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## **“[W]e’re Doing This to Ourselves”: South Dakota’s Anticorporate Farming Amendment**

by

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# “[W]e’re Doing This to Ourselves”:

## South Dakota’s Anticorporate Farming Amendment

John C. Pietila

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### I. INTRODUCTION

In the fall of 1998, the people of South Dakota were placed on the front lines of the national debate over control of agricultural production in the new millennium. On one side of the conflict stood multi-billion dollar agricultural corporations pushing for the continued integration of the state’s agricultural industry. On the other side stood rural activists and traditional family farmers fighting to halt the expansion of global conglomerates in the field of agricultural production. Many young farmers and rural communities were caught in the middle of this complex debate, forced to choose between desperately-needed financial options and a traditional way of life.

Following in the footsteps of their neighbors in Nebraska, the voters of South Dakota initiated and overwhelmingly approved a constitutional amendment that severely restricts corporate investment in agricultural production. The measure simultaneously reaffirms South Dakota’s commitment to family-controlled agriculture by carving out important exceptions for family farm corporations and cooperatives controlled by family farmers. Proponents of the anticorporate farming amendment welcome the restrictions as the last, best hope for the continuing viability of South Dakota’s family farms and rural communities. Opponents of the measure claim that it unwisely and unconstitutionally discriminates against nonresident agricultural investment and impermissibly interferes

with interstate commerce. They condemn the anticorporate farming amendment as a desperate, isolationist measure that will only exacerbate the economic crisis threatening South Dakota's agricultural economy.

Part II of this Note explains, to the extent possible, the social, economic, and legal circumstances that preceded the adoption of South Dakota's anticorporate farming amendment. Part III is broken down into three distinct sections. The first section analyzes South Dakota's anticorporate farming amendment and explore the amendment's heightened restrictions on corporate farming. The second section analyzes the constitutional objections made by opponents of South Dakota's anticorporate farming amendment, focusing on claims raised under the equal protection and commerce clauses. Finally, the third section addresses the measure's probable impact on agriculture in South Dakota and concludes that the long-term effects of the state's anticorporate farming amendment, if any, will depend in large part on the measure's influence on the ongoing debate over the direction of national farm policy.

## II. BACKGROUND

South Dakota is a state largely defined by its agricultural economy and rural tradition. While the state has been able to attract and retain some degree of nonagricultural industry,<sup>1</sup> South Dakota's greatest national significance is as a leading producer of farm commodities.<sup>2</sup> Even today, slightly more than fifty percent of South

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1. Economic incentives offered to businesses formed in or relocated to South Dakota include: no corporate or personal income tax, no personal property tax, no business inventory tax, no inheritance tax, and a low overall cost of doing business. South Dakota Governor's Office of Economic Development, *Business Advantages*, at <http://www.sdgreatprofits.com/advantages/busadv.htm> (last visited Feb. 23, 2001) (on file with author).

2. In 1999, South Dakota had 44,000,000 acres of land devoted to farming. This included 16,200,400 acres of harvested cropland. South Dakota ranks in the top ten in national production for most major farm commodities:

Crop	Production	National Rank
corn	367,300,000 bushels	9
oats	12,800,000 bushels	4
wheat	120,600,000 bushels	8
barley	3,552,000 bushels	15
rye	1,012,000 bushels	4
flaxseed	357,000 bushels	2
sorghum	4,640,000 bushels	12
soybeans	146,520,000 bushels	8
sunflower seeds	1,302,300,000 pounds	2
hay	9,440,000 tons	2

Dakota's residents live in rural communities.<sup>3</sup> Consequently, many South Dakotans rely on agriculture as the cornerstone of educational, economic, and social stability. Not surprisingly, prolonged downturns in the national farm economy have been especially troublesome for South Dakota.

In recent decades, traditional family farms have encountered hard times. In the 1980s, adverse weather conditions, depressed land values, and high interest rates combined with falling commodity prices to create a farm debt crisis of national proportions.<sup>4</sup> New and expanding family farms were particularly vulnerable to this financial calamity.<sup>5</sup> Faced with perceived indifference at the federal level, many state governments reacted to the farm debt crisis by enacting programs designed to alleviate debt, subsidize commodity production, and otherwise support traditional family farms.<sup>6</sup> By 1986, these state programs had combined with renewed federal support to spur a reverse of the farm debt crisis and stem the tide of farm foreclosures.<sup>7</sup> While the negative fiscal effects of the debt crisis lingered for some producers, the next decade was marked by a general improvement in the overall financial condition of family farmers.<sup>8</sup>

In 1998, however, a new economic crisis began to unfold in the farm sector.<sup>9</sup> Many family farmers, who had taken advantage of improved farm incomes, increased credit

Livestock	Production	National Rank
cattle & calves	3,900,000 head	7
hogs & pigs	1,260,000 head	11
sheep & lambs	420,000 head	5

South Dakota Governor's Office of Economic Development, *South Dakota Agricultural Profile*, at [http://www.sdgreatprofits.com/SD\\_Profiles/sdag.htm](http://www.sdgreatprofits.com/SD_Profiles/sdag.htm) (last visited Feb. 23, 2001) (on file with author).

3. As a matter of geographic distribution, 348,101 South Dakotans reside in rural communities while 347,903 live in urban centers. South Dakota Governor's Office of Economic Development, *South Dakota Demographic Profile*, at [http://www.sdgreatprofits.com/SD\\_Profile/demographics.htm](http://www.sdgreatprofits.com/SD_Profile/demographics.htm) (last visited Feb. 23, 2001) (on file with author).

4. For a noted agricultural economist's firsthand account of the causes and effects of the farm-debt crisis see NEIL E. HARL, *THE FARM DEBT CRISIS OF THE 1980S* (1990). Harl asserts that the farm debt crisis was rooted in federal inflation and interest rate policies coupled with the experimental tax cuts of 1981. *Id.* at 13-17. Although agriculture was not the only industry impacted adversely by soaring interest rates, "the characteristics of relatively low cash rate of return for many farm assets, a high level of capital intensity for U.S. agriculture, and sensitivity to changes in export supply and demand conditions in international farm commodity markets magnified the impacts upon farm and ranch firms." *Id.* at 13.

5. Neil E. Harl, *The Financial Crisis in the United States, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?* 112, 115-16 (Gary Comstock ed., 1987).

6. See HARL, *supra* note 4, at 183-209 (explaining how state governments "came to the rescue" of family farmers during the farm debt crisis of the 1980s with a variety of legal, financial, social, and psychological services including moratoria on farm and ranch mortgage foreclosures and counseling services for farmers and ranchers experiencing debtor distress).

7. See *id.*; see also Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311, 320 n.85 (1997) (citing H.R. CONF. REP. NO. 958, 89th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.A.N. 5246, 5249) (identifying Chapter 12 Family Farm Bankruptcy as a modification of federal bankruptcy law in response to the farm debt crisis of the 1980s).

8. Susan A. Schneider, *Financing the Agricultural Operation: Recent Developments and Current Trends*, 4 DRAKE J. AGRIC. L. 215, 219 (1999).

9. Neil D. Hamilton, *A Changing Agricultural Law for a Changing Agriculture*, 4 DRAKE J. AGRIC. L. 41, 42 (1999).

availability, and stabilized interest rates to capitalize their farm operations,<sup>10</sup> were stung by a recession in Asian economic markets.<sup>11</sup> As foreign demand for American farm exports collapsed, supply overhangs caused commodity prices to fall sharply.<sup>12</sup> As a result, producers were forced to sell most major commodities below the break-even point.<sup>13</sup> This decline in prices, combined with diminished federal price supports under Congress' 1996 Freedom to Farm program, dramatically reduced farm income and left many family farmers unable to service their increased debt loads.<sup>14</sup>

The economic woes of recent decades have taken their toll on agricultural producers. On a national scale, the total number of farms has dropped from more than five million in 1954 to fewer than two million today.<sup>15</sup> Currently, there are 300,000 fewer farmers in the United States than there were twenty years ago.<sup>16</sup> South Dakota has not been immune to these national trends. In 1999, the number of farms in South Dakota was 32,500, down seventeen percent from an estimated 39,000 farm operations in 1980.<sup>17</sup>

In South Dakota, as in many agricultural states, increasing frustration with the local and national farm economies prompted citizen action and legislative reaction. Beginning in the 1970s, citizens and lawmakers intent on saving the family farm targeted large-scale, integrated farm corporations that competed directly with family farms for agricultural market share and the land necessary for agricultural production.<sup>18</sup> Competition from conglomerate farm corporations, which can more readily secure capital and more easily offset agricultural losses, is perceived as a threat to "the ability of young farmers to enter agricultural production, the ability of rural communities to maintain a high level of social and economic existence, and the ability of young [family] farmers to adequately compete in the marketplace."<sup>19</sup> In response to this perceived threat, a handful of rural states, including South Dakota, have placed statutory restrictions on corporate farming.<sup>20</sup>

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10. See Schneider, *supra* note 8, at 218 (indicating that, according to the Economic Research Service of the United States Department of Agriculture, farm business debt had increased in eight of nine years from 1989 to 1998, including increases in each year from 1992 to 1998).

11. Hamilton, *supra* note 9, at 42-43.

12. *Id.*

13. *Id.*

14. See Schneider, *supra* note 8, at 218 (reporting that the Economic Research Service of the United States Department of Agriculture was forecasting 1998 net farm income of \$45.7 billion; this projected figure was \$4.1 billion below the net farm income for 1997 and \$7.6 billion below the net farm income for 1996).

15. Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 615 (1994).

16. William Claiborne, *Fighting the 'New Feudal Rulers': S. Dakota Farmers Split on Family Tradition vs. Corporate Efficiency*, WASH. POST, Jan. 3, 1999, at A3, available at 1999 WL 2191913.

17. U.S. Dep't of Agric., South Dakota Agric. Statistics Serv., *Farm Numbers Unchanged from 1998*, Feb. 18, 2000, at <http://www.nass.usda.gov/sd/releases/farm0200.htm> (last visited Feb. 23, 2001) (on file with author).

18. Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 400 (1992).

19. Roger D. Colton, *Old MacDonald (Inc.) Has a Farm . . . Maybe, or Nebraska's Corporate Farm Ban: Is it Constitutional?*, 6 U. ARK. LITTLE ROCK L. REV. 247, 250 (1983).

20. In all, nine states have enacted substantial anticorporate farming legislation. These states include Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin. Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anticorporate Farming Statutes*, 59 UMKC L. REV. 679, 680-85 (1991). While the initial purpose and specific provisions of state anticorporate farm statutes vary,

### A. The Family Farm Act of 1974

The South Dakota Legislature made its first effort to restrict corporate farming when it enacted the Family Farm Act of 1974 (Family Farm Act).<sup>21</sup> Advocates of the Family Farm Act, including the South Dakota Farmers Union, feared that an incursion of large-scale agricultural corporations into South Dakota would squeeze family farmers off the land and contribute to an overall decline in the economic, social, and educational welfare of towns and cities in agricultural areas.<sup>22</sup> Confronted with evidence that the increased presence of agricultural conglomerates would have an adverse impact on South Dakota's traditional family farms and rural communities, state lawmakers ultimately voted to foreclose the expansion of corporate farming in South Dakota.<sup>23</sup>

The express purpose of the Family Farm Act was to insulate the "family farm" from the perceived economic threat of "conglomerates in farming."<sup>24</sup> South Dakota lawmakers, like their counterparts in neighboring states,<sup>25</sup> wanted to restrict the agricultural activities of large corporations and "level the playing field" for family farmers.<sup>26</sup> The provisions of the Family Farm Act were intended to preserve South Dakota's traditional farm economy by restricting corporate involvement in, and influence over, agricultural production within the state.

The core of the Family Farm Act is an outright ban on corporate farming.<sup>27</sup> Under the statute, corporations and limited liability companies operating in South Dakota may not (1) own farm land or (2) engage in farming.<sup>28</sup> The act creates exceptions for certain types of corporations and for corporations involved in certain kinds of agricultural activities.<sup>29</sup> Notably, concerns about the potential loss of South Dakota's meatpacking industry and increased competition with neighboring states for livestock market share<sup>30</sup>

the acts typically ban corporations from engaging in agricultural production or owning agricultural land while granting exceptions for "family farm corporations" and "authorized farm corporations." *Id.* at 681-85.

21. S.D. CODIFIED LAWS §§ 47-9A-1 to -23 (Michie 2000).

22. 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).

23. *Id.*

24. S.D. CODIFIED LAWS § 47-9A-1 (Michie 2000). The statute does not define the term "conglomerates in farming."

25. Minnesota adopted its anticorporate farming statute in 1973. The Minnesota statute placed a detailed set of limits on farm corporations but exempted "family farm corporations" and "authorized farm corporations." The Minnesota statute became the pattern for anticorporate farming laws in the neighboring states of South Dakota and, to a lesser extent, Iowa. Stayton, *supra* note 20, at 683. Meanwhile, North Dakota first enacted an outright ban on corporate farming in 1932, amending its statute to provide certain exceptions for specified, closely-held family farm and ranch corporations in 1981. *Id.* at 682-83.

26. Haroldson, *supra* note 18, at 402.

27. S.D. CODIFIED LAWS § 47-9A-3 (Michie 2000). The Family Farm Act defines "farming" as "the cultivation of land for the production of agricultural crops; livestock or livestock products; poultry or poultry products; milk or dairy products; or fruit or other horticultural products." *Id.* § 47-9A-2.

28. *Id.*

29. *Id.* §§ 47-9A-3.1 to -9A-12.

30. See Richard F. Prim, *Minnesota's Anticorporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLIN L. REV. 431, 437-41 (1995) (discussing the relationship between anticorporate farming statutes and competition among states for livestock market share).

prompted the legislature to carve out exceptions for large corporations that hold agricultural land solely for the purpose of raising poultry<sup>31</sup> or feeding livestock.<sup>32</sup>

The most significant feature of the Family Farm Act is the total exemption of “family farm corporations”<sup>33</sup> and “authorized farm corporations”<sup>34</sup> from the act’s restrictions. By 1974, incorporation had become a prevalent form of family farm ownership.<sup>35</sup> The provisions of the Family Farm Act clearly distinguish large agricultural corporations, whose size and market impact are perceived threats to the economic well-being of family farmers and rural communities, from family farm corporations structured by farm families to obtain the various organizational benefits and economic advantages of incorporation.<sup>36</sup>

The Family Farm Act’s enforcement scheme includes registration, qualification, and reporting requirements. Any corporation engaged in farming or proposing to commence farming in South Dakota must first file a report with the secretary of state.<sup>37</sup>

31. S.D. CODIFIED LAWS § 47-9A-3.2 (Michie 2000).

32. *Id.* § 47-9A-11.

33. *Id.* § 47-9A-13. The statute defines “family farm corporation” as:

[A] corporation founded for the purpose of farming and the ownership of agricultural land in which the majority of the voting stock is held by the majority of the stockholders who are members of a family related to each other within the third degree of kindred, and at least one of whose stockholders is a person who is residing on or actively operating the farm or who has resided on or has actively operated the farm, and none of whose stockholders are corporations, or a corporation founded for the purpose of farming and the ownership of agricultural land in which a majority of voting stock is held by resident stockholders who are family farmers and are actively engaged in farming as their primary economic activity.

*Id.* § 47-9A-14.

34. The statute defines “authorized farm corporation” as “a corporation whose shareholders do not exceed ten in number, whose shareholders are all natural persons or estates, whose shares are all of one class, and whose revenues from rent, royalties, dividends, interest and annuities do not exceed twenty percent of its gross receipts.” *Id.* § 47-9A-15.

35. Lance Nixon, *South Dakota Still Wrestles with Incorporated Family Farms*, ABERDEEN AMERICAN NEWS, Aug. 22, 1999, available at 1999 WL 22008496.

36. Jensen, *supra* note 22, at 584. The corporate form is a practical and popular method of farm organization because it offers farmers increased business continuity, centralized management, simplified transfer of ownership, limited liability, more flexible financing options, and certain tax benefits. Matthew M. Harbur, *Anticorporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385, 393 (1999).

37. The information required in a corporation’s initial report is expressly set out in the Family Farm Act:

Every corporation engaged in farming or proposing to commence farming in [South Dakota] shall file . . . a report containing:

- (1) The name of the corporation and its place of incorporation;
- (2) The address of the registered office of the corporation in [South Dakota], the name and address of its registered agent in [South Dakota] and, in the case of a foreign corporation, the address of its principal office in its place of incorporation;
- (3) The acreage and location listed by section, township and county of each lot or parcel of land in [South Dakota] owned or leased by the corporation and used for the growing of crops or the keeping or feeding of poultry or livestock; and
- (4) The names and addresses of the officers and the members of the board of directors of the corporation.

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

Additionally, any corporation seeking to qualify for an exemption as a "family farm" or "authorized farm" corporation must demonstrate that the corporation meets the qualification requirements.<sup>38</sup> According to the statute, corporations engaged in farming must file such reports annually.<sup>39</sup> Primary enforcement responsibility under the Family Farm Act lies with the attorney general, who may seek court-ordered divestiture of land held in violation of the statute.<sup>40</sup>

### B. The 1988 Amendment to the Family Farm Act

The Family Farm Act, though a recurring subject of political discussion, remained relatively unchanged for fourteen years. Then, in 1988, hog farming moved to the forefront of the debate about corporate involvement in South Dakota's farm industry. At that time, large agricultural corporations targeted the state for a major expansion in hog production facilities.<sup>41</sup> In November 1988, an initiated measure,<sup>42</sup> approved by nearly sixty percent of South Dakota voters, expanded the Family Farm Act by expressly restricting corporate "hog confinement facilit[ies]."<sup>43</sup> The initiated amendment defined "hog confinement facility" as "any real estate used for the breeding, farrowing and raising of swine."<sup>44</sup> It appeared to most interested observers that South Dakota had "turned its back" on corporate hog production.<sup>45</sup>

However, in March 1995, South Dakota's attorney general ruled that, as a matter of construction, the conjunctive term "and" was the operative word in the statutory clause "breeding, farrowing and raising of swine."<sup>46</sup> The attorney general went on to indicate that agricultural conglomerates could legally be involved in the financing and operation of hog production facilities so long as the facilities were not used concurrently for the

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38. The statute requires additional information from corporations seeking to qualify for an exception as a "family farm corporation" or "authorized farm corporation" including:

- (1) The number of shares owned by persons residing on the farm or actively engaged in farming, or their relatives within the third degree of kindred;
- (2) The name, address and number of shares owned by each shareholder; and
- (3) A statement as to percentage of gross receipts of the corporation derived from rent, royalties, dividends, interest and annuities.

*Id.* § 47-9A-17. No corporation may "commence farming" in South Dakota until the secretary of state has inspected the required reports and certified that the corporation's proposed operations comply with the provisions of the Family Farm Act. *Id.*

39. *Id.* § 47-9A-19.

40. *Id.* §§ 47-9A-21 to -22.

41. Prim, *supra* note 30, at 439.

42. Under South Dakota law, statutes may be initiated by petition and become law when approved by a majority vote of the people. S.D. CODIFIED LAWS §§ 2-1-1 to -14 (Michie 1992). In 1898, South Dakota became the first state to authorize the initiative and referendum procedures for the adoption of ordinary legislation. S.D. SEC'Y OF STATE, ELECTION PROCEDURES, at <http://www.state.sd.us/sos/initiati.htm> (last visited Feb. 23, 2001) (on file with author).

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

44. *Id.* (emphasis added). Farrowing is the process of caring for female swine during and after gestation.

45. Prim, *supra* note 30, at 439.

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



breeding, farrowing *and* raising of swine.<sup>47</sup> By 1996, several of the nation's largest pork companies had set up contract feeding operations in South Dakota.<sup>48</sup> Under such arrangements, corporations could evade the restrictions of the Family Farm Act by financing hog confinement facilities and contracting with individual South Dakota farmers to raise feeder pigs bred and farrowed in a different location or locations.<sup>49</sup>

### C. South Dakota's Anticorporate Farming Amendment

In just more than two years after the attorney general's opinion interpreting the hog facility amendment to the Family Farm Act, North Carolina-based Murphy Family Farms, then the largest hog producer in the nation, was operating twenty contract hog-feeding facilities in South Dakota and had announced plans for at least forty more.<sup>50</sup> Frustrated that the Family Farm Act had failed to prevent the proliferation of such "hog factories," anticorporate activists again turned to the initiative process. A coalition of family farm advocacy groups, determined to resist further corporate control of South Dakota agriculture and halt the expansion of contract hog feeding, initiated a proposed amendment to the state constitution.<sup>51</sup> The measure, popularly referred to as Amendment E because of its location on the election ballot, would become the subject of a rancorous and divisive political debate.<sup>52</sup>

Supporters of the anticorporate farming amendment included the 14,000-member South Dakota Farmers Union and Dakota Rural Action, a grassroots citizens group.<sup>53</sup> These organizations endorsed Amendment E as a "logical extension of the Family Farm Act of 1974 and the 1988 amendment . . . prohibiting corporate ownership of pork production facilities."<sup>54</sup> The measure was necessary, proponents argued, to prevent corporate manipulation of livestock markets, protect the environment, and safeguard the social and economic well-being of rural communities.<sup>55</sup> Amendment E was designed, its drafters explained, to prevent large, nonfamily farm corporations from using unfair, anticompetitive production arrangements to turn independent family farmers and ranchers into "a new generation of sharecroppers."<sup>56</sup>

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47. *Id.*

48. Claiborne, *supra* note 16.

49. Under the typical feeding contract, a corporation will finance the construction of large confinement feeding barns on the farmer's property. Prim, *supra* note 30, at 448-51. The corporation then contracts with the farmer to raise hogs on its behalf. *Id.* The corporation often supplies the feeder pigs and the feed needed to fatten them, while the farmer provides the labor and overhead and assumes responsibility for environmental requirements. *Id.* Typically, each of these contract hog facilities is designed to hold three to four thousand feeder hogs at any given time. *Id.*

50. Claiborne, *supra* note 16. At least two other national hog farming companies had also expressed an interest in starting contract-feeding facilities in South Dakota. *Id.*

51. The constitution of South Dakota can be amended by initiative and majority vote of the people. S.D. CONST. art. XXIII, §§ 1-3.

52. Claiborne, *supra* note 16.

53. *Id.*

54. S.D. SEC'Y OF STATE, 1998 BALLOT QUESTION PAMPHLET, PRO-CONSTITUTIONAL AMENDMENT E, at <http://www.state.sd.us/sos/1998/98bqprocone.htm> (last visited Feb. 23, 2001) (on file with author).

55. *Id.*

56. *Id.* The image of independent family farmers being reduced to "mere sharecroppers" by agricultural conglomerates, characterized as "new feudal rulers," likely contributed to the intensity of the economic and social discussion surrounding South Dakota's anticorporate farming amendment; at the very least, the rhetorical

Opponents of the measure included the 10,000-member South Dakota Farm Bureau and various associations representing cattle, pork, wheat, corn, and other commodities producers.<sup>57</sup> Opponents of Amendment E claimed that the measure was a “poorly thought out idea” that required full and open debate in the state legislature.<sup>58</sup> They believed that the amendment would discriminate against successful family farmers, eliminate much-needed farm financing options, cripple value-added agricultural development, and fail to protect the environment or prevent large-scale hog operations.<sup>59</sup> Amendment E, its opponents argued, included “complicated and confusing language” that should be excluded from the state constitution.<sup>60</sup>

Ultimately, the debate over Amendment E would pit farmer against farmer and neighbor against neighbor.<sup>61</sup> In November 1998, after a great deal of heated political debate, the voters of South Dakota adopted the amendment and further restricted corporate farming and corporate ownership of agricultural land within the state.<sup>62</sup> As they had with the 1988 amendment to the Family Farm Act, nearly sixty percent of South Dakota voters approved Amendment E, including two-thirds of the state’s farmers.<sup>63</sup> Given its sweeping scope, the legal, social, and economic implications of South Dakota’s anticorporate farming amendment remain uncertain.

### III. ANALYSIS

Opponents of Amendment E assert that the measure’s restrictions on corporate farming and corporate investment in agricultural production are unwise and unconstitutional. Supporters of Amendment E insist that it is a legitimate and necessary extension of South Dakota’s Family Farm Act and the last hope for preserving the state’s traditional family farms and rural communities. The following sections of this Note analyzes: (1) the restrictions, exceptions, and enforcement provisions of Amendment E; (2) the unresolved constitutional challenges raised by opponents of Amendment E; and (3) the potential impact of Amendment E on South Dakota’s farm economy.

#### *A. South Dakota’s Anticorporate Farming Amendment*

With the passage of Amendment E, South Dakota joined Nebraska as the only two states to have written bans on corporate farming into their constitutions.<sup>64</sup> The South Dakota amendment is nearly identical to the measure Nebraska adopted in 1982.<sup>65</sup> By its

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impact of that image appears to have attracted some degree of national media interest to the debate. *See, e.g.*, Claiborne, *supra* note 16.

57. Claiborne, *supra* note 16.

58. S.D. SEC’Y OF STATE, 1998 BALLOT QUESTION PAMPHLET, CON-CONSTITUTIONAL AMENDMENT E, at <http://www.state.sd.us/sos/1998/98bqprocone.htm> (last visited Feb. 23, 2001) (on file with author).

59. *Id.*

60. *Id.*

61. Claiborne, *supra* note 16.

62. S.D. CONST. art. XVII, §§ 21-24.

63. Claiborne, *supra* note 16.

64. *Id.*

65. *See* NEB. CONST. art. XII, § 8.

terms, South Dakota's amendment is one of the strictest anticorporate farming laws in the nation.<sup>66</sup>

### *1. Restrictions*

The South Dakota anticorporate farming amendment, like the Family Farm Act before it, prohibits corporate ownership of agricultural land and corporate farming.<sup>67</sup> The amendment expressly extends the ban on farm activities to corporate farm "syndicates."<sup>68</sup> The amendment defines "syndicates" to include most forms of partnership and other limited-liability business enterprises.<sup>69</sup> In practical effect, the amendment reinforces the Family Farm Act's ban on corporate farming and prohibits further corporate expansion into agricultural production in South Dakota.

### *2. Exceptions*

The blanket restrictions of the anticorporate farming amendment, like those of the Family Farm Act, are qualified by exceptions for certain categories of corporations and syndicates, and for corporations or syndicates involved in certain kinds of agricultural activities.<sup>70</sup> Most notably, "family farm corporations or syndicates" are exempt from the restrictions.<sup>71</sup> While certain family farm cooperatives are also exempt from the ban,<sup>72</sup>

66. See Claiborne, *supra* note 16.

67. The amendment defines the term "corporation" as "any corporation organized under the laws of any state of the United States or any country." S.D. CONST. art. XVII, § 21.

68. The amendment provides that "[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." *Id.*

69. The measure defines "syndicate" 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.* "Syndicate" includes any general partnership in which "nonfamily" farm syndicates or "nonfamily" farm corporations are partners. *Id.*

70. The restrictions of the amendment do not apply to: family farm corporations or syndicates; certain cooperatives in which a majority of interest 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 or experimental purposes; land leases by alfalfa processors; agricultural land operated for the purpose of growing seed, nursery plants or sod; mineral rights on agricultural land; 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; and livestock futures contracts, livestock purchased for slaughter within two weeks of purchase, or livestock purchased and resold within two weeks. S.D. CONST. art. XVII, § 22.

71. The restrictions of the amendment do not apply to "[a] family farm corporation or syndicate." The act goes on to define these permissible forms of organization:

A family farm corporation or syndicate is 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. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other

there is no exception for most partnerships or other business arrangements between unrelated, individual farmers or related family farmers and investors who are not actively involved in the day-to-day management of a family farm.

### 3. Enforcement

Under the amendment, corporations and syndicates that own agricultural land or engage in farming must report to the South Dakota secretary of state on an annual basis.<sup>73</sup> Like the Family Farm Act, the amendment charges the attorney general with

corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate.

*Id.* § 22(1).

72. *Id.* § 22(2). The restrictions of the amendment do not apply to

[a]gricultural land acquired or leased, or livestock kept fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock.

*Id.*

73. *Id.* § 24. Unlike the Family Farm Act, South Dakota's anticorporate farming amendment does not expressly set forth the information a report must contain. Instead, the amendment grants the secretary of state authority to promulgate rules consistent with state law. S.D. CONST. art. XVII, § 24. Under the current rules, corporations and syndicates seeking exemption from the amendment's restrictions must file a claim of exemption with the secretary of state. Amendment E Rules, S.D. ADMIN. R. 5:05:01:03 (1999), available at [http://www.state.sd.us/sos/Amendment\\_E\\_Rules.htm](http://www.state.sd.us/sos/Amendment_E_Rules.htm). (last visited Feb. 23, 2001) (on file with author). Unless the information is already included in the firm's last annual report, a corporation's claim of exemption must contain:

- (1) The name of the corporation, the date of its incorporation, and its place of incorporation;
- (2) The name and address of its registered agent in [South Dakota], the address of its principal office in [South Dakota], and, in the case of a foreign corporation, the address of its principal office at its place of incorporation;
- (3) If the corporation is claiming an exemption as a family farm corporation, the name and address of each shareholder, and explanation of the degree of kinship among the shareholders, if any, and the number of shares owned by each;
- (4) The legal description of each lot or parcel of real estate in [South Dakota] owned or leased by the corporation and used for farming, the date the real estate was acquired by the corporation, and the type of ownership interest held by the corporation;
- (5) A description of the farming conducted on the real estate;
- (6) The name and address of each shareholder residing on the farm or actively engaged in the day-to-day labor and management of the farm;
- (7) The number of head of livestock, if any, owned by the corporation, a description of the type of livestock, the type of ownership in the livestock held by the corporation, and a statement of whether the livestock were acquired prior to November 3, 1998;
- (8) A copy of each contract for the keeping and feeding of livestock to which the corporation is a party;
- (9) The type of exemption claimed and the factual basis for the claim; and

primary enforcement responsibility.<sup>74</sup> If a corporation or syndicate violates any provision of the amendment, the attorney general may commence an action to enjoin the illegal purchase of land or livestock or to force the divestiture of land or livestock held illegally.<sup>75</sup> If the attorney general fails to enforce the act, any resident of South Dakota has standing under the amendment to sue for enforcement in the circuit court of the county in which the agricultural land or livestock is illegally held.<sup>76</sup>

### *B. Constitutional Challenges to South Dakota's Anticorporate Farming Amendment*

Prior to the passage of Amendment E, the state legislature's power to regulate corporate farming had not been specifically litigated in South Dakota. In June 1999, opponents of Amendment E, including the South Dakota Farm Bureau, South Dakota Sheep Growers Association, and a handful of independent farm producers, filed a lawsuit in the United States District Court for the District of South Dakota challenging the constitutionality of Amendment E.<sup>77</sup> The complaint alleged, in part, that Amendment E violates the federal constitution because it illegitimately discriminates against out-of-state businesses and impermissibly interferes with interstate commerce.<sup>78</sup> The next section of this Note analyzes the equal protection and commerce clause objections specifically raised by opponents of South Dakota's anticorporate farming amendment.

#### *1. Equal Protection Objections*

The equal protection clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>79</sup> The protections of the clause extend to corporations.<sup>80</sup> South Dakota's anticorporate farming amendment plainly makes a distinction between corporations in general and family farm

(10) A statement that the information contained in the claim of exemption form is accurate as of the date the form is signed.

*Id.* R. 5:05:01:04. Similar reporting requirements apply to "syndicates." "Syndicates" include limited liability companies, limited liability partnerships, limited partnerships, business trusts, and cooperatives. *Id.* R. 5:05:01:05 – 09.

74. S.D. CONST. art. XVII, § 24.

75. *Id.* The amendment further provides that any land held in violation of the act must be divested within two years, and any livestock held in violation of the act must be divested within six months. If land held in violation of the amendment is not divested in two years, the land escheats to the state. *Id.*

76. *Id.*

77. Chet Brokaw, *Judge Rules that Challenge to Corporate Farming Amendment Can Continue*, ASSOCIATED PRESS NEWSWIREs, Jan. 18, 2000, available at WL 1/18/00 APWIREs 19:11:00.

78. The original complaint also included a constitutional claim predicated on the privileges and immunities clause of Article IV. *Id.* In a ruling entered in September 2000, the privileges and immunities claim was dismissed for lack of standing. *South Dakota Farm Bureau, Inc. v. South Dakota*, 2000 DSD 43 ¶ 20, 197 F.R.D. 673, 679. Plaintiffs' claims against the state of South Dakota were also dismissed after the district court ruled that the state was immune from the federal lawsuit under the Eleventh Amendment. *Id.* ¶ 12, 677. However, the district court ruled that the plaintiffs' equal protection and commerce clause claims against the state attorney general and secretary of state were "necessary for the claimed vindication of claimed federal rights" and should be allowed to proceed. *Id.* ¶ 28, 681.

79. U.S. CONST. amend. XIV, § 1.

80. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949).

corporations.<sup>81</sup> Under the amendment, nonfamily farm corporations may not own agricultural land or engage in farming.<sup>82</sup> Family farm corporations, family farm syndicates, and certain family farm cooperatives are exempt from the amendment's restrictions on farming and farmland ownership.<sup>83</sup> The amendment also provides exceptions for farms operated for specific purposes, such as research and experimentation, or agricultural land held by a corporation for the growing of seed, nursery plants, or sod.<sup>84</sup> The classification of corporations, and the different treatment afforded to corporations according to their classification, are elements of South Dakota's anticorporate farming amendment that have been challenged as unconstitutional violations of the equal protection clause.<sup>85</sup>

Equal protection challenges to anticorporate farming statutes have not fared well in federal courts.<sup>86</sup> Because corporations are not a suspect class and the right to farm and own farmland is not a fundamental right, anticorporate farming statutes enjoy a strong presumption of constitutionality.<sup>87</sup> Social and economic legislation, like corporate farming restrictions, will ordinarily not be overturned unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational."<sup>88</sup>

As a matter of consistent judicial interpretation, it is unlikely that a federal court will conclude that the legislative classifications contained in South Dakota's anticorporate farming amendment violate the equal protection clause. In *Asbury Hospital v. Cass County*,<sup>89</sup> the United States Supreme Court rejected an equal protection challenge to North Dakota's anticorporate farming statute. The North Dakota statute, adopted by initiative in 1932, prohibited all corporations, foreign or domestic, from engaging in farming.<sup>90</sup> In addition, the statute required corporations which owned or held rural real estate "used or usable" for farming to divest themselves of all agricultural land not "reasonably necessary in the conduct of their business" within ten years of the enactment of the statute.<sup>91</sup> Appellant, a Minnesota hospital holding agricultural land in satisfaction of a mortgage debt, argued that the statute's exceptions for (1) lands owned and held by corporations in the business of dealing in farmland and (2) lands held by certain cooperatives, three-fourths of whose members or stockholders were farmers, violated the equal protection clause.<sup>92</sup>

Employing the rational basis test, the Supreme Court upheld the North Dakota anticorporate farming statute. In reaching its decision, the Court concluded that the

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81. See *supra* Part III.A.1-3.

82. See *supra* note 68.

83. See *supra* notes 70-71.

84. See *id.*

85. See Brokaw, *supra* note 77.

86. Colton, *supra* note 19, at 263.

87. *Id.* at 264.

88. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332 (8th Cir. 1991) (citing *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988)).

89. 326 U.S. 207 (1945)

90. *Id.* at 209.

91. *Id.*

92. *Id.* at 214.

exceptions to the statute's prohibitions were rationally related to North Dakota's legitimate state interest as expressed in its "policy against the concentration of farming lands in corporate ownership."<sup>93</sup> The Court reasoned that state legislatures are "free to make classifications in the application of a statute which are relevant to the legislative purpose."<sup>94</sup> The "ultimate test" of a statute's validity is "not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made."<sup>95</sup> The Court went on to indicate that statutory discrimination among classes that are, in fact, different is presumptively relevant to a permissible legislative purpose and will not be invalidated as a denial of equal protection "if any state of facts could be conceived" that would support the distinction.<sup>96</sup>

Lower federal courts have shown similar deference to the power of state legislatures to restrict corporate farm operations. In *MSM Farms, Inc. v. Spire*,<sup>97</sup> the Court of Appeals for the Eighth Circuit, which includes both South Dakota and Nebraska, rejected an equal protection challenge to the classifications contained within Nebraska's anticorporate farming amendment. The Nebraska amendment, adopted by initiative in 1982, restricted corporate farming and the corporate ownership of farmland.<sup>98</sup> Like Amendment E, the Nebraska law provided an exception for family farm or ranch corporations owned by shareholders related to one another within the fourth degree of kindred, so long as one family member was actively involved in the day-to-day labor and management of the farm.<sup>99</sup> Appellant, a Nebraska farm corporation with unrelated shareholders, argued that the amendment's exception for family farm corporations violated the equal protection clause.<sup>100</sup>

Affirming the district court's determination that Nebraska's policy toward the retention and promotion of family farm operations was a legitimate state interest under the equal protection clause, the Eighth Circuit concluded that the law's classifications were rationally related to averting the perceived threat posed by concentrated, nonfamily corporate ownership of farmland.<sup>101</sup> The court went on to clarify the nature of judicial analysis under the equal protection clause:

It is up to the people of the state of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. Whether in fact the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting nonfamily farm corporations might protect an agriculture where families own and work the land.<sup>102</sup>

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93. *Id.*

94. *Asbury Hosp.*, 326 U.S. at 214.

95. *Id.*

96. *Id.* at 215.

97. 927 F.2d 330 (8th Cir. 1991).

98. NEB. CONST. art. XII, § 8.

99. *Id.*

100. *MSM Farms*, 927 F.2d at 331.

101. *Id.* at 332-33.

102. *Id.* at 333 (citations and emphasis omitted).

Challenges to Nebraska's anticorporate farming amendment have fared no better in state court.<sup>103</sup> This degree of judicial deference has prompted at least one observer to suggest that, at least insofar as challenges have their basis in equal protection, "the constitutionality of anticorporate farming statutes appears to be settled."<sup>104</sup>

In analyzing Amendment E under an equal protection challenge, a federal court must first determine whether a legitimate state purpose exists for the law that South Dakota voters approved.<sup>105</sup> The amendment's classification of exempt and nonexempt corporations will be upheld unless those distinctions are "wholly arbitrary or irrational."<sup>106</sup> In light of the similarities in origin, purpose, and language of the Nebraska and South Dakota enactments,<sup>107</sup> judicial interpretation and analysis of the Nebraska anticorporate farming amendment should prove particularly persuasive to federal courts adjudicating equal protection challenges to the South Dakota amendment.

Federal precedent arising from challenges to Nebraska's anticorporate farming amendment suggest that South Dakota's anticorporate farming amendment is rationally related to a "legitimate state purpose" and therefore does not violate the equal protection clause. The objectives of Amendment E can be readily ascertained from the law's connection to the Family Farm Act of 1974. The Family Farm Act was enacted expressly to preserve the existence of family farms in the face of increasing competition with agricultural conglomerates.<sup>108</sup> The drafters of Amendment E plainly indicated to voters that the measure was intended as a "logical extension" of the Family Farm Act and would "expand and strengthen [South Dakota's] anticorporate farming statutes."<sup>109</sup> The underlying social and economic purposes of Amendment E, (1) retaining and promoting family farm operations, and (2) preventing and deterring the concentration of farmland in the hands of agricultural conglomerates, have been recognized as a "legitimate state interests" by the Eighth Circuit.<sup>110</sup>

There is ample evidence that South Dakota voters understood that voting "yes" on Amendment E would create constitutional prohibitions restricting most corporations, limited partnerships, limited liability companies, and other limited-liability enterprises from farming or owning farmland.<sup>111</sup> Voters also understood that the amendment would not affect qualified family farm corporations, nonprofit corporations, certain agricultural cooperatives, research farms, alfalfa leases, livestock futures, certain custom farm work, land held as security interest, or the purchase of land for nonfarm activities.<sup>112</sup> Given the

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103. In 1986, the Nebraska Supreme Court rejected an equal protection challenge to Nebraska's anticorporate farming amendment and its exception for family farm corporations. *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986). More recently, the Nebraska Supreme Court rejected a corporate hog producer's equal protection challenge to the amendment's exception for commercial poultry producers. *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 429-31 (Neb. 2000).

104. See Haroldson, *supra* note 18, at 406.

105. See *MSM Farms*, 927 F.2d at 332.

106. *Id.*

107. See *supra* note 65 and accompanying text.

108. See *supra* note 24 and accompanying text.

109. See *supra* note 54 and accompanying text.

110. See *MSM Farms*, 927 F.2d at 333.

111. See S.D. SEC'Y OF STATE, 1998 BALLOT QUESTION PAMPHLET, ATTORNEY GENERAL EXPLANATION, at <http://www.state.sd.us/sos/1998.98bqprocone.htm> (last visited Feb. 23, 2001) (on file with author).

112. *Id.*



sharply-delineated viewpoints offered by both the drafters and opponents of Amendment E,<sup>113</sup> the voters of South Dakota clearly could have believed that the amendment served as a “rational means” of promoting dual ends: preserving family farms and restricting concentrated, nonfamily corporate ownership of livestock and agricultural land.<sup>114</sup>

Because corporations are not a suspect class, agricultural land ownership is not a fundamental right, and the amendment was initiated by the people of South Dakota, courts should extend the greatest degree of judicial deference to the people’s determination as to the wisdom of the amendment’s objectives and classifications.<sup>115</sup> The Eighth Circuit has previously rejected an equal protection challenge to Nebraska’s nearly-identical anticorporate farming amendment,<sup>116</sup> making it even more unlikely, as a matter of *stare decisis*, that the South Dakota amendment will be overturned on equal protection grounds. However, the commerce clause challenge to Amendment E’s restrictions raises more difficult constitutional questions.

## 2. Commerce Clause Objections

The commerce clause grants Congress the authority to “regulate [c]ommerce . . . among the several states.”<sup>117</sup> Courts have regularly relied on the negative implications of the commerce clause, the “dormant commerce clause,” to invalidate state and local laws that improperly favor local economic interests over the national market or otherwise impermissibly interfere with interstate commerce.<sup>118</sup> South Dakota’s anticorporate farming amendment bans nonfamily, corporate ownership of livestock and farmland and prohibits the operation of most nonfamily, corporate farms and ranches.<sup>119</sup> The potential effects that Amendment E’s restrictions will have on interstate commerce have been challenged in federal court as an unconstitutional violation of the commerce clause.<sup>120</sup>

State anticorporate farming statutes have rarely, if ever, been challenged on dormant commerce clause foundations.<sup>121</sup> The validity of state anticorporate farming regulations under the dormant commerce clause “depends upon the balancing of national interests in uniform regulation against distinctive local interests.”<sup>122</sup> In determining whether a state regulation exceeds the commerce clause’s implied limitations on state power, a federal

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113. See *supra* notes 54-61 and accompanying text.

114. The Supreme Court has indicated that the means-end link need not be proven by empirical evidence. In short, there need not be an actual evidentiary link between conglomerates in agriculture and the economic well-being of family farms and rural communities. All that the equal protection clause requires is that the people of South Dakota could rationally have believed that there was such a link. “States are not required to convince the courts of the correctness of their legislative judgments . . . ‘those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

115. See *Omaha Nat’l Bank v. Spire*, 389 N.W.2d 269, 282 (Neb. 1986).

116. See *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991).

117. U.S. CONST. art. I, § 8.

118. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 289 (3d ed. 1996).

119. See *supra* Part III.A.1-3

120. See Brokaw, *supra* note 77.

121. Colton, *supra* note 19, at 265.

122. *Id.* at 268 (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1951)).

court must first determine whether the regulation affects an activity ordinarily within the reach of Congress' power under the commerce clause.<sup>123</sup>

The Supreme Court has interpreted the scope of the commerce clause to include those commercial activities that "substantially affect interstate commerce."<sup>124</sup> In *Wickard v. Filburn*,<sup>125</sup> the Supreme Court rejected an independent farmer's challenge to the authority of the Secretary of Agriculture, acting under the Agricultural Adjustment Act of 1938, to set quotas for the amount of wheat any one farm could produce for both sale and home consumption.<sup>126</sup> Reasoning that the consumption of homegrown wheat, viewed cumulatively, had a substantial impact on the price of wheat in interstate markets, the Court concluded that the production of homegrown wheat was commerce within the meaning of the commerce clause.<sup>127</sup> As one commentator has noted, the Court's holding in *Wickard* has so broadened the meaning of "commerce" in agricultural areas that "little question can now exist" as to the general applicability of the commerce clause to farm and ranch operations.<sup>128</sup>

Amendment E affects interstate commerce because it restricts nonfamily, corporate ownership and operation of farms, ranches, and other livestock production facilities.<sup>129</sup> Apart from its direct limits on corporate farming, Amendment E also restricts the nonfamily, corporate ownership of agricultural land—land indispensable to the production and distribution of agricultural commodities.<sup>130</sup> In South Dakota, the production of agricultural commodities is sufficient to affect both the availability and price of farm products on the national market.<sup>131</sup> Given the fact that collective farm operations in South Dakota "exert a substantial economic effect on interstate commerce,"<sup>132</sup> a federal court can be expected to conclude that Amendment E's corporate farming and land ownership restrictions likewise have a substantial affect on interstate commerce.<sup>133</sup>

While South Dakota's anticorporate farming amendment clearly affects interstate commerce, a federal court faces a more difficult question in deciding whether the law ultimately exceeds the limits of the dormant commerce clause. "The [Supreme] Court's current approach to state regulation of commerce places great emphasis on the question whether the regulation in question discriminates against interstate or out-of-state commerce."<sup>134</sup> So long as a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

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123. *See id.*

124. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

125. 317 U.S. 111 (1942).

126. *Wickard*, 317 U.S. at 115-17.

127. *Id.* at 127-29.

128. Colton, *supra* note 19, at 265.

129. *See supra* Part III.A.1

130. *See id.*

131. *See supra* note 2 (listing South Dakota's national rank in the production of several major farm commodities).

132. *Wickard*, 317 U.S. at 125.

133. *See* Colton, *supra* note 19, at 264-70 (analyzing the validity of Nebraska's anticorporate farming amendment under the commerce clause).

134. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-6, at 1059 (3d ed. 2000).

upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.”<sup>135</sup>

Given the applicability of South Dakota’s anticorporate farming amendment to in-state and out-of-state corporations and the important local interests protected by the law, it is unlikely that a federal court will conclude that Amendment E’s regulations violate the dormant commerce clause. In *Exxon Corp. v. Governor of Maryland*,<sup>136</sup> the Supreme Court upheld a Maryland statute that required vertically-integrated oil companies, whether based in-state or out-of-state, to divest themselves of retail service stations. While the burden of Maryland’s divestiture provision fell solely on interstate petroleum producers, the Court rejected appellants’ contention that the regulation impermissibly discriminated against interstate commerce.<sup>137</sup> Noting that the Maryland statute gave in-state gasoline dealers no competitive advantage over out-of-state dealers in the retail market, the Court determined that regulation was a legitimate exercise of Maryland’s legislative authority.<sup>138</sup> “The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”<sup>139</sup>

The Court likewise rejected appellants’ claim that the Maryland statute unduly burdened interstate commerce by interfering with the natural function of the interstate market for petroleum products.<sup>140</sup> Declining to accept appellants’ “underlying notion” that the commerce clause “protects the particular structure or methods of operation in a retail market,” the court concluded that “the [commerce clause] protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”<sup>141</sup> In measuring the regulation’s impact on the interstate market, the Court focused primarily on the statute’s effect on (1) the interstate flow of goods and (2) the regulation’s influence on the relative proportion of local and out-of-state goods sold in Maryland.<sup>142</sup>

Like the Maryland statute, South Dakota’s anticorporate farming amendment is facially neutral. Amendment E legislates equally to the detriment of any nonfamily farm corporation or syndicate wishing to operate a farm or purchase farmland in South Dakota.<sup>143</sup> Furthermore, opponents of the law will have difficulty demonstrating that the amendment in any way protects South Dakota producers from direct competition in interstate and global agricultural markets.<sup>144</sup> While the law serves important local

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135. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

136. 437 U.S. 117 (1978).

137. *Id.* at 125.

138. *Id.* at 126.

139. *Id.*

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

141. *Id.* at 127-28.

142. *Id.* at 125-28.

143. The amendment prohibits farm ownership or farm operation by *any* nonfamily farm corporations or syndicates organized under the laws of *any state* of the United States or *any country*. S.D. CONST. art. XVII § 21.

144. In a very real sense, Amendment E may actually disadvantage South Dakota’s local economic interests by causing the state to lose economic opportunities to other states and limiting the financial tools available to South Dakota producers. *See Prim, supra* note 30, at 435 (observing that state anticorporate farming statutes can do nothing to prevent the expansion of large corporate farms or the increasing use of contract production in other states); *see also Bahls, supra* note 7, at 313 (suggesting that anticorporate farming amendments have been ineffective in protecting rural economies).

purposes, the underlying objectives of Amendment E go well beyond local economic protectionism.<sup>145</sup> By regulating in-state and out-of-state agricultural corporations evenhandedly to protect family farm operations, Amendment E steers clear of impermissible discrimination against interstate or out-of-state commerce.

In light of the fact that Amendment E's effects on interstate commerce are incidental to its legitimate underlying purposes, opponents of the law must convince a federal court that the burden imposed on commerce is "clearly excessive."<sup>146</sup> In view of federal judicial focus on the two factors outlined by the Court in *Exxon Corp.*, opponents of South Dakota's anticorporate farming amendment will have difficulty demonstrating that the burden imposed by the act is "clearly excessive" in relation to its underlying local benefits.<sup>147</sup> In the long term, Amendment E may ultimately have little or no influence on (1) the interstate flow of goods or (2) the relative proportion of local and out-of-state goods sold in South Dakota.

It is plain that Amendment E was intended, at least in one respect, to have an immediate and direct impact on the number of livestock shipped into and out of South Dakota. The law prohibits the purchase of livestock by nonfamily farm corporations, other than livestock purchased for slaughter or resale within two weeks of the purchase date, and effectively prevents South Dakota farmers from contracting to raise hogs owned by out-of-state corporations.<sup>148</sup> There is at least some evidence to suggest that such contract feeding restrictions may, at least in the short term, reduce the total number of livestock bought, sold, and processed in South Dakota.<sup>149</sup>

However, South Dakota's anticorporate farming amendment is clearly not intended to reduce, in the long term, the total quantity of farm commodities shipped into or out of the state. To be certain, many of South Dakota's family farms and family farm corporations remain capable of efficiently supplying agricultural commodities without corporate financial support. While agricultural conglomerates may boast decided economic advantages over traditional farm operations, family farm corporations and family farm cooperatives have emerged as effective forms of farm organization.<sup>150</sup>

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145. While one express, underlying purpose of South Dakota's anticorporate farming legislation is to protect family farmers from perceived unfair competition from agricultural conglomerates, Amendment E can also be supported on legitimate social and economic grounds. See *supra* Part III.B.1. Apart from concerns about the ability of traditional family farmers to remain economically competitive, the drafters of Amendment E raised specific concerns about the adverse impact that nonfamily corporate farms can have on the social, environmental, and economic well-being of rural communities. See S.D. SEC'Y OF STATE, 1998 BALLOT QUESTION PAMPHLET, PRO-CONSTITUTIONAL AMENDMENT E, at <http://www.state.sd.us/sos/1998.98bqprocone.htm> (last visited Feb., 23, 2001) (on file with author).

146. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

147. See *id.* at 473 (upholding a Minnesota statute that banned the retail sale of milk in nonreturnable, nonrefillable plastic containers while allowing the sale of milk in nonreturnable, nonrefillable paperboard cartons). While the statute's restrictions burdened out-of-state plastic producers to the benefit of Minnesota pulpwood producers, the Court concluded that the burden was not "clearly excessive" in light of the substantial state interest in promoting conservation of natural resources and easing solid waste disposal. *Id.*

148. See *supra* Part III.A.1-2.

149. See Prim, *supra* note 30, at 437-41 (discussing the impact of anticorporate farming statutes on the corresponding market share of the livestock production and meatpacking industries in South Dakota and neighboring states).

150. See Mikkel Pates, *Bath, S.D. Cooperative Allows Farmers to Band Together to Raise Hogs*, KNIGHT-

Given the continuing evolution toward more efficient, large-scale family farm corporations and family farm cooperatives, any argument that agricultural conglomerates can, over the long term, better promote the free interstate flow of agricultural commodities or increase the number of out-of-state agricultural goods entering South Dakota is speculative at best.

On the other side of the balance, South Dakota's legitimate economic and social interests in (1) retaining and promoting family farm operations and (2) prohibiting and deterring the concentration of farmland in the hands of nonfamily corporations remain substantial. Combined with the historical reservation of property ownership as a matter of state law<sup>151</sup> and the nearly exclusive right of states to license corporations and define their limits,<sup>152</sup> these legitimate local interests tip the commerce clause balance in favor of the people of South Dakota. Having determined that South Dakota's anticorporate farming amendment will likely withstand equal protection and commerce clause challenges, the next section of this Note will address the probable impact of the amendment on agricultural production in South Dakota.

### *C. Potential Impact of South Dakota's Anticorporate Farming Amendment*

The ultimate effect of Amendment E is to prohibit agricultural conglomerates from owning, operating, or substantially investing in agricultural production in South Dakota unless the state constitution is first amended to permit such activities. While a federal court can provide the final verdict with regard to the constitutionality of the law, the wisdom of South Dakota's anticorporate farming amendment will undoubtedly remain the subject of fractious debate. In light of recent fundamental changes in American agriculture,<sup>153</sup> discussion about the wisdom of Amendment E and the advisability of anticorporate farming statutes in general can be expected to track the larger national debate over the future of agricultural production in the United States.

As market forces have operated to make it increasingly difficult for family farms to survive, control over modern agriculture has become increasingly concentrated.<sup>154</sup> A 1999 report released by the U.S. Department of Agriculture's National Commission on Small Farms revealed that, in the last twenty years, the number of farmers nationwide has

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RIDDER TRIB. BUS. NEWS, Apr. 24, 2000, available at 2000 WL 1931877 (reporting on James Valley Pork Cooperative near Aberdeen in northeastern South Dakota). The family farm cooperative owns and operates a 4,000 hog finishing facility which produces 500 head of finished pigs a week and contracts with another family farmer to finish hogs in a similar-sized operation twenty-five miles north.

151. Haroldson, *supra* note 18, at 396.

152. Colton, *supra* note 19, at 258.

153. See Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 DRAKE L. REV. 289, 290 (1997) (offering the recently altered structure of swine production as an example of larger national trends toward: (1) the concentration of agricultural production into large units, (2) an increase in integrated or corporate, nonowner-operated facilities, (3) the geographic shift of production to nontraditional areas, and (4) the increased use of hired labor or contract growers).

154. For a complete assessment of the trends toward vertical integration, concentration, and globalization in the food production system see MARY HENDRICKSON ET AL., NATIONAL FARMERS UNION, CONSOLIDATION IN FOOD RETAILING AND DAIRY: IMPLICATIONS FOR FARMERS AND CONSUMERS IN A GLOBAL FOOD SYSTEM (2001), available at <http://www.nfu.org>.

decreased by 300,000.<sup>155</sup> Although ninety-four percent of all U.S. farms were classified as "small" in 1999, small farms received only forty-one percent of all farm income.<sup>156</sup> In the beef business, four agricultural conglomerates now control eighty-one percent of the nation's beef cattle market, up from thirty-six percent in 1980.<sup>157</sup> In hog processing, four firms now control fifty-six percent of the nation's hog industry, up from thirty-four percent twenty years ago.<sup>158</sup> The impact that South Dakota's anticorporate farming amendment will have on the trend toward the "industrialization of agriculture"<sup>159</sup> remains to be seen.

Opponents of South Dakota's anticorporate farming amendment predict the law's restrictions on outside investment and financial cooperation with nonfamily agricultural corporations will have a disastrous impact on the state's economy. As small farms continue to struggle financially, family farmers find themselves under pressure to expand in order to obtain greater market share.<sup>160</sup> Family farmers are under additional pressure to link with national agribusiness in order to facilitate more efficient production and marketing of agricultural commodities.<sup>161</sup> As agricultural production becomes increasingly corporate-driven, large agricultural conglomerates, now unable to lawfully invest in farmland and farm operations in South Dakota, may instead make capital investments in the agricultural industries of states with fewer or no restrictions on corporate farming.<sup>162</sup> South Dakota's agricultural industry needs more outside capital investment, not less, and the new law might cripple the state's economic future by chilling the support and development of new agricultural ventures.

One outspoken critic of Amendment E is South Dakota Governor William Janklow.<sup>163</sup> Governor Janklow has characterized the law as a symptom of South Dakota's "huge schizophrenic problem" with agriculture.<sup>164</sup> He believes Amendment E

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155. Claiborne, *supra* note 16.

156. *Id.*

157. Joseph Weber, *Agribusiness' Assault*, BUSINESSWEEK, Oct. 23, 2000, at 50.

158. *Id.*

159. The "industrialization of agriculture" refers to the trend toward larger farms, more corporate farming, increased contract production, increased integration of production and processing, and increased use of biotechnology and genetic engineering. Hamilton, *supra* note 15, at 636-37.

160. The size of the average farm in South Dakota has increased from 781 acres in 1960 to 1,354 acres today. U.S. DEP'T OF AGRIC., SOUTH DAKOTA AGRIC. STATISTICS SERV., FARM NUMBERS UNCHANGED FROM 1998, Feb. 18, 2000 at <http://www.nass.usda.gov/sd/releases/farm0200.htm> (last visited Feb. 23, 2001) (on file with author).

161. Hamilton, *supra* note 15, at 615.

162. As one commentator aptly observed about the competitive nature of the agricultural industry at the state level, "[s]tates, with or without corporate restrictions, are in direct competition with one another over market share." Prim, *supra* note 30, at 437. Prim explains that in the early 1990s, several states attempted to significantly increase their share of the hog market by loosening corporate restrictions on contract swine production or by openly courting large hog production facilities. *Id.* at 438. As hog production became increasingly corporate-driven, states with few or no restrictions on corporate farming, such as North Carolina and Colorado, were able to increase their overall market share by as much as ninety-four percent. *Id.* at 438-41. Meanwhile, states that restricted corporate agricultural investment, including Nebraska, Minnesota, and South Dakota, continued to lose valuable market share. *Id.*

163. See Dennis Gale, *Governor Says South Dakota of Two Minds About Agriculture*, ASSOCIATED PRESS NEWSWIRES, June 23, 2000, available at WL 6/23/00 APWIRES 18:33:00.

164. *Id.* Governor Janklow was commenting on his perception that South Dakotans want to attract modern agricultural processing to the state while clinging to old-fashioned notions of agricultural production.

has failed to make life better for South Dakota's family farmers and has hampered South Dakota's ability to produce the volume of commodities needed to attract value-added agricultural processing to the state.<sup>165</sup> As a veteran of the South Dakota political scene, Janklow remains highly skeptical about the measure's potential to influence national farm policy. "The world doesn't care we're doing this to ourselves," Janklow said.<sup>166</sup>

While the rest of the world may not care, South Dakotans seem determined to preserve at least some version of the family farm. Supporters of South Dakota's anticorporate farming amendment, including sixty percent of the state's voters, made a calculated decision to reject agricultural production financed by outside corporate investors in favor of traditional agricultural production controlled by family farmers and ranchers. Prohibiting contract production of crops and livestock prevents agricultural conglomerates from exploiting the uncertain financial position and unequal bargaining power of independent livestock producers<sup>167</sup> and protects the state from corporations with poor or questionable environmental records.<sup>168</sup> In addition, the anticorporate farming amendment's exception for farmer-owned cooperatives<sup>169</sup> may provide independent family farmers with the incentive to utilize collective action in order to access the economic resources necessary to compete for profit in modern agriculture.<sup>170</sup> Finally, recent events indicate that concerns about Amendment E's effect on outside investment may be overstated.<sup>171</sup>

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165. As an example, Governor Janklow referred to concerns expressed by potential investors in a cheese plant facility planned for Lake Norden, a small town of just over 400 residents located along the Interstate 29 corridor in eastern South Dakota. *See id.* Janklow implied that, in the wake of Amendment E's restrictions on corporate investment in agricultural production, questions had been raised about attaining the level of development necessary to sustain large dairy herds in the area and make the venture profitable. *See id.*

166. Gale, *supra* note 163.

167. *See* Haroldson, *supra* note 18, at 414-18 (discussing how inequalities in bargaining position, economic differences, and cultural and educational differences may result in production contracts that transform an independent farmer into a "serf on his own land" and suggesting ways in which states may regulate contract production arrangements).

168. For example, the recent spill of over 25 million gallons of swine wastes from a North Carolina lagoon has been labeled by one commentator as an "unfortunate but predictable" consequence of the industrialization of swine production. Hamilton, *supra* note 153, at 291.

169. S.D. CONST. art. XVII, § 22(2).

170. *See* Hamilton, *supra* note 153, at 301 (suggesting that farmers who desire increased market access and control over the marketing of their products will be required to turn to cooperative action). Hamilton identifies recent examples of farmer-owned cooperatives in North Dakota, Iowa, and Minnesota as evidence of increased interest in cooperative action, a "traditional vehicle" used by producers to increase market share and add value to farm commodities. *Id.* For a discussion of the law concerning farm cooperatives see Harbur, *supra* note 36.

171. In October of 2001, Davisco Foods International, a family-owned firm based in Le Sueur, Minnesota and Land O' Lakes, a national farmer-owned cooperative based in Arden Hills, Minnesota, announced plans to move ahead with their investment in a \$50 million cheese plant facility in Lake Norden, South Dakota. Kevin Woster, *\$50M Dairy Project Unveiled*, SIOUX FALLS ARGUS LEADER, Oct. 27, 2001 available at <http://www.argusleader.com/saturday.shtml> (last visited Oct. 28, 2001) (on file with author). Davisco's president has made it clear that the project will hinge on the area's ability to sustain the 80,000 dairy cattle necessary to produce the volume of milk required to make the enterprise profitable. *See id.* Many of the players who squared off on opposite sides of the debate over Amendment E—including Governor William Janklow and South Dakota Farmers Union President Dennis Wiese—now appear willing to explore alternatives through which rural communities, family farmers, and outside investors can cooperate to ensure the success of large-scale agricultural ventures in South Dakota. *Id.*

Opponents of corporate farming restrictions are quick to point out that state regulations have proven insufficient to guarantee a continued role for independent family farmers in American agriculture.<sup>172</sup> However, national trends suggest that American producers and consumers are not necessarily content to let market forces, time, and inattention resolve agricultural production issues for them. One recent poll showed that nearly three-quarters of Americans think that corporations have gained too much control over too many aspects of their lives.<sup>173</sup> Two-thirds of Americans think large profits are more important to big companies than developing safe, reliable, and high quality products for consumers.<sup>174</sup> Stimulated by concerns about the environmental, nutritional, and economic security of an agriculture dominated by conglomerates, public attitudes toward agricultural production may be shifting from general indifference to a strong preference for independent farm operations.<sup>175</sup>

United with the regional sentiments expressed in anticorporate farming statutes,<sup>176</sup> these overriding public concerns may ultimately lead to the passage of comprehensive national legislation. In one of the first bills introduced in the 107th Congress, then Senate Minority Leader Tom Daschle, Democrat from South Dakota, offered a proposal "to enhance fair and open competition in the production and sale of agricultural commodities."<sup>177</sup> The bill, entitled the Securing a Future for Independent Agriculture Act of 2001, included, among other policies, a prohibition against anticompetitive practices in the agriculture and food-processing industries, a requirement that production contracts be fair and understandable, and a provision to assist rural farmer-owned businesses and cooperatives to acquire investment capital through a new public/private equity fund.<sup>178</sup> Whatever the ultimate effect of Amendment E in South Dakota, it appears that those who supported the law may, at the very least, have been successful in influencing the national debate over the future of independent family farmers.

#### IV. CONCLUSION

South Dakotans have traditionally been committed to the preservation of the independent family farm. In this regard, the state's anticorporate farming amendment is a logical extension of the state's previous anticorporate farming statutes. South Dakota's voters overwhelmingly approved the amendment in the wake of a candid political debate over the economic and social impact of conglomerates in agriculture. The law now stands as the strictest anticorporate farming legislation in the nation. As the debate over corporate control of agriculture moves to a national stage, the political sentiments which

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172. In Nebraska, despite the state's adoption of an anticorporate farming amendment in 1982, the number of farms decreased from 65,000 in 1980 to 55,000 in 1994. Bahls, *supra* note 7, at 314.

173. Aaron Bernstein, *Too Much Corporate Power*, BUSINESSWEEK, Sept. 11, 2000, at 145.

174. *Id.*

175. See generally Hamilton, *supra* note 15 (summarizing the then-emerging conflict between "industrialized agriculture" and "sustainable agriculture" and concluding that increasing public concern and evolving consumer demand will ultimately shape the future of independent agricultural production).

176. See *supra* note 20 and accompanying text.

177. S. 20, 107th Cong. (2001), available at <http://thomas.loc.gov/cgi-bin/query/z?c107:S.20.IS>: (last visited Feb. 23, 2001) (on file with author).

178. *Id.* §§ 111-115, 121-128, 131, 201.



influenced Amendment E may have an impact that reaches far beyond the law's local restrictions.

Because South Dakota's anticorporate farming amendment deals with such fundamental state issues, courts are not likely to overturn the law on constitutional grounds. The amendment does not violate the equal protection clause because its exceptions for family farm corporations and family farm cooperatives are rationally related to the legitimate promotion of family farm ownership and operation. Likewise, the amendment does not violate the commerce clause because South Dakota's legitimate interests in the preservation of the economic and social structure of the family farm outweigh the amendment's substantial effect on commerce.

In terms of economic impact, South Dakota's anticorporate farming amendment eliminates corporate financing options that were attractive to a number of cash-strapped family farmers. However, the voters of South Dakota have validly and overwhelmingly rejected the idea of an agricultural industry controlled by vertically-integrated conglomerates. Instead, the South Dakota anticorporate farming amendment promotes independent agricultural production and encourages cooperative action. To the extent that local restrictions on corporate farming can influence the national debate on agricultural production, South Dakota's anticorporate farming amendment may yet play a role in the future of family farms and rural communities across America.