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Amendment E: A Personal Perspective on Defending Its Constitutionality

by

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AMENDMENT E: A PERSONAL PERSPECTIVE ON DEFENDING ITS CONSTITUTIONALITY

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I assisted, along with Jay Tutchton of Earth Justice and John Davidson of the University of South Dakota Law School in representing the Intervenors, Dakota Rural Action and South Dakota Resources Coalition, at both the trial and appeal of Amendment E. These parties were allowed to intervene because of comments made by then Attorney General of South Dakota, Mark Barnett, during the debate and campaign on Amendment E, in which he questioned the constitutionality of the Amendment.

Dakota Rural Action is a grass roots community organization dedicated to preserving the quality of rural life in South Dakota. South Dakota Resources Coalition is a coalition of environmental organizations in the state. Both were instrumental in the passage of Amendment E. These organizations and the other supporters of Amendment E took direct democratic action to try to save the family farm and protect the environment and rural way of life in South Dakota. Amendment E was passed via referendum in November, 1998, with fifty-nine percent of the vote. It was backed by more than two-thirds of farmers and received significant support from South Dakota's urban centers.

Having lost at both the trial and appeal of Amendment E, I hope my view of the matter is not perceived as mere "sour grapes." Handling this case was one of the most remarkable and rewarding experiences of my legal career. I had a chance to assist in the defense of a citizen's initiative with which I agreed, and an opportunity to meet the remarkable people behind the passage of Amendment E.

The Amendment E trial was held in December, 2001, in Aberdeen, South Dakota. I still remember waking early every morning in the Super 8 Motel, going to the small lounge, and preparing for the day's events. At the time, I was obviously wrapped up in the realities and day-to-day cares of the trial of the case. In retrospect, the time has almost a magical quality in my mind, given both the import of the matter and the amazing individuals who were on our side.

Although Amendment E presents crucial legal issues, I admit to first being struck by the human element of the case. In March of 2001, I flew from Denver to South Dakota to meet with representatives of Dakota Rural Action and South Dakota Resources Coalition. I was struck by the incredible knowledge and dedication of individuals such as John Bixler, and Luanne Napton, who headed Dakota Rural Action and South Dakota Resources Coalition respectively.

What truly moved me though, was meeting some of the family farmers and

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ranchers who fought so hard for this Amendment. I was particularly struck by two retired hog farmers, Ralph and Don. They spoke of the changes as the worse that they had seen in agriculture, and how the way of life and land they knew were being destroyed. Throughout the case, when I would get lost in minutia or picky details of the proceedings, I would always be able to think of these two men and how important the case was to them and the many independent farmers and ranchers that they represented. Ralph and Don came to every day of the trial, and also traveled to St. Paul for oral argument. As lawyers, we must not ever forget that our work is truly a human endeavor, and not merely an intellectual exercise.

If one merely reads the Eighth Circuit's opinion, one truly misses both the import and intentions of Amendment E. Quite frankly, when I first read the opinion, I could not believe that they were really deciding the appeal of the trial that had been conducted. The Court focused on the alleged discriminatory purpose of Amendment E, and seemed to me to pick and choose isolated portions of the record to justify the decision. There was simply no mention that the trial court had found to the contrary, that there was no discriminatory purpose.

In my heart, I do not believe Amendment E was designed or passed with a purpose of discriminating against out-of-state corporations. It made no difference if the offensive corporations were located in South Dakota or elsewhere – it was the corporate structure that was the problem. Although not mentioned by the Eighth Circuit, several of the people who helped draft Amendment E testified about the very valid and legitimate purposes of Amendment E.

Amendment E was an attempt to turn the tide on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms. Limited liability entities enjoy limited risk exposure and tax advantages which allowed them to attract investment capital with which to expand. This creates anti-competitive forces that squeeze traditional, family farmers out of the market. The inability of the family farmer to compete changes social demographics in rural communities by replacing the independent farmer with disempowered sharecroppers and destroys the social fabric of small towns.

In addition, Amendment E sought to make farm owners responsible for environmental contamination. Large agribusiness, such as hog operations, have a propensity to produce an enormous amount of waste that saturates soil, deluges water channels, and contaminates groundwater. Corporate limited liability status allows owners of agricultural operations to avoid personal liability for environmental contamination. Accordingly, Amendment E seeks to limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally involved in the farming operation. Family farmers, even if they do enjoy limited liability due to corporate organization, are exempt under Amendment E due to their obvious disincentive to "foul their own nest."

Amendment E did not arise in a vacuum, but rather grew out of the earlier South Dakota Family Farm Act of 1974 and was modeled upon a provision of

the Nebraska Constitution that had withstood judicial scrutiny for fifteen years. Most mid-western states also have some form of prohibition on corporate agriculture, some dating back to the turn of the last century.

The significant history of anti-corporate farming legislation was simply ignored by the Eighth Circuit. However, the fact that Amendment E was historically grounded and modeled after similar legislation that had survived scrutiny presents a much larger philosophical problem. Assume for a moment that some citizens of a state want to draft legislation to address a specific problem. They could begin from scratch, eking out every phrase anew, only to witness a succession of challenges to that law. Certainly the better practice would be to look elsewhere, for similar laws that have both addressed the problem and withstood legal scrutiny. The proponents of Amendment E did exactly that, but to no avail.

In law school, I remember being awed by the scope and nature of disciplines that were brought to bear in some of the grand cases of our time. The use of dolls and sociological studies in *Brown v. Board of Education* still sticks in my mind. Back in law school, I wondered if I would ever have the opportunity to use such evidence and ideas in a case of true significance, and luckily I was given that chance.

Although not reflected in the Eighth Circuit's opinion, the trial of Amendment E featured significant and fascinating sociological, economic, and scientific expert testimony to buttress Amendment E. William Heffernan, a sociologist who had studied the impact of corporate agriculture on rural communities, discussed how the influx of corporate ownership in agriculture negatively impacted the social fabric, quality of life, and control of life in local communities. Linda Lobao, a rural sociologist, confirmed this point as well. She recounted how several studies have shown that indicators of quality of life such as economic, social fabric, inequality and others all go down with industrialized farming.

North Carolina has seen its waterways fouled because of the impact of large corporate hog farms there. Lawrence Cahoon is an environmental scientist who has studied the impact that such "nutrient importing" has on an ecosystem, and he testified about the horrors wrought in that state.

Perhaps the most unique expert was the most appropriate, and that was from Stanley Rosendahl, a farmer and rancher from Nebraska. Nebraska passed its I-300 law in 1982, a law very similar to Amendment E and upon which E had been modeled. Mr. Rosendahl explained how I-300 had not negatively impacted agriculture in Nebraska and had created additional opportunities for family farmers. The Eighth Circuit relied on the fact that the supporters of Amendment E conducted no studies on how an anti-corporate farming law might work, but the panel ignored the fact that there was twenty years of practical experience with a similar law in the record.

Philosophically and legally, the case of Amendment E presents several dilemmas. The first is obviously how much deference must be given to validly passed citizens' initiatives, and how such initiatives should be evaluated under

the Commerce Clause. The second is how much power will corporations be allowed to wield in our society, and how much can they be restricted. Finally, perhaps the crucial issue is how much deference will be accorded to pure economic considerations, to the detriment of social and environmental concerns.

Saving the family farm is not going to be a simple or easy task, and to date various other measures have not been successful. According to Luther Tweeten, an economist who testified for the plaintiffs, the United States has been losing family farms at a rate of two percent per year. Agriculture and the family farm have been foundations of the American way of life and both a practical and ideal examples of the values of community, mutual aid, and self-reliance. The citizens of South Dakota made a reasoned and historically grounded attempt at protecting the family farm, and it was an honor to assist in the defense of Amendment E.