South Dakota Farm Bureau, Inc. v. Hazeltine: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers

Christy Anderson Brekken*

Introduction

Amendment E to the South Dakota Constitution, passed in 1998, prohibits corporations from owning farmland and otherwise engaging in farming in South Dakota, with certain exceptions.[1] On August 19, 2003, the Eighth Circuit found that Amendment E violates the dormant Commerce Clause because the amendment discriminates against out-of-state interests.[2]

The Eighth Circuit's ruling represents a dramatic shift in dormant Commerce Clause jurisprudence, eroding a state's power to regulate its local economy and the corporations that operate within its borders. Similar laws in eight other states, which are several decades old and have survived other constitutional challenges, are now threatened. Successful challenges to these laws in largely rural farm-dependent states herald the loss of one of the last protections for the family farm and rural economies from corporate concentration and vertical integration in the agricultural sector.[3]

In Part I, this Article describes the pressures on family farms, the trend toward corporate concentration and increased farm size, the corresponding impacts on rural communities, and the history of progressive, pro-family farm laws.[4] Part II discusses federalism, separation of powers, and dormant Commerce Clause

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1. S.D. CONST. art. XVII, §§ 21-24 (1998).

2. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596-98 (8th Cir. 2003) (motion for rehearing *en banc* denied) [hereinafter *Hazeltine II*].

3. *See infra* Part I.C.

4. *See infra* notes 10-71 and accompanying text.

jurisprudence.[5] Finally, Parts III[6] and IV[7] describe and analyze the Eighth Circuit's decision in *South Dakota Farm Bureau, Inc. v. Hazeltine.*

This Article will show that the Eighth Circuit's dormant Commerce Clause analysis is flawed and should be overturned.[8] The court's purview is not to judge the wisdom of these laws. Rather, under precedent, the court must recognize the state's inherent power to regulate its local economy, including regulation of corporations, for the benefit of its citizens.[9]

I. The Proliferation and Power of Agribusiness Firms and the Crisis in Rural America

A. The Farm Crisis has had a National Impact in the Last Half of the Twentieth Century

Times are tough for family farmers, but that is old news.[10] Farming is an inherently risky business; weather, commodity prices, costs of inputs and technology, interest rates, government regulation, land prices, and foreign and domestic competition all combine to affect a farm's success each growing season, regardless of its ownership or management structure.[11] The number of farms in the United States has plummeted from more than five million in 1954[12] to just over two million in 2001.[13] The farm population has fallen from thirty million in the 1940s to less than five million, while the average farm size has more than doubled.[14] From 1999 to 2001, the United States lost 34,000 farms, over half of those in

5. *See infra* notes 72-171 and accompanying text.

6. *See infra* notes 172-200 and accompanying text.

7. *See infra* notes 202-294 and accompanying text.

8. *See infra* notes 295-296 and accompanying text.

9. *See infra* notes 203-206 and accompanying text.

10. *See infra* notes 11-16 and accompanying text.

11. MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 114-15 (1988); Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203, 203 (1993) [hereinafter *Saving the Family Farm*]; Jan Stout, *The Missouri Anti-corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 838 (1996).

12. John C. Pietila, *"[W]e're Doing this Ourselves": South Dakota's Anticorporate Farming Amendment*, 27 J. CORP. L. 149, 152 (2001).

13. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., AGRICULTURAL STATISTICS 2002, IX-2 (2002) (Table 9-2) [hereinafter AGRIC. STATISTICS SERV.].

14. OSHA GRAY DAVIDSON, BROKEN HEARTLAND: THE RISE OF AMERICA'S RURAL GHETTO 35 (1990).

the Midwest, which has thirty percent of all farms.[15] South Dakota saw a seventeen percent decrease in the number of farms from 1980 to 2001.[16]

B. Rural Crisis for Farm Families, Communities, and Environment

1. Farm Families' Livelihoods are Jeopardized by the Rural Crisis

It is easy to think of declining farm numbers and market factors affecting faceless farm "operations." However, for small and medium-sized family farmers, this decline threatens their families' livelihood. In 1990, farm families were twice as likely as the general population to live in poverty.[17] Today, farm families must supplement farm income by working off the farm—more than half of all farm operators also work off-farm, with eighty percent of those farmers working full-time off-farm jobs.[18] However, even though fewer farm families now live in poverty, the statistics do not signal the end of the family farm crisis. The Commission on Small Farms notes that "for some of these farmers, off-farm jobs are not a choice, but a necessity due to the inability to obtain an adequate return from farming. And in some places, such as Indian reservations, off-farm jobs are not available at all."[19] The farm is simply not supporting family needs anymore.[20]

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15. AGRIC. STATISTICS SERV., *supra* note 13, at IX-2 (Table 9-4). The Midwest states included in the statistics are Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. *Id.*

16. Pietila, *supra* note 12, at 152 (reporting 39,000 farms in 1980, down to 32,500 farms in 1999); AGRIC. STATISTICS SERV., *supra* note 13, at IX-5 (Table 9-9) (reporting 32,500 farms in 2001).

17. Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Service Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1089 (1996) (citing ECON. RES. SERV., U.S. DEP'T OF AGRIC., INCOME, WEALTH, AND THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS 1988-1990 10 (1993) (finding that 22.9% of farm operator households live in poverty whereas 10.7% of all U.S. families live in poverty)).

18. U.S. DEP'T OF AGRIC., ECON. RES. SERV., INCOME, WEALTH, AND THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS iii (Agric. Econ. Rep. No. 812) (2002) [hereinafter ECON. RES. SERV. 2002].

19. U.S. DEP'T OF AGRIC., NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 18 (1998) [hereinafter COMM'N ON SMALL FARMS].

20. ECON. RES. SERV. 2002, *supra* note 18, at iv. The farm operation actually reduced pre-tax income for sixty percent of farm households in 1998. *See id.*

2. Rural Farming Communities Sink Deeper into Poverty

In the United States in 1999, 15.7% of people living in farming-dependent counties were living in poverty, compared to 13.4% of all rural counties in 2000.[21] More than half of South Dakotans live in rural communities, most of which depend on farming.[22] When local farms are in crisis, the entire local economy feels the effects. Rural development experts have estimated that for every five to seven farms that go out of business, one business in the local town closes.[23] Even if the farm that goes out of business is replaced by a corporate farm, rural businesses are no better off because of the integration of corporate farming—the corporate farm is likely to acquire its needs internally or from outside the local economy.[24] In contrast, "[l]and owners who rely on local businesses and services for their needs are more likely to have a stake in the well-being of the community and the well-being of its citizens."[25] Additionally, corporate farms do not provide enough jobs or income to the local economy to replace what is lost.[26] During the farm crisis of the 1980s, the Midwest's net growth in jobs was in the "lowest paying, poverty level jobs."[27]

The social and economic fabric of a rural community is intertwined with its farm economy. The "multiplier effect" from the loss of locally-owned farms pulls down already marginal communities, which have lower levels of basic services, less diverse economies, and higher levels of poverty.[28] The farm crisis

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21. U.S. DEPT. OF AGRIC., ECON. RES. SERVICE, RURAL INCOME, POVERTY, AND WELFARE: RURAL POVERTY, *at* http://www.ers.usda.gov/Briefing/IncomePovertyWelfare/ruralpoverty/ (last visited Feb. 13, 2004).

22. Pietila, *supra* note 12, at 150-51.

23. DAVIDSON, *supra* note 14, at 57.

24. Richard F. Prim, *Minnesota's Anti-corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431, 447 (1995) [hereinafter *Minnesota's Anti-corporate Farm Statute*] ("[T]he purchasing trend associated with the large operations indicates that this production structure is not as socially beneficial as smaller farms because the larger operations are less likely to support their local communities through main street purchases." (citation omitted)).

25. COMM'N ON SMALL FARMS, *supra* note 19, at 21.

26. DAVIDSON, *supra* note 14, at 36 ("Farm management companies, which often hire bankrupt farmers to work the land they once owned, for hourly wages, increased their control over agricultural land by 36 percent between 1980 and 1986." (citation omitted)).

27. *See id.* at 59.

28. *See* Carpenter & Roth, *supra* note 17, at 1092; Steve H. Murdock et al., *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agriculturally Dependent Counties in the United States*, *in* RURAL POVERTY: SPECIAL CAUSES AND POLICY REFORMS 68-72 (Harrell R. Rodgers, Jr. & Gregory

of the 1980s sparked a rural crisis throughout America, including hunger, malnutrition, and homelessness.[29]

Society should not be troubled by the fall of the family farm merely as the end of a romantic era of the noble and independent farmer. The loss of family farms has a ripple effect beyond the farm to the local rural economy. With farms and local businesses closing, rural populations are pushed to urban areas where the crisis continues as they join the urban poor in a desperate bid for scarce resources.[30]

3. Corporate Farming Methods Take a Toll on the Environment

Insofar as a farmer's treatment of the land and water depends on government regulation and the use of new technology, there is little evidence that a family owned farm is different from a corporate-owned farm in terms of environmental impact.[31] However, family-owned farms tend to be smaller, making it easier to responsibly manage natural resources.[32] A traditional family farm was a diverse operation that allowed for sustainable management of resources.[33] The rise of corporate farm operations has led to more industrialization in farming—where one type of operation is done on a mass scale.[34] Industrialization requires greater use of petroleum fuels, chemical fertilizers, and pesticides in grain production.[35] In livestock production, greater concentrations of animals are confined in smaller areas resulting in serious odor problems and ground and surface water

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Weither eds., 1989).

29. DAVIDSON, *supra* note 14, at 75-76.

30. *See Saving the Family Farm*, *supra* note 11, at 207 ("Another factor not considered . . . is the social cost caused by the mass exodus of rural people to the city in search of work. The relationship between rural shrinkage and urban decline is not adequately considered by most in favor of corporate farming."). *See also* A.V. KREBS, THE CORPORATE REAPERS: THE BOOK OF AGRIBUSINESS 63 (1991) ("Virtually every aspect of the urban crisis—poverty and welfare, employment, crime, housing and health—could be linked to a migration from rural America . . . ." (citing a statement of former Secretary of Agriculture Orville Freeman)).

31. Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 398 (1992).

32. *See* COMM'N ON SMALL FARMS, *supra* note 19, at 21.

33. *Saving the Family Farm*, *supra* note 11, at 206-07 ("The family farm of the past was perfectly environmentally efficient. Farmers raised grain and livestock. The farm was its own closed ecological cycle." (citation omitted)). Stout, *supra* note 11, at 838 ("The traditional family farm has been the most socially and environmentally sound method of agricultural production . . . .").

34. *See Saving the Family Farm*, *supra* note 11, at 207.

35. *Id.*

contamination from large manure lagoons.[36]

C. *The Rise of the Corporate Farm, the Fall of the Competitive Local Market*

Even though all farmers face the same pressures, all farms are not equally equipped to weather bad times. As of 1998, about ninety-four percent of U.S. farms were small farms, but they received only about forty-one percent of all farm income.[37] Large corporate agribusiness operations have a competitive edge over smaller farms in a variety of ways—access to capital, limited liability, tax benefits, business continuity, centralized management, and easy ownership transfer.[38] These advantages enhance their ability to squeeze small farms out of the market.[39] Access to capital and flexible financing are the most important advantages large agribusiness corporations have over family farmers.[40] Not only does the corporate structure allow firms to pool capital from a variety of sources, agribusiness firms may also shift funds from other operations to support farm operations and leverage that capital to obtain favorable credit financing.[41] Furthermore, corporate concentration in agriculture has lead to vertical integration of farming operations—one firm controls farm inputs, production, processing, packaging, and marketing.[42] "Concentration translates into the loss of open and competitive markets at the local level . . . . The basic tenets of a 'competitive' market are less and less evident in crop and livestock markets today."[43] Family farmers are no longer on the same footing as corporate agribusiness, as the "competitive" market is captured by the biggest players.[44]

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36. *Minnesota's Anti-corporate Farm Statute*, *supra* note 24, at 447; Stout, *supra* note 11, at 842-43 (describing confinement method of industrial hog facilities) and 848-50 (describing the environmental consequences of industrial hog facilities, which "flushes animal waste . . . into football field size lagoons," where leaks and spills kill fish and enter the local water supply).

37. COMM'N ON SMALL FARMS, *supra* note 19, at 18 (defining small farms as those with gross sales under $250,000).

38. *Minnesota's Anti-corporate Farm Statute*, *supra* note 24, at 433; Haroldson, *supra* note 31, at 400.

39. *Minnesota's Anti-corporate Farm Statute*, *supra* note 24, at 433; Haroldson, *supra* note 31, at 400.

40. *Minnesota's Anti-corporate Farm Statute*, *supra* note 24, at 433; Haroldson, *supra* note 31, at 400.

41. *See* Haroldson, *supra* note 31, at 401.

42. COMM'N ON SMALL FARMS, *supra* note 19, at 9; *Saving the Family Farm*, *supra* note 11, at 206.

43. COMM'N ON SMALL FARMS, *supra* note 19, at 22.

44. *Id.* at 8-9 ("[F]rom 1910 to 1990, the share of the agricultural economy

1. Farm Size Matters to Rural Communities and Economies

The prevailing economic wisdom is that "bigger is better" in farming because it is more economically efficient.[45] Because larger operations input fewer resources per unit of product, the corporate farm is either considered to be in the national interest or simply inevitable because the market demands efficiency.[46] However, policy based on strict economic efficiency does not take all relevant costs into consideration. "Soil resource loss, environmental degradation, food security and sustainability and other such costs not specifically built into the market pricing system are generally ignored."[47] Economic studies also show that "small family and part-time farms are at least as efficient as larger commercial operations. In fact, there is evidence of diseconomies of scale as farm size increases."[48] Economic efficiency is only one factor among many considered when society makes policy choices about the structure of our agricultural system.[49] If locally-owned small and medium-sized farms are as economically efficient as large corporate-owned farms and also serve additional social goods, states have an incentive to encourage the smaller family farm ownership structure for the health of local economies and the environment.[50]

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received by farmers dropped from 21 to 5 percent." (citation omitted)); *Saving the Family Farm*, *supra* note 11, at 206; DAVIDSON, *supra* note 14, at 30 ("As farmers were going bankrupt in the early 1980s, ConAgra reported record sales and earnings each year." (citation omitted)).

45. COMM'N ON SMALL FARMS, *supra* note 19, at 14; STRANGE, *supra* note 11, at 78.

46. COMM'N ON SMALL FARMS, *supra* note 19, at 14; STRANGE, *supra* note 11, at 78. *See* Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 615 (1994).

47. KREBS, *supra* note 30, at 16.

48. COMM'N ON SMALL FARMS, *supra* note 19, at 20 (quoting Willis L. Peterson, Are Large Farms More Efficient? Staff Paper P97-2 (Jan. 1997) (Department of Applied Economics, University of Minnesota).

49. *See generally* Haroldson, *supra* note 31, at 397-99. Such policy choices are appropriate for society to make consciously. First, agriculture is already one of the most heavily regulated industries in the country, so the market is guided by policy choices already made. Second, farms are more than just a business that can come and go without notice. Their fate affects the livelihoods of a great number of real people who have an interest in farm policy. *See supra* notes 22-30 and accompanying text. Third, while only three percent of the population lives or works on farms, a vast number of people beyond the countryside feel a deeper cultural connection to the idea of the family farm and connection to the land and food, evident from continuing political and social attention given to saving the family farm and the origin of our food. *See* Haroldson, *supra* note 31, at 399.

50. *See supra* notes 17-36 and accompanying text.

2. Local Ownership and Control Matters to the Local Economy

The social ills associated with agricultural concentration are not limited to the size and number of farms. Land ownership and control of farms also significantly impact the analysis of the burdens on society.[51] The United States Department of Agriculture's (USDA) National Commission on Small Farms associates absentee ownership with deterioration of rural communities, and cites diversity of ownership as one of the public values of small farms: "[d]ecentralized land ownership produces more equitable economic opportunity for people in rural communities, as well as greater social capital."[52] Local landowners have a stake in the well-being of their community, and in turn are more likely to be held accountable for the negative effects of their operations.[53] Family operations also have a present and long-term connection to their land, and thus both emotional and business incentives to manage their natural resources responsibly.[54]

As absentee owners, corporate farmers have no connection to the land or community.[55] Maximization of short-term profit for shareholders is the primary motivation for corporate actions. Corporations also enjoy limited liability to protect decision-makers from liability for environmental contamination.[56] The very structure of corporate-owned farms leads them to be poor neighbors to rural communities, and poor stewards of the land.[57]

The USDA's own National Commission on Small Farms acknowledges that federal farm policy over the last twenty years has favored a

> structural bias toward greater concentration of assets and wealth in fewer and larger farms and fewer and larger agribusiness firms. Federal farm programs have historically

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51. Hamilton, *supra* note 46, at 614 (noting that the "principal organizational characteristic of [large, industrialized farms] is the separation of ownership from operation").

52. COMM'N ON SMALL FARMS, *supra* note 19, at 20-21.

53. *Id.* at 21.

54. *Minnesota's Anti-corporate Farm Statute*, *supra* note 24, at 441.

55. *Id.* at 442.

56. *Id.*

57. Hamilton, *supra* note 46, at 637 (discussing generally the importance of the structure—specifically ownership and control—of agricultural production for our economy and food system, and specifically noting an "abuse and exploitation of natural resources, primarily by non-residents, and increasingly international corporate economic interests").

> benefited large farms the most. Tax policies give large farmers greater incentives for capital purchases to expand their operations. Large farms that depend on hired farmworkers receive exemptions from Federal labor laws allowing them the advantage of low-wage labor costs.[58]

In contrast, the USDA's National Commission on Small Farms has a different vision for American agriculture:

> It is our resolve that small farms will be stronger and will thrive, using farming systems that emphasize the management, skill, and ingenuity of the individual farmer . . . . [N]ot only will they continue their valuable contribution to the Nation's food supply, but they will also fuel local economies and energize rural communities all across America . . . . This vision is focused on those farms with less than $250,000 gross receipts annually, on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets.[59]

Similarly, state legislatures and citizens have made the connection between increased corporate concentration in farming and social and economic degradation in rural communities. Nine states have adopted legislation or constitutional amendments limiting corporate ownership of farmland or corporate farming activities.[60] The laws typically exempt "family farm corporations," "authorized farm corporations," and some kinds of farming activities.[61] These states recognize that it is the secondary effects of the corporate structure that are problematic—larger operations, absentee ownership, monopolistic effects on local markets, and the associated social and environmental degradation.[62]

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58. COMM'N ON SMALL FARMS, *supra* note 19, at 8.

59. *Id.* at 9-10. The Commission's vision parallels Amendment E's policy choices regarding the operation of small farms, envisioning local ownership and control. *Id.*

60. *See* IOWA CODE §§ 9H.1-9H.15 (2001); KAN. STAT. ANN. §§ 17.5902-17.5904 (1995); MINN. STAT. § 500.24 (2002); MO. ANN. STAT. § 350.015 (2001); NEB. CONST. art. 12, § 8; N.D. CENT. CODE §§ 10-06.1-01 to 10-06.1-27 (2001); OKLA. CONST. art. XXII, § 2; S.D. CODIFIED LAWS §§ 47-9A-1 to 47-9A-23 (2003); S.D. CONST. art. XVII, §§ 21-24; WIS. STAT. § 182.001 (2002).

61. Pietila, *supra* note 12, at 152 n.20. *See* Haroldson, *supra* note 31, at 403-05. The exception for "family farm" or "authorized farm" corporations requires a relationship between shareholders or a small number of shareholders, and that at least one shareholder reside on the farm or engage in the day-to-day operation of the farm. *Id.* at 403.

62. *See supra* notes 42-43, 55-57 and accompanying text.

D. South Dakota's Anti-corporate Farming Law Attempts to Preserve Local Rural Economies

South Dakota first attempted to regulate the economic burden created by corporate farming with the Family Farm Act of 1974 (FFA).[63] Farm advocates and legislators became convinced that the increasing presence of "agricultural conglomerates would have an adverse impact on South Dakota's traditional family farms and rural communities" through their influence over agricultural markets.[64]

In response, the South Dakota Legislature hoped to strengthen the position of the family farm to preserve rural economies. In 1988, after large corporations sought to expand hog production operations in the state, nearly sixty percent of South Dakota voters approved a measure that expanded the FFA restrictions to corporate "hog confinement facilities."[65] In 1995, contrary to the intent of the Act, the Attorney General narrowly construed the language of the Amendment to open the door for major feeding operations in the state as long as the hogs were bred and farrowed at separate facilities.[66]

Two years later, a coalition of farm advocates and citizens' groups, including the 14,000-member South Dakota Farmers Union and Dakota Rural Action, initiated a proposed amendment to the state constitution to again attempt to limit corporate involvement in farming, including "hog factories."[67] Proponents claimed the measure was necessary to "prevent corporate manipulation of livestock markets, protect the environment, and safeguard the social and economic well-being of rural communities."[68] Opponents, including the 10,000-member South Dakota Farm Bureau, argued that the amendment would "discriminate against successful family farmers . . . and fail to protect the environment or prevent large-scale hog operations."[69] After lively political debate, nearly sixty percent of voters, including two-thirds of the state's farmers, adopted Amendment E in 1998.[70] Patterned after Nebraska's anti-corporate farming law,

63. Pietila, *supra* note 12, at 153.
64. *Id.* at 153.
65. *Id.* at 155.
66. *Id.* at 155-56. Farrowing is caring for sows and their piglets during and after gestation. *Id.* at 155 n. 44.
67. *Id.* at 156.
68. *Id.*
69. *Id.* at 157.
70. *Id.*

South Dakota's Amendment E is one of the strictest anti-corporate farming laws in the country.[71]

II. Hurdles for Constitutional Challenges to Anti-corporate Farming Laws

A. *Past Constitutional Challenges to Anti-corporate Farming Laws have Failed*

Numerous farm regulatory laws have survived constitutional challenges. Anti-corporate farming laws in North Dakota, Missouri, and Nebraska have been upheld against constitutional challenges under the Privileges and Immunities Clause, Contract Clause, and the Equal Protection and Due Process Clauses of the 14th Amendment.[72] No previous case challenged such a law under the dormant Commerce Clause, and commentators have doubted the success of such a challenge.[73]

In *Asbury Hospital v. Cass County,* the opponents unsuccessfully challenged a farm regulatory law on several grounds.[74] The Privileges and Immunities Clause of the Constitution[75] cannot be invoked on behalf of a corporation because it is not a "citizen" within the meaning of the Clause.[76] The only Contract Clause[77] challenge to an anti-corporate farming law failed because no contract rights were implied from the

71. *Id.* at 158. S.D. CONST. art. XVII, §§ 21-24 prohibits corporate ownership of land and corporate farming activities such as contract operations, including most partnership and other limited-liability vehicles. It exempts "family farm" corporations or cooperatives where the majority of the stock is held by related persons and at least one of those persons resides on the property or engages in the day-to-day operation of the farm. *Id.* at § 22(1), (2). Corporations seeking the exemption must file with the Secretary of State. *Id.* at § 24. It also exempts certain farming activities, such as agricultural research, growing seed, nursery plants or sod, owning mineral rights in agricultural land, and custom spraying, fertilizing or harvesting. *Id.* at § 22.

72. Asbury Hosp. v. Cass County, 326 U.S. 207 (1945) (upholding North Dakota law against Privileges and Immunities Clause, Contract Clause, due process, and equal protection challenges); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (upholding Nebraska constitutional amendment against equal protection and due process challenges); State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) (en banc) (upholding Missouri statute against equal protection and due process challenges).

73. *See infra* note 84 and accompanying text.

74. 326 U.S. 207 (1945).

75. U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1.

76. *Asbury Hosp.*, 326 U.S. at 210-11.

77. U.S. CONST. art. I, § 10.

corporation's holding of farmland.[78] After reviewing the law for rational relation to proper legislative purpose, the Supreme Court recognized the "unqualified power of the state to preclude [a corporation's] entry into the state" to engage in farming.[79]

An equal protection challenge to the anti-corporate farming laws was equally unsuccessful because those laws did not affect a suspect class such as one based on race or gender.[80] Since the challengers of the laws could not offer proof of irrationality, the Supreme Court deferred to the legislature's judgment that the discrimination against corporations was rational.[81] Following precedent, the Eighth Circuit in 1991 unequivocally held that a policy "to retain and promote family farm operations in Nebraska" was a "legitimate state interest under the equal protection clause."[82] The circuit court discussed the increase in corporate concentration in farming and the decrease in family farms, concluding that:

> It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. Whether *in fact* the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land.[83]

Prior to *Hazeltine*, commentators had concluded that a dormant Commerce Clause challenge to anti-corporate farming laws was unlikely to be successful because the laws do not differentiate between in-state and out-of-state corporations, and there is a legitimate state interest in regulating corporate operations in local agricultural markets.[84]

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78. *Id.*

79. *Asbury Hosp.*, 326 U.S. at 211. The court also upheld the power of the state to exclude corporations already doing business in the state. *Id.* at 211-12.

80. *See* Martin J. Troshynski, *Corporate Ownership Restrictions and the United States Constitution*, 24 IND. L. REV. 1657, 1660-61 (1991).

81. *Asbury Hosp.*, 326 U.S. at 214-15.

82. *MSM Farms, Inc.*, 927 F.2d, at 333. *See also* Pietila, *supra* note 12, at 162 (noting that the Nebraska and South Dakota constitutional amendments restricting corporate farming have the same basic provisions—both restrict corporate farming and corporate ownership of farmland while exempting family farm corporations owned by family members where at least one member is active in the day-to-day labor and management of the farm).

83. *Id.* (citation omitted).

84. *See* Pietila, *supra* note 12, at 164-68. *See* Troshynski, *supra* note 80, at 1664-67.

B. *Federalism and Separation of Powers Concerns Militate Against Invalidation of State Laws when Traditional State Powers are Implicated*

Dormant Commerce Clause analysis has traditionally balanced Congress' power to ensure open national markets under the Commerce Clause with federalism principles.[85] Federalism originates in the explicit enumeration of Congress' powers in the Constitution balanced against the states' retention of the remaining powers under the Tenth Amendment.[86] Congress' power to regulate economic activity is not exclusive: "[i]n conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."[87]

Despite the Tenth Amendment, commentators and jurists alike have warned that the dormant Commerce Clause has the potential to erode state sovereignty, as it "has proved to be one of the most prolific sources of invalidation of state laws."[88] Moreover, allowing states the freedom to create new laws without the looming threat of the dormant Commerce Clause has policy advantages: "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[89]

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85. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960); Sherlock v. Alling, 93 U.S. 99, 103 (1876). *See also* Julian Cyril Zebot, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1085-86 (2002) (criticizing the dormant Commerce Clause as a whole on federalism principles: "[s]uch concerns have only been magnified by the courts' expansion of the doctrine [of federalism] over the last several decades"). As dormant Commerce Clause analysis mirrors Commerce Clause jurisprudence, it is worth mentioning that federalism has recently become an important concern of the Court, narrowing Congress' power to legislate. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995). *See also* John J. Dinan, *The Rehnquist Court's Federalism Decisions in Perspective*, 15 J.L. & POL. 127, 145-46 (1999) (discussing the *Lopez* decision and the dormant Commerce Clause).

86. U.S. CONST. amend. X; Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 401-02 (1998).

87. *Sherlock*, 93 U.S. at 103.

88. Dinan, *supra* note 85, at 181. *See* Zebot, *supra* note 85, at 1085-86 (noting that Justices Scalia and Thomas in particular believe that the dormant Commerce Clause should be significantly limited or simply eliminated, while it "threatens to inflame federalism sensibilities" of more moderate justices).

89. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). *See generally* Lawrence, *supra* note 86, at 405.

Because of the its nontextual origins, the dormant Commerce Clause has also been criticized as a violation of the separation of powers doctrine.[90] Congress, not the courts, must ensure that local markets remain open to interstate commerce.[91] Additionally, when federal courts invalidate laws under the dormant Commerce Clause, they also judge the power and wisdom of state legislatures. "[C]ourts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment."[92] In a dormant Commerce Clause analysis, a court should first recognize if the law is within the traditional power of the state and give full weight to that recognition when evaluating the impact of the law on interstate commerce.[93] Indeed, the Tenth Amendment "makes state actions valid as a matter of law—in effect, it gives state actions a presumption of validity—unless expressly or impliedly prohibited by the Constitution."[94]

C. Dormant Commerce Clause Jurisprudence does not Preclude All State Regulation of Local Markets

The Constitution grants Congress the power to regulate commerce among the states.[95] The Framers wanted to create a common national market by eliminating internal trade barriers among the states.[96] Note that this is a "*political* theory of union, not [] an *economic* theory of free trade;"[97] the Commerce Clause does not mandate the courts to keep all markets free from all regulation.[98] From this express grant of power to Congress, the Supreme Court implied a limitation on state power to pass laws that unduly burden interstate commerce—hence the "dormant" Commerce Clause.[99] The non-textual aspect of the doctrine makes it immediately suspect even to those who support the doctrine in

90. *See* Lawrence, *supra* note 86, at 403-04.

91. *Id.* at 404.

92. Board of R.R. Com'rs v. Aero Mayflower Transit Co., 172 P.2d 452, 459 (Mont. 1946).

93. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142-43 (1970) ("If a legitimate local purpose is found, then the question becomes one of degree. . . . [W]e have recognized the legitimate interest of a State in maximizing the financial return to an industry within it. . . . Therefore . . . we may assume the constitutional validity of the Act.").

94. Lawrence, *supra* note 86, at 402. *See supra* note 93.

95. U.S. CONST. art. I, § 8, cl. 3.

96. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 403 (2d ed. 2002).

97. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (2d ed. 1988).

98. *Id.*

99. CHEMERINSKY, *supra* note 96, at 401.

theory and raises the federalism and separation of powers principles ever present in judicial review.[100] The agricultural industry, as a national market, is within Congress' power to regulate under the Commerce Clause; therefore, state laws that have an undue burden on the production of agricultural products may be invalidated under the dormant Commerce Clause.[101]

1. *Pike*'s Two-step Dormant Commerce Clause Test Determines the Fate of State Economic Regulations

Dormant Commerce Clause jurisprudence is widely criticized as a "quagmire,"[102] "not predictable,"[103] "hopelessly confused,"[104] and "not always . . . easy to follow."[105] One commentator has gone so far as to say that a decision "often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."[106] Nevertheless, courts follow a two-step dormant Commerce Clause analysis derived from *Pike v. Bruce Church, Inc.*:[107] (1) determine whether the law discriminates against out-of-state parties on its face, in its effect, or in its purpose; (2) balance the burden on interstate commerce against the state purpose in enacting the law.[108] If the law is found to be discriminatory in step one, the court will invoke a strict scrutiny test in step two, and the law is presumptively invalid.[109] If the law is not discriminatory under step one, the court will invoke a rational basis test in step two and the law is presumptively

100. Zebot, *supra* note 85, at 1085; Lawrence, *supra* note 86, at 403.

101. Troshynski, *supra* note 80, at 1665 (citing Wickard v. Filburn, 317 U.S. 111 (1942)); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.").

102. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

103. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring).

104. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 706 (1981) (Rehnquist, J. dissenting).

105. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); Zebot, *supra* note 85, at 1063; Lawrence, *supra* note 86, at 397.

106. TRIBE, *supra* note 98, at 439.

107. 397 U.S. 137 (1970).

108. *Id.* at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); CHEMERINSKY, *supra* note 96, at 410.

109. CHEMERINSKY, *supra* note 96, at 410.

valid.[110] Thus, the fate of the state law depends largely on whether the court determines under step one of the *Pike* test that the law discriminates against out-of-state interests.[111]

a. Pike *Step One: The Court Must Find Discrimination Against Interstate Commerce*

Both the Supreme Court and the Eighth Circuit have made it clear that "[f]or purposes of the dormant Commerce Clause, 'discrimination' means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[112] A statute that expressly draws a distinction between in-state and out-of-state parties will be deemed discriminatory on its face.[113] A more difficult question is a facially neutral law that may have a discriminatory effect or purpose. "[T]he Court never has articulated clear criteria for deciding when proof of a discriminatory purpose and/or effect is sufficient for a state or local law to be deemed discriminatory."[114] Courts approach the question on a case-by-case basis.[115]

The Supreme Court and Eighth Circuit have stated that a discriminatory purpose can trigger strict scrutiny,[116] but in no case has discriminatory purpose alone been sufficient.[117] Even a finding of discriminatory purpose in conjunction with discriminatory effect has been "relatively rare."[118] Commentators, agreeing with the underlying principals but dissatisfied with the Court's *ad hoc* approach, have suggested various theories to analyze these cases.[119]

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110. *Id.*

111. *Id.* at 412.

112. Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814, 818 (8th Cir. 2001) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

113. CHEMERINSKY, *supra* note 96, at 412-13.

114. *Id.* at 414-15.

115. *Id.* at 417; *see supra* note 106 and accompanying text.

116. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 270 (1984); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995).

117. *See, e.g., Bacchus Imps., Ltd.*, 468 U.S. at 273 ("[I]t had both the purpose and effect of discriminating in favor of local products."); *SDDS, Inc.*, 47 F.3d at 272 ("Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny.").

118. Lawrence, *supra* note 86, at 419.

119. *See id.* at 416-17 (suggesting a simplified test of (1) whether the state law pursues a legitimate state purpose, and if so, (2) whether the legitimate purpose is so outweighed by the burdens imposed on interstate commerce that it must be struck down); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094-95

At this point, federalism concerns arise both as a practical matter by the courts, and as a matter of principle according to commentators.[120] The Eighth Circuit has recognized federalism concerns by addressing the reality that almost any local economic regulation has some effect on interstate commerce.[121] To balance those concerns, courts have refused to find discriminatory purpose as long as a statute applies equally to in-state and out-of-state parties, absent a showing of a substantial impact on interstate commerce.[122] Where the court has found discriminatory purpose, the cases are fact specific and evidence of discriminatory effect is highly relevant to the conclusion of the court.[123]

Because the mass of dormant Commerce Clause cases are so fact specific and the Court has failed to provide a coherent test to follow, commentators find it useful to break the cases into categories based on the state regulation.[124]

State regulations seemingly aimed at furthering public health

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(1986) (suggesting that the underlying goal of the dormant Commerce Clause is to stop economic protectionism, and a statute is protectionist only if (1) the purpose is to improve the competitive position of in-state parties just because they are local at the expense of out-of-state parties, and (2) the statute uses traditional instruments of protectionism—the tariff, quota, or embargo); Zebot, *supra* note 85, at 1085 (suggesting that a discriminatory motive must be found to be the "but for" cause for the state action; the plaintiff bears the burden of showing discriminatory purpose was a "substantial part or fact" of the action, then the burden shifts to the defendant to prove that it would have reached the same decision regardless of the discriminatory purpose).

120. Lawrence, *supra* note 86, at 401-03. "The lack of predictability hinders States' efforts to regulate matters within their own borders, thus potentially disturbing in a basic sense their sovereignty." *Id.* at 398. *See supra* note 85.

121. United Waste Sys. of Iowa, Inc. v. Wilson, 189 F.3d 762, 767 (8th Cir. 1999) ("If taken to an extreme, every state regulation would have some minimal effect on interstate commerce."); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1387 (8th Cir. 1997) ("Like any other local market regulation, Ordinance 12 may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause."). Discriminatory purpose has been described as the state engaging in "simple economic protectionism." *Clover Leaf Creamery Co.*, 449 U.S. at 471 (quoting Philadelphia. v. New Jersey, 437 U.S. 617, 624 (1978)).

122. *E.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 125-28 (1978); *Clover Leaf Creamery Co.*, 449 U.S. at 471-72 ("Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State."); Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001). *See infra* notes 126-146 and accompanying text.

123. *See, e.g.*, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 273 (1984) (finding discriminatory effect); SDDS, Inc. v. South Dakota, 47 F.3d 263, 271 (8th Cir. 1995) (finding discriminatory effect).

124. Regan, *supra* note 119, at 1098-1100 (defining "movement-of-goods" cases, including *Exxon Corp.*).

> or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as "undue burdens on interstate commerce" than are state regulations evidently seeking to maximize the profits of local businesses. . . . [O]ne would have to say that regulations seemingly focused on preserving local *employment* as such rather than maintaining local *profits* have sometimes received treatment almost as favorable as regulations concerned with health or other non-financial aspects of well-being.[125]

In the end, however, a dormant Commerce Clause analysis will come down to the specific facts of the case. The best analysis compares the present facts to the most analogous authoritative cases.

i. *Exxon Corp. v. Governor of Maryland*

The case most analogous to *Hazeltine* is *Exxon Corp. v. Governor of Maryland.*[126] Maryland law prohibited a producer or refiner of petroleum from operating a retail service station in the state, clearly intending to eliminate vertical integration of the petroleum industry within the state while favoring local businesses.[127] Because there were virtually no petroleum producers or refiners in the state, the burden of the law fell almost exclusively on out-of-state companies while the benefits fell almost entirely on local independent businesses.[128]

Even with this strong indication of discriminatory purpose and effect, the Court found that the law did not discriminate against interstate commerce.[129] The law treated in-state and out-of-state petroleum producers and refiners in the same way: neither may own a retail station. The Court found that out-of-state independent dealers face no barriers to entering the

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125. TRIBE, *supra* note 98, at 437.

126. 437 U.S. 117 (1978).

127. CHEMERINSKY, *supra* note 96, at 416 ("[T]here was strong evidence of a discriminatory purpose. . . . [T]he Court found that a state law was not discriminatory even though it greatly harmed out-of-state oil companies and favored local businesses."); TRIBE, *supra* note 98, at 416 ("[T]he Court upheld a statute that required vertically-integrated oil companies, whether in-state or out-of-state, to divest themselves of their retail operations.").

128. *Exxon Corp.*, 437 U.S. at 125-27. The Court noted:

> Of the class of stations statutorily insulated from the competition of the out-of-state integrated firms . . . more than 99 percent were operated by local business interests. Of the class of enterprises excluded entirely from participation in the retail gasoline market, 95 percent were out-of-state firms, operating 98 percent of the stations in the class.

Id. at 138 (Blackmun, J., concurring in part and dissenting in part).

129. *Id.* at 125-29.

Maryland market, either by prohibition or by added costs.[130]

> While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.[131]

The oil companies also argued that the Maryland law impermissibly burdened the interstate petroleum market by changing the flow of goods in interstate commerce. The Court rejected this argument, noting that while the refiners would pull out of the Maryland market, other companies would adequately replace them.[132] The Court refused to accept the assertion that "the Commerce Clause protects the particular structure or methods of operation in a retail market."[133] Further, "the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[134] Because the market would continue to operate properly, the Court found no burden on the movement of goods within interstate commerce.[135] The particular structure of the market is a question of the wisdom of the statute so long as it does not burden the movement of goods in interstate commerce.[136]

Finally, the Court found that the state retains the power to regulate the local operation of the petroleum market, even though the economic market for petroleum operates on a national scale.[137] The state regulation will only be pre-empted if there is a need for national uniformity to ensure the flow of interstate goods.[138]

ii. *Hampton Feedlot, Inc. v. Nixon*

The Eighth Circuit followed the same principles in *Hampton*

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130. *Id.* at 125-26.

131. *Id.* at 126.

132. *Id.* at 127.

133. *Exxon Corp.*, 437 U.S. at 127.

134. *Id.* at 127-28.

135. *Id.* at 126 ("In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.").

136. *See id.*

137. *See id.*

138. *Exxon Corp.*, 437 U.S. at 128 (citing Wabash, St. Louis & Pac. R.R. Co. v. Illinois, 118 U.S. 557 (1886); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851)). "[T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods." *Id.*

Feedlot, Inc. v. Nixon.[139] Missouri passed a law requiring meatpackers to disclose any price they offered to pay or actually paid to sellers of livestock.[140] Nearly all packers who bought livestock in Missouri came from out-of-state, and the feedlots alleged that the price disclosure law would cause packers to avoid doing business in Missouri, placing a burden on interstate commerce.[141] The State believed the law would benefit Missouri farmers and the farming industry by improving the quality of Missouri livestock and increasing prices.[142]

The court found that the law only regulated the sale of livestock within Missouri, which did not require out-of-state commerce to be conducted on Missouri's terms.[143] It acknowledged that the statute might affect the out-of-state packers' participation in commerce in Missouri, but it did not dictate their behavior in interstate commerce.[144] The statute did not chill interstate commerce because packers were free to buy livestock in other states.[145] The court concluded that the law applied equally to in-state and out-of-state packers and producers and did not burden the flow of goods in interstate commerce.[146]

iii. *SDDS, Inc. v. State of South Dakota*

The *Hazeltine* court relied heavily on its earlier decision in *SDDS, Inc. v. South Dakota*[147] for its analysis. *SDDS, Inc.* involved a six-year battle waged in the courts, the legislature, and administrative agencies over whether SDDS, Inc. would be able to develop a large-scale municipal solid waste dump in South Dakota.[148] The battle culminated in a public referendum on approval of the dump. South Dakota voters rejected the Legislature's approval, leading to the dormant Commerce Clause challenge of the referendum.[149] The court determined that voters defeated the measure because their purpose was to discriminate against out-of-state waste and that the referendum had a

139. 249 F.3d 814 (8th Cir. 2001).
140. *Id.* at 817.
141. *Id.* at 816-18.
142. *Id.* at 817.
143. *Id.* at 819 (citing Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995)).
144. *Hampton Feedlot, Inc.*, 249 F.3d at 819.
145. *Id.*
146. *Id.*
147. 47 F.3d 263 (8th Cir. 1995).
148. *Id.* at 265.
149. *Id.* at 266.

discriminatory effect against interstate commerce.[150]

The court found that the initiative was "specifically designed and intended to hinder the importation of out-of-state waste," not necessarily to protect the environment.[151] Evidence of "protectionist rhetoric" was found in the "con" statement (rejecting the dump) that accompanied the referendum.[152]

The *SDDS, Inc.* court also looked to indirect evidence of discriminatory purpose, noting that a referendum on a particular dump is not the usual or most effective way of dealing with environmental protection.[153] South Dakota did not demonstrate that the additional step of a referendum after review by environmental agencies and the legislature furthered the purported goal of environmental protection.[154] There was also no information given to the voters about the environmental consequences of the dump, only the admonitions against accepting out-of-state waste.[155]

The court also found that the referendum had a discriminatory effect against interstate commerce.[156] Ninety-five percent of the waste destined for the site was to originate outside South Dakota.[157] It was determined that by denying disposal of the trash, the costs were forced on other states, "when the market would otherwise dispose of the trash in South Dakota."[158] Imposing higher costs on other states is evidence of a discriminatory effect on interstate commerce.[159] The court concluded that the referendum did not survive strict scrutiny.[160]

The public referendum vetoing administrative and legislative approval of the SDDS dump violated the dormant Commerce Clause because there was evidence of the voters' intent to keep

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150. *Id.* at 272.

151. *Id.* at 268.

152. *SDDS, Inc.*, 47 F.3d at 268. The "con" statement urged voters to vote against the "out-of-state dump" because "'South Dakota is not the nation's dumping grounds,' and '[a] "NO" vote will . . . keep its imported garbage out of South Dakota.'" *Id.*

153. *Id.* at 268-69.

154. *Id.* at 269.

155. *Id.* at 269-70 ("Thus, because the voters were not provided with any meaningful criteria, the defeat of the referred measure cannot be seen as improving environmental protection.").

156. *Id.* at 270-71.

157. *SDDS, Inc.*, 47 F.3d at 271.

158. *Id.*

159. *See id.* (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977)).

160. *See id.* at 271-72.

out-of-state goods from entering South Dakota and no evidence that the veto was motivated by environmental goals. Additionally, the result of the referendum had a discriminatory effect on interstate commerce.[161]

b. Pike *Step Two: The Court Must Weigh the Legitimate State Purpose Against the Burden on Interstate Commerce*

After evaluating whether the statute discriminates against out-of-state parties, the court undertakes a fact-specific inquiry, balancing the burden on interstate commerce against the state purpose in enacting the law.[162] If the law has been found to be discriminatory, the court will invoke a strict scrutiny test, requiring the state to prove the law is necessary to achieve an important state interest.[163] If the law has not been found to be discriminatory, it is presumptively valid unless its burden on commerce outweighs the local benefits.[164] Anti-corporate farming law cases present courts with at least two legitimate state interests to weigh: the state's power to regulate its local economy and the state's power to regulate corporate activity within its borders.

i. Regulation of Local Economies is a Legitimate State Purpose

"States are accorded wide latitude in the regulation of their local economies under their police powers . . . ."[165] When Maryland limited vertical integration in the local petroleum industry by prohibiting producers and refiners from entering the retail market, the Supreme Court concluded that the state has the power to regulate the structure of the retail market.[166] The Eighth Circuit has come to the same conclusion about local agricultural market regulations: "[t]he Missouri legislature has the authority to determine the course of its farming economy . . . ."[167] In the context of an equal protection challenge, it also found that the policy "to retain and promote family farm operations in Nebraska .

161. *Id.* at 272.

162. CHEMERINSKY, *supra* note 96, at 410; *see supra* notes 108-111 and accompanying text.

163. CHEMERINSKY, *supra* note 96, at 410.

164. *Id.*

165. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

166. *See Exxon Corp.*, 437 U.S. at 129.

167. *Hampton Feedlot*, 249 F.3d at 820.

. . by preventing the concentration of farmland in the hands of non-family corporations . . . represents a legitimate state interest."[168]

ii. Regulation of Corporations is a Legitimate State Interest

It is well-established that states have the power to "exclude a foreign corporation, or to limit the nature of the business it may conduct within the state . . . ."[169] Corporations are a creation of the state, which confers certain advantages and imposes certain burdens long recognized by the Supreme Court:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.[170]

For the purposes of a dormant Commerce Clause analysis, the state has a legitimate interest in regulating the operation of corporations in its jurisdiction.[171]

III. The Eighth Circuit Forced Strict Scrutiny Review on Amendment E in *Hazeltine*

The Eighth Circuit in *Hazeltine*[172] found that South Dakota's

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168. *MSM Farms, Inc.*, 927 F.2d at 333. The Missouri Supreme Court has echoed the same principle: "[i]t is within the province of the legislature to enact a statute which regulates the balance of competitive forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community . . . ." *State ex rel. Webster*, 744 S.W.2d at 806.

169. *Asbury Hosp.*, 326 U.S. at 211.

170. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).

171. *See CTS Corp.*, 481 U.S. at 89 ("We think the Court of Appeals failed to appreciate the significance, for Commerce Clause analysis, of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

172. *Hazeltine II*, 340 F.3d 583. The Eighth Circuit affirmed the district court in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020 (D.S.D. 2002) [hereinafter *Hazeltine I*]. The district court found a violation of the dormant Commerce Clause only on the second step of the *Pike* balancing test on the very narrow grounds that Amendment E inadvertently prohibits utility companies from holding an easement on agricultural land, which burdens their ability to build new transmission lines. *Hazeltine I*, 202 F. Supp. 2d at 1050. The district court found this to be a heavy burden on interstate commerce that is not outweighed by the state's legitimate interest in preserving family farms and the environment. *Id.* The court moved to the second tier of the test after finding no discrimination against interstate commerce on the law's face, in its effect, or in its purpose. *Id.* at 1048. The court's opinion closely follows the statements of law and analysis set forth in this Article. Because the Eighth Circuit found a discriminatory purpose, the district court's conclusions about the burden on interstate commerce shouldered

Amendment E violated the dormant Commerce Clause based solely on a perceived discriminatory purpose by the State.[173] Multiple plaintiffs alleged potential injuries resulting from Amendment E, including: prohibiting contracts to raise livestock in the state; prohibiting existing corporations, exempted from Amendment E,[174] from purchasing more farmland; and prohibiting or increasing the cost of easements that utility companies must acquire for transmission lines.[175] Dakota Rural Action and South Dakota Resources Council, two non-profit family farmer and environmental advocacy groups, intervened as defendants, joining the South Dakota Secretary of State and Attorney General.[176]

After an overview of dormant Commerce Clause law, the court uses the discrimination test from *Bacchus Imports*[177] to arrive at its proposition that discriminatory purpose alone can trigger strict scrutiny.[178] The court did not consider the state's given purpose for the law—preserving family farms and the environment.[179] The court then determined that Amendment E was enacted with a discriminatory purpose and it does not pass strict scrutiny.[180]

The court found direct evidence of discriminatory purpose first in the "pro" statement compiled by the Secretary of State before the referendum.[181] The statement warned that without Amendment E, "[d]esperately needed profits will be skimmed out of local economies into the pockets of distant corporations," and "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations."[182] The court found the "pro" statement to be "brimming with protectionist rhetoric."[183]

Other direct evidence of discriminatory purpose was found in Dakota Rural Action meeting minutes that discussed two out-of-

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by the utility companies was not discussed, and will not be discussed here.

173. *See Hazeltine II*, 340 F.3d 583, 596-597.

174. S.D. CONST. art. XVII, § 21(4). Amendment E contains a grandfather clause allowing corporations that currently own land to continue to hold it. *Id.*

175. *Hazeltine II*, 340 F.3d at 588-89.

176. *Id.* at 589.

177. 468 U.S. at 270.

178. *Id.* at 593.

179. *See id.* at 593-94 (looking immediately to the required "pro-con" statement circulated prior to the referendum).

180. *Id.* at 593-97.

181. *Id.* at 593-94.

182. *Hazeltine II*, 340 F.3d at 594.

183. *Id.* (quoting *SDDS, Inc.*, 47 F.3d at 268).

state corporate proposals by Tyson and Murphy Farms to build hog operations in the state, which the group opposed.[184] The *Hazeltine II* court pointed to these meetings that "led to Amendment E" to show the drafters' intent to keep out-of-state corporations from entering South Dakota.[185] One meeting participant testified that Amendment E was motivated in part by "'the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment.'"[186] The court found this reference to an out-of-state corporation to be "blatant" evidence of discriminatory purpose.[187]

Hazeltine II also looked to "indirect evidence" of discriminatory purpose, including "irregularities in the drafting process" stemming from a "lack of information," and "a low probability of effectiveness."[188] The court concluded that "the record leaves a strong impression that the drafters . . . had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information."[189] The fact that the Executive Director of South Dakota Resources Council believed that "personal responsibility" was the best way to ensure compliance with environmental laws, instead of being familiar "with all of South Dakota's environmental regulations at the time Amendment E was drafted," was evidence for the court that she was not as "seriously concerned with long-term environmental hazards, as [she] claimed she was . . . ."[190]

The court considered the drafters' heavy reliance on studies correlating industrialized farming with higher levels of poverty as "even less evidence that the drafters considered how Amendment E would affect the economic viability of family farmers."[191] It felt that if the drafters were really serious about protecting family farmers, they would have commissioned their own studies to learn the effects of a ban on corporate farming.[192] The court turned a perceived lack of information into a judgment that Amendment E has a low probability of achieving the state's purported goals of

184. *Id.* at 594.
185. *Id.*
186. *Id.* (citing Trial Tr. at 659) (alteration in original).
187. *Id.*
188. *Hazeltine II*, 340 F.3d at 594-96.
189. *Id.* at 594.
190. *Id.* at 594-95.
191. *Id.* at 595.
192. *See id.*

protecting family farms and the environment.[193] It believed the drafters irrationally viewed "out-of-state businesses . . . as the sole cause of the perils facing family farmers and a leading potential cause of environmental damage."[194] Therefore, the court found that the purpose of Amendment E was to keep out-of-state businesses out of South Dakota, which "bespeaks of 'the economic protectionism that the Commerce Clause prohibits.'"[195]

In a footnote, *Hazeltine II* reaffirmed that the defendants did not "bear the burden of disproving a discriminatory purpose," even though the decision rested on a perceived lack of information as much as a positive showing by the plaintiffs.[196] The court was specifically troubled that the drafting committee did not compare the potential impact of Amendment E on the environment with enhanced enforcement of environmental regulations.[197]

The court found a discriminatory purpose in enacting Amendment E, and it therefore turned to the strict scrutiny test, requiring the defendants to "demonstrate that they have no other method by which to advance their legitimate local interests."[198] The court noted that preserving family farms and protecting the environment are legitimate state interests.[199] However, after acknowledging that it could not "say with certainty that any alternative will ultimately succeed in meeting the goals of Amendment E," and that the court is not trained to make such determinations, it listed several other ways the state could achieve these goals.[200] Basing its decision only on evidence that the drafters of Amendment E harbored a discriminatory purpose against specific corporations, the court struck down Amendment E under the dormant Commerce Clause.[201]

193. *Id.*
194. *Hazeltine II*, 340 F.3d at 595.
195. *Id.* at 596 (quoting W. Lynn Creamery v. Healy, 512 U.S. 186, 205 (1994)).
196. *Id.* at 595 n.6.
197. *Id.*
198. *Id.* at 596.
199. *Id.* at 597.
200. *Hazeltine II*, 340 F.3d at 597 (citing COMM'N ON SMALL FARMS, *supra* note 19).
201. *Id.*

IV. The Eighth Circuit Abandoned Federalism and Precedent by Striking Down Amendment E in *South Dakota Farm Bureau, Inc. v. Hazeltine*

Rather than rewriting dormant Commerce Clause precedent as the Eighth Circuit did, this Article will apply precedent to the *Hazeltine* case. Because the conclusions of the second step of the *Pike* test are almost perfunctory, the fate of the challenged law rides on first finding discriminatory purpose and effect.[202] The Eighth Circuit seemed determined to strike down South Dakota's Amendment E, and it therefore forced a finding of discriminatory purpose where none existed. The analysis will begin with a discussion of the court's abandonment of federalism and separation of powers doctrines, followed by an analysis of Amendment E and the court's decision based on dormant Commence Clause discriminatory purpose principals and precedent.

A. Federalism Principles Guide Past Precedent that Rejected Challenges to Similar State Laws

Federalism principles and past precedent demand that the court credits the state's professed purpose for enacting the law if it falls within the state's police power during the first step of the *Pike* analysis.[203] The burden falls upon the plaintiff to show that the state acted with a discriminatory purpose.[204] Even the authority that the *Hazeltine II* court relies on most heavily, *SDDS, Inc.*, credited the state's interest in environmental protection then evaluated the plaintiff's evidence of discriminatory purpose against the state's purported purpose.[205] If the plaintiff cannot bring forth evidence of discriminatory purpose, the court must accept the state's legitimate interest and move to the second step of the *Pike* test.[206]

The court's evaluation of the indirect evidence of discriminatory purpose impermissibly shifted the burden to the state to prove that its purported purpose of protecting family farmers and the environment would be achieved by Amendment E.[207] Instead of looking at the actual environmental harms caused

202. *See supra* notes 108-111 and accompanying text.
203. *See supra* notes 93-94 and accompanying text.
204. *See supra* note 196 and accompanying text.
205. *See supra* notes 151-155 and accompanying text.
206. *See supra* notes 93-94 and accompanying text.
207. *See supra* note 189 and accompanying text.

by industrialized hog facilities, the court expected that the executive director of an environmental non-profit be familiar "with all of South Dakota's environmental regulations."[208] Even though it anticipated and disavowed the criticism, the court essentially placed the burden of proof on the defendants to prove non-discriminatory intent because the plaintiffs were unable to produce affirmative evidence of discriminatory intent.[209]

The court went even further, surmising that if the drafters were really concerned about family farmers, they would have initiated their own studies of the effects of Amendment E.[210] In so doing, the court again shifted the burden of proof to the defendants. The defendants offered studies showing a correlation between industrialized farming and higher levels of poverty, but the court summarily rejected this evidence without even articulating a reason why this study would not hold true in South Dakota, and failed to recognize the connection between industrialized farming and corporate concentration.[211]

Furthermore, federalism principles require a state to be able to make laws for the benefit of its citizens.[212] Every state law pertaining to the health and welfare of its people is initiated by a perceived problem—be it economic or environmental. The mere fact a law responds to a specific situation involving out-of-state corporations does not mean that it has a discriminatory purpose under dormant Commerce Clause jurisprudence.[213]

The *Hazeltine II* court abandoned federalism principles and contravened binding authority by failing to credit the state's legitimate interest in regulating its local economy or the operations of corporations within the state.[214] The court thus forced a finding of discriminatory purpose in order to invalidate Amendment E.

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208. *See Hazeltine II*, 340 F.3d at 594.

209. *See supra* note 196 and accompanying text.

210. *See supra* notes 191-192 and accompanying text.

211. *See supra* notes 191-192 and accompanying text. *See also Hazeltine I*, 202 F. Supp. at 1048 (citing *MSM Farms, Inc.* 927 F.2d 330) (accepting connection between increased corporate control and declining family farms).

212. *See supra* notes 87-89 and accompanying text.

213. *See infra* notes 236-237 and accompanying text (stating that the dormant Commerce Clause does not protect particular firms or methods of operation).

214. *See supra* notes 165-171 and accompanying text.

B. *The* Hazeltine II *Court Violated Separation of Powers Doctrine by Inquiring into the Substantive Effectiveness of an Amendment Approved by State-wide Referendum*

Relying on *SDDS, Inc.*, *Hazeltine II* also found that a "low probability of effectiveness can be indirect evidence of discriminatory purpose."[215] In *SDDS, Inc.*, the state could not show that holding the referendum on the dump would advance the state's environmental interests because an administrative agency and the legislature had already determined that the dump would be environmentally safe.[216] The court inquired into the "probability of effectiveness" that the statute would *procedurally* advance the state's goal of environmental protection.[217] Use of the "low probability of effectiveness" evidence in *SDDS, Inc.* was not a violation of the separation of powers doctrine but an investigation of whether an additional procedural step requiring statutory approval harbored a discriminatory purpose.

In contrast, in *Hazeltine II* second-guesses the judgment of South Dakota voters on the substantive aspects of the amendment by finding that restricting corporate ownership of farmland will not advance the State's goals of preserving family farms and protecting the environment. This is a violation of the separation of powers doctrine.[218] Later in the court's analysis of the second step of the *Pike* test, the court admits that it "cannot say with certainty that any alternative will ultimately succeed in meeting the goals of Amendment E because we are 'institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them.'"[219] Yet, in the first-tier of the *Pike* analysis the court felt competent to judge whether the state's evidence constituted sufficient proof that the law would meet its goal.[220] The court went even further by suggesting additional evidence it would need to be convinced.[221] Analytically, the court mixed the two prongs of the *Pike* test by using a judgment of the law's effectiveness as proof that it could not have been enacted for its stated purpose.[222] The court not only used

215. *Hazeltine II*, 340 F.3d at 595.

216. *See supra* notes 154-155 and accompanying text.

217. *Hazeltine II*, 340 F.3d at 595.

218. *See supra* notes 90-92 and accompanying text.

219. *Hazeltine II*, 340 F.3d at 597 (quoting General Motors Corp. v. Tracy, 519 U.S. 278, 308 (1997)).

220. *Id.* at 594-96.

221. *See supra* note 192 and accompanying text.

222. *See Hazeltine II*, 340 F.3d at 594-96.

sloppy reasoning, but also incorrectly applied the dormant Commerce Clause test.

C. *Dormant Commerce Clause Test: Discriminatory Purpose Alone does not Trigger Strict Scrutiny*

Although it seems to be universally accepted dicta that discriminatory purpose alone triggers strict scrutiny, the very case cited by the *Hazeltine II* court for that proposition found both discriminatory purpose and effect.[223] The Supreme Court and the Eighth Circuit have not applied strict scrutiny with only a finding of discriminatory purpose.[224] This is a good indication that the *Hazeltine* decision stands on shaky ground.

There is no facial discrimination in Amendment E; the court does not even discuss the issue.[225] Furthermore, the court does not even consider if the law has a discriminatory effect.[226] Logically, if a law were drafted with the *purpose* of discriminating, it would certainly have the *practical effect* of discriminating. This simple truism is the basic analysis of the Court in *Clover Leaf Creamery Co.*[227] and *Exxon*,[228] and of the Eighth Circuit in *Hampton* and *SDDS, Inc.*[229]

The simple definition that discrimination is "economic protectionism"[230] and "differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter"[231] does not provide much guidance. In order to ascertain discriminatory purpose, the Supreme Court and the Eighth Circuit have laid down some rules to define "economic protectionism," by defining what it is *not* rather than what it *is*.

1. The State Must Apply "Differential Treatment" to In-state and Out-of-state Interests to Show Discriminatory Purpose

Differential treatment does not occur if a state statute

223. *Hazeltine II*, 340 F.3d at 593 (citing *Bacchus Imports, Ltd.*, 468 U.S. at 270). *See also supra* note 117 (*Bacchus* found both discriminatory purpose and effect).

224. *See supra* note 117 and accompanying text.

225. *Hazeltine II*, 340 F.3d at 593 ("[W]e rest our conclusion on the evidence in the record of discriminatory purpose underlying Amendment E. As a result, we do not consider the two other tests . . . .").

226. *Id.*

227. 449 U.S. at 456.

228. 437 U.S. at 129.

229. *See supra* note 122 and accompanying text.

230. *Hazeltine II*, 340 F.3d at 596.

231. *Id.* at 593.

regulates in-state and out-of-state interests "evenhandedly" to effectuate a legitimate state purpose.[232] If the law operates the same on the affected in-state and out-of-state interests, it "regulates evenhandedly."[233]

Amendment E does not apply "differential treatment" to in-staters and out-of-staters.[234] All non-family farm corporations, whether they are in-state or out-of-state corporations, cannot own farmland or engage in farming in South Dakota. Indeed, some of the plaintiffs were South Dakota corporations or corporations already operating in South Dakota that would be prohibited from buying more farmland—proving that the law "regulates evenhandedly."[235]

2. The Commerce Clause does not Protect Private Out-of-state Interests

The interests protected by the Commerce Clause are clearly economic, but they are very broadly defined. The interests protected are *not* those of particular firms.[236] The interests are *not* associated with a particular structure or method of operation in the market, such as a form of business organization like a corporation.[237] The Commerce Clause exists to protect the movement of goods within the market, and the dormant Commerce Clause keeps states from burdening the movement of goods.[238] This point is particularly relevant to federalism and separation of power concerns. The states have traditionally maintained regulatory power over the structure of local markets and the operation of corporations in their jurisdiction.[239] Principles of federalism dictate that the dormant Commerce Clause cannot impinge upon these state powers.[240] The separation of powers doctrine keeps the courts from second guessing the wisdom of the state's regulation of local markets and corporations.[241] The purpose of the Commerce Clause and the dormant Commerce Clause doctrine is not to protect particular economic interests such as those of corporations. The state's power to regulate these

232. *See supra* notes 122, 129-130, 146 and accompanying text.
233. *See supra* notes 122, 129-130, 146 and accompanying text.
234. *See supra* notes 71, 267.
235. *See supra* note 175 and accompanying text.
236. *See supra* notes 131, 134 and accompanying text.
237. *See supra* note 133 and accompanying text.
238. *See supra* notes 96, 135 and accompanying text.
239. *See supra* notes 165-171 and accompanying text.
240. *See supra* notes 87-89 and accompanying text.
241. *See supra* notes 90-92 and accompanying text.

matters only implicates the dormant Commerce Clause when it substantially burdens the movement of goods among the states.[242]

The *Hazeltine II* court's preoccupation with the drafters' intent to keep Tyson and Murphy hog confinement facilities out of the state is misplaced.[243] The dormant Commerce Clause does *not* protect particular firms, even if those firms happen to be from out-of-state and control a large portion of the national market. South Dakota has the power to regulate how the livestock market operates within the state. Similar to Maryland in *Exxon,* South Dakota may enact laws to discourage vertical integration of the livestock market.[244] South Dakota also has the power to regulate corporate operations within the state.[245] Tyson and Murphy may still enter the state, but they may only operate according to the dictates of the state. The dormant Commerce Clause was not intended to be a sword wielded by particular corporations to strike down laws that adversely affect their business interests.

3. In-state Interests Must Receive Benefit from the Law as a Prerequisite to Discriminatory Purpose

It is an elementary fact of politics that every local law is intended to benefit local constituents (or elected officials would not stay in office for very long). If any law with a local benefit will run afoul of the dormant Commerce Clause, then nearly all laws will. State sovereignty would be non-existent.

Federalism principles are one way courts protect a state's ability to make laws that benefit local communities.[246] A court must determine if a local law crosses over into economic protectionism instead of invalidating any law with local economic benefits.[247] Commentators have studied precedent and concluded that "[r]egulations seemingly focused on preserving local *employment* as such rather than maintaining local *profits* have sometimes received treatment almost as favorable as regulations concerned with health or other non-financial aspects of well-being."[248]

Amendment E operates to preserve local employment rather

242. *See supra* notes 134-136 and accompanying text.

243. *See Hazeltine II,* 340 F.3d at 594 (discussing the "hog meetings" dealing with the proposed Tyson and Murphy hog confinement facilities).

244. *See supra* notes 127-129 and accompanying text.

245. *See supra* notes 169-171 and accompanying text.

246. *See supra* notes 85-89 and accompanying text.

247. *See supra* note 93.

248. TRIBE, *supra* note 98, at 437.

than local profits. The drafters of Amendment E and the voters of the state were operating out of the historical perspective of the farm crisis. The people of South Dakota experienced the farm crisis of the 1980s.[249] They watched their local economies struggle.[250] They also have heard what vertical integration and industrialization in the livestock industry has done in other rural communities, and do not want it to happen to them. They have experienced the migration in the agricultural sector toward concentration and industrialization, and prefer their economy to be based on smaller, locally owned farms.[251] To the voters of South Dakota, this regulation is more concerned with employment than profit. It is about maintaining a level of economic activity in their local communities, so that the people of South Dakota may have a place to live and work. They know the farms are the backbones of their communities. Amendment E is not about consolidating their hold on a market, or increasing their profits, but maintaining a healthy economy. It is about holding on to what they have.

"State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as 'undue burdens on interstate commerce.'"[252] Vertical integration of the livestock industry may not be legally defined as an "unfair trade practice," but it has been criticized as having a monopolistic effect on a local economy.[253] Amendment E probably will not lead to an increase in profits for local farmers, but the downfall of Amendment E will certainly lead to an increase in profits for the vertical integrators. South Dakota is making a legitimate policy choice when it chooses to regulate its local farm economy, rather than allowing a few large firms to dominate its livestock market.[254]

The benefits to the local economy from the state's regulation in *Exxon* and *Hampton* did not seem to trouble the Supreme Court or the Eighth Circuit respectively.[255] In *Exxon*, the state conferred benefits on local independent petroleum dealers and consumers in the historical context of the gas shortages of the 1970s.[256] In *Hampton*, the law benefited the local farm economy by improving

249. *See supra* note 16 and accompanying text.
250. *See supra* note 23 and accompanying text.
251. *See supra* notes 51-59, 68 and accompanying text.
252. TRIBE, *supra* note 98, at 437.
253. *See supra* notes 42-44, 62 and accompanying text.
254. *See supra* note 49.
255. *See supra* notes 128-129, 142-143 and accompanying text.
256. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 117 (1978).

the quality of Missouri livestock and increasing prices.[257] Based on *Exxon* and *Hampton*, Amendment E has not crossed the line into economic protectionism.

4. Out-of-state Interests Must be Burdened as a Prerequisite to Discriminatory Purpose

As with a benefit to a local economic interest, not just any burden on out-of-staters amounts to economic protectionism. A burden on a single out-of-state firm or class of out-of-state firms does not amount to economic protectionism.[258] The dormant Commerce Clause protects all out-of-staters as a class, not as individuals. Hence, an intent to keep Tyson or Murphy from setting up hog confinement facilities is not fatal to Amendment E, just as an intent to keep Exxon out of the retail market in Maryland did not amount to economic protectionism.[259]

Out-of-staters are *not* burdened if only some out-of-staters are excluded from a particular activity in the state.[260] In *Exxon*, as long as out-of-state independent dealers could enter the Maryland market and compete on the same basis as Maryland independent dealers, the law did not burden out-of-state interests.[261] Under Amendment E, an individual can move to South Dakota from another state and buy farmland. A corporation can qualify as a family farm corporation, incorporated in any state in the country, as long as it meets Amendment E's criteria.[262]

The *Hazeltine II* court read its own meaning into the "pro" statement issued to the voters by the Secretary of State.[263] In *SDDS, Inc.*, the statement given to the voters showed discriminatory purpose because it only referred to keeping out-of-state garbage out without mentioning the state's purported environmental goal.[264] In contrast, the "pro" statement found to be "brimming with protectionist rhetoric" that supported Amendment E directly addressed the state's intended goal of preserving family farms and local economies.[265] It did mention "distant corporations" and "a few, large corporations," but never explicitly

257. *Hampton Feedlot, Inc.*, v. Nixon, 249 F.3d 814 (8th Cir. 2001). *See also* text accompanying 142.

258. *See supra* notes 236-237 and accompanying text.

259. *See supra* notes 131, 134 and accompanying text.

260. *See supra* notes 131-134 and accompanying text.

261. *See supra* notes 131-134 and accompanying text.

262. *See supra* note 71.

263. *See supra* note 182 and accompanying text.

264. *See supra* notes 151-152, 155 and accompanying text.

265. *See supra* note 182 and accompanying text.

stated an intent to keep out-of-state corporations from entering the state.[266] The court read its own meaning into these phrases. First, the only word that could conceivably imply that the corporation is out-of-state is "distant." However, South Dakota is a large state. A corporation on the western side of the state would certainly be "distant" from a community in the east.[267] The residence of the corporation is not the problem for family farms and local economies, it is absentee ownership and monopolistic effects of vertical integration and industrialized farming.[268] South Dakotans could be equally concerned that corporations within their own borders would drive family farms out of business. The "pro" statement's reference to "distant" corporations does not compel a finding of discriminatory intent.[269]

Out-of-state interests are *not* burdened if the costs of doing business in a state are the same for in- and out-of-staters.[270] The state does not charge an extra fee or place any additional requirements on out-of-state individuals or corporations starting a farming operation in South Dakota.[271]

Likewise, out-of-state interests are *not* burdened if the law has no extraterritorial reach.[272] In *Hampton*, the meat packers subjected to Missouri's law were only regulated if they chose to do business in Missouri.[273] The prices set did not apply in any other state. The same is true of Amendment E, as in *Hampton*: no out-of-state commerce is required to be conducted on South Dakota's terms.[274] The corporation is only regulated if it chooses to do business in South Dakota.

Moreover, out-of-state interests are *not* burdened if goods can still move freely from state-to-state, even if some may choose not

266. *See supra* note 182 and accompanying text.

267. *Hazeltine I*, 202 F. Supp. at 1047 ("By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format.").

268. *See supra* note 62 and accompanying text.

269. *See infra* notes 232-235 and accompanying text (stating that if a law applies equally to in-state and out-of-state parties, there is no discrimination).

270. *See supra* note 130 and accompanying text.

271. *Hazeltine I*, 202 F. Supp. 2d. at 1048 ("While the cost of doing business in South Dakota may have risen for all concerned, namely both in-state and out-of-state limited liability entities, and while that may suppress future development in South Dakota, that does not translate into unconstitutional discrimination . . . .").

272. *Hampton Feedlot, Inc.*, v. Nixon, 249 F.3d 814 (8th Cir. 2001).

273. *Id.*

274. *Hazeltine I*, 202 F. Supp. 2d. at 1048 ("Amendment E does not affect how these entities conduct business outside South Dakota.").

to do business in the regulating state.[275] What was true in *Exxon* should be true for Amendment E.[276] Out-of-state interests may still buy farmland and engage in farming activities if they follow the regulation. Corporations are not entirely excluded from doing business in South Dakota. They may enter for non-farming purposes and for many farming purposes, including selling farm inputs and buying farm products.[277] Agricultural products will continue to move freely in and out of South Dakota, which is the activity specifically protected by the dormant Commerce Clause.[278]

Finally, out-of-state interests are *not* burdened if some out-of-staters avoid doing business in the state due to the regulation.[279] In *Hampton*, the court said that packers could conduct their business in other states if they did not like the regulation, which does not chill interstate commerce.[280] Likewise, there is no chilling effect on interstate commerce because corporations are free to bypass the South Dakota law by buying farmland or building hog confinement facilities in other states.

5. Amendment E was not Enacted for a Discriminatory Purpose

A law will *not* be deemed protectionist if it regulates evenhandedly,[281] falls on only particular firms or particular business organizations properly regulated by the state,[282] provides reasonable local economic benefits,[283] allows out-of-staters in the market without imposing additional costs on them,[284] regulates only within the state,[285] and allows the movement of goods into and out of the state.[286] Amendment E meets all of the criteria. Therefore, it is neither protectionist nor enacted for a discriminatory purpose.

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275. *See supra* notes 132, 145-146 and accompanying text.
276. *See supra* note 132 and accompanying text.
277. *See* text accompanying *supra* note 71.
278. *See supra* notes 134, 145-146 and accompanying text.
279. *See* text accompanying *supra* notes 145-146 and accompanying text.
280. *Hampton Feedlot, Inc.*, v. Nixon, 249 F.3d 814,819 (8th Cir. 2001).
281. *See* text accompanying *supra* notes 232-235.
282. *See* text accompanying *supra* notes 236-245, 258-269.
283. *See* text accompanying *supra* notes 246-257.
284. *See* text accompanying *supra* notes 270-271.
285. *See* text accompanying *supra* notes 272-274.
286. *See* text accompanying *supra* notes 275-280.

D. *Second Tier of the* Pike *Test: If the Court does not Find Discriminatory Purpose or Effect, It Must Balance the Burdens and Benefits of the State Regulation Under Rational Basis Scrutiny*

If the court finds no evidence of discriminatory purpose based on the criteria discussed above, the court must then find that the state has a legitimate interest in the law to move on to the second step of the *Pike* test.[287] No proof of discrimination on the law's face, or in effect or purpose, leads to rational basis scrutiny.[288] Under this standard, the court must ask whether there is a legitimate state purpose for the law, and whether the law is rationally related to its stated purpose.[289]

Regulating the local farm economy and regulating the operations of corporations in the state are both legitimate state interests.[290] Discouraging absentee ownership of farms by corporations and the accompanying industrialization of farming is rationally related to Amendment E's prohibitions.[291] Amendment E requires that a person holding shares in a family farm corporation actually participates in the operation of the farm.[292] This requirement eliminates absentee ownership of farm operations. The regulations also keep the corporations relatively small, discouraging large, industrialized operations that are problematic for the environment.[293]

As with any economic regulation, there are incidental effects on interstate commerce, but the benefits to the local economy outweigh the effects. Some interstate firms will be limited in their participation in South Dakota's agricultural economy, but the dormant Commerce Clause tolerates such effects. Balancing the local benefits against the burdens on interstate commerce, Amendment E should pass the second tier of the *Pike* test. The court does not reach this analysis, as it forced a finding of discriminatory purpose in order to reach strict scrutiny, striking down the law.[294]

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287. *See* text accompanying *supra* notes 203-206.
288. *See* CHEMERINSKY, *supra* note 96 at 410.
289. *Id.*
290. *See supra* notes 165-171 and accompanying text.
291. *See supra* notes, 24-25, 34-36, 43-44, 51-57, 62 and accompanying text.
292. S.D. CONST. art. XVII, § 22.
293. *Id.*
294. *See* text accompanying *supra* note 180.

Conclusion: Consequences of the Eighth Circuit's Abandonment of Family Farmers

The Eighth Circuit's decision in *Hazeltine II* sets a terrible dormant Commerce Clause precedent for a variety of reasons and should be overturned. First, the court departs from the deference owed to state laws under the principles of federalism and separation of powers, which seriously undermines a state's power to legislate for the health, safety and welfare of its people. Second, the court disregards and misconstrues established dormant Commerce Clause jurisprudence.[295] Finally, if *Hazeltine II* stands, this precedent will be used to strike down other progressive, pro-family farm laws, not to mention other state laws that regulate local economies and the operation of corporations within a state's borders.[296] This final consequence is more than a matter of principle; it will adversely affect the lives of thousands of real people, farmers, and state citizens while lining the pockets of corporate interests.

295. *See supra* notes 223-280 and accompanying text.

296. Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Rule Unconstitutional—Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture*? AGRIC. LAW DIG., Vol. 14 No. 17, Sept. 5, 2003, at 129 (noting that many of the states with these laws are in the Eighth Circuit). *See e.g.*, Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003) (invalidating Iowa's ban on vertical integration in the pork industry).