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**The Eighth Circuit Grants Corporate Interests  
a New Weapon Against State Regulation in  
*South Dakota Farm Bureau v. Hazeltine***

by

Susan E. Stokes and Christy Anderson Brekken

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# THE EIGHTH CIRCUIT GRANTS CORPORATE INTERESTS A NEW WEAPON AGAINST STATE REGULATION IN *SOUTH DAKOTA FARM BUREAU V. HAZELTINE*

SUSAN E. STOKES<sup>†</sup> AND CHRISTY ANDERSON BREKKEN<sup>††</sup>

## I. INTRODUCTION

Policy choices about the structure of the agricultural industry are appropriate for society to make deliberately, as the voters of South Dakota did when they passed Amendment E.<sup>1</sup> Family farms are more than just another business that can come and go without notice; their fate affects the livelihoods of a great number of real people who have a direct interest in farm policy. Family farms, and the families that operate them, strive to build sustainable rural communities, promote responsible stewardship of soil, water, and other resources, and ensure through family ownership that land can be farmed by future generations.<sup>2</sup> Rural and urban citizens alike share a connection to family farms and the values they represent.

“Farmers’ Legal Action Group, Inc. (FLAG) is a nonprofit law center dedicated to providing legal services to family farmers and their rural communities in order to help keep family farmers on the land.”<sup>3</sup> FLAG submitted a brief of *Amici Curiae* on behalf of a broad coalition of farm organizations<sup>4</sup> to the Eighth Circuit in *South Dakota Farm Bureau v. Hazeltine*<sup>5</sup> urging rehearing *en banc*,<sup>6</sup> and to the United States Supreme Court, urging the Court to grant the petitions for certiorari.<sup>7</sup> These organizations, along with their

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<sup>†</sup> Legal Director, Farmers’ Legal Action Group, Inc. Counsel for *Amici Curiae* in *South Dakota Bureau, Inc. v. Hazeltine*, Supreme Court Nos. 03-1108, 1111.

<sup>††</sup> J.D. expected 2005, University of Minnesota Law School; Law Clerk, Farmers’ Legal Action Group, Inc. For a more in depth discussion of the topic, see Christy Anderson Brekken, Note, *South Dakota Farm Bureau, Inc. v. Hazeltine: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 LAW & INEQ. \_\_\_ (forthcoming 2004).

1. S.D. CONST. art. XVII, §§ 21-24 (prohibiting corporations from farming or owning farmland).

2. See, e.g., MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 32-42 (University of Nebraska Press 1988).

3. See <http://www.flaginc.org> (last visited May 5, 2004).

4. The organizations joining in the Eighth Circuit *amicus* included: the National Farmers Union, Minnesota Farmers Union, South Dakota Farmers Union, Iowa Farmers Union, North Dakota Farmers Union, Land Stewardship Project, Iowa Citizens for Community Involvement, Missouri Rural Crisis Center, Illinois Stewardship Alliance, Citizens Action Coalition of Indiana, Campaign for Family Farms, and Western Organization of Resources Council. Friends of the Constitution, and National Family Farm Coalition, also joined in the United States Supreme Court *amicus*.

5. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (*motion for rehearing en banc denied; petitions for cert. filed*, (U.S. January 29, 2004) (Nos. 03-1108 and 03-1111), *cert. denied*, 124 S.Ct. 2095 (2004)).

6. Brief of *Amici Curiae* National Farmers Union et al. in Support of Petition for Rehearing En Banc, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (Nos. 02-2366, 02-2588, 02-2644, 02-2646) (*motion for rehearing en banc denied*) [hereinafter Brief of *Amici Curiae* for Rehearing En Banc].

7. See generally Brief of *Amici Curiae* National Farmers Union et. al in Support of Petitions for

thousands of members, have an interest in preserving the family farm as the basic unit of American agriculture.<sup>8</sup> They all have worked to enact and protect similar state laws that support family farmers and prevent the corporate takeover of agriculture.<sup>9</sup>

## II. LAWS SUPPORTING FAMILY FARMS ARE A NECESSARY AND LEGITIMATE SUBJECT OF STATE REGULATION

Nine states, including South Dakota, have legislation or constitutional amendments that limit corporate ownership of farmland or corporate farming activities.<sup>10</sup> The North Dakota, Missouri and Nebraska laws have been upheld against constitutional challenges under the Privileges and Immunities Clause, Contract Clause, and the Equal Protection and Due Process Clauses of the 14th Amendment.<sup>11</sup> No challenges to such a law have been brought under the dormant Commerce Clause, and commentators had doubted the success of such a challenge.<sup>12</sup> These pro-family farming state laws have long been relied on as critically necessary to support family farms and rural economies, and to stave off corporate concentration and vertical integration in the agricultural sector.

South Dakota voters made a conscious choice about the structure of their local agricultural system in 1998 when nearly 60% of South Dakota voters, including two-thirds of the state's farmers, adopted Amendment E after lively political debate.<sup>13</sup> Voters recognized that it is the secondary effects of the corporate control of farms, such as absentee-ownership, large size, and monopolistic effects, which are a threat to their rural economies and environment.<sup>14</sup>

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Writ of Certiorari, *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (Nos. 03-1108 and 03-1111) [hereinafter Brief of Amici Curiae for Writ of Certiorari] (Nelson replaced Hazeltine as the South Dakota Secretary of State).

8. Brief of Amici Curiae for Rehearing En Banc at 1, *South Dakota Farm Bureau*.

9. *Id.* at 2.

10. See IOWA CODE §§ 9H.1-9H.15 (2001); KAN. STAT. ANN. §§ 17-5902-17-5904 (2003); MINN. STAT. § 500.24 (West 2004); MO. ANN. STAT. § 350.015 (West 2004); NEB. CONST. art. 12, § 8; N.D. CENT. CODE §§ 10-06.1-01 – 10-06.1-27 (2001); OKLA. CONST. art. XXII, § 2; S.D.C.L. §§ 47-9A-1–47-9A-23 (2003) and S.D. CONST. art. XVII, §§ 21-24; and WIS. STAT. § 182.001 (2003).

11. *Asbury Hosp. v. Cass Co.*, 326 U.S. 207 (1945) (upholding North Dakota law against privileges and immunities, contract clause, due process and equal protection challenge); *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991) (upholding Nebraska constitutional amendment against equal protection and due process challenges); *State ex. rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988) (en banc) (upholding Missouri statute against equal protection and due process challenges).

12. See John C. Pietila, "[W]e're Doing this Ourselves": *South Dakota's Anticorporate Farming Amendment*, 27 J. CORP. L. 149, 164-68 (2001). See Martin J. Troshynski, *Corporate Ownership Restrictions and the United States Constitution*, 24 IND. L. REV. 1657, 1664-67 (1991).

13. Pietila, *supra* note 12, at 156-57.

14. See *infra* notes 20-39 and accompanying text.

## A. STATES HAVE THE POWER TO STRUCTURE LOCAL MARKETS AND CORPORATE ACTIVITY

It is well-established that states have the power to “exclude a foreign corporation, or to limit the nature of the business it may conduct within the state . . . .”<sup>15</sup> Corporations are a creation of the state, which confers certain advantages and imposes certain burdens, and this has long been recognized by the Supreme Court.<sup>16</sup> For the purposes of a dormant Commerce Clause analysis, the state has a legitimate interest in regulating the operation of corporations in its jurisdiction.<sup>17</sup> Regulating the operation of agricultural corporations within its borders thus seems to fall within these long accepted state powers.

Similarly, a state “has the authority to determine the course of its farming economy.”<sup>18</sup> The Eighth Circuit has concluded that the policy “to retain and promote family farm operations . . . by preventing the concentration of farmland in the hands of non-family corporations . . . represents a legitimate state interest.”<sup>19</sup>

## B. RETAINING FAMILY FARMS IS A LEGITIMATE STATE POLICY CHOICE

Family-owned farms are the backbone of the economy in a rural, farm-dependent state like South Dakota. For decades, studies have demonstrated that residents of rural communities supported by family farms have a much higher standard of living than those living in rural communities surrounded by industrialized farms.<sup>20</sup> Rural development experts have estimated that one business in the local town closes for every five to seven farms that go out of

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15. *Asbury Hosp.*, 326 U.S. at 211.

16. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

17. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (“We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”).

18. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001). *See also Exxon Corp. v. Maryland*, 437 U.S. 117, 128-29 (1978) (stating state has power to regulate the local retail petroleum industry).

19. *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). The Missouri Supreme Court has echoed the same principle: “It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community . . . .”; *State ex rel. Webster v. Lehdorff Geneva, Inc.*, 744 S.W.2d 801, 806 (Mo. 1988).

20. Walter Goldschmidt, *Small Business and the Community: A Study of the Central Valley of California on Effects of Scale of Farm Operations*, reprinted by Senate Special Committee to Study Problems of American Small Business, 79<sup>th</sup> Cong., 2d Sess., Report of the Special Committee 13 (Comm. Print. 1946); *see also*, David J. Peters, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest*, Missouri Economic Research and Information Center, Technical Paper P-0702-1, Missouri Dep’t of Econ. Dev. 25 (July 2002), available at <http://www.missourifarmersunion.org/conf03/goldschmidt03.pdf>.

business.<sup>21</sup> The loss of farms and local businesses causes further deterioration of rural communities, which already have lower levels of basic services, less diverse economies, and higher levels of poverty in general.<sup>22</sup> States, who shoulder the burden of caring for their residents who live in economically depressed areas and in poverty, have an obvious interest in fostering healthy, vibrant rural communities.

### 1. Local ownership ensures the health of rural economies

The USDA National Commission on Small Farms associates absentee land ownership with deterioration of rural communities, while recognizing that local and “[d]ecentralized land ownership produces more equitable economic opportunity for people in rural communities, as well as greater social capital.”<sup>23</sup> “Land owners who rely on local businesses and services for their needs are more likely [than absentee owners] to have a stake in the well-being of the community and the well-being of its citizens,”<sup>24</sup> a present and long-term connection to their land, and thus both emotional and business incentives to manage their natural resources responsibly.<sup>25</sup> Absentee ownership does not only refer to out-of-state owners; a landowner managing a farm from across the state creates the same absentee-ownership concerns.<sup>26</sup> Amendment E’s requirement that landowners be present and participate in the direct management of the farm addresses the problem of absentee ownership directly without targeting only out-of-state farm owners.<sup>27</sup>

### 2. Family farms mitigate environmental damage

Family-owned farms tend to be smaller and more diverse operations,

21. OSHA GRAY DAVIDSON, *BROKEN HEARTLAND: THE RISE OF AMERICA’S RURAL GHETTO 57* (University of Iowa Press 1996).

22. See Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Service Practitioners*, 29 CLEARINGHOUSE REV. 1087, 1092 (1996); Steve H. Murdock et al., *Impacts of the Farm Financial Crisis of the 1980s on Resources and Poverty in Agricultural Dependent Counties in the United States*, in RURAL POVERTY: SPECIAL CAUSES AND POLICY REFORMS 68-72 (Harrell R. Rodgers, Jr. & Gregory Weither eds., 1989).

23. U.S. DEP’T OF AGRIC., NAT’L COMM’N ON SMALL FARMS, *A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 13* (1998) [hereinafter COMM’N ON SMALL FARMS] available at <http://www.csrees.usda.gov/> (last visited May 18, 2004).

24. COMM’N ON SMALL FARMS, *supra* note 23, at 13.

25. See generally COMM’N ON SMALL FARMS, *supra* note 23, at 13; 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, 441 (1995) [hereinafter Prim, *Minnesota’s Anti-corporate Farm Statute*].

26. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1047 (D.S.D. 2002) (“By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format.”).

27. S.D. CONST. art. XVII, § 21 (“No 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.”).

making it easier to responsibly manage natural resources.<sup>28</sup> Conversely, corporate farm operations tend to be larger and are more likely to do one type of operation on a mass scale, resulting in greater industrialization in farming.<sup>29</sup> Serious odor problems and ground and surface water contamination from large manure lagoons arise from greater concentrations of animals confined in smaller areas.<sup>30</sup> In grain production, industrialization requires greater use of petroleum fuels, chemical fertilizers, and pesticides.<sup>31</sup> Amendment E facilitates an agricultural industry based on locally owned farms, which pose less of an environmental threat to the surrounding community.

### 3. *Diverse local ownership promotes free and fair markets*

Increasing corporate concentration and vertical integration of farming operations have squeezed family farmers out of agricultural markets.<sup>32</sup> In 2000, four firms controlled 81% of the beef processing industry and four firms controlled 56% of the nation's hog processing industry.<sup>33</sup> The number of American slaughterhouses for cattle and pigs has declined by two-thirds since 1980.<sup>34</sup> At the same time, processors have locked up the supply chain through the use of captive supplies. In the hog industry, more than 83 percent of hogs were committed to packers through ownership or contractual arrangements in 2002, up from 38 percent in 1994.<sup>35</sup> "Concentration translates into the loss of open and competitive markets at the local level . . . . The basic tenets of a 'competitive' market are less and less evident in crop and livestock markets

28. See COMM'N ON SMALL FARMS, *supra* note 23, at 13; Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203, 206-07 (1993) [hereinafter Prim, *Saving the Family Farm*] ("The family farm of the past was perfectly environmentally efficient. Farmers raised grain and livestock. The farm was its own closed ecological cycle." (citation omitted)). Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC 835, 838 (1996) ("The traditional family farm has been the most socially and environmentally sound method of agricultural production . . .").

29. See Prim, *Saving the Family Farm*, *supra* note 28, at 207.

30. Prim, *Minnesota's Anti-corporate Farm Statute*, *supra* note 25, at 447; Stout, *supra* note 28, at 842-43 (describing confinement method of industrial hog facilities) and 848-50 (describing the environmental consequences of industrial hog facilities, which "flushes animal waste . . . into football field size lagoons," where leaks and spills kill fish and enter the local water supply.); Marlene Halverson, *The Price We Pay for Corporate Hogs*, Institute for Agriculture and Trade Policy (July 2000) at 47, available at <http://www.iatp.org/hogreport/indextoc.html> (contrasting farms where manageable numbers of livestock are raised and manure can be composted or used as fertilizer for crops with operations raising only one type of livestock in concentrated numbers, where huge amounts of waste cannot responsibly be used or spread at that site).

31. See Prim, *Saving the Family Farm*, *supra* note 28, at 207.

32. See generally COMM'N ON SMALL FARMS, *supra* note 23, at 5; Prim, *Saving the Family Farm*, *supra* note 28, at 206.

33. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001* (June 2002) at 18, 38, available at <http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf>.

34. See Alan Barkema et al., *The New Meat Industry* (2001) at 35, available at <http://www.kc.frb.org/PUBLICAT/ECONREV/PDF/2q01bark.pdf>.

35. University of Missouri and National Pork Board, *Hog Marketing Contract Study* (Jan. 2002), available at <http://agebb.missouri.edu/mkt/vertstud.htm>.

today.”<sup>36</sup> As the market is captured by the biggest players, independent farmers find themselves without a competitive market in which to sell their products,<sup>37</sup> driving them into unfavorable contracts or out of business.<sup>38</sup>

As noted above, this loss of family farms has a ripple effect on rural economies.<sup>39</sup> Amendment E was intended by the voters to be a reasonable method of combating the evils of vertical integration of the agricultural industry in South Dakota by not allowing the same firms that control farm inputs and processing farm products to also own the means of production.

### C. FAMILY FARMS ARE A VIABLE BASIS FOR A STATE’S AGRICULTURAL INDUSTRY

Opponents to Amendment E claim that the family farm is no longer an economically viable unit in today’s agricultural marketplace. Studies show, however, that “small family and part-time farms are at least as [economically] efficient as larger commercial operations. In fact, there is evidence of diseconomies of scale as farm size increases.”<sup>40</sup> If family-owned small and medium-sized farms are as “economically” efficient as large corporate-owned farms and also serve additional social goods, such as stabilizing rural economies and avoiding monopolization of markets, states have an incentive to level the playing field for family farms by prohibiting agribusiness firms from engaging in one type of farm activity out of many in the industry—actually owning the farm.

## III. THE DORMANT COMMERCE CLAUSE WAS NOT INTENDED TO PROTECT PARTICULAR CORPORATIONS OR TO INVALIDATE LEGITIMATE STATE LAWS

### A. DISCRIMINATORY PURPOSE ALONE SHOULD NOT TRIGGER STRICT SCRUTINY

The Supreme Court and Eighth Circuit have stated in *dicta* that a discriminatory purpose can trigger strict scrutiny,<sup>41</sup> but in no case has discriminatory purpose alone been sufficient.<sup>42</sup> One would expect that a law

36. COMM’N ON SMALL FARMS, *supra* note 23, at 13.

37. See generally COMM’N ON SMALL FARMS, *supra* note 23, at 37 (“Current concentration figures indicate that the four largest firms control 80 percent of the steer and heifer market. . . . [There is] increasing pressure to conform to contract markets because of reduced buyer competition in the cash market.”).

38. Neil Harl, *The Structural Transformation of Agriculture*, Iowa State University (March 20, 2003) at 4-5, available at <http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf>.

39. See *supra* notes 20-22 and accompanying text.

40. COMM’N ON SMALL FARMS, *supra* note 23, at 8 (citation omitted).

41. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995).

42. See, e.g., *Bacchus Imps., Ltd.*, 468 U.S. at 273 (“[I]t had both the purpose and effect of discriminating in favor of local products.”); *SDDS, Inc.*, 47 F.3d at 272 (“Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny.”).

would have the *practical effect* of discriminating if it was drafted with the *purpose* of discriminating. This simple principle underlies the analysis of the Court in *Clover Leaf Creamery Co.*<sup>43</sup> and *Exxon*,<sup>44</sup> and of the Eighth Circuit in *Hampton*<sup>45</sup> and *SDDS, Inc.*<sup>46</sup> The *South Dakota Farm Bureau* court failed to find discriminatory effect, however, and seems to reach for a basis to invalidate South Dakota's Amendment E by resting its decision on discriminatory purpose alone.

## B. DIFFERENTIAL TREATMENT OF PROTECTED IN-STATE AND OUT-OF-STATE INTERESTS AMOUNTS TO IMPERMISSIBLE DISCRIMINATION

Both the Supreme Court and the Eighth Circuit have made it clear that “[f]or purposes of the dormant Commerce Clause, ‘discrimination’ means ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”<sup>47</sup> Amendment E does not treat in-state interests any differently than out-of-state economic interests, nor does it affect the economic interests protected by the dormant Commerce Clause.

### 1. *Differential treatment is required for a finding of discrimination*

Differential treatment does not occur if a law has the same impact on the affected in-state and out-of-state interests.<sup>48</sup> If it “regulates evenhandedly” to effectuate a legitimate state purpose, there is no discrimination. Amendment E does not apply “differential treatment” to in-staters and out-of-staters.<sup>49</sup> No non-family farm corporations may engage in farming or own farmland in South Dakota, whether they are in-state or out-of-state corporations. In fact, some of the *South Dakota Farm Bureau* plaintiffs were South Dakota corporations or corporations already operating in South Dakota that were prohibited from buying

43. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

44. *Exxon Corp. v. Maryland*, 437 U.S. 117, 125-28 (1978).

45. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819 (8<sup>th</sup> Cir. 2001).

46. *SDDS, Inc.*, 47 F.3d at 268-72.

47. *Hampton Feedlot, Inc.*, 249 F.3d at 818 (quoting *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994)).

48. *E.g., Exxon Corp.*, 437 U.S. at 125-28; *Clover Leaf Creamery Co.*, 449 U.S. at 471-72 (“Minnesota’s statute does not effect ‘simple protectionism,’ but ‘regulates evenhandedly’ by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State.”); *Hampton Feedlot, Inc.*, 249 F.3d at 820.

49. S.D. CONST. art. XVII, §§ 21-24 prohibits corporate ownership of land and corporate farming activities such as contract operations, including most partnership and other limited-liability vehicles. It exempts “family farm” corporations or cooperatives where the majority of the stock is held by related persons and at least one of those persons resides on the property or engages in the day-to-day operation of the farm. Corporations seeking the exemption must file with the secretary of state. It also exempts certain farming activities, such as agricultural research; growing seed, nursery plants or sod; owning mineral rights in agricultural land; custom spraying, fertilizing or harvesting; and others. *See South Dakota Farm Bureau v. Hazeltine*, 202 F.Supp.2d 1020, 1047 (D.S.D. 2002) (“By the same token, a person engaged in agriculture who lives in Aberdeen, for example, and wishes to manage farm land in Lyman County also could personally not do business in a limited liability format.”).



more farmland—proving that the law “regulates evenhandedly” while effectuating the legitimate state purpose of regulating the local agricultural industry and corporate activity within its borders.<sup>50</sup>

2. *Particular corporations are not protected interests under the dormant Commerce Clause*

The “interests” protected by the Commerce Clause are defined in terms of the market as a whole; they are *not* the interests of particular firms.<sup>51</sup> The case most analogous to *South Dakota Farm Bureau* is *Exxon Corp. v. Governor of Maryland*,<sup>52</sup> which upheld a Maryland law intended to eliminate vertical integration of the petroleum industry within the state.<sup>53</sup> In *Exxon*, producers and refiners of petroleum were prohibited from operating retail service stations, but because there were virtually no petroleum producers or refiners in the state, the burden of the law fell almost exclusively on out-of-state companies while the benefits fell almost entirely on local independent service stations.<sup>54</sup> The fact that interstate companies bore the burden of the law did not establish a claim of discrimination against interstate commerce.<sup>55</sup> The Supreme Court emphasized that “[t]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”<sup>56</sup>

The *South Dakota Farm Bureau* court’s preoccupation with the Amendment E drafters’ desire to keep Tyson and Murphy hog confinement facilities out of the state has no place in a dormant Commerce Clause analysis.<sup>57</sup> The dormant Commerce Clause does *not* protect particular firms, even if those firms happen to be from out-of-state and control a large portion of the national market. Amendment E does not substantially burden the interstate market for agricultural products, as in-state and out-of-state businesses can still buy

50. *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 588-89 (8th Cir. 2003).

51. *Exxon Corp.*, 437 U.S. at 127-28 (“The Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”).

52. 437 U.S. 117 (1978).

53. See generally *id.* See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 416 (2d ed. 1988) (“[T]he Court upheld a statute that required vertically-integrated oil companies, whether in-state or out-of-state, to divest themselves of their retail operations.”).

54. *Exxon Corp.*, 437 U.S. at 125-27. The Court noted:

Of the class of stations statutorily insulated from the competition of the out-of-state integrated firms . . . more than 99% were operated by local business interests. Of the class of enterprises excluded entirely from participation in the retail gasoline market, 95% were out-of-state firms, operating 98% of the stations in the class.

*Id.* at 138 (Blackmun, J., concurring in part and dissenting in part).

55. *Id.* at 126.

56. *Id.* at 127-28.

57. See *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 594 (8th Cir. 2003) (discussing the “hog meetings” dealing with the proposed Tyson and Murphy hog confinement facilities). Additionally, as a matter of statutory construction it was inappropriate for the court to consider private meetings of some of the individuals involved in drafting Amendment E and testimony given after Amendment E was passed. Brief of Amici Curiae for Rehearing En Banc at 3-7, Brief of Amici Curiae for Writ of Certiorari at 14 n. 5, *South Dakota Farm Bureau*.

livestock from South Dakota farmers, and South Dakota farmers can sell their livestock on the interstate market. As in *Exxon*, because the market would continue to operate properly under Amendment E, there is no burden on the movement of goods within interstate commerce and no discrimination exists.<sup>58</sup>

The Court in *Exxon* also rejected the assertion that “the Commerce Clause protects the particular structure or methods of operation in a retail market.”<sup>59</sup> The “interests” protected by the dormant Commerce Clause are *not* associated with a particular market structure, such as a vertically integrated industry, or method of operation in the market, such as a form of business organization like a corporation.<sup>60</sup> The dormant Commerce Clause is only implicated when a state’s regulation substantially burdens the movement of goods among the states.<sup>61</sup> Amendment E does not burden the movement of goods among the states.

The operation of local agricultural markets is within South Dakota’s power to regulate.<sup>62</sup> South Dakota may enact laws to prevent vertical integration of its livestock market, as Maryland did with the petroleum market in *Exxon*. South Dakota also has a legitimate interest in regulating corporate operations within its borders.<sup>63</sup> Tyson and Murphy are free to do business in the state in accordance with the laws of the state.

#### IV. CONCLUSION

The Eighth Circuit’s decision in *South Dakota Farm Bureau* charts a troubling new course in dormant Commerce Clause jurisprudence and should be overturned. First, Amendment E is within the regulatory power of the state and is a legitimate policy choice made by the voters of South Dakota. The decision undermines a state’s power to legislate for the health, safety and welfare of its people. Second, Amendment E applies to corporations within and outside of South Dakota equally. Without a discriminatory effect, there is no basis for finding it violates the dormant Commerce Clause. Finally, *South Dakota Farm Bureau* may be used to strike down other legitimate laws intended to support family farms. Other state laws that regulate local economies and the operation of corporations within a state’s borders also will be vulnerable to attack. If not overturned, *South Dakota Farm Bureau* will thwart states’ legitimate regulations intended to foster healthy rural communities.

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58. *Exxon Corp.*, 437 U.S. at 126.

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

60. *See id.*

61. *Id.* at 126.

62. *See supra* notes 18-19 and accompanying text.

63. *See supra* notes 15-17 and accompanying text.