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**Amendment E: The Constitutional  
Dimensions of Unintended Consequences**

by

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# AMENDMENT E: THE CONSTITUTIONAL DIMENSIONS OF UNINTENDED CONSEQUENCES

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For me, any commentary on South Dakota's Amendment E must begin with two admissions in the interest of full disclosure. First, my partner David Gerdes and I represented several investor owned utility companies in an action challenging the constitutionality of Amendment E. Second, from its inception I opposed Amendment E because I thought it was bad policy and probably unconstitutional. With those disclosures made, I can turn to what I see as Amendment E's most interesting and overlooked aspect: the vast array of unintended consequences it produced. Amendment E's impact was much wider than intended or anticipated. This overbreadth was its ultimate undoing.

## I. THE PHILOSOPHICAL AND POLITICAL BACKGROUND OF AMENDMENT E

Amendment E has its roots in a romantic (and largely unrealistic at this point) vision of the "small family farmer." It is the successor to South Dakota's Family Farm Corporation Act, which was passed in 1974 because of "the importance of the family farm to the economic and moral stability of the state" and because "the existence of the family farm is threatened by conglomerates in farming."<sup>1</sup> It is the cousin of statutes passed in several other farm states to protect small farms from corporate encroachment.<sup>2</sup> It is the product of the Jeffersonian vision of an agrarian nation whose yeoman farmers serve as the backbone of democracy.<sup>3</sup> From this tradition of thought, Amendment E drew a focus on the practitioners and structures of agricultural activity as the determinant of whether it was good or bad. This left Amendment E without a focus on the actual nature and impact of the activity itself.

While the intellectual roots of Amendment E reach deep into American history, the purpose of its proponents was more immediate: keeping large hog producers like Murphy Farms and Tyson out of South Dakota.<sup>4</sup> South Dakota Farmer's Union President Dennis Wiese testified at the trial regarding Amendment E's constitutionality and demonstrated both the intellectual roots and immediate concerns of Amendment E:

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1. S.D.C.L. § 47-9A-1 (2004).

2. *See, e.g.*, IOWA CODE §§ 9H.1 – 9H.6 (2004); MINN. STAT. § 500.24 (2004); N.D. CENT. CODE § 10-06.1-01 (2003).

3. PETER S. ONUF, JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD 69-70 (The University Press of Virginia 2000); *see* THOMAS JEFFERSON, WRITINGS 842 (Merrill D. Peterson, ed), (The Library of America 1984).

4. Record at 123, 634, 646, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002) (No. 99-3018) (Trial Tr.). *See also* Trial Tr. 634; *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594 (8th Cir. 2003).

There has been, had been at that time, a lot of pressure on family structure agriculture from companies that wished to control the livestock production in particular at that time. And we saw that as a detriment to the very economy of the community of South Dakota, but specifically to any of the family farmers in that particular livestock production. So it was our effort that if we could sustain the family farm and, then, the independent business way of life that they bring to this, that it was going to be important to the whole economy. We also felt that when these companies came in with large volumes of hogs it diminished the marketplace for those independent producers thus displacing them.<sup>5</sup>

This rationale was communicated to the voters of South Dakota in the “pro” ballot statement, drafted in part by Wiese.<sup>6</sup> That statement indicated an intention to keep agricultural profits from being “skimmed out of local economies and into the pockets of distant corporations.”<sup>7</sup> It also argued that Amendment E was needed to control large agribusinesses and to prevent them from cutting market access for family farmers.<sup>8</sup> Amendment E’s proponents tailored its exceptions, which allowed certain types of corporate agricultural activity, to prevent out of state corporations from being able to qualify for them.<sup>9</sup>

From the limited but deeply held concern about the effects of large agribusiness on South Dakota farmers came the sweeping language of Amendment E. It prevented any “corporation or syndicate” from holding any interest “whether legal, beneficial, or otherwise” in real estate used for farming or from engaging in farming.<sup>10</sup> The term “syndicate” extended to limited partnerships, limited liability partnerships, business trusts, and limited liability companies.<sup>11</sup> “Farming” was defined to include any “cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.”<sup>12</sup>

Discussion of Amendment E up to this point had focused on philosophical and pocketbook issues for the agriculture industry and environmental concerns relating primarily to large-scale confinement hog feeding. Enter the unintended consequences of the law. Suddenly, many businesses and people were facing the harsh reality that Amendment E outlawed a much broader range of economic activities than its proponents said it would. Utility companies found themselves to be an immediate victim of these unintended consequences in their development of power generation and transmission facilities. Those people and industries that were caught in the unintended reach of Amendment E filed an

5. *Hazeltine*, 202 F.Supp.2d. at 634.

6. Trial Ex. 513, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002) (No. 99-3018).

7. *Id.*

8. *Id.*

9. Trial Tr., *supra* note 5, at 226, 228, 649; S.D. CONST., art. XVII, § 22. *See generally* Trial Tr., *supra* note 5, at 224

10. S.D. CONST., art. XVII, § 21.

11. *Id.*

12. *Id.*

action arguing that it violated the Commerce Clause. Then the full consequences of Amendment E could be evaluated.

## II. AMENDMENT E'S UNINTENDED IMPACT ON INDUSTRIES OTHER THAN AGRICULTURE

While Amendment E was intended by its sponsors to exclude large agribusinesses from South Dakota,<sup>13</sup> its language prevented other industries from successfully operating here as well. Amendment E's first section prohibited corporations and most other liability limiting business organizations from acquiring or obtaining a legal, beneficial, or other interest in "any real estate used for farming."<sup>14</sup> As the District Court would eventually recognize in its memorandum opinion striking down Amendment E, this meant that corporations were excluded from taking an interest in farm real estate by ownership, lease, easement, option, mineral rights, lien, contract for deed, or eminent domain.<sup>15</sup> The scope of unintended consequences flowing from Amendment E is suddenly clear—no corporation could hold *any* interest in real estate that was currently used for farming, regardless of what they intended to do with it. Industries with no real interest in agriculture, nor any direct impact on the agricultural economy, were prohibited from taking interests in land. The law did not distinguish between those pursuing production agriculture and those not. Amendment E clearly controlled many companies besides Murphy Farms and Tyson.

Chief among the unintended casualties of Amendment E were utility companies who generate or transmit gas or electricity. The most powerful example of the limits those companies faced came in the acquisition of easements for transmission lines or pipelines. Prior to Amendment E, utility companies could obtain easements for their transmission facilities with a right of access to maintain those facilities.<sup>16</sup> The character and use of the land would otherwise remain the same—property used for farming or ranching before the easement was granted, continued to be farmed and ranched afterwards with little daily impact on the operation.<sup>17</sup> Amendment E prohibited a utility corporation from obtaining easement in land that was used for farming whether by purchase or eminent domain. In order to comply with Amendment E, a transmitting utility would be forced to acquire strips or chunks of land for transmission facilities and then close that land off from farming by fences or other means.<sup>18</sup> This system would double or triple the expected cost of easement acquisition, place large chunks of land out of agricultural production, and interfere with ordinary farming and ranching operations in a way utility transmission easements

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13. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594 (8th Cir. 2003).

14. S.D. CONST., art. XVII, § 21.

15. *South Dakota Farm Bureau, Inc., v. Hazeltine*, 202 F. Supp.2d 1020, 1028 (D.S.D. 2002).

16. Trial Tr., *supra* note 5, at 327.

17. *Id.* at 327, 329.

18. *Id.* at 327-28.

previously did not.<sup>19</sup>

Amendment E likewise dramatically hampered the ability of utility corporations to develop new power generation facilities. Under Amendment E, a corporation could obtain agricultural land for development of a non-farm use, but only if the development was completed within five years,<sup>20</sup> a timeframe roughly half of that common to power plant construction projects.<sup>21</sup> Utility corporations also could no longer obtain options to buy agricultural property for potential future development. These limitations on the ability of utilities to acquire property for future development would significantly impair their ability to plan future development, acquire property and reasonable prices, and to ensure adequate power generation and transmission facilities. Amendment E's prohibitions also delayed the development of renewable energy sources such as wind power due to uncertainty about the ability to acquire and maintain real estate for generation facilities and transmission easements.<sup>22</sup>

Amendment E's impact extended well beyond utilities. Economic development officials from the State of South Dakota testified that numerous economic development prospects chose not to move to South Dakota due to an inability to comply with the law or concerns about compliance.<sup>23</sup> The reach of Amendment E's limits prevented the development of manufacturing, cut off land ownership for commercial hunting or other recreational uses, and limited joint ownership of farm property unless by members of the same family.<sup>24</sup> Ironically, at trial a substantial amount of testimony indicted that Amendment E had cut off business opportunities for "family farmers" and the flow of capital into South Dakota.<sup>25</sup>

Amendment E was indeed the law of unintended consequences. Intended to protect small family farmers, in practice it required that the facilities bringing utility service to rural areas interfere with the existing character and use of the land. Billed as a means to protect South Dakota's environment, it delayed the development of environmentally friendly power sources. Planned as an attack on big agribusiness, it assaulted the ordinary operations of utilities. Sold as means to sustain local economies, it stifled many types of business development. All these were results that few people saw coming.

While these unintended consequences may have been unseen by many who voted for Amendment E, they were readily apparent when the constitutionality of the law was challenged in United States District Court. The Court recognized in its memorandum opinion that requiring fee title acquisition of property for utility transmission, along with the retirement of that property from agricultural use,

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19. *Id.* at 326, 327, 330, 332.

20. S.D. CONST., art. XVII, § 22, cl. 10.

21. Trial Tr., *supra* note 5, at 288.

22. *Id.* at 313.

23. *Id.* at 737, 739.

24. S.D. CONST., art. XVII, § 22, cl. 1.

25. Trial Tr., *supra* note 5, at 23-24, 124-126, 165-67, 192-96.

imposed an undue burden on interstate commerce.<sup>26</sup> The Court recognized that Amendment E would impermissibly make South Dakota an island in interstate commerce by the restrictions it placed on the interstate transmission of power; that placed an impermissible undue burden on interstate commerce just as an Iowa law banning the use of certain semi-truck trailers did.<sup>27</sup> The unintended consequences of Amendment E were ultimately the key to its undoing and the District Court's finding that it violated the Commerce Clause.

### III. UNINTENTIONAL LESSONS OF AMENDMENT E

There are lessons to be learned from the passage of Amendment E and the litigation surrounding it. Three seem of particular importance.

First, the intent of the framers of any legislation is crucial background information for constitutional litigation. The evidence of the intent behind Amendment E to purposefully exclude certain businesses from South Dakota was clear and powerful.<sup>28</sup> In affirming the District Court's decision that Amendment E violated the Commerce Clause, a panel of the Eighth Circuit Court of Appeals relied on this evidence to find a purpose to discriminate against interstate commerce.<sup>29</sup> The Eighth Circuit's reliance on such evidence to strike down Amendment E and an earlier South Dakota initiative<sup>30</sup> demonstrates how important determining the intent of the framers of a potentially unconstitutional law can be.<sup>31</sup>

Second, when considering the viability of any statute or constitutional provision, its full sweep—including any unintended applications—must be considered. Unlike many Commerce Clause cases where protectionist legislation was attacked by the out of state apple growers<sup>32</sup>, milk producers<sup>33</sup>, or truckers<sup>34</sup> harmed by it, Amendment E initially fell victim to its unintended impact on transmitting utility corporations.<sup>35</sup> When drafting, challenging, or defending the language of any law, it is important to think about all potential applications of it and the impact it may have to persons and circumstances other than those it was intended to address.<sup>36</sup>

Third, state legislation designed to protect small farming operations will usually face a difficult hurdle in the Commerce Clause.<sup>37</sup> While certainly a topic

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26. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1030, 1042-44, 1049-50 (2002).

27. *Id.* at 1050 (citing *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981)).

28. Trial Tr., *supra* note 5, at 123, 227-28, 634, 646.

29. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594-95 (8th Cir. 2003).

30. *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995).

31. Great credit goes to Professor David Day for making this point early in the Amendment E litigation and leading the charge to obtain that information in discovery.

32. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352-53 (1977).

33. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994).

34. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 676 (1981).

35. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1050 (2002).

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

37. See e.g., *West Lynn Creamery*, 512 U.S. at 192; *Hunt*, 432 U.S. at 353-54; *Am. Meat Inst. v. Barnett*, 64 F.Supp.2d 906, 918-20 (D.S.D. 1999).

calling for fuller exploration elsewhere, this is in no small part due to the fact that in the debates over our constitutional structure the prevailing view was the Hamiltonian view of “a commercial people” rather than the Jeffersonian view of a nation of small agrarians.<sup>38</sup> Statutes that effectively protect local agricultural interests inevitably involve some conflict with interstate commerce; striking a balance between promoting small-scale agriculture and not unduly burdening interstate commerce requires a level of statutory precision that is hard to achieve.<sup>39</sup> More successful avenues may be available in local mechanisms such as zoning ordinances.<sup>40</sup>

#### IV. CONCLUSION

Amendment E, a law arising from some good intentions, ultimately collapsed under the weight of its poor execution and resulting unintended consequences. The many unintended and unnecessary limitations on non-agricultural activities caused the law to be struck down by the District Court. Its history shows the need for real precision in constitutional drafting and open-ended thinking in constitutional litigation.

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38. THE FEDERALIST NO. 24, at 162 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JAMES F. SIMON, WHAT KIND OF NATION, 28-29 (2002).

39. *E.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

40. *See e.g.*, *In re Conditional Use Permit Denied to Meier*, 645 N.W.2d 579, 580 (S.D. 2002).