Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts

by

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TWO ISSUES IN CORPORATE AGRICULTURE: ANTICORPORATE FARMING STATUTES AND PRODUCTION CONTRACTS

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TABLE OF CONTENTS

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I. INTRODUCTION

The title of a recently published book asks: "Is there a moral obligation to save the family farm?"[1] Even asking this question indicates the ever changing structure of American agriculture. It is no longer a foregone conclusion that ownership of land and production of agricultural commodities will rest solely in the hands of individual family producers residing on the land where they make their living.

Land ownership is but one part in the parcel making up the concept of the family farm. Two land market players that compete directly (some would argue unfairly) with the family farmer are foreign investors and corporations. This Article will discuss these two competitors and their effect on the ownership of agricultural land.

The discussion will continue with a review of the differing views of the family farm. Generally, there are two schools of thought regarding the value of the family farm. The family farm can be viewed from either an economic or agrarian perspective. The survival of the family farm may well depend on which of these perspectives prevails when policy decisions are made.

This Article will next review the statutes of those states regulating the entry of corporations into the agriculture field. Currently, a minority of states limit corporate involvement in agriculture through regulations prohibiting corporate ownership of agricultural land or corporate production of agricultural commodities. This section will compare the language of these various statutes, review their enforcement procedures, and discuss the judicial interpretation of selected state statutes. Finally, this Article will discuss the use of contract production of agricultural commodities. Specifically, it will address contract feeding of livestock.

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1. IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? (Gary Comstock ed., 1987).

II. COMPETITION FOR AGRICULTURAL LAND

An article of the Agricultural Creed provides, "The land should be owned by the man who tills it."[2] As the following demonstrates, however, making this ideal a reality can be difficult:

> Ownership of a farm of his own has been an objective of the American farmer since earliest times. Until about the time of World War I the aspiring young couple could go West and preempt, homestead, or buy with little or no cash a family-sized farm of their own. As the West became settled and competition for land became keen, young farmers found it increasingly difficult to attain ownership . . . . The chief ways to become a farm owner were to be born or marry into the right family or to progress up the agricultural ladder from laborer to tenant to owner. Regardless of which procedure was used, credit became an essential element in the acquiring of control over farmland.[3]

Today, credit is still an essential element in farmland acquisition. For those seeking ownership of their own farm, however, the level of competition for land, and thus credit, has increased. Two entrants into the agricultural land ownership market that create concern are the foreign investor and the corporation.[4] Those concerned with agricultural investment by these parties have sought to exclude them from the market through government regulation.

A. *Federal Regulation of Foreign Investment*

The public policy against the ownership of American real estate by aliens is the primary reason foreign investment in agricultural land is discouraged.[5] In the late 1970s, some commentators believed foreign investors were acquiring American farmland at an alarming rate.[6] This perceived threat prompted Congress to enact the Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA").[7] The data compiled under AFIDA, however, demonstrates the amount of foreign-owned farmland in the United

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2. KEITH MEYER ET AL., AGRICULTURAL LAW CASES AND MATERIALS 3 (1985) (quoting DON PAARLBERG, FARM AND FOOD POLICIES: ISSUES OF THE 1980S 7 (1980)).

3. MARSHALL HARRIS & N. WILLIAM HINES, INSTALLMENT LAND CONTRACTS IN IOWA (MONOGRAPH NO. 5 University of Iowa Agric. L. Ctr. 1 (1965)).

4. Joseph Darby, *The Effects of Changes in Agricultural Structures Over the Past 20 Years*, 34 AM. J. COMP. L. 255, 262 (Supp. 1986); *see also* JULIAN JUERGENSMEYER & JAMES WADLEY, AGRICULTURAL LAW 131 (1982).

5. JUERGENSMEYER & WADLEY, *supra* note 4, at 131.

6. J. Peter DeBraal, *Impact of Information on Policy Decisions: The Agricultural Foreign Investment Disclosure Act*, 11 J. AGRIC. TAX'N & L. 135, 156 (1989).

7. Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. §§ 3501-3508 (1982)).

States is actually too small to measure any impact at the national level.[8] "[F]oreign investors own 12.5 million acres of [United States] agricultural land, that is, farm and forest land—slightly less than [1%] of the 1.29 billion acres of privately owned [United States] agricultural land and 0.5[%] of the 2.27 billion acres that comprise the United States."[9]

This data relieved the urgency behind the drive to pass federal legislation that limits foreign investment. It may also have decreased federal involvement in protection for family farmers from corporate competition.

In contrast to the regulation of foreign investment, imposing limitations on ownership of agricultural land by domestic corporations is not a federal concern. This is due, in large measure, to the historical reservation of property ownership as a matter of state law, as provided by the Tenth Amendment's reservation to the states of all powers not specifically granted to Congress.[10] Accordingly, the regulation of corporate involvement in agriculture has been undertaken almost exclusively by the individual states, with federal involvement limited to controlling production and providing price supports through various farm programs to promote the family farming system.[11]

B. *State Regulation of Corporate Investment*

The prospect of out-of-state corporate interests acquiring ownership of agricultural land, and thus competing in agricultural production, motivated some state legislatures to balance the benefits and burdens in favor of their own citizens. Laws prohibiting only nonresident corporations from owning agricultural land, however, would certainly be subject to constitutional challenge.[12] Thus, these laws are generally written to protect the state's citizens from the competitive forces of both in-state and out-of-state corporations.

In situations involving an in-state corporation, legislatures are faced with the delicate issue of balancing the interests of one of their citizens—the corporation—against that of another citizen—the family farmer.

III. THE FAMILY FARM—TWO VIEWS

Two questions come to mind when the alarm is sounded to "save the family farm." The first is: Who is in need of protection? This naturally leads to the second question: Are they deserving of protection? Of the two, the first is more easily answered.

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8. J. Peter DeBraal & Kenneth R. Krause, *Corporate, Foreign and Financial Investors in U.S. Agriculture*, 29 S.D. L. REV. 378, 398-406 (1984).

9. DeBraal, *supra* note 6, at 156.

10. U.S. CONST. amend. X.

11. DeBraal & Krause, *supra* note 8, at 427.

12. *See infra* text accompanying notes 77-95.

"[A] family farm [can be defined as] an agricultural operation that is owned by a family or family corporation, has gross annual sales of between forty thousand dollars and two hundred thousand dollars . . . , and does not hire more than 1.5 person-years of labor."[13] This definition views the family farm from an income producing standpoint. Using this definition, whether a family farm deserves protection varies according to the importance the opinion holder places on defining the family farm as an economic unit.

A. *Economic*

From an economic point of view, there is little evidence the family farm is the most cost-effective framework in which to produce agricultural commodities.[14] The family farm may be more economically efficient, but only because the owner-operator is not fully compensated for his managerial contribution.[15] The owner-operator's compensation comes partially in the form of increased investment value and increased income production.[16] When the full cost of management compensation is considered, the family farm operation ends up on relatively equal footing with the other forms of operation.[17]

The family farm is no more financially stable than the nonfamily operation.[18] An increase in interest rates is not selective. Any highly leveraged operation will suffer financially regardless of its structural framework.[19] All operations face the same financial risks. Although both family and nonfamily operations may be able to adjust to small financial reversals, nonfamily operations (which are possibly more diversified)[20] are better able to withstand a large financial crisis.[21]

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13. Gary Comstock, *Introduction* to IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at XV (quoting LUTHER TWEETEN, CAUSES AND CONSEQUENCES OF STRUCTURAL CHANGES IN THE FARMING INDUSTRY (Wash. D.C. National Planning Assoc. ed., 1984)).

14. *See generally* Michael Boehlje, *Costs Benefits of Family Farming, in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 361, 367.

15. *Id.* at 366.

16. *See id.* at 367.

17. *Id.* at 373.

18. *Id.* at 367.

19. Financial leverage is defined as "debt in relation to equity in a firm's capital structure . . . measured by the DEBT-TO-EQUITY RATIO. The more long-term debt there is, the greater the financial leverage." BARRON'S FINANCE AND INVESTMENT HANDBOOK 324 (2d ed. 1987). The ratio of debt to equity "is commonly called the leverage ratio and measures the farm's total obligation to creditors (lenders and lessors) as a percent of the equity capital provided by owners." PETER J. BARRY ET AL., FINANCIAL MANAGEMENT IN AGRICULTURE 65 (3d ed. 1983). "In general, increasing financial leverage will increase the growth in equity so long as the marginal returns from the use of a loan exceeds the cost of borrowing money." *Id.* at 118.

20. Diversification "reduce[s] the total variability of returns by combining several assets, enterprises, or income-generating activities." BARRY et al., *supra* note 19, at 159.

21. Boehlje, *supra* note 14, at 367.

There is also little evidence the family farm holds any distinct advantage in the area of resource conservation.[22] Proponents of the family farm claim "family farmers are the best stewards of the soil."[23] As one commentator noted, however, "it appears that a combination of tax rules, cost-sharing arrangements, and legal constraints have provided adequate incentives for landlords and investors to adopt conservation practices so that differences between owner-operators and landlord-tenant operated property in the adoption of conservation practices do not exist."[24]

Finally, the claim family farmers adapt more quickly to new technology has not been borne out.[25] This ability involves access to information and additional capital rather than any inherent advantage of the family farm.[26] Both family and nonfamily farms will adopt new technology when it becomes economically advantageous and capital is available.[27]

B. *Agrarian*

Economic analysis provides little justification for protecting the family farm. Proponents of the family farm, however, believe the definition of "family farm" should involve more than economics.[28] This agrarian view has European roots, and became part of the American heritage in the 1700s.[29] "This heritage maintained that farming was the best way of life and the most important economic activity, that it conferred psychological as well as economic benefits, and that it produced the best citizens . . . ."[30] The agrarian view is also the basis of many tenets of the agricultural creed,[31] and "define[s] a world to be lived in by human beings, not a world to be exploited by

22. Boehlje, *supra* note 14, at 368.

23. Carole Hodine, *We Whose Future Has Been Stolen, in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 54, 54.

24. Boehlje, *supra* note 14, at 368.

25. *See generally* Boehlje, *supra* note 14, at 369.

26. Boehlje, *supra* note 14, at 369-70.

27. Boehlje, *supra* note 14, at 369-70.

28. Comstock, *supra* note 13, at XXV.

29. Richard S. Kirkendall, *Up To Now: A History of American Agriculture From Jefferson to Revolution to Crisis*, AGRIC. & HUMAN VALUES 4 (1987).

30. *Id.*

31. The articles of the agricultural creed state:

Farmers are good citizens and a high percentage of our population should be on farms.

Farming is not only a business but a way of life.

Farming should be a family enterprise.

The land should be owned by the man who tills it.

It is good to make two blades of grass grow where only one grew before.

Anyone who wants to farm should be free to do so.

A farmer is his own boss.

MEYER et al., *supra* note 2, at 3.

managers, stockholders, and experts."[32] This traditional philosophy is difficult to quantify and plot on a supply and demand curve. Proponents of the family farm believe "family farmers can feed us better than the corporations can, unless agribusiness and its friends in government drive them off the land."[33] Within this agrarian view, the justifications for regulating corporate ownership of agricultural land can be found.

The question of whether such farms even deserve to be protected in the first place is not answered sufficiently by the preceding noneconomic justifications. Perhaps this question will never be answered to everyone's satisfaction. It may suffice to say, however, that any answer depends on whether the question is viewed from an economic or an agrarian perspective. One either believes the family farm should be protected, or that it should give way to a newer form of farm operation. Certainly, there is not much gray area in the debate. The "top barb" is strung too high to allow anyone to straddle the fence on this issue.

Another question comes to mind: How can a group of individuals, making up such a small percentage of the population, generate the interest necessary to induce legislatures to act on their behalf? Only three percent of the United States population live and work on family farms.[34] Although such a small figure does not readily translate into political clout, legislatures have proposed and passed laws favorable to family farmers.[35] The explanation for this anomaly goes deeper than saying agriculture is important because we all have to eat. Rather, it is based in part on the country's history.

It has been observed that "the United States was born in the country, and has moved to the city."[36] Although more than thirty million people have made this move since the 1940s,[37] very often strong agricultural ties still exist. Many people have relatives and friends who chose to remain on the farm, and may retain fond memories of growing up on the farm. As a result, a sense of "connectedness" with agriculture remains despite the move to the city. Thus, although a small percentage of persons actually remain on the farm, a larger percentage of the population, including policy makers and legislators that formulate and approve laws favoring the family farm, share a common experience in agriculture.[38]

32. Wendell Berry, *A Defense of the Family Farm, in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 347, 360.

33. Jim Hightower, *The Case for the Family Farm, in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 205, 211.

34. Richard S. Kirkendall, *A History of the Family Farm, in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 79, 94.

35. *See infra* text accompanying notes 39-78.

36. Kirkendall, *supra* note 34, at 94 (quoting RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR 23 (1955)).

37. Kirkendall, *supra* note 34, at 94.

38. Kirkendall, *supra* note 34, at 94-95.

The same should not be expected for the future. Time is pruning away agriculture's roots. Today, entire generations of people pass their lives in the city. Fewer and fewer people feel any personal connection with an agricultural way of life. It may safely be predicted that laws protecting the family farmer will receive less attention than before.

IV. ANTICORPORATE FARMING STATUTES IN THE UNITED STATES

A. *Where Do Anticorporate Farming Laws Exist?*

After identifying the family farm as the beneficiary of protections from corporate involvement, and leaving to philosophers the question of whether the family farm is the proper recipient of this protection, the next issues to be examined are the scope and effectiveness of anticorporate legislation. Currently, nine states have laws regulating corporate ownership of agricultural land and corporate production of agricultural commodities: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.[39] These states contribute a significant portion of the United States' total agricultural production.[40] This block of states could easily be considered an "anticorporate farming zone."

B. *From What Are Family Farms Being Protected?*

The popularity and proliferation of the corporate form of business organization has had a significant impact on agriculture, not only through land ownership by corporations, but also through corporate involvement in the production of commodities.[41] Thus, statutes restricting corporate farming are generally written to reach these two activities.

The corporate form of organization offers businesses continuity, centralized management, easy ownership transfer, limited liability, and flexible financing.[42] Of these advantages, the flexible financing is a significant reason why anticorporate farming statutes exist.[43]

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39. WINSTON SMART & ALLEN C. HOBERG, NATIONAL CENTER FOR AGRIC. LAW RESEARCH AND INFO., CORPORATE FARMING IN THE ANTI-CORPORATE FARMING STATES 4 (1989). The forms of business organization targeted by these regulations include "corporation[s], corporate partnership[s], limited partnership[s], limited corporate partnership[s], syndicate[s]" and joint stock companies or associations. *Id.* at 7-8. See *infra* notes 52-54 for specific reference to each state's statute or constitutional provision.

40. SMART & HOBERG, *supra* note 39, at 7-8.

41. *See generally* Fred Morrison, *Restrictions on Corporate and Alien Ownership and Operation of Farms, in* 2 AGRICULTURAL LAW 119, 120 (John Davidson ed., 1981).

42. EDWARD R. HAYES, IOWA PRACTICE: BUSINESS ORGANIZATIONS §§ 9-13 (2d ed. 1985).

43. *Id.* §§ 331-336.

Equity and debt financing provide corporations with additional sources of funds.[44] Additionally, diversified corporations may be able to transfer funds from other operations to support entry into, or continued operation in, agriculture.[45] These options normally are not available to private individuals financing business operations,[46] which results in corporations possessing an unequal economic advantage over private individuals.[47]

The flexible financing advantage the corporation enjoys is not, however, the only factor that creates an unequal or unfair economic balance. Corporations may also find it easier to acquire financing through traditional means.[48] Lenders may often feel more secure loaning the substantial sums of capital needed to support a large agricultural operation to a corporation rather than a private individual, because a corporation usually has many more resources than an individual. The other advantages enjoyed by corporations—continuity, centralized management, easy transfer of ownership, and limited liability[49]—also may play a significant role in the corporation receiving preferential treatment from lenders and other creditors.

The advantages of a corporate form of business organization undoubtedly result in economic benefits to society in general. In fact, the burdens caused by increased competition with the family farmer are arguably outweighed by the social benefits of the corporate form of business. This should be kept in mind when the statutes in the "anticorporate farming zone" are reviewed, because most of these statutes do not completely foreclose all types of corporate activity in the field of agriculture.[50] Also noteworthy are how the

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44. Equity financing is defined as "raising money by issuing shares of common or preferred stock. [It is] usually done when prices are high and the most capital can be raised for the smallest number of shares." BARRON'S FINANCE AND INVESTMENT HANDBOOK 250 (2d ed. 1987). Debt financing involves the sale of "bonds, notes, mortgages, and other forms of paper evidencing amounts owed and payable on specified dates or on demand." *Id.*

45. SMART & HOBERG, *supra* note 39, at 2.

46. *See* 7 NEIL E. HARL, AGRICULTURAL LAW § 52.01(2).

47. *See id.* Even the incorporation of a farm or ranch produces advantages that the private individual does not enjoy. The author writes:

> Incorporation of a farm or ranch business creates additional and interesting possibilities for financing the operation. Farmers operating their businesses as sole proprietorships contribute all of the equity capital used in the business. Debt capital is obtained from outside lenders, usually in arm's length transactions. Sole proprietors may not be creditors with respect to their business.

Id.

48. The traditional method of financing is to obtain money (*i.e.*, loans) from the financial sector. The financial sector is "[t]he sector of the economy that encompasses financial institutions, financial markets, and financial instruments." DAVID S. KIDWELL & RICHARD L. PETERSON, FINANCIAL INSTITUTIONS, MARKETS AND MONEY 642 (2d ed. 1984). "The primary role of the financial sector is to facilitate the movement of funds from savers to users." *Id.* at 4.

49. *See supra* text accompanying note 42.

50. *See infra* text accompanying notes 52-78.

goals of the statutes are furthered, or perhaps even limited, through both enforcement provisions and judicial interpretation.[51]

C. *How Do These Laws Accomplish Their Goals?*

Some states ban corporate ownership of agricultural land to "level the playing field" in favor of their own citizens. Seven states—Iowa, Kansas, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin—ban corporate land ownership via statute.[52] Nebraska does the same through a constitutional provision.[53] Oklahoma employs both constitutional and statutory provisions.[54]

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51. *See infra* text accompanying notes 79-100.

52. *See* IOWA CODE § 172C.4 (Supp. 1991) ("No corporation or trust, other than a family farm corporation, authorized farm corporation, family trust, authorized trust or testamentary trust shall, either directly or indirectly, acquire or otherwise obtain or lease any agricultural land in this state."); KAN. STAT. ANN. § 17-5904 (Supp. 1991) ("No corporation, trust, limited liability company, limited partnership or corporate partnership, other than a family farm corporation, authorized farm corporation, limited liability agricultural company, limited agricultural partnership, family trust, authorized trust or testamentary trust shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state."); MINN. STAT. ANN. § 500.24(3) (West Supp. 1992) ("No corporation . . . or limited partnership shall engage in farming; nor shall any corporation . . . or limited partnership, directly or indirectly, own, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state."); MO. ANN. STAT. § 350.015 (Vernon 1991) ("[N]o corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural land in this state . . . ."); N.D. CENT. CODE § 10-06-01 (Supp. 1991) ("All corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching."); S.D. CODIFIED LAWS ANN. § 47-9A-3 (1991) ("[N]o foreign or domestic corporation may engage in farming; nor may any foreign or domestic corporation, directly or indirectly, own, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state."); WIS. STAT. ANN. § 182.001(1) (West 1992) ("No corporation or trust may own land on which to carry on farming operations . . . .").

53. *See* NEB. CONST. art. XII, § 8(1) ("No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.").

54. *See* OKLA. CONST. art. XXII, § 2 ("No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto . . . ."); OKLA. STAT. ANN. tit. 18, § 951 (West Supp. 1993) ("[N]o foreign corporation shall be formed or licensed . . . for the purpose of engaging in farming or ranching or for the purpose of owning or leasing any interest in land to be used in the business of farming or ranching."). The Oklahoma statute does allow domestic corporations to engage in prohibited agricultural activity if they meet certain requirements, *see* OKLA. STAT. ANN. tit. 18, § 951(A) (West Supp. 1993), and exempts from the prohibitions both foreign and domestic corporations that engage in certain activities. *See id.* § 954.

Although the states are attempting to discourage corporate control of agricultural land, they also recognize the advantages of the corporate form of business and encourage its use by the citizens of the state.[55] Each state flatly prohibits corporate ownership of agricultural land,[56] yet each prohibition is qualified by a list of exceptions.[57] Some of the exceptions are so extensive that, in reality, the prohibition has a very limited effect. For example, in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, a corporation may be excepted from the agricultural land ownership prohibition if it is a "family farm corporation."[58]

The most common element required to achieve family farm corporation status is a relationship between the shareholders, either by consanguinity or affinity.[59] The second most common element, required by all the states except Iowa, is that at least one of the shareholders reside at the farm or be actively engaged in the farm's day-to-day labor and management.[60] Restricting stock ownership in the family farm corporation to individuals is another common element.[61] Finally, in Iowa only, the family farm corporation is limited in the percentage of gross revenue it may receive outside of farming.[62]

Although the North Dakota and Oklahoma statutes do not specifically mention or define family farm corporations, a corporation meeting most of the criteria mentioned above may also be excepted from the prohibitions.[63] Consequently, in all of the states except Wisconsin, a corporation that meets the definition of a family farm corporation may own agricultural land and still enjoy the advantages of the corporate form of business.

Some of these states also create an additional exception that lets unrelated persons form a corporation to own agricultural land. This corporate form, commonly designated an "authorized farm corporation," limits the number of persons that may hold stock in the corporation.[64] This limitation

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55. Morrison, *supra* note 41, at 125.

56. *See supra* text accompanying notes 52-54.

57. *See infra* text accompanying notes 58-78.

58. *See* NEB. CONST. art. XII, § 8(1)(A); IOWA CODE § 172C.4 (Supp.1991); KAN. STAT. ANN. § 17-5904 (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(b) (West Supp. 1992); MO. ANN. STAT. § 350.015(2) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-13 (1991).

59. *See* NEB. CONST. art. XII, § 8(1)(A); IOWA CODE § 172C.1(8)(a) (Supp. 1991); KAN. STAT. ANN. § 17-5903(j)(1) (Supp. 1991); MINN. STAT. ANN. § 500.24(2)(c) (West 1990); MO. ANN. STAT. § 350.010(5) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-14 (1991).

60. *See* NEB. CONST. art. XII, § 8(1)(A); KAN. STAT. ANN. § 17-5903(j)(3) (Supp. 1991); MINN. STAT. ANN. § 500.24(2)(c) (West 1990); MO. ANN. STAT. § 350.010(5) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-14 (1991).

61. *See* NEB. CONST. art. XII, § 8(1)(A); IOWA CODE § 172C.1(8)(b) (Supp. 1991); KAN. STAT. ANN. § 17-5903(j)(2) (Supp. 1991); MINN. STAT. ANN. § 500.24(2)(c) (West 1990); MO. ANN. STAT. § 350.010(5) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-14 (1991).

62. *See* IOWA CODE § 172C.1(8)(c) (Supp. 1991).

63. *See* N.D. CENT. CODE § 10-06-07 (1985); OKLA. STAT. ANN. tit. 18, § 951(A) (West Supp. 1993).

64. *See* IOWA CODE § 172C.1(3)(a) (Supp. 1991) (limiting stockholders to no more than 25); KAN. STAT. ANN. § 17-5903(k)(1) (Supp. 1991) (limiting stockholders to no more than 15); MINN.

varies from as low as five in Minnesota, to as many as twenty-five in Iowa.[65] Missouri takes a different approach to the authorized farm corporation. It does not limit the number of stockholders in the corporation; rather, it limits agricultural land ownership to corporations receiving "two-thirds or more of [their] total net income from farming."[66] Similar to the requirements for family farm corporations, stockholders in authorized farm corporations must be natural persons.[67] Nebraska, North Dakota, and Oklahoma do not provide for authorized farm corporations.[68]

In addition to the constitutional and statutory exceptions for family farm and authorized farm corporations, many states provide exceptions to the general prohibition against corporations owning or taking an interest in agricultural land. For example, exceptions have been created for corporations that acquire agricultural land to create a bona fide encumbrance for the purpose of security interest;[69] agribusiness corporations that use the land for research and development or production of plants, seeds, or animals for sale or resale to farmers;[70] corporations that acquire land for a nonfarm use;[71] corporations that acquire agricultural land in a debt collection proceeding;[72] corporations that acquire agricultural land while acting as a trustee;[73] corporations that acquire agricultural land through normal expansion of prior

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STAT. ANN. § 500.24(2)(d)(1) (West 1990) (limiting shareholders to no more than five); S.D. CODIFIED LAWS ANN. § 47-9A-15 (1991) (limiting stockholders to no more than 10); WIS. STAT. ANN. § 182.001(1)(a) (West 1992) (limiting stockholders to no more than 15).

65. *See supra* note 64.

66. *See* MO. ANN. STAT. § 350.010(2)(b) (Vernon 1991).

67. *See* IOWA CODE § 172C.1(3)(b) (Supp. 1991); KAN. STAT. ANN. § 17-5903(k)(2) (Supp. 1991); MINN. STAT. ANN. § 500.24(2)(d)(2) (West 1990); MO. ANN. STAT. § 350.010(2)(a) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-15 (1991); WIS. STAT. ANN. § 182.001(1)(c) (West 1992).

68. *See* NEB. CONST. art. XII, § 8(1)(A); N.D. CENT. CODE § 10-06-07 (1985); OKLA. STAT. ANN. tit. 18, § 951 (West Supp. 1993).

69. *See* NEB. CONST. art. XII, § 8(1)(L); OKLA. CONST. art. XXII, § 2; IOWA CODE § 172C.4(1) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(1) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(a) (West Supp. 1992); MO. ANN. STAT. § 350.015(1) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-6 (1991).

70. *See* NEB. CONST. art. XII, § 8(1)(E); IOWA CODE § 172C.4(2) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(10) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(d), (e) (West Supp. 1992); MO. ANN. STAT. § 350.015(4), (5) (Vernon 1991); OKLA. STAT. ANN. tit. 18, § 954(1)-(3) (West Supp. 1993); S.D. CODIFIED LAWS ANN. § 47-9A-9, -10 (1991); WIS. STAT. ANN. § 182.001(2)(d) (West 1992).

71. *See* NEB. CONST. art. XII, § 8(1)(J); OKLA. CONST. art. XXII, § 2; IOWA CODE § 172C.4(4) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(3) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(h) (West Supp. 1992); MO. ANN. STAT. § 350.015(8) (Vernon 1991); N.D. CENT. CODE § 10-06-01.3 (1985); S.D. CODIFIED LAWS ANN. § 47-9A-12 (1991); WIS. STAT. ANN. § 182.001(2)(e), (f) (West 1992).

72. *See* NEB. CONST. art. XII, § 8(1)(K); OKLA. CONST. art. XXII, § 2; IOWA CODE § 172C.4(5) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(4) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(i) (West Supp. 1992); MO. ANN. STAT. § 350.015(9) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 49-9A-7 (1991).

73. *See* IOWA CODE § 172C.4(7), (10), (11) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(6) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(p) (West Supp. 1992); MO. ANN. STAT. § 350.015(11) (Vernon 1991); OKLA. STAT. ANN. tit. 18, § 955(2) (West 1986).

ownership;[74] corporations that devote agricultural land to certain special uses;[75] and corporations that acquired an ownership or leasehold interest in agricultural land before the anticorporate statute was enacted.[76] Exceptions have also been created for nonprofit or religious corporations[77] and municipal corporations.[78]

These exceptions make it clear the intention of the statutes is not to prohibit per se corporate ownership of agricultural land. The availability of the family farm and authorized farm corporation exceptions indicate the states recognize the advantages the corporate form of business offers. Generally, these statutes are written to prohibit the ownership of agricultural land by large corporations such as General Motors, General Electric, and General Dynamics.

D. *Enforcement*

Enforcement limits the effectiveness of these anticorporate farming statutes. Most of the statutes require a business organized for the purpose of engaging in agriculture to file annual reports detailing its involvement.[79] Failing to report, or violating any of the statutory provisions, will subject the

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74. *See* MINN. STAT. ANN. § 500.24(3)(c) (West Supp. 1992); MO. ANN. STAT. § 350.015(3) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-5 (1991); WIS. STAT. ANN. § 182.001(2)(c)(2) (West 1992).

75. *See* NEB. CONST. art. XII, § 8(1)(F)-(I) (creating exceptions for corporations that use the land to produce poultry, alfalfa, seed, nursery plants, or sod; and corporations that acquire the land to obtain mineral rights); KAN. STAT. ANN. § 17-5904(a)(8), (13) (Supp. 1991) (creating exceptions for corporations that use the land "as a feedlot, a poultry confinement facility or rabbit confinement facility"; and for corporations that produce coal and farm tracts of land the corporation previously strip mined); MINN. STAT. ANN. § 500.24(3)(j), (k), (n) (West Supp. 1992) (creating exceptions for electric generation or transmission cooperatives that use the land in their business, for corporations that use the land to replace or expand asparagus growing operations, and for corporations that use the land to meet pollution control requirements); MO. ANN. STAT. § 350.015(6) (Vernon 1991) (creating exception for corporations that use the land for alfalfa dehydration); N.D. CENT. CODE § 10-06-01.2 (1985) (creating exception for corporations that own or lease farm or ranch land when maintenance of such interest in the land is reasonably necessary to the corporation's efforts to conduct "surface coal mining operations or related energy conversion."); S.D. CODIFIED LAWS ANN. § 47-9A-11 (1991) (creating exception for corporations that use the land to feed livestock); WIS. STAT. ANN. § 182.001(2)(c)(3) (West 1992) (creating exception for corporations that use the land to meet pollution control requirements).

76. *See* NEB. CONST. art. XII, § 8(1)(D); IOWA CODE § 172.C.4(9) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(7) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(c) (West Supp. 1992); MO. ANN. STAT. § 350.015(3) (Vernon 1991); OKLA. STAT. ANN. tit. 18, § 952(E) (West 1986); S.D. CODIFIED LAWS ANN. § 47-9A-5 (1991); WIS. STAT. ANN. § 182.001(2)(c)(1) (West 1992).

77. *See* NEB. CONST. art. XII, § 8(1)(B); IOWA CODE § 172C.4(3) (Supp. 1991); KAN. STAT. ANN. § 17-5904(2) (Supp. 1991); MINN. STAT. ANN. § 500.24(3)(g), (m) (West Supp. 1992); MO. ANN. STAT. § 350.015(7) (Vernon 1991); N.D. CENT. CODE § 10-06-04.1 (1985); S.D. CODIFIED LAWS ANN. § 47-9A-8 (1991).

78. *See* IOWA CODE § 172C.4(6) (Supp. 1991); KAN. STAT. ANN. § 17-5904(a)(5) (Supp. 1991).

79. *See* IOWA CODE §§ 172C.5A- .11 (1991 & Supp. 1991); KAN. STAT. ANN. § 17-5902 (1988); MINN. STAT. ANN. § 500.24(4) (West Supp. 1992); MO. ANN. STAT. § 350.020 (Vernon 1991); N.D. CENT. CODE § 10-06-08 (Supp. 1991); S.D. CODIFIED LAWS ANN. § 47-9A-19 (1991).

business to penalties. The Attorney General in each state may bring actions to enforce the regulations.[80] Only Oklahoma allows a private citizen to bring an action.[81]

Under the enforcement scheme provided by these statutes, the corporation has an affirmative duty to report its own abuses. A question then arises whether all corporate activity is being reported. Of course, requiring a state agency to actively gather the information and prepare the report is an alternative to self-reporting. Considering the time and expense of this alternative, self-reporting seems more feasible. Proof that abuses are not being reported will probably need to be provided, however, before any changes in the reporting method occur.

E. *Judicial Interpretation*

The constitutionality of anticorporate farming statutes appears to be settled. Admittedly, the power to regulate corporate farming has not been litigated in all the states.[82] The results from cases in North Dakota, Nebraska, and Missouri should, however, guide other jurisdictions.

One of the first challenges to these anticorporate farming statutes occurred in North Dakota. In *Asbury Hospital v. Cass County*,[83] a hospital challenged a North Dakota statute providing:

> "That any corporation, either domestic or foreign, that acquires any rural real estate, used or usable, for farming or agriculture, by judicial process or operation of law, hereafter, except such as is reasonably necessary in the conduct of its business, shall dispose of such real estate within ten years from the date that it is so acquired. . . ."[84]

The hospital argued the statute violated the Privileges and Immunities Clauses of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution.[85] The hospital further asserted the statute violated the Contract Clause of Article I, Section 10 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as similar rights protected by the state constitution.[86] The North Dakota Supreme Court

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80. *See* IOWA CODE § 172C.11 (Supp. 1991); KAN. STAT. ANN. § 17-5906 (1988); MINN. STAT. ANN. § 500.24(5) (West 1990); MO. ANN. STAT. § 350.030 (Vernon 1991); N.D. CENT. CODE § 10-06-13(1) (Supp. 1991); S.D. CODIFIED LAWS ANN. § 47-9A-21 (1991); WIS. STAT. ANN. § 182.001(4) (West 1992).

81. *See* OKLA. STAT. ANN. tit. 18, § 956 (West 1986).

82. SMART & HOBERG, *supra* note 39, at 61-62.

83. Asbury Hosp. v. Cass County, 326 U.S. 207 (1945).

84. *Id.* at 443 (quoting 1933 N.D. Laws ch. 89, § 3).

85. Asbury Hosp. v. Cass County, 16 N.W.2d 523, 523-24 (N.D. 1944), *aff'd*, 326 U.S. 207 (1945).

86. *Id.*

considered and rejected each asserted infringement.[87] On appeal, the United States Supreme Court agreed that a "state's powers over a foreign corporation as such justify the compulsory disposition of its farmland within the state."[88]

The *Asbury Hospital* case was cited in *Omaha National Bank v. Spire*,[89] a later Nebraska case. The challenged law in *Spire*, an amendment to the Nebraska Constitution, provided "'[n]o corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.'"[90] The bank challenged the amendment on various grounds, including a claim the amendment conflicted with the Equal Protection Clause of the Fourteenth Amendment.[91]

The Nebraska Supreme Court noted that in matters relating to *economic* issues, the United States Supreme Court has in effect stated it "'defers to legislative determinations as to the desirability of particular statutory discriminations.'"[92] Unless a fundamental right is involved, a discriminatory classification within a statute—or in this case, within a constitutional amendment—need only "be rationally related to a legitimate state interest."[93]

The Nebraska court found the amendment addressed a legitimate state interest.[94] From the time of the American Revolution, the court reasoned, the popular thought was that the public is served by actions to "eradicate the feudal incidents" resulting from the ownership of large blocks of land by a few landowners.[95] The court also cited *Asbury Hospital* for the principle that prohibiting a corporation from owning agricultural land does not "'deny any right guaranteed to it by the several provisions of the Constitution of the United States and the [state constitution].'"[96]

A more recent challenge occurred in Missouri. In *State ex rel. Webster v. Lehndorff Geneva, Inc.*,[97] the Missouri Supreme Court upheld the state's restriction on corporate land ownership by using a rational basis test.[98] In

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87. *Id.* at 525.

88. Asbury Hosp. v. Cass County, 326 U.S. at 216.

89. Omaha Nat'l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986).

90. *Id.* at 271. The quoted language originally appeared in Initiative Petition 300, which purported to add § 8 to article XII of the Nebraska Constitution. *See id.* This language was adopted by Nebraska voters on November 2, 1982. *Id. See generally* NEB. CONST. art. XII, § 8(1).

91. Omaha Nat'l Bank v. Spire, 389 N.W2d at 272.

92. *Id.* at 282 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)); *see also* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

93. Omaha Nat'l Bank v. Spire, 389 N.W.2d at 282.

94. *Id.* at 282-83 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42, n.5 (1984)).

95. *Id.*

96. *Id.* (quoting Asbury Hosp. v. Cass County, 16 N.W.2d 523, 525 (N.D. 1944), *aff'd*, 326 U.S. 207 (1945)).

97. State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801 (Mo. 1988) (en banc).

98. *Id.* at 805.

reaching this conclusion, the court eloquently made the case for anticorporate farming statutes, stating:

> The effect of the statute, which forms a rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland. The legislature apparently believed that the superior financial and other business resources of these corporations would have a detrimental effect on traditional farming entities. This is because the cyclical nature of the farming industry periodically causes depressed markets and losses which large diversified corporations are better able to sustain. Thus, the traditional farming entities would operate at a competitive disadvantage.
>
> The statute also has the effect of prohibiting large corporations, already controlling much of the processing and distribution of agricultural commodities, from buying large tracts of land for production of the commodity in which they deal, so as to vertically integrate an industry to the competitive exclusion of traditional farming entities.
>
> It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such statute is rationally related to a legitimate state interest.[99]

To this point, this Article has focused on controlling land ownership as a method of protecting the family farmer. As the threat of increased competition from foreign investors has proven illusory, the primary area of regulation has been in controlling competition from corporations. As previously discussed, this regulation has been undertaken exclusively by the individual states.[100]

Agriculture in general, and farming specifically, involve much more than simple land ownership. To remain profitable, farmers must maximize their labor, capital, and management resources in the production of market products. In this regard, land is a resource, not the ultimate product of a farming operation. The farmer's product includes livestock, produce from livestock (i.e., milk, eggs, wool), and foodstuffs and feed grains grown on land controlled by the farmer.

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99. *Id.* at 805-06.
100. *See supra* text accompanying notes 39-54.

This Article will next focus on corporate involvement in the production of agricultural commodities by examining the methods of control and considering a new issue for the future.

V. ANTICORPORATE FARMING LAWS AND THE PRODUCTION OF AGRICULTURAL COMMODITIES

A. *Prohibiting Corporations from Engaging in Farming*

Statutes that prohibit corporate ownership or lease of agricultural land significantly restrict potential corporate involvement in agriculture. Not only do they prohibit corporations from acquiring and holding agricultural land, but they also deny control of an important input in the production of agricultural commodities.

The statutory or constitutional language of seven states—Minnesota, Missouri, Nebraska, Oklahoma, North Dakota, South Dakota, and Wisconsin—further discourage corporate involvement in agriculture by prohibiting a corporation from engaging in the actual process of farming.[101] In these statutes, farming is typically defined as:

> [C]ultivating land for production of agricultural crops or livestock, or the raising or producing of livestock or livestock products, poultry or poultry products, milk or dairy products, or fruit or horticultural products. It does not include production of timber or forest products, nor does it include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.[102]

In states that prohibit a corporation from engaging in farming, many inputs in the production of agricultural commodities are removed from corporate control.[103] The result is a fairly comprehensive prohibition on corporate control of land, labor, and livestock, which encourages corporations to invest their capital in other activities.

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101. *See supra* notes 52-54. Note that in Wisconsin the corporation or trust is prohibited from owning land to carry on farming operations. WIS. STAT. ANN. § 182.001(1) (West 1992). Those operations "are the production of dairy products not including the processing of such dairy products; the production of cattle, hogs, and sheep; and the production of wheat, field corn, barley, oats, rye, hay, pasture, soy beans, millet and sorghum." *Id.* § 182.001(3) Thus, in Wisconsin, corporations are effectively prohibited from engaging in farming.

102. N.D. CENT. CODE § 10-06-01.1 (1985). This definition is representative of the definitions used by other states. *See* NEB. CONST. art. XII, § 8(1); MINN. STAT. ANN. § 500.24(2)(a) (West 1990); MO. ANN. STAT. § 350-010(6) (Vernon 1991); S.D. CODIFIED LAWS ANN. § 47-9A-2(3) (1991); WIS. STAT. ANN. § 182.001(3) (West 1992). Oklahoma prohibits corporations from engaging in farming, *see* OKLA. STAT. ANN. tit. 18, § 951(A) (West Supp. 1993), but does not define farming. *See id.* §§ 951-56 (West 1986 & Supp. 1993).

103. *See supra* text accompanying notes 101-02.

Iowa and Kansas have not yet explicitly prohibited a corporation from engaging in farming, although they do prohibit a corporation from taking an interest in agricultural land.[104] Engaging in agriculture, however, can involve more than land ownership. For example, the corporation could contract to provide the equipment and other inputs needed to produce a crop on agricultural land owned by someone else. Engaging in agriculture could also involve livestock production. Although the corporation may not be able to own the agricultural land on which the livestock is produced, it would not be prohibited from owning the livestock.

Iowa and Kansas do have statutes containing similar language. Conceivably, some borrowing was done between the two states when the statutes were originally enacted.[105] Yet, neither state borrowed language from the other seven states within the anticorporate farming zone. Interestingly, the statutes from both states define farming,[106] and the definitions employed are similar to the definitions used by the other seven states.[107] The statutes do not, however, prohibit a corporation from engaging in farming as so defined. Perhaps the definition of farming was included to complement the definition of a family farm corporation—a family farm corporation is defined as being "founded for the purpose of farming."[108] As a result, a corporation need not qualify as a family farm corporation or an authorized farm corporation before it may engage in farming and the production of agricultural commodities in Iowa and Kansas.

B. *Controlling Vertical Integration by Livestock Processors*

As was previously discussed, Iowa and Kansas do not prohibit a corporation from engaging in farming. This "loophole" was utilized by livestock processors who wished to vertically integrate their operations by owning the livestock they processed. "[W]hen a company involved in one phase of a business absorbs or joins a company involved in another phase in order to guarantee a supplier or a customer," it is said to be vertically integrated.[109] Owning or controlling the raw materials (in this case livestock) is also a form of vertical integration.[110] Vertical integration is advantageous because it gives a business the ability:

104. *See supra* note 52.

105. *See* SMART & HOBERG, *supra* note 39, at 7.

106. IOWA CODE § 172C.1(6) (1991) (recodified at IOWA CODE § 172C.1(11) (Supp. 1991)); KAN. STAT. ANN. § 17-5903(h) (Supp. 1991).

107. *See supra* text accompanying notes 101-02.

108. *See* IOWA CODE § 172C.1(8)(a) (Supp. 1991); KAN. STAT. ANN. § 17-5903(j)(1) (Supp. 1991); *see also supra* note 52.

109. DAVID J. RACHMAN & MICHAEL H. MESCON, BUSINESS TODAY 37 (2d ed. 1979). Note the authors designate this business arrangement as a vertical merger. *Id.*

110. *See generally* BARRY et al., *supra* note 19.

> 1) [T]o closely ally with a particular market outlet to assure future market access;
>
> 2) to become tied more closely with a particular source of raw product . . . that is not available on the open market, and that might improve profitability;
>
> 3) to acquire marketing and supervisory skills in order to better coordinate production to market specifications; [and,]
>
> 4) to obtain better financing through vertical coordination.[111]

In sum, vertical integration ultimately results in a power to affect the market.

Vertical integration was viewed as an unfair burden on the individual producer. Not only could the processor control the production of the livestock it slaughtered, but it could do so in direct competition with individual producers. The processor could enjoy the advantages of vertical integration, while the individual producer would lose a buyer for his livestock. This result was certainly not intended when the anticorporate farming statutes were enacted. The statutes prohibiting corporate ownership of agricultural land, and thus, the ownership of agricultural feedlots, were enacted for the express purpose of "preserv[ing] free and private enterprise, preventing monopoly and protecting consumers."[112]

Iowa and Kansas each tried to close the loophole in their respective statutes by enacting amendments that prohibited vertical integration by processors.[113] Although these states may have borrowed from one another when

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111. BARRY et al., *supra* note 19, at 441-42.

112. IOWA CODE § 172C.2 (1987) (amended 1988).

113. *See* IOWA CODE § 172C.2 (1987) (amended 1988); KAN. STAT. ANN. § 17-5905(a) (1988). The Iowa statute provided:

> In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner, to own, control or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter. However, this section shall not preclude a processor or limited partnership from contracting for the purchase or feeding of hogs or cattle, provided that where the contract sets a date for delivery which is more than twenty days after the making of the contract it shall: 1. Specify a calendar day for delivery of the livestock; or 2. Specify the month for the delivery, and shall allow the farmer to set the week for the delivery within such month and the processor or limited partnership to set the date for delivery within such week. This section shall not prevent processors or educational institutions from carrying on legitimate research, educational, or demonstration activities, nor shall it prevent processors from owning and operating facilities to provide normal care and feeding of animals for a period not to exceed ten days immediately prior to slaughter, or for a longer period in an emergency. Any processor or limited partnership which owns, controls, or operates a feedlot on August 15, 1975 shall have until July 1, 1985 to dispose of the property.

adopting statutory language in the past, they chose different approaches in this area. Iowa prohibited processors from "own[ing], control[]ing] or operat[ing] a feedlot in Iowa where hogs or cattle are fed for slaughter."[114] Kansas, on the other hand, prohibited the ownership of hogs by a processor, and also prohibited a processor from "[c]ontract[ing] for the production of hogs."[115]

The Kansas statute was clearly superior in limiting vertical integration by the processor. The Iowa statute still permitted the ownership of cattle and hogs by the processor—although processors could not own the feedlots, they could control the production of livestock through the use of contract feeding.

The Iowa legislature responded by amending the statute. The most recent amendment prohibits a processor from "control[]ing] the manufacturing, processing, or preparation for sale of pork products derived from swine if the processor contracted for the care and feeding of the swine in this state."[116] This provision does not completely foreclose use of contract feeding by a processor. Hogs can still be fed under contract in neighboring states and then be transported to Iowa for processing. Similarly, the processor could enter into a contract feeding agreement in Iowa for hogs that will be processed outside the state. Because neither of these options may be economically feasible, however, the statute may limit contract feeding of hogs by livestock processors.

Iowa and Kansas' legislative reactions aligned these states with other states in the anticorporate farming zone that do not allow nonqualifying corporations to produce agricultural commodities. Although this is a positive step, it may not go far enough—a corporation that is not a processor may still own livestock within these two states or enter into contracts for the care and feeding of the animals.

Additionally, and possibly of greater importance, the statutes of the remaining seven states that prohibit a corporation from engaging in agriculture may be interpreted as not reaching contract feeding. Or perhaps, the statutes will simply not be enforced. This will render the control of contract feeding an important topic in all states in the anticorporate farming zone.

IOWA CODE § 172C.2 (1987) (amended 1988). The Kansas statute provides:

> In order to preserve free and private enterprise, prevent monopoly and protect consumers, it is unlawful for any processor of pork or limited partnership in which a processor holds partnership shares as a general partner or partnership shares as a limited partner to: (1) Contract for the production of hogs of which the processor is the owner or (2) own hogs, except such processor may own hogs for 30 days before such hogs are manufactured, processed or prepared for sale as pork products.

KAN. STAT. ANN. § 17-5905(a) (1988).

114. *See* IOWA CODE § 172C.2 (1987) (amended 1988).

115. KAN. STAT. ANN. § 17-5905(a)(1) (1988).

116. IOWA CODE § 172C.2 (1991).

VI. CONTROLLING CONTRACT FEEDING: A NEW AGENDA IN ANTICORPORATE FARMING LAW?

A. *The Production Contract*

Under the traditional livestock production process, the livestock owner fed and cared for the livestock throughout the growing period. Contract feeding arrangements split this process. Under contract feeding, a livestock owner enters into a care and feeding agreement with a production facility or feedlot owner. Typically, the feedlot owner will furnish facilities and labor in exchange for payment by the livestock owner for the livestock's care and feeding. Such payment is usually made after care and feeding is rendered. The parties often include specific terms indicating who will bear production costs such as feed, medication, and utilities.

The most notable aspect of contract feeding is its impact on the individual producer. By splitting the traditional production process, and thereby splitting the risks, contract feeding shifts some of the entrepreneurial elements associated with farming away from the individual producer.[117]

The producer entering a production contract may gain a person or entity with whom risk may be shared, but forfeits two important characteristics of entrepreneurship—ownership and control. One commentator observed:

> The farmer's entrepreneurial position is weakened substantially by never gaining ownership of the final product. Among other things, he cannot pledge the product as security for a loan, he must follow meticulous care instructions of the [owner] in growing the product, and it is not his [option] to hold for a better price or to sell elsewhere.[118]

A similar change arises in the area of control. Under a contract feeding agreement, the producer does not make many of the day-to-day decisions. Rather, they are controlled by the contract provisions or are made by the owner or his agent.[119]

The transfer of ownership and control also diminishes the producer's identity. Outwardly, the producer conducts business in a manner similar to other producers, although many of the rights of ownership and control have been shifted away.[120] Lenders, suppliers, and others unaware of the underlying production contract may be misled as to their rights and security in the producer's operation.

As the producer loses identity as a sole proprietor, questions arise as to the producer's status. "Is the [producer] an agent, an independent contractor,

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117. MARSHALL HARRIS, ENTREPRENEURSHIP IN AGRICULTURE (MONOGRAPH NO. 12 University of Iowa Agric. L. Ctr. 101 (1975)).

118. *Id.* at 100.

119. *Id.* at 101.

120. *Id.* at 101-02 (citing Marcus v. Eastern Agric. Ass'n, 161 A.2d 247 (N.J. 1960)).

a partner, a joint venturer, a borrower, a bailee, or is there some other form of business relationship?"[121] If producers shift rights and control, do they become the owner's employee? How much ownership and control should be shifted, and how much should be retained? These questions, and other provisions discussed below, should be answered within the production contract.

B. *Production Contracts: Fairness or Feudalism?*

Producers take a risk when they contract away too much of their right to control the production process. Given the unequal bargaining position from which many individual producers operate, production contracts have the potential to transform an independent farmer into a serf on his own land.[122]

In most situations, the contracting parties will not possess equal bargaining power. Typically, an individual producer is given a contract drafted by an agribusiness corporation. The corporation seeks to vertically integrate its operation, which is usually the processing or marketing of some agricultural product. Because the success of integration depends on strict control of a corporation's costs, there is usually little room for negotiation on many of the contract provisions.

Some inequities can be attributed to cultural differences. Community standards and traditions may incorporate the implied covenant of good faith and fair dealing into an individual producer's day-to-day business dealings.[123] The producer may be accustomed to operating under verbal agreements when dealing with neighbors and local merchants. In these situations, a precise written contract outlining specific duties may not be necessary. Community standards may not affect the corporate consciousness in the same manner.

Economic differences can also affect each party's bargaining position.[124] Finally, differences in educational levels may play a part. Even sophisticated producers are subject, however, to unfair treatment when their option upon entering into a contract is "take it, or leave it."

"Take it, or leave it" provisions allow the owner to control when animals are placed in the producer's facilities and when they are removed for market, and also let the owner control feeding decisions and medications.[125] The contract will usually give the owner control over the timing, method, and rate

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121. *Id.* at 101.

122. Christopher Sullivan, *Chicken Growers Claim "Federal" Contracts Keep Them From Riches*, DES MOINES SUNDAY REGISTER, Nov. 25, 1990 at 1J. Note the statement of Vreeland G. Johnson, attorney for the plaintiff producers in Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991): "What you've got is a feudal system almost. [Contract growers] are at the total whim and mercy of the processors." Sullivan, *supra*, at 2J.

123. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

124. *See supra* text accompanying notes 41-51.

125. *See generally* James J. Long, *Contract Feeding of Swine*, and accompanying presentation at 1989 Rural Attorneys and Agriculture Conference, Nov. 10, 1989 (available from the Drake Agricultural Law Center).

of payment.[126] The contract may also provide for a reduction of the producer's payment if production goals are not met, or if expenses or death losses exceed certain levels.[127] On rare occasions, there may even be bonus provisions if the producer reduces expenses below anticipated levels, or reduces death losses.

The concept of contract feeding is not new. The broiler chicken industry has used contracting for many years.[128] Contract feeding has since expanded into the entire poultry industry, including egg and turkey production.[129] Thus, the poultry industry served as a testing ground for the development of production contracts. It also demonstrated the inherent dangers that arise when a producer's right of ownership and control is transferred away.

Braswell v. ConAgra, Inc.[130] illustrates this point. In *Braswell*, a class action suit was brought on behalf of producers who contracted with a large agribusiness entity to grow broiler chickens over an eight-year period.[131] Under the provisions of the standard form contract, the company provided chickens, feed, and medicine, while the producer supplied housing and care.[132] The company also established minimum standards under which the chickens were to be raised, and decided when the chickens would be removed from the producers' facilities.[133] In addition, the company dictated the process under which payments to the producers were to be determined.[134] This final element, the calculation of payment, proved to be an area in which the producers were defrauded and underpaid.

The company's procedure to determine payment at the end of a growing period began with the delivery of empty trucks to the producers' farms.[135] The trucks were loaded with chickens and returned to the plant.[136] Once there, the trucks were weighed, unloaded, and weighed again when empty.[137] The difference between the trucks' gross weight when full and their weight when unloaded (tare weight) was recorded as net weight.[138] The net weight was used to determine the amount the producers were paid.[139] Payment was based on a formula keyed to the number of pounds of live broiler chickens produced, taking into account a ratio between weight gained and feed consumed.[140]

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126. *Id.*
127. *Id.*
128. *See generally* HARRIS, *supra* note 117.
129. *See generally* HARRIS, *supra* note 117.
130. Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991).
131. *Id.* at 1172.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

According to the evidence presented at trial, company employees systematically inflated the tare weight of unloaded trucks.[141] As a result, the total number of pounds of chicken produced by each producer appeared less than it actually was, and each producer received a smaller payment than they deserved. One inflation method was to switch trucks—a lighter truck was used to determine the gross weight while a heavier truck was used to determine the tare weight.[142] In some instances, fuel tanks were refilled before the second weighing for tare weight.[143] Less imaginative methods were also used, including loading the truck with steel grates before reweighing, or simply putting two or three persons on the scale while the unloaded truck was weighed.[144]

The *Braswell* plaintiffs prevailed at trial on breach of contract and fraud claims.[145] The plaintiffs would have been equally well served, however, by a contract with a provision protecting their interests when the chickens were weighed and contract payments determined. Because of the apparent inequities in the contract, the producers were required to resort to litigation to enforce their rights.

An equitable provision in the production contract could have required the company to weigh the trucks with full fuel tanks before departing for the producers' facilities. The producers would then be given a copy of the scale ticket that indicated the empty (tare) weight when the truck arrived at the producer's farm. Once loaded, and on return to the company's plant, the fuel tanks would be refilled, and the loaded truck weighed to determine the gross weight. The producers would receive a second copy of the scale ticket indicating the gross weight. The difference between the weights on the two tickets, the net weight, would provide both the producers and the company with a true measure of the number of pounds of live chickens produced. This procedure would help eliminate all but the most blatantly fraudulent activities undertaken by the company's employees. Eliminating false weights, which resulted from putting extra people on the scale, would require more contract modification. The contract could require that trucks' weights, both empty and full, be determined at an independent scale, rather than at the company's facilities.

1. *Moving Toward Fairness—The Contract*

There are many provisions to a production contract. The *Braswell* case provides only one example of the harm unequal bargaining position may cause a producer.

141. *Id.* at 1174.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1172.

Steps should be taken to protect the individual producer. For instance, a provision that addresses the parties' relationship will eliminate the question of whether the producer is an independent contractor or the owner's agent.[146] Other recommended provisions include terms that address (1) the duration of the contract period; (2) the timing of the delivery and removal of the animals; (3) the feed consumption goals; (4) the death-loss tolerances; (5) the determination of payments; (6) dispute resolution; and (7) contract termination, either with or without default by either party. A provision that indicates which party bears the risk of animal loss while the animals are at the producer's facilities or are in transit should also be included.

All of these items should be considered at the time the production contract is executed. Depending on the circumstance of their operation, however, individual producers may place a different priority on these terms. For example, a producer that depends on a guaranteed number of contract payments to repay a loan that finances the construction or remodeling of facilities would most likely place a high priority on contract length. In this area, it is important to remember production contracts are vital to the expansion of many producers' facilities. Payments under a production contract provide the security necessary to satisfy many lenders' loan documentation requirements.

2. *Moving Toward Fairness—Legislation*

The question of whether states should limit the use of contract feeding by corporations is in some ways analogous to the question of whether states should limit corporate ownership of agricultural land. As the case law indicates, a state has a legitimate interest in protecting its citizens from unfair competition.[147] Nevertheless, controlling corporate contract feeding can be distinguished from controlling corporate ownership of agricultural land.

When corporations compete with the family farm for land ownership, the only possible benefit family farmers realize is an increase in the value of their land. Naturally, increased competition will drive up the land's price. This benefit has little actual value, however, unless the family farmer is in a position to sell.[148] Conversely, when a corporation enters into a contract feeding agreement, the family farm may receive a direct benefit. Rather than

146. *See* HARRIS, *supra* note 117, at 101.

147. *See supra* text accompanying notes 82-100.

148. Increasing land prices may have disastrous effects. For example, "[t]he value of agricultural real estate escalated from $216 billion in 1970 to $767 billion in 1980 and then crashed." Gregg Easterbrook, *Making Sense of Agriculture*, *in* IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?, *supra* note 1, at 3, 13. Those who owned land that was increasing in value were encouraged to borrow money against this increasing value. In fact "[t]he economic conditions of the 1970's seemed to say that it had actually become smart to pile loans on top of loans. But if inflation stopped, the loans would smash into each other like race cars trying to avoid a wreck." *Id.*

being squeezed out by competition, the family farmer can take advantage of the situation. The corporation will need a facility where its livestock can be raised, and the family farmer can potentially fill this need. Contract feeding allows individual farmers to share the risk inherent in livestock production with the corporate livestock owner.

Controls over corporate contract feeding arrangements should not attempt to eliminate corporations from the production contract process in the same way corporations are prevented from owning agricultural land. Rather, controls placed on livestock production contracts should be aimed at promoting the family farm while eliminating market power inequities between the corporation and the individual producer. Laws that prohibit corporate ownership of livestock may protect the producer within a state from competition; however, these laws may also eliminate an opportunity for some producers to expand their business or enter into new operations.

One step in the process would be to allow the corporate ownership of livestock raised under contract within a state if at least one of the contracting parties is either an individual farmer, family farm corporation, or authorized farm corporation. Thus, the family farmer would be protected from the competitive forces of corporations that produce agricultural commodities, and would still have the option of entering into production contracts. If this approach is taken, states should pay close attention to the definition of an authorized farm corporation. Otherwise, the provision may encourage nonfarm individuals to form authorized farming corporations solely for the purpose of operating as contract caregivers for a sister corporation that owns the livestock.

This would be only one step. Steps would still need to be taken to ensure fairness in the contracts.

VII. CONCLUSION

Agriculture and farming abound with risks and competitive forces. Of the two sources of competition for ownership of agricultural land—the foreign investor and the corporation—the threat posed by the foreign investor has proven illusory, while the threat posed by the corporation remains very real. "[N]o other [business] form has approached the success of the corporation in bringing together money, resources, and talent; in accumulating assets; and in creating wealth."[149] Without some regulation of corporate involvement in agriculture, the individual producer is distinctly disadvantaged. To date, nine states have responded by enacting anticorporate farming laws.[150] These states protect the individual producer from the competitive forces of publicly held corporations in the agricultural land market. Although not as comprehensively, the nine states also protect the individual producing agri-

149. RACHMAN & MESCON, *supra* note 109, at 36.

150. *See supra* text accompanying notes 52-54.

cultural commodities.[151] Perhaps the farming practices, climatic conditions, land ownership laws, land transfer laws, population characteristics, and culture making this area of the country unique explain why these laws have not been duplicated in other sections of the United States.[152] If this is true, the anticorporate farming statute will remain a uniquely Midwestern law.

Agricultural production contracts may provide an exception. Producers of agricultural commodities from Alabama to California and Minnesota to Texas are subject to unfair contract provisions and practices regardless of whether a state enacted an anticorporate farming statute. Producers, or their legal counsel, should carefully review the provisions of their production contracts before execution. Even if certain provisions are nonnegotiable, producers should be aware of their potential effect.

The regulation of agricultural production contracts may comprise part of a new agenda in anticorporate farming law. If legislatures from states inside, as well as outside, the anticorporate farming zone seek to regulate these contracts, they should remember statutes can be written to prohibit *and* promote. Legislatures can promote the family farm and still regulate agricultural production contracts by requiring one of the contracting parties be a family farmer. This would ensure the producer a place in the production process.

If states adopt the goal of promoting production contracts while protecting the individual producer from unfair contract provisions and practices, perhaps in the future we will not ask whether we have a moral obligation to save the family farm. If action that both protects and promotes is taken, family farmers may be able to save themselves.

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151. *See supra* text accompanying notes 101-116.

152. *See* WALKER WILCOX & WILLARD COCHRANE, ECONOMICS OF AMERICAN AGRICULTURE 31 (2d ed. 1960). The authors write:

> Many factors influence the type of farming followed in a community. Biological conditions, such as the prevalence of insect pests, weeds, and plant and animal diseases are important. Economic factors such as the availability of relatively cheap labor in the South and Southwest, or the location of nearby market outlets for perishable products are the critical influences in certain areas.

Id.