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INSIDE

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Tolerance of food contamination in Europe

Regulatory tolerances for food contamination in the USA and the European Union are strikingly different. US regulations regard insect and animal filth as "repulsive," treat them as indicia of improper sanitation and elevated health risks, and restrict their sale. European Union regulations explicitly exempt such materials in food, considering them instead to be either 'quality' issues or potential impediments to free trade. At the same time, US regulations exempt trade in foods made from engineered crops as safe, while EU regulations restrict them even more severely than foods with detectable amounts of disease-causing microbes.

This has come about because EU policy places a higher priority upon free trade in food among member states than it does upon consumer health, or even upon the precautionary principle.

In recent years, Europe has raised a series of barriers to the cultivation of genetically engineered crops and the foods made from them. The barriers have been raised by member states of the European Union,[1] food manufacturers,[2] food wholesaling and retailing companies,[3] and by the European Commission in regulatory attempts[4] to reconcile the interests of these entities and those of international trading partners, activist groups and voters.

European government officials tend to view these barriers as the result of general consumer skepticism about food safety which arose during a series of European food crises. "[F]ailure to address public concerns over food safety is very dangerous," said EU Commissioner Byrne in 1999. "One has only to look at the most contentious issues to cross the Commission's desk in recent years. BSE [mad cow disease], GMOs [genetically modified organisms], growth-promoting hormones in beef, antibiotic residues, dioxin etc. have all taken up a huge amount of time and political energy."[5]

Europe-based activist groups[6] have been more strident, denouncing engineered seeds, crops and the foods made from them as "contaminated" and pressing the claim that they pose risks to public health.[7] These groups are well-funded and have been highly effective in promoting consumer opposition to genetic engineering in agriculture.[8]

The barriers to the introduction of engineered crops and the foods made from them, the claims that these crops and the foods made from them are 'contaminated,' and the international trade disputes which resulted, all serve to highlight the mutually inconsis-

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Federal Register summary: Jan. 13 - Feb. 23, 2007

ANIMAL IDENTIFICATION SYSTEM. The APHIS has announced that it is making available for review and comment three documents related to the National Animal Identification System: A Draft User Guide, a Program Standards and Technical Reference document, and a technical specification document for the animal tracking databases. All three documents are available at http://animalid.aphis.usda.gov/nais/. The documents may also be viewed in the APHIS reading room located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. 72 Fed. Reg. 4680 (Feb.1, 2007).

FOOD SAFETY. The Food Safety and Inspection Service (FSIS) has issued a notice clarifying that flavor products, e.g., flavor bases, and blended and reaction/process flavors, with greater than three percent raw meat or poultry, or two percent or more cooked meat or poultry, in their formulation are amenable to FSIS jurisdiction. The FSIS stated that recent findings show that some manufacturers of flavor products formulated with significant levels of meat, meat byproducts, poultry, and poultry byproducts (e.g., 30-70 percent) are not aware that such products are under FSIS jurisdiction.

The FSIS stated that these manufacturers need to take necessary steps to come under inspection. 72 Fed. Reg. 3779 (Jan. 26, 2007).

DISASTER ASSISTANCE. The CCC has adopted as final regulations implementing the Emergency Agricultural Disaster Assistance Act of 2006, Pub. L. 109-234 which provides funds for assistance in areas affected by hurricanes Katrina, Ophelia, Rita and Wilma. The funds will be distributed through eight programs: (1) the Livestock Compensation Program will provide payments to livestock owners and cash lessees (not both for same livestock) for certain feed losses; (2) the Livestock Indemnity Program II will provide benefits to livestock

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tent views of Europe and the US of what actually constitutes 'contamination' in food and the degree to which it is tolerated.

In the US, where the approval of new GE crops is a regular event,[9] thresholds and action standards have been established for impounding and destroying foods deemed to be contaminated because they are mixed with the detritus of insects, such as cockroaches, pharaoh ants, latrine flies, redtailed flesh flies, and secondary screwworms, or with animal filth, such as from mice, rats, birds, bats, lizards, and humans. These contaminants are associated with microbes such as *Escherichia coli*, *Salmonella*, *Shigella* and *Staphylococcus*, which cause human disease and death.[10]

US officials can take action without proof of the presence of these potentially deadly microbes in food, and consider the presence of insect and animal filth to indicate an impermissible departure from essential sanitary measures. "The FD&C [US Food, Drug and Cosmetic] Act goes beyond regulating contaminants that cause injury or disease. Sections 402(a) (3) and 402(a) (4) of the Act require that foods be protected from contamination with filth and be produced in sanitary facilities. Filth includes 'contaminants such as rat, mouse or other animal hairs and excreta, whole insects, insect parts and excreta, parasitic worms, pollution from the excrement of humans and animals, as well as other extraneous materials which, because of their repulsiveness, would not knowingly be eaten or used.'"[11]

Regulations in the European Union largely exempt these materials. The 1993 Council Regulation laying down European Community procedures for handling food contaminants begins with this provision:

> 'Contaminant' means any substance not intentionally added to food which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of environmental contamination. *Extraneous matter, such as, for example, insect fragments, animal hair, etc, is not covered by this definition* (emphasis added).[12]

Later on in Article 5, the Regulation warns that "Member States may not prohibit, restrict, or impede the placing on the market of foods which comply with this Regulation..."[13] Thus, member states are prohibited from considering "insect fragments, animal hair, etc" in food to be 'contamination.'

The Regulation begins with a preamble reciting the importance "of progressively establishing the internal market... in which the free movement of goods, persons, services and capital is ensured,"[14] and the importance of maintaining the free flow of trade among the member states of the EU emerges even more strongly in later measures.

In 2002 the European Commission warned member states about applying the precautionary principle to matters of food safety, saying, "The precautionary principle has been invoked to ensure health protection in the Community, thereby giving rise to barriers to the free movement of food or feed." The Regulation crafted to address the potential conflict between precaution and free trade in food offers this: "For the purposes of this Regulation, [the definition of] 'food' ... *shall not include ... residues and contaminants* (emphasis added)." It goes on to establish traceability requirements for what *is* considered 'food' and makes precautionary restraints on food trade subject to the requirement that the restraints prove to be science-based and do not have a disproportionate effect on trade.[15]

There is ample precedent for European action against national food purity laws which impede the free flow of trade among member states. Perhaps the world's most famous purity law is the German Purity Law (*Reinheitsgebot*), which dates to 1516 and requires that beer be made with only a very short list of ingredients.[16] That ancient law is the precursor of Germany's Beer Tax Law (*Biersteuergesetz*), which was derogated by the European Court of Justice following a complaint by the European Commission. The Court found Germany's restrictions on the ingredients for anything labeled '*Bier*' (beer) were excessive, an impediment to trade, and a violation of Germany's obligation to harmonize its laws with European trading partners. Germany's arguments that its law was justified both by public health interests and by the precautionary principle were rejected, because the impact on trade was disproportionately severe.[17]

There are other precedents as well. European Union legislation regulating contaminants closely parallel provisions in the *Codex Alimentarius*, which define a 'contaminant' as "Any substance not intentionally added to food, which is present *** as a result of environmental contamination. *The term does not include insect fragments, rodent hairs and other extraneous matter* (emphasis added)."[18] And in a recent report, the Codex Committee explained this definition by pointing out that the provisions are not meant to cover "[c]ontaminants having only food quality significance, but no public health significance, in the food(s)."[19]

There may be an explanation of why the EU regards as a mere "quality" issue what the US considers "repulsive," and "filth," and indicative of risks to public health. According to one commentator, "[I]n the drafting of the *Codex Alimentarius*, health and trade have never been on equal footing. The Netherlands, Germany, Sweden, Switzerland, Italy and Austria supported uniform standards as a way to ease trade barriers rather than to protect public health - even though all these countries would adopt a contrary position during the 1996 'mad cow crisis'."[20]

The extent to which these countries adopted a "contrary position" is disputable. In 2004, a new Regulation was passed prohibiting any "food business operator" in the European Union from accepting raw materials (other than live animals) "if they are known to be, or might reasonably be expected to be, contaminated with parasites, pathogenic microorganisms or toxic, decomposed or foreign substances to such an extent that, even after the food business operator had hygienically applied normal sorting and/or preparatory or processing procedures, the final product would be unfit for human consumption."[21]

Since regulation of insect fragments, animal hair, etc. is prohibited, the "unfit for human consumption" standard can be no more than a subjective assessment of consumer acceptability. The Regulation encourages the use of HACCP (hazard analysis and critical control point) principles by food processors to "help food business operators attain a higher standard of food safety," but adds that the use of HACCP

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principles "should not be regarded as a method of self-regulation and should not replace official controls."[22] However, official controls are not allowed to discriminate against foods and food ingredients containing insect fragments, animal hair, etc—either because they are not considered "contaminants," or not considered "food."

Following the obligation of member states to 'transpose' European regulations into national regulations,[23] at least one member state has made an express exemption for "insect fragments, animal hair, etc" in its laws and in its food.[24] Consumer guides for Germany and Europe note that these materials are exempt,[25] and Canada advises exporters that European nations exempt these materials.[26]

The experience of the United States in refusing food imports based on sanitary and phytosanitary requirements is instructive. During a one-year period, the greatest number of contraventions cited by the US Food and Drug Administration for "import detentions" totaled 3,519 (31.5%) for "filth," followed by microbiological contamination at 1,425 (12.8%).[27] The European Union places its regulatory emphasis on the second category instead,[28] suggesting that much of what the US refuses on the basis of "filth" would be permitted in the EU.

At the same time, EC Regulations regarding foods made from genetically engineered crops—which EC scientists have declared safe[29]—are vastly more stringent than those regarding food mixed with insect fragments or animal hair. In 2003, the European Union passed comprehensive labeling and traceability requirements on foods made from genetically modified crops.[30] By 2004, Europe had established a network of 71 laboratories accredited to perform tests to detect biologically inactive gene fragments in food ingredients derived from engineered crops at levels less than one percent.[31] The European Union will tolerate the pathogenic organism *Listeria monocytogenes* in food at levels up to 100 cfu/g (colony forming units per gram),[32] but imposes labeling and traceability requirements on foods from engineered crops even when it is scientifically impossible to determine the source by protein or DNA analysis.[33]

While member states are prohibited from restricting sale of food ingredients and products containing insect and animal filth, many have hastened to impose national bans on engineered crops or the foods made from them. Austria, France, Germany, Luxembourg and Greece have a total of eight such bans in place, all of which have been rejected by the European Scientific Committees as unjustified.[34] The countries enacting these bans have relied on the precautionary principle as a justification,[35] even though European policy establishes the freedom of trade as more important than precaution.[36]

Europe-based activist groups purporting to represent consumers appear to advocate similar policies. One report on European food import requirements, prepared for an activist group intimately connected with the backlash against engineered crops worldwide,[37] merely mentions Europe's exemptions for specific types of food contamination, without further comment.[38] Otherwise, the groups have shown no interest in food contamination, except to the extent that it is claimed to result from genetic engineering or, to a lesser extent, the use of chemicals.

Europe appears to apply this hierarchy of policy interests only to matters arising among member states. This came to light recently, when the EU reversed this policy hierarchy and argued before the World Trade Organization that the precautionary principle justified trade restrictions on US, Canadian, and Argentine exports of products derived from engineered crops. Using a rationale strikingly similar to that that employed by the European Commission and the European Court of Justice regarding the application of the precautionary principle in matters of European trade, the World Trade Organization said that EU bans were not scientifically based to the extent that they relied on the principle.[39]

While these reversals of priority appear mutually inconsistent, they are highly consistent with a European policy that makes the protection of domestic trade in food more important than consumer health, food quality, or the precautionary principle.

--Andrew R. Apel, Raymond, IA. .This article was first published by CropGen, www.cropgen.org/european_food.pdf

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Nebraska corporate-farming ban unconstitutional: what does "the farm" mean?

By Anthony Schutz

In 2005, the United States District Court for the District of Nebraska ruled that Nebraska's anti-corporate-farming ban was unconstitutional under the dormant commerce clause and that it violated the Americans with Disabilities Act.[1] In January 2006, Professors McEowen and Harl analyzed the District Court's decision and concluded that there were serious flaws in the decision, but they questioned whether the Eighth Circuit would reverse.[2] Their skepticism was well-founded. Last month, in *Jones v. Gale*,[3] the Eighth Circuit of the United States Court of Appeals affirmed the District Court's conclusion on the dormant clause issue and refused to reach the ADA issue.[4] This article analyzes the dormant commerce clause aspect of the Eighth Circuit's opinion. More specifically, the article discusses the court's facial-discrimination and discriminatory purpose conclusions. Primary emphasis is placed on an issue that became more developed on appeal—what is "the farm" for purposes of the Nebraska provision—as well as the slippery question of voter intent and discriminatory purpose.

Historical background

In 1982, Nebraska voters, through the initiative process, amended the Nebraska Constitution by adding a prohibition on corporate farming, popularly called Initiative 300, or I-300.[5] I-300 bans corporations from "acquir[ing] ... an interest ... in any title to real estate used for farming or ranching in this state, or engag[ing] in farming or ranching."[6] But, under I-300, certain sorts of operations are allowed to engage in the proscribed activities (i.e., own farm or ranch land, or engage in farming or ranching), even though they are corporations or other sorts of limited liability entities. Some exceptions focus on the type of farming operation involved.[7] The exception of primary importance here is the exception for "family farm or ranch corporation[s]." To qualify for this exception, qualified family members[8] must own a majority of the entity's voting stock, and one of them[9] must be "residing on or actively engaged in the day to day labor and management of the farm or ranch."[10]

As the *Jones* court stated, a state law may violate the dormant commerce clause if it "'discriminate[s] against or unduly burden[s] interstate commerce.'"[11] Because the court found the law discriminatory, it did not address the "second tier" undue-burden issue.[12] The discrimination that the dormant commerce clause seeks to eliminate is "'the differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[13] The *Jones* court framed the discrimination as occurring when a state law is "discriminatory on its face," has a "discriminatory purpose," or has a "discriminatory effect."[14] Like the District Court,[15] the Eighth Circuit concluded I-300 was facially discriminatory and was enacted with a discriminatory purpose. Either, according to the court, was an independent ground for striking the provision.[16] The District Court and, implicitly, the Eighth Circuit, disavowed any reliance on the discriminatory effects of the provision, if any.[17]

Facial discrimination

The first basis upon which the court rested its conclusion was facial discrimination.[18] Clearly, I-300 does not have any express provision against out-of-state corporate ownership of agricultural land, nor does it expressly bar out-of-state corporations from farming or ranching in Nebraska. But, according to the court, "an interstate-commerce claim is [not] precluded by the absence of an express prohibition on non-resident ownership."[19] To qualify as a family farm corporation, among other things, one of the members of the family must be "residing on or actively engaged in the day to day labor and management of the farm."[20] The District Court and the Eighth Circuit both concluded that the residency and the active-engagement criteria required that the family member perform (or be close enough to Nebraska to perform) the requisite activities in Nebraska. Thus, according to courts, the law discriminated against those out-of-state corporations with qualifying family members who could not perform the requisite activities in Nebraska, while the law favored in-state corporations with qualifying family members who could perform those tasks in Nebraska.[21]

Implicitly, then, it appears that the courts concluded that a state law could *facially* discriminate against out-of-state economic interests if the discriminatory *effect* was obvious enough. This seems odd given the tri-partite rule for discrimination that the Eighth Circuit used in the opinion.[22] Why would not I-300's effects—the real-world separation along residency lines that results from compliance with the law—be more appropriately addressed under the "discriminatory effect" rubric? This simply may be a matter of semantics, or the parties may have painted the court into this corner. [23] But looking to the effect of a law at least highlights how difficult it is to separate the modes of discrimination, and it may skew the notion of "facial discrimination."[24]

The real question here, though, was whether the law was so clearly discriminatory.[25] The State offered an argument that makes this less than clear. The State argued that I-300 did not treat out-of-state corporations any differently than in-state corporations because out-of-state corporations with qualifying family members could perform the requisite activities on "the farm." To the State, "the farm" included all landholdings of the corporation wherever located. Thus, the State argued, residency or active engagement in labor and management on part of the farm's land in another state would qualify the corporation for the exception (assuming it met the other requirements).[26] In turn, the State argued, I-300 contains no residency or citizenship-based restriction.[27]

The court characterized this argument as a "heroic effort to develop a plausible alternative construction."[28] I-300's language—"in *this* state" and "of *the* farm or ranch"[29]—led the court to conclude, "we think it rather plain that Initiative 300 requires residing or working on a Nebraska farm."[30] In context, though, the highlighted words do nothing to resolve the questions. The term "this state" is not used to delineate, nor does it have any clear connection to, the site of qualifying activities—"this state" is found only in the general prohibition on corporate farming. True, I-300 bars certain activities in Nebraska by using the words "this state." But it could hardly do anything else as a matter of state law. So the emphasis seems to rest on the words "*the* farm."

But what is "the farm"? Many, if not most, crop-farming operations (and many larger animal operations) do not produce their goods on contiguous tracts of land. So one could ask, do those operations operate multiple farms? In the experience of many, the answer would be no. And, at the very least, it is just as plain to conclude that a farm includes all lands under the common ownership and operation of an individual farmer or the entity she has created.[31]

To buttress the plain meaning of the terms "this" and "the", the court drew upon the voters' intent in passing I-300 and a Nebraska Supreme Court statement concerning I-300's purpose. The notion of voter intention is addressed below. The question of what I-300's purpose was is not wholly conveyed by the Eighth Circuit's selective quotation from the Nebraska Supreme Court. The Eighth Circuit quoted the following statement from *Pig Pro Nonstock Cooperative v. Moore*—"the plain language of [I-300]" prohibits "absentee ownership and operation of farm and ranch land by a corporate entity."[32] Of course, to the extent I-300 prohibits absentee ownership, it prohibits absentee ownership by in-state and out-of-state corporations alike.[33] More impor-

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tantly, though, the State's interpretation is consistent with a more complete view of I-300's underlying purpose. That purpose, given the familial relationships necessary to qualify a family farm corporation, is to prohibit absentee ownership by corporate entities that are not family-owned and operated.[34] In fact, elsewhere in *Pig Pro*, the Nebraska Supreme Court states, "We determine that the language of article XII, §8, read as a whole, reflects an intent to prohibit individuals who are not members of the same family or Nebraska Indian tribe from forming and utilizing a corporation to own and operate farm or ranch land for their personal economic gain . . . ."[35] Thus, it does not appear that the policy underlying I-300 supports the court's interpretation of "the farm" vis-à-vis the State's interpretation of "the farm." That is, it would not defeat the purpose of I-300 to allow out-of-state ownership of farm and ranch land if those out-of-state corporations are family-owned and operated. This is precisely what the State's interpretation would allow.

That said, it is not clear to what extent the State has followed this interpretation in the past, and the record was not developed on this point. Wisely enough, the court did not rely on the State's enforcement history in rejecting its "the farm" argument.[36]

Voter intent

The Eighth Circuit also found that I-300 violated the dormant commerce clause because it was enacted with a discriminatory purpose. This was classified as an independent ground for relief, but the court drew upon that purpose—the voters' intent—when it found that the State's interpretation of the term "the farm" was unfounded.

Interpreting "the farm" with voter intent

The Nebraska Supreme Court has been willing to consult voter intent when interpreting the language of an initiative-created constitutional provision. But the Nebraska court has taken a narrow view of what can be considered evidence of voter intent, concluding that the primary source should be the text of the amendment.[37] With I-300, 290,377 people cast votes for the amendment.[38] It would be extremely difficult to assure oneself that any number of those voters intended anything other than that which can be fairly implied from the amendment's language. At least with that evidence, we can be somewhat sure that the voters read and understood it. Thus, in the run of cases, consulting voter intent should not take courts much past the plain meaning of the text at issue.

To decide whether I-300 was facially discriminatory, the Eighth Circuit interpreted the term "the farm," in part, by looking to the voters' intent. The Eighth Circuit considers "direct and indirect evidence" of discriminatory purpose when evaluating federal constitutional challenges under the dormant commerce clause.[39] Thus, the court looked beyond the language of I-300 to the ballot title and television advertisements that were used in the I-300 campaign to divine what the voters intended.[40] Insofar as the interpretation of "the farm" is concerned, it is unclear why the Eighth Circuit rejected the Nebraska rule. After all, Nebraska courts and Nebraska administrative offices will interpret the terms using Nebraska interpretive canons. Indeed, the Eighth Circuit relied upon the Nebraska court's interpretations of I-300's language for other purposes in this very case.[41] One could argue that the federal court has the discretion to reject state law insofar as the federal question of dormant-commerce-clause discrimination is concerned. But in this case the two ideas—discrimination and state-constitution interpretation—were wrapped up together in the court's facial-discrimination analysis. Oddly enough then, the court seems to have decided that for purposes of facial discrimination it could look broadly at evidence of voter intent to refute the State's non-discriminatory interpretation of "the farm," even though neither a state court nor a state administrative body could use that broad evidence to interpret or apply I-300.

Voter intent and discriminatory purpose

The court also used this broad notion of what may evince voter intent to conclude that Nebraska voters had a discriminatory purpose when they enacted I-300. As mentioned, the Eighth Circuit's ability to select a federal rule for how discrimination may be proven is hard to quibble with—it was a federal court dealing with a federal constitutional claim. But the court's decision to take a broad view of the relevant evidence of intent is debatable. As the Nebraska court has noted with regard to interpretation, voter intent is a slippery concept. How many of the 290,377 voters saw and acted upon the evidence that the court deems important? In the context of this case, would the voters have had to manifest an intent to discriminate against out-of-state, family-owned corporations that have qualifying family members working or living on some part of the corporation's land in another state? If so, or even if discriminatory purpose could be a general animus against out-of-staters, how many of the 290,377 voters would have had to harbor that animus?

Aside from the conceptual difficulty associated with voter intent, the main criticism of the opinion in this regard deals with the procedural posture of the underlying case—summary judgment. The plaintiffs presented fairly damaging evidence of the voters' discriminatory intent in the District Court. Specifically, the ballot title indicated that I-300 would "prohibit[] ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a **Nebraska** family farm corporation."[42] Similarly, the explanatory statement that accompanied the ballot title on the ballot stated that the provision would prohibit purchases of Nebraska farm and ranch land "by any corporation or syndicate other than a **Nebraska** family farm corporation."[43]

The Eighth Circuit, however, did not base its decision entirely on the ballot title, and it did not cite the explanatory statement. Rather, it concluded that the voters' discriminatory purpose was shown by the ballot title *and I-300's language*.[44] In this regard, the circularity becomes apparent: Can the voters' discriminatory purpose be seen in I-300's discriminatory language when I-300's language is discriminatory, in part, because the voters had a discriminatory purpose?

In addition to the circularity of this reasoning, there was conflicting evidence on the question of voter intent. If I-300 was susceptible to the construction that the State offered, then I-300's text should have been some evidence of the voters' non-discriminatory intent. Similarly, as the State argued in its brief,[45] the initiative petition that voters signed to get the item on the ballot did not have the discriminatory "Nebraska" in its introductory language. Rather, it stated "THE OBJECT OF THIS INTITIATIVE PETITION IS TO PROHIBIT NON-FAMILY FARM CORPORATIONS FROM FURTHER PURCHASE OF NEBRASKA FARM AND RANCH LAND, AND TO PROHIBIT FURTHER ESTABLISHMENT OF NON-FAMILY CORPORATE CROP AND LIVESTOCK OPERATIONS."[46] It is unclear why the Secretary of State chose the language included on the ballot title and even more unclear why that language should carry the day at the summary judgment stage of the proceeding. Even in the face of the other historical evidence—the television advertisements—and one possible interpretation of "the farm," it appears that there was a factual dispute to resolve.

Legitimate local interests

After finding I-300 discriminated on its face and had the purpose of discriminating, the court moved on to consider whether the discriminatory treatment was justified under the "rigorous scrutiny" that the dormant commerce clause demands.[47] Unsurprisingly, I-300 could not satisfy that high standard. But the court invoked quite strong language when it concluded that the State had not carried the day on the issue: "We assume that a mere desire to maintain the status quo cannot in itself be a 'legitimate local interest.' Indeed, it is that kind of xenophobia that the dormant commerce clause sets

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its face against."[48] It is unclear from the opinion whether the court would have the same view if the purpose were more clearly defined as preserving and promoting the family farm and its agricultural activities. Other cases, however, suggest that such a purpose would be legitimate.[49]

Conclusion

The Nebraska Attorney General has petitioned the United States Supreme Court for certiorari, but, as with any case, the chances of the Court taking the case are slim. In fact, the Court recently refused to stay enforcement of the District Court's injunction.[50] So it appears that Nebraska will be left with a choice: pass new legislation in one form or another or allow corporate-farming restrictions to die. The corporate-farming issue was politically hot in 1982, and the ballot initiative's success then was due largely to large landholdings in the state by a non-family corporate entity. The same political climate does not exist today, but there is some degree of support for would-be proponents of a corporate-farm restriction in the way this was struck down. That is, many may see the Eighth Circuit's ruling as a federal court telling Nebraskans what they cannot do. Though activism is often in the eye of the beholder, there may be some who hold that view in Nebraska. And corporate-farm opponents surely will draw upon any goodwill that may have come from having I-300 in place for 25 years. Of course, there will be plenty of support for the contrary position.

As of this writing, a bill has been introduced in the Nebraska Legislature and referred to the Agriculture Committee that would form a task force to advise the Legislature on the course to take.[51] Under the Eighth Circuit's view of the dormant commerce clause, legislators, task-force members, and anyone lobbying for I-300-like legislation would be well-advised to refrain from using the word "Nebraska", and they should ask themselves, "What does 'the farm' mean?" on a farm in south-central Nebraska.

[1] 405 F. Supp. 2d 1066, 1088 (D. Neb. 2005).

[2] 23 Agric. L. Update 5 (Jan. 2006).,

[3] 470 F.3d 1261 (8th Cir. 2006).

[4] 470 F.3d at 1271. The Eighth Circuit also addressed standing and severability issues, but this article focuses on the court's dormant commerce clause analysis. The ADA issue remains open in the event the plaintiffs with ADA claims seek and receive attorney fees under the ADA. This, however, appears unlikely because the successful plaintiffs may be able to recover attorney fees in conjunction with their other claims. *See* 42 U.S.C § 1988(b).

[5] Neb. Const. art. XII, § 8 (Reissue 1995).

[6] *Id.* § 8(1).

[7] See e.g., Neb. Const. art XII, § 8(F) (exempting poultry operations); *id.* § 8(G) (exempting alfalfa processors).

[8] *See id.* § 8(A) ("members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses").

[9] It is unclear whether the person who fulfills these conditions must own stock or simply be a member of the family. *See id.* (the ambiguous language is "one of whom").

[10] *Id.*

[11] *Jones*, 470 F.3d at 1267 (quoting *South Dakota Farm Bureau, Inc v. Hazeltine*, 340 F.3d 583, 592-93 (8th Cir. 2003)).

[12] The undue burden standard is found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

[13] *Jones*, 470 F.3d at 1267 (quoting *Hazeltine*, 340 F.3d at 593 (quoting *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994))).

[14] *Id.* While beyond the scope of this piece, these three categories of discrimination are subject to some debate. For example, the Fifth Circuit treats facially discriminatory laws differently than those that have only discriminatory effects (i.e., those that are facially neutral, but pose "'an indirect burden on interstate commerce'"). *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 497 (5th Cir. 2004) (quoting *Dickerson v. Bailey*, 336 F.3d 388, 395 (5th cir. 2003)), *cert. denied* 126 S. Ct. 332 (2005). The breadth of "discrimination" is important because courts review discriminatory laws using a very high standard of scrutiny under dormant commerce clause jurisprudence. Laws that are not discriminatory, or possibly those that have only discriminatory effects, are subject to the less-demanding balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See Dickerson*, 336 F.3d at 395.

[15] *Jones*, 405 F. Supp. 2d at 1079-82.

[16] *Id.*

[17] *Id.* at 1078.

[18] *Jones*, 470 F.3d at 1269.

[19] *Id.* at 1267.

[20] Neb. Const. art. XII, § 8(A).

[21] 405 F. Supp. 2d at 1081-82; *Jones*, 470 F.3d at 1269.

[22] *See, supra*, text accompanying, note 14.

[23] The parties stipulated that an effects analysis was not appropriate for summary judgment because it was too fact intensive. *Jones*, 405 F. Supp. 2d at 1078.

[24] Facial discrimination usually involves a situation where the law "'artlessly disclose[s] an avowed purpose to discriminate.'" *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 267 (8th Cir. 1995) (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)).

[25] There is support for the notion that the "practical effect" of a law helps determine whether a law is facially discriminatory. *See Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992). In any event, it appears that a law which clearly discriminates against out-of-state economic interests, expressly or in practical effect, is subject to the same demanding level of scrutiny.

[26] As Professors McEowen and Harl have noted, the term "actively engaged in the day to day labor and management" is not defined and could be interpreted broadly enough to include labor and management that a farmer supplies by contract. 23 Agric. L. Update 4-5 (Jan. 2006). Such an interpretation would bolster the argument that out-of-state owners could satisfy the family-farm-exception criteria without coming to Nebraska. However, that interpretation is foreclosed to some extent by Nebraska law. *See Hall v. Progress Pig*, 259 Neb. 407, 415 (2000) (noting that the term "actively engaged" means that the person "actually conduct such activities on a daily basis, not designate such activities to other individuals"). To what extent the Nebraska Supreme Court's interpretation should govern is unclear. As explained below, the Eighth Circuit appears to have rejected Nebraska law on the question of how one may prove voter intent for purposes of the dormant commerce clause. *See infra* text accompanying notes 37 - 39. But that does not necessarily mean that it would reject Nebraska's interpretation of I-300's language for all dormant commerce clause purposes, and in other parts of the opinion the court relied upon the Nebraska Supreme Court's interpretation of I-300. *See infra* text accompanying note 32. The argument the State presented on appeal assumed that active engagement required labor and management on the farm. But to the State, "the farm" included out-of-state tracts owned by the same corporate entity. Both arguments—an expansive view of active engagement and an expansive view of "the farm"—drive at the same point: it is no more difficult for out-of-state corporations to satisfy the family-farm-corporation exception than it is for in-state corporations.

[27] *Jones*, 470 F.3d at 1268.

[28] *Id.* Judge Malloy voiced his skepticism at oral argument by asking whether Murphy Family Farms, Inc., assuming it qualified in terms of familial ownership, could own farmland in Nebraska if one of the members of that family lived on a piece of the corporate property in North Carolina. Oral Argument, Case No. 06-1308, at minute 17:00, *available at* http://www.ca8.uscourts.gove/oralargs (search by case number for 06-1380) (last visited, Jan. 21, 2007). Given the history of Nebraska's reaction to large hog operations, this was an insightful and difficult question to overcome. *See generally*, Carolyn Johnsen, Raising a Stink: The Struggle over Factory Hog Farms in Nebraska (2003).

[29] *Id.* (quoting Neb. Const. art. XII § 8). For the text in context see, *supra*, text accompanying notes 6 & 10.

[30] *Jones*, 470 F.3d at 1268.

[31] The only Nebraska case on point is consistent with this position. *See Hall v. Progress Pig, Inc.*, 259 Neb. 407 (2000) (apparently concluding that a shareholding farmer did not reside on his corporation's farm because the corporation did not own the land upon which his residence was located; the farmer held that land in his own name).

[32] *Jones*, 470 F.3d at 1268 (quoting *Pig Pro Nonstock Co-op v. Moore*, 253 Neb. 72, 91 (1997)).

[33] *See Hall*, 259 Neb. 407 (concluding that a Nebraska corporation, wholly owned by a Nebraska resident, could not qualify as a family farm corporation because the shareholder was not residing on or actively engaged in farming with respect to land that the corporation owned, even though the shareholder resided on a tract of land that he personally owned three miles away from the corporation's hog confinement facility).

[34] Or, of course, one such corporation that has a family member residing on the farm.

[35] *Pig Pro*, 253 Neb. at 84.

[36] One of the amici briefs sheds some light on the subject. Brief of Amici Curiae Nebraska Bankers Ass'n, Inc., et al., Case No. 06-1308, pp. 19-23 (May 25, 2006). That brief argued that the State had pursued enforcement against some corporations that may have qualified for family-farm-corporation status under the State's interpretation. The brief's argument was premised, among other things, on the word "and" contained in a pleading that the State filed in an earlier enforcement action. In that pleading, the State alleged that a corporation was not performing the requisite activities on "Cedar **and** Knox County" tracts. *Id.* at p. 21 (emphasis in original). The amici also argued that another pleading in a different action alleged that a corporation did not conduct the requisite activities on each of twenty tracts of land that it owned. *Id.* at 22. From that language, the brief argued that the State had "staked out the position in prior enforcement actions that a Nebraska corporation must satisfy the residency or day-to-day management and labor requirements on each and every farm located in Nebraska . . . ." *Id.* This argument is fairly specious because we do not know if the corporations in question were owned by family members who worked or lived on some tract of land that the corporation owned in another state. This language and argument is noted because it seems entirely consistent with what the State

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would have to prove to establish a violation under its interpretation: No qualifying family-member meets the requirements on any tract of land that the corporation owns. Thus, the pleadings cited by amici demonstrate, if anything, that the State has sought enforcement consistent with its current interpretation.

[37] *Pig Pro*, 253 Neb. at 82.

[38] Nebraska Blue Book 263 (2004-05). Those voting against it numbered 224,555, for a total of 559,422 votes cast. *Id.* Arguably, even the views of those who were against it could be relevant to determining what voters though the measure meant.

[39] *Jones*, 470 F.3d at 1269.

[40] *Id.* at 1270. Notably, the same anti-out-of-state rhetoric has recently been used to defeat spending lid measures funded by out-of-state political activists. This raises an interesting question about whether such anti-outsider rhetoric should be construed as voter intent regarding the substance of the provision enacted or defeated. Such rhetoric seems just as likely to evince voter animus against political involvement by non-residents. That sort of protectionism—keeping the political process "our own"—would not necessarily mean that the voters intended to enact protectionist economic policies.

[41] *See supra* note 32.

[42] *Id.* at 1261 (omission by the court, emphasis added). It is unclear whether a Nebraska court would consider this evidence when interpreting the provision. *See Pig Pro*, 253 Neb. at 83 (finding that the quoted ballot-title language was "the only pertinent historical facts" to be considered in construing constitutional language, but arguably not relying on that language elsewhere in the opinion).

[43] *Jones*, 405 F. Supp. 2d at 1079 (court's emphasis omitted, present emphasis added).

[44] *Jones*, 470 F.3d at 1269.

[45] Brief for Appellant, State of Nebraska, No. 06-1308, p. 60 (Mar. 27, 2006).

[46] James W.R. Brown & Thomas R. Brown, *Constitutionality of Nebraska Initiative Measure Prohibiting Corporate Farming and Ranching*, 17 Creighton L. Rev. 233, 256 app. (1984). This piece also concluded that I-300 did not comply with the Nebraska Constitution, but the authors agreed that there was no dormant commerce clause problem with it. *Id.* at 247-48.

[47] *Jones*, 470 F.3d at 1270.

[48] *Id.*

[49] *E.g.*, *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) (concluding that a Missouri price-discrimination statute did not contravene the dormant commerce clause under the *Pike* test given, inter alia, Missouri's interest in "preserve[ing] the family farm and Missouri's rural economy"); *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 471 n.15 (concluding that Minnesota's purpose of promoting conservation justified its milk-container regulation, despite the "beneficial side effects" of economic gain for the in-state industry, where milk-container regulation applied evenhandedly to all milk, containers, and sellers inside and outside the state).

[50] The U.S. Supreme Court Docket in this case is available at http://www.supremecourtus.gov/docket/06-1045.htm.

[51] LB 516, 100th Legislature (2007), *available at* http://uniweb.legislature.ne.gov/Apps/BillFinder/finder.php (search by bill number for "516") (last visited Jan. 21, 2007).

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Statutory Instrument No. 401 of 2001 amending the the Food Safety Authority of Ireland Act, 1998 (No. 29 of 1998), http://www.irishstatutebook.ie/ZZSI401Y2001.html

[25] *See* "Food Safetynote," German Federal Ministry for the Environment (October 2005), http://www.bmu.de/english/food_safety/general_information/doc/5720.php and "Food & Nutrition Guide," European Food Information Council (June 2006), http://www.eufic.org/jarticle/en/food-nutrition-guide/agriculture/expid/basics-agriculture/

[26] "Canadian Exporters' Guide to Food Labelling & Packaging Requirements of the European Union" (Updated March 2000), http://ats.agr.ca/europe/e1429001.htm

[27] "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements," Henson, S. and Loader, R., World Development Vol. 29, No. 1, pp. 85-102 (2001), http://www.cours.ecn.ulaval.ca/cours/ECN-64021/texte%203.pdf The paper notes that "these data are only systematically collected and publicly available for the United States," and to date this seems not to have changed.

[28] Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_338/l_33820051222en00010026.pdf

[29] "Guidance Document of the Scientific Panel on Genetically Modified Organisms for the Risk Assessment Of Genetically Modified Plants and Derived Food and Feed," European Food Safety Authority (May 2006), http://www.efsa.europa.eu/etc/medialib/efsa/press_room/publications/scientific/1497.Par.0005.File.dat/gmo_guidance%20gm%20plants_en.pdf

[30] Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC, http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_268/l_26820031018en00240028.pdf

[31] "Activity Report of the European Network of GMO Laboratories," European Commission Joint Research Centre (2004), http://ihcp.jrc.ec.europa.eu/docs/b&gmos/engl.pdf

[32] Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs, *supra*.

[33] "ASA Supports WTO Biotech Case Against European Union," American Soybean Association press release (May 15, 2003), http://www.soygrowers.com/newsroom/releases/2003%20releases/r051503.htm

[34] "Questions and Answers on the Regulation of GMOs in the European Union," Memo 05/104 (March 22, 2005), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/104&format=HTML&aged=1&language=EN&guiLanguage=en

[35] "Are Biotech Crops And Conventional Crops Like Products? An Analysis Under GATT," Wong, Julian. Duke Law & Technology Review (2003 Duke L. & Tech. Rev. 0027), http://www.law.duke.edu/journals/dltr/articles/2003dltr0027.html *citing* Stephen Tromans, Promise Peril, Precaution: The Environmental Regulation of Genetically Modified Organisms, 9 Ind. J. Global Legal Stud. 187, 196 (2001).

[36] *See* notes 13-22, *supra*.

[37] "Hivos Partnerdatabase," HIVOS (n.d.), http://www.hivos.nl/english/english/cooperation_in_the_south/who_are_our_partners

[38] "Rice: a first analysis for exporting to the EU" (CREM/HIVOS) (February 2004), http://www.dgroups.org/groups/hivos/ppp-rice/docs/crem_eu_rijst_rapport_mei_04.pdf

[39] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, Dispute Settlements DS293 (Argentina); DS292 (Canada); and DS291 (United States) (September 29, 2006), http://docsonline.wto.org/gen_home.asp?language=1&_=1

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owners and contract growers (not both for same livestock) for certain livestock deaths; (3) the Citrus Disaster Program will provide benefits to citrus producers who suffered citrus crop production losses and associated fruit-bearing tree damage, including related clean-up and rehabilitation costs; (4) the Fruit and Vegetable Disaster Program will provide benefits to producers who suffered fruit and vegetable crop production losses, including related clean-up costs; (5) Tropical Fruit Disaster Assistance Program will provide benefits to producers of carambola, longan, lychee, and mangos who suffered tropical fruit production losses;

(6) the Nursery Disaster Assistance Program will provide benefits to commercial ornamental nursery and fernery producers who suffered inventory losses and incurred clean-up costs; (7) the Tree Assistance Program will provide benefits to producers who suffered tree, bush, or vine losses for site preparation, replacement, rehabilitation, and pruning; and (8) the 2005 Catfish Grant Program will provide assistance in the form of grants to states having catfish producers who suffered catfish feed losses. 72 Fed. Reg. 6435 (Feb. 12, 2007).

FOOD SAFETY. The FSIS has announced that it is re-opening and extending the comment period on a petition submitted by Hormel Foods on the voluntary labeling claim ³natural² and on the broader question of how to define this claim. The original comment period closed on January 11, 2007. 72 Fed. Reg. 2257 (Jan. 18, 2007).

ORGANIC FOOD. The AMS has issued revised guidelines for submitting petitions to amend the National List of Allowed and Prohibited Substances. The guidelines also include new commercial availability evaluation criteria to be applied during the petition review of non-organic agricultural substances. 72 Fed. Reg. 2167 (Jan. 18, 2007).

PINE SHOOT BEETLE. The APHIS has adopted as final regulations that amend the pine shoot beetle regulations by adding counties in Illinois, Indiana, Iowa, New Jersey, New York, and Ohio to the list of quarantined areas and by designating Michigan, Minnesota, and Pennsylvania, in their entirety, as quarantined areas based on their decision not to enforce intrastate movement restrictions. The interim rule also added Connecticut and Rhode Island, in their entirety, to the list of quarantined areas based on projections of the natural spread of pine shoot beetle that make it reasonable to believe that the pest is present in those states. 72 Fed. Reg. 1912 (Jan. 17, 2007).

–Robert P. Achenbach, Jr., AALA Executive Director

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2007 Membership Renewals

Many thanks to all the members who have promptly sent in their dues to renew their memberships for 2007. For those who have not yet done so, please take a few minutes and send in your membership renewal forms and dues. Reminder notices will be sent out soon.

Future Annual Conference Locations

The AALA Board of Directors will soon begin consideration of the location city for the 2009 Annual Agricultural Law Symposium. Note: the 2007 symposium will be in San Diego and the 2008 symposium will be in Minneapolis. I will be sending out a survey by e-mail to all members in March for your ideas about what makes a good location city for the symposium. The costs for the hotels, both for guest rooms and the conference facilities and food, have been rising dramatically in the last few years and may soon lead to increased registration fees unless various aspects of the location and symposium are changed. We need your ideas so that the symposium is your annual choice for CLE and learning about agricultural law developments.

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