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Foreign Investment in United States Real Estate: Federal and State Regulation

by Leslie J. Levinson*

I. INTRODUCTION

THE WORLD ECONOMIC system had undergone significant changes since World War II. Inflation, international trade readjustments, and the rise of third world nations—particularly the petroleum producing countries—have contributed most visibly to this process. Inevitably, changes of this nature produce alterations in the investment patterns of the international economic community. As a result, the United States is rapidly becoming a fertile ground for all forms of non-resident foreign investment. Indeed, at the end of 1974 total foreign portfolio investment in the United States was estimated to be on the order of $80-85 billion, while direct foreign investment was $26.5 billion. As of 1977 direct foreign investment had grown to $34.1 billion.

Non-resident alien investment in United States agricultural land and other real estate has attracted considerable attention and has stirred local as well as national concern in recent years. Because land ownership has sociological and political aspects, alien investment is certain to be an irritant to many Americans. Like citizens of most nations, Americans are nationalistic, and this resentment of foreign ownership of American real estate may stem, in part, from a feeling that America should be owned by Americans even though foreign ownership may possess economic benefits such as the recycling of foreign-held dollars.

This article will focus on state regulations and federal laws which attempt to control the individual alien’s acquisition and enjoyment of domestic real estate. Undoubtedly, some of the difficulty in regulating alien

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1 U.S. TREAS. DEP’T, INTERIM REPORT TO THE CONGRESS ON FOREIGN PORTFOLIO INVESTMENT IN THE UNITED STATES, October 1975, at 4. Portfolio investment is defined in the report generally as stocks and short term debt instruments with a maturity of less than one year.
4 FOREIGN INV. IN THE U.S., supra note 2, at 181.
investment in United States real estate has been caused by the lack of a clear consensus as to which governmental entity should be charged with regulating this type of investment. Part IV of this article analyzes several methods whereby the present system of regulation could become predominately federal, yet questions the ultimate wisdom of such a policy choice. Restrictions on foreign corporate investment in real estate, and inheritance by aliens will not be treated in this paper.\(^7\)

Foreign investment in real estate may be more visible to an observer than other forms of investment are because of the obvious physical characteristics of land. Since land is a finite asset, the greater the amount of property which is controlled by foreign interests, the less there is available for domestic purchase and use. Thus, when a prospective purchaser learns that only fifty of the one-hundred acres adjacent to his land are available for acquisition, the effect may be more dramatic than if this purchaser were to discover that a foreign investor had purchased fifty percent of the stock of a local corporation since the corporation’s activities will in all probability remain the same. The following examples of recent foreign purchases will further illustrate this point. In 1975, it was reported that Kuwaiti interests acquired Kiawah Island, South Carolina with plans to build $100 million residential resort;\(^8\) a French controlled chemical company purchased property in central Florida for phosphate mining;\(^9\) in 1974 a Japanese corporation paid over $100 million for three hotels on Waikiki Beach, Hawaii\(^10\) while foreign investment in Hawaiian real estate generally, had reached $585 million by 1975, up from less than $100 million in 1972.\(^11\) In addition to decreasing the amount of land available for domestic purchasers and users, increased foreign investment exerts upward forces on the price of real estate which may drive the price beyond that considered affordable by the average purchaser.

The number of inquiries concerning potential purchases of domestic

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\(^8\) The Clev. Plain Dealer, Mar. 12, 1979, at 10-A, col. 1.
\(^9\) The constitutionality of state restrictions on alien investment in American real estate is beyond the scope of this article. Excellent discussions of this aspect of the problem can be found in Weber, Foreign Direct Investment In United States Real Estate: Xenophobic Or Principled Reaction? 28 Fla. L. Rev. 491 (1976); Morrison, Limitations on Alien Investment in American Real Estate 60 Minn. L. Rev. 621 (1976). Parts II and III are presented in a survey format to provide the reader with a concise catalog of the major existing legislation dealing with this problem. The author would like to acknowledge the useful research that has been done previously in this area. Parts II and III update some of this earlier work while providing additional analysis and discussion.
real estate by foreigners has increased substantially over the last several years. Various reasons have been suggested to explain this foreign desire to invest in American real estate including (1) the extremely large size of the United States market; (2) the democratic institutions and political stability of this country; (3) a greater freedom from economic controls and government intervention than in most other countries, even democratic ones; (4) the traditional United States "open door" policy in regard to investments from abroad; (5) United States leadership in managerial and marketing know-how and innovations; (6) the efficient and highly skilled labor force of this country; (7) well-developed capital markets which readily provide credit at interest rates that often are lower than abroad; and (8) relatively large supplies of some important natural resources. In light of the political developments in Iran, Italy, Canada, and other nations, the political stability of the United States is becoming an increasingly important, if not paramount factor, to be considered in investment decisions.

Furthermore, there is a certain symbolic sense of continuity uniquely associated with real estate that does not necessarily accompany other forms of investment, perhaps based on the perception that although governments may change and the economy may experience wide fluctuations, land will, as always, remain fixed and finite in quantity. Undoubtedly, the devaluation of the dollar and the vast monetary reserves accumulated by OPEC countries and other nations with trade surpluses have had a significant impact upon foreign investment in the United States generally; and the acquisition of American real estate interests is an inevitable by-product of that situation.

II. FEDERAL CONTROLS ON FOREIGN INVESTMENT IN AMERICAN REAL ESTATE

Although land law is primarily state law, consideration must be given to federal regulation in the area, especially recent legislative activity. For well over a hundred years the federal government has intermittently legislated with regard to alien real estate activities. With the exception of the following three restrictions, prior to 1974 there had been little congressional interest in uniformly regulating alien investment in American real estate.

11 FOREIGN INV. IN THE U.S., supra note 2.
12 Id. at 185.
13 Id. at 98. There has been a continuing debate as to whether foreign investment in the United States is in fact beneficial to the domestic economy. The resolution of this question however is beyond the scope of this paper. See generally Katz, supra note 3.
14 Weber, supra note 7, at 519.
15 Morrison, supra note 7, at 629.
Two sets of regulations have been promulgated pursuant to authority granted under the Trading with the Enemy Act.16 The Alien Property Custodian Regulations17 establish a mechanism for dealing with property of enemy aliens that has been seized during a war or other period of hostility. The second set of restrictions, The Foreign Assets Control Regulations18 prohibits transactions with certain enumerated foreign countries unless specifically approved by the Secretary of the Treasury. Both sets of regulations can readily be seen as an expression of federal authority over foreign affairs granted under Article I, Section 10 of the United States Constitution and neither necessarily represents an affirmative statement of congressional intent to regulate foreign investment in American real estate.

In the past, Congress has also banned transactions by certain types of aliens, rather than subjecting these aliens to screening devices or future divestment of their property. The Alien Real Estate Ownership Acts19 prohibit aliens from acquiring land in United States territories under certain circumstances. However, numerous exemptions make the Act less than comprehensive.

The Foreign Investment Study Act of 197420 illustrates recent congressional concern over the lack of concrete data regarding foreign investment in the United States, including investment in domestic real estate. "[D]ata on foreign investment in real estate and agricultural facilities is almost nonexistent. The subcommittee was unable to substantiate or refute the numerous rumors of the movement of foreign capital into such areas. . . ."21

The Act authorizes22 the Secretary of Commerce to prepare a report to Congress on the question of direct foreign investment in the United States.23 The legislative history surrounding the Act suggests that Congress is considering increased federal regulation in this area: "The purpose of the study is to increase the understanding of the implications of such investments both within the United States Government and among the public at large, and thus to help lay the foundation for a national policy concerning foreign investments in the United States."24 Congress

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23 FOREIGN INV. IN THE U.S., supra note 2.
has supplemented the limited reporting mechanism found in the 1974 legislation with the permanent reporting provisions of the International Investment Survey Act of 1976.\(^\text{25}\) The Survey Act requires the President to set up a regular and comprehensive data collection program to gather current information on international investment practices and to publish such data on a regular basis. The Survey Act also authorizes the President to conduct "benchmark surveys" of direct foreign investment in the United States at least once every five years.\(^\text{26}\)

This Act touches more closely on the question of foreign investment in American real estate than did the 1974 legislation. It provides: "The President shall conduct a study of the feasibility of establishing a system to monitor direct foreign investment in agricultural, rural, and urban real property, including the feasibility of establishing a nationwide multipurpose land data system. . . ."\(^\text{27}\) Congress has continued the trend begun in 1974, by enacting the Agricultural Foreign Investment Disclosure Act of 1978.\(^\text{28}\) The Act creates a detailed reporting mechanism whereby any foreign person who acquires or transfers any interest in agricultural land must file a report with the Secretary of Agriculture within ninety days after completing such transaction.\(^\text{29}\) The motivations behind the Act stem from the special significance agricultural land has played in the American economic and political system.\(^\text{30}\) The legislative history makes it clear however, that the Act does not presently impose any federal restrictions on transactions in agricultural lands by foreigners.\(^\text{31}\)

Although the 1974, 1976, and 1978 Acts are essentially information gathering statutes, all three laws indicate an increasing congressional


\(^{29}\) Id. at § 3501. The Act requires that the following information be reported: (1) the legal name and address of such foreign person; (2) the citizenship of such foreign person, if an individual; or (3) the nature of the legal entity, principal place of business and country where such foreign person is created or organized if not an individual; (4) the type of interest in agricultural land; (5) the legal description and acreage of such land; (6) the purchase price paid for such interest; (7) in cases where the foreign person is a transferor of such interest, the name, address, citizenship or legal nature, country of organization and principal place of business of the person to whom the interest is transferred; (8) the agricultural purposes for which such foreign person intends to use the land; and (9) such other information as the Secretary requires.


\(^{31}\) Id. at 12.
awareness of the problem of foreign investment in American realty and indicate that uniform federal regulation in the area may be forthcoming. However, the fact that these statutes are informational in nature suggests that Congress is taking a wait and see attitude before placing any affirmative restrictions on alien investment in American real estate. Sensitive questions of federalism and necessity are always major considerations when Congress considers displacing 200 years of state land law with comprehensive preemptive federal legislation.

III. STATE REGULATION OF FOREIGN INVESTMENT IN UNITED STATES REAL ESTATE

Currently, twenty-three states have restrictions on individual aliens investing in real estate. Most of the states which have affirmative restrictions have imposed these restrictions on the basis of classifications which relate to the status of the particular alien.32

A. Citizenship

Alaska,33 like several other states, restricts non-citizen aliens who attempt to acquire or use public lands. The Alaskan limitation is fairly narrow in that it only applies to public lands which are used for mining, and/or exploration for mineral deposits. A declaration of intent to become a United States citizen by the alien will vitiate the restriction.

Arizona previously restricted ownership of public lands to citizens or those who declared their intention to become citizens, but this barrier was removed in 1978.34 In addition, general restrictions pertaining to all types of real property ownership by non-citizens in Arizona were also repealed in 1978.35

Hawaii seemingly limits the purchase of residential lots from a development board strictly to resident American citizens or those persons declaring an intention to become citizens.36 A recently amended section of the Hawaii Code,37 however, sheds some doubt on the stringency of this requirement. Ownership of a residential houselot within a development tract is limited to bona fide state residents or one who intends to reside in the development tract.

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32 There are several states which have manifested a distinction between aliens and citizens of the United States, although they have not imposed affirmative restrictions at this time. See, e.g., FLA. CONST. art. I, § 2; KAN. CONST. BILL OF RIGHTS § 17.
33 ALASKA STAT. § 38.05.190 (1977).
35 Id. §§ 33-1201 to 1210 (repealed 1978).
Idaho and Oregon still restrict the sale of public lands to citizens or those who have expressed the intention to seek United States citizenship. Interestingly enough many of the states which prohibit foreign ownership of state lands are western states where the federal government still continues to own or control much of the land. Although these states cannot constitutionally prevent citizens of other states from acquiring their land, the policy of excluding non-American citizens from owning state lands may have been an attempt to prevent further dilution of state control over real estate. It is certainly more difficult to enforce tax collection and other state procedures when the land is owned by persons located abroad.

Indiana also limits the acquisition and enjoyment of real property to citizens or those who intend to become United States citizens. Aliens who purchase more than 320 acres of land are given five years to obtain American citizenship in order to retain control over the excess property. If the alien fails to achieve citizenship within this period he must dispose of his holdings in excess of 320 acres, or suffer escheat to the State.

Kentucky gives the alien eight years within which to become a citizen, at which time the property escheats to the State. However, alien residents may hold and use realty for twenty-one years. This provision is not particularly useful for the foreign-based investor who has no intention of becoming an American citizen. Furthermore, the twenty-one year limitation effectively rules out long term real estate development, even by the resident alien.

B. Alien Enemies

Georgia is one of four states restricting ownership of real estate by alien-enemies. However, the Georgia statute does provide an exception where the property was acquired by devise. The Georgia Court in Fehn v. Shaw held that a devise of land to an enemy alien is not void unless the government where the land is situated affirmatively acts to prevent the transfer. Thus, government acquiescence may permit an enemy alien to retain possession of an inheritance of Georgia realty. One reading of the case suggests that the same rule would apply to any enemy alien investor absent appropriate government action.

In Maryland any alien, except an enemy alien, enjoys the same rights

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40 Ind. Code Ann. § 32-1-7-1 (Burns 1976).
41 Id. §§ 32-1-8-1, 32-1-8-2.
43 Id. § 381.320.
regarding real property that a citizen does. The New Jersey and Virginia statutes follow an approach similar to that employed in Maryland.

C. Residency

Generally, Connecticut bars non-resident aliens from possessing real estate within the state. Citizens of France, however, are accorded equal status with American citizens under the Connecticut statute. Provisions of this type are clearly susceptible of running afoul of federal authority over foreign affairs. Non-residents may acquire and use real estate within the state if the land is used for quarrying, mining or smelting purposes. The statute does not address the question of whether partial use would satisfy the restriction. Under a partial use theory, the foreign based investor could purchase and develop large tracts of land without violating the statute as long as token mining-related activities are maintained on the premises. There do not appear to be any Connecticut decisions dealing with this issue.

Resident aliens are permitted to hold real estate under Mississippi law. Non-resident aliens are only permitted to acquire or hold land for the purposes of securing a debt. In any event, the non-resident may not hold land for a period greater than twenty years unless he becomes a citizen of the United States within that period. Non-resident citizens of Syria and Lebanon are allowed to inherit property from citizens or residents of Mississippi. As mentioned earlier, statutes of this type are potentially violative of federal authority over foreign affairs.

Although the New Hampshire law on realty ownership does not expressly preclude non-resident aliens from acquiring real property within the State, the New Hampshire courts have consistently construed the relevant statute as not conferring any rights or privileges upon the non-resident alien.

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50 Id.
51 CONN. GEN STAT. ANN. § 47-58 (West 1960).
52 Miss. CODE ANN. § 89-1-23 (1972).
53 Id.
54 See note 50 supra.
56 Lazarou v. Morados, 101 N.H. 383, 143 S. 2d 669 (1958); the most recent support of
Oklahoma affords alien residents the right to acquire real property. If they decide to terminate their residency they are given five years upon termination to dispose of the property.\textsuperscript{67} Non-resident aliens may also hold realty for five years.\textsuperscript{68}

In Wyoming, aliens who are state residents are permitted to hold real property.\textsuperscript{69} An exemption exists for non-resident aliens who are eligible for United States citizenship and whose country of origin permits American citizens to acquire real estate in that country without being a resident there.\textsuperscript{70} Wyoming differs from other residency jurisdictions in that criminal penalties may be imposed upon either the alien or the American citizen for transactions which violate the statute.\textsuperscript{61} Furthermore, the transaction itself is void and ineffective.\textsuperscript{62}

D. Miscellaneous State Restrictions

This category encompasses other forms of restrictions on alien investment in real estate which are not based primarily on the status of the particular alien.

With certain exceptions, Illinois extends to aliens the right to hold, use and enjoy real property within the state.\textsuperscript{63} Aliens who fail to become citizens within six years after acquiring such property must dispose of it or face divestiture proceedings by the state.\textsuperscript{64} If the State Attorney fails to bring an action within thirty days after the matter is brought to his attention, the Illinois provision permits any citizen to bring a divestiture proceeding.\textsuperscript{65} It is unsettled whether this citizen enforcement mechanism is constitutional under Illinois law. In \textit{People v. Nagano},\textsuperscript{66} the Illinois Supreme Court held that permitting a citizen to enforce the statute was an unconstitutional delegation of the State Attorney's powers. Although the case has never been overruled or modified, the provision in question was reenacted by the legislature almost verbatim in 1967 and 1976.\textsuperscript{67} Although

\begin{itemize}
  \item \textsuperscript{67} \textit{Okla. Stat. Ann.} tit. 60 §§ 121-22 (West 1971).
  \item \textsuperscript{68} \textit{Id.} § 123.
  \item \textsuperscript{69} \textit{Wyo. Const.} art. 1, § 29.
  \item \textsuperscript{61} \textit{Id.} § 34-15-103.
  \item \textsuperscript{62} \textit{Id.} § 34-15-102.
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.}
  \item \textsuperscript{65} \textit{Id.} at § 2, \textit{Ill. Ann. Stat.}, ch. 6, § 2 (Smith-Hurd Supp. 1978).
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} \textit{389 Ill. 231, 59 N.E. 2d 96 (1945)}.
\end{itemize}
the legislature did not expressly overrule the *Nagano* case, the successive re-enactments of the statute present strong evidence that this impliedly occurred. Should the issue arise subsequently it is quite possible that the Illinois Supreme Court would again strike down the provision.

Subject to several exceptions, Nebraska\(^68\) denies aliens the right to hold real estate within the state other than leaseholds of five years.\(^69\) Real estate lying within the corporate limits of cities and villages or within three miles of such limits is exempted from the prohibition.\(^70\) This exception for urban real estate may stem from a desire to protect economically crucial agricultural lands from absentee ownership while not discouraging alien investment in urban real estate for industrial or other commercial use. A further exemption permits aliens to acquire unlimited quantities of real estate as long as such property is used in constructing and maintaining either industrial-manufacturing enterprises, or petroleum storage facilities.\(^71\)

Non-resident aliens may not acquire or hold more than 640 acres of land in Wisconsin unless the property was acquired by inheritance.\(^72\) Purchases greater than 640 acres are forfeited to the state, which enforces the provision through the Wisconsin Attorney General.\(^73\)

Iowa prevents non-resident aliens from owning more than 640 acres of land which are outside the boundaries of any city. Non-resident aliens may however, freely hold real estate within the corporate limits of any city.\(^74\) Wisconsin and Iowa, like Nebraska, are heavily agricultural states. Therefore, the “prevention of absentee ownership” rationale as suggested above, may also explain the Iowa and Wisconsin provisions.

Pennsylvania limits alien acquisition and retention of real estate to 5,000 acres.\(^75\) In addition, the annual net income derived from the property must not exceed $20,000.\(^76\) This effectively restricts the alien from large scale development of property while he retains ownership. Presumably, the property still retains its investment value, and the alien could reap potentially large capital gains by conveying the property to an independent developer. Because of the dearth of case law, it is unclear

\(^{68}\) *NEB. REV. STAT.* § 76-402 (1971).

\(^{69}\) *Id.*

\(^{70}\) *NEB. REV. STAT.* § 76-414 (1971).

\(^{71}\) *NEB. REV. STAT.* § 76-413 (1971).

\(^{72}\) *WIS. STAT. ANN.* §§ 710.01-710.02 (West Supp. 1979).

\(^{73}\) *Id.*

\(^{74}\) *IOWA CODE ANN.* § 567.2 (West Supp. 1978) Iowa has also instituted a reporting mechanism concerning the ownership of agricultural real estate by nonresident aliens. See *IOWA CODE ANN.* § 567.9 (West Supp. 1978). This procedure reflects a heightened attitude of concern among many states about the increasing investment in their real estate by foreigners.

\(^{75}\) *68 PA. CONS. STAT. ANN.* § 32 (Purdon 1965).

\(^{76}\) *Id.*
whether a sale generating more than $20,000 in profits would exceed the statutory limitations.\textsuperscript{77}

Aliens in South Carolina may own and enjoy the use of up to 500,000 acres of real estate.\textsuperscript{78} Unlike Pennsylvania, which impliedly restricts development of the property, acquisitions in South Carolina may be freely developed.

E. New State Limitations on Alien Investment

Recent concern over alien investment in U.S. real estate is not confined to the federal government. Several states have substantially modified their existing statutes regarding alien investment in real estate, and at least two jurisdictions have enacted new provisions to specifically deal with the problem. Much of the concern has been over alien acquisition of agricultural properties.

Minnesota, for example, has recently revised its statutes to make it unlawful for any non-resident alien to acquire agricultural lands within the state. Agricultural lands acquired by inheritance or as security for indebtedness, which are disposed of within three years after acquisition, are exempted from the statute. The statute also exempts lands secured by treaty, property used for transportation purposes by a common carrier, lands used for mining or mineral processing, and agricultural lands used for experimental or research purposes.\textsuperscript{79}

If agricultural lands are held in violation of the statute, the Minnesota Attorney General can bring an action to require the alien to divest himself of the property. The alien is given one year to do so or will suffer loss of the land at public sale.\textsuperscript{80} The non-resident alien may retain lands acquired before May 27, 1977, but an annual report must be filed with the Minnesota Commissioner of Agriculture describing the property, the purchase price, its current use, and other information as required by the Commissioner. Failure to register is a misdemeanor.\textsuperscript{81}

Missouri has recently enacted new legislation regulating alien investment in agricultural property. The provisions generally preclude non-resident aliens from owning agricultural realty within the State.\textsuperscript{82} Aliens who cease to be bona fide residents of the United States must dispose of the land within two years or it will be sold at public sale.\textsuperscript{83} Aliens may, how-

\textsuperscript{77} In any event, the buyer seems to be protected. See 68 Pa. Cons. Stat. Ann. §§ 53-54. (Purdon 1965).
\textsuperscript{78} S.C. Code 27-13—30. (1976)
\textsuperscript{80} Id.
\textsuperscript{81} Id.
ever, purchase agricultural land as long as the land is used for non-agricultural purposes. The exemption for “non-agricultural” use may have been motivated by the same factors behind the Nebraska, Iowa and Wisconsin provisions. Missouri, like these sister states, is heavily agricultural and this statutory exemption may be to prevent absentee ownership as well as to eliminate additional competition for Missouri farmers. A report must be filed with the Director of the Missouri Department of Agriculture stating the intended use of the property, the owner’s name, and a description of the property. The report must be filed within thirty days after acquiring the property.84

IV. FEDERAL REGULATION OF FOREIGN INVESTMENT IN UNITED STATES REAL ESTATE: SOME PROPOSALS

When considering proposals for federal legislation in spheres typically left to the states one must implicitly recognize the special problems that arise in a system involving multiple governmental entities. Pursuant to supremacy clause85 however, it is clear that in many cases federal law is paramount over local concerns when balanced on the scales of competing federal and state interests.

As noted previously, there is presently no clear, uniform federal policy regarding alien investment in U.S. real estate and thus no current preemption problem. The preemption doctrine recognizes that in certain situations conflicting or inconsistent state laws must yield in the face of federal legislation. The United States Supreme Court has dealt with this problem on more than one occasion, and although far from being settled, there exists a rough rule of thumb for when state law must yield to federal provisions.

A. The Preemption Doctrine

The case of *Hines v. Davidowitz*86 involved a state statute requiring aliens over eighteen years of age to register with the Pennsylvania State Department of Labor and Industry. The applicable federal regulation at the time required aliens over fourteen years of age to register and provide certain information to the federal government. The Supreme Court in *Hines* stated that the test for federal preemption over state legislation in a particular area is determined by whether the state’s law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”87

The United States Supreme Court extended the *Hines* formula in *Pennsylvania v. Nelson.*88 The defendant in *Nelson* was initially con-

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

86 312 U.S. 52 (1940).

87 Id. at 67.

88 350 U.S. 52 (1940).
victed of violating the Pennsylvania Sedition Act in a Pennsylvania trial court. The Pennsylvania Supreme Court held that the federal Smith Act indicated a congressional interest in regulating the field, and preempted Pennsylvania from enforcing its Sedition Act. In affirming the Pennsylvania decision, the United States Supreme Court in Nelson developed a more concrete framework for delineating federal preemption. Preemption has occurred when: (1) The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.\(^9\) (2) The federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject.\(^9\) (3) Enforcement of the state acts presents a serious danger of conflict with the administration of the federal program.\(^9\) Under the Hines-Nelson principles, the United States Supreme Court will examine each situation of possible federal preemption on a case-by-case basis.\(^9\)

B. Congressional Power to Regulate Commerce and Foreign Affairs

Congress' constitutional authority to regulate commerce\(^6\) and foreign affairs\(^4\) provides two grounds whereby present state activity could become federalized.

1. Authority over Commerce

Historically, the meaning of commerce as used in Article I, Section 8 has been interpreted liberally. The United States Supreme Court noted in *Welton v. Missouri*,\(^5\) that

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states.\(^6\)

These broad notions of federal commerce power, judicially approved, give Congress great flexibility in deciding whether to begin or expand federal

\(^9\) Id. at 502.
\(^9\) Id. at 505
\(^9\) Id.

\(^9\) As the Court noted in *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1976), the inquiry involves considering the “relationship between State and Federal laws as they are interpreted and applied, not merely as they are written.”

\(^9\) U.S. Const. art. I, § 8, cl. 3.
\(^4\) U.S. Const. art. I, § 8.
\(^9\) 91 U.S. 275 (1875).
regulation in a particular area. As the language of Welton indicates, foreign investors who use domestic agents in interstate realty transactions, or foreigners overseas who engage directly in domestic real estate transactions fall within the kinds of subjects traditionally thought appropriate for federal control.

Congressional power to regulate interstate and foreign commerce has long been recognized as being plenary in nature. Since the subject matter is conducive to federal regulation and Congress’ power to regulate such commerce is undisputed, it appears manifest that the commerce clause could serve as a ground for federalizing state control over alien investment in U.S. real estate.

The fact that congressional control over commerce is both plenary and absolute does not mean that such control is in all cases exclusive. It is well settled that absent congressional action, the states may move to control local affairs which have only an incidental effect on interstate commerce. The United States Supreme Court has developed several tests for determining when state activities unduly interfere with interstate commerce to the extent that they are unconstitutional. The theory initially presented in Cooley v. Board of Wardens is most applicable here. Under the Cooley theory, congressional power to regulate commerce is exclusive of the states when the subject in question is national in character or is one plainly calling for a uniform system of regulation. If the area is one not calling for national uniformity, or Congress has exercised its regulatory powers in a limited fashion, the states may act. The Supreme Court has apparently been willing to subject each case to individual scrutiny and not merely apply an across-the-board rule. In Colorado Anti-Discrimination Commission v. Continental Air Lines Inc., the Court noted that “the line separating the powers of a State from the exclusive power of Congress is not always distinctly marked; courts must examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify foreclosing a State from the exercise of its traditional powers.” This balancing approach reflects the Court’s concern with unnecessarily obliterating state control over activi-

102 Id. at 719.
ties which are legitimately within the scope of state authority. A fixed rule, particularly where Congress has not acted, would deny to the states the opportunity to concurrently regulate, with the federal government, questions raising bona fide local concerns.

Although alien investment in U.S. real estate may not require uniform regulation, the states still must not enact legislation which burdens interstate commerce in a manner clearly extending beyond the local interests embodied in the legislation.

In the early 1900's the federal government began to increase and centralize its control over activities that formally had been within the exclusive province of the states. In some cases this reflected federal belief that questions of national interest would not be adequately protected or understood by local entities.

Control over the use and ownership of land may present the opposite problem. By its very nature, land possesses historical, emotional and symbolic characteristics not found in other types of tangible property. Regulation by a distant, often uninformed bureaucracy may not fully protect the distinctly local matters associated with land ownership, use and control. Viewed from this perspective, it may be preferable to leave control over alien investment in U.S. real estate to the states, who can more directly evaluate the need for any governmental regulation.

2. Authority over Foreign Affairs

Congress has also been granted express authority to regulate certain questions touching foreign affairs and on more than one occasion the United States Supreme Court has recognized that additional congressional powers in the area of foreign relations may be implied. As the Court noted in Perez v. Brownell:

The States that joined together to form a single Nation and to create

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105 The symbolic, historical, and indeed economic development of the United States as a nation is integrally tied to the geographic expansion which began in New England and culminated in Alaska. The diverse regions of the United States and the "pioneer spirit" that developed in conquering these areas contributed to the folklore and traditions that remain vital to the uniqueness of American heritage, and any tampering with the traditional local mechanisms for regulating land use and control may be seen as an attack on this special significance that land has played in American history.

107 356 U.S. 44, 57 (1958). Although the case was later distinguished, the broad principle presented concerning congressional authority over foreign affairs still retains its viability. See also Fong Yue Ting v. United States, 149 U.S. 698 (1893).
through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations.

Should Congress decide to control alien investment in U.S. realty under its foreign relations powers, the argument for uniformity becomes considerably more forceful than under a commerce clause rationale. The states have no legitimate constitutional interest in conducting foreign relations. Subjecting national interests to fifty different approaches in this area would unduly interfere with the need for uniform foreign policy. Congressional power over foreign affairs, either expressed or implied, provides an alternative method for preempting or severely restricting state control over alien investment in American real estate.

The inquiry then becomes: why has Congress refrained from enacting a uniform system of regulation over alien investment in U.S. real estate? There are two possible explanations. As a general proposition, law making tends to be an incomplete process. Legislation usually is passed in response to matters deemed to be of public importance. Until recently, alien investment in American real estate had not been perceived as a problem, or as a subject ripe for federal legislative action.

Second, questions concerning the use and regulation of land have traditionally been matters of local concern. In a governmental system involving multiple sovereigns, Congress is invariably conscious of avoiding needless interference with important and settled state practices. Notions of federalism then, may have played a role in restricting affirmative congressional activity in the area.

V. CONCLUSION

Presently, there is no comprehensive federal scheme for regulating individual alien investment in American real estate. However, recent legislative activity indicates an increased federal interest in the problem, and the potential for comprehensive regulation in the area is growing.

The various state regulations surveyed in this article present a di-

109 Other branches of the Federal Government have also become increasingly aware of the delicate balance which exists between the State and Federal governments. The United States Supreme Court's current deferential attitude toward state activity is best represented by Younger v. Harris, 401 U.S. 37, 44 (1971), where the Court stated that "the National Government, anxious though it may be to vindicate and protect federal rights and interests, always endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." This renewed judicial concern over state authority in local matters may make it more difficult for Congress to completely eliminate state control over alien-investment in United States real estate, even when such state regulation impinges on congressional authority to regulate commerce.
verse system of regulation based on local needs and perceptions. The effectiveness of these restrictions is questionable, but recent state statutes incorporating reporting requirements may at least provide additional information on an issue for which there seems to be little concrete data. In addition, the dearth of case law interpreting these statutes seems to indicate that they are enforced on an irregular basis, if at all. As a practical matter, the existing state regulations do not pose a serious impediment to the individual alien intent on investing in U.S. real estate. A recent opinion of the Oklahoma Attorney General indicating that Oklahoma's provision banning the acquisition of real estate by non-resident individual aliens will be actively enforced, suggests that a new trend may be emerging. Other states may soon follow Oklahoma's approach and resuscitate their existing escheat provisions. The significance of this prospect should not be underestimated; the recent increased federal concern in this area may have been based in part on the perception that the states are ineffective in regulating foreign investment in American real estate. Active administration of new and existing state regulations will add further tension to the sensitive determination of who, if anyone, should be regulating foreign investment in American real estate and may indicate a willingness by the states to reassert traditional regulatory perogatives.

At this time, public sentiment appears to demand some kind of governmental intervention. Federal control certainly provides the appealing characteristics of uniformity and centrality. On the other hand, land law has historically been a subject of local concern, especially when its symbolic qualities are considered. The solution selected must accommodate and balance these competing interests.

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112 See note 105, supra.