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**The Past, Present and Future of Anti-
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Dakota: Purposeful Discrimination
or Permissive Protectionism?**

by

Jeffrey M. Banks

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THE PAST, PRESENT AND FUTURE OF ANTI-CORPORATE FARMING LAWS IN SOUTH DAKOTA: PURPOSEFUL DISCRIMINATION OR PERMISSIVE PROTECTIONISM?

JEFFREY M. BANKS[†]

Since 1974, South Dakota has attempted to restrict corporate access to agricultural land due to a perceived threat against the economic and moral stability of the state represented by the family farm. This threat, brought to South Dakota by conglomerates and other corporate forms of farm ownership, has prompted further restrictions on corporate farm ownership. However, thirty years after the Family Farm Act became law, South Dakota legislators attempted to expand anti-corporate farming laws as the Eighth Circuit Court of Appeals struck down 1998's Amendment E as unconstitutional.

I. INTRODUCTION

The family farm and agricultural production define the economic and rural tradition of South Dakota.¹ While the state of South Dakota boasts strong manufacturing, financial services, and tourism sectors, agriculture remains the state's leading industry.² South Dakota is also one of the nation's leading producers of farm commodities.³ Almost ninety-one percent of land in South Dakota is farm land,⁴ and just under fifty percent of the population lives in rural communities.⁵ South Dakota's reliance on agriculture has prompted voters and legislators to place restrictions on corporate farm ownership in hopes of preserving the family farm.⁶

The purpose of this note is to examine South Dakota's effort to restrict corporate farming, and whether, in light of these restrictions, the state has

[†] B.S. 1997, Maville State University (N.D.), J.D. 2004, University of South Dakota.

1. John C. Pietila, *"We're Doing This to Ourselves": South Dakota's Anti-Corporate Farming Amendment*, 27 J. CORP. L. 149, 150 (2001). See also S.D.C.L. §47-9A-1 (2000 & Supp. 2003) (recognizing "the importance of the family farm to the economic and moral stability of the state."). Cf. Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679 (1991).

2. South Dakota Governor's Office of Economic Development, South Dakota Agricultural Profile, at http://www.sdgreatprofits.com/SD_Profiles/sdag.htm (last visited Feb. 16, 2004). South Dakota had a \$15 billion agriculture industry as of 1998. William Claiborne, *Fighting the 'New Feudal Rulers'*; *S. Dakota Farmers Split on Family Tradition vs. Corporate Efficiency*, WASH. POST, Jan. 3, 1999, available at 1999 WL 2191913.

3. South Dakota Governor's Office of Economic Development, *supra* note 2. South Dakota ranks second in the nation in production of hay, sunflower and flaxseed, and in the top ten in most commodities. *Id.*

4. *Id.* There are forty-four million acres of farmland out of 48,566,400 acres in South Dakota. *Id.* The average farm size is 1,354 acres. *Id.* There are over 16 million acres of harvested croplands on 32,500 farms. *Id.*

5. South Dakota Governor's Office of Economic Development, South Dakota Demographic Profile, at http://www.sdgreatprofits.com/SD_Profile/demographics.htm (last visited Feb. 16, 2004). As of the 2000 Census, 363,417 people lived in rural communities while 391,427 lived in urban centers. *Id.*

6. S.D.C.L. §§ 47-9A-1 to 9A-23 (2000 & Supp. 2003); S.D. CONST. art. XVII, §§ 21-24.

succeeded in providing the desired protection to the environment and in-state farmers in a constitutionally permissible manner. Part II provides a background of anti-corporate farming laws in South Dakota and the legal challenges to those laws, as well as a review of the rationale underlying the Eighth Circuit Court of Appeals decision holding South Dakota's Amendment E unconstitutional. Then, Part III presents the measures taken by the South Dakota Legislature in the current legislative session in response to the constitutional infirmity of Amendment E, the doctrine underlying the challenge to state anti-corporate farming laws, and analysis addressing the petition for writ of *certiorari* submitted by the state of South Dakota and Dakota Rural Action. Finally, this note concludes that the proposed changes to South Dakota's anti-corporate farming laws will not cure the constitutional defects that exist and will be ineffective in protecting the environment and in-state farmers.

II. BACKGROUND

A. 1974 FAMILY FARM ACT

In 1974, South Dakota joined eight other states in restricting corporate farming when it passed the Family Farm Act.⁷ The legislature passed these laws aimed at restricting corporate farming amid fears of increased competition and economic threat to family farmers and ranchers and "an adverse impact on South Dakota's traditional family farms and rural communities" by large corporate entry and "expansion of nonfarm investment in agriculture."⁸ Advocates of the Family Farm Act feared a decline in family farm ownership as well as diminished economic, social and educational standards in rural areas.⁹ Prior to enacting the Family Farm Act, legislators relied on a comparison of the agriculture trends in North Dakota and South Dakota between 1932 and 1968.¹⁰ These trends showed increases in the number and size of farms but a decrease in overall farm population.¹¹

However, the results of this report did not necessarily confirm fears of the adverse effects of corporate farm ownership on the family farm.¹² North Dakota was the second state to place restrictions on corporate farming, and the trends analyzed by the South Dakota Legislature were measured subsequent to the

7. Stayton, *supra* note 1, at 679; NEB. CONST. art. XII, § 8(1); OKLA. CONST. art. XXII, § 2; IOWA CODE § 9H.1-.15 (West 2001); KAN. STAT. ANN. § 17-5904 (West 1995 & Supp. 1998); MINN. STAT. ANN. § 500.24 (West 1990 & Supp. 1999); MO. ANN. STAT. § 350.015 (West 2001 & Supp. 2004); N.D. CENT. CODE § 10-06.1-02 (2001 & Supp. 2003). Oklahoma and Nebraska include these restrictions in their constitutions. Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385, 387 (1999).

8. Pietila, *supra* note 1, at 153; Curtis S. Jensen, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?* 20 S.D. L. REV. 575 (1975).

9. Pietila, *supra* note 1, at 153.

10. Jensen, *supra* note 8, at 578-79.

11. *Id.* at 579.

12. *Id.*

enactment of North Dakota's restrictions.¹³ The Legislative Research Council concluded that the corporate ownership restrictions did not significantly protect the family farm in North Dakota, and that "the presence of farm corporations in South Dakota does not appear to have been a major cause of rural decline."¹⁴ Therefore, the Family Farm Act was aimed more at restricting new corporate expansion and curtailing the growth of existing farm corporations rather than eliminating them.¹⁵

B. 1988 AMENDMENT

While the Family Farm Act contains twelve exceptions in order to best serve the interests of South Dakota's agricultural structure and economy,¹⁶ the legislature proposed an amendment further restricting corporate farm ownership.¹⁷ In 1988, as South Dakota was the target for expansion in hog production facilities, sixty percent of voters passed an initiated measure prohibiting hog confinement facilities.¹⁸ This restriction prohibited corporate ownership of "any real estate used for the breeding, farrowing and raising of swine."¹⁹ However, a number of the largest pork producers in the country were able to circumvent the restrictions as a result of an opinion of the attorney general in 1995.²⁰ The attorney general opined that "a corporation which engages in less than all three [breeding, farrowing and raising] is not a hog confinement facility."²¹ This interpretation allowed corporations to "finance[e] hog confinement facilities [to contract] with individual South Dakota farmers to raise feeder pigs bred and farrowed in a different location."²² However, the proliferation of production contracting and hog confinement facilities led proponents of anti-corporate farming laws to initiate a proposed constitutional amendment to further restrict corporate farming.²³

C. AMENDMENT E

Amendment E was presented to voters in 1998 in an effort to further restrict

13. *See id.*

14. *Id.* Declining prices and technology advancement increasing productivity have been blamed for the decline in the family farm. *Id.* *See also* Harbur, *supra* note 7, at 386.

15. Jensen, *supra* note 8, at 579.

16. *Id.* at 585. Exceptions were made for raising poultry and feeding livestock. S.D.C.L. §§ 47-9A-3.2, 9A-11 (2000 & Supp. 2003). South Dakota ranks sixth nationally in number of cattle and calves and fourth in number of sheep and lamb. South Dakota Governor's Office of Economic Development, South Dakota Agricultural Profile, at http://www.sdgreatprofits.com/SD_Profiles/sdag.htm (last visited Feb. 16, 2004).

17. Pietila, *supra* note 1, at 155.

18. *Id.*; S.D.C.L. § 47-9A-13.1 (2000 & Supp. 2003).

19. S.D.C.L. § 47-9A-13.1 (2000 & Supp. 2003).

20. Pietila, *supra* note 1, at 155-56.

21. Family Farm Act/Cooperatives, Op. S.D. Att'y Gen. 95-02 (1995), available at 1995 WL 155155 (S.D.A.G.).

22. Pietila, *supra* note 1, at 156.

23. *Id.* "North Carolina-based Murphy Family Farms, then the largest hog producer in the nation, was operating twenty contract hog-feeding facilities in South Dakota and had announced plans for at least forty more." *Id.*

corporate ownership of farm land.²⁴ The proposed constitutional amendment was more restrictive and therefore more appealing than the Family Farm Act to proponents of anti-corporate farming laws.²⁵ First, “Amendment E applied to the ownership of livestock” in addition to land.²⁶ Furthermore, the exemptions available for family farm operations and “authorized farm corporations” under the Family Farm Act were much narrower in Amendment E.²⁷ Next, the “enforcement procedures [of Amendment E] were much broader and potentially intrusive” than those in the Family Farm Act.²⁸ Finally, proponents of Amendment E were able to thwart the use of “the normal legislative process to correct any mistakes created by Amendment E” by using the Initiative and Referendum process.²⁹

Amendment E created heated debate immediately and was challenged in the South Dakota Supreme Court before it was ever put to a vote.³⁰ Supporters of Amendment E listed protection of the environment and preservation of the “social and economic well-being of rural communities” as the main arguments in favor of the amendment.³¹ In contrast, opponents argued that the amendment would fail to achieve its proposed objectives, as well as harm access to capital and financing for family farmers and cooperatives.³² Despite aggressive argument on both sides, Amendment E gained approval from nearly sixty percent of voters, led by two-thirds of farmers.³³ Although Amendment E was patterned after Nebraska’s anti-corporate farming laws, which have withstood constitutional challenges thus far, the challenge to further restrictions on corporate farming in South Dakota had just begun.³⁴

As mentioned above, Amendment E was enacted through the Initiative and Referendum process rather than by a bill signed by the Governor following approval in the House and the Senate.³⁵ The Initiative and Referendum process allows a proposed constitutional amendment to become law following a majority vote of the people without being subject to the veto power of the Governor.³⁶ The proponents of Amendment E likely had this in mind because then-Governor

24. See Brief for Respondents at 9, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) *petition for cert. filed* [hereinafter Brief for Respondents] (on file with author).

25. *Id.* at 9.

26. *Id.*

27. *Id.*

28. *Id.* at 9-10.

29. *Id.* at 9.

30. *Hoogestraat v. Barnett*, 1998 SD 104, 583 N.W.2d 421 (challenging the attorney general’s use of the sentence “Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution” on the ballot). *Id.* ¶4.

31. Pietila, *supra* note 1, at 156.

32. *Id.*

33. *Id.*

34. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, 202 F. Supp. 2d 1020, *aff’d*, 340 F.3d 583 (8th Cir. 2003). Judge Kommann’s opinion provides a complete review of the differences between the Nebraska and South Dakota laws. *Id.*

35. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 587 (8th Cir. 2003).

36. S.D. Const. art. III, §1. In 1898, South Dakota became the first state to authorize the initiative and referendum procedures for the adoption of ordinary legislation. S.D. Sec’y of State, Initiatives and Referendums in South Dakota, at <http://www.sdsos.gov/initiati.htm> (last visited Feb. 25, 2004).

Janklow was not a supporter of restrictions on corporate farming.³⁷

Governor Janklow was active in the economic development of South Dakota and viewed Amendment E as a restriction to attracting agricultural and other industries to South Dakota.³⁸ Janklow was instrumental in bringing Hematech³⁹ to South Dakota and was worried that Amendment E would adversely affect Hematech's proposed move to Sioux Falls.⁴⁰ Janklow also viewed Amendment E "as a symptom of South Dakota's 'huge schizophrenic problem' with agriculture."⁴¹ By utilizing the Initiative and Referendum provision, proponents of Amendment E were able to avoid a probable veto by Governor Janklow.

D. AMENDMENT A

Facing attack in federal court over Amendment E and fearing a successful challenge, the proponents of anti-corporate farming laws once again proposed a constitutional amendment on corporate farming.⁴² Known as Amendment A, this amendment was designed to cure the unintended consequences of Amendment E, namely the restriction on expanding current farms owned by exempt entities under § 22, as well as a restriction on access to capital and financing by exempt entities.⁴³ According to the attorney general, "Amendment A would repeal 'Amendment E', and replace it with a less restrictive set of prohibitions."⁴⁴ These less restrictive prohibitions included allowing "research farms, corporate ownership of agricultural land for wind power projects and corporate ownership of livestock for research or medical purposes."⁴⁵ According to Representative Jay Duenwald, "South Dakota risks missing out on such economically important projects under Amendment E, even though these projects pose no threat to the small farm."⁴⁶ Although Amendment A would

37. Pietila, *supra* note 1 at 169-70.

38. See Farm & Business Scene, ABERDEEN AMERICAN NEWS, Nov. 2, 2001, available at 2001 WL 28637073.

39. *Id.* Hematech is a Connecticut-based biotechnology company researching ways "to use genetically altered cow blood to create treatments for human diseases." Jay Kirschenmann, *Trying to Lure Companies in Growing Biotech Field*, ABERDEEN AMERICAN NEWS, Jan. 2, 2004, available at 2004 WL 57196923.

40. *Id.*

41. Pietila, *supra* note 1, at 169-70. Governor Janklow "believes Amendment E has failed to make life better for South Dakota's family farmers and has hampered South Dakota's ability to produce the volume of commodities needed to attract value-added agricultural processing to the state." *Id.* Janklow thought that voters "shot themselves in the foot" and chided South Dakota's effort to impact national farm policy by saying that "[t]he world doesn't care [sic] we're doing this to ourselves." Farm & Business Scene, *supra* note 3; Pietila, *supra* note 1 at 170.

42. S.D. Sec'y of State, June 4, 2002 Election Ballot Question Pamphlet, Constitutional Amendment A, <http://www.sdsos.gov/2002/02bqprocon.htm> (last visited Feb. 16, 2004).

43. *Id.* See also Editorial Comment, *Step Up on Farm Issue*, ARGUS LEADER, November 9, 2003, available at 2003 WL 61650962; Molly McDonough, *Down on the Farm; Laws Aimed at Boosting Family Farmers May Violate Commerce Clause*, 89 ABA J. 18, Nov. 2003.

44. S.D. Sec'y of State, June 4, 2002 Election Ballot Question Pamphlet, Constitutional Amendment A, <http://www.sdsos.gov/2002/02bqprocon.htm> (last visited Feb. 16, 2004).

45. *Id.*

46. *Id.*

have provided more protection than the Family Farm Act of 1974 in the event Amendment E was struck down,⁴⁷ voters overwhelmingly refused to expand South Dakota's strict anti-corporate farming laws.⁴⁸

E. CHALLENGE TO AMENDMENT E

Less than one year after it was approved by South Dakota voters, nine plaintiffs brought an action in federal court against the state seeking declaratory and injunctive relief, challenging the constitutionality of the provisions of Amendment E.⁴⁹ The plaintiffs challenged Amendment E on the grounds that it was violative of the dormant Commerce Clause, the Equal Protection Clause, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act.⁵⁰ Two parties, Dakota Rural Action and South Dakota Resources Coalition, were successful in their motion to intervene on behalf of the "economic viability of the family farm" and environmental interests of South Dakota.⁵¹ The district court then ruled, *inter alia*, that while the state was immune from suit under the Eleventh Amendment, state officials were amenable to suit.⁵²

By the time the case was finally decided nearly four years later, the number of plaintiffs had grown to thirteen, representing a variety of interests in the agriculture sector.⁵³ Two of the plaintiffs were corporations owning custom cattle feedlots.⁵⁴ These plaintiffs averred that Amendment E would prohibit them from entering into the necessary contracts with third party cattle owners that deliver cattle to the feedlots because those third parties would be impermissibly engaging in farming.⁵⁵ Two other plaintiffs, unincorporated livestock feeding businesses, also argued that § 21 would restrict their ability to contract with third parties who own livestock.⁵⁶ Another corporate plaintiff, Spear H Ranch, challenged the prohibition on foreign corporations acquiring land in South Dakota and using it for agricultural purposes.⁵⁷ Spear H

47. Editorial Comment, *Replace Amendment E*, ARGUS LEADER, August 29, 2003, available at 2003 WL 61649299.

48. *Id.* Over seventy-eight percent of voters voted against Amendment A in 2002. 2002 Constitutional Amendment A Official Returns, at <http://www.sdsos.gov/2002/02amendAB.htm> (last visited Feb. 16, 2004).

49. *South Dakota Farm Bureau, Inc. v. South Dakota*, 1999 DSD 36, ¶ 4, 189 F.R.D. 560, 562.

50. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, ¶ 1, 202 F. Supp. 2d 1020, 1023, *aff'd*, 340 F.3d 583 (8th Cir. 2003).

51. *South Dakota Farm Bureau*, 1999 DSD 36, ¶ 16, 189 F.R.D. at 566.

52. *South Dakota Farm Bureau, Inc. v. South Dakota*, 2000 DSD 43, ¶¶ 12, 28, 197 F.R.D. 673, 677, 681 (D.S.D. 2000). The District Court also granted the state's motion to dismiss a claim arising under the Americans with Disabilities Act and a Privileges and Immunities claim because the plaintiffs lacked standing. *Id.* ¶¶ 13, 20. The District Court granted plaintiffs' motion to join the parties and to amend their complaint. *Id.* ¶ 4.

53. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 588-89 (8th Cir. 2003).

54. *Id.* at 588. These corporations were Haverhals Feedlot, Inc. and Sjovald Feedyard, Inc. *Id.*

55. *Id.* See S.D. CONST. art. XVII, §21.

56. *South Dakota Farm Bureau*, 340 F.3d at 588. Donald Tesch "raise[s] hogs for Harvest States Cooperative" of Minnesota under a ten-year contract. *Id.* William Aeschlimann feeds lambs owned by non-exempt third parties. *Id.*

57. *Id.* at 589. The Marston and Marian Holben Family Trust, the sole shareholder of Spear H, and Marston Holben were also plaintiffs. *Id.*

specifically challenged the exemptions in § 22.⁵⁸ Frank Brost, a rancher in South Dakota, also challenged § 22, as well as the perceived prohibition of § 21 on corporations acquiring additional land for farming.⁵⁹ The South Dakota Farm Bureau and the South Dakota Sheep Growers' Association, two groups representing "the interests of farm, ranch, and rural families in South Dakota," were plaintiffs challenging Amendment E's restrictions on the form of ownership and contracting ability.⁶⁰ The final three plaintiffs were utility companies claiming that Amendment E "applie[d] to, and increase[d] the cost, of easements they must acquire for a power plant."⁶¹

F. AMENDMENT E RULED UNCONSTITUTIONAL

After four years of litigation, the plaintiffs' interests were finally vindicated.⁶² First, the district court applied a non-discrimination tier analysis to rule that Amendment E violated the dormant Commerce Clause.⁶³ Then, a panel of the Eighth Circuit Court of Appeals upheld the district court's ruling that Amendment E was unconstitutional.⁶⁴ However, in a fact-based decision, the court of appeals held that Amendment E was *per se* invalid because it was purposefully discriminatory under a first-tier analysis.⁶⁵ The court reasoned that the most compelling evidence of a discriminatory purpose was the "'pro' statement on a 'pro-con' statement compiled . . . and disseminated to . . . voters."⁶⁶ Further evidence included drafting meeting minutes and memoranda indicating that the purpose of Amendment E was "to get a law in place to stop" Murphy Family Farms and Tyson Foods from building hog confinement facilities in South Dakota.⁶⁷

58. *Id.*

59. *Id.* Brost also contended that Amendment E diminished the value of his land due to the restrictions on who can acquire farm land. *Id.*

60. *Id.*

61. *Id.* The companies are Montana-Dakota Utilities Company, Northwestern Public Service, and Otter Tail Power Company. *Id.*

62. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶¶ 103-111, 202 F. Supp. 2d 1020, 1050-51, *aff'd*, 340 F.3d 583 (8th Cir. 2003). Although the District Court had previously dismissed the count alleging that Amendment E violated the Americans with Disabilities Act, the court, *sua sponte*, reconsidered the claim prior to issuing its memorandum decision. *Id.* ¶ 61. The court in fact ruled that Amendment E was violative of the ADA. *Id.* ¶ 80. However, since this decision was overturned on appeal, it will not be included in this discussion. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir. 2003).

63. South Dakota Farm Bureau, 2002 DSD 13, ¶¶ 103-107, 202 F. Supp. 2d at 1049-50. The district court chose to rely on the *Pike* balancing test, which measures the legitimacy of the state's interest and "whether the burden on interstate commerce clearly exceeds the putative local benefits." *Id.* The district court did not find any facial or purposeful discrimination in Amendment E, nor was it discriminatory in its effect under the first tier of dormant Commerce Clause analysis. *Id.* ¶¶ 82-102.

64. South Dakota Farm Bureau, 340 F.3d at 598.

65. *Id.* at 596-97.

66. *Id.* at 594. This statement told voters that a 'yes' vote would reduce the threat to "our traditional rural way of life" from large non-family corporations and would reduce foreign corporate control over the livestock market and increase environmental responsibility. S.D. Sec'y of State, 1998 Ballot Question Pamphlet, Constitutional Amendment E, <http://www.sdsos.gov/1998/98bqprocone.htm> (last visited Feb. 16, 2004).

67. South Dakota Farm Bureau, 340 F.3d at 594.

G. SUPREME COURT APPEAL

Although the state and other defendants have submitted a petition for writ of *certiorari* to the United States Supreme Court, the end for Amendment E appears to be on the horizon.⁶⁸ Attorney General Larry Long “harbor[s] no illusions about getting the [U.S. Supreme] [C]ourt to hear it or the chances of success if it gets there.”⁶⁹ Therefore, absent a surprise decision by the Supreme Court to overturn the Eighth Circuit, the legislature must address the restructuring of South Dakota’s anti-corporate farming laws.

Despite the appeal to the Supreme Court by the defendants and intervenors, the high court is not expected to grant *certiorari*.⁷⁰ The Supreme Court grants only a fraction of the petitions for writs of *certiorari* that are requested each year.⁷¹ Given the low rate at which petitions are granted, it is unlikely that this case meets the standards for a grant of *certiorari*.⁷²

The Supreme Court grants petitions for writ of *certiorari* only for “compelling reasons.”⁷³ The reasons stated by the Supreme Court for granting a petition are: 1) a split among the federal circuit courts of appeal; 2) a conflict between the decision of a state supreme court and another state supreme court or federal appeals court on a federal question; and 3) a decision by a state supreme or federal appellate court on a federal question that “has not been, but should be, settled by” the Supreme Court.⁷⁴ However, the one caveat in these three considerations is that the federal question or other issue must be deemed “important.”⁷⁵ Errors by the finder of fact or “the misapplication of a properly stated rule of law” are rarely sufficient to obtain review on a petition for writ of *certiorari*.⁷⁶

68. See Editorial Comment, *supra* note 43. As expected, the Supreme Court denied *certiorari* on May 3, 2004, nearly two months after this article was written. *Dakota Rural Action v. South Dakota Farm Bureau, Inc.*, No. 03-1108, 2004 WL 194066 (U.S. May 3, 2004); *Nelson v. South Dakota Farm Bureau, Inc.*, No. 03-1111, 2004 WL 203159 (U.S. May 3, 2004). The discussion on the petition for writ of *certiorari* in both the Background and Analysis sections remains useful, however, to better understand how the Court makes its decision regarding petitions for writ of *certiorari*, and the grounds for granting or denying the petition as it related to Amendment E.

69. *Id.*

70. See Dennis Gale, *Justices Asked to Step In; Anti-Corporate Farming Law Supporters Appeal to U.S. Supreme Court*, ABERDEEN AMERICAN NEWS, Feb. 17, 2004, 2004 WL 70210184; see also Editorial Comment, *supra* note 43.

71. Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 527-28 (explaining that the Court grants *certiorari* in about two percent of cases).

72. See Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 LAW LIBR. J. 193, 195 (2000). See also Sup. Ct. R. 10, <http://www.supremecourtus.gov/ctrules/ctrules.html>.

73. Sup. Ct. R. 10, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

III. ANALYSIS

A. CONSTITUTIONAL CHALLENGES TO ANTI-CORPORATE FARMING LAWS

Corporations affected by state anti-corporate farming laws have mounted challenges on multiple constitutional grounds for various reasons.⁷⁷ Although one would expect the challengers to state anti-corporate farming laws to be farmers or entities engaged in farming, due to the broad scope of the restrictions this is not always the case.⁷⁸ These challenges have been based on the Equal Protection Clause, the dormant Commerce Clause, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act.⁷⁹ The main challenges to Amendment E were based on the Equal Protection Clause and the dormant Commerce Clause, which will each be examined.

i. Equal Protection Challenges

Equal protection challenges of state anti-corporate farming laws have had no success.⁸⁰ These challenges have been unsuccessful due to the deference given state action under the Equal Protection Clause.⁸¹ It is not necessary, under the Equal Protection Clause, that legislation or constitutional amendments correct problems they are designed to address.⁸² It is only necessary that the legislature or voters enact laws which they rationally believe might address the problems they are designed to combat.⁸³ Social and economic measures such as corporate farming restrictions “run afoul of the equal protection clause only when ‘the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.’”⁸⁴

States are accorded wide latitude in the regulation of their local

77. *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, 202 F. Supp. 2d 1020, *aff’d*, 340 F.3d 583 (8th Cir. 2003); *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991); *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420 (Neb. 2000); *Omaha Nat’l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986).

78. *Asbury*, 326 U.S. 207 (Minnesota-based non-profit corporation which acquired farm land in satisfaction of a debt); *Omaha Nat’l Bank*, 389 N.W.2d 269 (nationally chartered bank owning land in trust); *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020 (utility companies owning and acquiring land for easements.)

79. *Asbury*, 326 U.S. 207; *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020; *MSM Farms*, 927 F.2d 330; *Hall*, 610 N.W.2d 420; *Omaha Nat’l Bank*, 389 N.W.2d 269.

80. *Asbury*, 326 U.S. 207 (rejecting an equal protection challenge to North Dakota’s corporate land divestiture requirement); *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d 1020 (ruling corporate farming prohibitions unconstitutional on other grounds); *MSM Farms*, 927 F.2d 330 (rejecting equal protection and due process challenges to Nebraska restrictions on non-family farm corporations); *Hall*, 610 N.W.2d 420 (rejecting a hog producer’s equal protection challenge to an exemption for poultry producers in Nebraska’s anti-corporate farming laws); *Omaha Nat’l Bank*, 389 N.W.2d 269 (rejecting an equal protection challenge to Nebraska’s anti-corporate farming laws and their exemption for family farm corporations).

81. See *MSM Farms*, 927 F.2d at 333-34.

82. *Id.* at 334.

83. *Id.* at 333.

84. *Id.* at 332 (quoting *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988)).

economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.⁸⁵

Given the deference state legislatures are afforded under equal protection analysis, challengers to anti-corporate farming laws needed to find a constitutional doctrine holding states to a higher burden in order to be successful.⁸⁶

ii. Dormant Commerce Clause

Challengers to state anti-corporate farming laws have turned to the dormant Commerce Clause to protect their economic rights.⁸⁷ The dormant Commerce Clause is the negative implication of the Commerce Clause, which “grants Congress the authority to regulate interstate commerce.”⁸⁸ The dormant Commerce Clause proscribes state regulation of interstate commerce that is discriminatory or unduly burdensome in nature.⁸⁹ Although it is often categorized as a confusing and impracticable judicial creation,⁹⁰ there is evidence that the Framers intended this negative aspect of the Commerce Clause in order to prevent state isolationism and economic protectionism following Independence.⁹¹

The dormant Commerce Clause protects economic rights by prohibiting state regulations that discriminate against or unduly burden interstate

85. *Id.* (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

86. *See id.* at 333. The Supreme Court specifically noted the challenger’s failure to advance a dormant Commerce Clause argument in *Asbury*. *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210 (1945).

87. *Smithfield Foods v. Miller*, 241 F. Supp. 2d 978 (S.D. Iowa 2003); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, 202 F. Supp. 2d 1020 (D.S.D. 2002), *aff’d*, 340 F.3d 583 (8th Cir. 2003).

88. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003).

89. *Id.*

90. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, ME*, 520 U.S. 564, 610-15 (1997) (Thomas, J., dissenting) (summarizing comments by every member of the current Court and several by their predecessors to this effect). Justice Thomas also provides an exhaustive commentary on the criticism of the dormant Commerce Clause and its lack of a textual basis in the constitution. *Id.*

91. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 n.9 (1994) (explaining that James Madison, the “father of the Constitution” considered “the ‘negative’ aspect of the Commerce Clause . . . the more important”). *See also* Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1071-72 (2002) (examining the background of the Framers’ intent with regard to the Commerce Clause, including a letter on the subject by James Madison); David S. Day, *The Rehnquist Court and Dormant Commerce Clause Doctrine: The Potential Unsettling of the “Well-Settled Principles”*, 22 U. TOL. L. REV. 675, 677 (1991) (recognizing the 170 year precedential history of the dormant Commerce Clause despite its lack of a textual basis and the academic criticism due to its characterization as a judicial creation). The Commerce Clause, and by extension its negative implication, is the embodiment of the concept of federalism. *See* WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 160 (2004). This concept was first espoused by “Dr.” Benjamin Franklin in his proposed Albany Plan, and later in 1776 as delegates of the original thirteen colonies voted for Independence from Britain and the Crown at the Second Continental Congress on July 2, 1776. *See id.* at 291, 312.

commerce.⁹² The dormant Commerce Clause doctrine is analyzed under a two-tier analysis with a discrimination and a non-discrimination tier.⁹³ Statutes affecting interstate commerce can be discriminatory on their face, in their purpose, or in their effect.⁹⁴ Statutes found to be discriminatory in nature are subject to strict judicial scrutiny.⁹⁵ Once the challenger has shown the statute to be discriminatory, the burden shifts to the proponent to show that the statute is the least restrictive alternative in protecting a compelling state interest.⁹⁶ The burden in the discrimination tier is a heavy one⁹⁷ that proponents rarely overcome.⁹⁸ Statutes that are not found to be discriminatory are subject to a balancing of the state's interest and the burden on interstate commerce.⁹⁹ In this second-tier analysis the burden is on the challenger to demonstrate the burden on interstate commerce, and once satisfied, the burden shifts to the state to show that the local benefits cannot be satisfied with less restrictive means.¹⁰⁰ Statutes analyzed under this second-tier balancing test are subject to greater judicial deference.¹⁰¹

Amendment E was found to violate the dormant Commerce Clause under both a first and second-tier analysis.¹⁰² The district court eschewed a discrimination tier analysis to find Amendment E violative under the balancing test.¹⁰³ On appeal, Amendment E was found to be “discriminatory” in its purpose under the first tier.¹⁰⁴ The court of appeals found that the purpose of Amendment E was to target out-of-state corporations, specifically Murphy Farms and Tyson Foods, and that this discriminatory purpose was repugnant to the Constitution.¹⁰⁵ The court of appeals found evidence of this purpose in trial testimony,¹⁰⁶ the “pro”-statement disseminated to voters in support of Amendment E,¹⁰⁷ as well as committee meeting minutes and correspondence.¹⁰⁸

92. See Day, *supra* note 91, at 678.

93. *South Dakota Farm Bureau*, 340 F.3d at 593.

94. *Id.*

95. *Id.* (characterizing the level of scrutiny as rigorous).

96. *Id.* at 597.

97. *Id.* (describing the burden as high).

98. See *Maine v. Taylor*, 477 U.S. 131 (1986). The state of Maine prohibited the importation of live baitfish for health and environmental concerns due to “parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine.” *Id.* at 141. Maine’s statute was upheld despite being found to be discriminatory, and is the only statute to be upheld under the discrimination tier. *Id.* at 151-52.

99. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, ¶ 103, 202 F. Supp. 2d 1020, 1049-50, *aff’d*, 340 F.3d 583 (8th Cir. 2003).

100. See David S. Day, *Revisiting Pike: The Origins of the Non-Discrimination Tier of the Dormant Commerce Clause Doctrine*, 27 *HAMLIN L. REV.* 45, 59 (2004).

101. See *id.* at 47.

102. *South Dakota Farm Bureau*, 340 F.3d at 583; *South Dakota Farm Bureau*, 2002 DSD 13, 202 F. Supp. 2d at 1020.

103. *South Dakota Farm Bureau*, 2002 DSD 13, ¶ 103, 202 F. Supp. 2d at 1049 (choosing “not [to] cross the ‘first tier bridge’” but “to rely on the so-called ‘second tier’ approach.”)

104. *South Dakota Farm Bureau*, 340 F.3d at 596.

105. *Id.* at 594.

106. *Id.* (quoting witness testimony about getting “a law in place to stop” Murphy Family Farms and Tyson Foods from building hog confinement facilities in the state).

107. *Id.* (quoting the “pro”-statement as describing passage of Amendment E as necessary or else “[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant

The Eighth Circuit Court of Appeals faced a similar challenge to an Iowa law restricting vertical integration in the pork industry.¹⁰⁹ In January, 2003, the district court also cited the dormant Commerce Clause in holding Iowa's anti-corporate farming law unconstitutional.¹¹⁰ The district court found Iowa's law violative of all three types of discrimination under a first-tier analysis, concluding "that Iowa Code § [9H] discriminates against interstate commerce on its face, in purpose, and in effect."¹¹¹ The court held that the state was unable to overcome the burden of showing "that the statute serves a legitimate local purpose unrelated to economic protectionism and that the purpose could not be served as well by nondiscriminatory means."¹¹² The court ruled that the purpose of Iowa's law, similar to that of South Dakota's Amendment E, was "nothing more than protecting local economic interests from out-of-state behemoth Smithfield Foods."¹¹³ The state of Iowa appealed the ruling and oral argument was heard in October, 2003.¹¹⁴

corporations").

108. *Id.* (quoting a memorandum to proponents of Amendment E that "[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them . . . either"). The state and intervenors challenge the Eighth Circuit's ruling on the grounds that, *inter alia*, the court incorrectly found a discriminatory purpose. See Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) *petition for cert. filed*, 2004 WL 210651 (U.S. Jan. 29, 2004) (No. 03-1108) [hereinafter Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition]; Brief for Petitioner South Dakota Secretary of State, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003), *petition for cert. filed*, 2004 WL 219798 (U.S. Jan. 29, 2004) (No. 03-1111) [hereinafter Brief for Petitioner South Dakota Secretary of State].

109. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003); Steve Karnowski, *Rulings on Laws Against Corporate Farming Raise Questions for Other States*, ABERDEEN AMERICAN NEWS, Nov. 16, 2003, <http://www.aberdeennews.com/ml/aberdeennews/news/7277995.htm>.

110. Smithfield Foods, 241 F. Supp. 2d at 992-93.

111. *Id.*

112. *Id.*

113. *Id.* Murphy Farms, Inc. was a plaintiff in this case, the very company that was the target of the drafters of South Dakota's Amendment E. *Id.* at 982; South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003).

114. See Karnowski, *supra* note 109. See also McDonough, *supra* note 43. On May 21, 2004, nearly two months after this article was written, the Eighth Circuit Court of Appeals vacated the district court's grant of summary judgment to plaintiff Smithfield Foods on appeal by the Attorney General of Iowa. Smithfield Foods, Inc. v. Miller, No. 03-1411, 2004 WL 1124476 (8th Cir. (Iowa) May 21, 2004). The court of appeals remanded the case for further discovery due to a 2003 amendment of § 9H.2 by the Iowa Legislature, which "repealed the cooperative exception from [§] 9H.2, but delayed the requirement that cooperatives comply with section 9H.2. until 2007, if the cooperative engaged in the prohibited activity before the 2003 amendment." *Id.* at *2. However, although remanding for discovery on whether the 2003 amendment discriminates against interstate commerce in its purpose, effect, on its face, or is unduly burdensome, the court of appeals did note that § "9H.2 appears to disadvantage Smithfield the same way it did before the 2003 amendment." *Id.* at *1. On remand, consideration of

[s]tatements by the legislators and the governor about the 2003 amendment may shed light on whether the General Assembly adopted the amendment as part of an apparent pattern of thwarting Smithfield's attempts to operate in Iowa, or to save section 9H.2 at the expense of in-state interests, or to eviscerate the prior section 9H.2's allegedly discriminatory purpose.

Id. at *3. Furthermore, discovery "showing the amendment's impact on in-state or other out-of-state interests" is required to determine the presence of a discriminatory effect on interstate commerce. *Id.* at *4.

iii. Purposefulness Under The Dormant Commerce Clause

Although the Supreme Court applies a *de novo* standard of review to questions of law,¹¹⁵ since petitioners focused their briefs on the Eighth Circuit's decision finding a discriminatory purpose in Amendment E, this section will focus on purposeful discrimination under a first-tier analysis.¹¹⁶

Although finding a discriminatory purpose is arduous,¹¹⁷ the Supreme Court in *Arlington Heights* established numerous types and evidentiary sources of discriminatory purpose.¹¹⁸ "The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" is one source of evidence of discriminatory purpose.¹¹⁹ "The [s]pecific sequence of events leading up the [sic] challenged decision," "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures" may "afford evidence that improper purposes are playing a role."¹²⁰ Finally, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."¹²¹

The Eighth Circuit has previously upheld a dormant Commerce Clause challenge to a South Dakota constitutional amendment.¹²² In *SDDS v. South Dakota*, the Eighth Circuit struck down a 1990 referendum vetoing approval for the Lonetree solid-waste disposal facility near Edgemont.¹²³ The Eighth Circuit referred to the "con" statement issued as part of the referendum that characterized the Lonetree facility as "an out-of-state dump" that "is not an option for South Dakota communities."¹²⁴ The Eighth Circuit found the referendum violative of the dormant Commerce Clause because of its discriminatory purpose despite the fact that the referendum was approved by citizen-voters; in effect, the Eighth Circuit imputed the discriminatory purpose of the referendum to the voters.¹²⁵

Petitioners challenge the Eighth Circuit's finding of a discriminatory purpose in Amendment E based on both direct and indirect evidence of this purpose.¹²⁶ The direct evidence of discriminatory purpose was found in the

115. Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 297 (2003). The Supreme Court could review all of the bases for challenge under this standard of review. *See id.*

116. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra* note 108; Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

117. *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (1995).

118. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). It is important to note that *Arlington Heights* was decided based on an Equal Protection Clause challenge. *Id.* at 254.

119. *Id.* at 267.

120. *Id.*

121. *Id.* at 268 (emphasis supplied).

122. *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995).

123. *Id.* at 265.

124. *Id.* at 266.

125. *Id.* at 268.

126. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra*

“‘pro’ statement on [the] pro-con statement compiled by [the] Secretary of State . . . and disseminated to South Dakota voters prior to the referendum.”¹²⁷ Further direct evidence was found in drafting meeting minutes, memoranda, and trial testimony evincing a desire by Amendment E supporters to prevent Murphy Family Farms and Tyson Foods from building hog facilities in South Dakota.¹²⁸ Indirect evidence was found in testimony by a “registered environmental professional” that despite the fact that “she was unfamiliar with all of South Dakota’s environmental regulations at the time Amendment E was drafted . . . Amendment E would be necessary even if the State’s current environmental regulations were enforced.”¹²⁹ Further evidence of a discriminatory purpose was the drafting committee’s lack of hesitation despite an expert’s inquiry as to “whether it was a good idea to create such ‘complete’ barriers to capital flow into the state,”¹³⁰ and an admission at trial by a committee member “that the committee completed the drafting process quickly because its members wanted to prevent Tyson Foods and Murphy Family Farms from building facilities in South Dakota.”¹³¹ This direct and indirect evidence demonstrated a lack of knowledge on the part of the drafters, and presumably the voters, of the effects on the environment and the “economic viability of family farmers” of Amendment E.¹³²

Although the drafters and proponents touted protection of the environment and family farm as the goals of Amendment E, the Eighth Circuit found the neglect to “measure the probable effects of Amendment E and of less drastic alternatives” fatal, and that this lack of “evidence supports the conclusion compelled by the direct evidence: the intent behind Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests.”¹³³ Although there is no prohibition on state laws benefiting in-state interests, this benefit cannot be conferred by “burdening out-of-state interests” because this form of “economic protectionism” is inimical to the purpose underlying the dormant Commerce Clause.¹³⁴

While the legislature proposed a constitutional amendment adopting Nebraska’s anti-corporate farming laws in the event that the Supreme Court does not revive Amendment E, that would not necessarily remove the purposefulness from anti-corporate farming laws in South Dakota.¹³⁵ In his introduction of the

note 108; Brief for Petitioner South Dakota Secretary of State, *supra* note 108. See also South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593-95 (8th Cir. 2003).

127. *South Dakota Farm Bureau*, 340 F.3d at 594.

128. *Id.* (characterizing the trial testimony as “blatant” evidence of purposeful discrimination).

129. *Id.*

130. *Id.* at 595. Furthermore, this expert was contacted by a member of the committee prior to giving this opinion. *Id.*

131. *Id.*

132. *Id.* at 595-96.

133. *Id.*

134. *Id.* at 596.

135. *Proposing and Submitting to the Electors at the Next General Election an Amendment to Article XVII of the Constitution of the State of South Dakota Relating to Certain Restrictions on Corporate Farming in South Dakota: Hearing on S.J.R. 1 before the Senate State Affairs Committee*,

Senate Joint Resolution proposing adoption of Nebraska's anti-corporate farming laws, Senator Kloucek, in describing the attack on corporate farming laws in the midwest, stated that having corporate farming laws in place was important because "what is happening with Enron, Northwestern Public Service, Farmland Industries and many other entities in the corporate sector are really putting pressure on our America as we know it."¹³⁶ He went on to say that

[t]he whole issue of corporations controlling agriculture, the whole issue of capital flow, the whole issue of doing great things in agriculture is a great issue for all of us to be concerned about. Who controls that capital and who gets the profits are the issues that we need to address and that's what these acts are trying to do and have tried to do in the past.¹³⁷

While it is difficult to fathom how criminal conduct in corporate accounting and bankruptcy proceedings are related to anti-corporate farming laws in South Dakota, it appears that the legislature is still intent on preserving access to agriculture and the fruits of that access to South Dakotans at the expense of out-of-state interests.¹³⁸

Furthermore, although the following statements were made by Secretary Gabriel in relation to amendment of the 1974 Family Farm Act, Senator Kloucek did not attempt to dispel the overt statement of the Family Farm Act's discriminatory purpose as described by Secretary Gabriel.¹³⁹ Secretary Gabriel stated that the legislature should allow the act to

do what it was designed to do, so that we don't have multi-national, publicly-traded corporations coming in here and taking over our production agriculture, but facilitate capital from coming in and financing the kind of capital intensive operations that we need if we are going to maintain any kind of viability for our rural communities here in South Dakota.¹⁴⁰

While Secretary Gabriel did not vote on Senate Bill 21, his unopposed testimony as to the discriminatory purpose of the Family Farm Act was heard by those who did.¹⁴¹

Similarly, the voters of South Dakota can only learn the effects and purpose of Amendment E and other constitutional amendments from the drafters and proponents of those amendments.¹⁴² Senator Kloucek and other proponents of

2004 Leg., 79th Sess. (S.D. 2004) [hereinafter Proposed Constitutional Amendment], <http://legis.state.sd.us/sessions/2004/SJR1.htm>.; *infra* notes 137-153.

136. *Id.*

137. *Id.*

138. *See id.* Senator Kloucek suggests that adoption of Nebraska's law is intended to try to do what previous laws have done. *Id.* However, what those previous laws have tried to do is to prohibit participation by out-of-state entities in farming. *See South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003).

139. *An Act to Revise Certain Provisions of the South Dakota Family Farm Act: Hearing on S.B. 21 Before the Committee on Agriculture and Natural Resources at the Request of the Department of Agriculture*, 2004 Leg., 79th Sess. (S.D. 2004) [hereinafter Family Farm Act Amendment] (statement of Larry Gabriel, Secretary of Agriculture), <http://legis.state.sd.us/sessions/2004/index.cfm?FuseAction=DisplayBills>.

140. *Id.*

141. *Id.*

142. *South Dakota Farm Bureau*, 340 F.3d at 596.

Amendment E bemoan the Eighth Circuit's perceived misinterpretation of Amendment E in striking it down as unconstitutional.¹⁴³ However, while Senator Kloucek cannot see any "way that any of the original Amendment E supporters could say that they were just trying to exclude the out-of-state corporations" and alleges that the Eighth Circuit "did not even take the context of . . . how it was written," it appears that Senator Kloucek is not aware of the extent to which the district court and the court of appeals examined how Amendment E was written nor the reasons why this type of economic protectionism is considered repugnant to the Constitution.¹⁴⁴ If any court misinterprets Amendment E it is because it must examine the law itself and how it was written, and these inquiries demonstrate a clearly pervasive discriminatory purpose on the part of the drafters of Amendment E, and subsequently South Dakota voters.¹⁴⁵

B. 2004 SOUTH DAKOTA LEGISLATIVE SESSION

In an effort to continue the promotion of the family farm and environmental responsibility while the challenge to Amendment E was pending, legislators turned to the Family Farm Act of 1974 to regulate agriculture.¹⁴⁶ In the 2004 legislative session, sponsors of Senate Bill 21, with the support of Secretary of Agriculture Larry Gabriel, proposed an amendment to the Family Farm Act with three goals in mind.¹⁴⁷ The main goal of the amendment was to expand the act in terms of the types of permissible corporate involvement in farming in South Dakota.¹⁴⁸ The Secretary cited the "contemporary issue" of "bio-pharmaceutical agriculture crops" where "genetically modified dairy cows producing proteins [are] used to enhance quality of life in humans" as an important agricultural opportunity currently precluded under both Amendment E and the Family Farm Act.¹⁴⁹ Secretary Gabriel cited Hematech and Trans Ova as benefiting from the amendment.¹⁵⁰ At the time Hematech arrived in the state, South Dakotans viewed it "as the potential beginning of a biotech boom in the state, complete

143. See Gale, *supra* note 70.

144. *Id.*

145. See *South Dakota Farm Bureau*, 340 F.3d at 592-97.

146. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, ¶ 111, 202 F. Supp. 2d 1020, 1051, *aff'd*, 340 F.3d 583 (8th Cir. 2003). See also Editorial Comment, *supra* note 43; Family Farm Act Amendment, *supra* note 130; S.J.R. 1, 2004 Leg., 79th Sess. (S.D. 2004).

147. Family Farm Act Amendment, *supra* note 130. The first goal was to correct drafting errors in the original Family Farm Act, making the exemptions and restrictions on corporate ownership unambiguous. *Id.* A third goal cited was an interest in easing the restrictions on financing and access to capital by in-state farmers. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* Hematech is a Connecticut-based bio-tech company that chose Sioux Falls over Minneapolis-St. Paul for its new headquarters and testing facility two years ago. Jay Kirschenmann, *Trying to Lure Companies in Growing Biotech Field*, ABERDEEN AMERICAN NEWS, Jan. 2, 2004, available at 2004 WL 57196923. Hematech received \$7.5 million in incentives from the State of South Dakota for its Sioux Falls lab facility. *Id.* "Trans Ova serves as Hematech's embryo-transfer facility, implanting Hematech embryos in cattle and providing care for the gestating cows." *Id.* Trans Ova received \$9 million from the State of Iowa for expansion in Sioux Center. *Id.*

with scientists, laboratories and cloned calves.”¹⁵¹ Senate Bill 21 exempts “any entity that engages in farming primarily for scientific, medical, research, or experimental purposes” from the corporate ownership restrictions as long as “any commercial sales from such farming shall be incidental to the scientific, medical, research, or experimental objectives of the entity.”¹⁵² This change will aid in the effort to attract expansion in the bio-tech industry into South Dakota while protecting the family farm from out-of-state corporations.¹⁵³ Senate Bill 21 was signed by Governor Rounds after it passed the Senate and the House with little opposition.¹⁵⁴

In addition to amending the Family Farm Act, the legislature attempted to confront the likely successful challenge to Amendment E head-on by tabling a joint Senate resolution on Amendment E.¹⁵⁵ This resolution provided for a constitutional amendment to be submitted to the voters in the next general election, which would in effect adopt Nebraska’s anti-corporate farming act verbatim.¹⁵⁶ This joint resolution was a temporary measure in the event that the Supreme Court acted upon the petition for writ of *certiorari* during the 2004 legislative session.¹⁵⁷ However, discussion on this proposed amendment was not re-opened and the joint resolution expired at the end of the 2004 session.¹⁵⁸

Although not acted upon during the 2004 Legislative Session, South Dakota’s proposed adoption of Nebraska’s anti-corporate farming laws in the event that the Eighth Circuit is upheld by the Supreme Court would not necessarily cure the defects in Amendment E. Amendment E was modeled after Nebraska’s I-300, albeit a more restrictive version.¹⁵⁹ Nebraska’s anti-corporate farming laws withstood an Equal Protection challenge, not a dormant Commerce Clause challenge.¹⁶⁰ Nebraska’s law could be subject to challenge under the dormant Commerce Clause, and could suffer a similar fate to both Amendment E and Iowa’s anti-corporate farming law under more strict scrutiny in a dormant Commerce Clause analysis if found to be discriminatory on its face, in its purpose, in its effect, or if unduly burdensome on interstate commerce.¹⁶¹

151. *Id.* Then Governor Janklow indicated “[t]his will give us the opportunity . . . to become the Silicon Valley in bioprotein.” *Id.*

152. S.B. 21, 2004 Leg., 79th Sess. (S.D. 2004); S.D.C.L. §§ 47-9A-1 to 9A-3 (2002 & Supp. 2003).

153. See Family Farm Act Amendment, *supra* note 131.

154. S.B. 21, 2004 Leg., 79th Sess. (S.D. 2004). The bill passed the Senate thirty-four to one, and sixty-three to zero in the House. *Id.*

155. Proposed Constitutional Amendment, *supra* note 127.

156. *Id.*

157. *Id.*

158. *Id.*

159. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 2002 DSD 13, ¶¶ 10-55, 202 F. Supp. 2d 1020, 1027-39, *aff’d*, 340 F.3d 583 (8th Cir. 2003).

160. *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991) (rejecting equal protection and due process challenges to Nebraska restrictions on non-family farm corporations); *Hall v. Progress Pig, Inc.* 610 N.W.2d 420 (Neb. 2000) (rejecting a hog producer’s equal protection challenge to an exemption for poultry producers in Nebraska’s anti-corporate farming laws); *Omaha Nat’l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986) (rejecting an equal protection challenge to Nebraska’s anti-corporate farming laws and their exemption for family farm corporations).

161. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003); *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (S.D. Iowa 2003). See also *Karnowski*, *supra* note 109. Neil Harl, a

Finally, the Nebraska legislature is considering a bill that would create “an Agricultural Opportunities Task Force to study trends in agriculture and to recommend changes to state law, including potential modifications of I-300, to provide agricultural producers and landowners with additional avenues to manage risk, access to capital, and transfer assets.”¹⁶² South Dakota may choose to either adopt Nebraska’s law verbatim or perhaps undertake a study to consider the scope and effectiveness of future anti-corporate laws as it did in 1968, if the Supreme Court upholds the Eighth Circuit.

C. APPEAL TO THE SUPREME COURT

A review of the considerations set forth by the Supreme Court, along with the low rate at which petitions are granted, lead to the conclusion that it is unlikely that the Supreme Court will review the challenge to Amendment E.¹⁶³ Petitioners have cited no authority indicating a split among the states or the federal circuits regarding applicability of the dormant Commerce Clause to the states.¹⁶⁴ Furthermore, petitioners do not allege that the applicability of the dormant Commerce Clause to state anti-corporate farming laws is a federal question that “has not been, but should be, settled by” the Supreme Court.¹⁶⁵ In addition, even if the Eighth Circuit were to have incorrectly applied the dormant Commerce Clause, or one of the other bases for the challenge to Amendment E, incorrect application of the dormant Commerce Clause would not, by itself, be sufficient for grant of the petition.¹⁶⁶ Finally, although the issue is of extreme importance to South Dakotans and to a slightly lesser extent to the eight other states having similar restrictions on corporate farming, petitioners must demonstrate a sufficient level of importance of this issue in order for the Supreme Court to grant their petition for writ of *certiorari*.¹⁶⁷ While there is

professor at Iowa State University, who helped draft Amendment E, is quoted as saying “I think there will be activity once the dust settles over these cases,” in relation to challenges of other state anti-corporate farming laws. *Id.* David Day, University of South Dakota constitutional law professor and co-counsel for plaintiffs challenging Amendment E, stated that while “the laws are narrower and less burdensome” in other states, “lawyers are likely to take a hard look at those decisions to see if they provide for new challenges.” *Id.*

162. L.B. 1086, 98th Leg., 2nd Sess. (Neb. 2004), http://www.unicam.state.ne.us/pdf/INTRO_LB-1086.pdf. LB 1086 follows “a report commissioned by the Nebraska Department of Agriculture on the state’s agricultural future [which] concluded that revisions to I-300 and local livestock zoning laws were needed to keep the state competitive with other states.” Robert Pore, *I-300 Hearing Set for Saturday in Grand Island*, THE GRAND ISLAND INDEPENDENT, Feb. 13, 2004, available at http://theindependent.com/stories/021304/new_pea-ce13.shtml. As in South Dakota, this proposed legislation was met with vigorous opposition. *Id.* Under LB 1086, any changes to I-300 would be proposed by legislators in 2005 and voted on by the people in 2006. *Id.*

163. *See id.* *See also* Schweitzer, *supra* note 71; Gale, *supra* note 70; Editorial Comment, *supra* note 43.

164. *See* Brief for Petitioners Dakota Rural Action and South Dakota Resources Coalition, *supra* note 108. *See also* Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

165. *See* Sup. Ct R. 10, *supra* note 72. *See also* Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 15 (2003) (suggesting that “the dormant Commerce Clause doctrine has among the longest histories of any active constitutional law doctrine”).

166. *See* Sup. Ct R. 10, *supra* note 72.

167. *See id.*

some authority in dormant Commerce Clause jurisprudence supporting the important nature of state regulation,¹⁶⁸ even if the challenge to Amendment E meets the standards for review by the Supreme Court, the chance that it will then be heard is still rare.¹⁶⁹

Petitioner's most cogent argument attacking the Eighth Circuit's ruling that Amendment E has a discriminatory purpose is whether the discriminatory intentions of the drafters can be imputed to the citizen-voters that approved Amendment E.¹⁷⁰ Petitioners implore the Supreme Court to grant *certiorari* in order to "ensure that the Eighth Circuit's misguided and deeply problematic approach to the dormant Commerce Clause is staunched."¹⁷¹ Petitioners cite numerous examples of statements by the Supreme Court warning against "intrusion into the workings of other branches of government" except in limited circumstances.¹⁷² However, while the Court in *Arlington Heights* did not view the list of sources for determining evidence of a discriminatory purpose as exhaustive,¹⁷³ the Eighth Circuit did perform an exhaustive analysis of the evidence, both direct and indirect, of a discriminatory purpose in Amendment E.¹⁷⁴ The Eighth Circuit examined all the sources in *Arlington Heights* and determined that there existed a discriminatory purpose.¹⁷⁵ However, despite the apparent appropriate finding of discriminatory purpose on the part of Amendment E drafters, petitioner's challenge this purpose being imputed to citizen-voters.¹⁷⁶

Although the question of imputing the discriminatory purpose of drafters to citizen-voters in the rubric of the Initiative and Referendum process is somewhat

168. See *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (invalidating an Oklahoma statute requiring power plants to burn a coal mixture containing at least ten percent Oklahoma mined coal on the grounds that it discriminated against interstate commerce on its face and in practical effect); *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding a regulation banning the importation of baitfish into Maine for health and safety reasons); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a Minnesota law prohibiting sale of milk in plastic containers, but allowing the sale of milk in paper containers); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a law prohibiting the importation of waste into New Jersey).

169. See Schweitzer, *supra* note 71.

170. Brief for Petitioner South Dakota Secretary of State, *supra* note 108. Petitioners also argue that the Supreme Court has never decided a dormant Commerce Clause challenge solely on the basis of purposeful discrimination. *Id.* at 16. However, as the Eighth Circuit explained:

[d]iscriminatory purpose is at the heart of dormant Commerce Clause analysis and is often incorporated into both first-tier analysis and second-tier *Pike* balancing analysis. See, e.g., *Fulton Corp.*, 516 U.S. at 330 . . . (explaining dormant Commerce Clause as a prohibition on state regulations designed with the purpose of benefiting in-state interests by burdening out-of-state interests); *W. Lynn Creamery*, 512 U.S. at 196 . . . (noting purpose of state's unconstitutional pricing scheme although resting decision on statute's discriminatory effect); *Taylor*, 477 U.S. at 148 . . . (equating purposeful economic protectionism with per se invalidity).

South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003).

171. Brief for Petitioner South Dakota Secretary of State, *supra* note 108, at 21.

172. *Id.* at 19 (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)).

173. *Id.* It is important to note that *Arlington Heights* was decided based on an Equal Protection Clause challenge. *Id.* at 254.

174. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592-96 (8th Cir. 2003).

175. 340 F.3d 583.

176. Brief for Petitioner South Dakota Secretary of State, *supra* note 108.

novel, previous attempts by the state to overturn the Eighth Circuit have failed.¹⁷⁷ In *SDDS*, the United States Supreme Court denied the state's petition for writ of *certiorari* despite the purposeful discrimination of the drafters of the referendum at issue being imputed to the citizen-voters who defeated it.¹⁷⁸ Furthermore, even if the Supreme Court chooses to review the challenge to Amendment E, the Court will review the questions of law *de novo*.¹⁷⁹ This means that the Supreme Court need not address this somewhat novel question petitioners raise, but may affirm or reverse the Eighth Circuit's decision under either tier of the dormant Commerce Clause.¹⁸⁰

V. CONCLUSION

South Dakota is an agriculturally rich state that has tried for thirty years to protect its environment and its family farmers from the perceived negative effects of corporate ownership of farmland. A narrow and restrictive constitutional amendment modeled after Nebraska's anti-corporate farming laws was struck down as violative of the dormant Commerce Clause as an example of the economic protectionism that is repugnant to the United States Constitution. The legislature's likely response in the event the Supreme Court does not overturn the Eighth Circuit's decision will be to propose a further amendment adopting Nebraska's less restrictive laws verbatim. However, the fall of South Dakota's Amendment E and Iowa's anti-corporate farming laws could send lawmakers back to the drawing board if Nebraska's laws succumb to a successful constitutional challenge. One piece of advice to future lawmakers considering restrictions on corporate farming; "our America as we know it",

[o]ur system, fostered by the Commerce Clause, is that every *farmer* and every craftsman shall be encouraged to produce by the certainty that he will have *free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them*. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.¹⁸¹

177. *South Dakota v. SDDS, Inc.*, 523 U.S. 1118 (1998).

178. *Id.*

179. Struve, *supra* note 115 at 297.

180. *See id.*

181. *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978, 993 (S.D. Iowa 2003) (quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35 (1949)) (emphasis supplied).