THE THREE LITTLE PIGS AND THE BIG BAD WOLF: A PROPOSAL TO REFORM PACKER-FEEDER LAWS IN THE EIGHTH CIRCUIT

ABSTRACT

Raising pigs has dramatically changed from an industry dominated by small independent owners to an industry led by large companies that have integrated multiple steps in the production process. As a means to preserve the Jeffersonian ideal of the yeoman farmer, many Midwestern states implemented packer-feeder laws to prevent corporate ownership of both upstream and downstream production functions. Though states had the support of the people, these statutory frameworks have failed to withstand constitutional challenges.

Iowa has experienced a unique history with packer-feeder laws, filled with judicial intervention, legislative retaliation, and executive concession. As the largest pork producing and pork processing state in the nation, Iowa has a vested interest in resolving this issue for the benefit of both its citizens and the hog industry.

Therefore, this Note analyzes Eighth Circuit court cases and the overturning of these packer-feeder laws as violating the dormant Commerce Clause of the U.S. Constitution. Following the analysis of litigation, there is an in-depth discussion of Iowa's current system of non-enforcement through an array of consent decrees. This Note concludes with potential solutions and a recommendation for the Iowa legislature that will benefit of every party involved.

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I. INTRODUCTION

Many variations of the fairytale about the three little pigs exist today, yet the moral remains consistent: you will not fare well with straw or sticks, so build your house with sturdy bricks. State restrictions are subject to a similar principle. It is much better to have a law made of bricks, which can withstand any huffing and puffing that may arise, rather than a law easily blown down by constitutional challenges.

In this Note, the characters of the fable are used to portray the legal principles surrounding packer-feeder laws in the Eighth Circuit. The three little pigs illustrate the past, present, and future of packer-feeder laws

restricting pork production in the Eighth Circuit, while the big bad wolf depicts the dormant Commerce Clause blowing down the various houses by finding such provisions unconstitutional. South Dakota's Amendment E,[1] Iowa's 9H.2 statute,[2] and Nebraska's Initiative 300[3] represent the collective effort to restrict processor ownership in upstream production—the straw house that has already been destroyed through litigation focused on dormant Commerce Clause arguments.[4] Iowa's section 202B.201[5] limitations symbolize the stick house presently being held together by consent decrees, which are set to expire in the near future.[6] The focus of this Note is to propose the blueprint of the brick house with hopes that the legislatures within the Eighth Circuit begin construction as a means to protect and fortify the pork production industry while preventing unnecessary litigation.[7]

II. OVERVIEW OF PACKER-FEEDER LAWS

Agriculture has played an essential role in American society since the inception of our country. Thomas Jefferson, an influential framer of the U.S. Constitution, held high respect for farmers and believed such citizens would be central to the success of the American democracy.[8] His vision of economically independent farmer-landowners[9] has become highly distorted through the evolution of agriculture in the past few decades.

1. S.D. CONST. art. XVII, §§ 21–24 (1999); *see also 1998 Ballot Question Text and Attorney General Explanations*, S.D. SECRETARY OF ST., http://sdsos.gov/content/viewcontent.aspx?cat=elections&pg=/elections/pastelections_electioninfo98_ballotextAGexplanation.shtm (last visited Nov. 29, 2012).

2. IOWA CODE § 9H.2 (2003).

3. NEB. CONST. art. XII, § 8 (1983); *see also History of Initiative 300*, CENTER FOR RURAL AFF., http://www.cfra.org/i300/history (last visited Nov. 29, 2012).

4. *See infra* Part III (discussing the history and eradication of packer-feeder laws in South Dakota, Iowa, and Nebraska).

5. IOWA CODE § 202B.201 (2011).

6. *See infra* Part IV (outlining the current regulatory framework of Iowa's restriction on packer ownership).

7. *See infra* Part V (discussing recommendations for packer-feeder law reform in Iowa and urging other states in the Eighth Circuit to follow suit).

8. *See* MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 116–18 (1970) (explaining Jefferson's agrarian ideology, which aligns the viability of a democratic nation with the existence of a tight-knit agricultural system comprised of yeoman farmers).

9. *See id.* (portraying agrarians as virtuous stewards of a small area of land who value community and self-sustainment).

Industrialization of agriculture has led companies to integrate upstream and downstream activities, creating an increased concentration of the production process.[10] Too much consolidation in the agricultural industry raises concerns of economic, political, and social issues arising from the potential elimination of open markets.[11] In response to such apprehensions, policymakers utilized constitutional amendment processes and legislative enactments to protect the Jeffersonian ideal of farmers and to promote competitive markets.[12]

A. *What Are Packer-Feeder Laws?*

As a means to prevent large companies from taking advantage of farmers, some states in the Midwest adopted constitutional amendments and statutes prohibiting corporate ownership in various sectors of the agricultural industry.[13] These anticorporate farming restrictions "range from prohibiting corporations and other business organizations from owning agricultural land and from engaging in farming; to prohibiting meat processors from getting involved with raising hogs; to restricting corporate farming in certain parts of the state."[14] Packer-feeder laws are those restrictions associated with the second example regarding livestock ownership. Specifically, these restrictions are "limits on large, corporate-owned farms . . . aimed at [preventing] what is called 'vertical integration,' in which the large corporate-owned meatpackers breed, raise, and slaughter the animals."[15]

10. *See* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213–18 (1993) (outlining the realities and concerns of the rapid industrialization of agriculture in America).

11. Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 531.

12. *See infra* Part III.A.2, B.2, C.2 (discussing the historical background surrounding the implementation of packer-feeder laws in South Dakota, Iowa, and Nebraska).

13. *See, e.g.*, NEB. CONST. art. XII (1983); S.D. CONST. art. XVII (1999); Act of July 11, 1975, ch. 133, 1975 Iowa Acts 309.

14. Matt M. Dummermuth, *A Summary and Analysis of Laws Regulating the Production of Pork in Iowa and Other Major Pork Producing States*, 2 DRAKE J. AGRIC. L. 447, 515 (1997).

15. Jennifer M. Vogel, *Iowa Code Chapter 9H.2: The State of Iowa's Battle Against Corporate Farming*, 30 J. CORP. L. 199, 201 (2004) (footnote omitted).

B. *Why Do We Have Packer-Feeder Laws?*

Integration, as a result of industrialization, has dramatically changed the dynamics of livestock production in recent decades.[16] Vertical integration in the pork sector means generally "controlling the food chain from breeding, farrowing, and finishing, to processing, marketing, and actually selling pork to the consumer."[17] Recent statistics illustrate 75% of the United States hog market is controlled by only forty integrators.[18]

Reorganization of the hog industry has resulted in larger operations at every point in the production process, allowing processors to decrease costs through directly ensuring uniformity and steady production flows.[19] While vertical integration allows for increases in production efficiency through effective utilization of capital, labor, and technology,[20] industrialized agriculture also raises many concerns about "environmental, economic, and social health" issues.[21] In an effort to balance the competing interests of integrators, producers, and consumers, packer-feeder laws were enacted.[22]

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16. *See* Hamilton, *supra* note 10, at 214–15 (examining trends in contract production of hogs and the effects these shifts have on the market).

17. Dummermuth, *supra* note 14, at 514.

18. JAMES M. MACDONALD & WILLIAM D. MCBRIDE, USDA, ECONOMIC RESEARCH SERVICE, THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE: SCALE, EFFICIENCY, AND RISKS 8 (2009), *available at* http://www.ers.usda.gov/media/184977/eib43.pdf.

19. *See id.* at 20.

20. *See* STEVE W. MARTINEZ, USDA, ECONOMIC RESEARCH SERVICE, VERTICAL COORDINATION IN THE PORK AND BROILER INDUSTRIES: IMPLICATIONS FOR PORK AND CHICKEN PRODUCTS 7–11 (1999), *available at* http://www.ers.usda.gov/media/491472/aer777_1_.pdf; Hamilton, *supra* note 10, at 213 ("[I]ndustrialization [is] the process whereby the production of goods is restructured under the pressure of increasing levels of capital and technology in a manner which allows for a management system to integrate each step in the economic process to achieve increasing efficiencies in the use of capital, labor and technology." (quoting Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, CHOICES, 4th Qtr., 1991, at 4) (internal quotation marks omitted)).

21. Karen Mundy & Wayne Purcell, *Agricultural Industrialization: David Versus Goliath*, 11 HORIZONS 1, 3 (1991).

22. *See, e.g.*, IOWA CODE § 202B.101 (2011) (stating that the purpose of Iowa's limitation on processor ownership is to "preserve free and private enterprise, prevent monopoly, and also to protect consumers").

C. *Why Are Packer-Feeder Laws Relevant?*

Pork production plays a pivotal role in state economies of the Midwest,[23] and restrictions imposed on the industry directly affect citizens of those areas. In June 2012, Iowa slaughtered hogs comprised 26.75% of the total number of hogs slaughtered in the United States, and the states of the Eighth Circuit were responsible for 54.4% of pork processing.[24] With over one-half of the entire nation's pork processing taking place in the states of the Eighth Circuit, this region's restriction of packer ownership in various stages of the production process creates a substantial effect both inside and outside the Eighth Circuit.

D. *Where Does the Federal Government Stand on This Issue?*

In December 2001, the U.S. Senate approved an amendment to the 2002 Farm Bill that would make it unlawful for a packer to "[o]wn, feed, or control livestock intended for slaughter" more than fourteen days prior to slaughter.[25] Proposed by a senator from South Dakota, this amendment was aimed at "protect[ing] America's livestock producers from the overwhelming market domination of a few meatpackers."[26] While the restriction on packer ownership gained support in the Senate, House members opposed the ban, raising arguments such as:

> the USDA has not found any causal relationship between captive supplies and price, the ban would flood the market with livestock currently owned by packers, without packer ownership farmers would have a harder time finding financing, the ban would cause capital to move out of the United States, the ban would have a negative effect on marketing agreements and forward contracts, and the ban would force livestock production out of the United States.[27]

The 2008 Farm Bill did not have a specific ban on meatpacker

23. *See* NAT'L AGRIC. STATISTICS SERV., USDA, LIVESTOCK SLAUGHTER 9 (2012), *available at* http://www.nass.usda.gov/Publications/Todays_Reports/reports/lstk0712.pdf (providing data that estimates more than 72% of all hogs slaughtered in the United States are processed in the Midwest).

24. *Id.*

25. 147 CONG. REC. S13,093, S13,099 (daily ed. Dec. 13, 2001).

26. *Id.* at S13,093.

27. Roger A. McEowen et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. AGRIC. L. 267, 301–02 (2002) (footnotes omitted) (summarizing arguments made by representatives during House and Senate committee hearings and personal interviews conducted by the authors).

ownership of livestock, but Congress did agree to amend the Packers and Stockyards Act of 1921 to provide more protection to swine contract producers.[28] In recent months, the Grain Inspection, Packers and Stockyards Administration (GIPSA)—the USDA agency "responsible for monitoring, reviewing, and investigating livestock and poultry markets to promote fair competition, provide payment protection through bonding and packer trusts, and guard against deceptive and fraudulent trade practices"—has proposed new regulations under the Packers and Stockyards Act.[29] Changes most relevant to processor ownership include: relaxing the standard of proof for growers from "harm to competition" to unfair practices by processors, banning packer-to-packer sales, and mandating all contracts be made publically available.[30]

The U.S. Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes."[31] Though Congress is expressly allowed to enact legislation that may inhibit commerce between the states, some suggest within the same text there exists an implicit meaning that states cannot pass laws that unduly burden interstate commerce—commonly referred to as the dormant Commerce Clause.[32] Therefore, while state limitations on integrator ownership in the hog industry may be found unconstitutional as violating

28. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1356–58 (2008).

29. JOEL L. GREENE, CONG. RESEARCH SERV., R41673, USDA'S PROPOSED RULE ON LIVESTOCK AND POULTRY MARKETING PRACTICES 1 (2011), *available at* http://www.nationalaglawcenter.org/assets/crs/R41673.pdf.

30. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,340, 35,346–47 (June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

31. U.S. CONST. art. 1, § 8, cl. 3.

32. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994) (explaining restrictions imposed on states by the dormant Commerce Clause); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (providing the modern dormant Commerce Clause test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960))); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–35 (1949) (discussing the intent of the Framers regarding implications of the Commerce Clause); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419–20 (Vicki Been et al. eds., 3d ed. 2006).

the dormant Commerce Clause,[33] similar action on behalf of Congress is completely permissible.[34] As such, the cleanest approach to restricting packer ownership is for Congress to enact federal legislation to create uniformity among the states. However, because this issue has yet to be addressed at the federal level, this Note proposes multiple plans of action state officials can commence in the meantime.[35]

III. THE FIRST LITTLE PIG AND ITS HOUSE MADE OF STRAW: PREVIOUS STATE RESTRICTIONS

In 1975, Iowa became the first state in the nation to enact a law specifically aimed at prohibiting meatpackers from engaging in contract feeding of livestock.[36] As rapid industrialization continued to transform the industry, other states began to follow Iowa's lead.[37] This overarching principle of protecting livestock producers from being taken advantage of by large-scale processors was exceedingly significant to the people of Nebraska and South Dakota—as evidenced by utilization of the constitutional amendment process rather than the legislative enactment route.[38] Though successful for a period of time in restricting processor ownership of livestock, during litigation in the past decade, each of these restrictions failed to withstand the destructive blow of the dormant Commerce Clause.[39]

33. *See, e.g.*, Jones v. Gale, 405 F. Supp. 2d 1066, 1088 (D. Neb. 2005) (holding Nebraska's restriction on packer ownership unconstitutional); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 990 (S.D. Iowa 2003) (finding Iowa's restriction on packer ownership unconstitutional); S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1050 (D.S.D. 2002) (finding South Dakota's restriction on packer ownership unconstitutional).

34. *See* U.S. CONST. art. 1, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. 1, § 8, cl. 18 (Necessary and Proper Clause); Gonzales v. Raich, 545 U.S. 1, 22 (2005) ("[W]hen [Congress] enact[s] comprehensive legislation to regulate the interstate market in a fungible commodity, Congress [is] acting well within its authority to 'make all Laws which shall be necessary and proper' to regulate Commerce . . . among the several States." (quoting U.S. CONST. art. 1, § 8) (internal quotation marks omitted)).

35. *See infra* Part V.B (discussing potential options for future state action).

36. *See* Act of July 11, 1975, ch. 133, § 2, 1975 Iowa Acts 309, 310–11 ("In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork . . . to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter.").

37. *See, e.g.*, NEB. CONST. art. XII (1983); S.D. CONST. art. XVII (1999).

38. *See* NEB. CONST. art. XII (1983); S.D. CONST. art. XVII (1999).

39. *See* Jones v. Gale, 405 F. Supp. 2d 1066, 1088 (D. Neb. 2005) (holding

James Joyce, the famous Irish author of the early twentieth century, once wrote that "errors are volitional and are the portals of discovery."[40] As a means to learn from our mistakes, it is important to thoroughly examine these restrictions enacted by certain states of the Eighth Circuit[41] and those cases determining such restrictions to be unconstitutional,[42] thereby discerning what not to do in future legislation.[43] Therefore, these next sections will describe the text, historical context surrounding the enactment, policy arguments in favor of and against, and efforts made during litigation to uphold and repeal each restriction. Sections for each state are organized chronologically according to the date each restriction was found to be unconstitutional and thereby repealed.

A. *South Dakota*

In 1998, nearly 60% of South Dakota voters supported an amendment of the state constitution to place limitations on corporate involvement in farming practices.[44]

1. *Text of the Amendment*

> No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state in the United States or any country. . . . The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.[45]

Nebraska's restriction on packer ownership unconstitutional); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 990 (S.D. Iowa 2003) (finding Iowa's restriction on packer ownership unconstitutional); S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1050 (D.S.D. 2002) (ruling South Dakota's restriction on packer ownership unconstitutional).

40. JAMES JOYCE, ULYSSES 190 (Random House 1961) (1914).

41. *See infra* Part III.A.1, B.1, C.1.

42. *See infra* Part III.A.3, B.3, C.3.

43. *See infra* Part V.

44. *Amendment E Received February Hearing*, THE NEW ERA (Parker, S.D.), Jan. 23, 2003, at 8 (reporting 59% of South Dakota voters supported Amendment E); *see also* S.D. CONST. art. XVII, §§ 21–24 (1999).

45. S.D. CONST. art. XVII, § 21 (1999).

Exceptions existed for cooperatives,[46] nonprofit corporations,[47] corporations or syndicates with continuous ownership,[48] livestock operations,[49] research farms,[50] and others.[51]

The hammer of the amendment came down in the last section, which provided:

> Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of §§ 21 to 24, inclusive, of Article XVII to the secretary of state on an annual basis . . . . The secretary of state shall monitor such reports and notify the attorney general of any possible violations . . . [who] shall [then] commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land . . . . If the attorney general fails to bring an action in circuit court to enforce §§ 21 to 24 . . . any resident of the state has standing in circuit court to sue for enforcement.[52]

2. *Amendment History*

A combination of the 1980s farm crisis and agriculture industrialization resulted in large farming operations getting larger and small farming operations disappearing—"get big or get out" became a harsh reality for American farmers.[53] South Dakotans feared the negative

46. *Id.* § 22(2) (exempting certain cooperatives that acquire or lease agricultural land); s*ee also id.* § 21 (failing to include cooperatives in the list of those organizations subject to prohibitions).

47. *Id.* § 22(3) (exempting "[n]onprofit corporations organized under state nonprofit corporation law").

48. *Id.* § 22(4) (allowing nonfamily corporations and syndicates to continue use of agricultural land "if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate").

49. *Id.* § 22(5) (permitting nonfamily farm corporations or syndicates to continue ownership of livestock owned as of November 3, 1998, and continue feeding livestock under contract as of November 3, 1998, until the expiration or termination of the contract).

50. *Id.* § 22(6) (exempting farms operated for research or experimental purposes with commercial sales incidentally resulting from research or experimental objectives).

51. *See id.* § 22(7)–(15) (providing exemptions irrelevant to this discussion).

52. *Id.* § 24.

53. *See* MANJULA V. GURU & JAMES E. HORNE, KERR CTR. FOR SUSTAINABLE AGRIC., U.S. FARM CRISIS 3–7 (2000), *available at* http://www.kerrcenter

impacts in rural areas were exacerbated by corporate ownership and nonfamily farming, even though legislative reports concluded "the presence of farm corporations in South Dakota [did] not appear to be a major cause of rural decline."[54]

The historical context with respect to the amendment process provided beneficial guidance to the courts when it was necessary to determine the purpose behind the policy. Amendment E[55] was adopted by the South Dakota voting public at large;[56] therefore, it was very difficult to ascertain the underlying intent of the restriction.[57] However, publications circulated at the time of voting and discussions from drafting meetings were helpful in determining the commonly understood effect this restriction was meant to have on agriculture in South Dakota.[58]

Minutes from Amendment E draft meetings suggest the intent of the drafters was to place limitations on out-of-state businesses.[59] Drafters were quoted saying it was necessary "to get a law in place to stop [Murphy Family Farms and Tyson Foods]" from building hog farming facilities in the state, and "[m]any have commented that . . . they do not want Murphys and Tysons walking all over them."[60] This evidence, along with planning meetings being deemed "hog meetings," illustrate the existence of a mutual understanding among the drafters, which would allow South Dakota to prevent processors, such as Tyson and Murphy Family Farms, from

.com/publications/FarmCrisis.PDF (detailing how farm dynamics in the U.S. shifted from small to large operations).

54. *See* Jeffrey M. Banks, Note, *The Past, Present and Future of Anti-Corporate Farming Laws in South Dakota: Purposeful Discrimination or Permissive Protectionism?*, 49 S.D. L. REV. 804, 806 (2004) (footnote omitted) (internal quotation marks omitted).

55. S.D. CONST. art. XVII, §§ 21–24 (1999) (commonly referred to as Amendment E).

56. *See 1998 Ballot Question Text and Attorney General Explanations*, *supra* note 1.

57. *See* S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1028 (D.S.D. 2002) ("It would be impossible, of course, to ascertain the intentions of the thousands of citizens of South Dakota who voted for Amendment E.").

58. *See, e.g.*, S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593–97 (8th Cir. 2003) (discussing whether Amendment E had a discriminatory purpose).

59. *See id.* at 594.

60. *See id.* (quoting Memorandum from John Z. Bixler at 4 (Apr. 28, 1997)) (internal quotation marks omitted).

engaging in livestock production within the state's borders.[61] Another implication of the amendment's purpose was a "pro-con" statement compiled by the secretary of state's office and distributed to voters soon before the referendum passed.[62] This statement had additional language suggesting that support of Amendment E would provide "South Dakota the opportunity to decide whether control of [the] state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations."[63] Collectively, this evidence seems to suggest the underlying intention behind Amendment E was to inhibit large foreign companies from participating in agricultural practices in South Dakota, while protecting and promoting local family farmers.[64]

3. *Litigation*

In 2002, agricultural litigants who were negatively affected by Amendment E brought an action against South Dakota officials in an effort to repeal the restriction.[65] Litigants challenged the constitutionality of the provision on the basis that it violated the dormant Commerce Clause and Title II of the Americans with Disabilities Act, among other constitutional challenges.[66] However, this Note will only cover the dormant Commerce Clause analysis.[67] Beginning its opinion, the district court clearly stated it would be very deferential to the state, as there is a strong presumption of constitutionality; therefore, the plaintiffs' burden was to clearly show that the provision was arbitrary and irrational or in direct conflict with the U.S. Constitution.[68]

Using a combination of the *Brown-Forman* approach[69] and the *Pike*

61. *See id.* (internal quotation marks omitted).

62. *See id.* (discussing the distribution of the secretary of state's "pro-con" statement).

63. *Id.* (quoting Constitutional Amendment E: Attorney General Explanation) (internal quotation marks omitted) (analyzing the text of the secretary of state's "pro-con" statement).

64. *See id.*

65. S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1023 (D.S.D. 2002).

66. *Id.*

67. *See supra* Part I (outlining the focus of this Note).

68. *See Hazeltine*, 202 F. Supp. 2d at 1023.

69. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79 (1986) (providing the two-tier approach adopted by the Supreme Court in determining whether the challenged state statute is discriminatory).

balancing test,[70] the district court found there to be no evidence of discrimination in the amendment's text, purpose, or effect, but the court did find that the law's burdens on interstate commerce were clearly excessive in relation to the local benefit it conferred.[71] While the court determined Amendment E sought to protect legitimate state interests of

> seeking to prevent further concentrations of agricultural land and the production of food and animals from such land, seeking to prevent in the future agricultural land and production of animals and crops from passing into the hands of limited liability entities to the detriment of traditional family farm units, . . . and seeking to protect family life and values,[72]

it concluded that "Amendment E clearly place[d] a substantial burden on interstate commerce," noting that these burdens were "clearly excessive in relation to the putative local benefits."[73] As a result, the court held Amendment E unconstitutional and unenforceable.[74]

Predictably, the case was appealed to the Eighth Circuit.[75] Conducting its own analysis of the two-tiered test, the appellate court found Amendment E had a discriminatory purpose.[76] As such, the court was required to strike down Amendment E as unconstitutional unless the state could prove there was no other method it could have implemented to advance legitimate local interests of promoting family farms and protecting the environment.[77] Concluding the appellants failed to meet their burden of

70. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (assessing under the second tier that once it has been determined the statute is not discriminatory on its face, in its purpose, or in its effect, the law will only be struck down if it "is clearly excessive in relation to its putative local benefits" (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960))).

71. *Hazeltine*, 202 F. Supp. 2d at 1045–51 (analyzing the discriminatory nature of Amendment E and balancing its burden on state interests with the local benefits it confers).

72. *Id.* at 1023.

73. *Id.* at 1050.

74. *Id.* at 1050–51.

75. *See* S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

76. *See id.* at 596.

77. *See id.* at 593 (discussing the first tier analysis, which finds a law per se invalid unless defendants "can demonstrate, under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest" (quoting C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994)) (internal quotation marks omitted)).

proof, the Eighth Circuit affirmed the district court's determination that Amendment E was unconstitutional.[78]

B. *Iowa*

In 1975, the Iowa General Assembly passed a statute making it unlawful for meatpackers to directly or indirectly engage in the feeding of livestock.[79]

1. *Text of the Statute*

> For swine, a processor shall not . . . [d]irectly or indirectly own, control, or operate a swine operation in this state[,] [f]inance a swine operation in this state or finance a person who directly or indirectly contracts for the care and feeding of swine in this state[,] . . . or directly or indirectly contract for the sale and feeding of swine in this state.[80]

This statute included an exemption for Iowa cooperatives, foreign cooperatives that contract with Iowa cooperatives, and foreign cooperatives that have an Iowa cooperative in its membership.[81] Additionally, the restriction on processor ownership only applied to the swine and beef industries, thereby failing to extend into the poultry sector.[82]

2. *Legislative History*

Enacted in 1975, the statute began with stating its purpose to "preserve free and private enterprise, prevent monopoly, and protect consumers."[83] Amendments were made in 1988,[84] 2000,[85] and 2002[86] as a

78. *Id.* at 596–98.

79. Act of July 11, 1975, ch. 133, § 2, 1975 Iowa Acts 309, 310–11 ("In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork . . . to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter.").

80. IOWA CODE § 9H.2(1) (2003).

81. *Id.* § 9H.2(1)(b)(2).

82. *See id.* § 9H.2 (limiting production activities of only pork and beef processors).

83. Act of July 11, 1975, ch. 133, § 2, 1975 Iowa Acts 309, 310.

84. Act of May 9, 1988, ch. 1191, 1988 Iowa Acts 327.

85. Act of April 5, 2000, ch. 1048, 2000 Iowa Acts 96.

86. Act of April 9, 2002, ch. 1095, 2002 Iowa Acts 169.

means of continuously adapting the law to the ever-changing swine production industry. In 2003, another amendment transferred 9H.2 to 202B.201[87] and altered the text to no longer include an exemption for cooperatives.[88]

3. *Litigation*

In late 1999, Smithfield Foods, Inc., the nation's largest pork producer,[89] publicly announced its intent to purchase and acquire all capital interest in Murphy Farms, Inc.[90] At that time, Murphy Farms was engaged in livestock production practices in Iowa; therefore, this business transaction caused alarm in the attorney general's office, which later filed suit against Smithfield for violating section 9H.2 of the Iowa Code.[91] Smithfield attempted to reorganize its business structures in Iowa to circumvent the 9H.2 issue, but in 2000 and 2002, the Iowa General Assembly amended section 9H to once again encompass Smithfield's production practices.[92]

In response to this legislative action, Smithfield filed a lawsuit challenging the constitutionality of Iowa Code section 9H.2.[93] The district court implemented the two-tiered approach of *SDDS, Inc. v. State* in discerning whether the statute violated the dormant Commerce Clause.[94] Concluding that section 9H.2 was discriminatory on its face, in its purpose, and in its effect, the district court found the most compelling evidence supporting its determination of a discriminatory motive to be the statute's

87. Act of May 9, 2003, ch. 115, § 16, 2003 Iowa Acts 282, 284–85.

88. *Id.* § 5, at 283.

89. Press Release, Smithfield Foods, Inc., Smithfield Foods Achieves Record Earnings for Third Consecutive Year in Fiscal 1999 (June 10, 1999), *available at* http://files.shareholder.com/downloads/SFD/1728256056x0x176076/ca5cc35c-3ea9-44d7-bc22-9f88a3e51d54/SFD_News_1999_6_10_General.pdf.

90. *See* Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 982 (S.D. Iowa 2003) (providing background information regarding the initiation of litigation), *vacated*, 367 F.3d 1061 (8th Cir. 2004).

91. *See id.* at 982–83 (detailing the argument made in state court that Smithfield was violating section 9H.2 and the counterargument that Iowa's restriction on packer ownership violated the dormant Commerce Clause).

92. *See id.* at 983–84 (outlining Smithfield's attempt to circumvent 9H.2 and the legislature's reactions to reinforce section 9H.2).

93. *See id.* at 984.

94. *See id.* at 985–86, 990–94 (citing SDDS, Inc. v. State, 47 F.3d 263, 267 (8th Cir. 1995)).

vast encompassment of Smithfield's involvement in livestock production, while exempting Iowa cooperatives involved in the exact same practices.[95] As a result, the court declared Iowa Code section 9H.2 unconstitutional, thereby null and void.[96]

Predictably, the case was appealed to the Eighth Circuit.[97] During the course of the appeal, the General Assembly of Iowa amended section 9H.2, repealing the cooperative exception while delaying the date for required compliance.[98] As a result of this legislative action, the Eighth Circuit was unable to resolve the issue on appeal; therefore it vacated and remanded the case for further consideration.[99] Consequential action taken by these parties will be discussed at length in the subsequent sections of this Note.[100]

C. *Nebraska*

In 1982, Nebraska voters adopted Initiative 300 to amend the constitution such that corporations would be restricted from acquiring an interest in agricultural land or engaging in agricultural practices.[101]

1. *Text of the Amendment*

"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."[102] Exemptions existed for family farm or ranch corporations,[103] non-profit corporations,[104] the poultry industry,[105] and others.[106]

95. *Id.* at 990.
96. *Id.* at 994.
97. *See* Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1063 (8th Cir. 2004).
98. *Id.* at 1064; *see also* Act of May 9, 2003, ch. 115, §§ 5, 8, 2003 Iowa Acts 282, 283.
99. *Smithfield*, 367 F.3d at 1064.
100. *See infra* Part IV.
101. *See* NEB. CONST. art. XII, § 8 (1983), *invalidated by* Jones v. Gale, 470 F.3d 1261, 1271 (8th Cir. 2006); *History of Initiative 300*, *supra* note 3.
102. NEB. CONST. art. XII, § 8 (1983) (defining "farming or ranching" as "the cultivation of land for the production of agricultural crops, fruit, or other horticultural products" or "the ownership, keeping, or feeding of animals for the production of livestock or livestock products"), *invalidated by* Jones, 470 F.3d at 1271.
103. *See id.* § 8, cl. 1(A).
104. *See id.* § 8, cl. 1(B).
105. *See id.* § 8, cl. 1(F).

2. *Amendment History*

As required by law,[107] a ballot title and explanatory statement were circulated to express the purpose of Initiative 300 in one hundred words or less.[108] Included in the text was a provision which stated: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?"[109] The explanatory statement provided: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation," while a "vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land."[110] Additionally, rhetoric was heard by voters through speeches, radio broadcasts, and newspaper articles expressing the intent of Initiative 300 as preventing "outside investors" and "rich out-of-state corporations" from purchasing farm and ranch land in Nebraska.[111]

3. *Litigation*

In late 2005, farm and ranch owners filed a lawsuit against the Nebraska attorney general and the Nebraska secretary of state, asserting the amendment to the state constitution violated the U.S. Constitution.[112] After determining that "[p]roducing, maintaining, and adding value to . . . farm commodities are activities that substantially affect interstate commerce,"[113] the court went on to apply the two-tiered dormant Commerce Clause analysis.[114]

106. *See id.* § 8, cl. 1(C)–(E), (G)–(N) (providing exemptions not particularly relevant to this discussion).

107. NEB. REV. STAT. § 32-707 (1984) (mandating requirements for the attorney general and secretary of state in the preparation and distribution of explanatory statements).

108. *See* Jones v. Gale, 405 F. Supp. 2d 1066, 1073–74 (D. Neb. 2005) (discussing background information regarding the amendment process), *aff'd*, 470 F.3d 1261 (8th Cir. 2006).

109. *Id.* at 1073 (alteration in original).

110. *Id.*

111. *Id.* at 1079 (citations omitted).

112. *Id.* at 1069.

113. *Id.* at 1077 (citing Wickard v. Filburn, 317 U.S. 111, 118–19 (1942)).

114. *See id.* at 1078–83 (determining first whether the statute has any discriminatory text, purpose, or effect, and then balancing legitimate state interests

Analysis under the first tier revealed the language of Initiative 300 was facially discriminatory.[115] Additionally, the amendment was deemed to have a discriminatory purpose as a result of the ballot title, the explanatory statement, and the events leading up to Initiative 300's adoption.[116] After the court determined the challenged amendment discriminated against interstate commerce, it subjected Initiative 300 to the strictest scrutiny by considering whether it was the state's "exclusive means of advancing legitimate local interests."[117] Due to lack of evidence that Initiative 300 drafters researched any potential alternatives, the state failed to meet its burden of proof,[118] thereby leading the court to conclude that Initiative 300 violated the dormant Commerce Clause.[119]

Predictably, the case was appealed to the Eighth Circuit.[120] Applying the dormant Commerce Clause framework used in *South Dakota Farm Bureau, Inc. v. Hazeltine*,[121] the appellate court affirmed the district court's ruling that Initiative 300 was discriminatory on both its face and in its purpose.[122] The declaration of Initiative 300 as discriminatory, coupled with the determination that the state failed to show discrimination was the only available means to advance its legitimate local interest, the Eighth Circuit affirmed, finding Initiative 300 unconstitutional.[123]

D. *Summary*

It was the vision of the Framers that "every farmer . . . be encouraged to produce by the certainty that he will have free access to every market in the Nation."[124] Some have interpreted this intent to mean the government

with reasonable nondiscriminatory alternatives).

115. *See id.* at 1080–82 ("Initiative 300's general prohibition against farming or ranching by corporations and syndicates *does not* apply to family farm or ranch corporations or limited partnerships in which at least one family member 'is a person residing on or actively engaged in the day to day labor and management of the farm or ranch.' Initiative 300 on its face, therefore, favors Nebraska residents . . . ." (footnote omitted)).

116. *See id.* at 1079–80.

117. *See id.* at 1082–83.

118. *See id.* at 1083.

119. *Id.* at 1088.

120. *See* Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).

121. *See* S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir. 2003).

122. *See Jones*, 470 F.3d at 1267–70.

123. *See id.* at 1270.

124. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

must ensure and protect open markets,[125] while others contend that government intervention is precisely the opposite of what the Framers advocated for.[126] As a result of the Eighth Circuit's endorsement of the latter, packer-feeder laws in their original form have failed to withstand a constitutional challenge.

IV. THE SECOND LITTLE PIG AND ITS HOUSE MADE OF STICKS: CURRENT STATE RESTRICTIONS

As a result of litigation in the Eighth Circuit, South Dakota's Amendment E, Iowa's 9H.2 statute, and Nebraska's Initiative 300 were all deemed unconstitutional.[127] While South Dakota and Nebraska let bygones be bygones—not enacting amended provisions that may meet requirements of a dormant Commerce Clause analysis[128]—Iowa responded to the challenge by amending 9H.2,[129] and there still exists a reformed version of the statute yet to be contested.[130] Contradictory as it seems to have 202B.201 still considered good law, Iowa pork processors and state officials were able to reach an agreement without embarking on another long litigation journey regarding the constitutionality of the amended statute.[131]

A. *Smithfield Consent Decree*

On May 21, 2004, the Eighth Circuit remanded *Smithfield Foods, Inc. v. Miller* for further review by the district court to determine the

125. *See, e.g.*, NEB. CONST. art. XII (2005); S.D. CONST. art. XVII (2001); IOWA CODE § 9H (2003).

126. *See, e.g.*, Jones v. Gale, 405 F. Supp. 2d 1066, 1088 (D. Neb. 2005), *aff'd*, 470 F.3d 1261 (8th Cir. 2006); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 990 (S.D. Iowa 2003), *vacated*, 367 F.3d 1061 (8th Cir. 2004); S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1050 (D.S.D. 2002).

127. *See supra* Part III.A.3, B.3, C.3 (discussing the dormant Commerce Clause litigation in South Dakota, Iowa, and Nebraska respectively).

128. *See* NEB. CONST. art. XII (2011) (lacking any changes post-Eighth Circuit *Gale*); S.D. CONST. art. XVII (2012) (lacking any changes post-Eighth Circuit *Hazeltine*).

129. Act of May 9, 2003, ch. 115, 2003 Iowa Acts 282.

130. *See* IOWA CODE § 202B.201 (2011) (providing the statute as amended in 2003, which was not subsequently challenged after the Eighth Circuit vacated *Smithfield*).

131. *See infra* Part IV.A (contextualizing the historical interplay of Iowa Code section 202B.201 and the attorney general's lack of enforcement due to a consent decree with Smithfield).

constitutionality of the amended section 202B.201.[132] In late December of the same year, the U.S. District Court for the Southern District of Iowa scheduled the trial to commence on March 13, 2006.[133] In the meantime, the Iowa attorney general and Smithfield representatives reached a settlement approved by the governor, legislative leaders, and the district court, which is documented in a consent decree.[134]

According to Professor Gordon Allen—an attorney who represented the Iowa Office of the Attorney General during the Smithfield litigation—the decision was best for both parties given the losses each side would have sustained through further litigation.[135] Probability of success was low for the state, and Smithfield could not afford any more negative media attention; therefore, both sides were willing to compromise.[136] These lawsuits adversely affected Smithfield's public relations, and "because of those three real smatterings of publicity, [Allen] think[s] they wanted to ease up their reputation, so they were willing to do some things that really didn't hurt them."[137] Additionally, the lack of predictability made it unwise for Smithfield to continue investing in Iowa, which necessitated a speedy

132. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1066 (8th Cir. 2004).

133. Press Release, Iowa Office of the Att'y Gen., State of Iowa Settles Litigation with Smithfield Foods (Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/Smithfield.html.

134. *Id.*; *see also* Smithfield Foods, Inc. v. Miller, No. 4:02-CV-90324, slip op. at 1 (S.D. Iowa Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/smithfield.pdf (listing the date and parties of the consent decree); Press Release, Iowa Office of the Governor, Statement from Governor Vilsack (Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/Governor_and_Legislative_Stmnts.pdf (noting Governor Vilsack's support of the compromise); Press Release, State of Iowa Gen. Assembly, Statement of House Speaker Christopher Rants (Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/Governor_and_Legislative_Stmnts.pdf (expressing Iowa House approval regarding the consent decree); Press Release, State of Iowa Gen. Assembly, Statement of Senate Republican Leader, Sen. Stewart Iverson, Jr., (R SD-5) Clarion, Regarding the Settlement Between Smithfield Foods and the Iowa Att'y Gen. (Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/Governor_and_Legislative_Stmnts.pdf (providing the optimistic views of the Iowa Senate with regard to the settlement).

135. Interview with Gordon E. Allen, former Deputy Att'y Gen. for Civil Litig., Iowa Office of the Att'y Gen., in Des Moines, Iowa (Jan. 24, 2012).

136. *Id.*

137. *Id.*

resolution to ensure future certainty for the swine industry.[138] Therefore, Iowa officials decided against an all-or-nothing approach, and instead bargained for a compromise that supported the interests that section 9H.2 was created to protect.[139]

As Professor Neil Hamilton—a Professor of Law and Director of the Agricultural Law Center at Drake University Law School—contends, Iowa was simply "making the best of a bad situation, all the while trying to get the most protection for Iowa farmers."[140] These protections included the rights to: join an association, be a whistleblower, use contract growers liens, review production contracts, disclose contractual terms, and obtain relief of a legal or equitable nature.[141] In addition to permitting certain activities, the consent decree prevented Smithfield from partaking in coercion, retaliation, or discrimination against any contractor who exercised these aforementioned rights.[142]

Smithfield further agreed to refrain from requiring a contract producer to make certain capital investments, mandating arbitration, or providing any false information to contract producers.[143] Additionally, Smithfield contracted to fund an environmental program at Iowa State University ($100,000 per year for ten years); a grant program for Iowans developing mechanisms to improve swine production ($100,000 per year for ten years); and a scholarship program for descendants of Smithfield employees ($60,000 per year for four years).[144] The Iowa attorney general

138. *See Smithfield*, No. 4:02-CV-90324, slip op. at 1 (noting that parties desire to "avoid the uncertainty, delay, and expense of further litigation").

139. Interview with Gordon E. Allen, *supra* note 135; *see also* Act of July 11, 1975, ch. 133, § 2, 1975 Iowa Acts 309, 310 ("In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor of beef or pork . . . to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter."); *Smithfield*, No. 4:02-CV-90324, slip op. at 2–6 (preserving the rights of contract growers, regulating company activities and market access, and implementing environmental protection and scholarship funding programs).

140. Interview with Neil D. Hamilton, Professor of Law and Dir. of the Agric. Law Ctr., Drake Univ. Law Sch., in Des Moines, Iowa (Jan. 23, 2012).

141. *Smithfield*, No. 4:02-CV-90324, slip op. at 2–3.

142. *Id.* at 3–4.

143. *Id.* at 3–7.

144. *Id.* at 6 (listing Smithfield's monetary obligations); *see also* Press Release, Iowa Office of the Att'y Gen., Miller: $100,000 in Grants Available to Enhance Swine Industry (Oct. 19, 2007), *available at* http://www.state.ia.us/government/ag/latest_news/releases/oct_2007/Smithfield_Grants_2007.html (describing the origins and interworkings of the grant program).

also required Smithfield to provide notice of intent to close any processing plants in the state, to purchase at least 25% of total pigs slaughtered from the open market for the following two years, and to wait five years before raising hogs for slaughter in company-owned facilities.[145] Collectively, "[t]he agreement contains important provisions that will ensure fairness in contracts for Smithfield's contract hog producers, increase openness and transparency in Iowa's hog markets, and promote the use of best environmental practices in hog production."[146]

B. *Subsequent Consent Decrees*

After Smithfield pioneered contract production of swine in Iowa in 2005, five other meat processors have followed suit.[147] While most of the terms in the consent decrees were modeled after the Smithfield arrangement, certain requirements have been modified in the more recent agreements.[148] Unlike Smithfield, none of the subsequent pork processors

145. *Smithfield*, No. 4:02-CV-90324, slip op. at 6–7 (providing notice, market access, and company-owned facility requirements).

146. Press Release, Iowa Office of the Att'y Gen., *supra* note 133 (quoting Iowa Attorney General Tom Miller's positive view of the decree) (internal quotation marks omitted).

147. *See* AgFeed Indus., Inc. v. Miller, No. 4:11-cv-422, slip op. at 1 (S.D. Iowa Sept. 15, 2011), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2011/Consent_Decree_Pratt_.pdf (evidencing a consent decree between AgFeed and the State of Iowa); Christensen Farms Midwest, LLC v. Miller, No. 4:11-cv-145, slip op. at 1 (S.D. Iowa Mar. 30, 2011), *available at* http://www.state.ia.us/government/ag/latest_news/releases/mar_2011/Consent_Decree_CFM.pdf (evidencing a consent decree between Christensen Farms and the State of Iowa); Tyson Fresh Meats, Inc. v. Miller, No. 4:09-cv-351, slip op. at 1 (S.D. Iowa Sept. 11, 2009), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2009/Tyson%20CNSNT%20DECREE%209-11-09.pdf (evidencing a consent decree between Tyson and the State of Iowa); Hormel Foods Corp. v. Miller, No. 4:06-cv-00161, slip op. at 1 (S.D. Iowa Apr. 6, 2006), *available at* http://www.state.ia.us/government/ag/latest_news/releases/apr_2006/Hormel%20Consent%20Decree%204-6-06.pdf (evidencing a consent decree between Hormel and the State of Iowa); Cargill, Inc. v. Miller, No. 4:06-cv-20, slip op. at 1 (S.D. Iowa Jan. 19, 2006), *available at* http://www.state.ia.us/government/ag/latest_news/releases/jan_2006/SFXCB.pdf (evidencing a consent decree between Cargill and the State of Iowa).

148. *See, e.g.*, *AgFeed*, No. 4:11-cv-422, slip op. at 10 (explaining how the consent decree expires at midnight on September 16, 2015, but the provisions of the decree will continue for the existence of any contract grower agreements beyond the decree's expiration date); *Cargill*, No. 4:06-cv-20, slip op. at 1 (permitting the consent decree to remain in effect for contract grower agreements with a term longer than ten years); *Smithfield*, No. 4:02-CV-90324 slip op. at 2 (noting that the "Consent Decree

were required to contribute financial support for environmental, research, or scholarship programs.[149] However, regardless of minute inconsistencies, every consent decree contains what has collectively been referred to as a "contract producer's bill of rights."[150]

Four of the six decrees are set to expire at midnight on September 16, 2015, while the other two terminate the following year.[151] At the time of expiration, 202B.201 will govern the actions of vertically integrated pork processors—Smithfield, Cargill, Hormel, Tyson, Christensen Farms, and AgFeed—unless preemptive measures are initiated.[152]

will be in effect for ten (10) years after which the rights of the Parties will be as they stood prior to the entry of this Consent Decree").

149. *Compare Smithfield*, No. 4:02-CV-90324, slip op. at 6 (listing Smithfield's monetary obligations), *with AgFeed*, No. 4:11-cv-422, slip op. at 1–11 (lacking monetary funding requirements). Smithfield was the only processor required to fund programs as a result of the course of action the company pursued upon initiating contract production in Iowa. Interview with Steve H. Moline, former Deputy Att'y Gen. for Envtl. and Agric. Law Div., Iowa Office of the Att'y Gen., in Des Moines, Iowa (Feb. 12, 2012). Essentially, Smithfield, in clear violation of section 202B.201, began conducting business in Iowa and later sought remedial measures, while all of the subsequent processing companies entered into consent decrees before commencing operations. *Id.*

150. *See AgFeed*, No. 4:11-cv-422, slip op. at 4–5 (describing "Contract Grower Rights"); *Christensen Farms*, No. 4:11-cv-145, slip op. at 4 (describing "Contract Grower Rights"); *Tyson*, No. 4:09-cv-351, slip op. at 3–4 (describing "Contract Grower Rights"); *Hormel Foods*, No. 4:06-cv-00161, slip op. at 3 (describing "Contract Grower Rights"); *Cargill*, No. 4:06-cv-20, slip op. at 3 (describing "Contract Grower Rights"); *Smithfield*, No. 4:02-CV-90324, slip op. at 2–3 (describing "Contract Grower rights"); Press Release, Iowa Office of the Att'y Gen., State of Iowa Settles Litigation with Smithfield Foods (Sept. 16, 2005), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2005/Smithfield.html (quoting Iowa Attorney General Tom Miller's statement about the decree) (internal quotation marks omitted).

151. *See AgFeed*, No. 4:11-cv-422, slip op. at 10 (expiring September 16, 2015); *Christensen Farms*, No. 4:11-cv-145, slip op. at 9 (expiring September 16, 2015); *Tyson*, No. 4:09-cv-351, slip op. at 9 (expiring September 16, 2015); *Hormel Foods*, No. 4:06-cv-00161, slip op. at 8 (expiring April 6, 2016); *Cargill*, No. 4:06-cv-20, slip op. at 8 (expiring January 19, 2016); *Smithfield*, No. 4:02-CV-90324, slip op. at 2 (expiring September 16, 2015).

152. *See* IOWA CODE § 202B.201 (2011); *AgFeed*, No. 4:11-cv-422, slip op. at 10 (stating after expiration "the rights of the parties will be as they stood prior to the entry of this Consent Decree"); *Christensen Farms*, No. 4:11-cv-145, slip op. at 9 (stating after expiration "the rights of the parties will be as they stood prior to the entry of this Consent Decree"); *Tyson*, No. 4:09-cv-351, slip op. at 9 (stating after expiration "the rights of the parties will be as they stood prior to the entry of this Consent Decree"); *Hormel Foods*, No. 4:06-cv-00161, slip op. at 8 (stating after expiration "the rights of

C. *Section 202B.201 and Future Uncertainty*

As a result of the aforementioned consent decrees, the amended version of Iowa Code section 202B.201 has never been fully challenged in a court of law.[153] If the State of Iowa fails to enact a substitution for these contractual agreements, a constitutional challenge of section 202B.201 is inevitable. During such litigation the Iowa attorney general will bear a significant burden, especially given the precedential case law favoring arguments that strike down this legislation as violating the dormant Commerce Clause.[154]

U.S. District Court Judge Pratt made determinations in *Smithfield Foods, Inc. v. Miller* that will likely result in section 202B.201 being considered null and void, regardless of the 2003 amendments to the statute.[155] Though the Iowa General Assembly sought to preserve section 202B.201 by expunging the cooperative exception, this legislative action only solved one-third of the problem; "while severing the cooperative exemption might cure some of the facial defects, the Act's discriminatory purpose and effect persist."[156] Evidence of a discriminatory purpose and effect—Senator Iverson's comments, language in Iowa Code section 15E.203, and protectionist tone in the text of Iowa Code section

the parties will be as they stood prior to the entry of this Consent Decree"); *Cargill*, No. 4:06-cv-20, slip op. at 8 (stating after expiration "the rights of the parties will be as they stood prior to the entry of this Consent Decree"); *Smithfield*, No. 4:02-CV-90324, slip op. at 2 (stating after expiration "the rights of the parties will be as they stood prior to the entry of this Consent Decree").

153. While each processor filed a lawsuit against the attorney general, simultaneous consent decrees prevented the district court from ever definitively ruling on the constitutionality of the statute. *See AgFeed*, No. 4:11-cv-422, slip op. at 1–4 (discussing the history of the previous five lawsuits and consent decrees).

154. *See* Jones v. Gale, 470 F.3d 1261, 1267–70 (8th Cir. 2006) (finding the packer-feeder law unconstitutional); S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592–97 (8th Cir. 2003) (finding the packer-feeder law unconstitutional); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 990–93 (2003) (finding Iowa Code section 9H.2—later transferred to Iowa Code section 202B.201—to be discriminatory "on its face, in its purpose, and in its effect"), *vacated*, 367 F.3d 1061 (8th Cir., 2004).

155. *See Smithfield*, 241 F. Supp. 2d at 991 ("[W]hile severing the cooperative exemption might cure some of the facial defects, the Act's discriminatory purpose and effect persist."); Act of May 9, 2003, ch. 115, § 5, 2003 Iowa Acts 282, 283 (codified as amended at IOWA CODE § 202.B.201) (striking the cooperative exemption from the language of Iowa Code section 202B.201—as transferred from section 9H.2).

156. *See Smithfield*, 241 F. Supp. 2d at 991 (expressing the district court's expansive view of the discriminatory nature of Iowa's packer-feeder law).

202B.201—did not disappear with the deletion of a single portion of the statute.[157] Therefore, if the judicial climate in 2015 regarding state protectionism and the dormant Commerce Clause is similar to that of 2003, it seems highly unlikely that section 202B.201 can withstand the first tier of discriminatory analysis, let alone the strict scrutiny analysis if found to be discriminatory. As such, unless Iowa officials are able to meet the significant burden of proving no other means are available to advance its legitimate local interests, the statute will be deemed unconstitutional.

V. THE THIRD LITTLE PIG AND ITS HOUSE MADE OF BRICKS: PROPOSAL FOR FUTURE STATE RESTRICTIONS

Due to the impending expiration of the contractual peace mechanisms[158] and the importance of future certainty for America's largest pork-producing state,[159] it is critical that Iowans begin researching possible solutions for the state's packer-feeder law. The administrative decision appears quite miniscule in the grand scheme of public policy, but the potential ramifications of mishandling this issue creates a rather significant incentive for the Iowa legislature to enact a statute feasible for all parties involved. Possible consequences of failing to act in the correct manner include companies taking business elsewhere, which may result if section 202B.201 withstands a constitutional challenge,[160] or leaving contract growers without any protection, which may result if section 202B.201 is struck down with no other provision to take its place. While the stakes are

157. *See id.* at 992 (finding evidence of Iowa Code section 9H.2's discriminatory purpose and effect—or in the court's words, its imposition of "a death sentence on Smithfield's Iowa business"—when (1) Senator Iverson stated that "[i]n response to a recent Iowa court decision that [lets] Smithfield Foods finance an Iowa-based hog producer, the Iowa Senate will consider legislation this week to protect farmers from large meatpacking firms"; and (2) Iowa Code section 15E.203 expressed the legislature's desire that "the majority of the wealth created by Iowa agricultural productivity is retained in the state" (internal quotation marks omitted)).

158. *See supra* Part IV.B (discussing the cessation of four consent decrees on September 16, 2015).

159. *See* NAT'L AGRIC. STATISTICS SERV., USDA, 2012 IOWA AGRICULTURAL STATISTICS 7 (2012), *available at* http://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/Annual_Statistical_Bulletin/2012/2012%20bulletin.pdf ("Iowa continued to rank number one in hog inventory in the United States.").

160. *See* Interview with Gordon E. Allen, *supra* note 135 (discussing how threats made by Smithfield during litigation—that the company would "completely pull their business out of Iowa"—are a serious possibility the Iowa legislature must keep in mind).

high, many options are available for the general assembly to consider.[161]

A. *Potential Resolutions*

Irrespective of whether the legislative, executive, or judicial branch is compelled to administer a resolution, change is inevitable—either preemptive actions or subsequent reactions will occur in the very near future.

1. *Inaction*

As previously mentioned, Iowa has the option to defer any legislative action until after the consent decrees have expired.[162] Taking the ostrich approach of sticking its head in the sand is unlikely to fare well for either the state, which is likely to face an uphill battle of litigation, or the pork processing companies, which are likely to retaliate quickly given the hefty fine of $25,000 per day for noncompliance with section 202B.201.[163] Though not an ideal solution, the political climate surrounding the 2014 election may inhibit other avenues of action from being ardently pursued.[164]

2. *Enter into a Subsequent Contract with Similar Provisions*

Another possible alternative, in the absence of legislation, exists for the executive branch to pursue subsequent contractual agreements encompassing the terms and conditions of the current consent decrees. Speaking from experience, Mr. Steve Moline—attorney for the Environmental and Agricultural Law Division in the Iowa Office of the Attorney General from 1990 to 2011—finds it much more productive for Iowa officials to enter into another contractual agreement rather than the state legislature attempting to restructure the statutory framework.[165] Politically, this route of compromise would be easier than initiating new legislation because the agreements have seemed to work well for the

161. *See infra* Part V.A (exploring five viable options to address the issue of regulating meatpackers in Iowa).

162. *See supra* Part IV.B (discussing Iowa's current pork processor regulatory scheme and impending expiration of the six consent decrees).

163. *See* IOWA CODE § 202B.401 (2011) (imposing penalties for each day a violation exists).

164. *See id.* §§ 39.1, .9, .15–.16 (designating 2014 as a general election year whereby the state officers, state representatives, and one-half of the state senators will be subject to re-election).

165. Interview with Steve H. Moline, *supra* note 149.

agricultural industry in Iowa thus far.[166] While this option seems relatively simple and straightforward, this approach merely defers addressing the issue to a later date.

3. *Repeal Section 202B.201 and Enter into Another Contract with Similar Conditions*

Although the legislature may choose to leave section 202B.201 untouched, it would be sensible—for the sake of clarity and future certainty—for the statute to be repealed for consideration of entering into another contractual agreement.[167] Even if Iowa officials agree to renew the consent decrees, "it takes two to tango." On the surface, it seems unwise for pork-processing companies to compromise given the likelihood of success through the judicial process.[168] However, in the past it made economic sense to enter into such an agreement, and it is predicted if "economics in 2015 are such that [these companies] still want to be in Iowa . . . they will be willing to renegotiate because [the consent decree requirements] didn't exactly hurt them."[169]

4. *Enter into a Subsequent Contract with Less Stringent Terms and Conditions*

Given the recent rise in profitability of agriculture, public perception of an intense need to protect farmers is simply nonexistent. Lack of constituent support, persistent development of vertical integration in the swine industry, and superior bargaining power of processing companies,

166. *See* Interview with Neil D. Hamilton, *supra* note 140 ("Politically, it would be easier to repeal [section 202B.201] and have the attorney general's office enter into another ten year agreement."); Interview with Steve H. Moline, *supra* note 149 ("Smithfield knew the consent decrees could be used against them, so they didn't do some of the things they did elsewhere. These did kind of improve producer power here because they gave producers economic ability to prevail if they pursued litigation. Without the consent decrees, Smithfield never would have conceded to attorneys' fees.").

167. *See* Interview with Neil D. Hamilton, *supra* note 140 ("Politically, it would be easier to repeal [section 202B.201] and have the attorney general's office enter into another ten year agreement.").

168. *See supra* Part IV.C (discussing the likely outcome if the constitutionality of section 202B.201 is litigated).

169. *See* Interview with Gordon E. Allen, *supra* note 135 (predicting the willingness of pork processors—Smithfield in particular—to renegotiate consent decree agreements).

collectively suggest that Iowa officials and pork processors will enter into a watered-down version of the existing consent decrees.[170] Given the upper hand that processing companies currently possess with respect to judicial precedent, it is a viable prediction that this resolution is most likely to occur.

5. *Reform Section 202B.201*

Legislative action will provide the most clarity, consistency, and certainty in this area of packer-feeder law. Statutory provisions have already been enacted to ensure certain contract producer privileges are protected.[171] Therefore, it would be relatively simple to codify a more comprehensive list of the contract producer's bill of rights as they exist in the consent decrees.[172]

If challenged, such a statute would likely withstand a dormant Commerce Clause analysis. This law is not conferring differential treatment to in-state versus out-of-state economic interests, as there are no exceptions for Iowa corporations or cooperatives, and it does not have the purpose or effect of benefitting the former and burdening the latter.[173] Additionally, it is likely a court in the Eight Circuit will find the protections offered in this bill of rights are meant to protect and promote legitimate state interests.[174] As a result, modification of section 202B.201 to incorporate those rights offered to producers under the current consent decrees is likely to withstand any dormant Commerce Clause challenges.

B. *Recommendation*

Unlike South Dakota and Nebraska, Iowa has succeeded at imposing

170. *See* Interview with Steve H. Moline, *supra* note 149 ("This is what may happen: a year to six months before [the consent decrees] expire, depending on who the attorney general is, companies are going to propose signing a new contract with less protections and with a term of fifteen years.").

171. *See, e.g.*, IOWA CODE § 654B.3 (2011) (mandating mediation of all livestock care and feeding contracts).

172. *See, e.g.*, *Smithfield Consent Decree*, No. 4:02-cv-90324, slip op. at 2–3 (S.D. Iowa Sept. 16, 2005) (discussing "Contract Grower rights").

173. *See, e.g.*, S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592–93 (8th Cir. 2003) (providing the test used to determine whether a law violates the dormant Commerce Clause).

174. *See, e.g.*, *id.* at 596 (finding promotion of the family farm and protection of the environment to be legitimate state interests).

various protections for local contract growers through the state's willingness to compromise. As a result of settlement rather than further litigation, Iowa was able to negotiate certain safeguards to which pork processors were willing to concede. However, time is of the essence and the extraterritorial impact of the Iowa legislature's decision further compounds the importance of this decision regarding how best to move forward. Therefore, the General Assembly of the State of Iowa should repeal section 202B.201 and enact a statute comprised of the contract producer's bill of rights as a means to codify the protections afforded by the consent decrees for the past seven years. By taking this proactive approach, Iowa's law will act as an example for other states in the Eighth Circuit.

VI. CONCLUSION

Packer-feeder laws in the Eighth Circuit have experienced a problematic history individually unique to South Dakota, Iowa, and Nebraska. Although the dormant Commerce Clause has successfully blown down previous state restrictions and will likely succeed at blowing down the current statute in Iowa, the aforementioned recommendation has plenty of brick and mortar such that this proposal is likely to withstand any challenges regarding its constitutionality.

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