PROPERTY AND PREJUDICE

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ABSTRACT

"Alien land laws"—laws restricting noncitizens from owning real property—are back. A dozen states have enacted such laws during the past year, and over thirty states have considered such bills. These new bills are rooted in xenophobia, much like their predecessors, but they also have unique characteristics. They single out governments, citizens, and corporations of specific countries perceived to pose a threat; they impose ownership restrictions based on arbitrary distances to U.S. military bases and critical infrastructure; they inflict particularly harsh penalties; and they try to ferret out foreign control in complex corporate structures. The purported justifications are national defense, food security, and prevention of absentee ownership. But these laws completely fail to achieve their asserted goals. The poor means-end fit, combined with the availability of far less restrictive alternatives, leaves the new laws vulnerable to legal challenges under the Equal Protection Clause and the Fair Housing Act. But century-old Supreme Court precedents and gaps in legal doctrine may still make it difficult for such challenges to prevail. Preemption arguments based on immigration law, the foreign affairs power, and federal laws governing foreign investment, as well as Dormant Commerce Clause arguments, also involve legal hurdles. This Article analyzes these legal arguments, evaluates potential obstacles, and charts possible paths forward. Regardless of the legal viability of these laws, this Article cautions that they will perpetuate prejudice, open the door to a new form of segregation, and limit who can achieve the American Dream.

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INTRODUCTION

Sun Guangxin, a Chinese real estate tycoon, owns 140,000 acres of land in Val Verde County, Texas, near an Air Force base close to the border.[1] He spent approximately $110 million on real estate purchases, paying above-market prices for plots that were not on the market.[2] But Mr. Sun did not buy this land himself. He used a Texan intermediary, who bought the land and transferred it to Mr. Sun's company, GH America Energy LLC, a subsidiary of the China-based Guanghui Energy Company.[3] The plan was to establish a wind farm and produce renewable electricity for the Texas grid.[4]

Environmentalists opposed the wind farm, but their concerns did not gain traction until they framed the wind farm as a threat to national security due to its location.[5] That got the attention of Senator Ted Cruz and state legislators, who began campaigning against the wind farm.[6] This campaign became a catalyst for several bills in Texas that restricted foreign ownership of land.[7] The bill that received the most traction prohibited real property ownership by any businesses headquartered in China, Iran, Russia, and North Korea or owned or controlled by citizens of those countries, as well as by individual citizens and government actors from those countries.[8]

Texas is not alone. In the past year, bills have been proposed in over thirty states that would restrict foreign ownership of land, real estate, and

1. John Hyatt, *Why a Secretive Chinese Billionaire Bought 140,000 Acres of Land in Texas*, FORBES (Aug. 9, 2021, 11:35 AM), https://www.forbes.com/sites/johnhyatt/2021/08/09/why-a-secretive-chinese-billionaire-bought-140000-acres-of-land-in-texas [https://perma.cc/F7UG-HSN6].
2. *Id.*
3. *Id.*; Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. 255, 280 (2024).
4. Hyatt, *supra* note 1.
5. *Id.* On the security creep in many areas and in property law in particular, see Erie, *supra* note 3, at 272.
6. Hyatt, *supra* note 1.
7. Erie, *supra* note 3, at 281, 284–85.
8. S.B. 147, 2023 Leg., 88th Sess. (Tex. 2023).

natural resources.[9] To date, a dozen of them have been enacted into law.[10] Many of these laws single out specific countries perceived to be hostile, including, but not limited to, China, Iran, Russia, and North Korea. Some bills name countries directly, while others reference various federal designations, such as federal lists of "foreign adversaries" and "countries of particular concern."[11] A few bills are a bit more subtle, restricting ownership by "state-controlled enterprises," which are most common in China,[12] or citing statutes that address only Chinese military companies.[13]

These laws fan the flames of rising anti-Chinese sentiment. Over 80% of the U.S. population currently holds an unfavorable view of China.[14] Fear of China's economic and military power,[15] disapproval of China's foreign policies and human rights abuses,[16] media reports blaming China for the COVID-19 pandemic,[17] and angst over espionage,[18] as well as explicit or implicit biases,[19] fuel these views. Of course, most Chinese investors seeking

9. *See* MICAH BROWN, NAT'L AGRIC. L. CTR., FOREIGN OWNERSHIP OF AGRICULTURAL LAND: 2023 FEDERAL & STATE LEGISLATIVE PROPOSALS 1 (2023) (on file with author); *Foreign Ownership of Agricultural Land: FAQs & Resource Library*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/foreign-investments-in-ag [https://perma.cc/L3ZM-GDFV]; Micah Brown & Nick Spellman, *Statutes Regulating Ownership of Agricultural Land*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/state-compilations/aglandownership [https://perma.cc/UT2Q-X2LM]. These proposals are discussed *infra* Part II.

10. These include Alabama, Arkansas, Florida, Idaho, Indiana, Louisiana, Montana, North Dakota, Oklahoma, Tennessee, Utah, and Virginia. *See infra* Part II.

11. *See infra* Sections II.A–B.

12. *See, e.g.*, S.B. 224, 2023 Leg., Reg. Sess. (Cal. 2023); *see also* Samuel Shaw, *State Legislatures Are Cracking Down on Foreign Land Ownership*, MOTHER JONES (Mar. 10, 2023), https://www.motherjones.com/politics/2023/03/state-legislatures-are-cracking-down-on-foreign-land-ownership [https://perma.cc/MN4Y-FQ43] (noting that "no other country [besides China] conducts as much business with 'state-controlled enterprises' ").

13. *See* UTAH CODE ANN. §§ 63L-13-101, -201, -202 (West 2024).

14. Laura Silver, *Some Americans' Views of China Turned More Negative After 2020, but Others Became More Positive*, PEW RSCH. CTR. (Sept. 28, 2022), https://www.pewresearch.org/short-reads/2022/09/28/some-americans-views-of-china-turned-more-negative-after-2020-but-others-became-more-positive [https://perma.cc/U66F-32FR].

15. *Id.*

16. *Id.*; *see also* Laura Silver, Christine Huang & Laura Clancy, *Negative Views of China Tied to Critical Views of Its Policies on Human Rights*, PEW RSCH. CTR. (June 29, 2022), https://www.pewresearch.org/global/2022/06/29/negative-views-of-china-tied-to-critical-views-of-its-policies-on-human-rights [https://perma.cc/JUN7-JSAX].

17. Zeyu Lyu & Hiroki Takikawa, *Media Framing and Expression of Anti-China Sentiment in COVID-19-Related News Discourse: An Analysis Using Deep Learning Methods*, 8 HELIYON, Aug. 2022, at 1, 1.

18. Katie Rogers, *Look! Up in the Sky! It's a . . . Chinese Spy Balloon?*, N.Y. TIMES (Feb. 4, 2023), https://www.nytimes.com/2023/02/04/us/politics/chinese-spy-balloon-obsession.html; Tara Copp & Lolita C. Baldor, *Pentagon: Chinese Spy Balloon Spotted Over Western US*, AP NEWS (Feb. 2, 2023, 7:26 PM), https://apnews.com/article/chinese-surveillance-balloon-united-states-montana-47248b0ef2b085620fcd866c105054be.

19. *See, e.g.*, Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCH. 447, 463–64 (2005); Sapna Cheryan & Benoît Monin, *"Where Are You* Really *From?": Asian Americans and Identity Denial*, 89 J. PERSONALITY & SOC. PSYCH. 717, 727–28 (2005).

to buy property in the United States are not acting as pawns of the Chinese Communist Party. Instead, they may be families trying to move their money beyond the reach of the Chinese government, investing to ensure that their children get a good education, or hoping to establish themselves in the United States.

Despite the new context, these laws conjure up one of the darkest periods of U.S. immigration history, involving Chinese Exclusion[20] and an Asiatic Barred Zone that swept across a continent.[21] The history of alien land laws is intertwined with racial exclusions from U.S. citizenship and the creation of hierarchies based on race, national origin, and alienage.[22] As California's Attorney General said in 1913 when he championed the state's alien land law aimed at limiting the presence of Japanese immigrants: "[T]hey will not come in large numbers and long abide with us if they may not acquire land."[23] A century ago, the U.S. Supreme Court upheld California and Washington's alien land laws, and it has never revisited the issue.[24] These lingering precedents from an unabashedly racist era are now being relied on by states eager to stretch the limits of traditional state powers like regulating the transmission of property and to influence the federal domains of immigration, national security, and foreign affairs.

This new wave of alien land laws differs from prior waves in important respects.[25] First, the naming of specific countries and use of certain federal

20. *See* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943); Geary Act, ch. 60, 27 Stat. 25 (1892) (repealed 1943).

21. Immigration Act of 1917, ch. 29, 39 Stat. 874.

22. *See* Shoba Sivaprasad Wadhia & Margaret Hu, *Decitizenizing Asian Pacific American Women*, 93 U. COLO. L. REV. 325, 363 (2022) ("The birth of Chinatowns in the U.S. at the turn of the century was not a geographic coincidence but rather the result of geographic ostracism that stemmed from other forms of exclusion."); Mary Szto, *From Exclusion to Exclusivity: Chinese American Property Ownership and Discrimination in Historical Perspective*, 25 J. TRANSNAT'L L. & POL'Y 33, 66–74 (2015–2016); Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 979–90 (2010); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–14 (1998) (explaining how naturalization became race-neutral with the Immigration and Nationality Act of 1952); Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 37 (1998).

23. MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 159 (1946).

24. *See* Terrace v. Thompson, 263 U.S. 197, 224 (1923); Porterfield v. Webb, 263 U.S. 225, 233 (1923); Frick v. Webb, 263 U.S. 326, 334 (1923); Webb v. O'Brien, 263 U.S. 313, 326 (1923).

25. For articles examining prior waves of alien land laws, see William B. Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407, 407–11 (1978); James Alan Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 251–58 (1980); James C. McLoughlin, Annotation, *State Regulation of Land Ownership by Alien Corporation*, 21 A.L.R. 4th 1329, 1329 (1983); Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 626–27 (1976); Mark Shapiro, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 BROOK. J. INT'L L. 217, 221–24 (1993); Charles H. Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 31–34 (1962).

lists reflects a new form of national security creep. This national security slant also appears in the heightened restrictions placed on property located within a certain distance of critical infrastructure, such as military bases and weather stations. While some states have found ten miles to be a safe distance, others require fifty miles, suggesting an arbitrariness to the restrictions imposed. The new laws also seek to ferret out foreign control in more complex corporate structures than ever before. And they punish violators with harsher criminal penalties than in the past.

While the laws purport to protect national security and food security, and to prevent absentee landownership, they are poorly designed to achieve these aims. Foreign ownership of U.S. real property is minimal. Only 2.9% of privately held agricultural land[26] and 1.8% of residential real estate[27] is foreign-owned. Additionally, the major foreign owners of agricultural land are not from the countries targeted by the new state laws. While China is second only to Canada on the list of foreign countries whose citizens are buying U.S. residential properties,[28] their share of US land is very small. Foreigners own 31% of the land in the U.S., but Chinese investors represent only 1% of all foreign-owned land.[29]

But even assuming there are compelling government interests at stake, the means used to achieve them are ineffective. These laws will not solve the problem of foreign interests and corporate consolidation driving the real estate and agricultural markets, as sophisticated players can easily circumvent the restrictions. For example, because most of the laws do not restrict leases, a foreign-owned business could just lease land from local landowners. The restrictions on landownership will also not increase national security in an era of cyber warfare, drones, and spy balloons. Furthermore, some of these alien land laws target only ownership and not

26. TRICIA BARNES, MARY ESTEP, VERONICA GRAY, CASSANDRA GOINGS-COLWELL, CATHERINE FEATHER & PHIL SRONCE, U.S. DEP'T OF AGRIC., FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 2020 1 (2020), https://www.fsa.usda.gov/sites/default/files/documents/2020_afida_annual_report.pdf [https://perma.cc/KG37-UMEU].

27. MATT CHRISTOPHERSON, NAT'L ASS'N OF REALTORS, 2023 INTERNATIONAL TRANSACTIONS IN U.S. RESIDENTIAL REAL ESTATE 11 (2023) (stating that from April 2022 to March 2023, "[t]he share of foreign buyer purchases to existing-home sales was 1.8% . . . while the dollar volume of foreign buyer purchases to the total existing-home sales volume" was 2.3%). The definition of foreign homebuyers used by the National Association of Realtors includes recent immigrants (i.e., those who have been in the United States for less than two years at the time of the transaction) and temporary visa holders who reside in the United States.

28. MATT CHRISTOPHERSON, NAT'L ASS'N OF REALTORS, 2024 INTERNATIONAL TRANSACTIONS IN U.S. RESIDENTIAL REAL ESTATE 4 (2024).

29. MARY ESTEP, TRICIA BARNES, VERONICA GRAY, CASSANDRA GOINGS-COLWELL, DENA BUTSCHKY, COURTNEY BAILEY, CATHERINE FEATHER, PETE RILEY, TOM GAJNAK & JOY HARWOOD, U.S. DEP'T OF AGRIC., FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 2022 5 (2022), https://www.fsa.usda.gov/sites/default/files/documents/2022_afida_annual_report_12_20_23.pdf [https://perma.cc/G2N9-XCVS].

leases. A tenant occupying a property near a military base can be as dangerous as the owner of that land, if not more. This new wave of alien land laws also fail to prevent absentee landownership because they generally exempt noncitizens residing in other U.S. states, along with all U.S. citizens and permanent residents regardless of their location. Less restrictive alternatives to some of the proposed or enacted laws could include simply limiting the amount of land that foreigners may own, requiring owners to reside or work on the land to avoid absentee ownership, or creating exceptions for residences if the main concerns are agriculture and food.

Given the poor means-end fit, the true purpose of the laws appears to be symbolic. These laws may simply be a way for politicians to capitalize on the xenophobic sentiments of their electoral base. Sadly, their nefarious social effects will extend well beyond the real estate market.[30] Like racist property restrictions of the past, the new laws will subordinate minorities. Excluding people from home ownership keeps them out of communities, deters immigration, impedes intergenerational transfers of wealth, and obstructs personal flourishing. Even people who are not directly affected by the new laws will suffer due to the chilling effect on the real estate market. Sellers will be hesitant, at best, to engage in transactions with anyone from a targeted country.

This Article examines potential legal challenges to the new wave of alien land laws. Part I provides historical background about prior waves of alien land laws. Part II describes the distinctive characteristics of the current wave. Part III explores possible statutory and constitutional arguments for challenging the new laws. First, Part III explores whether these laws violate the Fair Housing Act, which was enacted as part of the Civil Rights Act of 1968 and prohibits discrimination in housing based on race and national origin.[31] Second, Part III examines whether the new laws violate the Equal Protection Clause, highlighting the underdeveloped nature of equal protection jurisprudence on alienage and national origin classifications. This Section also stresses the lack of means-end fit, which we argue should result in the laws being struck down under either strict scrutiny or rational basis review.[32] Next, this Article analyzes whether the new state laws are preempted by federal immigration law, the federal foreign affairs power, or the federal regulatory framework involving the Committee on Foreign Investment in the United States ("CFIUS").[33] Finally, this Article analyzes

30. Erie, *supra* note 3, at 287–88.

31. 42 U.S.C. §§ 3601–3619, 3631.

32. *See* Graham v. Richardson, 403 U.S. 365, 370–76 (1971) (applying strict scrutiny to strike down state laws that discriminated against noncitizens).

33. Exec. Order No. 11,858, 40 Fed. Reg. 20263 (1975); 50 U.S.C. § 4565.

whether the new laws violate the Dormant Commerce Clause with respect to both domestic and foreign commerce.

Legal challenges to the new alien land laws will not be easy. A federal district court has already refused to enjoin Florida's law, which not only restricts individuals and companies domiciled in certain countries but also singles out those domiciled in China for especially harsh treatment.[34] The legal questions raised by alien land laws will likely reverberate in other important contexts as well. States like Texas and Florida are increasingly looking for ways to use well-established state powers, including police and property powers, to challenge the federal government's authority over international borders and immigration.[35] Alien land laws represent one, but by no means the only, way for states to do this. If no restrictions are placed on alien land laws by courts or the federal government, states could use them to create new forms of segregation, excluding immigrants from their territories by denying them a place to live. In short, these laws once again instrumentalize property for racial prejudice.

I. A BRIEF HISTORY OF ALIEN LAND LAWS

Alien land laws in the United States date back to colonial times and to the influence of the English feudal system.[36] English feudal laws were designed to secure allegiance to the Crown and initially prohibited aliens from purchasing land; then, the laws prohibited them from inheriting it.[37] England eventually abolished those restrictions by statute in 1870.[38] But alien land laws continued in the United States, sanctioned by common law.[39] Some early land laws were incorporated into state constitutions in explicitly racial terms. For example, in 1859, Oregon amended its constitution to prevent any "Chinaman" from owning property in the state and granted only "white foreigners" the same property rights as citizens, a provision that was not repealed for over one hundred years.[40]

Scholars have previously categorized alien land laws into several waves.[41] During the first wave, which extended from approximately 1880 to 1900, eleven states restricted alien ownership of real property in response to

34. *See* Shen v. Simpson, 687 F. Supp. 3d 1219, 1250–51 (N.D. Fla. 2023).

35. *See* J. David Goodman, *Abbott Signs Law Allowing Texas to Arrest Migrants, Setting Up Federal Showdown*, N.Y. TIMES (Mar. 19, 2024), https://www.nytimes.com/2023/12/18/us/abbott-texas-border-law-arrests.html.

36. Morrison, *supra* note 25, at 623.

37. *Id.*

38. *Id.*

39. *Id.*

40. OR. CONST. art. I, § 31 (1859) (repealed 1970).

41. *See* sources cited *supra* note 25.

a depressed agricultural economy and concerns over absentee landowners.[42] Congress also passed the Territorial Land Act of 1887, which "forbade extensive alien landholding in the organized territories, except by immigrant farmers who had applied for citizenship."[43] The federal law aimed to prevent large, foreign-owned ranches from jeopardizing statehood for the territories.

The second wave of alien land laws were passed in the 1920s, as a result of resentment toward Japanese immigrants engaged in farming in California, Oregon, and Washington.[44] California's law "was enacted and . . . enforced solely as a discriminatory law directed against the Japanese."[45] California's Attorney General at the time, Ulysses S. Webb, was transparent about its purpose, framing the central issue as "race undesirability."[46] The California law carried criminal penalties and resulted in successful prosecutions;[47] it also led to severe financial losses with over 30,000 Japanese farmers abandoning "nearly 500,000 acres of California's richest crop lands."[48] Beyond these penalties, the law had a severe psychological impact, demoralizing and subordinating Japanese Americans.[49]

Alien land laws passed at this time often excluded Japanese and other Asians by precluding noncitizens "ineligible for citizenship" from owning land.[50] As Keith Aoki observed, " 'aliens ineligible to citizenship' was a disingenuous euphemism designed to disguise the fact that the targets of such laws were [Japanese]."[51] Laws dating back to 1790 and 1870 excluded Asians from naturalizing.[52] In 1922, the U.S. Supreme Court confirmed that

42. These states were Colorado, Illinois, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, Texas, and Wisconsin. Sullivan, *supra* note 25, at 30–31, 31 n.68.

43. Shapiro, *supra* note 25, at 220–21.

44. *Id.* at 221; Huizinga, *supra* note 25, at 252.

45. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61, 61–62 (1947); *see also* KONVITZ, *supra* note 23, at 158 (explaining that California's alien land law was designed "to drive the Japanese from the land").

46. KONVITZ, *supra* note 23, at 159.

47. Gabriel J. Chin, *Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context*, 1 WYO. L. REV. 497, 504 n.42 (2001) (citing cases).

48. *Japanese Exodus from California*, LITERARY DIG., Jan. 12, 1924, at 14.

49. DAVID J. O'BRIEN & STEPHEN S. FUGITA, THE JAPANESE AMERICAN EXPERIENCE 24 (1991); JERE TAKAHASHI, NISEI/SANSEI: SHIFTING JAPANESE AMERICAN IDENTITIES AND POLITICS 24 (1997).

50. Morrison, *supra* note 25, at 626–27.

51. Aoki, *supra* note 22, at 38–39; *see also* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 19 (1951) ("The purpose of these [alien land] statutes is to prevent Chinese, Japanese and certain Oriental groups from acquiring land."); *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1017 n.3 (1947) ("The phrase, 'ineligible for citizenship,' initially operated to exclude all Asiatics.").

52. The Naturalization Act of 1790 limited naturalization to "free white person[s]." *See* An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (repealed 1795). After the Civil War, the Naturalization Act of 1870 extended eligibility for naturalization to persons of "African descent." *See* An Act to Amend the Naturalization Laws and to Punish Crimes Against the Same, and for Other Purposes, ch. 254, 16 Stat. 254 (1870).

a Japanese person could not be naturalized because he was not "white."[53] The following year, the Court reached the same conclusion regarding someone from India.[54]

That same year—1923—the U.S. Supreme Court upheld Washington's and California's alien land laws.[55] Both cases involved U.S. citizens who wanted to lease land to Japanese farmers. In *Terrace v. Thompson*, the Court reasoned that Washington had "wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people."[56] The Court explained that "in the absence of any treaty provision to the contrary, [a state] has power to deny to aliens the right to own land within its borders."[57] Similarly, in *Porterfield v. Webb*, the Court found California's law limiting property rights to those "eligible to citizenship" to be constitutional.[58] Two other U.S. Supreme Court cases decided that year upheld laws restricting the transfer of shares of a landowning corporation to aliens[59] and prohibiting food crop contracts with aliens.[60]

But Supreme Court decisions issued in 1948 cast doubt on whether *Terrace* and *Porterfield* remained good law. In *Oyama v. California*, the Court invalidated a provision of California's alien land law that deprived a U.S. citizen of Japanese descent of agricultural land paid for by his father.[61] The Court found that the state had failed to offer any compelling justification for discriminating against a citizen "based solely on his parents' country of origin."[62] The Court recognized that restrictions based on ineligibility for citizenship constituted discrimination based on "racial descent."[63] That same year, in *Takahashi v. Fish and Game Commission*, the Court declared unconstitutional a California law that allowed only U.S. citizens to get fishing licenses, which was aimed at discouraging Japanese immigrants from returning to the state after their exclusion from the West Coast and

53. Ozawa v. United States, 260 U.S. 178, 194–95 (1922).
54. United States v. Bhagat Singh Thind, 261 U.S. 204, 213 (1923). Japanese, Chinese, Indians, Filipinos, and others remained ineligible for naturalization until the 1940s. *See* Chin, *supra* note 22, at 13–14; RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 272 (1989).
55. Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923).
56. *Terrace*, 263 U.S. at 217.
57. *Id.*
58. *Porterfield*, 263 U.S. at 225.
59. Frick v. Webb, 263 U.S. 326, 334 (1923).
60. Webb v. O'Brien, 263 U.S. 313, 325–26 (1923).
61. Oyama v. California, 332 U.S. 633, 646 (1948).
62. *Id.* at 640.
63. *Id.* at 646.

internment.[64] Justice Black, writing for the Court, explained that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[65]

In the years following *Takahashi*, the supreme courts of Oregon, California, and Montana invalidated those states' alien land laws, recognizing their racist nature and finding them unconstitutional.[66] The Supreme Court of California opined that the law imposed on noncitizens "an economic status inferior to that of all other persons living in the state. "[67] Other states decided to simply repeal their laws.[68] The Immigration and Nationality Act of 1952, which made naturalization race-neutral, rendered meaningless any remaining state laws that still tied property ownership to eligibility for citizenship.[69] But various other types of alien land laws remained. For example, in 1943, Wyoming had enacted an alien land law that prohibited Japanese Americans who had been in internment camps from buying land in the state, which was not repealed until 2001.[70]

During the Cold War, a third wave of state laws emerged limiting the rights of foreigners to receive land by inheritance.[71] The purpose of these laws was to keep U.S. wealth from communist regimes rather than to prevent noncitizens from owning land.[72] This practice ended after the U.S. Supreme Court's 1968 decision in *Zschernig v. Miller*, which invalidated an Oregon statute that conditioned a noncitizen's inheritance right on reciprocal rights being granted to U.S. citizens.[73] The Court found that the Oregon law was preempted because it intruded on the federal government's authority over foreign affairs.

64. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421 (1948); *id.* at 423–25 (Murphy, J., concurring) (explaining the racist purpose of the law).

65. *Id.* at 420 (majority opinion).

66. Namba v. McCourt, 204 P.2d 569, 583 (Or. 1949) ("[O]ur Alien Land Law . . . must be deemed violative of the principles of law which protect from classifications based upon color, race and creed."); Fujii v. State, 242 P.2d 617, 625 (Cal. 1952) ("By its terms the land law classifies persons on the basis of eligibility to citizenship, but in fact it classifies on the basis of race or nationality."); State v. Oakland, 287 P.2d 39, 42 (Mont. 1955) (relying on the reasoning in *Fujii*).

67. *Fujii*, 242 P.2d at 629.

68. Morrison, *supra* note 25, at 627–28.

69. Immigration and Nationality Act, ch. 2, § 311, 66 Stat. 163, 239 (1952) (stating that the right to naturalize "shall not be denied or abridged because of race or sex or because a person is married") (current version at 8 U.S.C. § 1422).

70. *See* Chin, *supra* note 47, at 498–99. That law remained on the books until 2001. *Id.* at 507.

71. Morrison, *supra* note 25, at 628.

72. *See* Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 257 (1962); William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643, 643 (1985).

73. Zschernig v. Miller, 389 U.S. 429, 441 (1968).

A fourth wave of alien land laws occurred during the 1970s in response to media reports of increased foreign investment in U.S. farmland.[74] These laws generally restricted the type and amount of land that noncitizens could purchase. Media reports stoked fears that family farmers in the U.S. were threatened by foreign investment.[75] In 1972, the Wisconsin Supreme Court upheld an alien land law with "no racial implications" that restricted only the amount of land that could be owned by foreign investors, finding the law "sufficiently related to the state's asserted desire to limit possibly detrimental absentee land ownership."[76]

The current wave of land laws has much in common with these prior waves. Anti-immigrant biases, xenophobia, and fears regarding the fate of family farmers all appear to be playing a role. But as discussed below, the new bills and law also have their own distinct characteristics.

II. RECENT BILLS AND LAWS: THE FIFTH WAVE

The fifth wave of alien land laws began around 2020 and rapidly gained momentum. In 2022 and 2023, dozens of bills were proposed across the country restricting the ownership of real property by individual noncitizens, foreign companies, and foreign governments.[77] To date, twelve of those bills have been enacted into law in Alabama, Arkansas, Florida, Idaho, Indiana, Louisiana, Montana, North Dakota, Oklahoma, Tennessee, Utah, and Virginia. These laws, like their predecessors, vary widely, both in terms of whom they restrict and what is restricted.

Some of the newly enacted laws focus on foreign governments and businesses rather than individuals.[78] Among the laws that apply to individual noncitizens, most restrict only "non-resident aliens," while exempting "resident aliens." Residence in this context generally refers to domicile in the United States,[79] but a couple of laws define a "resident alien" to mean a

74. Shapiro, *supra* note 25, at 222.

75. Huizinga, *supra* note 25, at 253.

76. Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 824–25 (Wis. 1976).

77. For summaries of these bills prepared see APA JUST, TRACKING ALIEN LAND BILLS. (2023) https://www.apajustice.org/uploads/1/1/5/7/115708039/2023723_alienlandbillscan.pdf [https://perma.cc/R5DL-XKXR]; Brown & Spellman, *supra* note 9.

78. *See, e.g.*, ALA. CODE § 35-1-1.1 (2023) (restricting certain foreign governments, as well as political parties or members of political parties in those countries, but not individuals); IDAHO CODE § 55-103 (2024) (restricting foreign governments and foreign state-controlled enterprises, but not individuals); UTAH CODE ANN. §§ 63L-13-101, -201 (West 2024) (restricting "foreign entities" defined as certain companies, countries, sub-federal governments, and government agencies); VA. CODE ANN. §§ 55.1-507, -508 (2023) (restricting certain foreign governments).

79. ARK. CODE ANN. § 18-11-802 (2023) (defining a "resident alien" to include those who are not U.S citizens and who reside anywhere in the U.S.); *cf.* IOWA CODE § 558.44 (1979) (defining a

noncitizen who lives in the state.[80] Some of the laws require "resident aliens" to dispose of their real property within a certain amount of time if they no longer qualify as residents of the state.[81]

Other laws turn on immigration status rather than residence. For example, Louisiana's law exempts anyone "lawfully present" in the U.S.[82] Tennessee's definition of a "sanctioned nonresident alien" explicitly excludes legal permanent residents.[83] North Dakota, like Minnesota, exempts not only legal permanent residents but also noncitizens who enter with certain types of temporary investor or trader visas that are available only to citizens of specific countries that have special treaties with the United States.[84]

Like prior waves, many of the new laws place restrictions specifically on agricultural land and other natural resources.[85] Some are even more specific. Indiana, for example, has prohibited foreign business entities from owning agricultural land for the purpose of crop farming or timber production.[86] However, there are also novel types of restrictions. Notably, many of the new laws restrict ownership of land within a certain distance of a military installation or other "critical infrastructure."[87] Other bills and laws

"nonresident alien" as, inter alia, "[a]n individual who is not a citizen of the United States and who is not domiciled in the United States") (not newly enacted); OHIO REV. CODE ANN. § 5301.254 (West 1979) (defining a "nonresident alien" to mean an individual who is not a U.S. citizen and who is not domiciled in the United States) (not newly enacted).

80. OKLA. STAT. tit. 60, § 122 (2023) (exempting noncitizens who "take up bona fide residence in [the] state"); *cf.* N.D. CENT. CODE §§ 47-10.1-01, -02 (2023) (requiring residence in the state for at least ten months of the year).

81. *See, e.g.*, OKLA. STAT. tit. 60, § 122 (2023) (requiring disposal of the land within five years of when the noncitizen ceases being a bona fide resident of the state); *cf.* ARK. CODE ANN. § 18-11-110 (2023) (requiring a "prohibited foreign party" to dispose of any public or private land owned in violation of the statute within two years); S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (enacted) (requiring a "foreign adversary" who acquires land in violation of the law to divest within one year, after which time the property may be sold at public auction).

82. LA. STAT. ANN. § 9:2717.1 (2023).

83. TENN. CODE ANN. § 66-2-301 (2023).

84. N.D. CENT. CODE § 47-10.1-02 (2023); *see also* MINN. STAT. § 500.221 (2010) (not newly enacted) (defining a "permanent resident alien of the United States" to include not only legal permanent residents, but also individuals who hold a nonimmigrant treaty investment visa).

85. ALA. CODE § 35-1-1.1 (2023) (restricting ownership of agricultural and forest property); IDAHO CODE § 55-103 (2024) (restricting ownership of agricultural land, water rights, mining claims or mineral rights); S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (enacted) (prohibiting foreign adversaries from buying or leasing land used for agricultural production and from entering into contracts that result in control of agricultural production); N.D. CENT. CODE §§ 47-10.1-01, -02 (2023) (restricting ownership and leaseholds of agricultural land); VA. CODE ANN. § 55.1-508 (2023) (prohibiting any interest in agricultural land).

86. IND. CODE § 32-22-3-4 (2022).

87. ALA. CODE § 35-1-1.1 (2023) (restricting ownership of real property within ten miles of military infrastructure or critical infrastructure); IND. CODE. § 1-1-16-9 (2023) (restricting access to critical infrastructure); S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (enacted) (prohibiting foreign

apply broadly to any type of land or real property.[88]

The following Sections take a closer look at some of the distinct characteristics of the new wave of alien land laws and proposed bills. These include singling out specific countries or nationalities by name, focusing on foreign adversaries, prohibiting landownership within a certain distance of military installations or critical infrastructure, focusing on agricultural land, imposing more severe penalties for violations, and targeting all types of foreign control in complex corporate structures.

A. SINGLING OUT SPECIFIC COUNTRIES

Bills proposed in at least a dozen states (including Alabama, Arkansas, Colorado, Iowa, Florida, Georgia, Maryland, Mississippi, South Carolina, Texas, West Virginia, and Wyoming) singled out specific countries for property restrictions.

For example, Alabama enacted a law that defines a "foreign country of concern" as "China, Iran, North Korea, and Russia."[89] Bills considered in Arkansas,[90] Georgia,[91] and Texas[92] similarly placed restrictions on citizens of these four countries. In Colorado, West Virginia, and Wyoming, proposed bills placed restrictions on citizens of China, Russia, or any country designated as a "state sponsor of terrorism."[93]

Florida enacted an alien land law that defined a "foreign country of concern" to mean China, Iran, North Korea, Russia, Cuba, the Venezuelan regime of Nicolás Maduro, and Syria.[94] Florida's law is harshest, however, on citizens of China, placing more severe restrictions on them and subjecting them to stiffer penalties for violating the law.[95] A bill proposed in Arizona included the same seven countries on Florida's list plus Saudi Arabia.[96] The

adversaries from buying or leasing real property that has a direct line of sight to a military installation and from entering into contracts that result in control of critical infrastructure).

88. LA. STAT. ANN. § 9:2717.1 (2023) (restricting ownership of "immovable property"); OKLA. STAT. tit. 60, § 121 (2023) (restricting ownership of "land" generally); TENN. CODE ANN. §§ 66-2-301, -302 (2023) (restricting ownership of "real property," which is defined to include "real estate, including easements, water rights, agricultural lands, or any other interest in real property"); UTAH CODE ANN. § 63L-13-202 (West 2024) (restricting interest in land, defined to include all real property).

89. ALA. CODE § 35-1-1.1 (2023).

90. H.B. 1255, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (bill withdrawn by author).

91. H.B. 246, 157th Gen. Assemb., Reg. Sess. (Ga. 2023).

92. H.B. 4006, 88th Leg., Reg. Sess. (Tex. 2023); *see also* S.B. 147, 88th Leg., Reg. Sess. (Tex. 2023) (introduced version).

93. H.B. 23-1152, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023); H.B. 3436, 86th Leg., Reg. Sess. (W. Va. 2023); H.B. 0116, 67th Leg., Reg. Sess. (Wyo. 2023).

94. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023) (enrolled).

95. *Id.*

96. S.B. 1112, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

Arizona bill emerged after a Saudi Arabian company made headlines for leasing Arizona public lands and pumping exorbitant amounts of groundwater to grow alfalfa for export to Saudi Arabia.[97]

Many other bills singled out China alone, including bills proposed in Iowa,[98] Maryland,[99] Mississippi,[100] South Carolina,[101] and Washington.[102] Two Arizona bills,[103] as well as a bill proposed in Hawaii,[104] refer specifically to the Chinese Communist Party and its members. A Utah bill indirectly references Chinese companies by defining a "restricted foreign entity" as a company that the Secretary of Defense is required to report as a military company, which includes only Chinese military companies.[105] The intense focus on China across so many of these bills and laws is reminiscent of the anti-Asian sentiment that fueled alien land laws long ago. Alien land laws singling out specific countries are less likely to pass constitutional muster than more evenhanded laws.[106]

B. TARGETING FOREIGN ADVERSARIES

Prior to the most recent wave, only five states had alien land laws that restricted land ownership by citizens of foreign adversaries.[107] None of those laws explicitly referred to foreign adversaries, much less attempted to name them. Instead, they benignly extended equal property rights to "alien friends" (New Jersey),[108] "[a]liens who are subjects of governments at peace with the United States and this state" (Georgia),[109] or any alien who is "not an enemy" (Kentucky, Maryland, and Virginia).[110]

97. Isaac Stanley-Becker, Joshua Partlow & Yvonne Wingett Sanchez, *How a Saudi Firm Tapped a Gusher of Water in Drought-Stricken Arizona*, WASH. POST (Jul. 16, 2023, 5:00 AM), https://www.washingtonpost.com/politics/2023/07/16/fondomonte-arizona-drought-saudi-farm-water.

98. H. File 211, 90th Gen. Assemb., Reg. Sess. (Iowa 2023); H. File 542, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).

99. H.B. 968, 2023 Gen. Assemb., Reg. Sess. (Md. 2023).

100. H.B. 984, 2023 Leg., Reg. Sess. (Miss. 2023); S.B. 2828, 2023 Leg., Reg. Sess. (Miss. 2023).

101. H.B. 3118, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

102. S.B. 5754, 68th Leg., Reg. Sess. (Wash. 2023).

103. S.B. 1342, 55th Leg., 2d Reg. Sess. (Ariz. 2022); S.B. 1112, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

104. H.B. 505, 32d Leg., Reg. Sess. (Haw. 2023).

105. H.B. 186, 65th Leg., Gen. Sess. (Utah 2023) (enrolled) (citing National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388).

106. *See infra* Part III.B; *see also* Namba v. McCourt, 204 P.2d 569, 582 (Or. 1949) (striking down Oregon's alien land law, which affected only certain groups of noncitizens, and distinguishing it from a law that would apply equally to all noncitizens).

107. Morrison, *supra* note 25, at 634.

108. N.J. STAT. ANN. § 46:3-18 (West 2023).

109. GA. CODE ANN. § 1-2-11 (2024).

110. MD. CODE ANN., REAL PROP. § 14-101 (West 2024); VA. CODE ANN. § 55.1-100 (2019); KY. REV. STAT. ANN. § 381.290 (West 2023).

In 2023, however, numerous state legislatures considered or passed laws restricting property ownership rights of citizens and companies of countries designated by the federal government as hostile to the U.S. or its values in some way. These bills and laws use various federal lists that were created for completely different purposes.

Laws enacted in Louisiana,[111] North Carolina,[112] and Virginia,[113] as well as bills proposed in Kansas,[114] Montana,[115] Ohio,[116] South Carolina,[117] and Wisconsin,[118] refer to the Secretary of Commerce's designation of certain countries as "foreign adversaries" in the Code of Federal Regulations.[119] This designation is based on the Secretary's determination that a foreign government or foreign nongovernment person has "engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons."[120] Currently, this designation applies to six countries: China (including Hong Kong), Cuba, Iran, North Korea, Russia, and "Venezuelan politician Nicolás Maduro (Maduro Regime)."[121]

The Ohio bill and Louisiana law restrict not only "foreign adversaries" as defined by Secretary of Commerce but also the much longer list of foreign governments sanctioned by the Office of Foreign Assets Control ("OFAC"), which adds Afghanistan, Belarus, Burma, Central African Republic, Democratic Republic of Congo, Ethiopia, Iraq, Lebanon, Libya, Mali, Nicaragua, Somalia, Sudan, South Sudan, Syria, Yemen, and Zimbabwe.[122] A law enacted in Tennessee, on the other hand, refers to citizens of foreign governments sanctioned by OFAC but does not include "foreign adversaries" designated by the Secretary of Commerce.[123]

Other bills and laws refer to various U.S. State Department designations. For example, a bill proposed in New York[124] refers to a

111. LA. STAT. ANN. § 9:2717.1 (2023).
112. N.C. GEN. STAT. § 64-53 (2023).
113. VA. CODE ANN. § 55.1-507 (2019).
114. S.B. 283, 2023 Leg., Reg. Sess. (Kan. 2023).
115. S.B. 256, 68th Leg., Reg. Sess. (Mont. 2023). A different bill was later enacted in Montana.
116. H.B. 212, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).
117. S.B. 576, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).
118. S.B. 264, 106th Leg., Reg. Sess. (Wis. 2023).
119. 15 C.F.R. § 7.4 (2024).
120. *Id.*
121. *Id.*
122. *See Sanctions Programs and Country Information*, U.S. DEP'T OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information [https://perma.cc/43YD-HGGA].
123. TENN. CODE ANN. § 66-2-302(a)(1) (2023).
124. Assemb. B. 6410, 2023 Leg., 246th Sess. (N.Y. 2023).

"foreign country of particular concern," which currently includes twelve countries designated by the State Department: Burma, China, Cuba, Eritrea, Iran, North Korea, Nicaragua, Pakistan, Russia, Saudi Arabia, Tajikistan, and Turkmenistan. Bills proposed in Colorado, West Virginia, and Wyoming reference a completely different U.S. State Department designation—"state sponsors of terrorism"—a list that currently includes only four countries: Cuba, Iran, North Korea, and Syria.[125]

States have also incorporated other federal definitions into their bills and laws. For example, the law passed in Arkansas references not only foreign countries of "particular concern" but also includes citizens or residents of countries subject to the International Traffic in Arms Regulations.[126] Meanwhile, a bill proposed in Texas referred to countries identified by the United States Director of National Intelligence as posing a risk to the national security of the United States in each of the three most recent Annual Threat Assessments of the U.S. Intelligence Community.[127] At least one law, enacted in Indiana, does not refer to federal definitions at all and instead allows the governor to designate certain countries as a threat to critical infrastructure.[128]

A few of the proposed bills simply make vague references to "hostile" countries without providing a clear definition of the term. For instance, a Mississippi bill restricts ownership by "citizens of a country that is hostile to the interests of the United States or a country that is a known violator of human rights," without explaining how such countries should be identified.[129] Similarly, a Hawaii bill that restricts land ownership by members of the Chinese Communist Party also refers to "other hostile foreign influence," providing only a vague definition of this term.[130]

C. PROXIMITY TO MILITARY INSTALLATIONS AND CRITICAL INFRASTRUCTURE

Additionally, many of the recent bills and laws limit landownership near military installations or other critical infrastructure. Considerable variation exists among the bills regarding what types of facilities are

125. *See* H.B. 23-1152, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023); H.B. 3436, 86th Leg., Reg. Sess. (W. Va. 2023); H.B. 0116, 67th Leg., Reg. Sess. (Wyo. 2023).

126. ARK. CODE. ANN. § 18-11-802(5)(B) (2024) (citing 22 C.F.R. § 126.1 (2024)).

127. S.B. 147, 88th Leg., Reg. Sess. (Tex. 2023) (citing 50 U.S.C. § 3043b (2020)).

128. IND. CODE. § 1-1-16-8 (2023).

129. S.B. 2632, 2023 Leg., Reg. Sess. (Miss. 2023).

130. H.B. 505, 32d Leg., Reg. Sess. (Haw. 2023) (defining "hostile foreign influence" to mean "any entity which has partial ownership held by a foreign government hostile to the United States, or which has board members or employees connected in any way to governments or organizations hostile to the United States.").

included under these terms as well as what constitutes an acceptable distance from them.

For example, a bill proposed in California prohibits foreign actors from owning or leasing land within fifty miles of a U.S. military base or California National Guard Base.[131] A bill proposed in Louisiana restricts foreign ownership of "immovable property located within [fifty] miles of any federal or state military land, . . . weather station[], . . . or any facility operated by the Civil Air Patrol."[132] A bill proposed in Mississippi prohibits nonresident aliens from owning land within fifty miles of a military installation under the jurisdiction of the Department of Defense, the U.S. Coast Guard, or the Mississippi National Guard.[133] A South Carolina bill prohibits companies owned by China or the Chinese Communist Party, or whose principal place of business is in China, from controlling any land or real estate "within fifty miles of a state or federal military base or installation for the purpose of installing or erecting any type of telecommunications or broadcasting tower."[134]

Bills proposed elsewhere specify shorter distances from military installations. For example, a Georgia bill prohibits nonresident aliens from possessing any land within twenty-five miles of any military base, military installation, or military airport.[135] A North Carolina bill prohibits adversarial foreign governments from purchasing or holding land within twenty-five miles of a military base or airport.[136] The law enacted in Florida generally prohibits foreign land ownership within ten miles of a military installation or critical infrastructure facility.[137] Florida's choice of ten miles is particularly interesting given that the legislative history indicates that a major concern was a Chinese company's purchase of land located *twelve* miles from an air force base in North Dakota.[138] Meanwhile, a bill proposed in Hawaii considered just two miles from federal land or critical infrastructure to be a safe distance.[139]

131. Assemb. B. 475, 2023 Leg., Reg. Sess. (Cal. 2023).
132. S.B. 91, 2023 Leg., Reg. Sess. (La. 2023).
133. S.B. 2632, 2023 Leg., Reg. Sess. (Miss. 2023) (died in committee).
134. H.B. 3118, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).
135. S.B. 132, 157th Gen. Assemb., Reg. Sess. (Ga. 2023); H.B. 452, 157th Gen. Assemb., Reg. Sess. (Ga. 2023).
136. Farmland and Military Protection Act, H.B. 463, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).
137. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023) (enrolled).
138. PRO. STAFF OF COMM. ON RULES, S.B. 264 BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 2023, Reg. Sess., at 2 (Fla. 2023).
139. H.B. 929, 32d Leg., Reg. Sess. (Haw. 2023).

D. HARSH PENALTIES

Criminal penalties and prosecutions for violations of alien land laws are not new. In California and Arizona, such criminal prosecutions were common during the 1920s and 1930s, but those laws were subsequently repealed.[140] Penalties for violating a state's alien land laws have generally been civil. Forfeiture of the property or sale at auction with proceeds escheating to the state were commonly specified as penalties in state laws. Under some laws, such as Wisconsin's, a civil fine could be imposed, ranging from $500 to $5,000.[141] Criminal penalties existed but were rare.[142]

In the most recent wave of bills, criminal penalties have gained popularity, and civil fines are steeper. Additionally, some of the new bills and laws impose penalties on the sellers as well as the buyers. For example, the alien land law enacted in Arkansas makes a violation a felony punishable by two years in jail and a $15,000 fine.[143] Being a "resident alien" is mentioned as an "affirmative defense" to the charge.[144] Florida has also made it a criminal offense to violate its new law, which imposes harsher criminal consequences on Chinese purchasers of land than purchasers of other nationalities.[145] Violators who are domiciled in China may be charged with a third-degree felony, punishable by up to five years in jail and a $5,000 fine, while violators domiciled in the other countries named in Florida's law may be charged with only a second-degree misdemeanor, punishable by sixty days in jail and a $500 fine.[146] This disparity extends to sellers. Selling real property to individuals or companies domiciled in China is a first-degree misdemeanor, punishable by one year in prison and a $1,000 fine, while selling property to individuals or companies domiciled in other countries is only a second-degree misdemeanor.[147]

140. *See, e.g.*, People v. Osaki, 286 P. 1025, 1036–37 (Cal. 1930); People v. Entriken, 288 P. 788, 789–90 (Cal. Dist. Ct. App. 1930); People v. Cockrill, 216 P. 78, 79–80 (Cal. Dist. Ct. App. 1923), *aff'd*, 268 U.S. 258 (1925); *see also Ex parte* Nose, 231 P. 561, 562 (Cal. 1924) (denying habeas corpus), *appeal dismissed*, 273 U.S. 772 (1926); Takiguchi v. State, 55 P.2d 802, 805 (Ariz. 1936) ("Our law has real teeth in it, and persons who violate it may suffer very severe penalties, that is, they may have their lands escheated to the state besides being made to suffer criminal punishment—as much as two years in the State Penitentiary or a $5,000 fine, or both.").

141. WIS. STAT. § 710.02(7) (2024).

142. Minnesota is an example of a state that made violation of its alien land law a gross misdemeanor. MINN. STAT. § 500.221 (2010).

143. ARK. CODE ANN. § 18-11-110 (2023); *see also* ARK. CODE ANN. § 18-11-802 (2023) (definitions).

144. ARK. CODE ANN. § 18-11-110 (2023).

145. FLA. STAT. §§ 692.202(7)–(8), .203(8)–(9), .204(8)–(9) (2023).

146. *Id.*

147. *Id.*

E. TARGETING CORPORATIONS

Finally, the current wave of alien land laws targets all forms of foreign control in complex corporate structures. The laws restrict not only foreign corporations but also companies incorporated in the U.S. if they are controlled by noncitizens who would not be allowed to purchase the real estate themselves. The expansive language used in some of these laws reflects an attempt to close the loopholes in previous laws that allowed foreigners to acquire land simply by channeling their investments through the veil of a U.S. corporation. This was one of the main drivers behind the recent alien land law passed in Oklahoma, which specified that "[n]o alien or any person who is not a citizen of the United States shall acquire title to or own land in this state *either directly or indirectly through a business entity or trust*." [148]

Similarly, a Tennessee bill defined a "foreign business" as "a corporation incorporated under the laws of a foreign country, or a business entity whether or not incorporated, in which a majority interest is owned directly or indirectly by nonresident aliens."[149] The bill further explained, "Legal entities, including, but not limited to, trusts, holding companies, multiple corporations, and other business arrangements, do not affect the determination of ownership or control of a foreign business."[150] But this bill still has a major loophole—its definition of a foreign business is limited to owning a majority interest and does not address control. Nonresident aliens could control a corporation based on voting power, even if they do not own a majority of the stock.[151]

Many other bills closed that loophole. A Washington bill, for example, prohibited acquisition of agricultural land by a foreign-*controlled* enterprise

148. OKLA. STAT. tit. 60, § 121 (2023) (emphasis added); *see also* K. Querry-Thompson, *Bill to Strengthen Law Against Illegal Land Ownership Signed in OK*, KFOR (June 7, 2023, 11:06 AM), https://kfor.com/news/bill-to-strengthen-law-against-illegal-land-ownership-signed-in-ok.

149. S.B. 1070, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

150. *Id.*; *see also* S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023) (prohibiting the purchase of agricultural land by "[a] person, entity, or collection of persons . . . having a controlling interest in a partnership, association, corporation, organization, trust, or any other legal entity or subsidiary formed for the purpose of owning real property in this state"). A Democratic senator pushed for the removal of references to individuals in the definition of "foreign principals" to acknowledge that the U.S. is a "melting pot" where individuals come in search of opportunities. Jemma Stephenson, *Alabama Senate Passes Revised Bill on Foreign Land Ownership*, ALA. REFLECTOR (May 19, 2023, 7:01 AM), https://alabamareflector.com/2023/05/19/alabama-senate-passes-revised-bill-on-foreign-land-ownership [https://perma.cc/PBG2-HJH3].

151. For example, in "dual-class" stock companies, which have become increasingly common, "different classes already have unequal voting rights and sometimes even unequal dividend rights." Geeyoung Min, *Governance by Dividends*, 107 IOWA L. REV. 117, 131, 141 (2021) (giving an example of a company that owned 79.7% of the voting power in CBS, a dual-class stock corporation, but held only 10.3% of the economic interest in CBS).

and defined a controlling interest to mean "possession of more than [fifty] percent of the ownership interests in an entity, or an ownership interest of [fifty] percent or less if the persons holding such interest *actually direct the business and affairs* of the entity without the consent of any other party."[152] A law enacted in North Dakota adopts a nearly identical definition.[153]

While the definitions in the new bills and laws vary and are not perfect, they clearly seek to capture all kinds of businesses in which noncitizens play a decisive role. Of course, if a corporation is forty-nine percent owned by U.S. citizens and fifty-one percent owned by noncitizens, the U.S. citizen owners are also likely to suffer financial setbacks as a result of such laws.

III. ARE ALIEN LAND LAWS LEGAL?

Commentators have taken different perspectives on the legality of alien land laws in the past.[154] Some have argued that alien land laws would violate the Equal Protection Clause if they singled out specific countries.[155] Others contend that only restrictions on lawful permanent residents would raise equal protection concerns, and even those may be permissible.[156] Preemption concerns and Dormant Commerce Clause concerns have also been raised.[157] Because of significant variations among the laws, it is difficult to analyze these legal issues for the laws as a whole. Nevertheless, this Part attempts to parse some of the legal challenges that the new wave of alien land laws may face.

A. STATUTORY VIOLATIONS

Alien land laws may conflict with federal statutes that prohibit discrimination such as the Fair Housing Act ("FHA")[158] and the Civil Rights Acts of 1866[159] and 1870.[160]

152. H.B. 1412, 68th Leg., Reg. Sess. (Wash. 2023) (emphasis added) (addressing foreign ownership of agricultural lands).

153. N.D. CENT. CODE § 47-10.1-01 (2023).

154. *See* sources cited *supra* note 25.

155. Morrison, *supra* note 25, at 639–44.

156. James A. Frechter, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOK. J. INT'L L. 147, 183–84 (1988).

157. *See, e.g.*, Shapiro, *supra* note 25, at 232–53; Morrison, *supra* note 25, at 630–60.

158. Fair Housing Act, 42 U.S.C. §§ 3601–19, 3631.

159. Civil Rights Act of 1866, 42 U.S.C. §§ 1981–82.

160. Civil Rights Act of 1870, 47 U.S.C. §§ 1981–83.

1. The Fair Housing Act

The FHA, enacted as part of the Civil Rights Act of 1968, seeks to prohibit unlawful discrimination by landlords. Under the FHA, it is discriminatory "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[161] Although alienage is not specifically mentioned, the U.S. Department of Housing and Urban Development ("HUD") has stated that "[a] requirement involving citizenship or immigration status will violate the [FHA] when it has the purpose or [unjustified] effect of discriminating on the basis of national origin."[162] Private parties would be violating the FHA if they comply with state laws that restrict who can buy or lease real estate based on national origin. States may enhance the protections of the FHA but cannot reduce them. Section 816 of the FHA declares invalid any state law that requires or permits any action that would be a discriminatory housing practice under the FHA.[163]

One aspect of the FHA that makes the inquiry different from an equal protection claim is that claimants do not need to prove discriminatory intent. A facially neutral law may violate the FHA if it has "discriminatory effects."[164] This is useful in challenging a law like Florida's, which may be perceived as discriminating based on domicile rather than national origin. By prohibiting sales of real estate to individuals and companies domiciled in China, Florida's law clearly has discriminatory effects related to national origin: China has over one billion inhabitants, of whom only .05% are not Chinese.[165] Similarly, other countries identified as "foreign adversaries" under Florida's law have a very small percentage of foreigners. Less than

161. 42 U.S.C § 3604(a).

162. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON FAIR HOUSING ACT PROTECTIONS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY 3 (2016), https://www.hud.gov/sites/documents/lepmemo091516.pdf [https://perma.cc/JUN6-KV4H] (internal quotation marks omitted); *see also* Reyes v. Waples Mobile Home Park P'ship, 903 F.3d 415, 432 n.10 (4th Cir. 2018) (giving the HUD regulation and guidance "the deference it deserves"); *cf.* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) (stating that the EEOC's interpretations of Title VII, as the enforcing agency of Title VII, were "entitled to great deference"). Educational brochures about the FHA distributed by HUD also indicate that discrimination based on immigration status is prohibited. *See* U.S. DEP'T OF HOUS. & URBAN DEV., DID YOU KNOW? HOUSING DISCRIMINATION AGAINST IMMIGRANTS OR BECAUSE OF A PERSON'S NATIONAL ORIGIN IS ILLEGAL!, https://www.hud.gov/sites/documents/IMMIGRATION_STATUS_ASIAN.PDF [https://perma.cc/8RWT-JA2P].

163. 42 U.S.C. § 3615.

164. U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATORY EFFECTS FINAL RULE FACTSHEET 2, https://www.hud.gov/sites/dfiles/FHEO/documents/DE_Final_Rule_Fact_Sheet.pdf [https://perma.cc/9H9K-3Q9J].

165. Dudley L. Poston Jr., *China Needs Immigrants*, THE CONVERSATION (July 18, 2023, 8:29 AM), https://theconversation.com/china-needs-immigrants-208911 [https://perma.cc/6JVU-8852].

0.1% of Cuba's population are immigrants, for instance.[166]

A law that has a discriminatory effect on a protected class is unlawful if it is not necessary to achieve a substantial, legitimate, nondiscriminatory interest, or if a less discriminatory alternative could serve that interest.[167] As discussed further under equal protection below, alien land laws are not necessary to achieve the asserted interests, and less discriminatory alternatives are, in fact, available.

An important limitation of the FHA, however, is that it only applies to "dwellings," that is, to real estate capable of being used as a residence.[168] Thus, while broadly written alien land laws that restrict real estate (or real property in general) remain vulnerable to FHA challenges,[169] those that restrict only agricultural land cannot be challenged under the Fair Housing Act.[170] The Civil Rights Acts of 1866 and 1870 may help fill this gap, although, as explained below, these laws have their own limitations.

2. Civil Rights Acts of 1866 and 1870

The Civil Rights Act of 1866 provided that "*citizens* . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens."[171] The Civil Rights Act of 1870 made a significant revision by changing "citizens" to "*persons*."[172] This language is now codified in 42 U.S.C. § 1981 ("section 1981"). The revised language made it clear that noncitizens, as well as citizens, are protected by the law's equality mandate.[173] Courts have also construed section 1981 as prohibiting discrimination based on alienage.[174]

166. *Cuba*, INT'L ORG. FOR MIGRATION, https://www.iom.int/countries/cuba [https://perma.cc/65T3-X7Q3].

167. In 2023, the U.S. Department of Housing and Urban Development issued a rule that returned to the agency's 2013 framework for evaluating discriminatory effects under the Fair Housing Act. Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19450 (Mar. 31, 2023) (to be codified at 24 C.F.R. pt. 100).

168. 42 U.S.C. § 3602(b).

169. *See, e.g.*, OKLA. STAT. tit. 60, § 121 (2023).

170. *See, e.g.*, IDAHO CODE § 55-103 (2024).

171. Civil Rights Act of 1866, Pub. L. No. 39-31, § 1, 14 Stat. 27, 27 (emphasis added).

172. Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (emphasis added) (codified in part at 42 U.S.C. § 1981 (1991)).

173. Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 14–19 (2013).

174. *See* Sagana v. Tenorio, 384 F.3d 731, 738 (9th Cir. 2004), *as amended* (Oct. 18, 2004) ("Just as the word 'white' indicates that § 1981 bars discrimination on the basis of race, the word 'citizen' attests that a person cannot face disadvantage in the activities protected by § 1981 solely because of his or her alien status.").

Alien land laws may therefore run afoul of section 1981.[175]

One limitation of section 1981 is that it applies only to individuals "within the jurisdiction of the United States." While this phrase includes noncitizens in the United States,[176] it would likely exclude noncitizens residing abroad, the group most affected by alien land laws. Corporations headquartered abroad that are "foreign adversaries" under Montana's law therefore may not be able to bring challenges under section 1981, although if they have U.S.-based subsidiaries, such challenges may still be possible. Other states, like Indiana, have broad definitions of "qualified entities."[177] Many alien land laws tackle corporations controlled by foreigners. Any qualified entities based in the U.S. should be able to bring section 1981 challenges, even if they are owned or controlled by citizens of Iran, North Korea, or China.

Another potential limitation of section 1981 is that a separate provision of the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1982 ("section 1982"), specifically addresses property and extends equal protection only to U.S. citizens.[178] Specifically, section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[179] That language was not altered by the Civil Rights Act of 1870. Courts could therefore interpret section 1982 as a limited exception to section 1981's more general rule about contracts, excluding contracts pertaining to property from the alienage equality principle found in section 1981.

Even under this interpretation, however, section 1981 is still relevant, since some of the recently enacted laws not only prohibit buying and selling real property, but also prohibit forming other types of contracts. For example, Indiana's, Montana's, and Texas's new alien land laws prohibit certain foreign entities from countries like China from entering into agreements regarding critical infrastructure (energy grid, water treatment plants, and so on).[180]

175. While some courts have held that there is no private right of action or remedy under § 1981, a suit for damages may be brought under § 1983 to enforce § 1981. *See* McGovern v. City of Philadelphia, 554 F.3d 114, 122 (3d Cir. 2009); *cf.* Butts v. Cnty. of Volusia, 222 F.3d 891, 892 (11th Cir. 2000) (stating that § 1981 must be enforced through § 1983).

176. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) ("The protection of [42 U.S.C. § 1981] has been held to extend to aliens as well as to citizens.").

177. IND. CODE. § 1-1-16-7 (2023).

178. 42 U.S.C. § 1982.

179. *Id.*

180. IND. CODE § 1-1-16-3 (2023); MONT. CODE ANN. § 35-30-103 (2023); S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023); S.B. 2116, 87th Leg., Reg. Sess. (Tex. 2021).

Additionally, one could argue that section 1982 prohibits the restrictions that alien land laws place on U.S. citizen sellers and landlords, as well as U.S. citizen-owned or controlled realty and title companies. From the perspective of U.S. citizens who want to sell properties, the restrictions imposed by states are restraints on alienation.[181] The laws shrink their market, and if the claims about Chinese investors flooding the market and paying exorbitant prices are true,[182] then real estate owners and companies who cater to this population will lose a profitable share of potential buyers. One complication with this argument is that U.S. citizen sellers are not necessarily being treated differently from other "white citizens" under the language of section 1982. For the argument to work, the focus would likely have to be on non-white U.S. citizen sellers, for example, U.S. citizen sellers of Chinese descent whose clientele potentially include a substantial number of Chinese citizens or companies domiciled in China. These U.S. citizen sellers of Chinese descent could argue that they are being deprived of the same opportunities to sell real property that are enjoyed by white citizens who do not have clientele in China.

Another possible legal hurdle is that a disparate impact claim under section 1981 or section 1982 requires showing that the disparate impact is traceable to a discriminatory purpose.[183] This is more limiting than a disparate impact claim under the FHA. Nevertheless, the legislative history and rhetoric surrounding the passage of some of the laws may help demonstrate a discriminatory purpose. State legislators and executive officials discussing alien land laws have used inflammatory rhetoric coated with national security concerns. Feeding on the anti-Asian sentiment fueled by dubious theories about the origin of COVID-19 and compounded by economic fears concerning China's influence, their statements are reminiscent of the language used in the era of the "Yellow Peril."[184] Although alien land laws may seem somewhat removed from the original

181. More precarious is the situation of domestic shareholders who are the minority in corporations dominated, perhaps by a slim margin, by foreign interests. Before the approval of these state alien land laws, their companies could engage in real estate or natural resources transactions. Afterwards, they may need to divest themselves of those interests or may not be able to participate in these transactions.

182. Dionne Searcey & Keith Bradsher, *Chinese Cash Floods U.S. Real Estate Market*, N.Y. TIMES (Nov. 28, 2015), https://www.nytimes.com/2015/11/29/business/international/chinese-cash-floods-us-real-estate-market.html.

183. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390–96 (1982) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact." (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)).

184. Chandran Nair, *U.S. Anxiety over China's Huawei a Sequel of the Yellow Peril,* S. CHINA MORNING POST (May 11, 2019, 6:10 PM), https://www.scmp.com/week-asia/opinion/article/3009842/us-anxiety-over-huawei-sequel-yellow-peril.

purpose of the Civil Rights Acts, which was to prevent discrimination against African Americans in the wake of the Civil War, the rhetoric surrounding these laws reflects a form of racial discrimination.

B. EQUAL PROTECTION CONCERNS

The Equal Protection Clause applies to all persons within the United States, including all noncitizens.[185] But noncitizens abroad generally are not regarded as having a right to equal protection,[186] although open questions about extraterritorial rights certainly remain.[187] This may be a threshold hurdle for bringing an equal protection challenge, since many of the alien land laws apply only to "nonresident aliens" and define "resident aliens" as noncitizens living anywhere in the U.S.[188] If an alien land law restricts only foreigners abroad, an equal protection challenge would likely need to be brought by the individuals and companies based in the U.S. that are prohibited from selling or leasing real property to foreigners abroad.[189]

Another major challenge in bringing an equal protection claim will be the century-old Supreme Court precedents in *Terrace* and *Porterfield* upholding alien land laws, which have never been overruled.[190] Of course, in the 1920s, equal protection jurisprudence was quite different than it is today. Segregation, Jim Crow, and racially restrictive covenants were all legal.[191] Levels of judicial scrutiny were not introduced until 1938, in the famous footnote four of *United States v. Carolene Products*, in which Justice Stone mentioned certain circumstances that may call for a "more searching

185. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

186. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 7–8 (1996); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 69 (2019).

187. *See* Nicholas Romanoff, Note, *The "Bedrock Principle" That Wasn't:* Alliance for Open Society II *and the Future of the Noncitizens' Extraterritorial Constitution*, 53 COLUM. HUM. RTS. L. REV. 345, 367 (2021) ("[V]ital questions about the scope of the noncitizens' extraterritorial Constitution remained unanswered in 2020."). *See generally* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751 (2020) (examining whether noncitizens who are just outside the U.S. border have constitutional rights such as due process and discussing different tests that courts have used to analyze whether rights apply extraterritorially).

188. *See* Shapiro, *supra* note 25, at 223.

189. For a discussion of the equal protection rights of corporations, see Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581, 585 (2022) (arguing that "corporations have been crucial players in shaping rights guarantees—particularly an expansive interpretation of equal protection.").

190. Terrace v. Thompson, 263 U.S. 197, 217 (1923); Porterfield v. Webb, 263 U.S. 225, 233 (1923).

191. The U.S. Supreme Court upheld racially restrictive covenants in *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926), and did not invalidate them until two decades later in *Shelley v. Kraemer*, 334 U.S. 1, 22–23 (1948). *See also* K-Sue Park, *Race and Property Law, in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado et al. eds.) (2022).

judicial inquiry," including cases involving "prejudice against discrete and insular minorities."[192]

In 1948, when the Supreme Court applied this type of searching judicial inquiry in *Oyama*, it invalidated as racially discriminatory a part of California's alien land law that deprived U.S. citizens of Japanese descent of property rights.[193] But the Court stopped short of invalidating the law altogether.[194] That same year, in *Takahashi*, when the Court struck down a California law that prohibited those "ineligible for citizenship" from obtaining fishing licenses, it rejected California's reliance on the *Terrace* and *Porterfield* cases, finding them not controlling even "[a]ssuming the[ir] continued validity."[195]

The modern strict scrutiny test did not emerge until the 1960s.[196] And it was not until 1971 that the Supreme Court applied strict scrutiny to alienage classifications.[197] In a watershed decision, *Graham v. Richardson*, the Court found that "*[a]liens as a class* are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[198] Applying this new, rigorous standard of review, the Court struck down Arizona and Pennsylvania statutes that favored citizens over noncitizens in welfare benefits.[199] *Richardson* rejected the states' argument that the restrictions were justified by "a State's 'special public interest' in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits."[200] The Court also flatly rejected "fiscal integrity" as a compelling justification, stating that "aliens lawfully within this country have a right to enter *and abide in any State in the Union* 'on an equality of legal privileges with all citizens under non-discriminatory laws.' "[201]

192. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

193. Oyama v. California, 332 U.S. 633, 646 (1948).

194. *Id.* at 647; *see also* Cuison Villazor, *supra* note 22, at 985–86 (examining the impact of *Oyama* and the questions that it left unanswered).

195. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 422 (1948) (noting that the alien land law cases rested on "reasons peculiar to real property").

196. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007).

197. Graham v. Richardson, 403 U.S. 365, 370–76 (1971).

198. *Id.* at 372 (emphasis added) (citation omitted).

199. *Id.* at 374–76.

200. *Id.* at 372.

201. *Id.* at 378 (emphasis added) (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 422 (1948)).

The Supreme Court continued to apply strict scrutiny to strike down state laws that discriminated against noncitizens in employment. The Court invalidated a New York law that permitted only U.S. citizens to be eligible for state employment,[202] a Connecticut law that permitted only U.S. citizens to become lawyers,[203] and a Texas law that permitted only U.S. citizens to be notary publics.[204]

However, the Court has also recognized an exception to strict scrutiny in cases where alienage classifications are related to a state's political function.[205] In *Bernal v. Fainter*, the Court described this as a "narrow exception" that "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."[206] Under the political function exception, the Court has applied rational basis review to uphold laws that require police officers,[207] probation officers,[208] and public school teachers[209] to be U.S. citizens.

If strict scrutiny applies to an alien land law, then the law must be narrowly tailored to a compelling government interest, a test that is generally difficult to pass. If rational basis applies, the law must merely be related to a legitimate government interest. Determining which level of scrutiny applies is therefore a critical threshold question in assessing the likelihood of prevailing with an equal protection claim.

1. Does Strict Scrutiny Apply?

There are at least three important legal questions that must be answered in order to determine if alien land laws are subject to strict scrutiny. First, do all alienage classifications receive strict scrutiny or only those affecting lawful permanent residents? Second, does the "political function" exception to strict scrutiny for alienage classifications apply to alien land laws? Third, do restrictions that turn on being *domiciled* (or headquartered, for a corporation) in particular countries discriminate based on national origin?

202. Sugarman v. Dougall, 413 U.S. 634, 646 (1973).
203. *In re* Griffiths, 413 U.S. 717, 717–18 (1973); *see also* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 601–02 (1976).
204. Bernal v. Fainter, 467 U.S. 216, 226–28 (1984).
205. *Id.* at 220 (referring to the "political function" exception).
206. *Id.*
207. Foley v. Connelie, 435 U.S. 291, 299–300 (1978).
208. Cabell v. Chavez-Salido, 454 U.S. 432, 477 (1982).
209. Ambach v. Norwick, 441 U.S. 68, 80–81 (1979).

i. Do All Alienage Classifications Receive Strict Scrutiny, or Only Classifications Affecting Lawful Permanent Residents?

The Supreme Court's decision in *Richardson* broadly stated that "[a]liens *as a class* are a prime example of a 'discrete and insular' minority" and that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[210] This language does not distinguish between legal permanent residents and other noncitizens. Subsequently, in *Nyquist v. Mauclet*, the Supreme Court also applied strict scrutiny in striking down a New York statute that barred a heterogeneous group of noncitizens (not just permanent residents) from state financial aid for higher education, stressing that "[t]he important points are that [the statute] is directed at aliens and that only aliens are harmed by it."[211]

While the Court has never limited the application of strict scrutiny to lawful permanent residents, its use of the term "resident aliens" has created confusion. The term "resident alien" can easily be misconstrued as shorthand for a permanent resident, although it simply refers to an alien residing in the United States.[212] Asylum applicants, refugees, and noncitizens with a variety of temporary visas, among others, are permitted to reside in the United States, even though they are not lawful permanent residents.

In *Toll v. Moreno*, the Supreme Court had an opportunity to clarify what level of scrutiny applies to classifications involving temporary immigrants (technically called "nonimmigrants") when evaluating a University of Maryland policy that prohibited individuals with G-4 visas from receiving in-state tuition.[213] But the Court ultimately found that the university policy was preempted and declined to address the equal protection claim.[214] A circuit split has since emerged regarding what level of scrutiny applies to state classifications involving temporary immigrants.

The Fifth Circuit has held that temporary immigrants are *not* a suspect class, applying rational basis review in upholding Louisiana laws that prohibit temporary immigrants from taking the bar exam[215] and obtaining a nursing license.[216] In explaining why classifications affecting temporary

210. Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (emphasis added) (footnotes omitted) (quoting United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938)).

211. Nyquist v. Mauclet, 432 U.S. 1, 7–9 (1977).

212. *See* 8 U.S.C. § 1101(a)(33) (defining "residence" as "the place of general abode"); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (using the term "nonresident alien" to refer to a noncitizen living outside the United States).

213. Toll v. Moreno, 458 U.S. 1, 3, 7 (1982).

214. *Id.* at 17.

215. LeClerc v. Webb, 419 F.3d 405, 419–23 (5th Cir. 2005).

216. Van Staden v. St. Martin, 664 F.3d 56, 61–62 (5th Cir. 2011).

immigrants receive rational basis review, the Fifth Circuit stressed the ways that temporary immigrants are different from permanent residents, noting that "nonimmigrant aliens may not serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits."[217] The Sixth Circuit followed the Fifth Circuit's rationale, applying rational basis review in upholding a Tennessee statute that conditions issuance of a driver's license on being a U.S. citizen or permanent resident.[218]

The Second Circuit, on the other hand, has held that temporary immigrants *are* a suspect class and applied strict scrutiny in striking down a New York statute that prohibited them from a obtaining a pharmacist's license.[219] The court refused to create an exception to strict scrutiny for temporary immigrants that the Supreme Court never recognized.[220] Additionally, the court reasoned that the factual similarities between U.S. citizens and permanent residents recognized in *Richardson* were never intended to be a test for triggering strict scrutiny.[221] The court correctly recognized that *Richardson*'s recognition of aliens as a "discrete and insular minority" was premised on their minority status within the community, not their similarity to citizens.

The only class of noncitizens that the Supreme Court has ever treated differently in terms of the level of scrutiny that applies are undocumented individuals. But even in *Plyler v. Doe*, in which the Court refused to recognize undocumented children as a suspect class, the Court struck down the Texas statute that denied them a basic education.[222] There, the Court applied a form of intermediate scrutiny by requiring Texas to show that it had a "substantial" interest in excluding undocumented children from public schools.[223] This heightened scrutiny may have been unique to a case that stressed the importance of education and the innocence of children.[224] Still,

217. *LeClerc*, 419 F.3d at 419 (5th Cir. 2005) (footnotes omitted).
218. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 526, 537 (6th Cir. 2007).
219. Dandamudi v. Tisch, 686 F.3d 66, 70 (2d Cir. 2012).
220. *Id.* at 72.
221. *Id.* at 76 (citing Graham v. Richardson, 403 U.S. 365, 376 (1971)).
222. Plyler v. Doe, 457 U.S. 202, 223, 230 (1982).
223. *Id.* at 230.
224. *Id.* at 220, 226.

if undocumented children received heightened scrutiny, it is difficult to argue that lawfully present noncitizens should receive rational basis review simply because they are not permanent residents.[225]

ii. Does the "Political Functions" Exception to Strict Scrutiny for State Alienage Classifications Extend to Ownership of Real Property?

Courts have not yet addressed whether state alien land laws fall under the "political functions" exception to strict scrutiny. If the exception applies, a state's alienage classifications would receive only rational basis review. In *Shen v. Simpson*, the case challenging Florida's 2023 alien land law, Florida argued that the political function exception applies, triggering only rational basis review.[226] Thus far, however, the Supreme Court has only applied the political functions exception to certain state jobs.

The Supreme Court set forth a two-part test for determining "whether a restriction based on alienage fits within the narrow political-function exception."[227] First, a court examines the specificity of the classification: "[A] classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends."[228] As explained further below in the application of the strict scrutiny test, alien land laws are substantially over- and under-inclusive. That alone undercuts the relevance of the political function exception.

Additionally, the second part of the test provides that:

> [E]ven if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government."[229]

The plain language of the second prong indicates that the exception applies only to certain public positions. Owning real property is not a public position. Nor does being a property owner require any involvement in the formulation, execution, or review of public policies. Restricting property ownership is different from "limit[ing] *the right to govern* to those who are full-fledged

225. *But see* John Harras, *Suspicious Suspect Classes—Are Nonimmigrants Entitled to Strict Scrutiny Review Under the Equal Protection Clause?: An Analysis of* Dandamudi *and* LeClerc, 88 ST. JOHN'S L. REV. 849, 849–50 (2014) (arguing that rational basis review should be applied to nonimmigrants).

226. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 17–18, Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 23-cv-208).

227. Bernal v. Fainter, 467 U.S. 216, 221 (1984).

228. Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982).

229. *Id.* (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

members of the political community."[230]

One way to view the issue is to consider whether real property ownership is more closely related to Supreme Court cases protecting noncitizens' rights to equal economic opportunity,[231] or to cases that allow states to limit certain public positions to U.S. citizens.[232] Land is often connected to economic opportunity—agricultural land provides a livelihood through farming and raising livestock; commercial property supports businesses that provide livelihoods; and even residential property is often necessary to work in an area. In fact, in cases striking down state laws that discriminated against noncitizens in employment, the Supreme Court has connected the right to work to the right to "entrance and abode," stating "they cannot live where they cannot work."[233]

Furthermore, real property ownership has little in common with the public positions that have fallen under the exception to strict scrutiny. Landowners are not "clothed with authority to exercise an almost infinite variety of discretionary powers,"[234] they do not fulfill "a basic governmental obligation,"[235] and they are not "in a position of direct authority over other individuals."[236] Under this analysis, if any type of restriction on real property qualifies for the political functions exception, it would only be ownership of state land.

However, if the political functions exception is more broadly construed as encompassing "the process of democratic self-determination" and "the community's process of political self-definition," courts may consider land

230. *Bernal*, 467 U.S. at 221 (emphasis added).

231. *See generally* Graham v. Richardson, 403 U.S. 365 (1971) (holding that states cannot deny welfare benefits to non-citizens solely based on their alienage, as it violates the Equal Protection Clause, and emphasizing the federal government's exclusive authority over immigration); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating a California statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" because while the US regulates naturalization, a state cannot prevent lawfully admitted aliens from earning a living); Truax v. Raich, 239 U.S. 33 (1915) (invalidating an Arizona anti-alien labor law that required at least eighty percent of workers to be U.S.-born citizens if the company had at least five employees); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

232. *See generally Cabell*, 454 U.S. 432 (1982) (upholding a California law requiring peace officers to be U.S. citizens because states can impose citizenship requirements for positions involved in enforcing laws); Foley v. Connelie, 435 U.S. 291 (1978) (upholding a New York law requiring state troopers to be U.S. citizens because states can limit certain roles tied to fundamental functions of government to citizens); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding a New York law barring non-citizens from being public school teachers unless they sought naturalization because states can exclude non-citizens from roles integral to government functions).

233. *Takahashi*, 334 U.S. at 416 (quoting *Raich*, 239 U.S. at 42 (1915)).

234. *Foley*, 435 U.S. at 297 (holding that states may require police officers to be U.S. citizens under the public functions exception).

235. *Bernal*, 467 U.S. at 220 (citing Ambach, 441 U.S. 68 (1979)).

236. *Id.* (citing *Cabell*, 454 U.S. 432).

ownership to be relevant.[237] Land can be seen as providing "the basis for political organization."[238] States' historical restrictions on foreign land ownership, going back centuries, could also be viewed as reflecting an understanding that such restrictions are somehow inherent to state sovereignty and self-determination.

But choosing who gets to live in a state has not traditionally been part of a state's right to self-definition. Due to the constitutional right to migrate, the Supreme Court has stressed that "[s]tates . . . do not have any right to select their citizens."[239] A state law aimed at deterring a particular class of people from migrating to the state is impermissible whether that class consists of welfare applicants, as in *Richardson*, Japanese immigrants, as in *Takahashi*, or other noncitizens. Similarly, the Supreme Court has found that a "[s]tate's objective of reducing population turnover" would "encounter[] insurmountable constitutional difficulties."[240] The political functions exception allows a state to "limit *the right to govern* to those who are full-fledged members of the political community,"[241] but it has never allowed a state to limit who lives in the community.

In short, the political functions exception should not apply to alien land laws, and strict scrutiny would be the proper standard of review for their alienage classification.

iii. Do Restrictions Discriminate Based on National Origin if They Draw Distinctions Based on Where a Person or Entity Is Domiciled or Headquartered?

National origin discrimination is distinct from discrimination based on alienage. While alienage discrimination refers to distinctions between citizens and noncitizens,[242] national origin discrimination is broadly understood to include discrimination based on an individual's place of origin, or their ancestors' place of origin.[243] Laws that place restrictions on citizens or corporations of specific countries ought to trigger strict scrutiny based on national origin.

States may argue, however, that their laws do not discriminate based on national origin but instead draw distinctions based on place of "residence"

237. *Id.* at 221.

238. Lorenzo Cotula, *Land, Property, and Sovereignty in International Law*, 25 CARDOZO J. INT'L & COMPAR. L. 219, 221 (2017) (referring to nation states).

239. Saenz v. Roe, 526 U.S. 489, 511 (1999) (striking down a California law aimed at deterring welfare applicants from migrating to California).

240. Zobel v. Williams, 457 U.S. 55, 62 n.9 (1982).

241. *Bernal*, 467 U.S. at 221 (emphasis added).

242. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88–95 (1973).

243. *Id.* at 88–90.

or "domicile." For example, Florida's law restricts only noncitizens who are "domiciled" in certain foreign countries, rather than restricting citizens of those countries outright.[244] A federal district court found that the Florida law does not discriminate based on Chinese national origin because Chinese individuals domiciled in the United States are not restricted; only individuals domiciled in China are restricted, and they need not be Chinese.[245] Similarly, Montana's law applies to corporations that are "domiciled or headquartered" in a country identified as a "foreign adversary."[246]

A law like Florida's would clearly have a disparate impact on individuals of Chinese national origin, since over 99% of people living in China are Chinese. But equal protection principles require a showing of intentional discrimination; classifications that merely result in a disparate impact are not subject to strict scrutiny.[247] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, however, the Court found that discriminatory intent could be evidenced by factors that include "disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers."[248] These factors must be assessed cumulatively.[249] In *Shen*, the Florida case, the clearly disproportionate impact on Chinese individuals, along with the legislative history, would support a finding of discriminatory intent under *Arlington Heights*.

Because the *Arlington Heights* factors are non-exhaustive, some appellate courts have mentioned other considerations. For example, a "consistent pattern" of actions of decisionmakers that have a much greater harm on minorities than on non-minorities could help establish

244. FLA. STAT. § 692.204(1)(a)(4) (2023).

245. Shen v. Simpson, 687 F. Supp. 3d 1219, 1236–40 (N.D. Fla. 2023). The Eleventh Circuit, in an unpublished decision, found that the plaintiffs/appellants had "shown a substantial likelihood of success on their claim that Florida statutes §§ 692.201-692.204 are preempted by federal law, specifically 50 U.S.C. § 4565, the Foreign Investment Risk Review Modernization Act of 2018 ('FIRRMA'), Pub. L. 115-232, 132 Stat. 2174, and 31 C.F.R. § 802.701." Shen v. Comm'r, No. 23-12737, 2024 U.S. App. LEXIS 2346, at *3 (11th Cir. Feb. 1, 2024). As a matter of discretion, the Eleventh Circuit granted the injunction pending appeal only to two of the plaintiffs, "because their recent and pending transactions create the most imminent risk of irreparable harm in the absece of a stay." *Id.* at *4.

246. MONT. CODE. ANN. § 35-30-103(c) (2023).

247. Washington v. Davis, 426 U.S. 229, 242 (1976); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977).

248. *Arlington Heights*, 429 U.S. at 253.

249. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016) (reversing a district court decision that "resulted from the court's consideration of each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*"); *see also Arlington Heights*, 429 U.S. at 266 ("[I]mpact alone is not determinative, and the Court must look to other evidence.").

discriminatory intent.[250] In a state like Florida or Texas, where the governors have taken numerous actions to try to prevent immigrants from coming to the state, this may be a relevant consideration.[251] Courts have also found that applying different, less favorable processes or substantive standards to requests by members of a suspect class may raise an inference of discriminatory intent. Some alien land laws impose special procedures for buyers from certain countries, such as requiring buyers to sign affidavits attesting that they are not principals of China and to register existing properties with the state.[252] These types of procedures could further help establish discriminatory intent.[253]

2. Analyzing Alien Land Laws Under Strict Scrutiny

In order to survive strict scrutiny, a law must be narrowly tailored to serve a compelling government interest. When strict scrutiny is applied, the government "must show that it cannot achieve its objective through any less discriminatory alternative."[254] The main reasons offered for the new wave of alien land laws are national security, food security, and preventing absentee landownership. As explained below, even assuming these are all compelling government interests, alien land laws are unlikely to survive strict scrutiny because they are not narrowly tailored to achieve these objectives. There are also less restrictive alternatives available.

i. National Security

In explaining the need for Alabama's newly enacted alien land law, Governor Ivey said, "Across the United States, we have seen alarming instances of foreign entities purchasing large tracts of land, which could have severe consequences for our country's national defense and economy, if no action is taken." [255] As discussed above, many of the proposed and enacted laws forbid foreign ownership of land within a certain distance of military installations or critical infrastructure. Such restrictions are highly unlikely to

250. Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 819 (4th Cir. 1995).

251. *See, e.g.*, Rafael Bernal, *Texas, Florida Laws Have Latinos Rethinking Where They Live*, THE HILL (May 18, 2023, 6:00 AM), https://thehill.com/latino/4009496; Gary Fineout, *Florida GOP Passes Sweeping Anti-Immigration Bill That Gives DeSantis $12 Million for Migrant Transports*, POLITICO (May 2, 2023, 9:25 PM), https://www.politico.com/news/2023/05/02/desantis-anti-immigration-florida-00095012; Paul J. Weber, *Texas' Floating Barrier to Stop Migrants Draws Recurring Concerns from Mexico, US Official Says*, ASSOCIATED PRESS (Aug. 22, 2023, 3:15 PM), https://apnews.com/article/texas-buoys-barrier-immigration-7006ac19f8c11723c9ce20b7f0065628.

252. *See, e.g.*, FLA. STAT. § 692.204 (2023).

253. Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1158–59 (9th Cir. 2013).

254. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).

255. Press Release, Office of the Governor of Alabama, Governor Ivey Signs House Bill 379, Secures Alabama's Lands (May 31, 2023) (internal quotation marks omitted) https://governor.alabama.gov/newsroom/2023/05/governor-ivey-signs-house-bill-379-secures-alabamas-lands [https://perma.cc/RT7Z-DD84].

prevent espionage or other national security attacks. The Chinese balloon that hovered over Montana did not need to be launched from land near a military base.[256] Neither do drones or cyberattacks gathering U.S. data.[257]

Furthermore, the "safe" distances from military installations or critical infrastructure are arbitrary in this new wave of alien land laws. As noted above, these distances range from two to fifty miles. The best illustration of this arbitrariness is Florida's law, which bans ownership by "foreign principals" within ten miles of military installations even though the legislation was triggered by a Chinese company's purchase of land twelve miles from a military based in North Dakota.[258]

Nationality-based restrictions on ownership of real property are also easily circumvented. Straw men can be used to purchase the land. A Chinese tycoon can easily have someone purchase it for him, as Mr. Sun did in Texas.[259] As commentators have previously noted, alien land laws do not really pose an impediment to acquiring real property.[260]

A less restrictive alternative would be for states to establish or expand existing reporting requirements for foreign investment in land. Several states have already implemented reporting requirements for foreign investments in agricultural land.[261] Extending the reporting requirements to all real estate and subjecting those transactions to a review process to identify risky transactions would be less restrictive and potentially more effective than a blanket ban. Once the state has information about a potential transaction, it can decide if the transaction can go forward or if it involves too many risks from a national security perspective. This process imposes less of a restriction on individuals who want to sell their land and is less likely to be perceived as aggressive by foreign countries. It is an approach similar to the one used at the federal level by the Committee on Foreign Investment in the United States ("CFIUS"). However, this approach, like the current one banning transactions, may be preempted by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").[262] Another way to discourage transactions involving noncitizens abroad is taxation. A tax

256. Jim Robbins, *A Giant Balloon Floats into Town, and It's All Anyone Can Talk About*, N.Y. TIMES (Feb. 3, 2023), https://www.nytimes.com/2023/02/03/us/montana-china-spy-balloon.html.

257. Fred Kaplan, *So, Was the Chinese Balloon a Grave National Security Threat, or What?*, SLATE (Feb. 8, 2023, 4:44 PM), https://slate.com/news-and-politics/2023/02/spy-balloon-china-national-security.html [https://perma.cc/93HC-A3DD].

258. STAFF OF S. COMM. ON RULES, S.B. 264 BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 2023, Reg. Sess., at 2 (Fla. 2023).

259. *See supra* Introduction.

260. Morrison, *supra* note 25, at 663.

261. IOWA CODE §§ 10B.1, 10B.4 (2024).

262. It could also potentially be preempted by immigration law as a form of registration. *See infra* notes 322–23 and accompanying text.

would increase the cost of real estate transactions, ensuring that only those bringing a large benefit move forward. Taxation, though, could violate the Dormant Foreign Commerce Clause.[263]

In short, banning land ownership within certain distances of military installations or critical infrastructure is not going to bring large gains in national security. It will, however, impose significant costs by barring potential good faith purchasers from accessing land, introducing tensions in the United States' relationship with certain countries, and perpetuating negative sentiments towards people from countries like China.

ii. Food Security

The idea of food security has had a central role in farmland regulation for a long time.[264] There is a fear that foreign companies will control U.S. food production and either let Americans suffer if certain products are unavailable or make them pay a higher cost by importing them. The fear is not new: for decades, foreign owners of agricultural land have been required to report to the U.S. Department of Agriculture.[265]

But this fear is misplaced. The United States has a surplus of agricultural products.[266] Furthermore, the bills deal with land ownership as a proxy for agricultural production, but the current structure of agricultural markets may make that an inadequate proxy. Eight of the twenty largest food and beverage companies in the United States are foreign companies, but none are from the countries deemed foreign countries of concern in the new wave of alien land laws.[267] Control of agricultural land neither results in automatic control of the food supply, nor does it lead to control of agricultural production. In Iowa, for example, where roughly all non-family corporations are prevented from owning agricultural land, large agribusinesses simply lease the land from several owners, subverting the goal of the ownership prohibition.[268] A similar subterfuge could be used by foreign companies in response to state alien land laws.

263. Michael S. Knoll & Ruth Mason, *The Dormant Foreign Commerce Clause After* Wynne, 39 VA. TAX REV. 357, 360 (2020).

264. Anton Kostadinov, *Subsidies—Food Security or Market Distortion*, IKONOMIČESKI I SOCIALNI ALTERNATIVI, no. 4, 2013, at 95.

265. Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. §§ 3501–08); Disclosure of Foreign Investment in Agricultural Land, 7 C.F.R. pt. 781 (1984).

266. Jim Chen, *Around the World in Eighty Centiliters*, 15 MINN. J. INT'L. L. 1, 8 (2006).

267. *2021 Top 100 Food & Beverage Companies*, FOOD ENG'G, https://www.foodengineeringmag.com/2021-top-100-food-beverage-companies [https://perma.cc/G5F6-CVP4].

268. Vanessa Casado Pérez, *Ownership Concentration: Lessons from Natural Resources*, 117 NW. U. L. REV. 37, 60 (2022).

If the concern is foreign control of agricultural land and absentee ownership, focusing on the "who" by targeting specific countries' nationals would be a partial solution if the countries singled out were the ones that most foreign owners come from. If that were the case, then instead of banning China, Iran, North Korea, or Russia, states should ban Canada, Netherlands, Italy, the U.K. and Germany, in that order, because each of them owns far more agricultural land than China.[269] Even a measure like Washington's—a blanket prohibition on foreign investment in agricultural land—is not automatically going to slow down the consolidation of land and reduce land prices because domestic companies may still accumulate large amounts of natural resources.

A less restrictive alternative to address concerns about foreign control of resources is to limit the amount of these resources that foreigners can own. This approach recognizes that size matters and that small investments give foreign actors less leverage against federal, state, and local governments.[270] Restricting the amount of land that noncitizens can own would also discourage financial investors seeking market control who need a certain scale for the investment to be profitable.

iii. Absentee Ownership

A third motivation for the new wave of alien land laws is concern over absentee ownership.[271] Absentee ownership is problematic because property is treated as an investment, and the owner generally lacks interest in what role the property could fulfill in the community,[272] civically and economically.[273] This concern applies to both agricultural lands and dwellings. Alien land laws that distinguish between "resident aliens" and "nonresident aliens" reflect a desire to preserve property for residents. But because most state laws usually define a "resident alien" as living anywhere in the United States, limiting property ownership to resident aliens would not necessarily prevent absentee ownership. An owner of agricultural land in the Central Valley living in Shanghai is no different than an owner living in Rhode Island. Both will lack the local knowledge and the community involvement.

269. BARNES ET AL., *supra* note 26, at 21–22.

270. Morrison, *supra* note 25, at 632–34 (noting that Iowa, Minnesota, and Pennsylvania had alien land laws that limited the amount of land, while South Carolina imposes an almost meaningless limit of 500,000 acres).

271. Wisconsin already expressed this concern in 1974 when defending its alien land law in Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 825 (Wis. 1976).

272. Jessica A. Shoemaker, *Re-Placing Property*, 91 U. CHI. L. REV. 811, 818 (2024).

273. Shapiro, *supra* note 25, at 251.

A more narrowly tailored alternative to address absentee ownership would be to impose a requirement of occupancy or production, or both, like the requirements for establishing a homestead.[274] Alternatively, a state could tax land that is not in production at a higher rate, no matter where the owner resides.

A few alien land laws do impose stricter residency requirements to prevent absentee ownership.[275] For example, Oklahoma's newly enacted law has an exception for noncitizens who "take up bona fide residence in this state," but if they leave the state, they must dispose of the land within five years.[276] These requirements likely violate the Commerce Clause.

iv. Real Estate Market Prices

Although not explicitly mentioned by legislators proposing alien land laws, another motivation is fear of foreign investors driving up the prices of real estate.

In the agricultural sector, the fear is that it may displace American farmers who will not have access to land. Alabama's Senate Bill ("S.B.") 14 banning foreign ownership of agricultural land illustrates these concerns.[277] Although the problem of access to farmland for small family farmers is real, the culprit is not necessarily foreigners but rather investors and consolidation.[278] Furthermore, agribusinesses have been dominating the market.[279] These alien land laws focus on the "who," instead of on the "what"—in other words, they do not tackle the issue of corporate consolidation plundering natural resources.[280]

In the residential market, even if the overall Chinese investment in land is not large, it may have significant effects in certain local markets. While

274. Casado Pérez, *supra* note 268, at 53.

275. N.D. CENT. CODE § 47-10.1-02(1)(b) (2023).

276. OKLA. STAT. tit. 60, § 122 (2023).

277. Micah Brown, *Restricting Foreign Farmland Investments: Alabama's Proposed Constraints on Foreign Ownership*, NAT'L AGRIC. L. CTR. (Jan. 18, 2022), https://nationalaglawcenter.org/restricting-foreign-farmland-investments-alabamas-proposed-constraints-on-foreign-ownership [https://perma.cc/Q4YS-5H2Y].

278. Omanjana Goswami, *Farmland Consolidation, Not Chinese Ownership, Is the Real National Security Threat*, THE EQUATION (Mar. 2, 2023, 3:59 PM), https://blog.ucsusa.org/omanjana-goswami/farmland-consolidation-not-chinese-ownership-is-the-real-national-security-threat [https://perma.cc/YMS6-XJC5].

279. Linda Qiu, *Farmland Values Hit Record Highs, Pricing Out Farmers*, N.Y. TIMES (Nov. 13, 2022), https://www.nytimes.com/2022/11/13/us/politics/farmland-values-prices.html [https://web.archive.org/web/20240405010647/https://www.nytimes.com/2022/11/13/us/politics/farmland-values-prices.html].

280. Samuel Shaw, *Western Legislatures Take on Foreign Land Ownership*, HIGH COUNTRY NEWS (Mar. 8, 2023), https://www.hcn.org/articles/south-politics-western-legislatures-take-on-foreign-land-ownership [https://perma.cc/N4AA-ZJCJ].

Chinese investment in land may drive prices up, it is necessary to consider a more nuanced picture. In some areas of the Midwest, Chinese investment has helped revitalize crisis-stricken areas, such as the Stonewater Community in a suburb of Detroit.[281] Many municipalities have welcomed the new developments targeting Chinese buyers. Corinth, near Dallas, readily approved new developments in its jurisdiction.[282] The situation may be different in Manhattan or San Francisco and other big cities where Chinese investments may be driving up home values.[283] However, targeting the demand side will not solve the housing crisis because it is a supply-side problem.

The poor fit between alien land laws and their objectives, combined with the availability of less restrictive alternatives, means such laws are likely to be struck down under strict scrutiny.

3. Rational Basis Analysis

If rational basis review applies instead of strict scrutiny, then a court need only inquire if the law is rationally related to a legitimate government purpose. There is no analysis of less restrictive alternatives for rational basis review.[284] While laws generally survive rational basis review, courts have invalidated laws motivated by animus by applying rational basis with bite, a heightened form of scrutiny. Both types of rational basis review are discussed below.

i. Regular Rational Basis Review

The poor means-end fit discussed above arguably fails not only strict scrutiny, but also rational basis review. There is simply no rational relationship between the asserted objectives and the means being used to achieve them, since the restrictions imposed will be completely ineffective in addressing the problems identified. First, the problems of access and prices of real estate are mostly supply problems, not demand. Second, the countries that are singled out in the new wave of alien land laws completely fail to reflect the nationalities of the largest foreign landowners. Third, these laws are argued as ways to ensure food security, but food security is not a problem in the United States. To the extent that food security embodies consolidation in the agricultural sector and absentee ownership, alien land laws do not solve the food security problem because the real culprits are

281. Searcey & Bradsher, *supra* note 182.
282. *Id*.
283. *Id*.
284. R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1283 (1994).

domestic corporations and corporations from countries that are not mentioned in any of the alien land laws. Fourth, from a national security perspective, foreign adversaries who want to spy on the U.S. are likely to use methods that do not require a land base near the target.

The few cases where courts have upheld alien land laws under rational basis review are distinguishable from many of the current laws because those laws were different in scope and did not single out specific nationalities. For example, the Eighth Circuit upheld a Nebraska constitutional provision prohibiting agricultural land ownership by non-family corporations.[285] In addition, the Wisconsin Supreme Court upheld a law that limited ownership of land by "nonresident aliens" to 640 acres.[286] The court found the law to be rationally related to the legitimate goal of preventing absentee ownership, stating that "limiting the benefits of land ownership to those who share in the responsibilities and interests of residency is not an unreasonable exercise of legislative choice."[287]

The fate of the new laws may be different, especially if they single out specific countries. Laws targeting citizens, corporations, and governments of China, Iran, North Korea, Russia, and other countries on various federal lists are much more ineffective (and more insidious) than the laws considered in these prior decisions, which treated all nonresident aliens equally. If the targeted countries' citizens and corporations own little to no real property in the state, legislators cannot rationally think that prohibiting them from owning real estate will make a dent in the problems they want to tackle. Additionally, absentee ownership is already pervasive in the agricultural sector. Targeting foreign owners as a potential solution would affect only 3% of the land in the United States if *all countries* were restricted. Legislators are aware that there is little overlap between the problem of absentee ownership and foreign ownership.[288] As for statutes that prohibit

285. MSM Farms, Inc. v. Spire, 927 F.2d 330, 333–34 (8th Cir. 1991) (analyzing NEB. CONST. art. XII, § 8) (reasoning that "whether *in fact* the law will meet its objectives is not the question" and describing the proper inquiry as whether Nebraska's voters in the referendum approving this constitutional provision "could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land"); *see also* Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 378 (8th Cir. 1997) (refusing to consider the argument that strict scrutiny should apply because it was not raised below and finding that the disparate treatment of noncitizens was rationally related to "(1) protecting the state's food supply; (2) preserving the family farm system; (3) slowing the rising cost of agricultural land; and (4) mirroring restrictions on American's ability to acquire European and Japanese land").

286. Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 826 (Wis. 1976).

287. *Id.* at 825.

288. SIRAJ G. BAWA & SCOTT CALLAHAN, U.S. DEP'T OF AGRIC., ERS REP. NO. 281, ABSENT LANDLORDS IN AGRICULTURE—A STATISTICAL ANALYSIS (2021), https://www.ers.usda.gov/webdocs/publications/100664/err-281_summary.pdf?v=4617.7 [https://perma.cc/6EXF-87YL] (explaining

landownership within a certain distance of military bases or critical infrastructure, this will do nothing to prevent cyberattacks, which pose the main threat to national security, as noted above.[289]

Another reason for questioning the rationality of the new wave of alien land laws is that availability bias appears to play a major role in legislators' decisions. Availability bias is the human tendency to use information that comes to mind quickly and easily when making decisions.[290] It is an unconscious mental shortcut that circumvents taking all evidence into consideration. Because a few incidents that involved foreign investors made national news, the new wave of alien land laws was spurred.

In addition to the wind farm project planned by Mr. Sun in Texas, there were two other prominent incidents. One involved a Saudi-owned company called Fondomonte that was leasing public land in Arizona and draining the groundwater supply to grow alfalfa for export back to Saudi Arabia, where alfalfa farming was prohibited due to water scarcity. The company paid relatively little to lease the land in Arizona and got the water for free, while Americans in the surrounding area paid extremely high costs for water.

The other case involved a Chinese food manufacturer that tried to purchase 300 acres of agricultural land in North Dakota located twelve miles from the Grand Forks Air Force Base.[291] The federal government's CFIUS reviewed this case and determined that it did not have jurisdiction over the transaction because the Grand Forks Air Force Base was not on its list of military installations.[292] This led people to believe that the federal government's process was inadequate and that states needed to take more action. The Grand Forks incident was relied on not only by legislators in North Dakota, but also by other states including Florida.[293] Yet, as

that the distance between residences of non-operating landlords and the agricultural land they own vary by region and that landlords are usually in an urban area while most non-operating landlords live within 100 miles from their land).

289. Cassie Buchman, *What Are The Biggest Threats to US National Security*, NEWSNATION (Aug. 3, 2022, 6:25 AM), https://www.newsnationnow.com/world/biggest-threats-to-u-s-national-security [https://perma.cc/V72Q-NEVE].

290. *Why do we Tend to Think that Things that Happened Recently are More Likely to Happen Again?*, THE DECISION LAB, https://thedecisionlab.com/biases/availability-heuristic [https://perma.cc/U8DV-L7F8]; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207 (1973).

291. STAFF OF S. COMM. ON RULES, S.B. 264 BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 2023, Reg. Sess., at 2 (Fla. 2023).

292. Antonia I. Tzinova, Robert A. Friedman, Marina Veljanovska O'Brien & Sarah Kaitlin Hubner, *CFIUS Says Chinese Investment in North Dakota Agricultural Land Is Outside Its Jurisdiction*, HOLLAND & KNIGHT (Jan. 24, 2023), https://www.hklaw.com/en/insights/publications/2023/01/cfius-determines-chinese-greenfield-investment-in-north [https://perma.cc/5A3W-WLY5].

293. STAFF OF S. COMM. ON RULES, S.B. 264 BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S. 2023, Reg. Sess., at 2 (Fla. 2023).

previously noted, the law that Florida ultimately passed would not have stopped such an investment, since it prohibited Chinese foreign investment within *ten* miles of military installations. The arbitrariness and ineffectiveness of the laws suggest that decisions were driven by implicit biases rather than carefully studied facts. Worse yet, they may have been motivated by animus, as discussed below.

ii. Rational Basis with Bite

To the extent that recent alien land laws are motivated by animus toward China or another country, courts may apply "second order" rational review, also known as rational basis "with bite."[294] In such cases, the Supreme Court has found the government's interest to be illegitimate because it is motivated by prejudice. The Court has considered a poor means-end fit to be a signal that an illegitimate interest may be motivating the law.[295]

Comments made by politicians around the time that the recent wave of alien land laws started being proposed certainly suggest that anti-Chinese animus played a role. For example, in 2022, a candidate who competed in the Republican primary for a Texas House seat tweeted, "China created a virus that killed hundreds of thousands of Americans."[296] Former President Trump also continued to call COVID-19 the "China virus" throughout 2022.[297] Each tweet from Trump that mentioned "China" and "COVID" together resulted in an 8% increase in anti-Asian hate incidents and tweets with racial slurs.[298]

Politicians further fanned the flames of anti-Chinese animus by presenting China as a threat to the American way of life. A U.S. Representative from Indiana accused President Biden of "turning a blind eye to CCP spies abusing our visa system."[299] A U.S. Senator from Tennessee warned that "[t]he CCP is attempting to take over the USA across all industries—pushing spies into U.S. universities and buying U.S. farmland."[300] Vice President J.D. Vance, a former Senator from Ohio,

294. *See* CHEMERINSKY, *supra* note 254, at 536.

295. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (invalidating an ordinance that discriminated against group homes and holding that prejudice against people who are "mentally" disabled is illegitimate); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (invalidating an amendment to the Colorado Constitution that was motivated by "animus" against sexual minorities, based on an illegitimate governmental interest).

296. STOP AAPI HATE, THE BLAME GAME: HOW POLITICAL RHETORIC INFLAMES ANTI-ASIAN SCAPEGOATING 4 (Oct. 2022), https://stopaapihate.org/wp-content/uploads/2022/10/Stop-AAPI-Hate-Scapegoating-Report.pdf [https://perma.cc/6AXC-GRKQ].

297. *Id.* at 4.

298. *Id*. at 5. In past centuries, individuals of Chinese descent were similarly blamed for spreading diseases such as syphilis, smallpox, and bubonic plague. *Id.* at 6.

299. *Id.* at 7.

300. *Id.*

analogized U.S. economic dependence on China to slavery when he was running for his Senate seat, stating: "When our farmers go bankrupt the Chinese who sell the fertilizer will happily buy up their land. This is the pathway to *national slavery*."[301] The Washington Post and other outlets have also highlighted how "anti-Asian bigotry" is behind the new alien land laws targeting China.[302]

In *City of Cleburne v. Cleburne Living Center, Inc.*, a classic case on rational basis with bite, the Court focused on the lack of "fit" between the language of a zoning ordinance and a town's asserted objectives for denying a special permit to a group home for people with mental disabilities.[303] The town claimed that the purpose of the ordinance and permit process was to avoid congestion and ensure safety in the event of a fire or flood, but the Court pointed out that the permit process did not apply to hospitals, nursing homes, dormitories, and other uses that could be expected to pose greater problems than a group home.[304] This poor means-end fit supported the Court's conclusion that the ordinance had an illegitimate purpose based on animus.

Similarly, the underinclusive nature of alien land laws that target countries with minimal investments in U.S. land, while omitting the countries with the largest investments, demonstrates a poor means-end fit if the asserted objectives are to protect food security and prevent absentee landownership. These laws also generally "grandfather" in ownership of existing properties, which some commentators have identified as another signal of underinclusiveness that can trigger heightened "rational basis" review.[305]

301. *Id.* at 10 (emphasis added).

302. John Gleb, *Anti-Asian Bigotry is Behind a Texas Land Bill*, WASH. POST (Feb. 22, 2023, 6:00 AM), https://www.washingtonpost.com/made-by-history/2023/02/22/anti-asian-bigotry-is-behind-texas-land-bill; *see also* Edgar Chen, *With New "Alien Land Laws" Asian Immigrants Are Once Again Targeted by Real Estate Bans*, JUST SEC. (May 26, 2023), https://www.justsecurity.org/86722/with-new-alien-land-laws-asian-immigrants-are-once-again-targeted-by-real-estate-bans [https://perma.cc/G7D6-DCS7].

303. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985).

304. *Id.*; *see also* Hum. Dev. Servs. of Port Chester, Inc. v. Zoning Bd. of Appeals, 493 N.Y.S.2d 481, 486–87 (App. Div. 1985) ("In the absence of a rational explanation for the denial, the frequency of granting other yard-setback variances, in some instances of far greater magnitude, suggest that the respondent zoning board engaged in a subtle form of discrimination against petitioner.").

305. Peter Margulies, *The Newest Equal Protection:* City of Cleburne *and a Common Law for Statutes and Covenants Affecting Group Homes for the Mentally Disabled*, 3 N.Y. L. SCH. J. HUM. RTS. 359, 374–75 (1986).

In sum, regardless of whether strict scrutiny or rational basis review applies, alien land laws targeting specific countries should be struck down. They are not rationally related to a legitimate government interest, much less narrowly tailored to a compelling government purpose, and they appear to be motivated, at least in part, by impermissible animus.

C. PREEMPTION CONCERNS

Whether alien land laws are preempted by federal law is another important constitutional question. This Section explores whether alien land laws are preempted by federal immigration laws, the federal government's national security and foreign affairs powers, and the CFIUS and USDA reporting regimes.

1. Immigration Preemption

The Immigration Act of 1952 established "a comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."[306] Supreme Court precedents indicate that alien land laws restricting noncitizens who have already been admitted to the U.S. may be preempted by federal immigration law. In *Takahashi*, the Supreme Court explained that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] federal power to regulate immigration, and have accordingly been held invalid."[307] Both *Takahashi*, and an earlier case, *Truax v. Raich*, struck down state laws limiting the employment of lawfully present noncitizens by reasoning that federal immigration law granted a "privilege to enter and abide in 'any state in the Union,' " and that denying the right to work would be "tantamount to . . . deny[ing] them entrance and abode."[308]

In *Richardson*, the Supreme Court confirmed that states may not impose an "auxiliary burden[] upon the entrance *or residence* of aliens" that Congress had never contemplated.[309] Restrictions on ownership of real

306. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 587 (2011) (quoting De Canas v. Bica, 424 U.S. 351, 353, 359 (1976)).

307. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (emphasis added).

308. *Id.* at 415–16 (quoting Truax v. Raich, 239 U.S. 33, 42 (1915)) (emphasis added).

309. Graham v. Richardson 403 U.S. 365, 378–79 (1971) (emphasis added) (explaining that Congress had chosen to afford "lawfully admitted resident aliens . . . the full and equal benefit of all state laws for the security of persons *and property*."); *see also* Toll v. Moreno, 458 U.S. 1, 12–13 (1982) (explaining that *Takahashi* and *Richardson* stand for the "broad principle" that a state regulation that "discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional

property impose precisely this type of auxiliary burden. Certainly, Congress never contemplated that lawful permanent residents would be encumbered by ownership restrictions. With respect to temporary immigrants (i.e., "nonimmigrants"), Congress required certain classes, such as tourists, students, and crewman, to maintain a residence abroad that they had no intent of abandoning.[310] But for other classes of temporary immigrants, Congress did not impose any such requirement.[311] The Supreme Court has interpreted this silence "to mean that Congress . . . was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile."[312] If every state could prohibit temporary immigrants from buying—or potentially even leasing—property, the doors of the United States would effectively be closed to when Congress permitted them to establish domicile here.[313] As a federal court in Texas recognized, "[r]estrictions on residence directly impact immigration in a way that restrictions on employment or public benefits do not."[314]

While lawfully admitted immigrants may have the strongest argument for immigration preemption, courts have also struck down state laws that discriminate against undocumented individuals in housing as preempted by federal immigration law.[315] For example, in *Villas at Parkside Partners v. City of Farmers Branch*, the Fifth Circuit found that immigration law preempted a local ordinance that prohibited renting to individuals who are not "lawfully present."[316] The court reasoned that Congress contemplated that such individuals would reside in the United States until potential

burdens not contemplated by Congress"); Guttentag, *supra* note 173, at 33–38 (noting that both *Takahashi* and *Richardson* also relied on the Civil Rights Act of 1870 as establishing an alienage equality norm that preempted discriminatory state laws).

310. 8 U.S.C. § 1101(a)(15)(B)–(D), (F), (H).

311. Elkins v. Moreno, 435 U.S. 647, 665 (1978) ("Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States.").

312. *Id.* at 666.

313. *See id.* at 665; *supra* notes 310 and 311 and accompanying text.

314. Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010), *aff'd* 675 F.3d 802 (5th Cir. 2012), *aff'd on reh'g en banc*, 726 F.3d 524 (5th Cir. 2013).

315. *See City of Farmers Branch*, 726 F.3d at 530–31; Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1024–29 (9th Cir. 2013); United States v. South Carolina, 720 F.3d 518, 531–32 (4th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1285–88 (11th Cir. 2012); Ga. Latino All. for Hum. Rts. v. Governor of Ga., 691 F.3d 1250, 1263–67 (11th Cir. 2012); Lozano v. City of Hazleton, 620 F.3d 170, 219–24 (3d Cir. 2010) (holding that a local ordinance's housing provisions were preempted because they attempted "to regulate residence based solely on immigration status," and "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government"), *vacated*, 131 S. Ct. 2958 (2011); Garrett v. City of Escondido, 465 F.Supp.2d 1043, 1056 (S.D. Cal. 2006) (finding that a harboring provision that prohibited leasing or renting housing to unauthorized aliens raises "serious concerns in regards to . . . field preemption" based on 8 U.S.C. § 1324). *But see* Keller v. City of Fremont, 719 F.3d 931, 940–45 (8th Cir. 2013) (upholding an ordinance similar to the one struck down in *Lozano*).

316. *City of Farmers Branch*, 726 F.3d at 537.

deportation and even required them to provide a reliable address to the federal government.[317] Additionally, the court noted that deciding whether someone is "lawfully present" requires a complex analysis and should be made only by federal immigration officials.[318] The same reasoning would support striking down Louisiana's newly enacted alien land law, which exempts noncitizens who are "lawfully present in the United States" and would therefore require a state official to make a determination about someone's legal status.[319]

Additionally, in *City of Farmers Branch*, the court was concerned about the immigration classification in the local ordinance being "at odds" with a much more nuanced federal regime.[320] Some of the proposed and enacted alien land laws raise similar concerns by using terms that conflict with immigration law. For example, Minnesota's law defines a "permanent resident alien" to include not only someone who is a lawful permanent resident, but also a nonimmigrant treaty investor.[321] A bill proposed in West Virginia defined a "nonresident alien" as someone who is neither a U.S. citizen nor a lawful permanent resident. Under that definition, all sorts of noncitizens would be swept into the restriction, even if they live in West Virginia.

Finally, the registration and reporting requirements found in some alien land laws may be preempted by immigration law. In *Hines v. Davidowitz*, the Supreme Court found that immigration law preempted a Pennsylvania statute requiring adult aliens to register with the state, pay a fee, and carry an ID.[322] Likewise, in *Arizona v. United States*, the Court stressed that "the Federal Government has occupied the field of alien registration."[323] The Court explained that "[t]he federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance."[324] A state law that requires certain noncitizens to register their property, and penalizes them for failing to do so, is not far afield from one requiring noncitizens to register themselves, especially since the same personal information must be provided.

317. *Id.* at 530; 8 U.S.C. § 1229(a)(1)(F)(I); *see also id.* § 1305 (requiring change of address notifications for certain noncitizens required to be registered); *id.* § 1306 (imposing a penalty for failure to notify the federal government of an address change).

318. *City of Farmers Branch*, 726 F.3d at 532 (explaining that the ordinance "put[] local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision").

319. S.B. 91, 2023 Leg., Reg. Sess. (La. 2023).

320. *City of Farmers Branch*, 726 F.3d at 532–33.

321. MINN. STAT. ANN. § 500.221 (2010).

322. Hines v. Davidowitz, 312 U.S. 52, 61, 72–75 (1941).

323. Arizona v. United States, 567 U.S. 387, 401 (2012).

324. *Id.*

The arguments presented above all involve noncitizens who are in the United States. The major group omitted from this analysis of preemption by federal immigration laws are noncitizens abroad. But the other bases for preemption, discussed below, would apply to that group.

2. Foreign Affairs Preemption

The Constitution entrusts foreign affairs powers exclusively to the federal government.[325] Foreign affairs preemption serves several purposes: it constrains a state's ability to offend a foreign country, which could lead to hostilities; it promotes unity in the nation's external affairs; and it furthers the effective exercise of foreign policy.[326] Yet, as the history of alien land laws shows, states have long engaged with issues that affect foreign nationals.[327]

The Supreme Court has provided different versions of the test for determining whether a state law impermissibly interferes in foreign affairs. In *American Insurance Ass'n v. Garamendi*, which struck down California's "Holocaust-era" insurance legislation, the Court framed the issue as whether the state law is likely to produce "*more than [an] incidental effect* in conflict with express foreign policy."[328] In *Zschernig*, the Supreme Court invalidated an Oregon probate law that permitted states courts to withhold remittances to nonresident aliens residing in Communist countries.[329] Even though states traditionally have the power to regulate estates and probate, the Court found that the Oregon law "affect[ed] international relations in a persistent and subtle way."[330] There, the Court framed the test as whether the state law "*impair[s] the effective exercise* of the Nation's foreign policy."[331] And in *Crosby v. National Foreign Trade Council*, which struck down a Massachusetts law that barred state agencies from purchasing goods or services from companies doing business with Burma, the Court considered whether the state law "stands as an obstacle to the accomplishment and

325. U.S. CONST. art. II, § 2.

326. Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875).

327. MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 304–06 (2016) (arguing that states and localities regularly engage in actions with transnational dimensions, often filling gaps left by federal inaction, and that this is constitutionally permissible).

328. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (emphasis added) (holding California's "Holocaust-era" insurance legislation unconstitutional due to a clear conflict with policies adopted by the federal government); *see also* Clark v. Allen, 331 U.S. 503, 517 (1947) (holding that a general reciprocity clause in a California inheritance statute had only "some incidental or indirect effect in foreign countries").

329. Zschernig v. Miller, 389 U.S. 429, 432, 440 (1968).

330. *Id.* at 440.

331. *Id.* (emphasis added).

execution of the full purposes and objectives of [federal policy]."[332]

Applying these cases to alien land laws, the question is whether, or to what degree, they conflict with U.S. foreign policy or pose an obstacle to the objectives of foreign policy. Do they merely have an incidental impact on foreign affairs, or is the effect more material? While the answer will likely depend on the specifics of a particular law, it is also worth considering the cumulative impact of these alien land laws on foreign affairs. If every state prohibited citizens of China from buying property, the impact on foreign relations would be far more significant than if only a few did so.

State laws that unilaterally identify certain nations as "countries of concern" or "foreign adversaries," with no reference to a federal law, are particularly likely to raise foreign affairs preemption concerns. Like the Massachusetts law struck down in *Crosby*, these state laws are making a judgment about the conduct of a foreign country that is "apart from the federal government's own announced judgment."[333] Even if the countries identified by the state law are currently consistent with a federal designation, federal law expressly contemplates those designations changing over time, and state laws may not keep up with them.[334] Some lower courts have already expressed preemption concerns about state laws that are directed at particular nations, noting that they can be perceived as a unilateral declaration of "economic war,"[335] or a "political statement" about the country.[336] As one court recognized, the potential effect on international relations is greater

332. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (internal quotations marks and citation omitted) (invalidating a Massachusetts law that barred state agencies from purchasing goods or services from companies doing business with Burma, when a federal law imposed diffens sanctions).

333. Fac. Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206, 1211 (11th Cir. 2010) (upholding a Florida law that prohibited using state money to travel to countries that the federal government had designated as sponsors of terrorism).

334. *See, e.g.*, 15 C.F.R. § 7.4(b) (2024) ("[T]he list of foreign adversaries will be revised as determined to be necessary."); *id.* § 7.4(d) ("The Secretary will periodically review this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend this list."); 22 U.S.C. § 6442(b)(1) (specifying that the State Department's "countries of particular concern" designation shall be reviewed annually).

335. *Winn*, 616 F.3d at 1210 (distinguishing a state's reliance on federal designations of certain countries as state sponsors of terrorism from a situation where a state "unilaterally select[s] by name a foreign country on which it has declared, in effect, some kind of economic war").

336. Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1379 (D.N.M. 1980) (invalidating a New Mexico State University rule that denied admission to Iranian students on preemption grounds); *see also* N.Y. Times Co. v. City of N.Y. Comm'n on Hum. Rts., 393 N.Y.S 2d 312, 322 (N.Y. 1977) (plurality opinion) (holding that a city ordinance that banned advertising by employers who practice discrimination could not be applied to employers in South Africa); Bethlehem Steel Corp. v. Bd. of Comm'rs of Dep't of Water and Power, 80 Cal. Rptr. 800, 802–05 (Ct. App. 1969) (invalidating California's selective purchasing law on grounds of foreign policy preemption). *But cf.* Bd. of Trs. v. Mayor of Balt., 562 A.2d 720, 724, 757 (Md. 1989) (upholding Baltimore's ordinances requiring divestment of its pension plan from companies investing in South Africa); Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 913–14 (3d Cir. 1990) (finding that Pennsylvania's selective purchasing law had only an incidental effect on foreign affairs).

when a state targets a specific country instead of regulating all noncitizens regardless of nationality.[337]

Additionally, the countries identified by name in the new wave of alien land laws are already subject to individualized sanctions by the federal government. Several Presidents have issued Executive Orders and Congress has passed laws imposing unique sanctions against China,[338] Iran,[339] North Korea,[340] and Russia,[341] among other countries. Just like the sanctions against Burma discussed in *Crosby*, the laws addressing sanctions against these countries give the President flexible authority over what sanctions to impose and empower the President to waive any sanctions in the interest of national security. In *Crosby*, the Court reasoned that Congress would not have "gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."[342]

Like the Massachusetts law in *Crosby*, alien land laws that target countries subject to federal sanctions "impos[e] a different, state system of economic pressure," "penalize[] some private action that the federal [laws] . . . may allow, and pull[] levers of influence that the federal [law] does not reach."[343] The restrictions imposed by the alien land laws also make it impossible for the President "to restrain fully the coercive power of the national economy" by lifting or promising to lift sanctions, which leaves the President with "less to offer and less economic and diplomatic leverage as a consequence."[344] These state laws could also conflict with the federal sanctions scheme by flatly prohibiting financial transactions that the OFAC

337. *Tayyari*, 495 F. Supp. at 1379–80.

338. *See,* e.g., Exec. Order No. 14,032, 86 Fed. Reg. 30145 (June 3, 2021); Exec. Order No. 13,959, 85 Fed. Reg. 73185 (Nov. 12, 2020); 31 C.F.R. § 586 (2024); Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648.

339. *See, e.g.*, Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312, as amended through Pub. L. No. 112-239, 126 Stat. 1632 (2013); Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017); Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. No. 112-239, 126 Stat. 1632, 2004–2018 (2013).

340. Countering America's Adversaries Through Sanctions Act; North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, 130 Stat. 93; 31 C.F.R. pt. 510 (2024); *see also* Exec. Order No. 13,722, 81 Fed. Reg. 14943 (Mar. 15, 2016).

341. *See, e.g.*, Suspending Normal Trade Relations with Russia and Belarus Act, Pub. L. No. 117-110, 136 Stat. 1159 (2022); Countering America's Adversaries Through Sanctions Act; Ukraine Freedom Support Act of 2014, Pub. L. No. 113-272, 128 Stat. 2952 (2014) (codified at 22 U.S.C. §§ 8921–30); Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014, Pub. L. No. 113-95, 128 Stat. 1088 (2014) (codified at 22 U.S.C. §§ 8901–10); *see also* Exec. Order No. 14,065, 87 Fed. Reg. 10293 (Feb. 21, 2022).

342. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 376 (2000).

343. *Id.* at 376.

344. *Id.* at 377.

might permit with a license.[345]

When Congress wanted state and local governments to play a role in sanctioning a country such as Iran, Congress explicitly authorized them to do so.[346] The 2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act specified what form such state sanctions could take (divestment from companies that invest $20 million or more in Iran's energy section), stated that such laws were not preempted, and protected due process by requiring notice and the opportunity for a hearing.[347] Without this explicit congressional authorization, however, such sub-federal sanctions would likely be preempted by either the statute or executive action.[348]

Alien land laws that avoid naming specific countries but rely on various federal designations raise similar preemption concerns. The federal government has already determined the unique purposes and consequences of each of these designations. Adding restrictions involving real property ownership to whatever consequences the federal government has already imposed interferes with the federal scheme. For example, if the Secretary of State designates a country as "of particular concern," Congress has authorized fifteen specific "Presidential Actions" that may be imposed on such designated countries, as well as any "commensurate action."[349] The President is also authorized to waive the application of any action.[350] State laws that restrict real property ownership by citizens or entities of these "countries of particular concern" add consequences that were never contemplated by Congress and that can undermine the President's decisions.

The variation among the countries included in each federal list underscores the deliberate decisions made by federal actors about how each country should be classified based on specific foreign policy objectives. State laws that use these classifications in a completely different context distort their purpose. This preemption argument is especially strong where the federal law constrains the context in which a particular term may be used. For example, federal regulations specify that the Secretary of Commerce's classification of certain countries as "foreign adversaries" is "*solely for the*

345. *Sanctions Program and Country Information*, U.S. DEP'T OF THE TREASURY: OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/sanctions-programs-and-country-information [https://perma.cc/9BQP-3KC4].

346. 22 U.S.C. § 8532.

347. *Id.* § 8532(c)–(d).

348. Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2145 (2017) (reviewing GLENNON & SLOANE, *supra* note 327.).

349. International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 405(a)–(b), 112 Stat. 2787 (codified at 22 U.S.C. § 6401).

350. *Id.* § 407.

purposes of" a particular executive order.[351]

Individually and collectively, alien land laws that target specific countries, either by name or based on a federal list developed for another context, "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[352] As the Court explained in *Crosby*, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics."[353]

Although the argument for foreign affairs preemptions seems strong based on these Supreme Court precedents, the U.S. Department of Justice surprisingly did not assert preemption in a Statement of Interest that it submitted in the case challenging Florida's alien land law.[354] Its failure to do so was noted by the district court in rejecting the plaintiffs' preemption argument.[355] Given the weight that courts give to the federal government's own position on preemption, the Department of Justice's position could prove fatal to preemption arguments in other cases as well. However, in the recent *Shen* case, even with the silence of the federal government, the Eleventh Circuit Court of Appeals granted a preliminary injunction based on CFIUS regulation of real estate transactions.[356]

3. The CFIUS and USDA Regimes

Concerns about foreign interests in real property are not unique to States. At the federal level, there are two avenues to rein in foreign investment: data collection on foreign interests in agricultural lands by the USDA and the review of certain transactions via CFIUS. These federal regimes may preempt state restrictions on foreign investment.

i. Reporting to USDA

The Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA") established a framework to collect reported data on foreign ownership of agricultural land.[357] Unfortunately, the system has not been properly implemented. Inaccuracies and underreporting have been pointed

351. 15 C.F.R. § 7.4(b) (2024) (emphasis added).
352. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000).
353. *Id.*
354. Statement of Interest of the United States in Support of Plaintiffs' Motion for Preliminary Injunction at 6, Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 23-cv-208).
355. *Shen*, 687 F. Supp. at 1250 n.17.
356. Shen v. Comm'r, No. 23-12737, 2024 U.S. App. LEXIS 2346, at *3 (11th Cir. Feb. 1, 2024).
357. Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. §§ 3501-08.

out.[358] These critiques of the incompleteness and lack of transparency of the USDA reporting system have prompted Congress to include in the Consolidated Appropriations Act for the 2023 Fiscal Year ("FY") a mandate to USDA to report on the impact that foreign investment has on family farms, rural communities, and the domestic food supply.[359] The Government Accountability Office is expected to issue a report on the AFIDA and USDA reporting frameworks. There are several bills being discussed in the 2023–2024 congressional term seeking to ensure compliance with AFIDA. The Not One More Inch or Acre Act would ensure higher penalties for not complying with AFIDA.[360] Under current law, persons who have violated AFIDA are subject to a fine of up to twenty-five percent of the foreign person's interest in the agricultural land. This bill would make the minimum fine to be ten percent. House Resolution ("H.R.") 1789 would require the penalty to be "at least [fifty] percent" of the market value of the land.[361] S.B. 2060 (Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act)[362] would require USDA to investigate efforts to steal agricultural knowledge and technology and to disrupt the U.S. agricultural sector. S.B. 2060 would also made the Secretary of Agriculture a member of CFIUS.

ii. CFIUS

CFIUS is a system for monitoring and, if necessary, blocking foreign investments that threaten national security.[363] Established by President Ford in 1975, CFIUS is an interagency committee, chaired by the U.S. Department of Treasury.[364] If CFIUS determines that an investment poses a threat to national security, the President can block or unwind the transaction. National security is not defined for CFIUS's purposes, leaving it open to discretion.[365]

CFIUS originally focused only on foreign investment in U.S. businesses, without reviewing any real estate transactions. But in 2018, the Foreign Investment Risk Review Modernization Act ("FIRRMA") expanded

358. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106337, FOREIGN INVESTMENTS IN US AGRICULTURAL LAND: ENHANCING EFFORTS TO COLLECT, TRACK, AND SHARE KEY INFORMATION COULD BETTER IDENTIFY NATIONAL SECURITY RISKS (2024).

359. Pub. L. No. 117-328. § 773, 136 Stat. 4459, 4509 (2023).

360. Not One More Inch or Acre Act, S. 1136, 118th Cong. (2023).

361. H.R. 1789, 118th Cong. (2023).

362. Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense Act of 2023, S. 2060, 118th Cong. (2023).

363. 50 U.S.C. § 4565(a)(4)(B)(ii), (d)(1); 31 C.F.R. pt. 802.

364. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26 (1988) (codifying CFIUS); *see also* Foreign Investment and National Security Act of 2007, Pub. L. 110-49, 121 Stat. 246 (2007) (modifying responsibilities of CFIUS).

365. Jose W. Fernandez, *Lessons from the Trenches*, 33 INT'L FIN. L. REV. 44, 44 (2014).

CFIUS and the President's authority to review and block "certain types of real estate transactions involving the purchase or lease by, or a concession to, a foreign person."[366] CFIUS only has authority over real estate transactions that are in or around airports and maritime ports, or that are close to certain designated military installations. FIRRMA recognized that the President may want to consider factors such as "the relationship of [the investor's] country with the United States" and "the adherence of the subject country to nonproliferation control regimes" in deciding whether to block a transaction.[367]

CFIUS's jurisdiction also excludes transactions involving a single housing unit or real estate in urbanized areas.[368] Small real estate investments are not expected to have a significant impact on national security and may not encourage large investments. Certain transactions must be reported, such as those involving a foreign government or any other transaction that CFIUS's regulation mandates, while others fall under voluntary reporting. Real estate transactions so far have not been subject to mandatory reporting, suggesting that Congress did not consider them a national security threat. Control of critical infrastructure does trigger an investigation by CFIUS,[369] but agriculture and food systems are not specifically identified as critical infrastructure. Bills that Congress considered but did not pass would have made that connection clear.[370] In 2022, President Biden instructed CFIUS to consider the implications of foreign investment for food security.[371]

For transactions under the purview of CFIUS, CFIUS is a ceiling and states cannot strengthen the regime by imposing additional obstacles. Hence,

366. Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 84 Fed. Reg. 50214, 50214 (2019) (codified as amended at 31 C.F.R. pt. 802).

367. 50 U.S.C. § 4565(f)(9)(A)–(B), (f)(11); *see also* 31 C.F.R. §§ 802.101 (giving the President discretion to exempt nationals of particular countries from the real estate provisions of FIRRMA based on foreign policy considerations).

368. 50 U.S.C. § 4565(a)(4)(C)(i); *see also* 31 C.F.R. §§ 802.223, .216. This relates both to the de minimis risks that such small investments can have for national security and to the idea that having a home is relevant to participate in society and that the home is a particular type of property that is very much tied to our personhood. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991–92 (1982); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1312 (2014).

369. 50 U.S.C § 4565(b)(2)(B)(III).

370. Foreign Adversary Risk Management Act (FARM Act), H.R. 5490, 117th Cong. (2021) (companion bill to S. 2931); Prohibition of Agricultural Land for the People's Republic of China Act, H.R. 809, 118th Cong. (2023); Protecting our Land Act, H.R. 212, 118th Cong. (2023); Securing America's Land from Foreign Interference Act, H.R. 344, 118th Cong. (2023).

371. Press Release, The White House, President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States (Sept. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states [https://perma.cc/2PLY-RATR].

the provisions of new alien land laws overlapping with CFIUS are preempted because they could constitute an obstacle for federal enforcement.[372] Because of its limited jurisdiction, CFIUS would not have the authority to review many of the individual real estate transactions prohibited by state alien land laws. For example, as noted above, CFIUS found that it did not have jurisdiction to review a Chinese food manufacturing company's purchase of 370 acres located twelve miles from the Grand Forks Air Force Base in North Dakota.[373] That air force base was not on CFIUS's list of designated military installations. Additionally, as a practical matter, CFIUS's review of real estate transactions is negligible. In 2022, CFIUS reviewed 285 notices of non-real estate transactions, and only one notice of a real estate transaction.[374] But still CFIUS may operate as a deterrent.

One could argue that Congress steered clear of ordinary real estate transactions in order to allow states to exercise their traditional control over land and property.[375] On the other hand, Congress's decision to include certain transactions while omitting others may reflect a carefully calibrated consideration of national security and economic interests, in which case states should not be allowed to disturb the delicate balance struck by Congress.[376] Of course, if Congress had perceived alien land laws as conflicting with federal law (the CFIUS regime), it could have taken some action. So far, however, Congress has done nothing to impede states from implementing such laws. When Congress amended FIRRMA in 2018, at least fifteen states had alien land laws,[377] and Congress did not indicate any intent to displace those laws in the amended Act. However, in past years, bills were introduced at the federal level that would have expanded CFIUS's jurisdiction over real estate transactions,[378] or outright prohibited citizens of China, Russia, North Korea, or Iran from purchasing land.[379] While the CFIUS regime is limited, states' unilateral actions singling out certain

372. Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT'L SEC. J. 1, 21 (2022).

373. Tzinova et al., *supra* note 292.

374. COMM. ON FOREIGN INV. IN THE U.S., ANN. REP. TO CONG. 19 (2022), https://home.treasury.gov/system/files/206/CFIUS%20%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf [https://perma.cc/VCH2-HY58].

375. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 36–38, Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 2023) (No. 23-cv-208).

376. *See* Plaintiff's Emergency Motion for Preliminary Injunction, *id.*; *see also* Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1702(b)(1), 132 Stat. 1636, 2175 (codified at 50 U.S.C. § 4565).

377. *See* Memorandum in Opposition,*supra* note 375, at 38 (citing state laws).

378. Protecting Military Installations from Foreign Espionage Act, H.R. 2728, S. 1278, 117th Cong. (2021); Prohibition of Agricultural Land for the People's Republic of China Act, H.R. 7892, 117th Cong. (2022); Securing America's Land from Foreign Interference Act, H.R. 3847, 117th Cong. (2021); Securing America's Land from Foreign Interference Act, S. 4703, 117th Cong. (2022).

379. Appropriations bills passed by the House in 2022 would have limited ownership of real estate to the boundaries set by H.R. 8294, 117th Cong. (2021) and H.R. 4502, 117th Cong. (2021).

countries threaten the unified position that CFIUS enshrines with respect to both adversaries and allies.[380]

The Eleventh Circuit Court of Appeals in the case challenging Florida's S.B. 264 granted a preliminary injunction in favor of two of the plaintiffs and based the "likelihood of success" on the merits on the potential preemption of S.B. 264 by the carefully crafted balance of CFIUS review under FIRRMA for real estate transactions, including those near military installations.[381]

D. DORMANT COMMERCE CLAUSE

1. Interstate Commerce

While the Commerce Clause gives power to the federal government to regulate commerce between the states, it has also been interpreted as a limit on state action. Unlike preemption doctrine, which asks whether a state law conflicts with a federal law or whether Congress has occupied the field, the Dormant Commerce Clause prohibits state or local action that restricts interstate commerce even in the absence of congressional action. The goal of the Dormant Commerce Clause doctrine is to prevent "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[382]

Some alien land laws violate the Dormant Commerce Clause by treating out-of-state actors differently than in-state actors in ways that have a negative impact on interstate commerce. The disparate treatment between in-state and out-of-state residents in North Dakota's new law is the clearest example. North Dakota's law disadvantages noncitizens who are either abroad or in another state. It requires noncitizens who are not permanent residents or otherwise exempted to reside in the state for ten months a year. It also exempts those who actively participate in the management of the agricultural operation, which could allow someone to comply with the restrictions without being present in the state.[383] A noncitizen who stops fulfilling these requirements must dispose of the property. A foreign person who moves to another state then cannot hold land while a similarly situated foreign person in North Dakota can.

Another example is the initial version of an Oklahoma bill, which exempted "any alien who is or shall become a bona fide resident of the State

380. Eichensehr, *supra* note 372, at 16; 50 U.S.C. § 4565 (C)(3).

381. Shen v. Comm'r, No. 23-12737, 2024 U.S. App. LEXIS 2346, at *3 (11th Cir. Feb. 1, 2024).

382. Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or., 511 U. S. 93, 99 (1994); *see also* United Haulers Assn. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

383. N.D. CENT. CODE § 47-10.1-02 (2023).

of Oklahoma" from the restrictions on ownership.[384] Such a provision explicitly treats noncitizens living in another state differently than noncitizens residing in Oklahoma, which would trigger strict scrutiny under the Dormant Commerce Clause.[385] Oklahoma likely recognized the Dormant Commerce Clause issue, because the final version of its rule pronounced that "the requirements of this subsection shall not apply to a business entity that is engaged in regulated interstate commerce in accordance with federal law."[386]

Courts have struck down similar restrictions on landownership that favor in-state residents. For example, in *Jones v. Gale*, the Eighth Circuit invalidated a Nebraska initiative that amended the state constitution to ban corporations from owning farmland, with an exception for family farm businesses in which at least one family member resided or worked on the farm.[387] The court found that this amendment favored Nebraska residents in violation of the Dormant Commerce Clause.[388] Alien land laws that apply restrictions without differentiating based on residence in the state are much more likely to survive a Dormant Commerce Clause analysis.

2. Foreign Commerce

Restrictions on foreign ownership of land have a more obvious effect on international trade than they do on interstate commerce because noncitizens abroad are clearly targeted.[389] North Dakota's law, for example, allows noncitizens to buy agricultural land only if they reside in the state, while U.S. citizens and permanent residents can own agricultural land there regardless of where they live. While no country is singled out in North Dakota's law, those countries without a treaty of friendship with the United States will be the ones whose citizens will be most affected.[390]

The Dormant Foreign Commerce Clause operates similarly to the interstate Dormant Commerce Clause, but state laws burdening foreign commerce are subjected to more demanding scrutiny.[391] When it comes to regulating *foreign* commerce, the Supreme Court has stressed that state laws

384. OKLA. STAT. tit. 60, § 122 (2023). For an account of the malleable nature of residency's meaning, see Anthony Schutz, *Nebraska's Corporate-Farming Law and Discriminatory Effects Under the Dormant Commerce Clause*, 88 NEB. L. REV. 50, 85 (2009).

385. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (discussing the restrictions on exporting minnows outside the state). The state would then have to prove that the law serves a legitimate local purpose that cannot be promoted by a reasonably nondiscriminatory alternative.

386. OKLA. STAT. tit. 60, § 121 (2023).

387. Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006); *see also* Schutz, *supra* note 384.

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

389. Shapiro, *supra* note 25, at 245.

390. N.D. CENT. CODE § 47-10.1-02 (2023).

391. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).

should not "prevent this Nation from 'speaking with one voice.' "[392] In the seminal case *Japan Line, Ltd. v. County of Los Angeles*, the Court highlighted the "acute" risk of retaliation by Japan for California's imposition of a tax rule that deviated from international practice, observing that such retaliation "would be felt by the Nation as a whole," not just by California.[393]

In subsequent cases, however, the Court has acknowledged the difficulty in determining "precisely when foreign nations will be offended by [a] particular act[]" or whether they might retaliate.[394] The Court has also upheld state taxes on foreign entities by reasoning that no coherent federal policy exists.[395]

Under the Dormant Foreign Commerce Clause, it may be hard to demonstrate a uniform federal policy on foreign land ownership, since the federal government has traditionally entered into bilateral treaties with specific countries when it wanted to override state restrictions on foreign ownership of land.[396] Additionally, in *Barclays*, the Supreme Court suggested that congressional inaction indicates acquiescence to differing state laws.[397]

Alternatively, courts may rely on the Supreme Court's position in *South-Central Timber Development, Inc. v. Wunnicke*,[398] which allows states to escape scrutiny under the Dormant Commerce Clause only if they are market participants themselves. For example, states could be acting as market participants when they are regulating state public lands, or when Congress has expressly excluded a state law from Dormant Commerce Clause scrutiny.[399] In some cases, the Court has not considered references to

392. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979).

393. *Id.* at 453.

394. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983); Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 327–28 (1994) ("The judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.' ") (quoting *Container*, 463 U.S. at 194).

395. Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 11–12 (1986).

396. *Cf.* Webb v. O'Brien, 263 U.S. 313, 321–22 (1923) ("In the absence of a treaty to the contrary, the State has power to deny to aliens the right to own land within its borders."); *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1104–10 (2000).

397. *Container*, 463 U.S. at 196–97 (finding that the California tax apportionment rule was not "pre-empted by federal law or fatally inconsistent with federal policy"); *Barclays*, 512 U.S. at 323, 324–25. *Id.* at 332 (Scalia, J., concurring) (quoting the majority opinion).

398. S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984).

399. Shapiro, *supra* note 25, at 249.

state power over a resource, like water, in federal laws[400] or in treaties[401] enough to conclude that Congress has excluded the application of the Dormant Commerce Clause to states. Accordingly, acknowledgement of state power to regulate property is an inadequate basis for refusing to apply the Dormant Foreign Commerce Clause when state laws discriminate against noncitizens abroad.

CONCLUSION

While each wave of alien land laws has responded to unique historical events, xenophobia of some kind undergirds them all. The current wave is no different. The dominant narratives that have fueled such bills involve members of the Chinese Community Party buying land to either spy on U.S. military bases or to "undermine American agriculture and control the global food supply."[402] These narratives reflect a few salient examples of Chinese investments near military bases, but they have nothing to do with most foreign investment in the U.S. This Article has argued that one of the most significant weaknesses of these new laws is the complete lack of fit between the objectives asserted and the means being used to achieve them. This lack of means-end fit, combined with the availability of less restrictive alternatives, is highly relevant to both the equal protection analysis and the Fair Housing Act disparate impact analysis.

As legal cases challenging these new laws start percolating through the court system, the Supreme Court may eventually need to decide whether it will stand by hundred-year-old precedents upholding alien land laws that were based on explicitly racist naturalization eligibility criteria—rules that prohibited Asians from becoming U.S. citizens. The time has come for those cases to be overturned. But overturning them will likely require the Court to clarify certain unanswered questions in equal protection doctrine regarding alienage discrimination, such as whether strict scrutiny applies to all classes of noncitizens and whether the political functions exception to strict scrutiny can be extended to landownership.

Courts may also decide to avoid the thorny equal protection questions by striking down alien land laws on preemption grounds instead. However, the various arguments for preemption discussed here involve their own

400. *See generally* Sporhase v. Nebraska, 458 U.S. 941 (1982) (While states retain some control over water resources within their borders, their regulatory power is not absolute. They cannot impose restrictions that interfere with interstate commerce unless justified by legitimate conservation concerns).

401. Shapiro, *supra* note 25, at 248.

402. Press Release, Ashley Hinson, Representative, House of Representatives, We Must Stop the CCP from Undermining U.S. Agriculture (Aug. 3, 2023), https://hinson.house.gov/media/press-releases/hinson-we-must-stop-ccp-undermining-us-agriculture [https://perma.cc/L89W-6Y38].

hurdles. Preemption under immigration law would likely be limited to noncitizens who have already been admitted to the U.S. Foreign affairs preemption seems particularly promising, but the federal government's decision not to argue preemption in the recent Florida case to date may undermine that claim. A Dormant Foreign Commerce Clause argument is also strong, but courts may still be reluctant to invalidate a law related to traditional state powers over property based on interference with commerce.

There is also a chance that Congress will enact new laws in the near future addressing foreign ownership of land, as several such bills have already been proposed.[403] Depending on the substance of a federal law, this could either make it harder or easier to challenge property restrictions related to national origin. In FY 2024, the House proposed a bill that would "prohibit the purchase of agricultural land located in the United States by nonresident aliens, foreign businesses, or any agent, trustee, or fiduciary associated with Russia, North Korea, Iran, or the Communist Party of China."[404] If the federal government decides to pass a law like this that singles out certain countries, it would be harder to challenge than a similar state law, as rational basis review, rather than strict scrutiny, applies to alienage classifications by the federal government.[405] Additionally, the Dormant Commerce Clause and preemption arguments would disappear, since they only constrain states.

The enactment of federal legislation would, however, bolster arguments that state laws are preempted. A federal law that did not single out specific countries and instead set some general limits on foreign land ownership across the board, such as a limit on the amount of U.S. land that a noncitizen abroad or foreign business may own, could have a positive effect by displacing state laws that impose much more discriminatory restrictions.

A third possibility is that Congress could explicitly embrace a cooperative approach, specifying that the newly enacted federal legislation does not prohibit states from passing their own laws on foreign ownership of real property. Because this approach would potentially permit discriminatory state laws, it would be wise for Congress to at least set some constraints regarding what types of state restrictions would be permissible to prevent a race to the bottom.

403. *See* RENÉE JOHNSON, CONG. RSCH. SERV., R47893, SELECTED RECENT ACTIONS INVOLVING FOREIGN OWNERSHIP AND INVESTMENT IN U.S. FOOD AND AGRICULTURAL: IN BRIEF 4 (2024).

404. *Id.* at 3 (citing H.R. 4368, 118th Cong. § 765 (2023)); *see also* RENÉE JOHNSON, CONG. RSCH. SERV. IF12312, FOREIGN OWNERSHIP OF U.S. AGRICULTURE: SELECTED POLICY OPTIONS (2023) (noting that "the House-passed versions of [] FY2023 and FY2022 appropriations bills included provisions that would have prohibited the purchase of U.S. agricultural land by companies owned, in full or in part, by China, Russia, North Korea, or Iran").

405. Mathews v. Diaz, 426 U.S. 67, 87 (1976).

At the end of the day, states and the federal government should be wary of the harm that exclusionary laws inflict. Laws that draw distinctions based on national origin or citizenship are likely to lead to racial or ethnic profiling by realtors, lenders, and others involved in real property transactions, as well as to subordinate minorities more generally. These laws are especially apt to exacerbate discrimination against Asian Americans, Iranians, and others who are already subject to discrimination. Long ago, the Supreme Court recognized that if states were allowed to deny immigrants the right or live and work in their borders, immigrants "would be segregated in such of those States as chose to offer hospitality."[406] Alien land laws open the door to this type of segregation.

Property ownership is a crucial means of achieving both financial and social mobility; it provides access to schools, jobs, culture, and community. Restricting property rights has therefore been used as a tool throughout history to disempower certain groups, including women and racial minorities. When we deprive noncitizens of property rights, we prevent hardworking immigrants from achieving the American Dream.

406. Truax v. Raich, 239 U.S. 33, 42 (1915).