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Alien Ownership of South Dakota Farmland: A Menace to the Family Farm?

by

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ALIEN OWNERSHIP OF SOUTH DAKOTA FARMLAND: A MENACE TO THE FAMILY FARM?

Changing economic conditions have increased the attractiveness of U.S. real property to investors throughout the world. This trend has produced the fear that major industries in the United States may fall under foreign control with possible adverse effects for the nation. These concerns have not gone unnoticed in the agricultural Midwest where the health of the family farm is always at issue. This comment analyzes the problem of foreign owned farmland in South Dakota and possible legislative responses.

INTRODUCTION

> Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms, and the grass will grow in the streets of every city in the country.[1]

No one can deny that agriculture is still a vital industry in the United States today. The economies of the Midwest and Plains States are especially dependent on agriculture and therefore these states are sensitive to the problems facing family farmers and agriculture in general. South Dakota is the home of 46,500 family farms and ranches covering forty-five million acres of land.[2] Farming and ranching are the largest industries of the state and employ the largest number of people.[3] But the magnitude of family farming in South Dakota does not reflect the mounting adversities that challenge its future existence.[4] Increasingly expensive land, high interest rates, depressed commodities markets and dry weather have chipped away at this rural foundation. The prospect of huge corporate operations squeezing the family farmer out of the market led many midwestern states to prohibit corporate ownership of agricultural land.[5] The South Dakota legislature has enacted the Family Farm Act of 1974 with this objective in mind.[6] More recently the emergence of Japan and certain oil producing nations as worldwide economic powers has provoked the fear that they may use some of that power to dominate

1. William Jennings Bryan, Democratic National Convention, Chicago, July 8, 1896.

2. BUSINESS RESEARCH BUREAU, USD SCHOOL OF BUSINESS, BULL. NO. 107, SOUTH DAKOTA ECONOMICS AND BUSINESS ABSTRACT 124 (1972). There were 83,000 farms in South Dakota in 1930.

3. *Id.* at 59.

4. *See* Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D.L. REV. 475 (1975).

5. *See* Comment, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?* 20 S.D.L. REV. 575 (1975) [hereinafter cited as Comment].

6. S.D.C.L. ch. 47-9A (Supp. 1977).

farm production in the United States.[7] Some commentators fear that control of United States farmland by foreign nationals[8] could eclipse American ownership in a few decades.[9] Increasing foreign direct investment[10] has also been characterized as a threat to our national sovereignty.[11] Although these allegations may be speculative, there is no doubt that foreign direct investment in the United States has been climbing at unprecedented rates.[12] Its potential impact on the family farm, its values and way of life, is something to be concerned about. Dick Clark, United States Senator from Iowa, echos these fears. "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."[13]

The issues dealt with in this comment are threefold. The first issue is the amount of South Dakota farmland that is owned or controlled by non-resident aliens and its impact on agriculture in the state. The second issue is the legal and constitutional constraints that the South Dakota legislature must consider if it decides to restrict

7. F. MORRISON & K. KRAUSE, STATE & FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION, UNITED STATES DEP'T OF AGRIC. ECON. REP. NO. 284 2 (1975).

8. The terms alien, foreigner, foreign national, and non-resident alien are synonymous in this comment unless otherwise indicated. All four denote a person who is neither a resident nor a citizen of the United States or its territories.

9. SATURDAY REVIEW, Oct. 18, 1977, at 22.

10. "So-called foreign direct investments in the United States include all foreign equity interests in those American corporations or enterprises which are controlled by a person or group of persons (corporate or natural) domiciled in a foreign country." U.S. DEP'T OF COMMERCE, FOREIGN INVESTMENTS IN THE UNITED STATES 10 (1937). The percentage of stock ownership at which a non-resident alien can be said to control a United States corporation or enterprise is the subject of some disagreement. Prior to 1974 the Dep't of Commerce disregarded any equity interest below twenty-five percent. Meanwhile, the Internal Revenue Service had been computing statistics based on fifty percent alien ownership. *See House Hearings, infra* note 13, at 471. Many felt that these percentages were too high and underestimated the amount of foreign control. Acknowledging this criticism, the Dep't of Commerce has since computed its statistics using a ten percent equity threshold. BENCHMARK SURVEY, *infra* note 12, at 5.

11. *Foreign Investment Legislation: Hearings on S. 329, S. 995 & S. 1303 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce,* 94th Cong., 1st Sess. 142 (1975) (statement of Benjamin J. Cohen) [hereinafter cited as *Senate Hearings*].

12. U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS: FOREIGN INVESTMENT IN THE UNITED STATES (April 1976) [hereinafter cited as BENCHMARK SURVEY]. In response to increasing anxiety toward all forms of foreign investment in the United States, Congress passed the Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (codified at 15 U.S.C. § 78(b) (1976)). It directed the Dep't of Commerce and the Dep't of Treasury to study direct and portfolio investment in the United States and to issue a report of their findings. The Commerce report, herein cited as the BENCHMARK SURVEY, is the cornerstone of our present knowledge. Its methodology included some 7,200 questionnaires that were returned by manufacturing, commercial and agricultural enterprises either owned or controlled by non-resident aliens.

13. *Foreign Investment in the United States: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs,* 93rd Cong., 2d Sess. 77 (1974) (statement of Senator Dick Clark) [hereinafter cited as *House Hearings*].

foreign ownership of farmland. The third issue is whether restricting foreign acquisition of farmland is sound public policy, and if so, whether state legislation is the best vehicle for implementing that policy.

EXTENT AND IMPACT OF FOREIGN OWNED FARMLAND

At the present time there is no comprehensive information available concerning foreign ownership of South Dakota farmland.[14] Furthermore, reliable data is difficult to obtain because land titles are registered at the county level[15] and do not necessarily disclose the true ownership or control of the property.[16] In fact, South Dakota does not require the registration of a conveyance of land if the grantee does not desire to do so.[17] Given the absence of any data, an ad hoc survey of foreign land ownership in South Dakota was undertaken by the author with the help of Dr. C. A. Kent of the University of South Dakota School of Business.[18] Due to the various means through which land can be owned and controlled in the United States and due to the nature and purpose of land recordation systems, the results of any attempt to discover who owns and controls the agricultural land in South Dakota or the United States at best must be viewed as incomplete, and at worst, as erroneous. With this in mind, a threshold discussion of foreign investment in the United States in general, as well as foreign direct investment in agricultural land, will provide a background for a clearer analysis of the situation in South Dakota.

National and State Statistics

In 1972 the level of foreign direct investment[19] in the United States reached 14.8 billion dollars, increasing at an annual rate of seven percent since 1950.[20] During the following four years foreign direct investment increased at annual rates of twenty-three, twenty-three, twenty and fourteen percent to stand at 30.2 billion dollars in 1976.[21] These dramatic increases are attributed to lower inflation

14. 3 BENCHMARK SURVEY, *supra* note 12, at A-209. Although this survey did not find any alien owned farmland in South Dakota it did report three Canadian business enterprises in the state: The Mitchell Republic (newspaper) in Mitchell; Pure Plant Foods, Ltd. (fertilizer) in Sioux Falls; and Miracle Span Corp. (steel) in Watertown.

15. S.D.C.L. § 43-28-1 (1967).

16. *See* S.D.C.L. § 48-4-3 (1967). This statute allows partnerships to hold land in their partnership name with no requirement of disclosing the individual partners or their nationality. *See also* 8 BENCHMARK SURVEY, *supra* note 12, at L-141.

17. S.D.C.L. § 43-28-1 (1967). *See generally* Des Moines Register, Sept. 29, 1977, at 1, col. 5.

18. *See* note 47 *infra*.

19. *See* note 10 *supra*.

20. Lupo & Fouch, *Foreign Direct Investment in the U.S. in 1975*, 56 SURVEY OF CURRENT BUSINESS 34 (August 1976) [hereinafter cited as Lupo].

21. Mantel, *Foreign Direct Investment in the U.S., 1976*, 57 SURVEY OF CURRENT BUSINESS 27 (Oct. 1977). The following table gives the basic statistics of foreign direct investment in the United States by country since 1962. The total

rates in the United States relative to other industrialized nations, continued devaluations of the U.S. dollar and the traditional stability of our political and social system.[22] As a comparison, U. S. direct investment abroad in 1972 was 89.8 billion dollars.[23] By 1976 it had climbed to 137.2 billion dollars, an average annual increase of twelve percent.[24] The foreign investors buying property in the United States are predominately from Europe and Canada.[25] Likewise, it is these areas of the world where the majority of the U. S. investment interests are located.[26]

These national statistics indicate that foreigners are investing primarily in property other than farmland,[27] although there have been some agricultural land purchases. The Benchmark Survey of Foreign Investment undertaken by the U. S. Department of Commerce pursuant to the Foreign Investment Study Act of 1974,[28]

for each year includes the percentage increase from the previous year. In addition the proportional share that each country contributes to the total is included.

in millions of dollars

	1962	%	1972	%	1973	%	1974	%	1975	%	1976	%
Total	7,612		14,868	95	18,284	23	22,421	23	26,740	20	30,182	14
Canada	2,064	27	3,466	23	4,044	22	4,930	22	5,146	19	5,859	19
Europe	5,247	69	11,087	75	12,054	68	14,627	65	16,533	62	19,916	66
Japan					259	2	504	2	858	3	890	3
Other	304	4	314	2	1,477	8	2,362	11	4,204	16	3,518	12

22. Lupo, *supra* note 20, at 36.

23. Whichard, *U.S. Direct Investment Abroad in 1976*, 57 SURVEY OF CURRENT BUSINESS 42 (August 1977).

24. *Id.* at 42. The following table gives the basic statistics of U.S. direct investment abroad since 1971. The total for each year includes the percentage increase from the previous year. In addition the proportional share that each country contributes to the total is included.

	1971	%	1972	%	1973	%	1974	%	1975	%	1976	%
Total	82,760		89,878	8	101,313	13	110,174	9	124,212	11	137,244	11
Canada	21,818	26	22,985	25	25,541	22	28,404	25	31,038	24	33,927	24
Europe	28,654	34	31,696	34	38,255	37	44,782	40	49,533	40	55,906	41
Other	6,478	8	7,378	8	8,417	8	9,839	9	10,352	8	11,316	9
Dev. Countries	20,719	25	22,274	25	22,904	24	19,812	18	26,222	20	29,050	21
Unallocated	5,091	7	5,545	7	6,196	6	7,335	7	7,067	5	7,044	5

25. Lupo, *supra* note 20, at 36.

26. Whichard and Freidlin, *U.S. Direct Investment Abroad in 1975*, 56 SURVEY OF CURRENT BUSINESS 34 (August 1976).

27. Lupo, *supra* note 20, at 36.

28. *See* note 12 *supra*.

reports that foreigners own four and nine tenths million acres of real estate and lease another thirty million acres in the United States.[29] It should be noted, however, that a significant proportion of these leases secure offshore mineral rights. Of the land owned by foreigners only twenty-two percent, or one million acres, is held by enterprises that are engaged in farming. This represents only one tenth of one percent of the one and one-tenth billion acres of U.S. land devoted to agriculture. Moreover, ninety percent of foreign controlled farmland is owned by Canadians and Europeans and is predominately located in the Far West, the South East and the South West.[30]

There is also information available on the state level that seems to parallel these national statistics. For example, Iowa and Nebraska have recently adopted statutes requiring the disclosure of foreign interests in farmland.[31] The Iowa law provides that all corporations and non-resident aliens who own or lease agricultural land must file a report annually with the Secretary of State. Nebraska requires that each corporate owner of agricultural land must disclose the percentage of members of the board of directors who are aliens, all aliens who own ten or more percent of the voting stock and all executive officers and managers who are aliens. The fact that the Nebraska statute does not require alien individuals to disclose their property interests is not a problem, in theory, because Nebraska severely restricts alien individuals from holding land.[32] It is important to realize, however, that the nature of land ownership in the United States makes it very difficult for these statutes to operate effectively and may distort any conclusion based thereon. The 1977 reports from Iowa reveal that non-resident aliens own or lease 6,780 acres of Iowa farmland from a total of thirty-four million acres under production.[33] This is an increase of fourteen percent from the amount owned in the previous year.[34] Most investors are from Europe and are predominately German citizens. Of the 3,092 corporate farms filing reports in Iowa, thirteen indicate that foreigners own five or more percent of their voting stock; an increase of two since 1976.[35] The statistics from

29. 1 BENCHMARK SURVEY, *supra* note 12, at 184.

30. *Id.* at 184.

31. IOWA CODE ANN. § 567.9 (West Supp. 1977); NEB. REV. STAT. §§ 76-1501 to 1506 (Reissue 1976).

32. NEB. REV. STAT. §§ 76-402, 414 (Reissue 1976).

33. This information was made available through the office of the Secretary of State of Iowa [hereinafter cited as *1976-1977 Iowa Reports*; copy on file at S.D.L. REV.].

34. *Id.* It is difficult to know whether this increase is due to new acquisitions of land or the accounting of previously undisclosed owners. There were twenty-three non-resident aliens who reported farmland holdings in 1977 compared to eighteen in 1976. The following table shows the nationality of each non-resident alien and the amount of land owned in 1976. The nationality of each person was not made available in the 1977 reports.

35. *Id.*

Nebraska are less impressive. In 1976 one corporate farming operation from a total of 2,399 corporate farms filing reports stated that it had a non-resident alien shareholder controlling ten or more percent of its voting stock.[36]

Two other surveys of interest, which were done at the request of the Department of Commerce and included in the Benchmark Survey,[37] investigate the extent of foreign land holdings in Colorado[38] and Hawaii.[39] The Colorado study refers to an Arab purchase of fifteen percent interest in the Arizona-Colorado Land and Cattle Company, which has sizable holdings of western lands.[40] The author also mentions Arab control of eight thousand acres of land in western Colorado, a fifty thousand head cattle feedlot owned by Japanese interests and a ten thousand acre acquisition by an Argentine investor.[41] He concludes that there has been a reasonable number of farmland purchases by non-resident aliens in Colorado and forecasts increases.[42] The survey of Hawaiian real estate discloses a concentration of foreign investment somewhat higher than what apparently

1976 Iowa Report

Nationality	No. of Acres	Nationality	No. of Acres
Guatemala	229	Germany	173
Guatemala	239	Germany	173
Italy	320	Germany	173
Austria	60	Germany	530
Canada	160	Germany	611
Netherlands	120	Germany	610
Germany	235	Germany	442
Germany	600	Germany	472
Germany	622	Germany	202
		TOTAL	5,971

36. PRIBBENO, JOHNSON & BAKER, FARM CORPORATIONS IN NEBRASKA Neb. Dep't of Agric. Econ. Rep. No. 78, 11 & 13 (1977). As of the time of printing, information from the 1977 reports was not available. The office of the Secretary of State of Nebraska stated that the delay was caused by the failure of a substantial number of corporations to file reports before the March deadline.

37. 8 BENCHMARK SURVEY, *supra* note 12.

38. *Id.* at L-97.

39. *Id.* at L-72.

40. *Id.* at L-103. This corporation reportedly owns 155,000 acres of ranch land in Colorado.

41. *Id.* at L-103-04. The author's information is based upon personal visits and phone calls with key people in Colorado and a 1975 survey done by students in a real estate finance class at Colorado State University.

42. *Id.* at L-104.

exists in Colorado, Iowa and Nebraska.[43] The author states that Hawaii's unique location and character as an international tourist center has contributed to the growth of foreign direct investment. Foreigners primarily have purchased commercial property and, as of March, 1975, owned thirty-three percent of the hotel units along Waikiki Beach.[44] Moreover, one corporation dominated by foreign shareholders owns forty-two thousand acres of farmland and controls a total of eighty-one thousand acres on the Island of Hawaii. About one-half of this land is devoted to sugar cane and accounted for fourteen percent of the total amount of land in cane in Hawaii in 1974.[45] There is also a joint Japanese/American venture located in Hawaii that processes tropical fruit produced on five hundred acres of leased land.[46]

This summary of available information supports the conclusion that foreign ownership of agricultural land is very small nationally. Similarly, the amount of land controlled by non-resident aliens in Iowa, Nebraska, and Colorado has not reached large proportions. Investment may be more intense in Hawaii. Those foreigners who do have land holdings are predominantly European. There are some Arab and Japanese interests in Colorado, and the Japanese are the dominant investors in Hawaii.

South Dakota Statistics

After reviewing the amount of foreign controlled farmland in our neighboring states the status of land ownership in South Dakota should not be surprising. The survey taken by the author and Dr. C. A. Kent shows that approximately twenty-eight hundred acres of agricultural land is owned by non-resident aliens with a total value of 662,000 dollars.[47] All the owners are natural persons. The land is located in six different counties scattered around the state. There has been no reported change in its use. The citizenship of the owners is generally European, which follows the national trends. Japanese financing, however, is rumored to be behind a large ranching operation in Todd County. The rumor has not been verified. The date and type of conveyance in each county was not disclosed through the survey. One questionnaire, however, reports that the foreign owned

43. *Id.* at L-72,78. Foreign owned real estate in Hawaii is valued at 517 million dollars, representing two percent of the market value of all land and improvements in the state.

44. *Id.* at L-78.

45. *Id.* at L-79. The enterprise discussed is the Theo. Davies Co. acquired by Japanese interests for fifty-four million dollars.

46. *Id.*

47. In the fall of 1977 a questionnaire was sent to the director of equalization of each county in the state. Sixty-three of the sixty-five questionnaires sent were returned. The directors of equalization were thought to be the most likely persons to have knowledge of the identity of the owners of the farmland located in each county. The directors were asked to state the amount of land owned by non-resident aliens in their county, the nationality of each alien owner, and the value and the use of the land. The following table summarizes the results. The author wishes to express his gratitude for the assistance of Dr. Kent.

land in Walworth County was owned by citizens who later moved to Canada and retained title to the land while renouncing their United States citizenship. Furthermore, it would not be overly speculative to assume that some of the land held by non-resident aliens was inherited from their relatives who had immigrated to South Dakota to live.[48] In any event, nothing indicates a recent increase in land acquisitions by foreign investors.

Considering the forty-five million acres of land devoted to agriculture in South Dakota, the amount that is owned by non-resident aliens is small. The statistics could be misleading, however, if there is a substantial number of investors who have masked their transactions with partnerships or trusts. The directors of equalization when filling out the survey questionnaire invariably hedged their reply with the words "to the best of my knowledge." On the other hand, South Dakota, by statute, allows non-resident aliens to own land,[49] and the South Dakota Constitution protects the property rights of resident aliens.[50] Therefore, there would seem to be little to gain from clandestine transactions except, perhaps, the maintenance of a low profile. The small amount of non-resident alien real property interests in Iowa and Nebraska lends the strongest support to the credibility of the survey.

Impact of Foreign Owned Farmland

The basic information gained through the ad hoc survey sheds little light on the economic and social impact that foreign interests in South Dakota farmland may have on the surrounding farms and communities. Moreover, the survey did not attempt to identify the characteristics of the foreign owners or reasons that motivated their purchases. Perhaps the small amount of land involved would hinder any generalizations even if such information were available. In any

County	No. of acres	Mkt. value	Nationality	Land use
Clark	800	280,000	German	Agriculture
Edmunds	310	37,400	Czech	Agriculture
Fall River	23	60,000	Brazilian	Commercial
Miner	668	100,000	Norwegian	Agriculture
Turner	200	56,000	Swedish	Agriculture
Walworth	800	128,000	Canadian	Agriculture
TOTAL	2801	661,900		

48. *Cf.* S.D.C.L. § 29-1-17 (1967) (permits aliens to inherit the same as citizens).
49. S.D.C.L. § 43-2-9 (1967).
50. S.D. CONST. art. 6, § 14.

case, there have been some studies in other states focusing on these questions and what has been found to be true there probably is also true in South Dakota. One such study was based on a 1975 survey of Iowa real estate brokers.[51] It showed that most investors are wealthy Europeans who wish to place their money in something that will retain its value and give a modest return.[52] Farmland in the investors' home countries is typically extremely expensive and rarely sold.[53] These foreigners see the United States as the last stronghold of capitalism and relatively unrestricted private property.[54] Consequently, they look for long term investment in land rather than speculative gain. Moreover, no desire has been perceived on the part of investors to secure United States agricultural products for foreign consumption.[55]

In most cases the Iowa land continued to be farmed in the manner of its previous owner. It was usually leased to local grain farmers either for cash or share rent, with one reported case of custom farming.[56] Similarly, the new owners of the Hawaiian sugar plantation[57] announced high priority for continued sugar production and plans for substantial investment for that purpose. This news led the local residents to disregard many fears that they may have once associated with alien owners.[58]

Although similar agricultural methods and usage has kept foreign investors inconspicuous, it does not follow that investors have had no impact. On the positive side, investment helps the United States balance of trade[59] and capital expenditures for improvements tend to increase local income.[60] On the other hand, there is some evidence that foreign investment may drive up land prices. Real estate experts from Hawaii note the willingness of foreigners to pay relatively high prices for real estate. One example is the stock of the Hawaiian sugar plantation, which was purchased by foreign interests at prices exceeding its all-time high on the Honolulu Stock Exchange.[61] The Iowa study also mentions the desire of foreigners to purchase high quality farmland and willingness to pay premium prices. It concludes that the prices paid in some instances appear to have increased the expectations of other sellers in the same area. A

51. 8 BENCHMARK SURVEY, *supra* note 12, at L-29.
52. *Id.* at L-47.
53. *Id.* at L-20. German pasture and hay land commands a price of $3,200, while better farmland is valued at $6,500 per acre.
54. *Id.* at L-107.
55. *Id.* at L-47.
56. *Id.* at L-44.
57. *See* note 45, *supra* and accompanying text.
58. 8 BENCHMARK SURVEY, *supra* note 12, at L-79.
59. 1 BENCHMARK SURVEY, *supra* note 12, at 220.
60. 8 BENCHMARK SURVEY, *supra* note 12, at L-91. Foreign investors are estimated to have spent 141 million dollars developing Hawaiian commercial property. These improvements have generated 892,000 dollars worth of income to Hawaiian households for each million dollars spent.
61. *Id.* at L-81.

significant influence on land values beyond the local area, however, was not documented.[62]

Besides increasing land values, residents fear that foreign ownership may reduce local political control.[63] Furthermore, Hawaiians complain that investors could destroy the "Hawaiian atmosphere" while Japanese owned hotels, restaurants, and golf courses gobble up a substantial portion of the tourist industry.[64] One writer suggests possible underutilization of the land by investors.[65] With limited exceptions in Hawaii these fears have not materialized, but it is important to recognize the existence of such fears as a reaction to foreign investment.

It is also important to recognize that some local sentiment is favorable, especially where tangible benefits are realized. The joint Japanese/American fruit processing plant in Hawaii met favorable responses because it provided employment in an area vacated by a sugar plantation.[66] Moreover, a survey of Hawaii residents shows that most recognize the importance of foreign investment and believe it should continue to be encouraged.[67] New jobs also resulted through the purchase of seven thousand acres of Iowa farmland by outside interests. The Iowa study suggests that the residents of the locality are more tolerant of other non-resident investors because of this beneficial experience. Residents of German descent in a particular county in Iowa are also though to have welcomed farmland purchases by German nationals.[68]

The local reaction to foreign investors seems to be mixed and mostly influenced by the experience of the local residents. Foreign investors have caused apprehension in the minds of many farmers based on perceptions founded both in fact and fiction. Investors have not tried to alter the use of land and generally maintain a low profile. There is evidence that foreign acquisitions may tend to increase the value expectations of local land vendors. Its influence beyond the locality is not known. Foreign investment has generally been beneficial to the economy of the state of Hawaii. The small amount of purchases in Iowa makes it difficult to render any measurement of its effect on income in that state.

RESTRAINTS ON STATE LEGISLATION

The English common law permitted an alien to take land by purchase[69] and hold it against all but the state, which could divest him of the property through an action known as "inquest of office."[70]

62. *Id.* at L-47.
63. *Id.* at L-172.
64. *Id.* at L-84-89.
65. *Id.* at L-175.
66. *Id.* at L-80.
67. *Id.* at L-84.
68. *Id.* at L-46.
69. 2 W. BLACKSTONE, COMMENTARIES * 249-50.
70. *Id.* * 293.

An alien could not take by inheritance, and land left to an alien heir would pass instead to the next eligible person in line of descent. If none, the land escheated to the state.[71] In the United States each state has traditionally regulated all of the rights of property ownership within its jurisdiction.[72] The states have not hesitated to modify the common law when it was deemed expedient. Consequently, a heterogeneous assortment of restrictions of foreign property rights exists across the country today.[73] A majority of the states permit aliens to own and inherit land the same as citizens.[74] The anti-alien laws that remain were generally enacted during the nineteenth century to disenfranchise certain minority aliens or to discourage investment by English barons.[75] South Dakota is among the states extending national treatment to all aliens. By statute, first adopted by the Dakota Territory in the 1870's, South Dakota law states that, "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state."[76] There is a similar provision securing equal rights to alien heirs.[77]

The recent potential for large scale foreign investment threatens to bring about the abandonment of this one hundred year old open door policy. Three legislative bills[78] introduced in 1976, 1977 and 1978 respectively sought to severely restrict ownership of South Dakota farmland by non-resident aliens. None of the bills has been

71. *Id.* * 249.

72. *See* Sullivan, *Alien Land Laws: A Reevaluation*, 36 TEMP. L. Q. 15, 26 (1962) [hereinafter cited as Sullivan].

73. *Id.* at 17.

74. Twenty states do restrict alien land ownership: ARIZ. REV. STAT. § 33-1201(A) (1974); CONN. GEN. STAT. ANN. § 47-58 (West 1958); GA. CODE ANN. § 79-303 (1973); HAW. REV. STAT. § 206-9 (West 1976); ILL. ANN. STAT. ch. 6, § 2 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 32-1-8-2 (Burns 1977); IOWA CODE ANN. § 567.1 (West Supp. 1977); KY. REV. STAT. § 381.290 (1970); MD. ANN. CODE art. 21, § 14-101 (1973); MINN. STAT. ANN. § 500.221 (West Supp. 1978); MISS. CODE ANN. § 89-1-23 (1972); NEB. REV. STAT. § 76-402 (ReIssue 1976); N.H. REV. STAT. ANN. § 477.20 (1968); N.J. STAT. ANN. § 46:3-18 (West Supp. 1977); OKLA. STAT. ANN. tit. 60, §§ 121, 123 (West 1971); PA. STAT. ANN. tit. 68, § 32 (Purdon Supp. 1977); S.C. CODE, § 27-13-30 (1976); VA. CODE § 55-1 (1974); WIS. STAT. ANN. § 710.01.01 (West 1971); WYO. STAT. § 34-151 (Supp. 1975).

Twelve states impose conditions on alien inheritance rights: CONN. GEN. STAT. ANN. § 45-278 (West Supp. 1978); IOWA CODE ANN. § 567.8 (West Supp. 1977); KAN. STAT. § 59-511 (1976); KY. REV. STAT. §§ 381.300, 330 (1970); MASS. ANN. LAWS ch. 206 § 27B (Michie/Law Co-op 1969); NEB. REV. STAT. § 76-402 (Reissue 1976); N.J. STAT. ANN. § 3A:25-10 (West 1953); N.Y. SURR. CT. PROC. ACT § 2218 (McKinney Supp. 1977); N.C. GEN. STAT. § 64-3 (1975); OKLA. STAT. ANN. tit. 60 § 123 (West 1971); WIS. STAT. ANN. § 863-37 (West 1971); WYO. STAT. § 2-43.1 (Supp. 1975).

75. *See* Sullivan, *supra* note 72, at 31-33.

76. S.D.C.L. § 43-2-9 (1967); DAK. TERR. REV. STAT. CIV. CODE § 170 (2d ed. 1877). South Dakota does discriminate against resident aliens who desire to live in a public housing project. S.D.C.L. § 11-7-60 (1967).

77. S.D.C.L. § 29-1-17 (1967); DAK. TERR. REV. STAT. CIV. CODE § 794 (2d ed. 1877).

78. HB-885, 51st Sess., Leg. Ass., (1976); HB-719, 52nd Sess., Leg. Ass., (1977); and HB-1273, 53rd Sess., Leg. Ass., (1978).

adopted.[79] The 1978 bill,[80] HB-1273, limits the amount of land a nonresident alien individual or corporation or other association can hold to ten acres. Foreigners could foreclose a mortgage on land in excess of ten acres or inherit an excess provided the property would be disposed of within ten years. Resident aliens are excluded from

79. In 1977 HB-719 came within one vote of being adopted by the House, losing on a vote of 35 For and 34 Against. A majority of 36 is required for passage. 1 PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF SOUTH DAKOTA 652 (52nd Sess. 1977).

80. The 1978 Bill reads as follows:

HOUSE BILL NO. 1273

FOR AN ACT ENTITLED, An Act to establish restrictions on the acquisition of title to real property by nonresident aliens and certain corporations and to revise the provisions relating to ownership of property.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. No alien, who is not a resident of this state, of some state or territory of the United States or of the District of Columbia; no corporation or whose stock more than twenty percent is owned or controlled, directly or indirectly, by nonresident aliens, or any unincorporated association whose membership consists of more than twenty percent of nonresident aliens, or by corporations or associations not created or organized under the laws of the United States or some state thereof; and no foreign government shall hereafter acquire lands, or any interest therein, exceeding ten acres, except such as may be acquired by devise or inheritance, and such as may be held as security for indebtedness. The provisions of this section do not apply to citizens, foreign governments or subjects of a foreign country whose right to hold land are secured by treaty.

Section 2. The prohibitions of section 1 of this Act do not apply to lands acquired by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise. However, all lands so acquired shall be disposed of within ten years after acquiring title. Such prohibitions do not apply to any corporation actually engaged in manufacturing in this state. The corporation may hold such lands as may be reasonably necessary in the carrying on of its business. However, all lands so held by such corporation actually engaged in manufacturing in this state shall be disposed of within ten years after it ceases to use them for the purposes of its business.

Section 3. Any nonresident alien who is or becomes a bona fide resident of this state, of some state or territory of the United States or of the District of Columbia, shall have the right to acquire and hold lands in this state upon the same terms as citizens of this state during the continuance of such bona fide residence. However, if such resident alien ceases to be a bona fide resident, he shall have ten years from the time of termination of residency in which to alienate lands in excess of ten acres.

Section 4. All nonresident aliens and all corporations of whose stock, more than twenty percent is owned or controlled, directly or indirectly, by nonresident aliens and all unincorporated associations whose membership consists of more than twenty percent nonresident aliens, or by corporations or associations not created or organized under the laws of the United States or some state thereof, who may acquire real estate in this state by devise or descent shall have ten years from the date of so acquiring such title in which to alienate such lands.

Section 5. All lands acquired or held in violation of sections 1 and 4 of this Act shall be forfeited to the state. The attorney general shall enforce such forfeiture. However, no such forfeiture may be adjudged unless the action to enforce is brought within three years after such property has been acquired or held by such alien or corporation. No title to land is invalid or liable to forfeiture by reason of the alienage of any former owner or person interested therein.

Section 6. That § 43-2-9 be amended to read as follows:

43-2-9. Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state, *except as provided in Section 1 of this Act.*

coverage and may own the same as citizens.[81] There are many legal and constitutional constraints affecting this proposed law, and its chances of surviving constitutional attacks must be considered.

State Constitution

The South Dakota Constitution provides, "No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property."[82] Since Section 1 of HB-1273 does not restrict the property rights of resident aliens it would not violate this constitutional provision. There is, however, no South Dakota Supreme Court decision construing this clause upon which to rely. The provision dates to the Sioux Falls Constitutional Convention of 1883 and was adopted with no debate by the 1885 Convention.[83] Why the delegates limited the protection to resident aliens when by statute[84] the Dakota Territory extended property rights to all persons, alien or citizen, remains a mystery. If the occasion to interpret this provision arose, it could be argued that it grants property rights to resident aliens, excluding non-resident aliens, and thereby voids the South Dakota statute that extends property rights to all aliens.[85] This issue arose in *McConville v. Howell*,[86] in which the Colorado Constitution granted property rights to resident aliens while the Colorado Legislature had also given the same rights to non-resident aliens. Plaintiff, a non-resident alien, sued for specific performance when defendant defaulted on an agreement to purchase plaintiff's mining property. Defendant claimed that the deletion of non-resident aliens from the language of the constitutional provision meant that non-resident aliens were not allowed to hold property notwithstanding the statutory rights granted by the legislature. Therefore, plaintiff could not sell what he did not own. The court rejected this construction, reasoning that "rights guarantied [*sic*] by the constitution cannot be taken away, but other rights may be given to the same or to other persons."[87] Similarly, the more sound construction of the South Dakota provision would be that it prohibits infringement of property rights of resident aliens but leaves the rights of non-resident aliens to other constitutional provisions and the will of the legislature.

The proposed legislation also must not offend the privileges and immunities clause of the South Dakota Constitution.[88] Because this

81. *Cf.* MINN. STAT. ANN. § 500.221 (West Supp. 1978).

82. S.D. CONST. art. 6, § 14. Similar provisions are contained in WYO. CONST. art. 1, § 29 and WIS. CONST. art. 1, § 15.

83. 1 DAKOTA CONSTITUTIONAL CONVENTION DEBATE OF 1885 12, 280 (Doane Robinson ed. 1907).

84. DAK. TERR. REV. STAT. CIV. CODE § 170 (2d ed. 1877).

85. S.D.C.L. § 43-2-9 (1967).

86. 17 F. 104 (D. Colo. 1883).

87. *Id.* at 106.

88. S.D. CONST. art. 6, § 18. "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

provision is limited to citizens and corporations, it excludes aliens from protection by its own terms. This result, however, may be circumvented through the formation of a domestic corporation, which is afforded protection. HB-1273 prohibits any corporation, with twenty percent of its stock owned by non-resident aliens, from owning any land in excess of ten acres.[89] Whether this restriction violates the privileges and immunities clause depends upon the application of the tests involved.

Generally, the state supreme court has applied two tests to determine the validity of a legislative classification. The first test is whether the classification "arbitrarily discriminate[s] between persons in substantially the same situation."[90] The second test is whether the classification "accomplish[es] what is claimed for it," *i.e.*, "that the classification scheme not be palpably and obviously in vain."[91] The first test, requiring that the lines of classification be rationally drawn, was applied to a corporation in *Berens v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*[92] In that case a South Dakota statute required railroads to construct and maintain fences bordering its right of way. Another statute provided that the killing or injuring of livestock by the railroad would be prima facie evidence of negligence. Plaintiff's cattle had wandered on defendant railroad's right of way through a decrepit fence and were struck by a train. Plaintiff, relying on the statutory provision, was successful in a suit for damages. On appeal the railroad conceded that at one time the statutes were necessary. But the railroad complained that today, motor carriers transport a substantial amount of freight, but are not subject to the same duties. Therefore, changed circumstances had rendered the law unconstitutional since it discriminated against railroads and not motor carriers. The court held that the differing treatment accorded railroads and motor carriers would be upheld if there was a rational basis for the classification. The court recognized the different methods and means by which each performed their functions and found sufficient reason for the legislature to impose different duties on each.[93]

The second test requires that the legislative purpose of the classification must have a reasonable chance of accomplishment.[94] The court has applied this doctrine to strike down a South Dakota statute that prohibited everyone except registered pharmacists from selling patent medicines.[95] The court reasoned that the purpose of the statute was to protect the public from defective medicine. Registered

89. *See supra* note 80, at § 1.

90. Behrns v. Burke, — S.D. —, 229 N.W.2d 86, 89 (1975). This case held that the South Dakota guest statute was valid under the United States and South Dakota Constitutions.

91. *Id.* at 89.

92. 80 S.D. 168, 120 N.W.2d 565 (1963).

93. *Id.* at 176, 120 N.W.2d at 571.

94. Behrns v. Burke, — S.D. —, 229 N.W.2d 86, 89 (1975).

95. State v. Wood, 51 S.D. 485, 215 N.W. 487 (1927).

pharmacists, however, were in no better position to know the contents of the medicine than any other kind of reputable merchant. The court, therefore, was not convinced that this restriction tended to protect the public health, and the court held the law invalid.[96]

The South Dakota Supreme Court has never entertained an alien discrimination case. The tests that it applies to discrimination cases in general seem to be no more than a reasonableness standard. First, there must be a reasonable basis for classifying individuals or corporations for different treatment. Second, the different treatment must reasonably result in the accomplishment of the legislative purpose. Since South Dakota does have a legitimate interest in protecting the livelihood of its residents from foreign domination, it would seem likely that HB-1273 would be held valid under these tests.

Equal Protection

HB-1273 must overcome the challenge that it discriminates against non-resident aliens in violation of the fourteenth amendment.[97] The Supreme Court of the United States has held that resident aliens are protected by the equal protection clause, and are a "discrete and insular minority" for whom strict judicial scrutiny is appropriate.[98] This means that the power of the state "to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[99] It is a higher test than the traditional approach, which gives the state broad power to classify as long as its classification has a rational basis.[100] The court has not decided the question of whether equal protection extends to non-resident aliens, and if so, whether the statute in issue must meet the rational basis test or the strict scrutiny test or some standard in between.[101] Although the status of non-resident aliens is in doubt, a brief examination of the resident alien cases may give some insight into the thinking of the court.

In 1971 the Court decided *Graham v. Richardson*,[102] striking down an Arizona statute[103] that denied old age and disability assistance to any person who was not a citizen of the United States or who had not resided in the United States for a total of fifteen years. The

96. *Id.* at 492, 215 N.W. at 490.
97. U.S. CONST. amend. XIV, § 1.
98. Graham v. Richardson, 403 U.S. 365, 372 (1971).
99. *Id.* at 372.
100. *Id.* at 371.
101. *See* Stanton v. Stanton, 421 U.S. 7 (1975). The court found that it was not necessary in the case to determine whether a classification based on sex is inherently suspect. Nevertheless, the court struck down a Utah statute requiring parents to support their children until the age of majority, which was age eighteen for girls and age twenty-one for boys.
102. 403 U.S. 365 (1971).
103. ARIZ. REV. STAT. § 46-233 (1956). *Cf.* S.D.C.L. § 61-6-1.5 (Supp. 1977) (right of alien to unemployment benefits conditioned upon a showing that the alien applicant is a permanent resident of the United States).

state argued that it had a "special public interest" in favoring its own citizens over aliens. Welfare benefits, because of their scarce nature, should be allocated only to citizens and long term residents. At the threshold the court held that it would view resident alien classifications with strict scrutiny.[104] It noted that the "special public interest" doctrine is partially supported by the notion that a privilege, but not a right, may be dependent on citizenship. The court rejected this distinction as a rationale for denying constitutional rights. The court reiterated its position that a state could not justify invidious discrimination because it lessened the financial burden of the state, pointing out that aliens like citizens pay taxes, may be called into the armed forces, and contribute to the economic growth of the state. It concluded that the state can have no "special public interest" in maintaining tax revenues to which aliens have contributed on an equal basis with citizens.[105]

Two years later in *Sugarman v. Dougall*,[106] the court reviewed a New York statute that prohibited all aliens from holding state civil service positions.[107] The court recognized the right of the state to limit alien participation in government, but held that the citizenship requirement swept too broadly including the typist and office worker who have no authority to make or execute state policy.[108] Applying the rationale of *Graham*, it also rejected the "special public interest" argument pressed by the state. An alien like a citizen pays taxes, is a permanent resident of the state, and is subject to military service. The court added that the "special public interest" doctrine is not applicable to this case since it is rooted in the concepts of privilege and of the "desirability of confining the use of public resources. . . ."[109]

The companion case decided with *Sugarman* was *In Re Griffiths*,[110] which involved an alien who was denied admittance to the Connecticut bar because she was not a citizen of the United States.[111] The state argued that the special role of a lawyer, as an officer of the court, demands that the person be a loyal citizen of the United States to avoid conflicts of interest.[112] The court disagreed, holding that the state had made no showing that the alienage of an attorney would affect the representation of his client. The court pointed out that lawyers who are citizens have found no difficulty representing

104. Graham v. Richardson, 403 U.S. 365, 372 (1971).
105. *Id.* at 376.
106. 413 U.S. 634 (1973).
107. N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973). *Cf.* S.D.C.L. § 3-1-4 (1967) (right of alien to public employment dependent upon declaration of intent to become a United States citizen).
108. Sugarman v. Dougall, 412 U.S. 634, 643 (1973).
109. *Id.* at 645.
110. 413 U.S. 717 (1973).
111. Conn. Gen. Stat. Ann. § 51-80 (West 1958). *Cf.* S.D.C.L. § 16-16-2 (Supp. 1977) (similar provision).
112. In Re Griffiths, 413 U.S. 717, 723 (1973).

foreign clients. In situations where the alienage of the attorney may cause conflict, the honorable person, whether alien or not, would decline the representation.[113]

The last case in this series is *Examining Board of Engineers v. Flores deOtero*.[114] In this case the court invalidated a Puerto Rico statute that granted engineering licenses only to those persons who were United States citizens or who had obtained their education in Puerto Rico. Plaintiff was a professional engineer and a native of Mexico. The government's justification for the discrimination was (1) to prevent the influx of Spanish-speaking aliens, (2) to raise the prevailing low standard of living, and (3) to assure the financial responsibility of the engineer should the building collapse at a later date.[115] The court rejected these justifications as insufficient. First, the prevention of Spanish-speaking immigrants was little more than the assertion that discrimination may be justified by the desire to discriminate. This policy was also at odds with the federal government's primary authority over immigration.[116] Second, the interest of the state to maintain the standard of living did not permit it to deny lawful employment to resident aliens. Last, the state had other means by which to require financial responsibility. The court held that this statute swept too broadly, discriminating against a class of engineers who are in all respects qualified professionals.[117]

It is important to recognize that *In Re Griffiths, Sugarman*, and *Examining Board of Engineers* dealt with the right of aliens to be lawfully employed on an equal basis with citizens, while *Graham* spoke to the issue of equal access to welfare benefits. In these cases the court took a dim view of the expressed justification for this discrimination, especially in light of the contributions to the state made by resident aliens.[118] The states could not convince the court that a "special public interest" justified the discrimination. At the same time, the court in a footnote in *Sugarman*, acknowledged that it had, in the past, invoked the "special public interest" doctrine to uphold statutes that limit the right of noncitizens to acquire and hold land.[119] The principal case it cited was *Terrace v. Thompson*,[120] which involved a Washington statute that prohibited any alien from owning any interest in land unless he had declared his intent to become a United States citizen. The appellants in *Terrace* were United States citizens who desired to lease a tract of farmland to a Japanese native who, because of his alienage, was prohibited from becoming a citizen by federal law. The court approached the equal protection challenge with the rational basis test and upheld the

113. *Id.* at 724.
114. 426 U.S. 572 (1976).
115. *Id.* at 605.
116. *Id.*
117. *Id.* at 605-06.
118. Graham v. Richardson, 403 U.S. 365, 376 (1971).
119. Sugarman v. Dougall, 413 U.S. 634, 644 n.11 (1973).
120. 263 U.S. 197 (1923).

statute. Although it did not use the words "special public interest," the court was convinced that the quality and allegience of those who own farmland are matters of highest importance to the state.[121] The court also drew a distinction between the opportunity of an alien to be employed[122] and the privilege to own land, which the state lawfully extended to citizens only.[123]

The impact that *Graham* and its progeny will have on the holding of *Terrace* remains to be seen. None of these cases overruled or distinguished *Terrace*. The court has clearly rejected the notion that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege.[124] Yet, the argument that the state has a special interest in the ownership and control of its land is as true now as it was then. Another important factor is the test of strict scrutiny, which the court applies to resident aliens.[125] Arguably, the court has not extended the higher test to non-resident alien classifications because it has not been faced with the issue. On the other hand, the characteristics that persuaded the court to apply strict judicial scrutiny to resident aliens are not applicable to non-resident aliens. A non-resident alien, prior to acquiring an economic interest in this country, pays no taxes and does not contribute to the economic growth of the state. Furthermore, a non-resident alien is not subjected to military service under federal law.[126] Should the court find that non-resident aliens are not afforded the protection of the higher test, the state would have an easier task in justifying its legislation.

There is a threshold issue concerning the application of the equal protection clause to non-resident aliens. The clause by its own terms requires that the person be "within [the] jurisdiction" of the state.[127] The Supreme Court has held that these words are comprehensive[128] and require the clause to be applied "to all persons within the territorial jurisdiction" of the state.[129] The issue whether these words act to exclude non-resident aliens from equal protection has not been decided by the Supreme Court. There is some authority holding that they do.[130] This construction, however, has been criticized as too technical since, in fact, the effect of a restrictive statute such as HB-1273 is to submit non-resident aliens to the jurisdiction of the state.[131] This viewpoint defines jurisdiction as the power of the state

121. *Id.* at 221.
122. *See* Truax v. Raich, 239 U.S. 33 (1915).
123. Terrace v. Thompson, 263 U.S. 197, 221 (1923).
124. Graham v. Richardson, 403 U.S. 365, 374 (1971).
125. *Id.* at 372.
126. 50 U.S.C. App. § 454(a) (1970).
127. U.S. CONST. amend. XIV, § 1.
128. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923).
129. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
130. De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975); Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972).
131. *See* Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 642 (1976) [hereinafter cited as Morrison].

to enforce a law rather than in terms of its territorial boundaries.[132] The problem with this definition is that it would extend the equal protection clause to persons throughout the world who have no appreciable relationship with the United States. In a different context, the Supreme Court has held that a state court has no jurisdiction over a non-resident person unless the person has established certain minimum contacts with the state.[133] In the final analysis, the fact that a corporation is a person within the meaning of equal protection diminishes the importance of this issue.[134] Nothing prohibits a foreign investor from forming a corporation in the United States that is constitutionally protected from illegal discrimination despite any construction of the word "jurisdiction."[135]

Due Process

Section 2 of HB-1273 requires that the foreigners who come into possession of land either through foreclosing a debt or through inheritance shall dispose of the land within ten years. Similarly, an alien who purchases land in violation of the statute forfeits the land to the state. The challenge can be made that these provisions deprive an alien of his property without due process of law in violation of the fourteenth amendment.[136]

In *Terrace v. Thompson*,[137] the Supreme Court specifically recognized the police power of the state, reserved at the time of the adoption of the Constitution, to deny aliens the right to own land within its boundaries. The court held that this did not violate the due process clause.[138] The more recent case of *Shames v. Nebraska*,[139] which was affirmed by the Supreme Court without opinion, involved plaintiffs who were non-resident alien devisees to an estate in land located in Nebraska. In an action to probate the will, the State of Nebraska intervened and asked that the land involved escheat to the state for failure of qualified heirs to take. By statute Nebraska prohibited any alien from taking or holding any land that extended beyond a three mile perimeter of any city.[140] The devisees brought suit to enjoin the enforcement of the statute. Relying on *Terrace* the federal district court emphasized the power of the state to regulate property rights and held that the operation of escheat did not violate the due process rights of the devisees.[141]

132. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1965).

133. Shaffer v. Heitner, 97 S. Ct. 2569 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

134. Southern R. Co. v. Greene, 216 U.S. 400 (1910).

135. *See* Lehndorff Geneva, Inc. v. Warren, 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

136. U.S. CONST. amend. XIV, § 1.

137. 263 U.S. 197 (1923).

138. *Id.* at 217.

139. 323 F. Supp. 1321 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972).

140. NEB. REV. STAT. §§ 76-402, 414 (Reissue 1976).

141. Shames v. Nebraska, 323 F. Supp. 1321, 1335 (D. Neb. 1971).

Substantive due process rights have been characterized as "the last resort of a doomed cause. . . ."[142] In this context the courts are reluctant to challenge the police power of the state. The Supreme Court has held that property lawfully acquired by non-resident aliens cannot be taken for a public purpose without just compensation.[143] But this doctrine probably would not extend to property illegally held by the same person.

Treaties

Treaties between the United States and foreign countries are the supreme law of the land.[144] Their provisions override inconsistant state laws.[145] By its own terms HB-1273 does not apply to any person whose right to hold property is secured by a treaty. The extent to which treaties of the United States grant such rights to non-resident aliens will diminish the effectiveness of the bill. Those treaties that have the greatest impact upon non-resident alien property rights are forty bilateral agreements of friendship, commerce, and navigation to which the United States is a party.[146] These treaties secure the rights of foreign nationals to engage in business or trade in the United States. Most of the treaties grant few property rights to foreign nationals, but on the other hand, neither do they prohibit the ownership of land. Since the rights that are conferred vary from treaty to treaty it is important to look at the particular agreement to answer a specific question. For example, the citizens of Saudi Arabia are given most favored nation status, meaning that they shall not be treated in their persons, property, rights and interests, in any manner less favorably than the nationals of any other foreign country.[147] Since Dutch nationals and companies[148] are allowed to lease land, buildings and other real property to conduct business activities within the United States, subject to the reserved power to limit the exploitation of land or other natural resources,[149] the Saudis must be accorded the same rights. Thus, South Dakota could not prohibit a Saudi from leasing land in excess of ten acres if it is for a business purpose.[150]

The major issue involving treaty rights is the extent to which a

142. *See* Morrison, *supra* note 131, at 644.
143. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).
144. U.S. CONST. art. VI, cl. 2.
145. Hauenstein v. Lynham, 100 U.S. 483 (1880).
146. *See* Morrison, *supra* note 131 at 657.
147. Agreement Regarding Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation, Nov. 7, 1933, United States-Saudi Arabia, 48 Stat. 1826, T.S. No. 18B.
148. Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 [hereinafter cited as Netherlands Treaty]. *See also* Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.
149. Netherlands Treaty, *supra* note 148, at 2052. Business activities are defined as "commercial, industrial, financial and other activity for gain . . . ."
150. *See* § 2 of HB-1273 which exempts land acquired by foreign manufacturing enterprises.

state may limit exploitation of land if a foreign national desires to lease cropland to support his cattle feeding business. In *Lehndorff v. Warren*,[151] plaintiff was a Texas corporation whose stock was entirely owned by West Germans. The corporation held options to purchase farmland in Wisconsin, which prohibited foreign ownership of land in excess of 640 acres. Plaintiff relied upon a treaty between the United States and West Germany that secured the right of Germans to engage in business and to lease land required to conduct business subject to the power of the state to limit exploitation.[152] The investors complained that the 640 acre limit violated their treaty rights and asked that the attorney general be enjoined from enforcing the statute. Denying this relief, the court said that the treaty only secured leasehold rights for limited economic purposes and not for agriculture. It defined exploitation as turning resources into economic accounts and held that this reservation gave states the power to prohibit foreign ownership of farmland in excess of 640 acres.[153] A similar argument was also rejected by the Supreme Court in *Terrace*.[154] Of course, in both these cases a broader definition of permissible business activities or a more restricted view of the power of the state to limit exploitation would lead to a different result.

Another property interest that is sometimes regulated by treaty is the right of foreign nationals to inherit property in this country. Such treaty provisions would supersede section 4 of HB-1273 where in conflict. Most treaties, however, recognize the supremacy of state probate laws.[155] For example, a 1921 treaty between the United States and Canada grants Canadian citizens the right to inherit real property in the United States unless "disqualified by the laws of the country where such property is located . . . ."[156] In such case, the treaty provides that the alien has three years from the time of acquisition to dispose of the inherited property.[157] Since these treaty provisions recognize the relevancy of local law, section 4 of HB-1273 is not in conflict and, in fact, allows a substantially longer period of time, ten years, within which the alien must dispose of the land.

The impact that treaty rights would have upon the effectiveness of an alien land law is dependent upon the treaty involved and the nature of the rights therein stated. The courts have taken a restrictive view of the activities that are authorized. This is especially true when the treaty reserves the power of the states to control natural resources and prevent exploitation. Treaties that regulate alien inher-

151. 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

152. Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

153. Lehndorff v. Warren, 74 Wis. 2d 369, —, 246 N.W.2d 815, 819 (1976).

154. Terrace v. Thompson, 263 U.S. 197, 223 (1923).

155. *See* Morrison, *supra* note 131 at 660.

156. Convention Relating to the Tenure and Disposition of Property, March 2, 1899, United States-Great Britain-Ireland, 31 Stat. 1939, applied to Canada, Oct. 21, 1921, 42 Stat. 2147, T.S. No. 339.

157. *Id.*

itance rights many times defer to state law and in some instances impose more severe restrictions.

Foreign Relations Power

Under our constitutional framework the federal government is given exclusive authority to act in the field of foreign affairs. The federal government exercises this authority "entirely free from local interference."[158] In contrast, states have always exercised wide powers over property rights of citizens and aliens within their boundaries.[159] How far state regulation of alien property ownership extends before colliding with the federal foreign relations power is an issue that must be considered. The Supreme Court has set some guidelines marking the permissible interplay between these two doctrines. In *Hines v. Davidowitz*,[160] the issue was whether a Pennsylvania Alien Registration Act unconstitutionally infringed upon the foreign relations power of the federal government. The Pennsylvania law required aliens to register with the state and to carry identification cards. While the case was pending on appeal, Congress passed the Alien Registration Act of 1940. The court struck down the Pennsylvania statute primarily resting its decision on the theory that the new federal act pre-empted any state regulation. The court specifically left open the question whether the Pennsylvania statute would have been an invasion into the foreign relations power of the federal government had Congress failed to exercise its authority in the field.[161] Nevertheless, in dictum, the court said that the treatment of foreign nationals is one of the most important and delicate of all international relations and that the Pennsylvania requirement of alien identification cards and other burdens "provoke questions in the field of international affairs."[162]

Six years later in *Clark v. Allen*[163] the Supreme Court had an opportunity to adjudicate the claims of California heirs-at-law to an estate left by the testator to German nationals. The court ruled that a 1923 treaty between the United States and Germany established the right of German citizens to inherit real property, but not personal property, in the United States. Therefore, the personal property would be disposed of in accordance with a California probate statute that conditioned taking on reciprocity.[164] At common law an alien could not take by inheritance and the property passed instead to the next eligible person.[165] Therefore, the California heirs-at-law would

158. Hines v. Davidowitz, 312 U.S. 52, 62-3 (1941).
159. United States v. Fox, 94 U.S. 315, 320 (1877).
160. 312 U.S. 52 (1941).
161. *Id.* at 62.
162. *Id.* at 66.
163. 331 U.S. 503 (1947).
164. *Id.* at 516. In other words the right of non-resident aliens to take property is dependent upon a reciprocal right of U.S. citizens to do so in the other country.
165. *See* note 69 *supra* and accompanying text.

receive the personal property in the estate if they could defeat the operation of the California probate statute and cut off the rights of the German legatees. The heirs-at-law challenged the statute on the grounds that reciprocity unconstitutionally extended state power into the field of foreign relations reserved to the federal government. The Supreme Court evidently concluded that the California statute did not "provoke questions in the field of international affairs" of the type that it had spent so much time discussing in *Hines*. Instead it held that succession to property is governed by local law and is affected only by the presence of an overriding federal policy. The California statute had an incidental and indirect effect in foreign countries, but nothing of substance that "would cross the forbidden line."[166]

Twenty years later an East German heir, appellant in *Zschernig v. Miller*,[167] challenged the operation of an Oregon inheritance statute that required reciprocity, and among other things, required proof by the foreign government that the heir would receive the benefit of the estate. The Court held the statute invalid as applied, citing many judicial abuses in Oregon and throughout the country where courts administered probate proceedings on the basis of political ideology and cold war strategy.[168] Such an application of the law was held to violate the foreign relations power of the federal government. The Court distinguished *Clark* in so far as that case dealt only with the words of the statute on its face and not its manner of application.[169] *Zschernig* did not overrule *Clark* and arguably may be limited to its facts.[170] On the other hand, *Zschernig* may stand for the proposition that probate statutes, as construed, must not invite unavoidable judicial criticism of other nations and their political systems.[171]

Arguably, *Zschernig* has not substantially modified the power of the states to regulate alien property rights. An alien land law or inheritance law would conflict with the foreign relations power only if the enforcement of the statute resulted in offensive contacts with foreign countries and judicial criticism of their policies. Property regulations may have indirect and incidental effects on foreign countries without infringing on foreign affairs. From a realistic point of view, however, those types of laws do have a substantial impact on the citizens and policies of foreign nations. The proposed legislation does "provoke questions in the field of international affairs." HB-1273 is particularly blatant in this regard since it specifically denies property rights to foreign governments. If the court would adopt a

166. Clark v. Allen, 331 U.S. 503, 517 (1947).
167. 389 U.S. 429 (1968).
168. *Id.* at 432-40.
169. *Id.* at 432-33.
170. Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), *aff'd mem.*, 408 U.S. 901 (1972) (held that judicial criticism of foreign nations found offensive by the Supreme Court in *Zschernig* was not present in the application of a Nebraska escheat statute divesting Syrian nationals of their inheritance).
171. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

more realistic standard of state infringement on foreign relations the validity of an alien land law would be more difficult to ascertain.

Federal Pre-Emption

There is also the issue whether an attempt by South Dakota to prohibit foreign ownership of land is pre-empted by federal legislation in the same area. The determination of whether a federal statute would preclude enforcement of all state laws on the same subject depends upon "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the laws. . ."[172] At present, federal regulations of non-resident alien real property rights are embodied principally in the Trading with the Enemy Act.[173] Two sets of regulations have been promulgated under this statute. The Alien Property Custodian Regulations[174] take effect only in time of declared war, vesting the property of enemy aliens in a federal official. The Foreign Assets Control Regulations[175] block the assets of aliens who are citizens of countries deemed to be hostile to the United States. This list of hostile nations can easily be altered without a formal declaration.

Applying the federal pre-emption tests announced by the Supreme Court, these regulations would not pre-empt state legislation limiting alien property rights. The present federal statutes do not manifest the intent of Congress to cover the field. Furthermore, the federal policy is limited in scope, regulating the rights of enemy aliens. Moreover, these regulations easily co-exist with state regulation of the rights of non-enemy aliens. It is important to recognize that Congress does have the power granted by the commerce clause[176] and the power of foreign relations to regulate all forms of foreign investment. Therefore, any state legislation could be pre-empted should Congress decide to act.

Coverage

It is self-evident that property restrictions on non-resident aliens must be tightly drawn to be effective. The provisions of HB-1273[177] apply to natural persons, corporations and associations organized outside the United States, foreign governments, domestic corpora-

172. Hines v. Davidowitz, 312 U.S. 52, 70 (1941).
173. 50 U.S.C. App. § 6 (1975 Supp.).
174. 8 C.F.R. §§ 501.1-510.70 (1977).
175. 31 C.F.R. §§ 500.20-500.809 (1977).
176. U.S. CONST. art. I, § 8, cl. 3.
177. This proposed law would overlap the present restrictions on corporate farms as applied to non-resident aliens. S.D.C.L. §§ 47-9A-1 to 23 (Supp. 1977). *See* Comment, *supra* note 5. It is worth noting that the Family Farm Act does not require the stockholders of a family farm corporation or an authorized farm corporation to be residents of the United States. Presumably a foreign family could form a family farm corporation provided one of the family members resides on the farm or actively engages in the farming.

tions twenty percent of whose stock is owned or controlled by non-resident aliens, and domestic unincorporated associations whose membership consists of more than twenty percent of non-resident aliens.[178] The term "corporation" in the bill should encompass all forms of incorporated enterprises.[179] The words "unincorporated association" should include partnerships[180] and business trusts.[181] The term "land" used in section 1 is a little more ambiguous and probably does not include mineral deposits that can be leased or purchased separate from the land lying above. The bill also proscribes a non-resident alien from acquiring lands, "or any interest therein, in excess of ten acres." Presumably this language would include the beneficial interest held by a non-resident alien through an inter vivos trust.

Two problems remain with the bill, which are somewhat more complex than the definitional difficulties. These problems are its enforceability and the foreclosure of mortgages. Section 2 provides that "[t]he prohibitions . . . of this Act do not apply to lands acquired by . . . any procedure for the enforcement of a lien or claim thereon, whether created by a mortgage or otherwise. However, all lands so acquried shall be disposed of within ten years after acquiring title."[182] This provision excludes those non-resident aliens who wish to loan money to farmers and take back a mortgage. But in so allowing, the provision opens up the possibility of straw man mortgagors. Such a person would take the money "loaned" to him by the non-resident alien, purchase the land, and then summarily default on the note. The foreign mortgagee could acquire the land through foreclosure and enjoy its benefits for the following ten years.[183] The same machinations could then be repeated. Requiring that the loan and mortgage be made at arms length and in good faith may be inferred from the language and purpose of the provision. But it is not wise to leave such matters to chance.

The second problem is in Section 5, which provides that "[a]ll lands acquired or held in violation . . . of this Act shall be forfeited to the state."[184] The action to enforce the forfeiture is to be brought

178. *See supra* note 80.

179. *See* South Dakota Business Corporations Statutes: S.D.C.L. ch. 47-2 (1967); Cooperative Statutes: S.D.C.L. ch. 47-15 (1967); Non-profit corporations statutes: S.D.C.L. ch. 47-22 (1967).

180. See Lenhdorff v. Warren, 74 Wis. 2d 369, —, 246 N.W.2d 815, 817 (1976).

181. S.D.C.L. § 47-14-1 (1967). "The term business trust as used in this chapter shall mean an unincorporated business *association* . . . ." (emphasis added).

182. *See supra* note 80 at § 2.

183. The mortgagee can purchase the mortgaged property at a fair price either in an action of foreclosure S.D.C.L. §§ 21-47-15 to -16 (1967) or foreclosure by advertisement S.D.C.L. §§ 21-48-13 to -14 (1967). In both cases the mortgagor can redeem the mortgage within one year or longer if certain requirements are met. S.D.C.L. § 21-52-12 (1967). This right of redemption cannot be circumvented by the mortgagee. 4 AMERICAN LAW OF PROPERTY § 16.59 (A.J. Casner ed. 1962). Without recourse to foreclosure, however, the mortgagor and the foreign mortgagee could enter into an accord whereby the mortgagor would convey the land to the mortgagee as satisfaction for the debt. ***See*** S.D.C.L. §§ 21-7-1 to -4 (1967).

184. *See supra* note 80, at § 5.

by the attorney general,[185] subject to a three year statute of limitation. If the non-resident alien sells the land before such action is brought, the bona fide purchaser for value takes free and clear. The problem is, however, that in most cases the attorney general has no effective way to determine whether a non-resident alien owns an interest in land in violation of the law. A deed would indicate that the land is held by partnership 'P', but would not disclose its foreign partners. Moreover, no statute requires such a disclosure. The officials on the county level would not have access to any information other than that necessary to collect the taxes. The three year statute of limitations would run from the date of acquisition before anyone was the wiser. A foreign ownership disclosure statute, similar to the law in Iowa,[186] is not a cure-all because of the same problems of enforcement. The number of different methods through which a person can control land and the traditional land recordation system in this country combine to thwart any revelation of the landowners' secrets. Probably the simplest answer to this dilemma is to start the statute of limitations running upon the discovery of the violation. This would increase the risk of financial catastrophe facing a would be foreign investor no matter how quietly he moved. It has the further advantage of avoiding the difficulties inherent in our land recordation system.

CONCLUSIONS AND PUBLIC POLICY

Whether South Dakota should adopt some form of an alien land law is difficult to answer. The political implications of such legislation are beyond the scope of this comment. The discussion of the issues outlined in this comment hopefully has provided a sense of direction. The latest proposal, HB-1273 appears to be tightly drawn except for its enforcement provisions and the provision for foreclosing mortgages. The remaining issues affecting the wisdom of an alien land law cannot be summarily answered.

If national and state estimates are accurate, there does not presently seem to be much foreign ownership of farmland. Without more complete statistics, however, a definite determination of the amount of foreign owned agricultural land is impossible. Foreign investment in all kinds of property has been increasing at unprecedented rates. Whether investment in farmland could reach a level that would threaten the family farm in the future is a matter of concern. Many foreigners have enormous assets with which to buy land. The factors that initiated the onslaught of foreign investment are still influential. On the other hand, the wealth and amount of agricultural land in the United States were sufficient to convice President Ford's administration to disregard fears of foreign domination.[187] The decentralized

185. *See* S.D.C.L. § 21-28-20 (1967).

186. IOWA CODE ANN. § 567.9 (West Supp. 1977).

187. *House Hearings, supra* note 3, at 79 (statement of Peter Flanigan, Assistant to the President for International Economic Affairs).

structure of agriculture makes it difficult to invest large sums of money. Furthermore, there is some doubt whether the major oil producing states have the "necessary skilled manpower to gain or maintain control over major segments of the United States economy."[188]

One analyst suggests that foreign acquisitions of farmland will continue to expand because of the relatively low price of farmland in the United States compared to the market values in Western Europe and Japan. In those countries investment in farmland is little more than storage of value. In the United States by contrast, rates of return on money invested in farmland are still substantial.[189] This reasoning may not be applicable to South Dakota, however, where the quality of the land and the weather usually combine to decimate expected profits.

A corollary issue is whether a substantial increase in foreign investment would have an adverse impact on agriculture in South Dakota. The available information suggests that foreign purchases have increased the prices of land asked by sellers in each locality. Foreign investment, however, can contribute to the overall economic growth of the state. Most investors seem interested in long-term investment rather than short-term speculation. Based on these findings, the Benchmark Survey concluded that the expressed concern about foreign ownership does not have a strong factual basis but conditions do indicate the need for further investigation.[190]

The constitutionality of an alien land law is another consideration to be weighed during the deliberations of the legislature. The success of an equal protection challenge is directly related to the test that the court would apply to the classification. Since the test of strict judicial scrutiny is applied to resident alien classifications, the power of the state to deny them property rights is questionable. Likewise, if this higher test is extended to non-resident aliens, the validity of restricting their property rights would be in doubt. The rationale expressed in the recent alien discrimination decisions, however, would not seem to support this extention. If the strict scrutiny test were not used, a non-resident alien land law would probably be tested by the rational relationship standard, which requires a weaker showing of state interest. The proposed legislation must endure a similar test of reasonableness under the provisions of the South Dakota Constitution. In view of the special interest the state has in controlling property, the legislation, in all likelihood, would survive these lower tests.

An alien land law is also subject to the charge that it improvidently infringes on the foreign relations power of the United States.

188. *Senate Hearings, supra* note 11, at 49 (statement of Jack Bennett, Under Secretary of Treasury for Monetary Affairs, Department of Treasury).

189. 8 BENCHMARK SURVEY, *supra* note 12, at L-175.

190. 1 BENCHMARK SURVEY, *supra* note 12, at 237.

An argument marshalling the facts, showing the impact that such a law has on foriegn policy, could be persuasive. The case law, however, seems to support the position that states have the power to regulate alien ownership of land despite incidental international implications. Provided the local legislation does not bring about the direct interference condemned in *Zschernig*, it probably will be upheld. On the other hand, future decisions may extend *Zschernig* and apply a higher standard to alien land restrictions rendering their validity more in doubt. But the immediate extension of *Zschernig* is not probable. Insofar as aliens are concerned, the courts continue to honor the traditional regulation of property interests by the established authority where the property is located. In the long run, however, as the world grows more interdependent and federal power more pervasive, the reliability of this doctrine will probably become less predictable.

Aside from constitutional issues, some commentators believe that regulation of foreign investment should be left to Congress.[191] The federal government is best equipped to handle all forms of foreign investments in banks, the stock market and real property, all of which may have a greater impact on agriculture than direct land ownership. Moreover, the impact that federal income tax laws will have on foreign investments is completely at the discretion of Congress.[192] But from another point of view, property law is state law. If a state decides to limit foreign ownership of real property, it should not hesitate to act. Congress has the power to act otherwise in the future, but in the meantime, the decision should be left to the states.

In the final analysis, the laws closing the door to foreign ownership of land are really statements of foreign policy. This nation has traditionally favored international trade and investment free of unilateral barriers. The extent to which the nation as a whole desires to depart from this policy is a decision in which all should participate. Whether alien land laws are local or national in character and whether the decisions should be left to the local or national level is determined to a certain extent by the importance of the role that these decisions play in the total issue. If non-resident alien farmland ownership is a substantial factor in the total national policy on foreign investment, then its regulation should be left to the federal government.

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191. *See* Morrison, *supra* note 131, at 667.

192. *See* Forry, *Planning Investments from Abroad in United States Real Estate*, 9 INT'L LAWYER 239 (1975); Zagaris, *Investment by Non-Resident Aliens in U.S. Real Estate*, 31 U. OF MIAMI L. REV. 565 (1977).