REFORMING ALIEN AGRICULTURAL LANDOWNERSHIP RESTRICTIONS IN CORPORATE FARMING LAW STATES: A CONSTITUTIONAL AND POLICY VIEW FROM IOWA

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I. INTRODUCTION

The ink spilt on citizenship-based agricultural land ownership restrictions suggests a certain formula for a successful note on the topic. First, avoid policy and operate under the assumption that these restrictions will never be voluntarily changed by any legislature.[1] Second, given this premise, presume that the validi-

* J.D., Drake University Law School, 2012. Despite the *Journal's* timeline, the author's daughter was born a few days early—which was also a few days before initial submission of this note was due. He would like to thank his patient wife who put up with the assembling of sources and minor collating of papers in her maternity ward recovery room, his stepson for thinking

ty of these restrictions must sink or swim on the success of constitutional constraints of state power and masquerade some degree of support.[2] Third, even as the writer purports to disagree with others on the constitutional issues, politely minimize the general consensus that such restrictions are irrelevant.[3] Suggestive titles like *Who Owns America?* or *Alien Ownership of South Dakota Farmland: A Menace to the Family Farm?* tease out the original impetus for these restrictions while typically concluding and advocating a more underwhelming reality.[4]

This is understandable as the current restrictions are the watered-down leftovers of once-robust vehicles for discrimination.[5] Alien land laws in more dramatic form have existed since America's inception.[6] They have been routinely revised; they recede at times only to flare-up or shrink in coverage but, like

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this was all normal, and his daughter for continuing on what he presumes will be a life of adorable defiance to all her father's best laid schedules and plans.

1. *See* Mark Shapiro, Note, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 BROOK. J. INT'L L. 217, 219 (1993) (passing judgment on policy issues explicitly outside scope of Note).

2. *Compare* James A. Frechter, Note, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOK. J. INT'L L. 147, 148–49 (1988) (focusing issue on federalism and arguing that all constitutional restraints on state power in this field fail), *with* Shapiro, *supra* note 1 (adhering to dormant Commerce Clause as limit to alien restrictions).

3. *See, e.g.*, Frechter, *supra* note 2, at 147 (stating idea that alien land ownership poses a national threat to our wellbeing is doubtful); Note, *Property Rights Of Aliens Under Iowa and Federal Law*, 47 IOWA L. REV. 105, 119 (1961) (stating that discrimination against nonresident aliens comes from a myopic attitude); Andrew W. Wilson, Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135, 135 (1982) [hereinafter Wilson, *Policy Considerations*] (commenting that restrictions are "confusing and largely ineffective").

4. *See* Chip Lowe, *Alien Ownership of South Dakota Farmland: A Menace to the Family Farm?*, 23 S.D. L. REV. 735, 735, 760 (1978) (opening article with vaguely apocalyptic quote by Williams Jennings Bryan regarding the fate of the country if tragedy should befall our farms only to conclude there does not appear to be much foreign investment in farmland); Peter T. Butterfield, *Who Owns America? The Adequacy of Federal Foreign Investment Disclosure Requirements*, 24 COLUM. J.L. & SOC. PROBS. 79, 79–82 (1990) (opening with exposition of then-current fears of "foreignness" and then concluding what is needed is better information sharing between government agencies, not further disclosure regulation).

5. *See* Terry L. Anderson, *A Survey of Alien Land Investment in the United States, Colonial Times to Present*, *in* REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, vol. 8, app. L, at L-2 n.1 (U.S. Dep't of Commerce ed. Apr. 1976) (explaining historically that resident alien landholding is hard to disentangle from nonresident alien landholding even though much of the current concern regards nonresident aliens; resident alien landholding helped spur most current restrictive legislation).

6. *See* Frechter, *supra* note 2, at 147 (noting cyclical nature of fear of alien investment and the resulting alien land ownership restrictions).

cockroaches, some remnant survives attack.[7] Despite their initial widespread adoption, each law is unique.[8] Early laws in the United States were tied up in what was subtly called the "Japanese question."[9] Despite the current constitutional dead letter of laws targeting Asians ineligible for citizenship, state constitutional language was still being targeted for repeal as recently as 2008, with Florida as the sole remaining national hold-out; it *failed* to delete such a constitutional provision with fifty-two percent of voters voting no.[10]

Alien land laws adapt to the times,[11] surviving on a meager diet of vague, sensational, and largely unsubstantiated but equally always theoretically possible grounds.[12] Yet, proponents of such modern laws are not necessarily to be lumped together with the stereotypical laws (or lawmakers) of old that could barely hide antipathy for any and all alien visitors.[13]

After all, agriculture *has* always been unique in American industry. Alexander Hamilton stated that the "cultivation of the earth . . . has [an] *intrinsically . . . strong claim to pre-eminence over every other kind of industry*," and that the self-sufficiency of soil for food was to be preferred.[14] In the same stroke, however, Hamilton also dismissed those who would see foreign investment with jealousy, suggesting Americans relish every "farthing" that would help unfold the country's young resources, and that funds so invested would end up subservi-

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7. *See, e.g.*, SAM RANKIN, ALIEN FARMERS IN MINNESOTA 1851–2004, 83RD LEG, 1 (2004) (noting Minnesota statute had been revised thirty-five times since 1851, while legislature had "wrestled" with the issue on "more than a hundred occasions during the past 153 years").

8. Shapiro, *supra* note 1, at 217–18 (dividing array of alien land laws into nine different non-mutually exclusive statute types).

9. CHARLES F. CURRY, CALI. HOUSE OF REP., ALIEN LAND LAWS AND ALIEN RIGHTS, H.R. Doc. No. 67-89, 1st Sess., at 3 (1921).

10. Damien Cave, *In Florida, an Initiative Intended to End Bias Is Killed*, N.Y. TIMES, Nov. 6, 2008, at A22, *available at* http://www.nytimes.com/2008/11/06/us/06florida.html ("[V]oters incorrectly assumed it would prevent illegal immigrants from owning property.").

11. STEPHEN HODGSON ET AL., FOOD & AGRIC. ORG., U.N., LAND OWNERSHIP AND FOREIGNERS: A COMPARATIVE ANALYSIS OF REGULATORY APPROACHES TO THE ACQUISITION AND USE OF LAND BY FOREIGNERS 20 (Dec. 1999) ("[T]he extent and scope of restrictions on foreign ownership and use of land will depend in each case on the historical, political and economic context.").

12. *See* David A. Williams, Note, *Alien Ownership of Kansas Farmland: Can It Be Prohibited?*, 20 WASHBURN L.J. 514, 514–15 (1981) (citing popular headlines referring to alien "invasions" and concluding that most objections to foreign ownership can be traced to "emotional responses").

13. Sen. Dick Clark, *Foreword* to ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS, ix, xi (1985) (forward by Senator Clark demanding a uniform refugee act, advising others to empathically look at the "way we treat the strangers at our gates").

14. 3 ANNALS OF CONG. 971, 973 (1791) (emphasis added).

ent to the interest of agriculture.[15] Such investment not only improved the nation's "funds," but "agriculture . . . h[as] been animated by it."[16]

America's resources are not as young anymore, and resources are now limited.[17] The question is not foreign investment generally, but is farming the place to direct it; as former Iowa Senator Dick Clark stated, is investment in agriculture different than investment in factories?[18]

Citizenship has always been bound up in belonging to the "territorial club."[19] As one commentator noted, citizenship is "land's investment" and "claim on people," or, put another way, "[p]atriotism is the demand of the territorial club for priority."[20] This inevitably leads to tension regarding foreign investment in farmland. Recently, Stephen Bloom remarked that in Iowa "[m]any towns are so insular that farmers from another county are strangers."[21] It may be a great deal to ask farmers to accept nonresident aliens as investors in their community, after all "alien land laws are but reflections of attitudes of exclusion from the territorial club."[22] Still, a farmer's opinion on a foreign investor may stem from other beliefs apart from that farmer's experience (or lack of) with any actual or particular foreign nationality. To support these laws, more should need to be shown, as it has been put, than ascertaining "surface opinions;" informed public policy requires examining the beliefs of those who will determine land policy.[23]

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15. *Id.* at 994.

16. *Id.*

17. *See* Michael D. Duffy, *2011 Farmland Value Survey*, AG. DECISION MAKER (Iowa State Univ. & Outreach, Ames, Iowa), Jan., 2011, at 1 [hereinafter Duffy, *2011 Farmland Value Survey*] (reporting scarcity of land as property sales factor).

18. *Foreign Investment in the United States: Hearings Before the Subcomm. on Foreign Econ. Policy of the H. Comm. on Foreign Affairs*, 93rd Cong. 77 (1974) [hereinafter *Foreign Investment Hearings*] (statement of Sen. Dick Clark).

19. Gene Wunderlich, *Foreign Investment in U.S. Real Estate: Summary, Conclusions, and Recommendations*, *in* FOREIGN INVESTMENT IN U.S. REAL ESTATE 344, 347 (Gene Wunderlich, USDA ed., 1976) (citing Alexander M. Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369, 382–83 (1973)).

20. *Id.* at 348; Letter from Oliver W. Holmes to Felix Frankfurter (Mar. 27, 1917), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, 70 (Robert M. Mennel & Christine L. Compston, eds., 1996).

21. Stephen G. Bloom, *Observations From 20 Years of Iowa Life*, THE ATLANTIC (Dec. 9, 2011), http://www.theatlantic.com/politics/archive/2011/12/observations-from-20-years-of-iowalife/249401/.

22. GENE WUNDERLICH, USDA, SUMMARY OF THE REPORT: FOREIGN INVESTMENT IN U.S. REAL ESTATE 8 (1976).

23. *See generally* Gene F. Summers, *Social Attitudes and Values Associated with Foreign Investment and Occupation of U.S. Land*, *in* FOREIGN INVESTMENT IN U.S. REAL ESTATE 59, 59–63 (Gene Wunderlich, USDA ed., 1976) (proposing methods for ascertaining public opinion on foreign investment of land issues).

While modern proponents are not necessarily directed by animus, it is unclear if this stems less from choice or constitutional compulsion. These laws, shrunk to a symbolic shell by the Equal Protection Clause, now serve as a cursory last hurrah for potential Tenth Amendment enthusiasts.[24] Their survival is based on the inertia of legislatures prompted by restrictions that by definition have dwindled to only effect non-constituents.[25] Such laws have reached a persistent state of anti-climax and almost random characterization. In 1979, Iowa's Attorney General stated Iowa's soon to be passed law "will remain as the sole state restriction on alien ownership of land,"[26] only to find the same law, described in 2011, as the "strictest in the United States."[27]

Agricultural protectionism is also behind corporate-farming laws where a set "normative foundation" can likewise be "difficult to pin down."[28] The following applies equally as well to alien land laws upon proper substitution of alien land law for "corporate-farming law":

> [T]he normative foundation for a[n] [alien land] law is seldom taken beyond the phrase, "protect the family farm." This rallying cry is often used as a shortcut reference to an unarticulated set of traits denoting a vision of farming with which few can disagree without (at least historically) running significant political risks. Unfortunately, this also means that the extent to which [alien land] laws avoid whatever problems they are geared at dealing with is difficult to measure, and serious discussions about these laws' underpinnings and ramifications are sometimes difficult to find.[29]

The two strands of agricultural law make for easy bedfellows—both ultimately based on a genuine desire to protect family farms from "outsiders."[30]

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24. *See generally* United States v. Burnison, 339 U.S. 87, 91–92 (1950) (citations omitted) (grounding state's ability to regulate testamentary beneficiaries, even as against the federal government, in state power to regulate property and the Tenth Amendment).

25. It should be noted that restrictions effecting corporate entities do, of course, affect a U.S. citizen's freedom to enter into business relationships with who they choose and therefore broadly affect anyone who wants to partner with a nonresident alien on different terms.

26. Opinion No. 79-11-1, 1979 Iowa Op. Att'y. Gen. 461, 1979 WL 21110, *14 (1979).

27. Kathleen Masterson, *No Need to Worry About Chinese Buying Farmland in Iowa*, HARVEST PUBLIC MEDIA (May 16, 2011), http://harvestpublicmedia.org/article/563/no-need-worry-about-chinese-buying-farmland-iowa/5 (quoting Roger McEowen, director of Iowa State University's Center for Agricultural Law and Taxation).

28. Anthony B. Schutz, *Corporate-Farming Measures in A Post-Jones World*, 14 DRAKE J. AGRIC. L. 97, 98 (2009) [hereinafter Schutz, *Post-Jones World*].

29. *Id.* at 102.

30. *See* Stephen G. Bloom, *The New Pioneers*, WILSON Q., Summer 2006, at 63, 67–68 (noting employment in packinghouses by large producers like Tyson and Smithfield and discussing the resulting immigration boom in Marshalltown and Postville, Iowa as newcomers fill the jobs). As corporate agricultural operations, like meatpacking, have developed a cultural reputation for the

They share similar concerns.[31] A more liberal alien land ownership policy could provide additional sources of investment that corporate farming laws may deprive farmers, while complimenting—not dismantling—the core of anti-corporate farm regulation.[32] This Note does not call for de-regulation of agricultural land ownership. I do not wish to step on the third rail of Midwestern politics. The events of the 1970s, however, promised something more in how policy in this area was going to be made. This promise is unfulfilled. To paraphrase a comment directed at corporate farming law reform, "[i]f states are concerned about the perceived 'bad habits' of [nonresident aliens], states would be better served by identifying and regulating those bad habits."[33]

This Note is broken up into four parts, including this introduction. In Part II, alien land laws will be provided a context, looking briefly at the history from absolute restriction to mere regulation of nonresident aliens and the regulatory response regarding foreign investment in general to see where they fit. It will end with a broad statutory survey of the nine states that have enacted corporate farming laws (an area where generalization is admittedly difficult), focusing primarily on Iowa.

Part III and IV of this Note will revisit the main constitutional and policy issues. While the majority of constitutional limits on current state restrictions are of mixed merit, the constitutional arguments better function as proxies for the policy discussion to follow. Regardless of success, each possible limitation yields a policy takeaway. Part III will discuss the messy position these restrictions occupy within the federal preemption doctrine,[34] and the federal treaty[35] and dormant foreign affairs powers.[36] The main focus here will be on the use of the dormant Foreign Commerce Clause.[37] The Eighth Circuit's decisions regarding the constitutionality of corporate farming laws under the dormant Commerce Clause will inform the discussion.[38]

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mass employment of potentially illegal immigrants, the public's attitude and fear of corporate ownership has been inexorably linked with a broader paranoia of foreign elements.

31. Schutz, *Post-Jones World*, *supra* note 28, at 101–02 (discussing absentee land ownership and lack of social controls).

32. *See* Steven C. Bahls, *Preservation of Family Farms: The Way Ahead*, 45 DRAKE L. REV. 311, 313 (1997) (commenting that corporate farming laws have "deprived [farmers] of an important vehicle to raise funds").

33. *Id.* at 314.

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

35. *Id.*; Hauenstein v. Lynham, 100 U.S. 483, 488–89 (1879).

36. U.S. CONST. art. II, § 2, cl. 2; *id.* art. I, § 8, cl. 3; *id.* art. I, § 10, cl. 1, 3.

37. *See id.* art. I, § 8, cl. 3 (like all dormant constitutional doctrines, no explicit textual provisions are provided in the Constitution, the doctrine being developed in case law).

38. *See* Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

Part IV will focus on Iowa and present policy. It will look at current data, and the shifting reasons that underpin alien agricultural land ownership restrictions. This Note will humbly attempt what courts typically do not—that is, pass judgment on the policy decision to maintain these laws. It ends with suggestions for reform.[39]

The Note will not cover due process, equal protection claims, or restrictions on inheritance of land. The lesson of alien land ownership restrictions should produce a fresh look at what such laws are meant to restrict and if they are effective in doing what they aspire to. In response to constitutional challenge, some have suggested reform of corporate farming laws by framing them as neutral land use or management laws.[40] As this Note is primarily concerned with those states which already have corporate farming laws, repealing or reforming alien land ownership restrictions would provide further opportunity and support to make similar corporate farming reforms, and with them incorporate alien land ownership restrictions within a comprehensive law that neutrally focuses on land use and farm structure standards, not inconclusive paranoia based on alienage status. This Note suggests that alien agricultural land laws, particularly provisions placing restrictions on corporate or other business entities based on shareholder citizenship, are redundant alongside strong corporate farming laws. Likewise, supporters of corporate farming laws may be in a better position to learn from the lessons of unsatisfying alien land ownership restrictions and to aspire to regulate conduct and land use, not status.

Because states with restrictive alien land ownership laws may not have corporate farming laws underpinning them, this Note indirectly suggests that, in the future, such states not addressed herein reform alien agricultural land laws and adopt focused land use laws in their place, leaving each state to determine for itself what shape those laws should take based on each state's needs.

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39. *See* Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 817–18 (Wis. 1976) (noting policy arguments against such laws "should be addressed to the Legislature rather than to this court").

40. *See* Kathryn Benz, *Saving Old McDonald's Farm After* South Dakota Farm Bureau, Inc. v. Hazeltine: *Rethinking the Role of the State, Farming Operations, the Dormant Commerce Clause, and Growth Management Statutes*, 46 NAT. RESOURCES J. 793, 826–27 (2006) ("[T]he function of a Midwest land-use regulatory scheme is to strike a balance . . . not to promote a certain type of farming activity, hoard a natural resource, or protect in-state farmers from their out-of-state competitors.").

II. CONTEXT AND BACKGROUND

A. *The Global Context (A Policy Preview)*

Territory is the basic foundation for any nation's authority and existence.[41] While restrictions against foreigners have shrunk in an "ever more interdependent world,"[42] there is still worry of countries sweeping up land elsewhere to export crops to their own people.[43] The subtitle to the website farmlandgrab.org states the sentiment: "Governments and Corporations are Buying up Farmland in Other Countries to Grow Their Own Food—or Simply to Make Money."[44]

The narrower topic addressed in this Note could easily expand out from a "micro" discussion on alien land ownership into "macro" discussions of food security, food sovereignty, and foreign investment concerns in general. Valid ongoing global debates about food security are prevalent; concern focuses on countries or businesses, including investors from the U.S. private sector, importing their food from snatched up land elsewhere.[45] This issue has intensely impacted Africa, for example, where commodification of land can threaten a malnourished nation by exporting resources more needed for its own citizens.[46]

Some believe the United States is next.[47] While the author does not want to dismiss the possible lessons to be learned from abroad, he is equally hesitant to over analogize and draw reflexive apples to oranges conclusions.[48] Any true discussion of land grabs must be localized and region specific. Any particular

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41. HODGSON ET AL., *supra* note 11, at 1.

42. *Id.*

43. Bob St. Peter, National Family Farm Coalition of the U.S., Statement at Media Briefing to Denounce World Bank Principles of Land Grabbing (Apr. 26, 2010), *available at* http://farmlandgrab.org/12419.

44. FOOD CRISIS & THE GLOBAL LAND GRAB, http://farmlandgrab.org/ (last visited Jan. 19, 2013).

45. *See* Howard Mann and Carin Smaller, Dep't of Econ. & Soc. Affairs, U.N., *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?*, SUSTAINABLE DEV. INNOVATION BRIEFS 1, Jan. 2010, http://farmlandgrab.org/10405.

46. *See id.* at 1–2, 6.

47. *See generally* Nat'l Family Farm Coal., *U.S. Farmland: The Next Big Land Grab?*, NFFC.NET (May 2012), http://www.nffc.net/Learn/Fact%20Sheets/US%20Land%20Grab%20backgrounder_5.24.12.pdf (describing global land grabs and the current conditions in the farm economy, suggesting similar land grabs may occur in the United States).

48. For example, at the same time one Maine farmer expresses solidarity with landless farmers around the world, his own landlessness appears to stem from distinctly American, New England, complaints. St. Peter, *supra* note 43 (citing "affluent summer residents, a seasonal tourism economy, and those seeking empty landscapes and waterfront views for development purposes" among the many causes for inflated rural farmland prices in the region).

case or analysis rests on that region or countries' legal environment concerning labor laws, environmental laws, and protections that will differ, or possibly not even exist, for every country.[49]

American discussion of the "macro" global scene is rife with rhetoric.[50] While well intended, those focused on the global scene may unintentionally cut off discussion before it starts without being open to the possibility that some foreign investment in farmland may be possible on equitable terms.[51] It is unclear how much of the opposition to foreign ownership is redundant doubling, using foreign ownership as a stand-in for opposition to corporate farming.[52] Part of the problem is that opponents to foreign ownership, looking purely in a vacuum on a global level, cannot conceive of any set of legal regulations that would assuage their concerns even as they imply such regulations could exist in the right circumstances.[53] Because this note is focused on the propriety of state (as opposed to a nation-state) regulation and does not advocate deregulating restrictions against foreign *government* (or foreign government controlled entity) purchases, the global situation is acknowledged but not considered determinative of this question in this country at the level of appropriate state regulation.

That said, to foreshadow the policy discussion to follow, there is still room for limited comparative comments involving recent discussion in Australia

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49. Mann & Smaller, *supra* note 45, at 3 (describing the analysis as country specific, particularly when discussing countries where farming regulations "can be weak or absent").

50. *See* Ethan A. Huff, *Report: Investors (China?) Buying Up U.S. Farmland at Alarming Rate*, NATURALNEWS.COM (Nov. 28, 2011), http://www.naturalnews.com/034259_farmland_America.html (describing investor interest in U.S. farmland, the author concludes China is buying up farmland around the world after solely citing Iowa farmland values, inferring China could and does directly purchase Iowa farmland despite current Iowa law).

51. *Compare* Mann & Smaller, *supra* note 45, at 7 (discussing the negatives of land grab land purchases, the brief yet states, "There is no question that more investment in agriculture is critically needed. The question that needs to be addressed is how can foreign investments in agriculture make a positive contribution to development and food security."), *with* GRAIN, *The New Farm Owners: Corporate Investors and Control of Overseas Farmland*, *in* AGRICULTURE AND FOOD IN CRISIS: CONFLICT, RESISTANCE, AND RENEWAL 139, 148 (Fred Magdoff & Brian Tokar eds., 2010) (discounting the possibility of foreign investment ever being positive with a similar "[o]f course we need investment" but is immediately interrupted with a disclaimer claiming investment should not be placed "in a few mega-farms controlled by a few mega-landlords").

52. *See* GRAIN, *supra* note 51, at 141 (stating "it often goes unrecognized that the lead actors in today's global land grab for overseas food production are not countries or governments but corporations," and advising "not [to] be blinded by the involvement of states. Because at the end of the day, what the corporations want will be decisive.").

53. *See id.* at 146 (aggressively stating, "as if foreign investors would respect communities' rights to land when the local governments don't"). This at least implies that laws and local governments could exist that do respect local communities, and this note asserts in the United States local communities can, do, and should exist alongside foreign ownership.

and South America, as foreign ownership of rural land took on a prominent role in Australia's 2012 elections.

As if channeling the 1970s discussion in the U.S. described later, one article noted that the "defining feature [of discussion] is the generation and dissemination of misinformation over the extent of foreign investment in agriculture and its impact on national food security."[54] The pros and cons oscillate from fears "fuelled in part by emotion" to disbelief current Australian law would actually allow the "African example [to] occur[] here."[55] As one writer put it,

> The story being relayed in the bush is that Chinese government enterprises are running around Australia buying up family farms so they can work them with cheap Chinese labour, knock out Australian competitors and send the produce back to China to feed its massive population. Australia, so the story goes, will not be able to feed its own people. None of this is backed up by facts.[56]

Interestingly, Australia reviews transactions over a certain value amount and looks to whether the purchaser has a valid commercial purpose (as opposed to allowing a country to come in purely for the purpose of exporting food back to its own mainland).[57] It is not an outright ban.

Déjà vu to the American Experience, the perceived threat is often greater than is real, with one article noting that a major lobbyist "admitted . . . farmers have been surprised to learn that only 1 per cent of Australia's agricultural businesses are in foreign hands."[58] Ultimately the piece concludes with what the reader will see is a familiar refrain: "'We need data to actually have a good debate on and also to create policy from.'"[59]

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54. Craig Emerson, *Critics Making Hay on Foreign Farm Ownership*, AUSTRALIAN, Aug. 11, 2012, http://www.theaustralian.com.au/national-affairs/opinion/critics-making-hay-on-foreign-farm-ownership/story-e6frgd0x-1226447716349.

55. *See* Peter McCutcheon, *Are Foreign Farm Investors Friend or Foe?* (AUSTL. BROAD. CORP. television broadcast Feb. 8, 2012), http://www.abc.net.au/7.30/content/2012/s3559544.htm (describing one sugar cane grower whose initial reluctance gave way to ultimately welcoming the badly-needed capital).

56. Emerson, *supra* note 54.

57. *Id.*

58. Sarina Locke et al., *Farm Groups Still Concerned About Foreign Ownership*, AUSTL. BROAD. CORP. (Dec. 9, 2011), http://www.abc.net.au/rural/news/content/201109/s3315698.htm; *see also* Maggie Lu YueYang, *China Firm Eyes Controversial 58-sq-mile Australia Farm Project*, REUTERS (Jul 25, 2012), http://www.reuters.com/article/2012/07/25/australia-china-farms-idUSL4E8IO8BG20120725 ("Far from 'buying up the family farm', the amount of foreign-owned farmland in Australia had grown only marginally since the 1980s, Trade Minister Craig Emerson told a conference in Sydney last week.").

59. Locke et al., *supra* note 58 (quoting Brent Finlay of Queensland farm lobby group AgForce).

While global farm ownership laws are being "tightened" due to land price spikes, the character of these new regulations is informative.[60] The regulations are "in pursuit of national targets, rather than [] outright ban[s]," are of a "general nature," and meanwhile "long term development is being encouraged."[61]

In South America, governments are looking not to total bans, but to examining the purpose of rural land purchases.[62] Regulations by Brazil and Argentina suggest alternate solutions by placing restrictions based on proportional ownership limits in relation to a specific area's total useable farmland, not blanket bans based on citizenship status or arbitrary corporate control percentages.[63]

Given current restrictions in the U.S. Midwest, policy makers cannot appeal to the same zeitgeist of global land grabs by foreigners as in the 1970s; foreigners cannot be blamed for contemporary farmland price spikes here with determinative and offhand reference to the global experience with land grabs.[64]

B. *The Common Law to the 1970s*

Our relationship with foreigners began when Americans were themselves foreigners. When America declared its independence from England, one complaint centered on the King's procrastination in passing efficient immigration laws, actively preventing immigrants from becoming naturalized fast enough to populate a new country.[65] While the colonists may have had qualms about the

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60. Jeremy Bowden, *Farmland: Tightening of Foreign Ownership Rules*, WORLDCROPS.COM (Sept. 21, 2011), http://farmlandgrab.org/post/view/19319 (last visited Jan. 19, 2013).

61. *Id.*

62. *See* Marcela Valente, *Curbing Foreign Ownership of Farmland*, AL JAZEERA (May 22, 2011), http://www.aljazeera.com/indepth/features/2011/05/201151713335891459 9.html (describing the regulations of Brazil, Argentina, and Uruguay as "fairly mild").

63. Bowden, *supra* note 60.

64. Kent Darr, *The Big Question: Is the Farmland Bubble About to Burst?*, IOWA BUS. RECORD, Nov 11, 2011, http://www.public.iastate.edu/~nscentral/mr/11/1111/question.html; *see also* Michael Duffy, *The Current Situation on Farmland Values and Ownership*, CHOICES (2011), *available at* http://www.choicesmagazine.org/magazine/pdf/cmsarticle_24.pdf (last visited Jan. 19, 2013) (noting farmland prices have risen to an extent not seen since the 1970s). Darr notes that farmland prices are

> fueled in part by what one broker calls 'stupid neighbor' sales, in which farmers adjoining a piece of property bid up its price, with one hoping to keep it from the other. It is true that farmers account for more than 70 percent of all farmland sales—the property is not being gobbled up by investors.

Darr, *supra*.

65. *See* THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("HE has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization

King, much of our law is derived from the English common law, itself derived from feudal law.[66] The King used real property restrictions affirmatively to ensure allegiance and to ensure a ready source of indebted landowners who would in-turn supply knights.[67] Therefore, disloyal subjects were not rewarded.[68] From those medieval roots to today's alien land laws is an uneven ride from restriction to general freedom by resident aliens to own property and land.[69]

First, English common law restricted alien *real* property rights so while aliens might in theory hold property against all but the king, they could not truly deed, inherit, or devise real property, along with being constantly susceptible to divestiture by the crown.[70] English law then did not.[71] Soon-to-be American colonists inherited this common law, and likewise, restricted property rights to aliens, which in a country of immigrants proved "problematic."[72] Upon independence, the new citizens did not.[73]

Alien restrictions continued their ebb and flow as direct responses to political and cultural events. Worried about territories becoming, in effect, "economic colon[ies] of Great Britain," Congress passed the Territorial Land Act of 1887, which restricts nonresident aliens who have not declared an intention to become a citizen from owning real property in U.S. territories.[74]

In the 1920s states reacted to growing anti-Japanese sentiment on the west coast with a set of laws that elegantly restricted land from being owned by those "ineligible for citizenship."[75] It so happened that classification, by definition, only applied to "Orientals."[76] This attitude was repeated around the second World War, finding a judicial peak in the 1923 ruling *Terrace v. Thompson*, up-

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of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.").

66. Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 15 (1962).

67. Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 623 (1976).

68. *Id.* (explaining that promising fealty to the crown was means of securing a lordship).

69. *Id.* at 624; Sullivan, *supra* note 66, at 16–17.

70. Sullivan, *supra* note 66, at 16–17.

71. *See* Morrison, *supra* note 67, at 623.

72. Sullivan, *supra* note 66, at 15; Ronald L. Bell & Jonathan D. Savage, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MARSHALL L. REV. 679, 685 (1980).

73. *See* Shapiro, *supra* note 1, at 220 (citing Morrison, *supra* note 67, at 624–25) (describing a trend toward dilution and abolition of the common law exclusion of aliens after independence up to the late 1800s).

74. 48 U.S.C. §§ 1501–1507 (2006); Morrison, *supra* note 67, at 625.

75. Morrison, *supra* note 67, at 626–27 (citing case law example of various landowning techniques ruled unusable by aliens).

76. *Id.*

holding a discriminatory alien land law, stating plainly that states could craft property rights inside their own borders.[77] As before, but without overturning *Terrace*, the trend reversed in *Oyama v. California* when the Court allowed the American citizen and minor son of a Japanese citizen to acquire land that his father had purchased for him in contravention of a California alien land law.[78]

The next wave sprung up during the Cold War, serving as a momentary historical response to State attitudes toward communist or totalitarian governments.[79] Laws passed in this period were applicable in probate, with the idea that those inheriting land who also lived in a totalitarian country would never see the benefit of the land anyway, and instead the benefit would go to the underlying totalitarian government.[80] In evaluating whether such benefit would actually reach the new owner, courts appeared to independently inquire into the laws of other countries, and in *Zschernig v. Miller* an Oregon statute that demanded reciprocity in the other country's inheritance laws for United States' citizens was struck down as intruding into "the field of foreign affairs."[81]

C. *The 1970s: States Fill in the Blanks of an Information Deficit (with More Blanks)*

Next came a sustained period of renewed interest in foreign ownership in the 1970s, a product of "emotional response to media reports."[82] Even with claims to real property hoarding by foreigners "greatly exaggerated," the states and federal government focused on foreign investment amid the clamor, and began to take diverging paths.[83] This excitement led to a boom in federal information collection and renewed state interest by states not wanting to wait for the federal government to act, and yet, ends in the present with most states allowing full rights for lawful permanent resident aliens, with nonresident alien and partial

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77. 263 U.S. 197, 217 (1923).

78. 332 U.S. 633, 647 (1948).

79. James R. Mason, Jr., Note, *"Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VAND. J. TRANSNAT'L L. 453, 461 (1994); Morrison, *supra* note 67, at 628.

80. Morrison, *supra* note 67, at 628; Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 262–63 (1962).

81. 389 U.S. 429, 432, 435 (1968); Shapiro, *supra* note 1, at 222.

82. Shapiro, *supra* note 1, at 222–23 (citations omitted).

83. Frechter, *supra* note 2, at 153; James Alan Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 253–54 n.25 (1980) (discussing state legislative action in the late 1970s).

corporate restrictions as the last bastion of alien land owning restriction—out of sight, out of country, out of mind.[84]

The panic started in the 1970s with fear that the Organization of Petroleum Exporting Countries (OPEC) would buyout the country.[85] The problem was information. A massive information deficit existed regarding who owned what.[86] This led to the Foreign Investment Study Act of 1974 (FISA).[87] The Act authorized a new study of foreign investment to be conducted.[88] The House Report explained that current information "makes it impossible to determine the implications for foreign investment in the United States. . . . [I]t is impossible in these circumstances to formulate a coherent and rational policy toward foreign investment."[89]

The FISA produced nine volumes of information, and with certain elements afraid that "scrutiny" would deter foreign investment, Congress was motivated in part to pass the International Investment Survey Act of 1976 (presently, IITSA).[90] The Act is implemented by the Bureau of Economic Analysis (BEA), who reports on the current level of foreign direct investment.[91] It should be noted that the Act explicitly dictates it is to be carried out "with a minimum burden on business" and that "[n]othing in this [Act] is intended to restrain or deter foreign investment in the United States, United States investment abroad, or trade in services."[92] This is consistent with the posture that information should precede restriction. What did this flurry of concern turn up in the many reports requested at the time? For one, no "Arabs" were lying in wait.[93]

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84. Frechter, *supra* note 2, at 153–55, nn.52–63 (citing a number of state statutes and listing states that do not distinguish between citizens and aliens in regard to real property tenure).

85. Butterfield, *supra* note 4, at 82–83.

86. H.R. REP. No. 93-1183, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5957, 5959, 1974 WL 11591 ("[D]ata on foreign investment in real estate and agricultural facilities is almost nonexistent.").

87. *See* Pub. L. No. 93-479, 88 Stat. 1450.

88. *Id.*

89. H.R. REP. No. 93-1183, at 2.

90. Pub. L. No. 94-472, 90 Stat. 2059 (codified as the International Investment and Trade in Services Survey Act, 22 U.S.C. §§ 3101–3108 (2006)).

91. *See* Butterfield, *supra* note 4, at 86–87 (discussing the BEA's ability under the IITSA to better handle attempts to hide ownership while preserving a modicum of confidentiality in reporting).

92. 22 U.S.C. § 3101(b)–(c).

93. U.S. GEN. ACCOUNTING OFFICE, CED-79-114, FOREIGN INVESTMENT IN U.S. AGRICULTURAL LAND—HOW IT SHAPES UP (1979) ("GAO did not find Arab investors to be a factor.").

The main legislative act directly relating to agricultural landholding is the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).[94] The Act's purpose, as discussed in the House report, was, and continues to be, to fix the lingering information deficit that would need to be closed before Congress could even think of entertaining a uniform law.[95] This uniform law never came to bear, despite an attempt at passage of a restrictive agricultural landholding act shortly after the AFIDA was passed.[96] This legislation would have banned foreign ownership with the minor exception of a small parcel to a buyer who owned no other farmland and whose purchase did not increase foreign ownership to such an extent that it would be incompatible with the interests of the specific county the land was purchased in.[97] The major exception provided a case-by-case application and permitting process that would have waived compliance with the provision provided such purchase was found to be in the best interests of the country.[98]

AFIDA is still in effect, with annual reports issued every year.[99] Any foreign person, including business entities, that exercises substantial control or have a significant interest in farmland must disclose any interest in agricultural land.[100] This is further defined by ownership of a ten percent or more interest, or if a number of investors, even if explicitly not acting in concert, who yet by their collective foreign character own fifty percent or more in the land.[101] Penalties for incomplete reports or failure to report will be twenty-five percent of the fair market value of the land.[102] Reports are transmitted directly to the States.[103]

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94. Pub. L. No. 95-460, 92 Stat. 1263 (1978) (codified at 7 U.S.C. §§ 3501–3508 (2006)).

95. H.R. REP. NO. 95-1570 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2914, 2917–18, 1978 WL 8633; Reka Potgieter Hoff, *Foreign Investment in U.S. Farmland—The Facts and the Law*, 31 DRAKE L. REV. 547, 549 (1981–1982). The relatively contemporaneous IITSA declaration of purpose echoes the sentiment, stating "the potential consequences of international investment cannot be evaluated accurately because the United States Government lacks sufficient information on such investment and its actual or possible effects on the national security, commerce, employment, inflation, general welfare, and foreign policy of the United States." 22 U.S.C. § 3101(a)(5).

96. *See* 125 CONG. REC. S738, 798–800 (daily ed. Jan. 23, 1979) (listing full text of the Agricultural Foreign Investment Control Act of 1979, S. 194, 96th Cong., 1st Sess. (1979)).

97. *Id.* at 799.

98. *Id.*

99. 7 U.S.C. § 3501 (2006); *see AFIDA*, FARM SERV. AGENCY, USDA, http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ecpa&topic=afa (last updated July 11, 2012).

100. 7 C.F.R. §§ 781.2(g)–(h), 781.3 (2012).

101. *Id.* § 781.2(k).

102. *Id.* § 781.4(b)(2).

103. 7 U.S.C. § 3505.

D. *AFIDA in Context*

Other national lawmaking on foreign investment has centered on national security. The Trading with the Enemy Act of 1917 prohibits trade with enemy countries during times of war, including the power to immediately seize any property prohibited under the act.[104] The International Emergency Economic Powers Act (IEEPA) provides similar power for the President "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[105]

Embedded in a larger 1988 omnibus trade bill, the "Exon-Florio" amendment gives the president the power to investigate and stop mergers and acquisitions that would give foreign control to domestic companies.[106] The President has delegated the authority to make these security reviews to the Committee on Foreign Investment in the United States (CFIUS).[107] This Committee was created in the 1970s by President Gerald Ford during the wave of concern over foreign investment.[108] Over time, the same executive order was amended by President Ronald Reagan to incorporate the CFIUS into the implementation of the Exon-Florio Amendment, and by President George W. Bush who implemented the Foreign Investment and National Security Act of 2007 (FINSA), which finally codified large parts of the CFIUS membership and review process.[109]

Under FINSA, the CFIUS has authority to review certain covered transactions where control of a preexisting American business would change to that of a foreign person or entity, and there exists a credible threat to national security that has not been mitigated and cannot be dealt with by other law.[110] The scope

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104. Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 3(a), 16(b)(2) (2006).

105. *Id.* § 1701(a).

106. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. app. § 2170 (2006 & Supp. IV 2010)).

107. JAMES K. JACKSON, CONG. RESEARCH SERV., RL 33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 3–4 (2011) [hereinafter JACKSON, EXON-FLORIO].

108. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

109. Exec. Order No. 12,661, 54 Fed. Reg. 779, 780–81 (Dec. 27, 1988); Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 23, 2008); Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007) (codified at 50 U.S.C. app. § 2061 (Supp. IV 2010)).

110. 50 U.S.C. app. § 2170(b)(2)(B),(D) (Supp. IV 2010); 31 C.F.R. § 800.207 (2012) (defining covered transaction); 31 C.F.R. § 800.501(a)(2)–(3) (2012) (reviewing determination includes question of whether no other law may handle transaction and investigation into "credible evidence").

of the law includes "critical infrastructure" and "critical technology."[111] What may be covered under the law is an open question with the law clarifying that national security now includes issues related to homeland security and its application to critical infrastructure.[112] The term is sometimes narrowly interpreted,[113] but if homeland security coverage of critical infrastructure has been incorporated, then food and agriculture is encompassed in the law.[114] Even so, the law would not cover start-ups and would not cover an independent real property purchase, only situations where a company changes control.[115]

The Foreign Investment in Real Property Tax Act of 1980 taxes sales of real property located in the United States by foreign persons, ending a loophole that had created disparate tax treatment.[116] There are also assorted and individually targeted areas of federal regulation such as foreign involvement in airlines,[117] telecommunications,[118] energy,[119] minerals,[120] and banking.[121]

E. *An Overview of Corporate Farming Law States and Alien Landownership Restrictions, or AFIDA Ignored*

Nine states have corporate farming laws.[122] Generally, restrictions on limited liability entities can include restrictions on the number of members vary-

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111. 31 C.F.R. §§800.208–.209 (2012) (defining critical infrastructure and technology, respectively).

112. 50 U.S.C. app. § 2170(a)(5) (Supp. IV 2010).

113. *See* JACKSON, EXON-FLORIO, *supra* note 107, at 7 (noting that Treasury department has indicated that notifying CFIUS "is not intended for firms that produce goods or services with no special relation to national security, especially toys and games, *food products*, hotels and restaurants, or legal services") (emphasis added).

114. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RS22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW 4, nn.18–19 (2011) [hereinafter JACKSON, FOREIGN INVESTMENT] (discussing more expansive scope of "critical infrastructure" as used within the Department of Homeland Security, including food and agriculture as an identified vital sector of the economy and assigning the USDA as the sector-specific agency in charge).

115. JACKSON, EXON-FLORIO, *supra* note 107, at 5; *see* JACKSON, FOREIGN INVESTMENT, *supra* note 114, at 4 (discussing sectors of the economy considered to be part of the "critical infrastructure of the nation").

116. Foreign Investment in Real Property Tax Act of 1980, Pub. L. No. 96-499, §§ 1121–25, 94 Stat. 2599 (1980) (part of the Omnibus Reconciliation Act of 1980); *see* Hoff, *supra* note 95, at 549 (1981–1982).

117. 14 C.F.R. § 47.3(a)(2)–(3) (2012).

118. 47 U.S.C. § 310 (2006).

119. 42 U.S.C. § 2201(i) (2006); 10 C.F.R. § 725.12 (2012).

120. 30 U.S.C. § 181 (2006); 43 C.F.R. § 3102.1 (2011).

121. 12 U.S.C. § 3102(f) (2006).

122. NEB. CONST. art. XII, § 8; OKLA. CONST. art. XXII, § 2; IOWA CODE § 9H.4 (2011); KAN. STAT. ANN. § 17-5904 (2007); MINN. STAT. ANN. § 500.24 (West Supp. 2012); MO. ANN.

ing anywhere from five,[123] ten,[124] fifteen,[125] all the way to twenty-five.[126] There is an almost universal requirement that all members be natural persons.[127]

Family farm corporations are the classic exception with requirements of common kinship within ownership, but there is often an authorized farm corporation form that is not wholly focused on an internal familial kinship and can have different requirements.[128] Restrictions for authorized farm corporations can include a maximum percentage of profit that can come from nonfarm income like dividends,[129] or maximum acreage limitations, in Iowa set at 1500 acres.[130]

A big development in the constitutionality of corporate farming laws stems from the Eighth Circuit and involves the attempts by some corporate farming laws to define and restrict corporate farming based on requirements that a certain proportion of shareholders either reside on the farm or be "actively engaged in farming."[131] While South Dakota's law was found to violate the dormant Commerce Clause due to discriminatory intent,[132] discriminatory effect was found in the most relevant case rejecting Nebraska's corporate farming law in *Jones v. Gale*.[133] Nebraska required a person associated with the farm entity to engage in certain qualifying activities.[134] States with such requirements allowed farm residency to qualify.[135] What became problematic is how the alternative condition, "active engagement," was otherwise met. The states vary wildly since there exists "no universal view of who farmers are."[136] Even when management activities counted towards active engagement, the court in *Jones* interpreted Nebraska's law to require a physical presence on the farm.[137] The end result is that

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STAT. § 350.015 (West 2001); N.D. CENT. CODE ANN. § 10-06.1-02 (West 2012); OKLA. STAT. ANN. tit. 18, § 951 (West 2012); S.D. CODIFIED LAWS § 47-9A-1 (2004); WIS. STAT. ANN. § 182.001 (West 2002).

123. MINN. STAT. ANN. § 500.24, subdiv. 2(e)(1).

124. S.D. CODIFIED LAWS § 47-9A-15.

125. WIS. STAT. ANN. § 182.001(1)(a).

126. IOWA CODE § 9H.1(3)(a).

127. *See, e.g.*, *id.* § 9H.1(3)(b).

128. *Id.* § 9H.1(3), (9).

129. *See* MINN. STAT. ANN. § 500.24, subdiv. 2(e)(4) (limiting revenue that can come from things such as dividends to twenty percent).

130. IOWA CODE § 9H.5.

131. Schutz, *Post-Jones World*, *supra* note 28, at 113.

132. S. D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 597 (8th Cir. 2003).

133. 470 F.3d 1261, 1269 (8th Cir. 2006).

134. NEB. CONST. art. XII, § 8, *ruled unconstitutional by* Jones v. Gale, 470 F.3d 1261, 1271.

135. *See e.g.*, *id.* § 8(1)(A); MINN. STAT. ANN. § 500.24, subdiv. 2(c) (allowing family corporate farms to qualify if there was at least one family member residing on the farm).

136. Schutz, *Post-Jones World*, *supra* note 28, at 113.

137. *Jones*, 470 F.3d at 1269.

"any provision that seeks to provide favorable treatment to people with a physical connection to in-state farmland will be deemed discriminatory and facially so."[138]

After *Jones*, one critic noted that in Nebraska, despite the "prospect of a better, renewed debate," one "did not come to fruition."[139] Similarly, during the passage of AFIDA, while there was an opening for discussion and a call for more information before action, states simply went ahead with even stricter restrictions.[140] The sponsor of the proposed 1979 post-AFIDA bill to control agricultural land investment by foreigners stated upon the bill's introduction that its terms were not "cast in concrete" and any provisions seen as "harsh" were meant merely as vehicles to kick-start a national dialogue on the topic.[141] The bill disappeared. The state monologues continued unabated.

Additionally, the same nine states with corporate farming laws have a buffet of alien restrictions to choose from.[142] Generally, they house a reporting component, though states vary on the public availability of the results.[143] The individual restrictions can be absolute[144] or, like South Dakota or Wisconsin, restricted by maximum acreages of 160 and 640, respectively.[145] Kansas defaults to the common-law as modified by constitutional precedent.[146] Many pro-actively include treaty exemption provisions.[147] Most hinge on their definitions section, typically patterned after or directly referencing the federal definitions laid out in the Immigration and Nationality Act (INA). Aliens are not citizens.[148] Within that category, most states adhere to the federal government's definition of being a lawfully admitted permanent resident alien; in the INA, given the definition of "admitted," this divides into permanent resident aliens, and the catch-all remainder category of nonimmigrant aliens, who are typically here temporarily.[149]

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138. Schutz, *Post-Jones World*, *supra* note 28, at 123.

139. *Id.* at 141.

140. *See id.* at 128–34.

141. *See* 125 CONG. REC. S798 (daily ed. Jan. 23, 1979) (statement by Sen. McGovern).

142. IOWA CODE § 9I.2 (2011); KAN. CONST. BILL OF RIGHTS § 17; MINN. STAT. ANN. § 500.221, subdiv. 2 (West Supp. 2012); MO. ANN. STAT. § 442.560 (West 2000); NEB. REV. STAT. ANN. §§ 76-402, 76-1520 (LexisNexis 2004); N.D. CENT. CODE § 47-10.1-02 (West Supp. 2011); OKLA. CONST. art. XXII, § 1; S.D. CODIFIED LAWS § 43-2A-2 (2004); WIS. STAT. ANN. §§ 710.01–.02 (West 2001).

143. *Compare* MINN. STAT. ANN. § 500.221, subdiv. 4(c) (making information available to the public), *with* IOWA CODE § 10B.5 (2011) (holding agricultural land reports confidential pursuant to IOWA CODE § 22.7(47) (2011)).

144. *See* N.D. CENT. CODE § 47-10.1-02 (with only minor, trivial exceptions).

145. S.D. CODIFIED LAWS § 43-2A-2; WIS. STAT. ANN. §§ 710.02(1).

146. *See* KAN. CONST. BILL OF RIGHTS § 17 (nonresident aliens are not restricted *per se*).

147. *See, e.g.*, MINN. STAT. ANN. § 500.221, subdiv. 2(2).

148. 8 U.S.C. § 1101(a)(3) (2006).

149. *Id.* §§ 1101(a)(13)(A). Interestingly, though a common immigration term, lawful permanent resident alien is not defined on its own. *Id.* §§ 1101(a)(13)(A), (15) (defining an immi-

Because it becomes confusing, the reader should note that many state corporate codes define a foreign corporation as one formed outside its borders, which can mean out-of-country or out-of-state, and that references within deal with entities either out-of-state, out-of-country, *or* domestic who have some type of partial nonresident alien ownership.[150] The scope of foreign business restrictions is across the board. Some states prefer a twenty percent maximum allowed percentage of nonresident alien ownership.[151] Nebraska restricts it in full (alongside out-of-state corporations), while North Dakota similarly restricts nonresident alien membership from family farms and provides no authorized corporate farm form.[152] It seems while agricultural land is a part of our sovereign identity, mineral or timberland—though included in AFIDA—is often excluded at the state level from these restrictions.[153]

To illustrate the disconnect between AFIDA's warning of caution, data collection, and the state's kneejerk reactions, a 1976 survey of Nebraska's 2399 total corporate farming entities showed a single, as in *one*, company was owned by nonresident alien shareholders holding voting stock at an ownership level of ten percent or more.[154] Exemplifying the dubious rhetoric of alien land ownership restrictions, it is worth noting that while Nebraska's modern corporate farming restriction includes a family farm entity exception, none of the members may be nonresident aliens—even if they are related to the other members.[155] This is a regrettable indication that even when nonresident aliens have a family connection with a U.S. farm, suddenly being family is not so relevant a consideration.

For a long time, the Iowa Constitution has granted resident aliens the same rights as citizens.[156] Iowa's history is interesting in that in 1965, just shy of the decade that would herald a renewal of alien invasion rhetoric, Iowa actually *increased* the maximum acreage allowed to be owned by a nonresident alien or corporation (even if wholly owned) from 320 to 640 acres.[157] The restrictive en-

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grant as all aliens except certain nonimmigrant aliens listed, who are generally not here permanently).

150. *See, e.g.*, IOWA CODE § 490.140(13) (2011) (defining "foreign corporation").

151. MINN. STAT. ANN. § 500.221, subdiv. 2 (phrasing requirement negatively by requiring eighty percent of ownership to be by citizen ownership); WIS. STAT. ANN. § 710.02(1)(c) (West 2001).

152. NEB. REV. STAT. ANN. § 76-402 (LexisNexis 2004); N.D. CENT. CODE § 10-06.1-12(5) (2012).

153. *See, e.g.*, MINN. STAT. ANN. § 500.221, subdiv. 2(4).

154. Lowe, *supra* note 4, at 740 (citing JEFFREY PRIBBENO ET AL., NEB. DEP'T OF AGRIC. ECON., REP. NO. 78, FARM CORPORATIONS IN NEBRASKA 11, 13 (1977)).

155. NEB. CONST. art. XII, § 8.

156. IOWA CONST. art. I, § 22.

157. IOWA CODE § 567.1 (1962); Act of Apr. 23 1965, ch. 416, §1, 1965 Iowa Acts 801, 801–02.

vironment for aliens may have been collateral paranoia from Iowa's fear of corporate farming, as the State initiated a corporate farming moratorium and reporting requirement (including nonresident alien individuals) in 1975.[158] By the time the dust settled in 1979, the year after AFIDA portended cool heads and patience before regulation, Iowa ended the moratorium with a repeal and total rewrite of the alien land ownership restrictions alongside the finalized and newly-minted corporate farming law.[159]

Today, Iowa bans individual ownership by nonresident aliens of any interest in the land, which similar to many states, likely includes leaseholds.[160] The business entity provisions encompass any business entity owned by nonresident aliens in any proportion over fifty percent.[161] Iowa's agricultural land reporting law is robust, covering both nonresident alien and its corporate farming interests.[162] Unfortunately, these reports are confidential, though presumably they have little to disclose.[163] When Iowa Senator Chuck Grassley asserted that AFIDA would "assist the states in decision-making on issues relating to foreign investment within their borders," state legislatures may have already made up their minds.[164]

III. CONSTITUTIONAL CONSTRAINTS ON STATE POWER

A. *Supremacy, Preemption, and Related Doctrines*

Preemption doctrine, as rooted in the Supremacy Clause, articulates in what situations a state law will bow to federal supremacy.[165] For instance, a treaty granting rights to own land, as such, would preempt state law.[166] Some states

158. Act of July 11, 1975, ch. 133, §§ 4, 7, 1975 Iowa Acts 309, 309–13; *see also Foreign Investment Hearings*, *supra* note 18, at 77 ("For years we have fought the takeover of farms by American corporations. It would be ironic if we succeeded in this only to see ownership by foreign corporations.") (statement of Sen. Dick Clark).

159. Act of June 10, 1979, ch. 133, 1979 Iowa Acts 433–37; Act of Apr. 20, 1979, ch. 47, 1979 Iowa Acts 217–19.

160. IOWA CODE § 9I.2–.3 (2011) (referring to *any* other interest acquired); *see also* MO. ANN. STAT. § 442.581 (West 2000) (stating lease over ten years or possibility for renewal over ten years is considered ownership); N.D. CENT. CODE § 47-10.1-01 (West 1999) ("'Interest in agricultural land' includes any leasehold interest").

161. IOWA CODE § 9I.1(3).

162. IOWA CODE §§ 10B.1(11), 10B.4 (2011).

163. IOWA CODE § 10B.5 (holding agricultural land reports are confidential pursuant to IOWA CODE § 22.7(47) (2011)).

164. H.R. REP. No. 95-1570 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2914, 2938, 1978 WL 8633 (statement of Sen. Grassley).

165. BLACK'S LAW DICTIONARY 1216 (8th ed. 2009).

166. U.S. CONST. art. VI, cl. 2; *see* Hauenstein v. Lynham, 100 U.S. 483, 488–89 (1879).

take the initiative to specifically exempt from operation any rights granted under a valid treaty,[167] even though it is generally accepted that most treaties will not have any real effect on regulation or restriction of land ownership.[168]

Traditional preemption occurs through express or implied field and obstacle preemption.[169] Field preemption occurs when Congress intends to occupy the field, either because the regulation is so pervasive as to preclude state supplementation or is so dominated by federal concerns to leave no room for state law.[170] Obstacle or conflict preemption occurs when a private actor cannot possibly comply with both state and federal requirements.[171] The Court has stated that the "'purpose of Congress is the ultimate touchstone' in every pre-emption case"[172] and that

> [i]n all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[173]

Because AFIDA was not imposed on a blank slate of state regulation, and cooperation or reporting supplementation from the states was hoped for to make AFIDA effective, it is unlikely there was an explicit desire to preempt nascent reporting laws.[174] The courtesy of information sharing, however, wherein AFIDA reports are transmitted to the states does not amount to explicit authorization either, though landholding has been considered a classic area of state control.[175]

At the same time Congress set to the task of replacing conjecture and hysteria with data, by instituting a national reporting system, they did so on top of states that cemented restrictions precisely at the time calls for further study were made. A state that strictly restricts land ownership has nothing to report;

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167. *See*, *e.g.*, N.D. CENT. CODE § 47-10.1-02(7) (West Supp. 2011).
168. HODGSON ET AL., *supra* note 11, at 3–4.
169. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).
170. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299–300 (1988).
171. *Id.* at 300.
172. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citation omitted).
173. *Id.*
174. H.R. REP. No. 95-1570, at 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2914, 2938 (statement of Sen. Grassley).
175. 7 U.S.C. § 3505 (2006); United States v. Fox, 94 U.S. 315, 320 (1876). "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *Id.* (citing McCormick v. Sullivant, 23 U.S. 192, 202 (1825)). Whether this characterization is fair is discussed *infra* Part III.B.

therefore, the promised data on the long-term effects or actual value of these types of restrictions have remained a nascent goal, replaced with a feeling of federal self-satisfaction and state insincerity. While not amounting to interference that would yield preemption, there is a certain sense that states brushing aside the call for more data and reporting on top of highly restrictive statutes does present, in spirit, "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[176] State reporting statutes on top of ownership bans inevitably report little.

Preemption is usually argued alongside other constitutional grounds that operate with a preemptive effect, such as claims of broaching the federal foreign affairs power, or as discussed separately in Part III.B below, the dormant Foreign Commerce Clause.[177]

Federal power over foreign affairs is broad and absolute, generally implied from various provisions in the constitution.[178] Intrusion into the foreign affairs power, as noted earlier, was invoked in the land use context in *Zschernig v. Miller*, where the court struck down an Oregon inheritance statute that required reciprocity of inheritance rights with the claimant's country.[179] The ruling is somewhat tempered by the fact that the Court retained and did not overturn prior caselaw where a "general reciprocity clause did not on its face intrude on the federal domain."[180] The main difference in constitutionality stemmed from whether state action worked only an incidental effect upon another country, by merely matching laws.[181] A state can apply law, look to foreign law, but a state is not allowed "to establish its own foreign policy."[182]

This is where alien land laws do not fit cleanly into the constitutional scheme. The intrusion into foreign affairs by agricultural ownership restrictions on nonresident aliens can be seen as small and "incidental" or—within the subject matter of agricultural land or regionally—more substantial as an absolute ban of ownership that carries obvious ideological national security undertones.[183] One commentator has suggested that the modern overlap in domestic and foreign

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176. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

177. *See, e.g.*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999).

178. *See id.* at 49–50 (discussing in depth the patchwork of grants of foreign affairs authority).

179. 389 U.S. 429, 432, 441 (1968).

180. *See id.* at 432–33 (1968) (citing Clark v. Allen, 331 U.S. 503, 516–17 (1947)).

181. *Id.* at 433 n.5; *see also* Shames v. Nebraska, 323 F. Supp. 1321, 1326–27 (D. Neb. 1971) (discussing holdings of *Zschernig* and *Clark*).

182. *Zschernig*, 389 U.S. at 441.

183. *See generally* Wilson, *Policy Considerations*, *supra* note 3, at143–44 (discussing conflicting trends on defining real foreign affairs encroachment).

affairs may have led the Court in *Crosby v. National Foreign Trade Council*[184] to avoid discussing the effect of the foreign affairs matters at issue there and hold on normal preemption grounds, stating,

> The *Crosby* Court appeared sensitive to the difficulty of statutory foreign affairs preemption in a world in which the line between domestic and foreign affairs has blurred; it went out of its way to indulge no presumption whatsoever in favor of federal or state law, or to inject its own views of the foreign policy consequences of preemption versus non preemption; and it decided the preemption issue on the narrowest possible basis, leaving it to political process to work out the scores of other difficult issues about the relationship between state and federal law related to foreign affairs.[185]

Crosby did not discuss, and left undisturbed, the lower court's ruling in *Natsios* which had also invoked foreign affairs and the dormant Commerce Clause to strike down a Massachusetts law that restricted business with Burma.[186] Its discussion re-asserted that the foreign affairs power is exclusive, with states not sharing any power.[187] It is one of the few times that the normal conception of the federal government as one of only enumerated powers falls away, as that limitation only pertains to matters of internal affairs.[188]

Arguably, *Natsios* carries more force in a situation in which treatment of an individual nation is at issue, though blanket policies do not appear to be less of an intrusion into foreign affairs, particularly if regionally adopted.[189] Still, while farmland investment may come from outside the country, the farmland is fixed within the nation's boundary.[190] While this may put the balance more in line with internal traditional state affairs, the court stated that *Zschernig* did not hold "that a sufficiently strong state interest could make lawful an otherwise impermissible intrusion into the federal government's foreign affairs power."[191]

Additionally, the First Circuit found impermissible the ongoing scrutiny that would be necessary to "inquire[] into whether that firm does business in Burma" each time a firm bids for a government contract and concluded that "[b]y

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184. 530 U.S. 363, 388 (2000).

185. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 (2001).

186. *Crosby*, 530 U.S. at 374 n.8 (stating the Court will "pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause"); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 44–45 (1st Cir. 1999).

187. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 50 (1st Cir. 1999) (quoting United States v. Pink, 315 U.S. 203, 233 (1942)).

188. *Id.* (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–16 (1936)).

189. *Id.* at 53.

190. *See id.* at 50, 53.

191. *Id.* at 53; *see also* Zschernig v. Miller, 389 U.S. 429 (1968).

investigating whether certain companies are doing business with Burma, Massachusetts is evaluating developments abroad."[192] Of note, in determining the state's individual effect on foreign affairs, the court stated that under *Zschernig* the court must look at the "combined effects of similar laws in numerous jurisdictions," or the laws overall effect if magnified by successful adoption by *other* states.[193]

State alien land ownership restrictions likely dodge intruding into foreign affairs by requiring reports; development of state-based disclosure laws was encouraged by AFIDA, which acknowledged the state's role in the accuracy of data collection.[194] Because many states require reporting from all companies and individuals owning agricultural land, asking for foreign ownership percentage or country of origin becomes just one more line item.

Concerning the actual substantive restrictions, most state laws do not intrude into the foreign affairs of any particular country and may amount to nothing but incidental intrusions in an area of state competence; however, if total ownership or partial corporate ownership bans have been adopted regionally, the substantive restrictions may reach a level of notorious action.[195] Though the balance weighs in favor of the states, erecting regional investment barriers in a country known for its open land ownership policies could nudge these laws further toward characterization as "statements of foreign policy" made not by the nation, but by individual states.[196]

B. *The Dormant Foreign Commerce Clause*

The Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States."[197] The Supreme Court has said that while "its terms do not expressly restrain 'the several States' in any way, we

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192. *See Natsios*, 181 F.3d at 53 (stating that level of scrutiny is not a key factor, and while the statute did not explicitly make inquiry into foreign affairs, the statute inevitably made necessary ongoing and sustained, however minor, scrutiny).

193. *Id.*; *see generally Zschering*, 389 U.S. 429 (holding invalid Oregon law dictating terms of succession or testamentary disposition of real property to foreign individuals).

194. *See* H.R. REP. NO. 95-1570, 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2914, 2938, 1978 WL 8633 (statement of Sen. Grassley) (welcoming cooperation of states to yield greater accuracy).

195. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 398 (2003) (discussing Justice Harlan's *Zschernig* concurrence regarding traditional state regulation). *But see* N.D. CENT. CODE § 47-10.1-02(1) (West Supp. 2011) (singling out and excluding Canada from restrictions on agricultural land acquisition).

196. Lowe, *supra* note 4, at 762.

197. U.S. CONST. art. I, § 8, cl. 3.

have sensed a negative implication in the provision since the early days."[198] Similarly, a dormant aspect of the Foreign Commerce Clause is recognized, though not as thoroughly developed as the interstate variant. A facially discriminatory statute, like the land ownership restrictions at issue, would be *per se* invalid if any nondiscriminatory means could be employed to achieve the desired end.[199]

1. *Is It Commerce?*

The threshold question to address under this analysis is if the purchase of an interest in agricultural land can be classified as commerce despite the local and immoveable character of the land. AFIDA was certainly passed under the presumption that Congress could regulate the subject matter, and in as much as collection of data portended possible passage of a national bill, there was no question within Congress whether they had the power to regulate in this area.[200] This is also important as "the Supreme Court has never struck down an act of Congress as exceeding its powers to regulate foreign commerce."[201]

The Court has indicated that the scope of the dormant Commerce Clause tracks the scope of the positive Commerce Clause.[202] The scope of the positive Commerce Clause is broadly defined as including the channels and instrumentalities of commerce, as well as that which substantially affects interstate commerce.[203]

Circling land ownership, the Court has allowed exercise of the Commerce Clause for purely intrastate land use regulations, justifying federal regulation in one case by noting both the effect of coal mining on air and water that may flow to other states and the effect differing production conditions to mine coal may have on interstate competition with other states.[204] The Court, rejecting an argument that the Commerce Clause did not apply to a *real estate* tax, also used the dormant Commerce Clause to strike down a discriminatory state tax

198. Dep't of Revenue v. Davis, 553 U.S. 328, 337 (2008).

199. *Id.* at 338 (citations omitted).

200. *See* Lowe, *supra* note 4, at 758 (assuming Congressional action could preempt state law in this area).

201. United States v. Clark, 435 F.3d 1100, 1113 (9th Cir. 2006).

202. Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979).

203. *E.g.* United States v. Morrison, 529 U.S. 598, 609 (2000) (citations omitted).

204. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 280–83 (1981) (rejecting the argument Congress lacked authority to regulate local activity merely "because it regulates a particular land use").

against out-of-state campers, stating that allowing a discriminatory tax to escape coverage by *labeling* it as a real estate levy was inappropriate.[205]

The Eighth Circuit corporate-farming dormant Commerce Clause cases have brought this blurring of use and ownership to the forefront. As one critic remarks, while agricultural land ownership has not been deemed interstate commerce, "[i]t is difficult to argue that interstate commerce is not involved because land in the agricultural setting is the means of agricultural production."[206] This begs the question regarding placement of the line between a law purporting to merely regulate an intrastate real estate transaction that is outside the definition of commerce, and one that restricts ownership and use that is not. Arguably, alien land ownership restrictions effectuate a ban on nonresident alien agricultural production.[207] This is supported by the fact that agricultural land is itself defined as land useable for farming, which is why states whose corporate farming restrictions appear to only restrict land *ownership* are not excluded from dormant Commerce Clause claims.[208] Agricultural land is used to make agricultural products. Corporate farming law philosophy is focused on that intertwined relationship of ownership and use. Agricultural land ownership restrictions for aliens are sometimes also included within corporate farming laws.[209] The hair is split too thin to say one law restricts conduct susceptible to dormant Commerce Clause scrutiny while the other is *mere* status and real property—the law restricts conduct based on status, and that conduct is not only ownership, but is meant to restrict participation in agricultural production.[210]

Similarly, that the class or area of industry is proportionally small to the national economy is to overlook that within the class and within the industry the restriction is absolute for individuals, and any entity ownership is, by law, relegated to minority shareholder status with limitations on dividend income. Such restrictions substantially affect interstate and foreign commerce as attempts not

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205. Camps Newfound/Owatonna, Inc. v. Harrison, Me, 520 U.S. 564, 574–75 (1997) (stating, interestingly, that presuming Congress could not impose a national real estate tax due to states' traditional powers to tax, states would still be unable to use a real estate tax to burden interstate commerce).

206. Schutz, *Post-Jones World*, *supra* note 28, at 138.

207. *See id.* at 137–38 (noting while corporate farming laws ban ownership, production, or both, production has been identified as congressionally governed since *Wickard*). *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (establishing Congress' power to regulate agricultural production).

208. *See id.* at 108–10 (citations omitted).

209. *Compare* NEB. CONST. art. XII, § 8 (excluding nonresident aliens from corporate farm exemptions), *with* NEB. REV. STAT. ANN. § 76-402 (LexisNexis 2004) (restricting all ownership by aliens and foreign, including out-of-state, corporations).

210. *See* N.D. CENT. CODE § 47-10.1-01(2) (1999) (implying statute is meant to cover all basis of use, not just ownership, by defining ownership broadly enough to include leaseholds).

so much to restrict an initial land purchase as to "restrict[] the post-purchase activity of the purchaser, rather than merely the purchasing activity."[211]

2. *Are Such Transactions Foreign Commerce?*

The next question to ask becomes is it foreign commerce? The Court's earliest reference to the quality of foreign commerce states in language predating modern commerce jurisprudence that it "must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial."[212] A more recent federal district court in Texas, while discussing the Fifth and Ninth Circuits, adopted their positions stating, "[T]he Fifth Circuit and Ninth Circuit go further in their analysis and hold that when regulating foreign commerce, Congress' authority is not constrained by the three categories in the *Lopez/Morrison* framework."[213] The land, internally situated, is transacted with an extraterritorial investor whose extraterritoriality will remain and be maintained throughout the ongoing ownership and possible disposal in the future. Its foreign quality distinguishes itself within the statutes, and foreign owned farms (even if domestically originated) cannot produce and bring to market any products purely based on the initial and ongoing exchange of value to and from outside the country.

In what may end up being an outlier rather than bedrock jurisprudence, the U.S. Supreme Court in *South-Central Timber Development, Inc. v. Wunnicke* struck down a state regulation requiring in-state processing of timber bound for Japan as a naked restraint on interstate and foreign commerce, stating that an important factor buttressing the holding and making it an easy analysis was that it involved foreign commerce even though the logs themselves were grown, cut, and shipped from Alaska by an Alaskan company, had not left the United States, and merely the timber's destination and end-purchaser were foreign.[214] Although goods are the most common, straightforward example of commerce, because restrictions against foreign ownership and involvement in farming can be phrased to avoid goods or instrumentalities and speak only of generalities of origin or rights of purchasers, a broad approach is justifiable. While it would be too broad to suggest all commerce becomes shielded as special "foreign" commerce because of some tenuous or one-time link to another country in the chain of production or distribution, a much narrower and justifiable case appears here where

211. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).
212. Veazie v. Moor, 55 U.S. 568, 573 (1852).
213. United States v. Martinez, 599 F. Supp. 2d 784, 805 (W.D. Tex. 2009).
214. *Wunnicke*, 467 U.S. at 85–86, 96.

statutes specifically and explicitly target foreign involvement for clear market based purposes.

If states were to allow foreign involvement and tax domestic exports coming from foreign owned farmland, for example, to alleviate possible food security concerns, it would run afoul of the Constitution's import/export clause; a good indication that while states have vital roles to play as stewards and watchdogs, it is a matter of foreign commerce better suited for the federal government.[215]

While the Agricultural Foreign Investment Control Act of 1979 died in committee, it is worth noting its opening "Findings and Declaration of Policy" section stated that "acquisitions of interests in United States agricultural land by foreign persons *are transactions in foreign commerce* and regulation of such acquisitions as provided in this Act is necessary to regulate effectively such commerce."[216] This is foreign commerce.

3. *If It Is Foreign Commerce, What Analysis?*

Next, is the Foreign Commerce Clause analysis parallel to a domestic dormant Commerce Clause analysis, and how, if at all, should they differ? The initial case is *Japan Line, Ltd. v. County of Los Angeles*, where the Court stated that while the Constitution has parallel phrases for the domestic and Foreign Commerce Clauses, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."[217] The analysis requires a more *extensive* inquiry centered on the need for uniform relations with other nations, requiring the country to speak with "one voice."[218] This expansive language has been scaled back in later cases with a reminder that "we never suggested in [*Japan Line*] or any other [case] that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice," and that a law (at least a tax law) "will [only] violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a

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215. U.S. CONST. art. I, §10, cl. 2 ("No State shall . . . lay any Impost or Duties on Imports or Exports."). The clause prevents states from imposing a discriminatory tax on imports or exports. *Id.*

216. *See* 125 CONG. REC. S799, S.194 § 2(a)(3) (daily ed. Jan. 23, 1979) (emphasis added).

217. 441 U.S. 434, 448 (1979).

218. *Id.* at 446, 449; *see also* Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

clear federal directive.[219] The second of these considerations is, of course, essentially a species of preemption analysis."[220]

It is this last sentence that prompted one author to state that after *Crosby* the Foreign Commerce Clause has taken a back seat to preemption analysis, and future courts applying a dormant Foreign Commerce Clause analysis may choose to either use a whole new test, discard the dormant Foreign Commerce Clause altogether, or employ an identical test as in normal dormant Commerce Clause analysis.[221]

The Court's reluctance, however, to put too much stock into broadening *Japan Line* may simply stem from an aversion to turning every transaction involving foreign commerce, even if *de minimus*, into a *per se* constitutional violation.[222] This leaves open situations where the law is facially discriminatory and blatantly protectionist, when it may make sense to fall back on traditional dormant Commerce Clause analysis.[223]

This requires a look at the justifications of the dormant Commerce Clause to see if it makes sense to apply, not the same, but a similar analysis. Leanne Wilson recites three main justifications: first, the economic efficiency of allowing the nation's states to compete with one another; second, to prohibit in-state politicians from unfairly catering to local and voting interests or protectionism; and third, that the nation as a whole must "sink or swim together."[224]

Perhaps alien land ownership is not an area of policy that demands the type of federal uniformity of voice that *Japan Line* was concerned with.[225] Presuming federal uniformity is unnecessary without conceding that to be true, such an argument merely calls for a rejection of an automatically heightened analysis tacked onto any and all situations whenever *any* minimal foreign commerce is involved. The economic and practical desirability for consistent state laws—for investors who will move resources from a lower to higher use and value—and for laws not driven by in-state political catering against foreigners justifies incorpo-

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219. Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 13 (1986); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

220. *See Container Corp. of Am.*, 463 U.S. at 194 (considering the effect of a state law containing only foreign resonances). In a nontax context the possibility of state action reaching beyond mere resonance may be more salient or clearly motivated, as with a total ban on a specific type of investment.

221. Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 748 (2007) [hereinafter Wilson, *Fate*].

222. *Id.* at 756.

223. *Cf.* Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 81 (1992) (noting in the tax context that even in rational basis equal protection analysis "a State may not advance its legitimate goals by means that facially discriminate against foreign commerce").

224. Wilson, *Fate*, *supra* note 221, at 750–53 (citations omitted).

225. *See* Frechter, *supra* note 2, at 168–69 (claiming no need for uniformity).

rating normal dormant Commerce Clause analysis in a foreign commerce setting when obvious facially discriminatory laws are enacted by a state.[226] As illustrated above, the laws are varied and regionally distinct, and pockets of different regulation provide inconsistent guidance to businesses and impact the nation as a whole.[227] The clause should, at a minimum, follow the normal analysis for facially discriminatory laws and along the lines of how the First Circuit has applied it, should restrict blatantly protectionist policies such as current alien land laws.[228]

Because such laws are facially discriminatory and would be found to be *per se* violations, the State must meet a high burden of proof by showing the laws serve a local interest that cannot be met by any other nondiscriminatory alternatives.[229] One critic has remarked that in the corporate farming context, this burden is almost impossible to meet given the normal lack of data describing the effectiveness of alternatives and inability to show that no other less restrictive measure would work.[230] In the context of alien land restrictions, the insignificant volume of nonresident alien investment alongside the largely unfounded and theoretical basis for a shifting array of supposed harms weighs in favor of striking the restrictions down.

The Eighth Circuit in *Hazeltine* was critical that the South Dakota legislature did not look at or commission (nor seemed concerned with gathering) any studies on the impact of banning corporate farming on family farms and did not examine whether certain concerns could have more easily been handled under reforming preexisting law of a general nature.[231] That court would be at least equally incredulous that alien land laws do not have a discriminatory purpose given their enactment alongside federal recognition that no rational law could be

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226. *See e.g.*, Campeau Corp. v. Federated Dep't Stores, 679 F. Supp. 735, 738–39 (S.D. Ohio 1988) (striking down a law aimed at regulating takeovers of domestic companies by companies organized in foreign countries on the ground that it would subject businesses to inconsistent state regulations).

227. Mason, Jr., *supra* note 79, at 459, 462, 482 (indicating dual compliance with treaties, federal law, and patchwork of state laws creates "confusing" investment landscape and poses "severe" problem for alien land laws).

228. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 66 (1st Cir. 1999) (incorporating domestic commerce clause policy concerns into foreign commerce clause analysis).

229. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994) (citing New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).

230. James C. Chostner, *Buying The Farm: The Eighth Circuit Declares South Dakota's Anti-Corporate Farming Amendment Violates the Dormant Commerce Clause*, 11 MO. ENVTL. L. & POL'Y REV. 184, 192–93 (2004).

231. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594–95 (8th Cir. 2003); *see also* Chostner, *supra* note 230, at 190.

passed without actual data on the problems and magnitude of foreign ownership, and that there was no such empirical data.[232]

To decide otherwise would allow, on a state-by-state basis, a slow creep into foreign affairs by shielding market restrictions in the form of alien land laws behind a real property veneer. Outside of constitutional restraint, legislatures are perfectly free to pass bad law. If they can, as the next section explains, they still should not.

IV. REPEAL, REPLACE, OR REFORM

When AFIDA was passed in 1978 there may have been a claimed lack of data on foreign farmland ownership. Decades of its operation along with state reporting systems would suggest that is no longer the case. Even in the late 1970s, however, Iowa had some idea of the lack of nonresident alien ownership.

In 1976, Iowa's first report produced from its new reporting law during the corporate purchasing moratorium was presented to the state legislature.[233] Only eighteen nonresident aliens owned farmland, along with three out of nearly three thousand corporate entities having at least a five percent foreign ownership stake, which were notably two family farms and one authorized farming corporation.[234] No limited partnerships had any nonresident alien limited partners.[235] A contemporaneous report showed that 1.5 million acres, or 4.7% of the land used for farming in Iowa, was being farmed by corporations, about two-thirds of which was by family farm corporations and the rest by nonfarm corporations and non-Iowa residents.[236] Out of the 1.5 million acres, eighteen nonresident alien individuals farmed 1845 acres and leased 4122 more for a total of 5967 acres; this comes to 0.39% of the total acreage operated by corporations at that time.[237] This is sobering in view of one Iowa Senator's story that in 1974 a friend had told him "that he thought there were at least 17 farms in his county controlled by

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232. *See* Craig Currie, et al., *Foreign Investment in Iowa Farmland*, *in* FOREIGN INVESTMENT IN U.S. REAL ESTATE 114, 129–30 (Gene Wunderlich, USDA ed., 1976) (delineating list of remaining questions regarding foreign farmland investment and highlighting the need for more data).

233. LEGISLATIVE SUBCOMM. ON CORP. FARMING, ANALYSIS OF CORPORATIONS, LIMITED PARTNERSHIPS, AND NON-RESIDENT ALIENS INVOLVED IN AGRICULTURAL ACTIVITIES IN THE STATE OF IOWA 1 (1976).

234. *Id.* at 1–2.

235. *Id.* at 3. The author concedes that as a first dry run, numbers for such an early report may be underreported.

236. CORP. FARMING SUBCOMM. OF THE STANDING COMM. ON AGRIC., REPORT TO THE MEMBERS OF THE FIRST SESSION OF THE SIXTY-SEVENTH GENERAL ASSEMBLY, 67th Gen. Assemb., 1st Sess., at 2 (1977).

237. *Id.*

foreign interests but he didn't know which farms they were."[238] This is the type of statement that motivated passage of current restrictions and that data corrects too softly to be heard.

The definition of agricultural land used in connection with AFIDA is broader than most state definitions and includes forestry and timber production.[239] It also has exclusions for leaseholds of less than ten years in duration and interests solely in minerals rights.[240] Since most corporate farming laws require corporate members to be natural persons, the concern with AFIDA and other reporting requirements to dive into corporate ownership and suss out the true owners of a business shelled within another is simply not present in corporate farming law states.[241] AFIDA results may also be broader because it defines the minimum substantial interest that triggers reporting at ten percent in contrast to many of the corporate farming law states.[242]

Nationally, foreign-owned agricultural land represented 1.8% of total U.S. agricultural land.[243] Due to the inclusion of forestry and timber, which accounted for a whopping 55% of 2010 AFIDA reports,[244] Maine ranks number one in percentage of foreign owned private agricultural land with 14.7%.[245] Texas has the highest raw number of foreign owned acreage but relative to its size foreign ownership is only a little under 2% of its total agricultural land.[246] Apart from Maine, only a small percentage of privately held land is held by foreign investors in the remaining forty-nine states.[247] Foreign investors come from such exotic places as Canada, owning the most acreage, with Danes, Germans, and the British coming a distant second, third, and fourth.[248]

To put it in perspective, excluding foreign owned corporate ownership, investors from Liechtenstein own roughly ten times the U.S. acreage as individu-

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238. *Foreign Investment Hearings*, *supra* note 18 (statement by Sen. Dick Clark).
239. *See* 7 C.F.R. § 781.2(b) (2012).
240. *Id.* § 781.2(c)(2), (c)(6).
241. *See e.g.*, IOWA CODE § 9H.1(3)(b) (2011); MINN. STAT. ANN. § 500.24, subdiv. 2(e)(2) (West Supp. 2012); MO. ANN. STAT. § 350.010(2)(a) (West 2000); NEB. CONST. art. XII, § 8; OKLA. STAT. ANN. tit. 18, §§ 951(A)(1), 955 (West 2012); WIS. STAT. ANN. § 182.001(1)(c) (West 2002).
242. 7 C.F.R. § 781.2(k)(1).
243. FARM SERV. AGENCY, USDA, FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND, at 6, report 1 (2011), *available at* http://www.fsa.usda.gov/Internet/FSA_File/2010_afida_9_21_11.pdf.
244. *Id.* at 6.
245. *Id.* at 5, report 1.
246. *Id.*
247. *Id.* at report 1.
248. *Id.* at 5.

al Chinese investors.[249] When looking strictly at U.S. companies with a sufficient number of foreign shareholders to trigger reporting, total acreage owned is on par with individual investor ownership.[250]

Purchases remained steady from 2000 to 2006, hovering around 1% of total privately held agricultural land.[251] Timber, cropland, and pastureland purchases by foreign investors surged from 2007 to 2010, but mainly due to timber companies making large purchases and foreign wind companies executing long-term leases.[252]

Iowa's foreign owned agricultural land represents somewhere between 0.02 to 0.09% of the national total.[253] Out of Iowa's roughly 33 million acres of privately held agricultural land, foreign-owned acreage is approximately 120,513 acres or 0.4%, and is largely cropland.[254] To compare, Minnesota with a "tolerant" statutory scheme including a maximum acreage limit still only registers a 0.7% ownership percentage of foreign-owned interests.[255]

From 2009 to 2010, the numbers alone seem inconclusive.[256] Iowa and ownership-restrictive Nebraska both inexplicably doubled reported acreage held by foreign interests, though not that difficult a feat when foreign owned acreage was so small to begin with.[257] Given AFIDA's explanation of recent increases in other states, it is unclear if this increase could be a direct result from increased interest in (or leaseholds involving) Iowa wind energy.[258]

Numbers alone, unfortunately, will not resolve the issue in a vacuum, if resolution is what is sought. Whether foreign investors are actually worse neighbors, one commentator opined, was too impossible a question to ever answer, weakly submitting that the public is better off with the hypothetical rationality of legislative judgment, even if it may not be so "sensitive to the facts."[259]

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249. *Id.* at report 4.
250. *Id.* at report 4.
251. *Id.* at 6.
252. *Id.*
253. *Id.* at 9, fig. 1.
254. *Id.* at report 1.
255. *Id.*
256. *See id.* at report 1A.
257. *Id.*
258. Restrictions on foreign investment could have an unintended reach to the wind energy sector. *See, e.g.*, Chuck Raasch, *Foreign Investment in U.S. Land on the Rise*, USA TODAY, July 25, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-07-18/foreign-investing-US-farm-timber-land/56466674/1 ("Washington state saw a gain of 388,000 acres of foreign investment in land for wind farms.").
259. Frechter, *supra* note 2, at 183–84 (strangely prefacing this opinion on the impossibility of answering the question and whether such restrictions can be "rational" under theoretically

Past this data, what reasons have propped up these restrictions? In an early opinion letter, the Iowa Attorney General asserted that upon constitutional challenge the legislature could look to concern with absentee landowners and farmland price spikes to provide any required rational basis for the law.[260] Also generally noted is the laudable goal "to influence farm structure by preserving the family farm."[261] More recently, the Iowa law was asserted to have originated in worries of cash rich oil companies, motivated primarily on what was termed a national security basis, but boiled down to the statement, "'we want Americans to own that.'"[262]

These justifications have to be examined in relation to today's modern farm, a shifting landscape of demographics. While agriculture is the United States' backbone, now "95 percent of rural income is earned off the farm."[263] In Iowa, the megatrend is aging, where "[t]he percent[age] of farmland owned by people over the age of 75 has more than doubled over the past two decades. Today more than half [of] Iowa farmland is owned by someone 65 years old or older."[264] Since 1982, Iowa farmland has seen increases in the amount of farmland owned by part-time or out-of-state residents, and by those who did not farm in 2007 or have never farmed.[265] Respondents indicated that 74% of land sales were to existing farmers, 22% to investors, with only 3% being new farmers.[266]

Since 2000, Iowa farmland value, on average, has doubled.[267] The value of an acre of farmland in 2011 increased 32.5%, the highest ever recorded by Iowa State University's land value survey.[268] The reported value of an acre of

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reasonable conjectures with the seemingly opposite acknowledgment that it may be the "real" question).

260. Opinion No. 79-11-1, *supra* note 26, at *14.

261. Philip E. Harris, *Land Ownership Restrictions of the Midwestern States: Influence on Farm Structure*, 62 AM. J. OF AGRIC. ECON. 940, 940 (Dec. 1980); *see also, e.g.*, MINN. STAT. ANN. § 500.24, subdiv. 1 (West Supp. 2012).

262. Masterson, *supra* note 27 (quoting Roger McEowen, director of Iowa State University's Center for Agricultural Law and Taxation).

263. *Before the Subcomm. on Rural Dev., Biotechnology, Specialty Crops, and Foreign Agric. of the H. Comm. on Agric.*, 111th Cong. 1 (2010) (statement of Dallas Tonsager, USDA Under Secretary for Rural Development), *available at* http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/testimony/111/h072010rd/Tonsager.pdf.

264. MICHAEL DUFFY ET AL., IOWA STATE UNIVERSITY, FARMLAND OWNERSHIP AND TENURE IN IOWA 2007, at 4 (Nov. 2008) [hereinafter DUFFY, FARMLAND OWNERSHIP], *available at* http://www.extension.iastate.edu/publications/pm1983.pdf.

265. *Id.* at 30.

266. Duffy, *2011 Farmland Value Survey*, *supra* note 17, at 2.

267. Michael Duffy, *2007 Iowa Land Value Survey: Overview*, IOWA STATE UNIV. (Nov. 25, 2008), http://www.extension.iastate.edu/landvalue/land07/background07.html.

268. Duffy, *2011 Farmland Value Survey*, *supra* note 17, at 2.

Iowa farmland in 2011 is at a new high of $6708.[269] Of course, just because farmland prices have spiked with no influence from the type of alien purchases restricted by Iowa law, does not mean that such investments would be welcome in an already crowded market, like pouring fuel on the fire. When there are so many disparate factors at play affecting overall real estate values, however, the proper attitude should not be to regulate first and ask perennially inconclusive questions later.[270]

Any reduction in competition for real estate will, in theory, suppress pricing. This is not the same as saying any and all reductions should be pursued. Biofuel demand led to a 34% increase in farmland values from 2007 to 2009, but there is no call to ban ownership rights to those who produce corn for ethanol production.[271] If low pricing was an absolute good, every restriction could be justified a priori on grounds of regulating price spikes.

It is helpful to see farmland prices in context. AFIDA was passed within a context of currency depreciation and rising oil prices.[272] America's complicated love/hate relationship with foreigners and agriculture blossomed. The inconsistency of, but quest for, global demand has been with the nation since early on.[273] Without trying to oversimplify the myriad causes of the 1980s debt crisis, the country's farms experienced a real estate value free-fall, partly due to a decline in what had been burgeoning foreign demand for agricultural products.[274] In 1985, after recounting a long family history of farming in Iowa, then farm editor of the Des Moines Register, Don Muhm, lamented that "'land values ha[d] dropped so much.'"[275] The article notes that while land had previously held its value and enticed farmers to acquire more, it was now a "burden that [was] destroying them."[276] High property values can be an adverse factor in purchasing, but they can be adverse if they are too low as well.[277] Both can be potential downfalls. A blind goal to suppress land value is an incomplete goal when out-

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269. *Id.*

270. *See id.* at 3 (listing factors such as U.S. energy policy, performance of the U.S. economy, and weather).

271. DUFFY, FARMLAND OWNERSHIP, *supra* note 263, at 4.

272. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-608, SOVEREIGN WEALTH FUNDS: LAWS LIMITING FOREIGN INVESTMENT AFFECT CERTAIN U.S. ASSETS AND AGENCIES HAVE VARIOUS ENFORCEMENT PROCESSES 20 fig.4 (2009), *available at* http://www.gao.gov/new.items/d09608.pdf.

273. *See* 3 Annals of Cong. 971, 971–72 (1791) (Alexander Hamilton, *Report on Manufactures*) (foreshadowing the inconsistency of foreign agricultural demand).

274. Brian C. Briggerman, *The Role of Debt in Farmland Ownership*, CHOICES, 2 (2011), http://www.choicesmagazine.org/magazine/pdf/cmsarticle_28.pdf.

275. Hugh Sidey, *The Presidency: The Power of the Prairie*, TIME (Feb. 18, 1985), http://www.time.com/time/magazine/article/0,9171,960758,00.html.

276. *See id.* ("Wealth once again is the undoing of the heartland").

277. *See id.* (discussing how farmland that has dropped in value is a burden on farmers).

of-context. In light of the small amount of foreign investment, plethora of other factors influencing land pricing, and shifting and relative usefulness of low land prices, alien landownership restrictions inevitably fail to be effective, plausible, or internally consistent as methods of controlling land value, but succeed as rhetoric.[278]

The 1980s showcase these no-win positions for foreign investors, but the 1980s are still with us.[279] Claims that American agriculture is best kept to feed Americans is at odds with what cannot be too overstated; agricultural exports have always been eagerly courted and are driving farm income higher, not lower.[280] Our attitude towards exports has often confused our attitude towards foreign investment, misreading it for something it is not. Former Iowa Senator Dick Clark, in a hearing on foreign investment in the 1970s, assumed foreign countries would try to shore up unmet export demand by purchasing our farmland,[281] yet in 1976, Iowa's primarily German investors were not looking for exports to consume,[282] and after interviewing potential foreign investors, including Iranians, one similarly dated report uniformly rejected the idea that purchasing U.S. farmland as a means for a foreign country to shore up its food supply would be anything other than ineffective and impractical.[283]

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278. *Authorization for the International Investment Survey Act: Hearing on S. 2928 Before the Comm. on Commerce, Science, and Transportation*, 95th Cong. 13–14 (1978) (answering that due to myriad factors involved in land pricing, controlling foreign investment would not by itself reduce, prevent, or limit the drastic increase in farmland prices) (statements by Sen. Inouye and Dr. Kenneth R. Farrell, Admin., Economics, Statistics, and Cooperative Services, USDA).

279. *See* Duffy, *2011 Farmland Value Survey*, *supra* note 17, at 2 (noting worry that farmers are setting themselves up for a fall similar to the 1980s).

280. *See, e.g.*, Austin Ramzy, *Why China's Future Leader Is Going to Iowa*, TIME (Jan. 24, 2012), http://world.time.com/2012/01/24/why-chinas-future-leader-is-going-to-iowa/ (explaining Iowa Governor Terry Branstad's history with China's Vice President Xi, and hope for an increased relationship involving corn exports).

281. *Foreign Investment Hearings*, *supra* note 18 (statement of Sen. Dick Clark). Presumably this flows from the truth underlying the ancient, instinctive rhetorical question – "why pay for the cow if you can get the cow grazing farmland and dairy facility for free?"

282. U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: REPORT OF THE SECRETARY OF COMMERCE TO THE CONGRESS IN COMPLIANCE WITH THE FOREIGN INVESTMENT STUDY ACT OF 1974 (PUBLIC LAW 93-479), vol. 1, 188–89 (1976) [hereinafter INVESTMENT COMPLIANCE REPORT], *available at* http://hdl.handle.net/2027/uc1.32106007303966.

283. Arnold Paulson, *Goals and Characteristics of Foreign Purchasers of Farmland in the United States*, *in* FOREIGN INVESTMENT IN U.S. REAL ESTATE 95, 98–99 (Gene Wunderlich, USDA ed., 1976); *see also* Mason, Jr., *supra* note 79, at 481 (arguing national security arguments for alien land laws are inherently overbroad, noting such arguments could reach almost any alien-owned property).

Foreign investors do not have to be viewed as inherently opposed to our own well-being.[284] A calmer approach shows our anxieties are unfounded, and cultural or moral defenses occasionally even hypocritical. Wealthy businessman T. Boone Pickens, in response to feeling excluded from influence after investing in a Japanese company, complained about the denial of America's piece of the action and implied that closed markets were un-American.[285] Then South Carolina Senator Ernest Hollings had this to say on Japan's cultural resistance to foreign investment, stating, "'This is a matter of policy. They try to finesse it with the word "culture." They've got the same culture you and I've got—money talks' . . . ."[286] For all the rhetoric, do American companies have the capacity to land grab with the best of them, just as our founding fathers could entertain land speculation?[287] It is certainly more convenient and easier for local politicians to keep alien restrictions than try to reform either alien land ownership restrictions or corporate farming laws—ignoring what role foreign investors actually want to, or could, play in our economy.

Each investor in each country, and by country, has a different motive; generalizations are impossible and broad restrictions cut too wide.[288] A 1976 report on the motives of foreign investors in Iowa showed German investors motivated by long term investment, with no indication of short-term speculation, citing America as a great place to visit friends and family living near their parcels.[289] Iranian investors, while not immune to speculation, still displayed no desire to invest in American farmland given the low rate of return in relation to its high asking price.[290] To best evaluate the impact of foreign investment on

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284. *See* Mason, Jr., *supra* note 79, at 481 (suggesting intertwining of foreign and domestic interests promotes national security).

285. Associated Press, *Japanese Economy Closed, Pickens Says*, L.A. TIMES, July 12, 1989, http://articles.latimes.com/1989-07-12/business/fi-3605_1_japanese-economy-closed.

286. *Id.*

287. *See* Kathleen Masterson, *Criticism Escalates over Iowa Company's Plans for Tanzania*, HARVEST PUBLIC MEDIA (Sept. 29, 2011), http://harvestpublicmedia.org/article/789/criticism-escalates-over-iowa-companys-plans-tanzania/5 ("An Iowa-based energy company's agriculture project in the east African nation of Tanzania is coming under increasing scrutiny. AgriSol Energy describes the project as an effort to bring modern farming methods, machinery and high quality seeds to the region. But some critics see it as a plantation-style land grab."); *see also* Wunderlich, *supra* note 19, at 345 n.2 (mentioning revolutionary-era land speculation and the key actors of the time, specifically referencing Patrick Henry and George Washington).

288. *See* INVESTMENT COMPLIANCE REPORT, *supra* note 281, at 188 (noting diversity of investor motives).

289. *Id.* at 188–89.

290. *Id.* at 189. The author concedes more recent data would be desirable, but within the states that ban foreign agricultural land ownership and have farmland that would be most relevant for monitoring, new or useful data is a legally mandated impossibility. *See* IOWA CODE § 10B.5 (providing agricultural land reports are confidential pursuant to IOWA CODE § 22.7(47) (2011)).

land, it is necessary to know how land use shifts between original owners and new foreign owners.[291] In the 1976 report on foreign investment in Iowa farmland, the use of the land remained the same, with local residents generally continuing to operate the land.[292]

Maybe equity is not equivalent to patriotism, but foreign investors become intertwined and interested parties in America's success.[293] As "[f]armland values are highly correlated with gross farm income," when domestic farmers do well, so do foreign investors.[294] When the U.S. economy does poorly, so do they.[295]

Foreign investors can be compatible with domestic interests. As one critic argues, the motives of foreign investors and the need to unite land ownership with management—or at least the supposed incongruity of interests between a nonresident alien investor and lessor or minority business partner—may be based on outdated assumptions; their interests may actually align.[296] If the effect of foreign investment on family farms is and would be minimal to nonexistent, the laws need to be changed.[297]

Economically, the efficiency of alien land restrictions has been questioned repeatedly.[298] One author, David Laband, found that the staying power of alien restrictions were proof of the strength of farming lobbyists.[299] He concluded such laws to be accomplished facts of "questionable economic efficiency," remarking that it "doesn't cost very much to buy votes against foreigners, either directly, or indirectly, by putting the fear of foreigners into the minds of the voting public."[300]

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291. Wunderlich, *supra* note 19, at 363–64.

292. INVESTMENT COMPLIANCE REPORT, *supra* note 281, at 192.

293. *See* Wunderlich, *supra* note 19, at 347 (posing question on equity and patriotism).

294. Duffy, *2011 Farmland Value Survey*, *supra* note 17, at 2.

295. *See, e.g.*, James Bates & Karl Schoenberger, Chastened Yen Heads for Home: Japan's Big U.S. Investment Wave has Ebbed, in Wake of Changed Economic Times. Investors are Retrenching, Raising Fears that the American Economy May Suffer, L.A. TIMES, Apr. 03, 1992, *available at* http://articles.latimes.com/1992-04-03/news/mn-252_1_japanese-investor.

296. *See* Harris, *supra* note 260, at 943–44 (indicating that severing productive and speculative interests in land from existing in one owner is not necessarily incompatible with family farming since the family farmer will often continue to manage the land, and implying that like anything, its value is relative to the precise circumstances of a given arrangement).

297. *Id.* at 944–45.

298. *See* David N. Laband, *Restriction of Farm Ownership as Rent-Seeking Behavior: Family Farmers Have It Their Way*, 43 AM. J. OF ECON. & SOC. 179, 179 (1984) ("To an economist such indignation and regulation appears at first, and even second, glance to be 'irrational.'").

299. *Id.* at 188.

300. *Id.* at 184, 188.

A nonresident alien cannot individually own farmland, but this provides a false (and possibly insincere) sense of accomplishment. The land, at the heart of the debate, will be protected from nonresident aliens and alien controlled business entities if they wish to farm, but if they want to use the land as a public park or not use it at all (yes, this seems to be at odds with simultaneously claiming that the law is in place to prevent absentee ownership, for example, the idle and wasteful use of viable land), or for that matter, develop it into a parking lot, that is allowed.[301] Nonresident aliens and controlled entities cannot win. Either alien investors will be depicted as absentee owners that neglect farmland, or if they do use the land, they may be depicted as too present, overusing the land.[302] Others may avoid foreign investors because they are perceived as only looking at farmland as a distant investment, not consuming any products themselves. Meanwhile, if they do use the commodities it produces critics will claim they are abducting the American food supply for their own country.

The harms of nonresident investment seem to be arbitrarily accepted when the exact same farmland is employed for experimental farming purposes, or used for "the primary purpose of testing, developing, or producing seeds or plants for sale or resale to farmers as seed stock."[303] The latter is an expressive statement on just what the purpose of the statute is. Foreign owned farmland can produce seeds and plants, and can even be the source of seed stock for *valid* farmers, yet if the farmland was simply farmed—harms lurk.[304] At least Iowa has not dropped all pretense of uniform treatment and made a more direct statement, as in North Dakota where nonresident aliens are riskier investors unless, of course, they are Canadian.[305]

There is an obvious disconnect. Addressing the same concerns with a neutral and reformed land use law would correct not only any absentee nonresident alien's conduct, but the majority citizen shareholder's conduct who could behave just as poorly; all the while the nonresident alien business owner is relegated by law to a minority shareholder position. The nonresident alien's conceptual negligence would be captive to any citizen's actual negligence. The fear of

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301. IOWA CODE §§ 9H.4(1)(d), 9I.3(3)(e) (2011); *see also* Anthony Schutz, *Nebraska's Corporate-Farming Law and Discriminatory Effects Under the Dormant Commerce Clause*, 88 NEB. L. REV. 50, 56 n.18 (2009) (remarking that corporate farming law exception for immediate nonfarming use presumably would allow land to be used as park).

302. *See* Harris, *supra* note 260, at 943 (explaining how a nonresident alien owner could contract with a farmer lessee to alleviate *his* concerns that the *farmer* would neglect or overuse the land and diminish land value).

303. IOWA CODE §§ 9I.3(3)(d)(1)–(2) (2011).

304. *See id.* (providing rules for research and experimental activities on farmland).

305. *See* N.D. CENT. CODE § 47-10.1-02 (West Supp. 2011) (stating an alien cannot acquire an interest in agricultural land, but excludes Canadians from being considered aliens).

an alien controlling a business majority seems better addressed not through alien land restrictions, but provisions analogous to farming corporation minority shareholder protections like those found in North Dakota's corporate farming law and easily re-fitted.[306]

While maintaining a desired farm structure is a valid end, businesses with some amount of foreign ownership already must comply with current corporate farming law, which requires all members to be natural persons, avoiding the problem of shell companies within shell companies, and limits non-farming profit and membership number.[307] The percentage of foreign ownership allowed for a business entity should only be regulated to the extent that a business may simultaneously comply with any relevant corporate farming laws on active engagement.[308] Such requirements should be interpreted to allow investors to be involved so long as they are meaningfully engaged as landowners. Anything further is not regulating a new element, only "foreignness," and is redundant, and ultimately distracting.

Kathryn Benz makes the point in the corporate farming context that given that most large corporate farms are, in fact, family-owned, the problem was not the use of limited liability entities, but agricultural aggregation "regardless of ownership."[309] Similarly, while discussing the farm-belt states, just as quickly as author James Mason, Jr. claims that regulating externalities (consequences affecting persons not party to the transaction) may be the only real justification possible for alien ownership laws he dispels that sentiment and states, "[e]xternalities can occur, however, with domestic owners as easily as with foreign owners. A more effective way to prevent" them is to offer a series of sticks and carrots for "desired land use patterns."[310] Echoing the calls for reform in the corporate farming law context, alien land laws justified in this manner do not touch on the "un-

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306. N.D. CENT. CODE §§ 10-06.1-26, 10-06.1-27 (West 2012) (stating protections of minority shareholders).

307. IOWA CODE §§ 9H.1(3), .1(8)(c); *see* Schutz, *Post-Jones World*, *supra* note 28, at 112 (remarking that Iowa's income from farming requirement seems to be based on a desire to limit nonfarmer ownership).

308. This would likely necessitate a new interpretation and discussion regarding what could constitute active engagement for a nonresident alien investor, but this should be seen as an opportunity, not a retreat. It is also unclear if this re-evaluation would be constitutionally required under the dormant Commerce Clause for nonresident alien investors to have some avenue to be able to comply with any active engagement requirement.

309. Benz, *supra* note 40, at 798–99, 829 (citing Robert A. Hoppe & Penni Korb, *Large and Small Farms: Trends and Characteristics*, *in* STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS: 2004 FAMILY FARM REPORTS 5, 11, 16 (David E. Banker & James M. MacDonalds eds., 2005), *available at* http://www.ers.usda.gov/media/866515/aib797c_002.pdf).

310. Mason, Jr., *supra* note 79, at 480.

derlying problem."[311] Such laws are distractions and Mason concludes that "no economic rationale exists for the majority of alien land regulations in place."[312] Minnesota, for example, includes specific conservation provisions in its corporate farming law, and there is no reason to think a general land use law encapsulating both limited liability entities and foreign investors could not incorporate such measures in a streamlined fashion.[313]

The Iowa legislature has discretion to solve a problem one step at a time, but in light of the ongoing trend of increasing nonresident ownership, singling out and restricting foreign landownership is a misstep, and in light of trends in how citizens are treated, an unequal and outlying treatment.[314] Absentee landownership is never preferred, but with the increased percentage of nonresident owners of any stripe, absentee landowners are more likely to be viewed as a distinct group needing to be understood with outreach rather than parasites needing to be blindly restricted.[315] Present need for absentee landowner data sounds a familiar echo to the call for more data regarding nonresident alien landowners.[316] The difference is that reaction to foreign investors was reflexive restriction, while *citizen* absentee landowners are held out as a demographic of significant opportunity in terms of conservation enrollment.[317] Instead of a wall of rhetoric, non-

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311. *Id.*

312. *Id.*

313. *See* MINN. STAT. ANN. § 500.24, subdiv. 3b (West Supp. 2012).

314. *See* DUFFY, FARMLAND OWNERSHIP, *supra* note 263, at 12 tbl.4.4.

315. *See About Us*, CONSERVATION CONNECT, CENTER FOR ABSENTEE LANDOWNERS, http://www.absenteelandowners.org/about (last updated Nov. 23, 2010). Conservation Connect is a Carroll, Iowa based nonprofit with the

> goal of developing outreach to absentee landowners about conservation programs[,] . . . to inform and assist absentee landowners with understanding and implementing conservation programs on their land[,] . . . [and to] act[] as an advocate for more than 40 percent of our nation's landowners—those who do not operate the agricultural land they own.

Id.; *see also* Marley Beem, *Absentee Rural Land Ownership*, OKLA. STATE UNIV. (2010), http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Version-11756/AGEC-966web.pdf (offering advice and guidance for absentee landowners to succeed).

316. *See* Peggy Petrzelka, Conservation & the Absentee Landowner: Attitudes & Behavior (Feb. 25, 2011) (on file with author) (noting that little is known of today's landowners, even less about absentee landowners, including their motivation to conserve and how to effectively reach them).

317. *See id.* (implying outreach is the solution of least resistance, notably that absentee landowners represent a significant opportunity to expand farm acreage enrolled in conservation programs); *see also* Rick Tafoya et al., *Absentee Landowners & Conservation*, CENTER FOR ABSENTEE LANDOWNERS, http://www.law.drake.edu/academics/agLaw/docs/ruralLandstomBuman.pdf (last visited Jan. 19, 2013) (providing information from absentee landowner survey and implying opportunities for conservation).

resident citizen absentee landowners are viewed as being capable of engaged farmland investment.[318] This is partially due to increased awareness that bad land stewardship is not just bad for the local community but bad for any absentee landowner's business, period.[319] Problems that exist in this area[320] transcend using a determination of owner citizenship status as a remedy, and isolating foreign owners as a proxy to deal with any of these problems is a lesson in political misdirection.

A predominantly foreign-owned corporation or individual that violates a conservation mandate or neglects their land should be under the same restrictions as a domestic corporation or individual, and regulations affecting the latter would naturally constrain the other. There is no justification for segregating and regulating based on citizenship status rather than including foreign investors in a streamlined land use statute.[321] Ends can be met with nondiscriminatory and more effective means.[322] This could include such things as adopting an application and permit structure that grants nonresident investors permission to invest on a case-by-case basis.[323]

Ultimately, the legislature could simply repeal the restrictions, impose current corporate farming law maximum acreage amounts on foreign investors (individual or otherwise), and do nothing. After all, farm income is still rising, up 28% from 2010 in part due to, yes, foreign exports.[324] What better economic

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318. *See* Petrzelka, *supra* note 315 (suggesting an absentee landowner's lack of conservation involvement in land stems from a lack of knowledge, and while they are not as actively involved as resident owners, are equally concerned with environmental and community impact).

319. *See generally* Michael Duffy, Director, Iowa State University Beginning Farmer Center, Presentation at Agricultural Outlook Forum: Land Values, Conservation, and the Absentee Landowner (Feb. 25, 2011) (illustrating that negatives typically associated with absentee landownership make no business sense to maintain and hurt any landowner and farmer).

320. *See id.* (stating that the loss of land productivity is factored into rent and not land price).

321. *See, e.g.*, Raasch, *supra* note 258 ("'We don't focus on where someone is from, in state or out of state,' said Maine State Forester Douglas Denico. 'We look at how they treat the forest.'").

322. *See* Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV. 1205, 1207 (1991) (commenting that growth management regulations aim to slow or stop undesired changes on a community's character).

323. *See* 125 CONG. REC. S799 (daily ed. Jan. 23, 1979) (outlining proposed federal legislation from 1979 that would have provided an application and permitting structure for foreign farmland investors, including case-by-case exemptions from compliance with restrictions based on a determination that the foreign investment is in the best interests of the United States).

324. Press Release, USDA, Statement from Agriculture Secretary Tom Vilsack on Strong 2011 Farm Income Forecast, Continued Strength of American Agriculture (Nov. 29, 2011), *available at* http://www.usda.gov/wps/portal/usda/usdahome?contentid=2011/11/0495.xml.

poetry then to have foreign investors invest and cheer on the exportation of agricultural products to their own countries. In one Iowa survey from 2007, only a single instance of non-U.S. citizen ownership of farmland was noted in Iowa, bringing the level of Iowa farmland owned by nonresident aliens to 0.1%.[325] As one author points out, in a one-sided investment with a nonresident foreign investor, a state cannot seriously assert that it could not simply reclaim its land if a threat truly emerged.[326] With concurrent state and federal reporting laws and a strong generally applicable land use law, Iowa can cautiously and confidently invite, monitor, and manage foreign investment in farmland and focus on positive advances to land use legislation. Foreign capital could substitute for strained government subsidies, and help cover fees to increase reporting enforcement. Instead of a negative, states should seek out new and creative partnerships and arrangements with foreign investors. Young farmers, for example, could be enticed to remain farmers with the help of advantageous partnerships with foreign investors. Young farmers may provide a counterweight by partnering with foreign investors in their early years when they may be less capable of absorbing risk and acquiring credit but have the necessary labor, or developing programs that induce foreign investors to offer preferred lease arrangements with new farmers.[327]

V. CONCLUSION

Instead of approaching foreign investors as fixed and static individuals, Iowa should accept all comers, but tailor laws affecting nonresident alien investors and entities to meet standards based on business conduct harmonized with the stewardship and values Iowans expect. Foreign individuals can be regulated alongside citizens with laws targeting conduct, not the citizenship status of the owner. Alien business entities already have to dually comply with alien land ownership restrictions and corporate farming laws. These restrictions are overkill reactions to a problem that never existed, and it is time they reflect current values and data.

These laws have been withered by the Equal Protection Clause, and remain primarily as symbolic laws that distract from developing real solutions to issues that transcend the citizenship status of land owners.[328] They carry more

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325. DUFFY, FARMLAND OWNERSHIP, *supra* note 263, at 12.

326. Mason, Jr., *supra* note 79, at 481–82.

327. *See* Harris, *supra* note 260, at 944 (suggesting foreign investors and young farmers may discover and develop a mutually beneficial relationship).

328. *See* Wilson, *Policy Considerations*, *supra* note 3, at 146. The author notes constitutional restrictions have forced alien land laws to generally only apply to nonresident aliens. *Id.* at 137–38.

historical baggage than prospective benefit, existing today simply because *they might as well*. In light of the Eighth Circuit's corporate farming jurisprudence, they may justifiably run afoul of the dormant Commerce Clause. A symbolic law calls for an equally symbolic reform, and recent calls for such a reform in the corporate farming context provide the opportunity to fulfill the promise of AFIDA's call to legislate rationally, not emotionally, by looking at the consistently underwhelming data that exists and legislating from a clear head. This is not a call for complete removal of regulation, but better regulation under the auspices of concurrent national and state based reporting laws already in place; there will be no surprise, sneak infiltration of agricultural land. Like with corporate farming calls to alternate action, protecting and promoting the family farm is more proactively done by marketing, education, promotion of sustainable agriculture, and positive enforcement of preexisting laws than through quick-fix regulations centered on straw men.[329]

329. *See* Chostner, *supra* note 230, at 193–95 (suggesting alternatives to corporate farming bans).