debts. It was also unlawful for any corporation more than twenty percent of whose stock was owned by aliens to acquire or hold realty by any means; the law also provided for forfeiture of land improperly held.⁴⁴ However, this was modified in 1897 to permit aliens or alien-owned corporations to acquire security interests in realty and to purchase at foreclosure sales, provided interests so purchased were alienated to citizens within six years.⁴⁵

Finally, in 1965 the legislature adopted a provision⁴⁶ which in effect restored the situation first established in 1872. This was apparently done in part to accommodate a specific prospective investment.⁴⁷

37. *Stokes v. O'Fallon*, 2 Mo. 32 (1828).

38. RSMo 1835, at 66.

39. RSMo 1845, ch. 6, § 1, at 113.

40. 1855 Mo. Laws at 4.

41. RSMo 1855, ch. 5.

42. 1871 Mo. Laws at 79.

43. See *Sullivan*, *supra* note 5, at 30-32.

44. 1895 Mo. Laws at 207-08.

45. 1897 Mo. Laws at 144. The 5 year limit in this act was extended to 6 years in § 4765, RSMo 1899.

46. Section 422.560, RSMo 1969 provided:

Persons not citizens of the United States and corporations not created by or under the laws of the United States or of some state or territory of the United States shall be capable of acquiring, by grant, purchase, devise or descent, real estate, or any interest therein, in this state, and of owning, holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state.

47. See *St. Louis Globe-Democrat*, May 27, 1965, at 7C, col. 9 (report of the signing of the bill which would "allow alien-owned corporations like Dutch Shell Oil Company to own real estate in Missouri").

C. *The 1978 Missouri Law*

Missouri Senate Bill 685⁴⁸ amends the existing law by excepting agricultural land from the general authorization for aliens and foreign-country corporations to own land. It then expressly prohibits the acquisition of agricultural land, either directly or through business entities, by aliens who are neither citizens nor residents of the United States or its territories.⁴⁹ "Agricultural land" is defined essentially as land consisting of more than five acres and capable of supporting an agricultural enterprise.⁵⁰ Acquisition of such land is nonetheless permitted for non-farming purposes;⁵¹ the acquirer must in such case file a declaration of intent regarding use of the land.⁵² If a filing is made, farming can be pursued pending development, either by the filing acquirer or by another person under lease.⁵³ If land is improperly acquired or a permissible use discontinued, the attorney general must institute an action to require the acquirer to divest himself of the land within two years; failing such divestiture, the land is to be sold at public auction as if pursuant to mortgage foreclosure.⁵⁴

Proponents of this and similar bills have offered at least three different reasons for their enactment: (1) that nonresident aliens are paying such high prices for farmland that the Missouri farmer cannot afford to outbid them;⁵⁵ (2) that foreigners would not necessarily use the land—particularly in a prospective time of food scarcity—in the best interest of Missourians;⁵⁶ and (3) that the bills would "help preserve our family farm system."⁵⁷ Registration of otherwise permissible alien acquisitions is presumably intended to provide information as to the extent of foreign ownership⁵⁸ as well as to facilitate enforcement.

Regardless of whether it served as a model for one or more of the Missouri bills, the similarity between the 1977 Minnesota law⁵⁹ and the 1978 Missouri law is worth noting. The Minnesota provision also applies only to agricultural land, defined as land "capable of use in the production" of agricultural products,⁶⁰ and prohibits acquisition thereof by an

48. See appendix *infra*.

49. Senate Substitute for S. 685, *supra* note 9, § 3.

50. *Id.* § 2(1).

51. *Id.* § 7.1.

52. *Id.* § 7.2.

53. *Id.* § 7(1).

54. *Id.* § 4.

55. *E.g.*, St. Louis Globe-Democrat, Sept. 2, 1977, at 18A, col. 4 (quoting the state director of agriculture).

56. See St. Louis Post-Dispatch, Feb. 19, 1978, at 6B, col. 7 (quoting Rep. Osbourn, sponsor of one of the house bills).

57. *Id.* (quoting Rep. Novinger).

58. *Cf.* note 3 *supra* (foreign ownership statistics).

59. 1977 Minn. Laws, ch. 269.

60. *Id.* § 1.

alien not permanently resident in the United States, or by any business entity not at least eighty percent owned by United States citizens or permanent residents.⁶¹ As with the Missouri bills, forced sale is used rather than escheat to provide the remedy.⁶² The prohibition is against acquisition, rather than holding; however, persons holding land as of the effective date of the law, the future acquisition of which would have been prohibited by the law, are required to register and file annual informational reports.⁶³

II. CONSTITUTIONAL LIMITATIONS: EQUAL PROTECTION

The equal protection clause of the fourteenth amendment to the federal Constitution provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Both aliens⁶⁴ and corporations⁶⁵ have long since been held to be "persons" within the meaning of the fourteenth amendment generally and the equal protection clause in particular, so that this criterion is met by those against whom the alien land laws discriminate.

It has been argued that the equal protection clause does not protect a nonresident alien, because such a person—not being physically within the state's borders—is not "within its jurisdiction."⁶⁶ There are in fact several different possible interpretations of that phrase; the two most obvious are "physically present within its borders," and "subject to its laws or adjudicatory authority." However, even if it is assumed that physical presence is meant, it is clear that a person can be physically present within a state's borders without being a resident thereof. A statute which prohibited a person from purchasing land while present in the state, merely because he was not a resident of the state or of the United States, would therefore come within the equal protection clause.⁶⁷

The use of the term "jurisdiction," on the other hand, suggests the broader meaning "subject to its laws," and it might be supposed that the fact of the prohibition against acquiring or holding land is itself an exercise of jurisdiction over the nonresident, nonpresent alien.⁶⁸ Histori-

61. *Id.* § 2.

62. *Id.* § 3.

63. *Id.* § 4.

64. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

65. *E.g.*, *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935).

66. *De Tenorio v. McGowan*, 510 F.2d 92, 101 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975); *Shames v. Nebraska*, 323 F. Supp. 1321, 1333 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972); *Liebman & Levine, Foreign Investors and Equal Protection*, 27 MERCER L. REV. 615, 618-19 (1976).

67. See *Sailer v. Tonkin*, 356 F. Supp. 72 (D.V.I. 1973); *Liebman & Levine, supra* note 66, at 618; *Lowe, supra* note 28, at 263 n.57; *Morrison, supra* note 5, at 642.

68. See authorities cited note 67 *supra*.

cally, however, it must be presumed that the term "jurisdiction" as used in the fourteenth amendment would incorporate the distinction between jurisdiction *in personam* and jurisdiction *in rem*, already firmly established when expounded by the Supreme Court in 1877 in *Pennoyer v. Neff*.⁶⁹ In that light, the phrase "person within its jurisdiction" can be seen as most likely *intended* to refer to *personal* jurisdiction, not established merely by the existence of a claim to or interest in property within the state's borders. That the distinction between these forms of jurisdiction may have been rendered archaic under recent due process analysis⁷⁰ does not necessarily destroy its usefulness in determining the proper scope of equal protection analysis.

Assuming that the equal protection clause is to be applied, the question remains what standard of review is to be applied to discrimination against aliens. Two interlocking lines of cases involving legislative classifications based on alienage have applied the highest standard of judicial review, referred to as "strict scrutiny."⁷¹ The first line of cases deals with classifications based on alienage as such, restricting the right of aliens to earn a livelihood in various occupations or to receive various economic benefits from the state. *Truax v. Raich*⁷² struck down a limitation on the proportion which aliens could constitute in any employer's work force. Other cases have held unconstitutional the exclusions of aliens from competitive civil service;⁷³ the exclusion of aliens from the practice of law;⁷⁴ and the exclusion of aliens from licensure to practice civil engineering.⁷⁵ The Supreme Court has held it impermissible to deny welfare benefits to aliens,⁷⁶ or to deny nondeclarant aliens state financial aid for higher education.⁷⁷ In these cases, aliens were found to be "a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate."⁷⁸ Discrimination

69. 95 U.S. 714 (1877).

70. See *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977).

71. E.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 (1978).

72. 239 U.S. 33 (1915).

73. *Sugarman v. Dougall*, 413 U.S. 634 (1973). *Sugarman* effectively overruled *Crane v. New York*, 239 U.S. 195 (1915) and *Heim v. McCall*, 239 U.S. 175 (1915), involving public works employment.

74. *In re Griffiths*, 413 U.S. 717 (1973). *Griffiths* effectively overruled *Clarke v. Deckebach*, 274 U.S. 392 (1927) (pool hall licenses). See also *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972); *Application of Park*, 484 P.2d 690 (Alaska 1971). Florida's citizenship requirement for applicants for letters of administration of estates was struck down in *Estate of Fernandez*, 335 So. 2d 829 (Fla. 1976).

75. *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976). See also *Surmeli v. New York*, 412 F. Supp. 394 (S.D.N.Y.), *aff'd mem.*, 556 F.2d 560 (2d Cir. 1976) (medical doctors); *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976) (public school teachers).

76. *Graham v. Richardson*, 403 U.S. 365 (1971).

77. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

78. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

against them is sustainable only if necessary to the accomplishment or protection of a permissible and substantial purpose or interest.⁷⁹ At the same time, however, the Court recognized limits to the right of equal treatment in the rights of the state to establish its own form of government and define its political community⁸⁰ and to limit to citizens "high public offices that have to do with the formulation and execution of state policy."⁸¹ Accordingly, after having summarily refused to overturn decisions sustaining citizenship requirements for jury duty⁸² and voting in local elections,⁸³ the Court this year held it permissible to exclude aliens from New York's State Highway Patrol.⁸⁴

The second line of cases has dealt with land or other natural resources, and with classifications based not only on alienage as such, but also upon a subclass of aliens, those ineligible for citizenship. In *Terrace v. Thompson*,⁸⁵ decided at the peak of anti-Japanese sentiment in 1923, the Supreme Court upheld a Washington statute prohibiting nondeclarant aliens from owning non-mineral lands unless acquired by inheritance, finding the distinction between aliens and citizens real and pertinent to the legislative purpose. The fact that under the then existing immigration laws orientals were ineligible for citizenship was disregarded, because that was the federal government's own discrimination. In the same week the Court sustained California statutes based expressly on ineligibility for citizenship.⁸⁶ In 1948 in *Oyama v. California*,⁸⁷ the Court held that it was unconstitutional to apply to a citizen the California statute's presumption that if an ineligible alien supplied the consideration for another's purchase, it was done with intent to evade the prohibition. Because by that time virtually only Japanese were ineligible for citizenship under federal law, escheat of the land held in the defendant son's name would be based solely on his alien father's nationality. This scheme was struck down as an impermissible racial discrimination against

79. See *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

80. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

81. *Id.*

82. *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976).

83. *Skaft v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977). Cf. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 *Mich. L. Rev.* 1092 (1977), who acknowledges authorities to this effect but argues for the opposite policy.

84. *Foley v. Connelie*, 98 S. Ct. 1067 (1978). The three dissenters represented by Justice Stevens were unable to distinguish state troopers from lawyers who were held to be not sufficiently official in *In re Griffiths*, 413 U.S. 717 (1973). Cf. *Chavez-Salido v. Cabell*, 427 F. Supp. 158 (C.D. Cal. 1977) (invalidating a citizenship requirement for peace officers).

85. 263 U.S. 197 (1923).

86. *Porterfield v. Webb*, 263 U.S. 225 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Frick v. Webb*, 263 U.S. 326 (1923).

87. 332 U.S. 633 (1948).

a citizen. Four of the justices voting for the majority would have held the statutory classification to be based upon race and therefore unconstitutional on its face.⁸⁸ A few months later, in *Takahashi v. Fish and Game Commission*⁸⁹ the Court invalidated a Washington law excluding ineligible aliens from commercial fishing licenses, characterizing the activity as "earning a living" and rejecting the state's claim to a special interest in preserving natural resources for its citizens. On the strength of these decisions, the supreme courts of Oregon,⁹⁰ California,⁹¹ and Montana⁹² invalidated their alien land laws which disqualified aliens who were ineligible for citizenship.

Both of these lines of cases involved *resident* aliens, lawfully admitted for residence by the immigration authorities and resident in the discriminating state. The obvious question then is whether these cases have any bearing on statutes, such as those of Minnesota⁹³ and Missouri, which apply only to aliens not resident in the United States.

Aside from the argument noted above, that the equal protection clause does not apply to such aliens at all, the principal alternative is to hold that "nonresident alien," as distinguished from "alien," is not a suspect classification, and is therefore subject to a lesser standard of review. This is the position taken in 1976 by the Supreme Court of Wisconsin in *Lehndorff Geneva, Inc. v. Warren*,⁹⁴ which applied a lesser standard of review to the Wisconsin statute disqualifying nonresident aliens from owning land in the state. Whatever the position of aliens resident in the United States seeking to earn a living, a class which includes over ninety percent of the world's population can scarcely be a "discrete and insular minority for whom heightened judicial solicitude is appropriate." This notion is strengthened because, by hypothesis, only investment is at stake, not the means of earning a living. To be sure, the nonresident alien is just as much excluded from the relevant political community as the resident, if not more so, and has even less opportunity to influence *directly* the decisions affecting his interests. However, the nonresident's stake in the community is correspondingly limited, and he is much more likely than the resident alien to have the countervailing diplomatic support of his home government.⁹⁵ "Heightened judicial solicitude" seems therefore less necessary.

If the lesser standard of "minimum rationality"⁹⁶ applies, it is highly likely that such statutes would pass muster, as the Wisconsin court held.

88. *Id.* at 647 (Black, J., concurring); *Id.* at 650 (Murphy, J., concurring).

89. 334 U.S. 410 (1948).

90. *Kenji Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569 (1949).

91. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

92. *State v. Oakland*, 129 Mont. 347, 287 P.2d 39 (1955).

93. MINN. STAT. § 500.221 (1977). *See also* statutes cited note 26 *supra*.

94. 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

95. *See Morrison supra* note 5, at 642-43.

96. *See L. TRIBE, AMERICAN CONSTITUTIONAL LAW* § 12-2 (1978).

Not only does the exclusion of aliens from land ownership have a long common law history, but it is at least rational to conclude that absentee ownership of land is "potentially detrimental to the welfare of the community . . . and persons who are neither citizens nor residents are least likely to consider the welfare of the community. . . ." ⁹⁷

On the other hand, if the strict standard of review applies, restrictions on nonresident alien ownership of land cannot be expected to stand. Ownership of land scarcely rises to the level of membership in the political community; it is no longer permissible to make such ownership a condition of the franchise in elections of general interest.⁹⁸ Moreover, exclusion of nonresident aliens, as distinguished from nonresident United States citizens, cannot be said to be *necessary* to the protection of any of the interests claimed to lie behind restrictions on ownership of agricultural land (control of prices, control of disposition of crops, preservation of the family farm).⁹⁹ All of those interests are susceptible of more direct protection¹⁰⁰ and the protective urge of the nonresident citizen is at best speculative.

However, one provision of the Missouri law may pose serious equal protection problems, even under the lower standard. Section 4(3) of that law, after establishing the general two-year period for divestiture after judicial order, contains the following proviso: "Provided, however, an incorporated foreign business must divest itself of agricultural land within the minimum time required by Article XI, Section 5, of the Missouri constitution." The constitutional provision referred to prohibits corporations from owning real estate except as necessary and proper for carrying on their legitimate business, but permits them to hold real estate acquired in payment of a debt for at least ten years.¹⁰¹ The proviso in the land law is ambiguous at best and may have been intended simply to provide for a different time period for acquisition of land in payment of a debt.¹⁰² However, only the time period is incorporated by reference, not the manner of acquisition specified in the constitutional provision. In any case, the proviso applies only to corporations, not to individuals or unincorporated business entities. Therefore, the effect of the proviso may be to establish a ten-year divestiture period for foreign corporations, regardless of the mode of acquisition, while unincorporated aliens must divest within two years. No rational basis appears for such a

97. *Lehndorff Geneva, Inc. v. Warren*, 246 N.W.2d 815, 825 (Wis. 1976). See St. Louis Post-Dispatch, Feb. 19, 1978, at 6B, col. 1 (argument of Rep. Osbourn in support of one of the Missouri bills).

98. See *Hill v. Stone*, 421 U.S. 289 (1975); L. TRIBE, *supra* note 96 § 13-11.

99. See text accompanying notes 55-57 *supra*.

100. *E.g.*, Missouri Farming Corporation Law, §§ 350.010-.030, RSMo (Supp. 1975) (limiting the power of corporations to engage in farming).

101. Mo. CONST. art. XI, § 5.

102. See *Columbia Missourian*, Apr. 14, 1978, at 14, col. 1; *Columbia Missourian*, Apr. 15, 1978, at 14, col. 1 (comments by legislators after passage of the bill in the House and Senate).

distinction; if there is none the provision must fail. Moreover, by virtue of a rather unusual indivisibility clause added on the floor of the House on the day of passage, if any provision of the law is found unconstitutional the entire law is to be invalid.¹⁰³

III. CONSTITUTIONAL LIMITATIONS: DUE PROCESS

Unlike the equal protection clause, the due process clause of the fourteenth amendment is not limited to persons "within the jurisdiction" of the state. Therefore, to the extent that a nonresident alien has property interests in the state, he is entitled to due process protection. There can be no doubt that the nonresident alien who purchases land has a property right, even though the purchase is formally prohibited. Under both the American common law¹⁰⁴ and statutes such as the old Missouri Alien Land Law¹⁰⁵ an alien could *take* by purchase, could defend his right against any person other than the state, and could convey good title to a citizen before the state began proceedings to declare an escheat.¹⁰⁶ Practice in the pursuit of escheat was so lax in most states that the alien could expect to enjoy the purchase virtually unmolested.¹⁰⁷ The 1978 Missouri law clearly follows this pattern by providing for mandatory divestiture rather than escheat as the remedy for a prohibited holding, and that only after action by the attorney general.¹⁰⁸

Due process may be seen as having two aspects: first, as a source of a standard of review for the state's legislative classification; and second, as the basis for a potential claim to a right of compensation from the state.

The due process standard of review requires that a state's law have a purpose which bears a rational relationship to a legitimate state interest.¹⁰⁹ This is, in effect, the same standard applied to nonsuspect clas-

103. Senate Substitute for Senate Bill 685, *supra* note 9, § 7(1). The only interpretation of the proviso that appears to be available which would avoid this equal protection problem is that it was merely intended to forestall any extension by this law of the time period specified in the constitutional provision for divestiture by a corporation of real estate acquired in payment of a debt, but not otherwise necessary or proper to its legitimate business. The constitution permits extension by general law, and because the 2-year period in the land law runs only from the date of the judicial divestiture order, it could run more than 10 years past the date of *acquisition*. By that reasoning, the proviso should be read simply to require a corporation to comply with the 10-year period specified in the constitution, if applicable, even if that would leave less than two years after the divestiture order.

104. See note 12 *supra*.

105. *Pembroke v. Huston*, 180 Mo. 627, 79 S.W. 470 (1904).

106. *Id.*

107. See, e.g., M. GILL, TREATISE ON REAL PROPERTY LAW IN MISSOURI 94-95 (1949).

108. See Senate Substitute for S. 685, *supra* note 9, § 4.

109. *Morrison*, *supra* note 5, at 645.

sifications under the equal protection clause and serves only to protect against arbitrary or capricious laws. As indicated above, under this standard there is no apparent basis for invalidating a law prohibiting non-resident aliens from owning land.

Even if a taking of property is not arbitrary or capricious, the due process clause of the fourteenth amendment incorporates the fifth amendment's obligation to provide compensation for a taking of property for public use.¹¹⁰ To the extent that a state's enforcement of alien land laws deprives aliens of their property, therefore, it might be argued that the state is obligated to compensate them for any loss incurred.¹¹¹

A number of states have recognized this claim as at least persuasive by providing for compensation in the case of escheat¹¹² or by providing, in lieu of escheat, for a period of time within which the alien may dispose of the land on the real estate market.¹¹³ In either of these cases, the alien presumably receives market value for the property, and the obligation of the state to compensate either does not arise or is satisfied.

If judicial sale is imposed upon failure to divest within the statutory period, as in the Missouri and Minnesota laws, it might be argued that the resulting compensation is likely not to represent fair market value, and that there has therefore been a taking to the extent of the difference. The United States Supreme Court has dealt with this issue in *Asbury Hospital v. Cass County*,¹¹⁴ a 1945 decision sustaining the North Dakota corporate farm law as applied to land acquired by a corporation before enactment of the law. The statute gave the corporation ten years in which to dispose of the property, then required judicial sale with the proceeds to be paid to the corporation. The corporation argued that prevailing conditions did not permit recapture of the original investment. The Supreme Court held that due process requires only an *opportunity* to realize market value, which the ten-year period provided. Although the two-year period established in the Missouri law might be thought less adequate for that purpose, especially because it will be known to any prospective buyer through recording of the divestiture order that the seller is under compulsion of a time limit,¹¹⁵ there is no reason to suppose that the holding of *Asbury Hospital* will be abandoned.

If the remedy for prohibited acquisition or failure to divest is escheat, with proceeds retained by the state, the argument that there has been a taking seems stronger. On the one hand, it is generally said that escheat in the context of alien land laws or inheritance statutes is in the

110. *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

111. *See Shames v. Nebraska*, 323 F. Supp. 1321, 1341 (1971) (Van Pelt, J., dissenting).

112. *E.g.*, NEB. REV. STAT. § 76-408 (1976).

113. *See* statutes cited note 32 *supra*.

114. 326 U.S. 207 (1945).

115. Senate Substitute for S. 685, *supra* note 9, § 4(3).

nature of a forfeiture for wrongful holding.¹¹⁶ It is settled, at least in the case of a forfeiture of contraband or property involved in the commission of a crime, that there is no obligation to compensate.¹¹⁷ On the other hand, because the state's right to escheat derives from its position as ultimate owner of all land, this would seem to be a fairly good example of a taking by the state as proprietor or enterpriser, said in more recent analyses to be the paradigm of compensable expropriation.¹¹⁸ No case has been found holding that a duty to compensate in such cases exists independent of statute.

IV. CONSTITUTIONAL SUBORDINATION TO FEDERAL AUTHORITY

In addition to the direct restraints placed on state legislative activity by the fourteenth amendment, the supremacy clause of article VI of the federal Constitution provides a vehicle for indirect restraints through the actual or potential exercise of authority or by the federal government. State laws may be superseded by treaties, by comprehensive and therefore preemptive federal legislation, or by conflict with the federal government's exclusive power over foreign affairs. It is these restraints which provide the most serious obstacle to effective state regulation of alien land ownership.

A. Treaties

It has been settled since *Missouri v. Holland*¹¹⁹ that valid treaties supersede state law, even in areas which the federal government has otherwise left to the states. Conflict with treaty rights is therefore among the most common defenses to enforcement of alien land laws. The difficulty, however, is that treaties seldom provide an effective defense, particularly to the sort of law now contemplated in Missouri. Even the extensive series of bilateral treaties on friendship, commerce and navigation, which deal with many aspects of foreign investment, normally do not provide a citizen of one country a general right to own land in the

116. See, e.g., 2 W. BLACKSTONE, COMMENTARIES *293; *Takiguchi v. State*, 47 Ariz. 302, 55 P.2d 802 (1936) (denying injunctive relief where the same proof would establish escheat and criminal liability); *Rippeth v. Connelly*, 60 Tenn. App. 430, 447 S.W.2d 380 (1969) (citing analogy to forfeiture as the reason for the rule that escheats are not favored in law). Some statutes use the term "forfeit" or "forfeiture" in connection with escheat provisions: IOWA CODE ANN. § 567.1 (1974); MISS. CODE ANN. § 89-1-23 (1972); NEB. REV. STAT. § 76-408 (1976); WIS. STAT. ANN. § 710.02 (1969).

117. See *McKeehan v. United States*, 438 F.2d 739 (6th Cir. 1971).

118. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1964). Seven years later the same author conceded that the cases have not yet settled on a consistent theory. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

119. 252 U.S. 416 (1920).

other country.¹²⁰ In lieu of a comprehensive survey of these treaties, a few examples will suffice to indicate the limits of their applicability to this problem.

The 1950 treaty with Ireland¹²¹ provides nationals of each party a right to enter the territory of the other for the purpose of carrying on trade and related commercial activities, on a most-favored-nation bases;¹²² a right to national treatment¹²³ with respect to recovery for personal injury, death, or work-related injury, and regarding compulsory insurance systems; a right to equitable treatment for capital; a right to national treatment for engaging in economic and cultural activities, obtaining protection for industrial property, and access to courts and tribunals. In article VII,¹²⁴ however, which deals with ownership of property, more or less standard common law limitations on alien ownership are left intact. Nationals of one party are to be given national treatment in the other with respect to the *acquisition* of property by succession or through judicial process, but may be ineligible to *hold* such property, and in such case are to be given only a reasonable time in which to dispose of it in the normal manner at market value. Otherwise, they are subject to local law concerning ownership of real property, ex-

120. See Morrison, *supra* note 5, at 656, 660.

121. [1950] 1 U.S.T. 788, T.I.A.S. No. 2155.

122. Defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . of any third country." [1950] 1 U.S.T. 788, T.I.A.S. No. 2155 art. XXI(2).

123. Defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . of such Party." [1950] 1 U.S.T. 788, T.I.A.S. No. 2155 art. XXI(1).

124.

1. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring all kinds of property by testate or intestate succession or through judicial process. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a reasonable period in which to dispose of it, in a normal manner at its market value. In the case of ships and shares therein, however, a specially limited period may be prescribed.

2. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring, by purchase, lease or otherwise, and with respect to owning and disposing of, personal property of all kinds, both tangible and intangible

3. Except as provided in paragraph 1 of the present Article, the ownership of real property within the territories of each Party shall be subject to the applicable laws therein. Nationals and companies of either Party shall, however, be permitted to possess and occupy real property within the territories of the other Party, incidental to or necessary for the enjoyment of rights secured by the provisions of the present Treaty. [1950] 1 U.S.T. 788, T.I.A.S. No. 2155 art. VII.

cept in so far as possession and occupation thereof may be incidental to enjoyment of rights otherwise provided in the treaty.

The 1957 treaty with the Netherlands,¹²⁵ a civil law country which itself does not restrict alien ownership of land as such though investments in land may be subject to regulation,¹²⁶ affords economic, cultural, and institutional rights similar to those described in the Irish treaty above. Article VII, however, after providing general freedom of establishment, contains the following language: "2. Each party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on enterprises engaged in . . . the exploitation of land or other natural resources. . . ." Article VIII of this treaty, dealing with ownership of property, also contains provisions similar to the treaty with Ireland.

The friendship, commerce and navigation treaties, therefore, would make two principal changes in the common law or standard alien land laws. Nonresident nationals of a treaty state would be entitled to realize the market value of land claimed by succession, rather than being excluded from inheritance altogether.¹²⁷ Such nonresident nationals also would be entitled to lease and occupy premises appropriate to the economic or cultural activities authorized by the treaty. A limitation on the acquisition of agricultural land by nonresident aliens, such as that proposed in Missouri and already in effect in a number of states,¹²⁸ would be unaffected by treaties reserving the right to restrict exploitation of land and natural resources.

B. Preemption by Federal Legislation

The federal government's predominant authority in foreign affairs makes that field especially susceptible to a finding that comprehensive federal legislation precludes even state laws which may be technically consistent with a federal statute. When the issues involved come within the area of immigration and naturalization, the Supreme Court has been most unsympathetic to state legislation. The leading cases in this area have been *Hines v. Davidowitz*,¹²⁹ which held a state alien registration law invalid in the face of the federal provision, and *Pennsylvania v. Nelson*,¹³⁰

125. [1957] 8 U.S.T. 2043, T.I.A.S. No. 3942.

126. See [1972] 3 COMMON MARKET REP. (CCH) ¶ 26,653. Among European countries substantial restrictions on alien ownership of land are imposed by Switzerland, [1972] 3 COMMON MARKET REP. ¶¶ 29,153, 30,929 (since relaxed) and Sweden, see Bogdan, *Restrictions Limiting the Right of Foreigners to Acquire Real Property in Sweden*, 41 RABELS ZEITSCHRIFT 536 (1977).

127. See *Hanafin v. McCarthy*, 95 N.H. 36, 57 A.2d 148 (1948) (1889 treaty with Great Britain).

128. See statutes cited notes 22 & 23 *supra*.

129. 312 U.S. 52 (1941).

130. 350 U.S. 497 (1956).

which struck down a state sedition law as preempted by the federal Smith Act.

The comprehensive and constitutionally mandated federal system of immigration and naturalization laws was, in fact, a principal alternative basis for invalidation of the state restrictions on resident aliens, at least in the earlier cases *Takahashi v. Fish & Game Commission*¹³¹ and *Graham v. Richardson*.¹³² State limitations on the ability of an alien to earn a living after the federal government has permitted him to establish permanent residence in the United States were said to conflict with those decisions. This concept is also discernible as a factor in the decisions invalidating the ineligibility-alien land laws.¹³³

The recent decision of *De Canas v. Bica*,¹³⁴ which sustained a California law prohibiting employment of illegal aliens, probably does not presage a significant relaxation of this view. The Court strongly emphasized the fact that the effect of the state law was simply to enlist state authorities in the implementation of federal policy, and, unlike the regulations in *Hines* and *Nelson*, imposed no new burdens on persons authorized to enter and reside in the country.

Limitations on nonresident aliens do not appear to invade the immigration and naturalization field directly, or otherwise to conflict with current federal law, which contains no comprehensive regulation of foreign investment. The direct preemption doctrine therefore poses no immediate threat to Missouri's statute.

C. Constitutional Preemption—Interference with Foreign Relations

As early as 1853, the Vermont Supreme Court expressed the view that alienage and the consequences of that status are the exclusive concern of the federal government:

[I]t seems . . . that the right to interfere with aliens holding real estate in this country, strictly and appropriately belongs to the national, and not to the State sovereignty. It goes upon the basis of some defect in allegiance; and allegiance is a matter pertaining altogether to the national sovereignty. They have the exclusive control of all relations between this country and foreign nations, or their citizens. And the States are expressly prohibited, in the United States Constitution, from attempting any stipulations, treaties or compacts, upon the subject. . . .¹³⁵

It was not until 1968, however, that the United States Supreme Court first articulated the principle that state laws may be invalidated solely because they constitute "an intrusion by the State into the field of

131. 334 U.S. 410, 419 (1948).

132. 403 U.S. 365, 377 (1971).

133. See cases cited notes 90-92 *supra*.

134. 424 U.S. 351 (1976).

135. *State v. Boston, C. & M.R.R.* 25 Vt. 432, 439 (1853).

foreign affairs.”¹³⁶ Because *Zschemnig v. Miller*¹³⁷ involved that particular form of alien land law known as the “Iron Curtain Statute,” it assumes special importance in this discussion.

Zschemnig declared invalid an Oregon statute which conditioned a nonresident alien's right to take property by succession on a showing that the claimant's country afforded reciprocal rights to United States citizens, and that the claimant would have the right to receive the property without confiscation. The Court did not disturb the holding in *Clark v. Allen*¹³⁸ that a general reciprocity statute is not per se invalid. It did find, however, that the actual judicial administration of statutes like Oregon's involved

inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their laws have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.¹³⁹

By contrast, in *Clark v. Allen* the statute “seemed to involve no more than a routine reading of foreign laws.”¹⁴⁰ The more extensive inquiry into administration, however, invades the field of foreign affairs. “As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.”¹⁴¹

In the light of this rationale, state and federal courts on at least three occasions have invalidated similar statutes. In two of those, however, it was emphasized that the statute as applied involved more than a “routine reading” of the foreign law. In *Mora v. Battin*¹⁴² the statute required withholding the distribution of legacies to alien beneficiaries if they would not receive the benefit, use, or control of the money “because of circumstances prevailing at the place of residence of such legatee. . . .” The court found that this language compelled inquiry into the operations of the foreign government, and that had in fact been done:

The affidavits establish that the defendant's refusal to distribute

136. *Zschemnig v. Miller*, 389 U.S. 429, 432 (1968). For the view that this is “new constitutional doctrine,” see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 239 (1972).

137. 389 U.S. 429 (1968).

138. 331 U.S. 503 (1947).

139. 389 U.S. at 434.

140. *Id.* at 433.

141. *Id.* at 437-38.

142. 303 F. Supp. 660 (N.D. Ohio 1969).

the assets in question to the plaintiffs was based on a consideration of matters other than the statute law of Czechoslovakia. Such a construction and application of [the statute] is prohibited under the Supreme Court's decision in *Zschernig v. Miller*.¹⁴³

In *In re Estate of Kraemer*¹⁴⁴ the same California statute which had been sustained in *Clark v. Allen* was invalidated. It is significant that Justice Douglas noted in a footnote to his *Zschernig* opinion that post-*Clark* California decisions would have presented the same problems as the Oregon cases.¹⁴⁵ A concurring opinion in *Kraemer* stated the distinction between "routine reading" and forbidden inquiry:

[*Zschernig*] would not condemn [the statute] if, under it, all that could be done by local trial courts, to determine if the other country involved treated its own citizens and nonresident United States citizens alike, was to read the applicable written law of that country (presumably through an authenticated translation) and possibly hear expert interpretive testimony where the credibility of the foreign expert was not put into question. However, if, through legislative language or through subsisting court interpretation, trial court inquiry into how the law is administered (such as to learn that officials and the courts of the country do not interpret its inheritance statute literally and sanction discrimination against nonresident United States citizens) is allowed, then the code section is disapproved by *Zschernig*.¹⁴⁶

Only Pennsylvania appears to have invalidated its statute "on its face" without inquiry into application.¹⁴⁷ The majority of post-*Zschernig* decisions, on the other hand, have held such statutes valid where no "animadversions" are required and indeed have found that most East European countries satisfy the statutory requirements.¹⁴⁸

If a statute discriminates against aliens as a class, but does not require investigation of the administration of the laws of a particular foreign country or otherwise single out any country for judicial criticism, the application of the *Zschernig* case is problematical. To be sure, the California appellate court in *Bethlehem Steel Corp. v. Board of Commissioners*¹⁴⁹ invalidated the California "Buy American Act," which required

143. *Id.* at 664.

144. 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (1969).

145. 389 U.S. at 433 n.5.

146. 276 Cal. App. 2d at 725, 81 Cal. Rptr. at 295 (Reppy, J., concurring).

147. *Demczuk Estate*, 444 Pa. 212, 282 A.2d 700 (1971).

148. *E.g.*, *Bjarsch v. DiFalco*, 314 F. Supp. 127 (S.D.N.Y. 1970); *In re Estate of Kish*, 52 N.J. 454, 246 A.2d 1 (1968); *In re Estate of Leikind*, 22 N.Y.2d 346, 239 N.E.2d 550 (1968), *appeal dismissed for want of finality*, 397 U.S. 148 (1970); *In re Johnston*, 16 N.C. App. 38, 190 S.E.2d 879 (N.C. App. 1972). See Comment, *The Demise of the "Iron Curtain" Statute*, 18 VILL. L. REV. 49 (1972).

149. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

public construction contracts to be let only to persons agreeing to use or supply American-made materials. The court held that the statute had a "direct impact on foreign relations" and found *Zschernig* controlling. However, in 1977 the Supreme Court of New Jersey took the opposite view in *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*,¹⁵⁰ sustaining an essentially similar New Jersey statute. That court found no foreign policy or ideological attitudes implicit in the law, nor any distinction based on the internal policies of the seller, and held *Zschernig* therefore inapplicable.¹⁵¹

The most that can be said of *Zschernig* and its limited progeny is that they afford some basis for argument that any state law which discriminates against aliens, especially aliens not resident in the United States, constitutes an impermissible intrusion into foreign affairs.¹⁵² The opinion of Justice Douglas in *Zschernig*, however, does not so hold. The case does make clear that a law which directly discriminates against particular nations, and thus impinges on our relations with those nations, must be presumed invalid. To that extent it also might be argued that a provision specially *favoring* particular nations is also invalid—for example, the provision in the original Missouri Senate Bill 685 which would have exempted citizens of Canada from the definition of "alien."¹⁵³

V. CONCLUSION

Today's alien land law is directed at the foreign investor, rather than the unassimilated immigrant. It seems clear that the federal Constitution would preclude any such law aimed at residents of the United States. However, the authorities provide less protection (or at least less clear-cut protection) for the nonresident who wishes simply to make a capital investment in land. In all probability, neither the due process clause nor the typical treaty would bar enforcement of a state law limiting investment in land other than that appropriate to a nonagricultural, nonextractive commercial or industrial enterprise. The application of the strict scrutiny test of the equal protection clause is at least open to serious question.

The strongest argument for the invalidity of statutes such as those of Minnesota and Missouri would seem to be that they constitute an impermissible intrusion into the conduct of foreign relations. However, to the extent that the effect on foreign relations is diffuse and incidental,

150. 75 N.J. 272, 381 A.2d 774 (1977).

151. 381 A.2d at 783-84.

152. See Morrison, *supra* note 5, at 650; Note, *Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents*, 25 SYRACUSE L. REV. 597, 621-22 (1974).

153. Senate Substitute for S. 685, 79th General Assembly, 2d Sess. (1978), as originally perfected by the Senate, Feb. 28, 1978. This provision was eliminated by the House from the final bill.

and the statute refrains from discriminating against particular countries, the existing cases can be distinguished, and that argument loses much of its technical support. The United States Supreme Court's long tolerance of many forms of alien land law and other courts' narrow interpretation of the *Zschemig* principle must leave considerable doubt that the Court would invalidate these statutes.

The most obvious answer to these problems would be the establishment, by express legislation, of a uniform national policy with respect to foreign investment, thereby preempting such state laws. Pending such action by Congress, however, it is commended to other courts the century-old wisdom of the Vermont Supreme Court in concluding that the status of alien is one which concerns only the federal government.

APPENDIX

Senate Substitute for S. 685, 79th General Assembly, 2d Sess. (1978) provides:

Section 1. Section 442.560, RSMo 1969, is repealed and seven new sections are enacted in lieu thereof to be known as sections 442.560, 2, 3, 4, 5, 6, and 7, to read as follows:

442.560. Except as provided in this act, persons not citizens of the United States and not residents of the United States or of some territory, trusteeship, or protectorate of the United States, and corporations not created by or under the laws of the United States or of some state, territory, trusteeship, or protectorate of the United States shall be capable of acquiring, by grant, purchase, devise or descent, real estate except agricultural land as defined in section 2 of this act, or any interest therein, in this state, and of owning, holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state.

Section 2. As used in this act unless the context clearly requires otherwise the following terms mean:

(1) "Agricultural Land", any tract of land in this state consisting of more than 5 acres, whether inside or outside the corporate limits of any municipality, which is capable, without substantial modification to the character of the land, of supporting an agricultural enterprise, including, but not limited to land used for the production of agricultural crops or fruit or other horticultural products, or for the raising or feeding of animals for the production of livestock or livestock products, poultry or poultry products, or milk or dairy products. Adjacent parcels of land under the same ownership shall be deemed to be a single tract;

(2) "Alien", any person who is not a citizen of the United States and who is not a resident of the United States or of some state, territory, trusteeship, or protectorate of the United States;

(3) "Director", the director of the Missouri department of agriculture;

(4) "Foreign Business", any business entity whether or not incorporated, including but not limited to corporations, partnerships, limited partnerships, and associations, in which a controlling interest is owned by aliens. In determining ownership of a foreign business legal fictions such as corporate form or trust shall be disregarded;

(5) "Residence", means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, where he intends to remain permanently or for an indefinite period of time at least.

Section 3. 1. Except as provided in section 6 and section 7 of this act, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business.

2. Any alien or foreign business who acquires agricultural land in violation of this act remains in violation of this act for as long as he holds an interest in the land.

Section 4. 1. If the director finds that an alien or foreign business or an agent, trustee, or other fiduciary therefor has acquired agricultural land in Missouri after the effective date of this act or the land ceases to be used for non-agricultural purposes under Section 7 of this act, he shall report the violation to the attorney general.

2. The attorney general shall institute an action in the circuit court of Cole County or the circuit court in any county in which agricultural land owned by the alien or foreign business, agent, trustee or other fiduciary, alleged to have violated this act, is located.

3. The attorney general shall file a notice of the pendency of the action with the recorder of deeds of each county in which any portion of such agricultural lands are located. If the court finds that the lands in question have been acquired in violation of this act, it shall enter an order so declaring and shall file a copy of the order with the recorder of deeds of each county in which any portion of the agricultural lands are located. The court shall order the owner to divest himself of the agricultural land. The owner must comply with the order within two years. The two year limitation period shall be a covenant running with the title to the land against any alien grantee or assignee. Provided, however, an incorporated foreign business must divest itself of agricultural land within the minimum time required by Article XI, Section 5, of the Missouri constitution. Any agricultural lands not divested within the time prescribed shall be ordered sold by the court at a public sale in the manner prescribed by law for the foreclosure of a mortgage on real estate for default in payment.

Section 5. Any person who obtains a lease on agricultural land for a term of ten years or longer or a lease renewable at his option for terms which might total ten years has acquired agricultural land within the meaning of this act.

Section 6. This act shall not apply to agricultural land now owned in this state by aliens or foreign businesses so long as it is held by the present owners, nor to any alien who is or shall take up bona fide residence in the United States; and any alien who is or shall become a bona fide resident of the United States shall have the right to acquire and hold agricultural lands in this state upon the same terms as citizens of the United States during the continuance of such bona fide residence in the United States; except, that if any resident alien shall cease to be a bona fide resident of the United States, such alien shall have 2 years from the time he ceased to be a bona fide resident in which to divest himself of such agricultural lands. Any agricultural lands not divested within the time prescribed shall be ordered sold by the court at a public sale in the manner prescribed by law for the foreclosure of a mortgage on real estate for default in payment.

Section 7. 1. The restrictions set forth in this act shall not apply to agricultural land or any interest therein acquired by an alien or foreign business for immediate or potential use in non-farming purposes. An alien or foreign business may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation; provided, however, that pending the development of agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm unit; a family farm corporation defined in 350.010 RSMo 1975 Supp.; an alien or foreign business which has filed with the director under this act; or except when controlled through ownership, options, leaseholds or other agreements by a corporation which has entered into an agreement with the United States of America pursuant to the New Community Act of 1968 (Title IV of the Housing and Urban Development Act of 1969, 42 U.S.C. 3901-3914) as amended, or a subsidiary or assign of such a corporation.

2. Any alien or foreign business which acquires an interest in agricultural land, for the purposes outlined in this section shall file with the director a declaration of intent as to the intended use of the land, the owner's name and a legal description of the land acquired. Such filings shall be made within sixty days of acquiring such land.

3. Regardless of any provision of Section 1.140 RSMo to the contrary, if any separate provision of this act shall be found unconstitutional by a competent court of law, all other provisions of this act shall be deemed unconstitutional.