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SOUTH DAKOTA AMENDMENT E RULED UNCONSTITUTIONAL — IS THERE A FUTURE FOR LEGISLATIVE INVOLVEMENT IN SHAPING THE STRUCTURE OF AGRICULTURE?

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In *South Dakota Farm Bureau, Inc. v. Hazeltine*,[1] the United States Court of Appeals for the Eighth Circuit affirmed the United States District Court for the District of South Dakota's decision and ruled the South Dakota anti-corporate farming law unconstitutional on dormant Commerce Clause grounds.[2] The court's opinion is viewed as critical to the future viability of anti-corporate farming restrictions in other states and, more generally, to the ability of state legislatures to shape the structure of agriculture within their borders.[3]

I. ANTI-CORPORATE FARMING RESTRICTIONS

All states permit the incorporation of a business for any lawful purpose not otherwise expressly prohibited.[4] However, several states, by statute or by constitutional provision, either prohibit or limit the operation of farm or ranch corporations, or the owning, holding, or operating of farmland by corporations.[5] These provisions have been en-

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1. 340 F.3d 583 (8th Cir. 2003), *aff'g* 202 F. Supp. 2d 1020 (D. S.D. 2002).

2. S.D. Farm Bureau, Inc. v Hazeltine, 340 F.3d 583, 585, 598 (8th Cir. 2003).

3. The opinion takes on even greater significance because many of the states with the major restrictions on corporate involvement in agriculture are located in the Eighth Circuit. *See, e.g.*, MINN. STAT. ANN. § 500.24 (West 2002); MO. ANN. STAT. §§ 350.010 to -.040 (West 2001); NEB. CONST. art. XII, § 8; IOWA CODE ANN. §§ 9H.1 to -.15 (West 2001); N.D. CENT. CODE §§ 10-06.1-01 to -06.1-27 (2001).

4. *See, e.g.*, WIS. STAT. ANN. § 180.0301 (West 2002).

5. *E.g.*, Arizona (ARIZ. CONST. art. 10, § 11; ARIZ. REV. STAT. ANN. § 37-240 (West 2003)); Colorado (COLO. REV. STAT. §§ 25-7-109, -7-138, -8-501, -8-504 (2003)); Iowa (IOWA CODE ANN. § 9H.1-.15 (West 2001)); Kansas (KAN. STAT. ANN. §§ 17-5901 to -5908 (1995)); Minnesota (MINN. STAT. ANN. § 500.24 (West 2002)); Missouri (MO. ANN. STAT. §§ 350.010 to -.040 (West 2001)); Nebraska (NEB. REV. STAT. ANN. §§ 76-1501-1519 (Michie 1995); NEB. CONST. art. XII, § 8); North Dakota (N.D. CENT. CODE § 10-06.1-02 (2001)); Oklahoma (OKLA. CONST. art. XXII, § 2); South Carolina (S.C. CODE ANN. § 12-43-220(d)(1) (Law. Co-op. 2000)); South Dakota (S.D. CODIFIED LAWS §§ 47-9A-1 to -9A-23 (Michie 2000)); Texas (TEX. CORPS. & ASS'NS. ACT. ANN. art. 2.01(B) (Vernon 2003));

acted for various reasons, but are grounded largely in the belief that the Jeffersonian ideal of numerous vibrant, independent, widely-dispersed family farmers is healthy for the nation.[6]

Presently, fourteen states restrict, to various degrees, corporate involvement in agriculture.[7] Recently, consolidation in almost every aspect of the farm economy has further threatened the continued viability of a vibrant, independently owned and widely dispersed farm production sector with the specter of being vertically integrated (largely through contractual arrangements) in the production, processing and marketing functions. Thus, as concentration of agricultural production has accelerated in recent years,[8] legislatures in many of these same states have attempted to legislate protections for the economic autonomy of individual farmers and the environmental health and safety of both the rural and non-rural sectors.

II. THE SOUTH DAKOTA PROVISION

Concerns over the changing structure of agriculture and the long-term viability of independent farmers and ranchers in South Dakota led the South Dakota legislature to enact an anti-corporate farming restriction in 1974.[9] The legislation, known as the Family Farm Act of 1974,[10] was modeled after the Minnesota provision enacted a year

West Virginia (W. VA. CODE ANN. § 11-12-75 (Michie 2003)); and Wisconsin (WIS. STAT. ANN. § 182.001 (West 2002)).

6. Many of the provisions were initially passed in the depression era of the 1930s by states that had experienced a high number of farm foreclosures by corporate lenders. *See* T.P. McElroy, *North Dakota's Anti-Corporate Farming Act*, 36 N.D. L. REV. 96 (1960). Other state provisions reflected a general distrust of corporations and the policy of preventing land from being tied up by corporations for long periods of time. *See* John Hancock Mut. Life Ins. Co. v. Ford Motor Co., 33 N.W.2d 763, 766 (Mich. 1948). The Kansas restriction was enacted out of a fear of an eventual corporate monopoly of agricultural land. *See* State *ex. rel.* Boynton v. Wheat Farming Co., 22 P.2d 1093, 1099 (Kan. 1933). While the anti-corporate restrictions reflect the sentiments and attitudes that prevailed at the time of enactment, their continued effectiveness reflects at least a degree of continuing support for the limitations.

7. *See supra* note 5 and accompanying text.

8. *See* McEowen, Carstensen and Harl, *The 2002 Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE AGRIC. L. 267, 269-71 (2002).

9. S.D. CODIFIED LAWS § 47-9A-1 (Michie 2000). Section 47-9A-1 reads in pertinent part:

> The Legislature of the state of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the Legislature recognizes that the existence of the family farm is threatened by conglomerates in farming. Therefore, it is hereby declared to be the public policy of this state, and shall be the provision of this chapter, that, notwithstanding the provisions of § 47-2-3, no foreign or domestic corporation except, as provided herein, shall be formed or licensed under the South Dakota Business Corporation Act for the purpose of owning, leasing, holding or otherwise controlling agricultural land to be used in the business of agriculture.

S.D. CODIFIED LAWS § 47-9A-1.

10. S.D. CODIFIED LAWS § 47-9A-23 (Michie 2000).

earlier.[11] The key part of South Dakota's 1974 enactment provided that: "[n]o . . . corporation may engage in farming; nor may any . . . corporation, directly or indirectly, own, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state."[12]

The provision contains numerous exemptions, including exemptions for banks and trust companies,[13] bona fide encumbrances taken for purposes of security,[14] land acquired by a corporation "solely for the purpose of feeding livestock,"[15] and family farm and authorized farm corporations.[16] In 1988, South Dakota voters approved by a wide margin[17] an initiative prohibiting corporations, except family corporations, from owning or operating hog confinement facilities in the state.[18] A hog confinement facility was defined as "any real estate used for the breeding, farrowing and raising of swine."[19] The 1988 provision was clearly designed to target large agricultural corporations believed to have the power to negatively threaten the economic well-being of family farmers and rural communities as opposed to family farming operations structured in the corporate form for estate

11. MINN. STAT. ANN. § 500.24 (West 2002).

12. S.D. CODIFIED LAWS § 47-9A-3 (Michie 2000). The law was viewed as a necessary means of protecting family farmers from being forced off their land by large-scale agricultural corporations, and protecting the state's agricultural economy from an overall economic decline. *See* Curtis S. Jensen, Comment, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?*, 20 S.D. L. REV. 575, 577-80 (1975).

13. S.D. CODIFIED LAWS § 47-9A-4 (Michie 2000). However, a national or state bank or trust company is prohibited from purchasing agricultural land in South Dakota through a pooled investment fund formed from assets from retirement, pension, profit sharing, stock, bonds or other trusts. *Id.* This restriction was added in 1977 in response to the promotion of "Ag Land I," a fund developed by a Chicago bank to invest in farmland. *See Ag-Land Trust Proposal: Before the Subcomm. on Family Farms, Rural Development, and Special Studies of the Comm. on Agriculture*, 95th Congress, Feb. 18, 24, 25 (1977).

14. S.D. CODIFIED LAWS § 47-9A-6 (Michie 2000).

15. S.D. CODIFIED LAWS § 47-9A-11 (Michie 2000). An exemption also exists for corporations that hold agricultural land solely for the purpose of raising poultry. S.D. CODIFIED LAWS § 47-9A-3.2 (Michie 2000).

16. S.D. CODIFIED LAWS § 47-9A-13 (Michie 2000).

17. The initiative passed with nearly 60 percent approval.

18. 1988 S.D. Laws ch. 371. Under South Dakota law, statutes may be initiated by petition and become law upon approval by a majority vote of the people. S.D. CONST. art. XXIII, §§ 1-3. The initiative was spurred by large agricultural corporations planning for the expansion of confinement hog operations in South Dakota. *See* Richard F. Prim, *Minnesota's Anti-corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431, 437-41 (1995). Twenty other states have a constitutional provision providing for direct democracy through the initiative process. The states are: AK, AZ, AR, CA, CO, ID, ME, MA, MI, MO, MT, NE, NV, ND, OH, OK, OR, UT, WA and WY.

19. S.D. CODIFIED LAWS § 47-9A-13.1 (Michie 2000).

planning and other reasons. However, the South Dakota Attorney General's ruling in 1995 that the term "and" was the operative word in the statutory clause "breeding, farrowing and raising of swine"[20] led to several large pork companies establishing hog contract feeding operations in South Dakota by the end of 1996.[21] Indeed, by the late 1990s, Murphy Farms, at the time the largest hog producer in the United States, was operating twenty hog-feeding facilities in South Dakota and had plans for at least forty additional operations.[22] These developments spurred interest in tightening the South Dakota anti-corporate farming measure to curb the expansion of corporate contract feeding operations in the state, and any new rules were viewed as a "logical extension of the Family Farm Act of 1974 and the 1988 amendment . . . prohibiting corporate ownership of pork production facilities."[23] A coalition of family farm groups argued that additional restrictions were necessary to prevent corporate manipulation of livestock markets, protect the environment, and safeguard the social and economic well-being of rural communities.[24] The result was a proposed amendment to the South Dakota Constitution, referred to as Amendment E.[25]

In the fall of 1998, South Dakota voters, with nearly a sixty percent majority,[26] amended the South Dakota Constitution (known as "Amendment E") to prohibit corporations and syndicates from owning an interest in farmland (with numerous exceptions).[27] Section 21

20. 1995 Op. S.D. Att'y. Gen. 95-02 (Mar. 30, 1995).

21. *See* William Clairborne, *Fighting the 'New Feudal Rulers'; S. Dakota Farmers Split on Family Tradition vs. Corporate Efficiency*, WASH. POST, Jan. 3, 1999, at A3. Under such arrangements, corporations could avoid the restrictions of the anti-corporate farming law by financing hog confinement facilities and contracting with individual South Dakota farmers to raise feeder pigs bred and farrowed out-of-state.

22. *See* Clairborne, WASH. POST, Jan. 3, 1999, at A3.

23. S.D. Sec'y of State, 1998 Ballot Question Pamphlet, Pro-Constitutional Amendment E.

24. In essence, proponents argued that changes to the existing anti-corporate farming restriction were necessary to prevent large agricultural corporations from utilizing unfair, anticompetitive contract production arrangements to turn independent family farmers and ranchers into serfs. These concerns about a new "agricultural feudalism" were not unfounded. In the mid-to-late 1990s, vertical integration in the meatpacking industry progressed rapidly with meatpackers becoming engaged in livestock production through long-term contracts. This vertical consolidation led to serious concerns of an imbalance of power between meatpackers and independent producers and numerous bills were introduced at the federal level to deal with the problem. *See* Roger A. McEowen et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE AGRIC. L. 267, 269-71 (2002). Also, from 1974 to 1997, the South Dakota Agricultural Census reported that the number of individuals listing their principal occupation as farming declined from approximately 37,000 in 1974 to 23,000 in 1997.

25. The proposed amendment was referred to as Amendment E due to the placement of the provision on the election ballot.

26. Amendment E became effective on November 16, 1998.

27. S.D. CONST. art. XVII, §§ 21-24.

states, "[n]o corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming."[28] Section 22 exempts "family farm corporations" or "family farm syndicates" as follows:

> a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration.[29]

III. THE CONSTITUTIONAL CHALLENGE

In the summer of 1999, the plaintiffs, a collection of farm groups, South Dakota feedlots, public utilities and other farm organizations, challenged Amendment E on various grounds, but the essence of the claims was that the provision would prevent the continuation of their existing farming enterprises unless those enterprises changed organi-

28. S.D. CONST. art. XVII, § 21. The amendment defines corporation as "any corporation organized under the laws of any state of the United States or any country." *Id.* A syndicate is defined as "any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country." *Id.* Likewise, the term includes any general partnership in which nonfamily farm syndicates or nonfamily farm corporations are partners. *Id.* Clearly, Amendment E was designed to extend the prohibitions of the anti-corporate farming law by barring corporate ownership of farmland and corporate livestock feeding operations.

29. S.D. CONST. art. XVII, § 22(1). The provision also was made inapplicable to cooperatives in which a majority of the interest therein is held by family farmers or family farm corporations or syndicates, nonprofit corporations organized under state law, agricultural land or livestock owned or leased by a corporation prior to the approval date of the amendment, farms operated primarily for research purposes, land leased by alfalfa processors, agricultural land acquired or leased for an immediate or potential nonfarming purpose, interests in land acquired in the collection of debts or as security, land held by banks in trust for natural persons or exempt farm corporations or syndicates, custom spraying, fertilizing or harvesting, livestock futures contracts, and livestock purchased for slaughter within two weeks of purchase, or livestock purchased and resold within two weeks. S.D. CONST. art. XVII, § 22(2)-(15). The attorney general has primary enforcement authority to enforce Amendment E by bringing an action to enjoin the illegal purchase of land or livestock or to force the divestiture of land or livestock held illegally. S.D. CONST. art. XVII, § 24. However, any South Dakota resident has standing to enforce Amendment E in the county circuit court of the county where the agricultural land or livestock is alleged to be held illegally. *Id.*

zationally to come within a statutory exemption.[30] Specifically, several of the plaintiffs fed livestock in their South Dakota feedlots under contracts with out-of-state firms and claimed Amendment E would apply to their out-of-state contracting parties and hurt economically their South Dakota livestock feeding businesses.[31] Hence, the plaintiff's primary claim was that Amendment E violated the dormant Commerce Clause of the United States Constitution by discriminating against these out-of-state firms.[32]

IV. THE DORMANT COMMERCE CLAUSE

"The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[33]

Clearly, the Commerce Clause of the U.S. Constitution grants Congress the power to regulate interstate commerce. From the mid-1930s until the mid-1990s, the United States Supreme Court interpreted the scope of the Congressional power under the Commerce Clause in a manner which gave Congress expansive authority to regulate commerce.[34] Indeed, there exists today little question that the

30. The lawsuit was filed in the Federal District Court for the District of South Dakota and asserted that Amendment E violated 42 U.S.C. §1983 (dormant Commerce Clause and Fourteenth Amendment) and 42 U.S.C. §12101 et. seq. (the American with Disabilities Act (ADA)). While the plaintiffs dropped the ADA claim early in the litigation, the District Court renewed it and held that the ADA preempted Amendment E. South Dakota Farm Bureau, Inc., et al. v. Hazeltine, 202 F. Supp. 2d 1020 (D. S.D. 2002). The District Court also ruled that Amendment E violated the dormant Commerce Clause by preventing the utilities from holding agricultural property for use in interstate electricity transmission. On appeal, the United States Court of Appeals for the Eighth Circuit reversed the trial court on the ADA claim. South Dakota Farm Bureau, Inc. et al. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

31. *S.D. Farm Bureau*, 340 F.3d at 588, 589. Two of the plaintiffs fed cattle under contract with out of state firms, one plaintiff raised contract hogs and another raised contract lambs. *Id.* at 588.

32. *S.D. Farm Bureau*, 340 F.3d at 592. The plaintiffs claimed that statements made by drafters and proponents of Amendment E illustrated discriminatory intent. However, it is not uncommon for plaintiffs challenging social policy legislation (or, in this instance, a state constitutional provision) that impacts business relationships to allege intentional discrimination because of the contentious nature of political debate on the issue. Given the wide range of debate on policy issues, there are almost always some policymakers which make statements during the legislative process that could help facilitate a discriminatory purpose argument for disaffected parties. *See, e.g.*, SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995) (statements made in election pamphlet provided "ample evidence of a discriminatory purpose").

33. U.S. CONST. art. I, § 8, cl. 3.

34. Since the mid-1930s, the United States Supreme Court has interpreted the Commerce Clause in such a manner to give almost absolute power to the Congress to regulate commerce among the states. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (the Congress has the power to regulate all commerce or activity that affects more than one state). In addition, an activity that occurs entirely within one

Commerce Clause has general application to farm and ranch operations.[35] Undoubtedly, Amendment E impacts interstate commerce because it restricts nonfamily, corporate ownership and operation of farms, ranches and other livestock production facilities.[36]

A tougher question, however, is whether Amendment E exceeds the limits of the dormant Commerce Clause.[37] The Constitution does not specifically address whether the states have the authority to regulate commerce when Congress has not acted to regulate a particular area of commerce.[38] Consequently, the question of a state's authority to regulate commerce when Congress has not acted (the existence of a so-called "dormant" Commerce Clause) is left open to the original intent of the Framers and judicial interpretation.[39] Chief Justice Mar-

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state may still affect other states and be subject to federal regulation. *See, e.g.*, United States v. Darby Lumber Co., 312 U.S. 100 (1941) (factory producing and selling goods locally subject to federal regulation of working conditions if goods compete with goods produced in other states). However, in a 1995 Supreme Court opinion, the Court indicated it was taking a narrower view of Congress' authority to regulate commerce. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court invalidated a federal statute prohibiting the possession of a firearm in a school zone because such activity did not substantially affect interstate commerce. *Lopez*, 514 U.S. at 549, 567. At the time, the decision represented the first Supreme Court opinion in over sixty years to acknowledge limits on Congress' power to enact legislation under the Commerce Clause. Although the Court expressed deference to Congress' explicit will, the Court otherwise required that actions must substantially affect interstate commerce to fall within the ambit of the Commerce Clause. *Id.* at 559. Such a principle could prevent federal intervention into actions with minor interstate effects such as environmental laws aimed at local activities. However, in the years since the *Lopez* opinion, the results have been mixed, particularly with respect to federal environmental regulation.

35. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court upheld, under the Commerce Clause, Congressional legislation in which farm price and income price support programs were administered, against the claim of an independent farmer arguing the Secretary of Agriculture lacked the authority to set quotas for the amount of wheat that a particular farm could produce for sale and home consumption. *Filburn*, 317 U.S. at 112, 128-29. Thus, the expansive view accorded the Commerce Clause by the Supreme Court leaves little doubt that the Congress has the authority to regulate the business transactions of individual farms and ranches.

36. In South Dakota, a legitimate argument can be made that the production of agricultural commodities is sufficient to affect both the availability and price of farm products on the national market. South Dakota ranks in the top ten in national production for most major farm commodities. For a recent listing of how South Dakota compares to other states in various categories of agricultural production, see "South Dakota's Rank in United States Agriculture 2002," (May 2003) publication of the South Dakota Agricultural Statistics Service, and available at http://www.state.sd.us/doa/Department/rank.htm.

37. The dormant Commerce Clause is not a separate clause in the Constitution. The reference to a "dormant" Commerce Clause refers to a body of constitutional jurisprudence establishing limits on state regulation when Congress has not regulated an area within the Congress' Commerce power.

38. *See supra* note 37 and accompanying text.

39. James Madison, commonly referred to as "the father of the Constitution," wrote in an 1829 letter that the Commerce Clause was "intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the

shall made the first reference to the existence of a dormant Commerce Clause in the Court's 1829 opinion of *Willson v. Black-bird Creek Marsh Co.*,[40] when he described a "power to regulate commerce in its dormant state."[41]

The driving force behind the concept of a dormant Commerce Clause was to prevent economic trade barriers that had emerged among the colonies, and later the states, under the Articles of Confederation[42] in order to create and foster the development of a common market among the states and to eradicate internal trade barriers.[43] Over time, the judicial interpretation of the dormant Commerce Clause that emerged was one barring discrimination against commerce, which repeatedly has been held to mean that states and localities may not discriminate against the transactions of out-of-state actors in interstate markets even when the Congress has not legislated on the subject.[44] However, the states remain free to enact rules governing business transactions within their borders that require

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remedial power could be lodged." Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14, 15 (1867). Whether Madison's letter can provide a basis for the creation of a dormant Commerce Clause depends on the meaning of the phrase "General Government." The issue of the existence and the extent of a state's power to enact regulations affecting interstate commerce does not have a legislative history. But, the inability of the Articles of Confederation to bar trade wars among the states and the discrimination against interstate commerce could be seen as evidence of the Framer's intent that a dormant Commerce Clause be read into the Constitution. On the other hand, the Framers' failure to specifically address discrimination against interstate commerce in the Constitution is evidence that they did not intend to restrict the ability of the states to discriminate against interstate commerce. Clearly, the Federalists of the Constitutional Convention of 1787 intended the Congress to have significant power to regulate commerce, but other Framers and ratifiers were fearful of severely restricting or removing state autonomy. *See, e.g.*, C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Rev. ed. 1960).

40. 27 U.S. (1 Pet.) 245 (1829).

41. Wilson v. Blackbird Creek Marsh Co., 27 U.S. (1 Pet.) 245, 252 (1829). The phrase reappeared in a 1945 dissenting opinion by Justice Frankfurter in *Hill v. State*, 325 U.S. 538, 547 (1945).

42. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). *See also* THE ANTIFEDERALISTS (Cecelia M. Kenyon ed., 1966); Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142 (1978).

43. The Constitutional Convention of 1787 was called, in large part, to amend the powers of the national government under the Articles of Confederation to deal effectively with multi-state economic problems.

44. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (holding as unconstitutional a city ordinance prohibiting the sale of milk in the city unless it had been bottled at an approved plant within five miles of the city); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) (state statute requiring all closed containers of apples sold or shipped into the state to bear "no grade other than applicable U.S. grade or standard" held an unconstitutional discrimination against commerce).

both in-state and out-of-state actors to abide by the same rules.[45] Thus, a state may not enact rules or regulations requiring out-of-state commerce to be conducted according to the enacting state's terms.[46]

Historically, dormant Commerce Clause analysis has attempted to balance national market principles with federalism, and was never intended to eliminate the states' power to regulate local activity, even though it is incidentally related to interstate commerce.[47] Indeed, if state action also involves an exercise of the state's police power, the impact of the action on interstate commerce is largely ignored.[48] Absent an exercise of a state's police power, the courts evaluate dormant Commerce Clause claims under a two-tiered approach. Generally, if a state provision discriminates against commerce on its face, or in its purpose or effect,[49] the provision is subject to strict scrutiny and will be held to be unconstitutional unless the state can justify the provision as serving a compelling state interest in the least restrictive way.[50] However, if the state regulates without a discriminatory purpose but with a legitimate purpose, the provision will be upheld unless the burden on interstate commerce is clearly excessive in relation to

45. *See, e.g.*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-6, 1059 (3d ed. 2000) (noting "[t]he Court's current approach to state regulation of commerce places great emphasis on the question whether the regulation in question discriminates against . . . out-of-state commerce.").

46. *See, e.g.*, American Meat Institute, et al. v. Barnett, 64 F. Supp. 2d 906 (D. S.D. 1999) (declaring a South Dakota price discrimination statute unconstitutional because it applied to livestock slaughtered in South Dakota regardless of where the livestock was purchased).

47. *See, e.g.*, Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) (state legislation designed to maintain clean air constituted legitimate exercise of police power allowing state to act in many areas of interstate commerce).

48. *Id.* A strong argument can be made that Amendment E was also enacted according to the state's police power to protect South Dakotans from adverse health and environmental effects of large-scale, vertically integrated livestock operations. In that event, the impact of the law on interstate commerce would be less of a concern. It is noted that the two firms that were the target of Amendment E, Tyson Foods, Inc. and Smithfield Farms, Inc. (which acquired Murphy Farms. Inc.), have a long history of environmental and other violations. *See* http://corporatecrimereporter.com/top100.html; http://www.sierraclub.org/factoryfarms/rapsheets/operators.asp (rapsheet on animal factories listing environmental violations against Tyson Foods, Inc. and Smithfield Foods, Inc., among others).

49. States generally do not articulate a protectionist purpose on the face of a statute (or constitutional provision) or in legislative history. But, if a state cannot show a legitimate state purpose for the statute or cannot show the absence of a nondiscriminatory alternative way to achieve its purpose, a court will infer that the true purpose was protectionist.

50. *See, e.g., Hughes*, 441 U.S. at 325. But, the party challenging the statute bears the initial burden of proving discriminatory purpose. *Id.* If the state has been motivated by a discriminatory purpose, the state bears the burden to show it is pursuing a legitimate purpose which cannot be achieved with a nondiscriminatory alternative. *Id.*

the benefits that the state derives from the regulation.[51] In essence, a state may regulate transactions that occur within its borders,[52] but cannot single out interstate commerce for regulation or impose more burdensome regulations on interstate commerce than on comparable local commerce.[53]

V. DORMANT COMMERCE CLAUSE PRECEDENT IN THE EIGHTH CIRCUIT

In *Hampton Feedlot, et al. v. Nixon*,[54] the court upheld, against a dormant Commerce Clause challenge, provisions of the Missouri Livestock Marketing Law, passed in 1999, which prevented livestock packers who purchased livestock in Missouri from discriminating against producers by purchasing livestock except for reasons of quality, transportation costs or special delivery times.[55] The law required any differential pricing to be published.[56] The trial court held the law to be unconstitutional,[57] but the Eighth Circuit reversed.[58] While the court noted the Act closely resembled an earlier South Dakota law that had been found unconstitutional,[59] the court noted the Missouri provision did not eliminate any method of sale — it simply required price disclosure. More importantly, however, the court noted the Missouri statute, unlike the South Dakota provision, only regulated the sale of livestock sold in Missouri. As such, the extraterritorial reach that the court found fatal to the South Dakota statute was not present in the

51. The two-tiered approach is known as the *Pike* balancing test. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (state law prohibiting interstate shipment of cantaloupes not packed in compact arrangements in closed containers even though furthering legitimate state interest, held unconstitutional due to substantial burden on interstate commerce). Under the *Pike* balancing test, the burden is on the party challenging the provision to show that it imposes too great a burden on commerce. *Id.* at 141.

52. Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1936) (upholding a Pennsylvania price control statute as applied to purchasers of milk in Pennsylvania by a dealer who intended to ship all the milk out of state, noting purpose of statute was "to reach a domestic situation" and that the activity regulated was "essentially local"). *See also* Hampton Feedlot, et al. v. Nixon, 249 F.3d 814 (8th Cir. 2001).

53. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (striking down a statute requiring milk purchased out-of-state not to be sold in New York unless out-of-state producers had received the New York minimum price). *But see* Nebbia v. New York, 291 U.S. 502 (1934) (upholding New York law setting minimum prices paid to milk producers as applied to purchases by New York retailers from New York producers). Remember, a primary concern of the Framers was the need to combat economic protectionism by the states which had led to retaliatory economic warfare among the states. *See supra* note 39 and accompanying text.

54. 249 F.3d 814 (8th Cir. 2001).

55. MO. ANN. STAT. §§ 277.200, .203, .209, .212 (West 2001).

56. MO. ANN. STAT. § 277.203(2) (West 2001).

57. 202 F. Supp. 2d 1020 (D. S.D. 2002).

58. 340 F.3d 583 (8th Cir. 2003).

59. S.D. CODIFIED LAWS §§ 40-15B-1 to -8 (Michie 2000).

Missouri statute. The court reasoned the statute was indifferent to livestock sales occurring outside Missouri and had no chilling effect on interstate commerce because packers could easily purchase livestock other than in Missouri to avoid the Missouri provision.[60] The court also noted the Missouri legislature had legitimate reasons for enacting a price discrimination statute, including preservation of the family farm and Missouri's rural economy, and an improvement in the quality of livestock marketed in Missouri.[61] Specifically, the court opined the Missouri legislature had the authority to determine the course of its farming economy and the legislation was a constitutional means of doing so.

The Eighth Circuit's rationale in *Hampton Feedlot* is consistent with Supreme Court precedent on the dormant Commerce Clause issue. For example, in *Exxon Corp. v. Governor of Maryland*,[62] the Supreme Court upheld a Maryland statute requiring vertically-integrated oil companies, whether based in Maryland or elsewhere, to divest themselves of retail service stations. The Court held that the provision, neutral on its face, did not impermissibly discriminate against interstate commerce even though the burden of the divestiture provision fell solely on interstate petroleum producers.[63] The Court noted the statute gave Maryland gasoline dealers no competitive advantage over out-of-state dealers in the retail market.[64] As such, the statutory provision was a legitimate exercise of the state's legislative authority. Importantly, the Court opined the fact that the burden of state regulation falls on interstate companies is insufficient, by itself, to establish a claim of discrimination against interstate commerce.[65] Likewise, the Court rejected the claim of the oil companies

60. *Hampton*, 249 F.3d at 819.

61. *Id.* at 820. The court found persuasive the testimony of a witness for the state who testified that by providing an incentive for packers to buy livestock on the basis of quality through the grade and yield method, producers would make better genetic decisions, raise better quality animals and earn a better price. *Id.* The court also noted that, under the current system, larger producers receive premiums for their livestock, giving them an economic advantage over smaller farmers. *Id.* at n.3. Interestingly, the American Farm Bureau Federation filed an amicus brief in the case on the side of those challenging Amendment E. The Alabama, Arkansas, Kansas, Kentucky, Minnesota, North Dakota and Utah Farm Bureaus joined in on the brief. The brief argued that the protection of South Dakota's family farmers was not a compelling interest. That, however, runs counter to *Hampton*.

62. 437 U.S. 117 (1978).

63. Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978). The provision was facially neutral because the language of the statute applied the law in an indiscriminant fashion to both in-state and out-of-state vertically integrated oil companies.

64. *Exxon Corp.*, 437 U.S. at 125.

65. *Id.* at 126. The Court held that "the fact that the burden of the divestiture requirements falls solely on interstate companies . . . does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level."

that the statute unduly burdened interstate commerce by interfering with the natural function of the interstate market for petroleum products.[66] Specifically, the Court rejected the notion that the Commerce Clause "protects the particular structure or methods of operation in a retail market," concluding instead the Commerce Clause protects the interstate market instead of particular firms from prohibitive or burdensome regulation.[67] Thus, according to the Supreme Court, the constitutionality of Amendment E does not turn on whether South Dakotans wanted to protect themselves from anticipated harm from specific out-of-state corporations,[68] but whether the regulatory effect of Amendment E (as the vehicle of that desired protection) was the same with respect to both in-state and out-of-state firms.[69]

VI. THE *HAZELTINE* COURT'S RATIONALE

A. THE STANDING ISSUE

In a discussion involving the issue of the plaintiffs' standing, the court in *Hazeltine* cited an Ohio statute which charged out-of-state natural gas vendors at a higher sales tax rate than certain in-state vendors.[70] The court reasoned that the South Dakota livestock feeders contracting with out-of-state firms, that were not within an exemption under the South Dakota law, were similarly disaffected because of the imminent loss of business if Amendment E were to be enforced. However, the court did not discuss the obvious difference

66. *Exxon Corp.*, 437 U.S. at 127.

67. *Id.* at 127-28. The Court stated specifically that it could not "accept [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. As indicated by the Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. Thus, the Court focused on the statute's effect on the interstate flow of goods and the regulation's influence on the relative proportion of local and out-of-state goods sold in Maryland.

68. However, the Court has held that a state law that discriminates against interstate commerce is constitutional if the law protects health and safety (non-economic) interests if reasonable and adequate nondiscriminatory alternatives are unavailable. *See., e.g,* Maine v. Taylor, 106 S. Ct. 2240 (1986) (statute prohibiting importation of live baitfish upheld as serving legitimate local interest of protecting health of in-state fish; nondiscriminatory means of protection unavailable); *Cf.* Dean Milk v. Madison, 340 U.S. 349 (1951) (state law prohibiting sale of milk not pasteurized within five miles of city unconstitutional; nondiscriminatory alternatives available to assure quality of milk).

69. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981).

70. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003). An Ohio manufacturing facility purchased nearly all of its natural gas from out-of-state suppliers subject to the higher sales tax rate, and was held to have standing to challenge the statute because it was financially injured. The statute exempted natural gas sales by a "natural gas company" from all state and local sales taxes. OHIO REV. CODE ANN. § 5739.02(B)(7). In *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995), the Ohio Supreme Court interpreted the phrase "natural gas company" to exclude out-of-state gas sellers.

between the Ohio statute and Amendment E. The Ohio statute treated out-of-state natural gas vendors differently from in-state vendors. Amendment E treats *all* businesses operating in South Dakota under the same set of rules, regardless of whether the business is a South Dakota business or an out-of-state enterprise. Under the *Hampton* rationale,[71] the test is whether Amendment E has an extra-territorial reach requiring business transactions conducted in states other than South Dakota to be governed in accordance with South Dakota law, not whether South Dakota businesses are financially injured because of business relations with companies not coming within an exemption to the law. While the court was addressing legal standing on this point, the court was also framing the dormant Commerce Clause issue.[72] Unbelievably, the court did not make even a single reference to its recent prior opinion in *Hampton*.[73]

B. The Contract Issue

As mentioned previously, Amendment E prohibits corporations and syndicates from acquiring or otherwise obtaining an interest, whether legal, beneficial or otherwise, in real estate used for farming in South Dakota, or from engaging in farming in South Dakota.[74] The plaintiffs in *Hazeltine* entered into contracts with both in-state and out-of-state entities covered by the provision. The plaintiffs claimed Amendment E would force them out of business, diminish their business revenue substantially, increase the cost of doing business, or diminish the value of owned land by virtue of eliminating the contractual relationships. A proper analysis of the plaintiffs' claims concerning the contractual relationships should have focused on whether, by virtue of the contracts, a disqualified entity obtained an interest (whether legal, beneficial or otherwise) in real estate used in farming in South Dakota, or engaged in farming in South Dakota.[75] Unfortunately, the court provided no analysis on the issue of what entity was actually performing farming operations under the contract

71. 249 F.3d 814 (8th Cir. 2001).

72. The court's analysis of the standing issue reveals the flaw in reasoning that would lead the court to strike down Amendment E on constitutional grounds.

73. Hampton Feedlot, et al. v. Nixon, 249 F.3d 814, 817 (8th Cir. 2001). The *Hampton* case was briefed by the defendant.

74. *See supra* note 28 and accompanying text.

75. Beyond the issue of whether an out-of-state firm was the contract party actually conducting farming operations in South Dakota, the Eighth Circuit also ignored various socioeconomic studies illustrating the detrimental impact that industrialized farming via contract production imposes on independent farmers and rural communities. *See* Labao, Locality and Inequality: Farm and Industry Structure and Socioeconomic condition, 60-64 (State Univ. of N.Y. Press 1990). Testimony was elicited at trial concerning the results of these studies.

feeding arrangements. Apparently, the *Hazeltine* court simply assumed the disqualified entities either acquired an impermissible interest via the contracts or was the party that was actually engaged in farming under the contracts. However, if South Dakota farmers are the ones making the relevant and meaningful production decisions under the contracts, and are the ones rendering material participation, then it seems highly unlikely that the out-of-state contracting parties could be found to have acquired an impermissible interest in South Dakota real estate used for farming or be engaged in farming in South Dakota in a manner that Amendment E prohibits.[76] Unfortunately, the court failed to analyze the matter.[77]

C. Is Amendment E Discriminatory?

In determining whether Amendment E was impermissibly discriminatory, the *Hazeltine* court did not examine the language of Amendment E.[78] Had the court evaluated the language of Amendment E, the court would likely have noted that Amendment E, on its face, is neutral. Amendment E applies equally to any nonfamily farm corporation or syndicate operating a farm or purchasing farmland in South Dakota.[79] The Amendment makes no distinction, in its applica-

76. For a discussion of the issue of packer ownership and control of livestock through contractual relationships and the effort, at the federal level, to ban packer ownership of livestock, see Roger A. McEowen et al., 7 Drake Agric. L. at 269-71. The authors point out that the proposed federal ban on packer ownership of livestock is designed to prohibit production contracts only where the individual grower is stripped from decision-making and material participation with respect to the growing and raising of livestock. Conversely, where the individual producer retains decision-making control and is materially participating under the contractual relationship with the packer, the arrangement is not banned.

77. It is noted, however, that had the court analyzed the issue and determined that the out-of-state companies were engaging in farming in South Dakota under the contracts, the issue would have remained as to whether Amendment E discriminated against these businesses by treating them in a more disadvantageous manner than in-state businesses.

78. Indeed, the Eighth Circuit placed great emphasis on the subjective intent of the drafters of Amendment E. However, in the legislative context, the U.S. Supreme Court has held that legislative intent is not to be the determinative factor on whether the statute in question is constitutional because one legislator's rationale for speaking on behalf of the legislation may differ from another legislator's reason for signing the legislation into law. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-384 (1968). While the U.S. Supreme Court has held that statements made by initiative sponsors during public city council meetings may constitute "relevant evidence of discriminatory intent, the Court's opinion was rendered in a case involving an equal protection challenge and minutes of a public meeting. City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003). However, *Hazeltine* is a dormant Commerce Clause case that involves the minutes of a private ad hoc group.

79. S.D. Const. art. XVII § 21.

tion to covered entities, between in-state and out-of-state firms.[80] Also, similar to the statute at issue in *Exxon Corp. v. Governor of Maryland*,[81] Amendment E does not protect in-state producers from direct competition in interstate and global agricultural markets.[82]

However, the court determined the drafters of Amendment E had acted with a discriminatory purpose in enacting Amendment E on the basis that the record contained a substantial amount of evidence on the point.[83] For example, the court found relevant statements of drafters, as well as a statement of a co-chairman of the Amendment E promotional organization, that Amendment E was motivated in part by the environmental problems caused by large-scale hog operations in other states.[84] The court called this statement "blatant" discrimination.[85] The court also pointed out that comments made by the

80. Amendment E regulates both South Dakota and out-of-state entities in the same manner with the purpose of protecting family farm operations. As such, the burden on interstate commerce imposed by Amendment E is not clearly excessive when compared with the state's economic and social interest in the continued viability of family farming operations and rural communities.

81. 437 U.S. 117 (1978).

82. *Exxon Corp.*, 437 U.S. at 125. Indeed, the opposite may be true. *See* Steven C. Bahls, *Preservation of Family Farms – The Way Ahead*, 45 DRAKE L. REV. 311, 313 (1997) (commenting on the notion that anti-corporate farming laws have not effectively protected family based agriculture).

83. *Hazeltine*, 340 F.3d at 596. For example, the court noted the "pro" Amendment E statements compiled by the Attorney General informed voters that without passage of Amendment E, "desperately needed profits will be skimmed out of local economies and into pockets of distant corporations," and "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." *Id.* at 594. The court claimed these statements were "brimming with protectionist rhetoric." *Id.* Also, on the matter of discriminatory intent, the court cited minutes of Amendment E drafting committee meetings that illustrated a desire that Amendment E bar Murphy Farms, Inc., and Tyson Foods, Inc., from conducting farming operations in South Dakota. The court also noted that some individual drafters of Amendment E did not know of the environmental and economic effects of then-existing laws and Amendment E, and that the drafters did not attempt to study those issues. However, the court did not reference the portions of the "Pro" statement that showed the general interest in preserving the "traditional way" of life of family farming, or that mentioned the environmental justification for Amendment E.

84. *Hazeltine*, 340 F.3d at 594. Why the court found statements of intent relevant to the discrimination issue without examining the content of the language of Amendment E was not explained. In any event, a desire to protect South Dakotans from the health and environmental problems posed by large-scale, corporatized agriculture makes state regulation impacting interstate commerce more likely to be *upheld* under a dormant commerce clause challenge. *See supra* notes 47-48 and accompanying text.

85. *Hazeltine*, 340 F.3d at 594. However, state legislation designed to maintain clean air has been held to constitute a legitimate exercise of the state's police power allowing the state to act in many areas of interstate commerce. *See, e.g.*, Huron Cement Co. v. Detroit, 362 U.S. 440, 445 (1960) (state statute designed to maintain clean air); Mintz v. Baldwin, 289 U.S. 346 (1933) (statute requiring cattle or meat imported from other states to be certified as disease-free upheld as constitutional). Importantly, one of the firms targeted by the proponents of Amendment E, Tyson Foods, Inc., has a history

drafters of Amendment E during drafting meetings constituted direct evidence of intent that Amendment E was designed to discriminate against out-of-state businesses.[86] While the court found the reference to specific corporations to be "blatant" discrimination, the court failed to note the tremendously high level of concentration in hog production and that the firms mentioned in the drafting meetings, as being the target of Amendment E, controlled a very high percentage of hog production in the United States.[87] The court also found indirect evidence of discrimination in that the drafters and supporters of Amendment E had no evidence that a ban on corporate faming would preserve family farms or protect the environment, and that no economic studies had been undertaken to determine the economic impact of "shutting out corporate entities from farming in South Dakota."[88]

Because the court found Amendment E was enacted with a discriminatory purpose, the state bore the burden to show it had no other

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of serious environmental violations at both the state and federal level. Indeed, the United States Department of Justice, Environmental and Natural Resources Division listed among its accomplishments for fiscal year 2003 the successful prosecution of Tyson Foods, Inc. for numerous federal environmental violations. *See* United States Department of Justice, Environmental and Natural Resources Division, Summary of Litigation Accomplishments Fiscal Year 2003, *available at* http://www.usdog.gov/enrd/sumlitaccomp2003 (noting a guilty plea of Tyson Foods, Inc. to twenty felony Clean Water Act violations and levying of $5.5 million fine, additional $1 million in damages paid to the State of Missouri in a separate civil enforcement action, and $1 million paid to the Missouri Natural Resources Protection Fund).

86. *Hazeltine*, 340 F.3d at 594. A drafter testified at trial that Tyson Foods and Murphy Farms, two out-of-state corporations, were proposing to build large-scale hog confinement facilities in South Dakota and that Amendment E was designed to prevent such type of farming activity in the state. *Id.* But see supra notes 48 and 85 for the problems associated with large-scale corporatized farming that Amendment E was designed to prevent.

87. *Hazeltine*, 340 F.3d at 594. The point being that Tyson Foods, Inc. and Murphy Farms controlled such a high percentage of hog production in the United States, that any legislation designed to limit contract hog production to those situations where the independent producer retains managerial and decision-making control would necessarily have a disproportionate impact on those firms. In that situation, it would be expected that the drafters of Amendment E would mention the leading firms in the industry in discussions concerning the purpose of Amendment E. Also, Tyson Foods, Inc. has been involved in several reported appellate-level opinions illustrating the problems associated with production contracts. *See, e.g.*, Tyson Foods, Inc. v. Davis, 66 S.W.3d 568, 570 (Ark. 2002) (substantial reliance on Tyson's misrepresentation; jury verdict for hog producer of approximately $900,000 upheld on appeal); Tyson Foods, Inc. v. Stevens, 783 So. 2d 804 (Ala. 2000) (recurring odor problems from hog facilities resulting in punitive damages of $25,000); Sierra Club, Inc., et al. v. Tyson Foods, Inc., et al., No. 4:02CV-73-M, 2003 U.S. Dist. LEXIS 20130 (W.D. Ky. Nov. 7, 2003) (failure to report under federal environmental statutes release of ammonia gas from confinement chicken houses); City of Tulsa v. Tyson Foods, Inc., et al., 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (water pollution from chickens grown under contract production arrangements). It is these problems that Amendment E was designed to prevent from happening to family farmers and rural communities in South Dakota.

88. *Hazeltine*, 340 F.3d at 594-95. The court failed to mention the numerous exemptions under the South Dakota provision.

way to advance legitimate state interests. The court determined the state could not point to a legitimate state purpose for Amendment E and failed to show the absence of a nondiscriminatory alternative way to achieve its purpose.[89] Consequently, the court concluded Amendment E was enacted with a discriminatory, protectionist purpose and was unconstitutional.[90]

VII. IMPLICATIONS OF THE DECISION

The *Hazeltine* court's willingness to treat Amendment E as facially discriminatory by virtue of statements of drafters and supporters of the provision without examining the provision's language, demonstrates the court's current dormant Commerce Clause analysis places significant emphasis on the legislative history of any challenged provision. The Eighth Circuit had earlier utilized a similar approach in a case involving a challenge to another statute passed by referendum.[91] In *SDDS, Inc. v. South Dakota*,[92] a statute concerning large, solid waste disposal facilities tied operating approval to a finding that the landfill was environmentally safe and in the public interest.[93] The plaintiff, an out-of-state firm, wanted to construct a large landfill and claimed the provision impermissibly discriminated against interstate commerce.[94] The Eighth Circuit, in evaluating the plaintiff's claim, cited an election pamphlet drafted by the state attorney general and other state campaign literature that urged voters to vote against the out-of-state dump as sufficient evidence of discriminatory intent.[95] The court considered the state's rationale for the referendum, but only after deciding the provision was facially discriminatory and, in essence, a strict scrutiny analysis would apply.[96] As expected, the court's approach resulted in the statute being

89. *Hazeltine*, 340 F.3d at 597.

90. *Id.* Because the court found purposive discrimination based largely on the comments surrounding the initiative process engaged in to place Amendment E on the election ballot, the court avoided a technical analysis of whether Amendment E discriminated against interstate commerce by benefiting in-state economic interests at the expense of out-of-state competitors. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994). Almost assuredly, such an analysis would have revealed that Amendment E had no discriminatory effect.

91. SDDS, Inc. v. South Dakota, 47 F.3d 263, 265, 266 (8th Cir. 1995).

92. 47 F.3d 263 (8th Cir. 1995).

93. *SDDS, Inc.*, 47 F.3d at 265. Prior to enactment of the statutory provision, solid waste facilities only had to comply with the state administrative permit procedure. *Id.*

94. *SDDS, Inc.*, 47 F.3d at 265.

95. *Id.* at 268. The court downplayed the state's argument that additional legislative approval was required for larger waste disposal facilities which generally posed greater environmental risks. *Id.* at 270.

96. *SDDS, Inc.*, 47 F.3d at 268. The court's approach makes it very unlikely any provision found to be facially discriminatory would not be in violation of the dormant Commerce Clause.

ruled unconstitutional as an impermissible restraint on interstate commerce.[97]

The Eighth Circuit's current approach in deciding dormant Commerce Clause cases has significant implications for legislative bodies, state officials and other supporters of legislation that impacts social policy. Any legislative attempt to modify structural conditions in agriculture to favor an independent, family-based structure will require great care to not leave a "legislative history" trail that could provide ammunition for a dormant Commerce Clause claim, even if the resulting statutory provision is neutral on its face. The Eighth Circuit's current approach pays little attention to any legitimate purpose for which the legislation was actually approved. It is easy to predict the court's approach will often result in the invalidation of state measures not based on economic protectionism, but where the primary motive is to protect the quality of life and the environment.[98]

If left standing, the *Hazeltine* court's opinion raises serious concerns about the analysis of future dormant Commerce Clause cases in the Eighth Circuit, the principle of federalism,[99] the doctrine of stare decisis, the theory of separation of powers and the ability of states to regulate business conduct within their borders in a facially non-discriminatory manner.[100] The opinion could also have a chilling effect on further legislation impacting the future structure of agriculture.[101]

The court's willingness to ignore it's prior opinion, in *Hampton Feedlot, et al. v. Nixon*,[102] and not evaluate the actual language of

97. *SDDS, Inc.*, 47 F.3d at 272. The same approach has been utilized by the Sixth Circuit, but with a different result. In *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*, 127 F.3d 532, 539 (6th Cir. 1997), Kentucky's waste management program was challenged on dormant Commerce Clause grounds. In an attempt to create a regional approach to solid waste management, the statute at issue gave the states authority over developing waste management rules to local planning areas and required all landfill developments to comply with local waste disposal plans. *Id.* at 535, 536. While the court noted the statute was neutral on its face, the court examined circumstantial evidence (such as legislative history) in determining whether a discriminatory intent was present. *Id.* at 541. The court determined the plaintiff had failed to carry its burden to prove discriminatory intent. *Id.*

98. For example, the purpose of the South Dakota anti-corporate farming restriction (and subsequent amendments) was to preserve the viability of the family farm and the moral stability of the state. *See supra* note 9 and accompanying text.

99. A strong argument can be made that the Eighth Circuit's approach significantly alters the Constitution's structure for allocating power between the federal government and the states. *See, e.g.*, Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, The Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409 (1992).

100. South Dakota filed a petition for rehearing en banc with the court. However, the petition was denied. S.D. Farm Bureau, Inc. v. Hazeltine, Nos. 02-2366, -2588, -2644, -2646, 2003 U.S. App. LEXIS 22469 (8th Cir. Oct. 31, 2003).

101. Fear of litigation in an unsettled area of law tends to be a strong deterrent to legislative activity.

102. 249 F.3d 814 (8th Cir. 2001).

Amendment E on dormant Commerce Clause grounds poses difficulty for other states defending against either current or future challenges to anti-corporate farming laws.[103] It would appear at this time, however, the court is not favorably disposed to anti-corporate farming laws in general, and may also strike down other laws designed to deal with the structural conditions presently facing family farming and ranching operations. The court's opinion represents a complete shift from its opinion in *Hampton Feedlot*, and the court appears to have adopted the modern economic theory of free trade as its framework for evaluating commerce clause cases involving state regulation of business activity.[104] Unfortunately, the court failed to note that the types of production contract arrangements involved in the case have been used in other settings to provide vertically integrated firms with market power and to exclude producers from competitive market outlets for their products.[105] The question remains whether the Supreme Court will be asked to take up the issue[106] and force the Eighth Circuit to continue the judicial path laid down in *Hampton Feedlot* and U.S. Supreme Court precedent set forth in *Exxon Corp. v. Governor of Maryland*.[107]

103. The State of Iowa presently has an appeal pending with the Eighth Circuit involving the state's ban on packer ownership of livestock. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003). Many states with major anti-corporate farming laws are located within the Eighth Circuit. *See supra* note 3 and accompanying text.

104. Indeed, the court cited *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949), where the Court stated, "the vision of the Framers was that every farmer . . . shall be encouraged to produce by the certainty that he will have free access to every market in the Nation."

105. For a discussion of these issues see Roger A. McEowen et al., 7 DRAKE AGRIC. L., 269-71; Michael C. Stumo, Douglas J. O'Brien, *Antitrust Fairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003); and Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531 (2000). Also, on February 17, 2004, a federal jury rendered a $1.28 billion verdict against Tyson Foods, Inc., based on a finding that Tyson's use of contracts to acquire cattle for slaughter violated the Packers and Stockyards Act's proscription against price manipulation of the cash market for fed cattle. *See* "Tyson Loses Cattle-Price Lawsuit," The Wall Street Journal, Feb. 18, 2004, pp. A-3, 8.

106. The state of South Dakota filed a petition for certiorari with the U.S. Supreme Court on January 29, 2004; the case name is now Nelson, et al. v. South Dakota Farm Bureau, et al.

107. 437 U.S. 117 (1978).