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Foreword

by

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FOREWORD

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The *South Dakota Law Review* accepted the opportunity to publish a Special Issue that would focus exclusively on the Amendment E litigation and issues related to the regulation of "corporate farming" by the States shortly after the Eighth Circuit had affirmed the District Court's opinion that Amendment E violated the dormant Commerce Clause. At the time the decision was made to proceed with publishing this Issue, the petition for writ of certiorari had not yet been filed with the United States Supreme Court but the Defendants and Intervenors had announced plans to file the petition. The petition for writ of certiorari was filed on January 29, 2004. On May 3, 2004, the United States Supreme Court denied certiorari. Because the issue remains important in South Dakota and several surrounding states, the *South Dakota Law Review* is proceeding to publish this Issue.

The Board of Editors would like to acknowledge and express appreciation for the writing contributions that were submitted for this Issue. All parties were invited to submit articles for publication. The *South Dakota Law Review* endorses no party that was involved in the *South Dakota Farm Bureau v. Hazeltine* litigation.

Randy Canney, one of the attorneys for the Intervenors (Dakota Rural Action and South Dakota Resources Coalition), and Neil Fulton, one of the attorneys representing investor owned utility companies, provided insight into the work of an attorney in litigating a constitutional issue. Representatives from the Farmers' Legal Action Group who submitted amici curiae briefs to the Eighth Circuit and United States Supreme Court wrote from the perspective of the need to preserve the family farm and the necessity of laws such as Amendment E to support the family farm. From the sociological perspective, Meredith Redlin and Brad Redlin considered the impact of corporate farming on rural communities.

Several students including *South Dakota Law Review* Board members contributed articles for this Special Issue. Jeffrey Banks provided an historical perspective of the corporate farming laws in South Dakota beginning with the 1974 Family Farm Act. This article focuses on the challenge to the Amendment E and addresses subsequent attempts to revise the corporate farming laws in South Dakota. Jeremy Jehangiri wrote an overview of an article written by Professor Noel T. Dowling in 1940 and discusses the theories and assertions advanced by Dowling in regards to dormant Commerce Clause jurisprudence. In

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addition, Justice Scalia's formalistic approach to the dormant Commerce Clause is highlighted from the perspective of one current Supreme Court Justice. The article by Jennifer Larsen article provides an overview of the dormant Commerce Clause from an historical perspective and focuses on the discrimination tier – the tier in which the United States Supreme Court has utilized in the past decade to determine the constitutionality of a state statute when considering a dormant Commerce Clause challenge. Finally, the recognition of economic liberties in dormant Commerce Clause jurisprudence is discussed in an article written by Bruce Broll. Each of the articles submitted by the parties involved and/or interested in this litigation and student written articles are intended to provide a comprehensive understanding of the Amendment E and corporate farming and their relationship to the dormant Commerce Clause.

I. BRIEF BACKGROUND OF SOUTH DAKOTA CORPORATE FARMING LAWS

Amendment E was not the first restriction on the restriction of corporate farming in South Dakota. The 1974 Family Farm Act was passed to restrict corporate farming and it restricted corporate ownership of agricultural land.[1] The 1974 Act provides for "the importance of the family farm to the economic and moral stability of the state" and "recognizes that the existence of the family farm is threatened by conglomerates in farming."[2] The statutes that are included in the 1974 Family Farm Act address cultivation of land.[3] Exempt from the Act are family farms and "authorized small farm corporations."[4]

In 1988, the statutes in the Family Farm Act were amended to address confined hog operations.[5] These amended statutes were aimed strictly at corporations that bred, farrowed and raised swine.[6] Neither the 1974 Family Farm Act nor its 1988 amendments restricted any other corporate livestock feeding corporations.[7]

Amendment E[8] was placed on the ballot through an Initiative and Referendum and was voted upon in November 1998. The Amendment essentially barred corporate ownership of farmland in addition to corporate livestock feeding operations. The voters of South Dakota passed the amendment to its constitution making it Article XVII, Sections 21-24 of the South Dakota

1. *See* S.D.C.L. § 47-9A-1 (2003).
2. *Id.*
3. S.D.C.L. § 47-9A-2 (2003).
4. S.D.C.L. § 47-9A-13 (2003).
5. S.D.C.L. § 47-9A-13.1 (2003).
6. *Id. See also* Op. S.D. Att'y Gen. 95-02 (1995). The amended statute applies only to hog confinements operations that carry out all three operations. *Id.*
7. *See* S.D.C.L. § 47-9A-11 (2003).
8. The Amendment was called "Amendment E" because of its location on the 1998 election ballot. Brief for Appellants at 1, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (Nos. 02-2366, 02-2644, 02-2646, 02-2588) (hereinafter Appellant's Brief).

Constitution. The first challenge to the constitutionality of the amendment was filed on June 28, 1999.[9]

II. CHALLENGES TO AMENDMENT E

The plaintiffs in *South Dakota Farm Bureau, Inc. v. Hazeltine*[10] included a variety of individual plaintiffs, individuals representing farm corporations, corporations organized for non-farm purposes and organizations aimed at representing farmers and ranchers. The plaintiffs originally brought claims that Amendment E violated the dormant Commerce Clause, the Equal Protection doctrine, the Contracts Clause, the Supremacy Clause, and the Americans with Disabilities Act (ADA).[11] After a court trial in December 2001, Judge Kornmann issued an opinion in May 2002 that Amendment E: 1) was preempted by the ADA;[12] 2) was unconstitutional under the dormant Commerce Clause; and, 3) that cooperatives were not subject to Amendment E.[13]

A. DORMANT COMMERCE CLAUSE CHALLENGE

The plaintiffs argued that Amendment E (also referred to as the Corporate Farming Ban) discriminated against interstate commerce.[14] The plaintiffs claimed that the Amendment E facially discriminated against interstate commerce and that the Amendment constituted discrimination through its purpose and in its effect.[15] While the District Court did find that the Amendment violated the dormant Commerce Clause, it applied the *Pike*[16] balancing test. The plaintiffs, however, wanted Amendment E to be ruled unconstitutional on the first-tier of the dormant Commerce Clause test, thus finding that it discriminated against interstate commerce.[17]

B. A TWO-TIERED ANALYSIS OF THE DORMANT COMMERCE CLAUSE

The modern day dormant commerce clause doctrine has evolved to recognize a two-tiered approach to determine the validity of a state regulation affecting interstate commerce.[18] This two-tiered approach is described in

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9. *Id.*

10. 2002 DSD 13, 202 F.Supp 2d 1020 (D.S.D. 2002), *aff'd in part*, 340 F.3d 583 (8th Cir. 2003), and *cert. denied*, 124 S.Ct. 2095 (2004).

11. *South Dakota Farm Bureau*, 2002 DSD 13, ¶1, 202 F.Supp. 2d at 1023.

12. On appeal, the Eighth Circuit Court of Appeals ruled that the ADA issue had effectively been dismissed prior to the trial at the District Court. Therefore, the court could not "revive" the ADA claim *sua sponte*. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir. 2003).

13. *South Dakota Farm Bureau*, 202 F.Supp. 2d at 1039.

14. Brief of Appellees and Cross-Appellants at 9, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (No. 02-2588, 02-2644, 02-2646, 02-2366) (hereinafter Appellees' Brief).

15. *Id.* at 9-10.

16. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

17. Appellees' Brief at 12.

18. Shane D. Buntrock, *Quill Corporation v. North Dakota: Spawning the Physical Presence*

Oregon Waste Systems, Inc. v. Dep't of Environmental Quality.[19] In that case, the Court found an Oregon statute that imposed a greater surcharge on in-state disposal of solid waste generated in other states to be facially discriminatory and in violation of the dormant Commerce Clause.[20] The approach utilized in analyzing a dormant "Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."[21] The Court defined "discrimination" in this case to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[22] A restriction on commerce that is discriminatory is "virtually *per se* invalid."[23] In *Oregon Waste Management*, the Court found that the differential surcharge imposed by the statute favored shippers of Oregon waste over shippers "handling waste generated in other States . . . patently discriminates against interstate commerce."[24]

Judge Kornmann, in his District Court opinion, opined that before the court engages in a full-fledged analysis of the challenged statute, the court must first determine whether or not the statute "regulates or discriminates against interstate commerce."[25] If so, the first tier, or the discrimination tier, applies.[26] Under the first tier, there are three ways in which discrimination may be found: the statute may be facially discriminatory,[27] the statute may have a discriminatory purpose,[28] or, the statute may have a discriminatory effect.[29]

If a statute is not to be discriminatory, the second tier will be applied by the Court.[30] In this tier, the statute will be "struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'"[31] This tier, referred to as the non-discrimination tier, was firmly established in *Pike v. Bruce Church* and uses a "balancing test" to weigh the putative local benefits against the burden the regulation places on interstate commerce.[32]

In the District Court, Judge Kornmann applied the second-tier balancing test and found that Amendment E created a substantial burden on interstate

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"Nexus" Requirements Under the Commerce Clause, 38 S.D. L. Rev. 130, 137 (1993).

19. 511 U.S. 93, 99 (1994).
20. *Id.* at 108.
21. *Id.* at 99 (citations omitted).
22. *Id.*
23. *Id.* (citations omitted).
24. *Oregon Waste Sys, Inc.*, 511 U.S. at 100.
25. South Dakota Farm Bureau, Inc. v. Hazeltine, 2002 DSD 13, ¶88, 202 F.Supp. 2d 1020, 1045.
26. *See id.*
27. Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997)).
28. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003).
29. *Id.*
30. *See generally* South Dakota Farm Bureau, 340 F.3d at 593.
31. *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).
32. *See generally Pike*, 397 U.S. at 142.

commerce when considering the utilities and other interstate companies that must cross through the state in order to carry out business.[33] Furthermore, "the burdens imposed on interstate commerce are clearly excessive in relation to the putative local benefits."[34]

On appeal to the Eighth Circuit, however, the Court of Appeals found Amendment E to violate the dormant Commerce Clause on the first-tier.[35] Specifically, the court found that Amendment E had a discriminatory purpose.[36] Finding this discriminatory purpose, the court determined that it did not need to apply the two other first-tier tests or the second-tier balancing test.[37] Evidence of discriminatory purpose was found in the "pro" statement, drafting meeting notes, drafting process irregularities and testimony at the district court trial.[38] Applying the strict scrutiny test, the Defendants were required to show that there existed no reasonable non-discriminatory alternatives "to advance their legitimate local interests."[39] In this case, the court found that the Defendants were unable to meet their burden of demonstrating "that non-discriminatory alternatives would not advance Amendment E's interests."[40]

III. IN DEFENSE OF AMENDMENT E

Defending the amendment to the South Dakota Constitution included the offices of the Secretary of State and Attorney General, and Intervenors, Dakota Rural Action and South Dakota Resources Coalition. In addition, Amicus Briefs were filed with the Eighth Circuit by a number of interested parties in support of Amendment E including the State of Nebraska, the State of Minnesota, and the Farmers Unions from the National Farmers Union and from the states of Minnesota, South Dakota, Iowa and North Dakota. Those supporting Amendment E focused on the social, economic and environmental concerns that may be created by corporate farm ownership. It was argued that, by restricting corporate farming in South Dakota, the tide will be turned "on the adverse social, economic, and environmental impacts imposed on rural communities by non-family, corporate farms."[41] According to the defenders of Amendment E, "corporate farming causes adverse sociological effects on communities, has harmful long-term effects on family farmers who do business with corporate farms under production contracts, and limits the ability of family farmers to have

33. South Dakota Farm Bureau,Inc. v. Hazeltine, 202 DSD 13, ¶105, 202 F.Supp. 2d 1020, 1050 (2002).

34. *Id.*

35. South Dakota Farm Bureau, 340 F.3d at 597.

36. *Id.* at 593.

37. *Id.*

38. *Id.* at 593-94.

39. *Id.* at 596-97.

40. *Id.* at 597.

41. Brief of Intervenor-Appellants at 16, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (No. 02-2588) (hereinafter Intervenor-Appellant's Brief).

independent markets for their products."[42] Family farmers are squeezed out of the market by anti-competitive forces that are created when limited liability entities with limited risk exposure and attractive tax advantages are allowed to operate in the state.[43] Furthermore, "the inability of the family farmer to compete changes social demographics in rural communities"[44] and the loss of farms ultimately leads to a loss of businesses in the rural communities.[45]

In addition, Amendment E was thought to be a means of protecting the environment from contamination of soil and water that is caused by waste from large agribusinesses.[46] The Amendment would "limit the availability of reduced risk exposure provided by corporate status to family farmers who are personally involved in the farming operation."[47] Defenders of Amendment E argued that owners of agricultural operations that are organized under a corporate limited liability status are able to avoid liability for contamination of the environment.[48] Hence, some means of promoting environmental responsibility by large agribusinesses was necessary.

Specifically opposing the finding that Amendment E violated the dormant Commerce Clause, the Defendants argued before the Eighth Circuit that the Amendment regulates evenhandedly as it applies to all in-state and out-of-state corporations and limited liability syndicates conducting business in this state.[49] Furthermore, the Amendment created no "preferential treatment in favor of in-state businesses or discriminating against out-of-state entities."[50] The purpose of Amendment E was not "to economically protect in-state businesses to the detriment of out-of-state businesses."[51] As reflected in the "Pro-Con Statement" published before the 1998 election, the purpose of Amendment E was "to protect family farms and the environment and to maintain the rural way of life."[52]

In applying tier-two of the dormant Commerce Clause analysis, the Defendants argued that the incidental effects imposed upon interstate commerce by Amendment E were not "excessive in relation to the putative local benefits."[53] Citing precedent from the United States Supreme Court and Eighth Circuit Court of Appeals, the Defendants argued that a state has a legitimate

42. Appellant's Brief at 7.

43. Intervenor-Appellant's Brief at 16.

44. *Id.* at 16-17.

45. *See generally* Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Service Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1092 (1996).

46. Intervenor-Appellants Brief at 17.

47. *Id.*

48. *Id.*

49. Appellant's Brief at 19.

50. *Id.* at 20. *See also* U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1067 (8th Cir. 2000) (describing that discrimination under the dormant Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (citations omitted)).

51. Appellant's Brief at 21.

52. *Id.* at 20. *See also* Trial Ex. 513, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583(8th Cir. 2003); *South Dakota Farm Bureau*, 340 F.3d at 594-97.

53. Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970); *see also* Appellant's Brief at 29.

interest in preventing corporate ownership of farms in order to promote family farm operations and the welfare of citizens in rural farm communities.[54] In addition, the Defendants' experts at trial in the District Court testified that laws such as Amendment E are needed to "protect[] the socioeconomic structure of rural life and traditional family-farm based agriculture."[55]

IV. PETITION FOR WRIT OF CERTIORARI FILED BUT DENIED

The South Dakota Secretary of State and Attorney General timely filed a Petition for Writ of Certiorari with the United States Supreme Court in January 2004.[56] Using the rationale upon which the Supreme Court will grant a petition for writ of certiorari, the Petitioners argued that the decision of the Eighth Circuit was "in conflict" with the Supreme Court's analysis of the dormant Commerce Clause[57] and that this is an "important and recurring issue."[58] Contrary to the opinion of the Eighth Circuit, the Petitioners argued that the proper test in determining whether a law is discriminatory is found within the text and effects of the state law.[59] Furthermore, "[t]he Court has never held that a state law violates the dormant Commerce Clause based *solely* on a finding of discriminatory purpose."[60] The Eighth Circuit Court of Appeals also deviated from the usual dormant Commerce Clause analysis when it based "its ruling not only on the "purpose" generally, but on . . . the subjective intent of the *drafters* of Amendment E."[61] Finally, this case was argued to be a relevant issue for the Supreme Court to consider because of the importance of family farms particularly in those states with corporate farming laws.[62] *South Dakota Farm Bureau* is likely to impact the "power of states to enact regulations affecting interstate commerce"[63] and the courts need to be making proper and consistent analyses.

V. CONCLUSION

After five years in the courts, the fate of Amendment E has been settled. Because South Dakota's corporate farming law has been compared to the corporate farming laws in North Dakota, Minnesota, Nebraska, Iowa, Kansas,

54. Appellant's Brief at 23-24. *See, e.g.*, Asbury Hosp. v. Cass County, 326 U.S. 207 (1945); Hampton Feedlot, Inc. v. Nixon, 249 F.3d 814 (8th Cir. 2001); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991); State ex rel. Webster v. Lehndorff Geneva, Inc. 744 S.W.2d 801 (Mo. 1988).

55. Appellant's Brief at 28-29.

56. Brief of Petitioners, Nelson v. South Dakota Farm Bureau, Inc., 124 S.Ct. 2095 (2004) (No. 03-1111), *cert. denied*, (U.S. May 3, 2004).

57. *Id.* at 12.

58. *Id.* at 21.

59. *Id.* at 16.

60. *Id.* at 15.

61. *Id.* at 17.

62. *Id.* at 21.

63. *Id.* at 23.

Oklahoma and Missouri, those states have closely watched the outcome of *South Dakota Farm Bureau, Inc. v. Hazeltine.* Iowa's corporate farming law has recently been challenged, with the District Court for the Southern District of Iowa's decision vacated and remanded by the Eighth Circuit Court of Appeals.[64] Upon being ruled unconstitutional by the District Court for the Southern District of Iowa, the law in Iowa was amended; thus, the law in effect at the time of its appeal to the Eighth Circuit Court of Appeals had been changed.[65] The Eighth Circuit ordered the District Court to consider whether the new law "unconstitutionally discriminates against interstate commerce."[66]

It is likely that plaintiffs in other states will come forward to challenge the constitutionality of the corporate farming laws of their states now that the law in South Dakota (which arguably is fashioned after those of other states) has been ruled unconstitutional on a dormant Commerce Clause challenge. For that reason, the *South Dakota Law Review* is pleased to present this Special Issue.

The following briefs are those that were submitted to the United States Eighth Circuit Court of Appeals in *South Dakota Farm Bureau v. Hazeltine.* The order in which they appear is the order in which the brief was filed with the court.

These briefs have been formatted for publication purposes in the *South Dakota Law Review* and do not include the original cover page, table of contents, table of authorities or certificates of compliance and service. Otherwise, the content of the briefs has not been intentionally altered.

64. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004).
65. *Id.*
66. *Id.*