

# ANTICORPORATE FARMING LEGISLATION: CONSTITUTIONALITY AND ECONOMIC POLICY

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## I. INTRODUCTION

*“Small farms have been the foundation of our Nation, rooted in the ideals of Thomas Jefferson and recognized as such in core agricultural policies.”*<sup>1</sup>

Most Americans in the twenty-first century have adapted to the industrialization that increasingly dominates every day life. Small family farmers, however, are resisting the change. A “small family farm” is considered to be a farm “with less than \$250,000 gross receipts annually, on which day-to-day labor and management are provided by the farmer and/or the farm family that owns the production or owns, or leases, the productive assets.”<sup>2</sup> In recent times, the family farmer has been squeezed out, with a decrease from twenty-five percent of Americans participating in farming in the early twentieth century to merely two percent currently.<sup>3</sup>

“Industrialization” can be defined as the introduction of the corporate formation, “result[ing] in different people owning, managing and working the land.”<sup>4</sup> The introduction of the corporate form into the agricultural arena produces many benefits to the states where corporations are located, including an increased number of jobs and a higher tax base. However, industrialization has prompted concerns from many, including the small family farmer.<sup>5</sup> These concerns include economic hardship on small farms, environmental concerns, anti-trust and market concerns, and other “hidden costs” society must absorb as a result of the corporate form in agriculture.<sup>6</sup>

This Note will analyze the response to these concerns, namely, the enactment of anticorporate farming statutes and constitutional amendments. Section II provides an overview of anticorporate farming statutes and includes a description of the goals and policies behind their enactment, where they are located, the arguments for and against them, and their disposition. Section III closely analyzes the substance and effect of anticorporate farming legislation, utilizing

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1. NAT'L COMM'N ON SMALL FARMS, USDA, A TIME TO ACT: A REPORT OF THE USDA NAT'L COMM'N ON SMALL FARMS § II (Jan. 1998), available at [http://www.csrees.usda.gov/nea/ag\\_systems/pdfs/time\\_to\\_act\\_1998.pdf](http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf).

2. *Id.*

3. Jan Stout, Note, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 838 (1996).

4. *Id.* at 841.

5. See Richard F. Prim, *Minnesota's Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431, 432 (1995).

6. See Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203, 222 (1993).

Missouri's anticorporate farming statute as an example. Section IV explains the legal challenges made to these statutes. Section V provides an in-depth economic analysis of the effect of anticorporate farming legislation. Section VI assesses the possibility of a national ban on corporate farming and the future of anticorporate farming statutes. Finally, Section VII provides an update on the current state of agricultural case law and anticorporate farming statutes.

## II. OVERVIEW OF ANTICORPORATE FARMING LEGISLATION

### A. *Where is Anticorporate Farming Legislation Located?*

Currently, seven states have anticorporate farming laws.<sup>7</sup> Some of these are in the form of statutes<sup>8</sup>, while some states provide a state constitutional amendment that prohibits corporate farming.<sup>9</sup> These seven states are responsible for a substantial portion of total agricultural production in the U.S. Many of the statutes or constitutional amendments were passed in the early twentieth century, while a few were passed as late as the 1970s and 1980s.<sup>10</sup>

### B. *What are the Goals of Anticorporate Farming Statutes/Amendments?*

The express language of anticorporate farming statutes makes it clear that the primary goal of anticorporate farming legislation is to protect the small family farmer from industrialization and to preserve the benefits small family farmers provide to society.<sup>11</sup> For instance, Minnesota's anticorporate farming statute provides that:

[I]t is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of

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7. These states include Kansas, Missouri, Minnesota, Nebraska, North Dakota, Oklahoma and Wisconsin.

8. These states include Kansas, Missouri, Minnesota, North Dakota and Wisconsin.

9. Nebraska's, North Dakota's and Oklahoma's anticorporate farming provisions are in the form of state constitutional amendments (North Dakota has both an amendment and a statutory provision).

10. See Brian F. Stayton, *A Legislative Experiment in Rural Agriculture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679, 681-85 (1991) (reviewing anti-corporate laws and their history in Kansas, Oklahoma, North Dakota, Minnesota, South Dakota, Missouri, and Iowa).

11. See KAN. STAT. ANN. §§ 17-5903 to 17-5904 (2002); MINN. STAT. ANN. § 500.24 (West Supp. 2004); MO. ANN. STAT. §§ 350.010 to 350.025 (2001); NEB. CONST. art. XII, § 1; N.D. CENT. CODE §§ 10-06.1-02 to 10-06.1-27 (2001); OKLA. CONST. art. XXII, §§ 1-2; WIS. STAT. ANN. § 182.001 (2002).

agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.<sup>12</sup>

The rationale behind the primary goal is that protecting the family farmer leads to benefits for the economy, the environment and society. A recent study done by the National Commission on Small Farms for the United States Department of Agriculture ("USDA") proclaims that protecting small family farmers leads to increased diversity, a feeling of self-empowerment and community responsibility, a personal connection for consumers to food, better citizenry and environmental benefits.<sup>13</sup> The study argues that by prohibiting corporate agribusiness, states encourage the existence of thousands of small farms, which leads to diversity of ownership, which in turn leads to biological diversity.<sup>14</sup> The National Commission on Small Farms also claims that [d]ecentralized land ownership produces more equitable economic opportunity for people in rural communities, as well as greater social capital.<sup>15</sup> As a result, this provides a greater sense of personal responsibility and a chance to learn business management skills that can be passed to future generations.<sup>16</sup> Additionally, the study claims that small farms and community markets allow consumers to develop an immediate and meaningful relationship with farmers and the food they produce.<sup>17</sup> As a result of industrialization, many consumers have no connection with the farming population, who produce the food consumers eat. By encouraging small family farmers and prohibiting large-scale agribusiness, the statutes provide for a greater sense of community between consumers and farmers.<sup>18</sup>

Anticorporate farming statutes have also been heralded as a way to return to the days of good citizenry.<sup>19</sup> This sociological/cultural argument holds that small family farmers are the "best citizens" because farming was once held out to be "the best way of life and the most important economic activity", conferring psychological, as well as economic, benefits.<sup>20</sup>

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12. MINN. STAT. ANN. § 500.24(1) (West Supp. 2004).

13. NAT'L COMM'N ON SMALL FARMS, USDA, *supra* note 1, § III.

14. *See id.* § II.

15. *Id.*

16. *See id.*

17. *Id.*

18. *See id.*

19. *See* Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 398 (1992).

20. *Id.* (quoting Richard S. Kirkendall, *Up to Now: A History of American Agriculture from Jefferson to Revolution to Crisis*, 4 AGRIC. & HUM. VALUES 4 (1987)). The psychological benefits of protecting family farmers include the preservation of an old-world way of life, "a world to be lived in by human beings, not a world to be exploited by managers, stockholders, and experts." *Id.* at 398-99 (quoting Wendell Berry, *A Defense of the Family Farm*, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? 347, 360 (Gary Comstock ed., 1987)).

According to the USDA study, small family farmers have a less-damaging impact on the environment than agribusiness, and decentralized management leads to environmental benefits.<sup>21</sup> Lastly, by prohibiting agribusiness, it has been argued that the anticorporate farming statutes break-up monopolistic business, thereby opening the market for competition.<sup>22</sup>

C. *What are the Arguments For and Against Anticorporate Farming Statutes/Amendments?*

Many scholars have hashed out the debate for and against anticorporate farming legislation at length.<sup>23</sup> Proponents of these statutes argue that small farms need to be protected because they possess the unique potential to produce food, and contribute a variety of economic, social, and environmental benefits to society.<sup>24</sup> Proponents also claim that large corporations are responsible for many spills and public nuisances as a result of irresponsible waste management.<sup>25</sup> Additionally, many of these statutes were designed “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>26</sup> In this respect, “when small farms predominate no one producer is able to influence prices, and because food production is so important, the public clearly has an interest in preserving vigorous competition in the farm economy rather than allowing a few large corporations to control production.”<sup>27</sup> In short, proponents of prohibition of corporate farming “believe family farmers can feed us better than the corporations can.”<sup>28</sup>

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21. See generally NAT'L COMM'N ON SMALL FARMS, USDA, *supra* note 1, § III.

22. See generally *id.*

23. See generally Haroldson, *supra* note 19; Roger A. McEowen et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. AGRIC. L. 267 (2002); John C. Pietila, Note, “[W]e’re Doing This to Ourselves”: *South Dakota’s Anticorporate Farming Amendment*, 27 J. CORP. L. 149 (2001); Prim, *supra* note 5; Prim, *supra* note 6; Stayton, *supra* note 10; Stout, *supra* note 3.

24. See NAT'L COMM'N ON SMALL FARMS, USDA, *supra* note 1, § II.

25. See Stout, *supra* note 3, at 848-50.

26. Pietila, *supra* note 23, at 156 n.56 (2001) (quoting S.D. SEC'Y OF STATE, 1998 BALLOT QUESTION PAMPHLET, available at <http://www.sdsos.gov/1998/98bqprocone.htm> (last visited Mar. 3, 2004)).

27. Stout, *supra* note 3, at 845 (citations omitted); see also Prim, *supra* note 6, at 204 (explaining that in America today, four percent of the total number of farms produce fifty-one percent of the total gross sales).

28. Haroldson, *supra* note 19, at 399 (quoting Jim Hightower, *The Case for the Family Farm*, in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?* 205, 211 (Gary Comstock ed., 1987)).

In addition to arguing the unconstitutionality of these statutes, opponents of anticorporate farming statutes use strong economic arguments to counter many of the arguments put forth by family farm supporters. For instance, it is generally agreed that “[f]rom an economic point of view, there is little evidence the family farm is the most cost-effective framework in which to produce agricultural commodities.”<sup>29</sup> This argument holds that “the bottom line to the consumer is that corporate farms mean lower prices at the store.”<sup>30</sup> In response to social cost arguments advanced by proponents of the statutes (i.e., that society is better off restricting corporate farming because corporate farming produces “hidden costs”, such as environmental concerns and erosion of “community”) opponents argue that artificially manipulating the marketplace is inherently anticapitalistic.<sup>31</sup> As one scholar has phrased it, there are two views of agriculture – an economic view of farming, which generally supports the allowance of corporate farming, and an agrarian view of farming, which generally supports the societal benefits produced by small family farms.<sup>32</sup>

#### D. *What is the Current Disposition of Anticorporate Farming Legislation?*

Nine states that have enacted anticorporate farming statutes; however, two have recently been struck down as unconstitutional under the Dormant Commerce Clause.<sup>33</sup> Of the remaining seven states, constitutional challenges were raised in four states and all were defeated.<sup>34</sup> The four constitutional challenges, in Missouri, Nebraska and North Dakota respectfully, were defeated, contrary to the constitutional challenges South Dakota and Iowa, which were upheld, albeit on different grounds.<sup>35</sup> Specifically, the Missouri, Nebraska, and North Dakota challenges were upheld on equal protection grounds and were not challenged under a Dormant Commerce Clause theory.<sup>36</sup> As a result of the rulings in *S.D. Farm Bureau v. Hazeltine* and *Smithfield Foods, Inc. v. Miller*, there will no

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29. *Id.* at 397.

30. Prim, *supra* note 6, at 221.

31. *See id.* at 222.

32. *See* Haroldson, *supra* note 19, at 396-400.

33. *See generally* *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003); *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (S.D. Iowa 2003).

34. *See generally* *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945); *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991); *Missouri ex rel. Webster v. Lehdorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988); *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986).

35. *Compare Asbury Hosp.*, 326 U.S. at 214-15; *MSM Farms, Inc.*, 927 F.2d at 335; *Lehdorff Geneva, Inc.*, 744 S.W.2d at 806; *Omaha Nat'l Bank*, 389 N.W.2d at 283 *with Hazeltine*, 340 F.3d at 597; *Smithfield Foods, Inc.*, 241 F. Supp. 2d at 991-92.

36. *See Asbury Hosp.*, 326 U.S. at 214-15; *MSM Farms Inc.*, 927 F.2d at 335; *Lehdorff Geneva, Inc.*, 744 S.W.2d at 806; *Omaha Nat'l Bank*, 389 N.W.2d at 283.

doubt be additional challenges mounted against the anticorporate farming statutes in the remaining seven states.

The specific legal arguments, including theories under the Equal Protection Clause, Due Process Clause and Dormant Commerce Clause, will be discussed in section IV.

### III. SUBSTANCE AND EFFECT OF ANTICORPORATE FARMING LEGISLATION

#### A. *Substance of an Anticorporate Farming Statute: Missouri*

The substance of the anticorporate farming statutes or constitutional amendments vary from state to state, although most have a similar structure and allow similar exceptions to the general ban against corporate farming.<sup>37</sup> It should also be noted that these statutes generally apply to all types of agricultural production, including livestock, poultry and crop production. In analyzing the substance of the anticorporate farming statutes or amendments, an in-depth look at the express language of the provisions and exceptions is necessary. The example used below is Missouri's anticorporate farming statute, although many of the same provisions and exceptions are present in all anticorporate farming statutes.

The Missouri anticorporate farming statute is set out in eight provisions of the Missouri statutory code.<sup>38</sup> The first section, Section 350.010 of the Missouri code supplies definitions that are applicable to the remainder of the statute.<sup>39</sup> In this first section, the definitions provided include "agricultural land," "authorized farm corporation," "corporation," "family farm," "family farm corporation," and "farming".<sup>40</sup> Two of the most important definitions in this first section are "family farm corporation", and "authorized farm corporation", as they provide the biggest exceptions to the general ban on corporate farming in Missouri. A "family farm corporation" is a "corporation incorporated for the purpose of farming and the ownership of agricultural land in which at least one-half of the voting stock is held by and at least one-half of the stockholders are members of a family related to each other within the third degree of consanguinity."<sup>41</sup> An "authorized farm corporation" means a corporation that is made up of natural

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37. See, e.g., KAN. STAT. ANN. § 17-5904 (2002); MINN. STAT. ANN. § 500.24 (West Supp. 2004); MO. ANN. STAT. § 350.015 (2001); NEB. CONST. art. XII, § 1; N.D. CENT. CODE § 10-06.1-02 (2001); OKLA. CONST. art. XXII § 2; WIS. STAT. ANN. § 182.001 (2002).

38. See generally MO. ANN. STAT. § 350.010, 350.015, 350.016, 350.020, 350.025, 350.030, 350.040 (West 2001).

39. *Id.* § 350.010.

40. *Id.*

41. *Id.* § 350.010(5).

persons, and receives two-thirds or more of its income from farming.<sup>42</sup> These two exceptions are the biggest exceptions to the ban on corporate farming in the statute.

The second section of Missouri's anticorporate farming statute provides the "meat" of the ban on corporate farming. Section 350.015 states that "[a]fter September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest . . . in any title to agricultural land in this state."<sup>43</sup> In its express language, Section 350.015 prohibits corporate farming in Missouri.<sup>44</sup> Section 350.015 contains twelve exceptions.<sup>45</sup>

Section 350.016 further explains the last exception provided in Section 350.015(12) stating that the general ban on corporate farming is inapplicable to swine production by a corporation or limited partnership "in any county of the third classification with a township form of government which has at least three thousand but no more than four thousand inhabitants."<sup>46</sup> Section 350.016 was added in 1993.<sup>47</sup>

The next section of Missouri's anticorporate farming statute provides that corporations engaged in farming before the statute's effective date must file a report, listing information on the corporation, including address, names of officers, and its acreage, with the state agricultural department.<sup>48</sup> Additionally, this section provides that those seeking to engage in farming under the "family farm corporation" exception<sup>49</sup> must file a report, providing similar information, with the Missouri Department of Agriculture.<sup>50</sup> The last section of this provision provides a fine will be assessed, not less than five hundred dollars, and not more than one thousand dollars, for the corporation which either fails to file a report or intentionally files a false report.<sup>51</sup>

Section 350.025 dictates that all farm cooperatives that own farmland must file a report in accordance with Section 350.020.<sup>52</sup> Section 350.030 is the enforcement provision of Missouri's anticorporate farming statute.<sup>53</sup> This section

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42. *Id.* § 350.010(2).

43. *Id.* § 350.15.

44. *Id.*

45. *Id.* § 350.015(1)-(12).

46. *Id.* § 350.016.

47. *See* H.B. No. 566, 82nd Gen. Assem., Reg. Sess. (Mo. 1993).

48. *See* MO. ANN. STAT. § 350.020(1).

49. *See id.* § 350.015(2).

50. *See id.* § 350.020(2).

51. *See id.* § 350.020(5).

52. *See id.* § 350.025.

53. *Id.* § 350.030.



provides that any corporation which violates Section 350.010 to 350.030, shall be subject to a court action, instituted by the Attorney General.<sup>54</sup> If a court finds the corporation in violation of the anticorporate farming statute, this section provides that the court shall enter an order requiring the corporation to divest itself of such land within a period of two years.<sup>55</sup> Further, this section provides that any lands not divested within the two-year limitation period shall be sold at a public sale.<sup>56</sup> The final section of Missouri's anticorporate farming statute declares that "any corporation or cooperative engaged in farming . . . shall not be eligible . . . for financial or economic assistance," including state tax credits, deductions, state grants, loans or other assistance.<sup>57</sup>

### B. *Effectiveness of Anticorporate Farming Legislation*

The most important way to judge the effectiveness of these anticorporate farming statutes is to assess whether they meet their overall goal of protecting the family farmer. Many scholars who have commented on the topic of anticorporate farming statutes have concluded the statutes are not effective.<sup>58</sup>

Since the enactment of anti-corporate farming statutes, large-scale agribusiness has not been affected; in states where there are no restrictions on corporate farming large-scale agribusiness has been developing.<sup>59</sup> Additionally, the number of small family farms continues to decline since the enactment of anticorporate farming legislation.<sup>60</sup> Moreover, opponents of anti-corporate farming statutes cite statistics that the number of overall farms is declining in states where there are corporate bans on farming.<sup>61</sup> Additionally, the numerous exceptions provided in the anticorporate farming statutes, specifically the "family farm corporation" exception and the "authorized farm corporation" exception, continue to allow some corporate farming, frustrating the purpose of the legislation.<sup>62</sup>

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* § 350.040.

58. *See, e.g.,* Stout, *supra* note 3, at 846; Haroldson, *supra* note 19, at 403.

59. Stout, *supra* note 3, at 846.

60. *Id.*

61. *See generally* USDA, 1997 CENSUS OF AGRICULTURE: RANKING OF STATES AND COUNTIES (May 1999), available at <http://www.nass.usda.gov/census/census97/rankings/ac97s-3r.pdf> (citing state statistics that indicate in the majority of the anticorporate farming states, the number of overall farms has declined).

62. *See* Stout, *supra* note 3, at 846-50 (discussing Missouri's problems with the "authorized farm corporation" and "family farm corporation" exceptions provided in its anticorporate farming statute, indicating that three major corporate farming companies have been allowed to farm

Finally, these statutes have created great economic loss for the states where they are enacted. For example, since 1990, Nebraska's livestock market share is down four percent.<sup>63</sup> South Dakota's livestock market share is also down the same amount.<sup>64</sup> Wisconsin has also followed suit, with their market share dropping four percent since 1990, and twenty-five percent in the last two decades.<sup>65</sup> Conversely, two states without corporate farming restrictions, North Carolina and Colorado, have drastically gained in livestock market share.<sup>66</sup> North Carolina's market share has grown ninety-four percent since 1990, and three hundred percent over the past two decades.<sup>67</sup> Colorado's livestock market share is up eighty-five percent since 1990.<sup>68</sup> As a result of the ineffectiveness of anticorporate farming legislation, numerous states have begun to re-examine the wisdom of their philosophy against corporate farming because this philosophy has led to economic loss and stagnation.<sup>69</sup>

#### IV. LEGAL CHALLENGES MADE AGAINST ANTICORPORATE FARMING LEGISLATION

##### A. *Equal Protection/Due Process*

Until 2002, only four challenges in three states had been mounted against anticorporate farming statutes.<sup>70</sup> In all four challenges, one of the claims brought against the anticorporate farming statutes was that the statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>71</sup> The Fourteenth Amendment, in relevant part, provides that a State shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>72</sup>

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in Missouri under these exceptions and have been no less destructive to the environment than a non-exempt farming corporation).

63. Prim, *supra* note 5, at 439.

64. *Id.*

65. *Id.*

66. *See id.* at 438.

67. *Id.*

68. *Id.*

69. *See Stout, supra* note 3, at 857.

70. *See generally Asbury Hosp.*, 326 U.S. 207; *MSM Farms, Inc.*, 927 F.2d 330; *Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988); *Omaha Nat'l Bank*, 389 N.W.2d 269 (Neb. 1986).

71. *See Asbury Hosp.*, 326 U.S. at 210; *MSM Farms Inc.*, 927 F.2d at 331; *Lehndorff Geneva, Inc.*, 744 S.W.2d at 804, 807; *Omaha Nat'l Bank*, 389 N.W.2d at 230-31.

72. U.S. CONST. amend. XIV, § 1.

In *Asbury Hospital v. Cass County*, the first major challenge mounted against anticorporate farming statutes, the United States Supreme Court sustained a North Dakota state statute as a valid exercise of state legislative power.<sup>73</sup> In *Asbury Hospital*, a non-profit corporation challenged an anticorporate farming statute, which forced a sale of farming land within ten years if acquired by any corporation, on a theory that the statute violated equal protection and denied due process.<sup>74</sup> As to the equal protection challenge, the corporation argued it was being treated differently than other farmers within the state, which amounts to unconstitutional discrimination.<sup>75</sup> The Court held that a state “legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose.”<sup>76</sup> Further, “[s]tatutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it.”<sup>77</sup> The language of the Court suggested a deferential standard of review, and the Court held that the statute did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>78</sup>

With respect to due process, the Court in *Asbury Hospital* held that “[t]he Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it.”<sup>79</sup> Additionally, the Court held that “excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process.”<sup>80</sup> According to the Court, the forced sale, as well as other procedural requirements dictated by the anticorporate farming statute in question was not a denial of due process.<sup>81</sup>

The next major challenge against anticorporate farming statutes was brought in *Omaha National Bank v. Spire*.<sup>82</sup> In that case, a bank brought an action challenging an anticorporate farming amendment to the Nebraska constitution.<sup>83</sup> The Supreme Court of Nebraska, perhaps foreshadowing its decision, began its opinion by quoting the U.S. Supreme Court’s language in *New Orleans v. Dukes*, which held in part that “[t]he judiciary may not sit as a superlegislature

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73. See 326 U.S. at 214.

74. See *id.* at 214-16.

75. See *id.* at 210, 214.

76. *Id.* at 214.

77. *Id.* at 215.

78. See *id.* at 214.

79. *Id.* at 211.

80. *Id.* at 212.

81. *Id.*

82. See generally *Omaha Nat’l Bank*, 389 N.W.2d 269.

83. See *id.* at 271-72.

to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”<sup>84</sup> The Nebraska Supreme Court, using a rational basis test, held that the anticorporate farming amendment did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>85</sup> Discrimination against corporations is not drawn upon an inherently suspect distinction, and thus is deserving of a rational basis test, whereby legislation is upheld if it is rationally related to a legitimate state interest.<sup>86</sup> The Nebraska court, citing *Hawaii Housing Authority v. Midkiff*, had no trouble holding that the break-up of large estates of land was a legitimate state interest.<sup>87</sup> Thus, the anticorporate farming legislation was once again upheld under an equal protection challenge.

In *MSM Farms, Inc. v. Spire*, another challenge was mounted against an amended version of Nebraska’s anticorporate farming constitutional amendment.<sup>88</sup> The Eighth Circuit Court of Appeals upheld the regulation as rationally related to a legitimate state interest.<sup>89</sup> The Eighth Circuit had little difficulty in concluding that promoting the family farm in Nebraska does not offend the Fourteenth Amendment, because promotion of family farming is a legitimate state interest.<sup>90</sup>

In *State ex rel. Webster v. Lehndorff Geneva*, a challenge against Missouri’s anticorporate farming statute was made via the Fourteenth Amendment.<sup>91</sup> The corporation in question argued that it was being discriminated against, as it was not allowed to own farmland, while other “authorized” corporations were allowed to own farmland.<sup>92</sup> Additionally, the corporation in *Webster* argued that the statute’s requirement of “divestiture” of illegally-owned farmland was vague, and thus amounted to a due process violation.<sup>93</sup>

The Missouri Supreme Court rejected these arguments and upheld the anticorporate farming legislation.<sup>94</sup> The Missouri court explained that the effect of the statute, which “is to prevent the concentration of agricultural land, and the production of food there from, in the hands of business corporations to the detri-

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84. *Id.* at 273 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

85. *See id.* at 283.

86. *See id.* at 282.

87. *See id.* at 282-83 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 n.5 (1984)).

88. 927 F.2d at 332.

89. *Id.* at 335.

90. *See id.* at 333.

91. 744 S.W.2d at 804.

92. *Id.* at 804-05.

93. *Id.* at 806-07.

94. *Id.* at 808.

ment of traditional family units and corporate aggregations of natural persons” is a legitimate state interest.<sup>95</sup> The Missouri court further noted that by prohibiting large agribusinesses from owning or operating farmland in the state, the legislation “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.”<sup>96</sup> The regulation of market forces, the Missouri court held, is rationally related to the state’s interest in protecting the family farmer, and thus does not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>97</sup>

Additionally, the Missouri court quickly dismissed the corporation’s claim that it was denied due process because the divestiture requirement was vague.<sup>98</sup> The court held that the corporation was aware of the ultimate sanctions of the statute, and as such, could not complain of a lack of adequate notice.<sup>99</sup> Thus, the Missouri court sustained the anticorporate farming legislation, holding that it did not violate the Due Process Clause of the Fourteenth Amendment.<sup>100</sup>

From these challenges, it is clear that the goal of anticorporate farming legislation, protecting the family farmer, is largely ruled to be a legitimate state interest. Moreover, the means of achieving that goal, including discrimination against large agribusiness by prohibiting them from owning or operating farmland, is rationally related to the legitimate state interest. Thus, any further attacks on anticorporate farming legislation under a due process or equal protection theory will likely fail. The law appears so clear that one scholar has remarked, that at least in terms of Fourteenth Amendment challenges, “[t]he constitutionality of anticorporate farming statutes appears to be settled.”<sup>101</sup>

### B. *Dormant Commerce Clause*

Until 2002, all challenges mounted against anticorporate farming statutes were only pursued under due process or equal protection theories. This fact is astounding, considering the language in *Asbury Hospital*, where the Court suggested that the corporation might successfully invoke the Commerce Clause.<sup>102</sup> In 2002, a federal district court in South Dakota heard the first arguments that an

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95. *Id.* at 806-07.

96. *Id.* at 806.

97. *Id.*

98. *See id.* at 807.

99. *See id.*

100. *Id.* at 808.

101. Haroldson, *supra* note 19, at 406.

102. *See Asbury Hosp. v. Cass County*, 326 U.S. 207, 210 (1945).

anticorporate farming statute violated the Commerce Clause.<sup>103</sup> This case, as well as a later Iowa case challenging the legislation under the same theory, will be discussed in the following section.

“The Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.”<sup>104</sup> The Supreme Court has inferred this grant of power to Congress to regulate interstate commerce from Article I, section 8, clause 3 of the United States Constitution.<sup>105</sup> Article I, section 8 provides, in relevant part, “[t]he Congress shall have power . . . [t]o regulate commerce . . . among the several states.”<sup>106</sup> In essence, the Dormant Commerce Clause grants Congress the power to place limits on state authority because the state or local law might unduly affect interstate commerce.<sup>107</sup>

In a Dormant Commerce Clause challenge, the initial question to be answered is whether the state or local law discriminates against out-of-state parties or whether it treats all parties equally irrespective of residence.<sup>108</sup> This initial question is the first tier of a Dormant Commerce Clause analysis. In *Baldwin v. G.A.F. Seelig, Inc.*, the Court invalidated a New York law that circumscribed prices of milk produced out-of-state and prohibited out-of-state milk from being sold at a lower price than in-state milk.<sup>109</sup> The Court held that if the state had the power to outlaw the sale of milk and if the price paid for it in a neighboring state was less than what would be paid in-state, this would effectively set an unconstitutional barrier to interstate commerce.<sup>110</sup> The Court further noted that “a state may not, in any form or under any guise, directly burden the prosecution of interstate business.”<sup>111</sup> The rationale, according to the Court, was that the Constitution was “framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”<sup>112</sup> Thus, if the law discriminates on its face between in-state parties and out-of-state parties, the law will be held as facially discriminatory, and hence, unconstitutional under the dormant commerce clause.

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103. See *S.D. Farm Bureau v. Hazeltine*, 202 F. Supp. 2d 1020, 1023 (D. S.D. 2002).

104. ERWIN CHERMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 401 (Erwin Cherminsky, et al. eds., Aspen Publishers 2d ed. 2002) (emphasis removed).

105. U.S. CONST. art. I, §8, cl. 3.

106. *Id.*

107. CHERMINSKY, *supra* note 104, at 406.

108. *Id.* at 411.

109. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935).

110. See *id.* at 521-22.

111. *Id.* at 522 (citations omitted).

112. *Id.* at 523.

If a state law is not facially discriminatory, the inquiry then proceeds to assess whether the effect or purpose of the law is discriminatory.<sup>113</sup> In *Hunt v. Washington State Apple Advertising Commission*, discrimination was found based on a North Carolina statute that restricted the type of apple shipped or sold into the state.<sup>114</sup> In *Hunt*, a North Carolina law that required all apples sold or shipped into the state to bear “no grade other than the applicable U.S. grade or standard”<sup>115</sup> was invalidated even though it was facially neutral, that is, the law treated all apples, whether produced or sold in-state or out-of-state the same.<sup>116</sup> The Court invalidated this law because it had a discriminatory effect on Washington apple producers.<sup>117</sup> Washington apple producers had a different, more stringent standard of grading apples, and when successfully completed, apples bore the Washington grade, not the applicable United States grade or standard.<sup>118</sup> The Court held that the North Carolina law had a discriminatory effect on the sale of Washington apples because it granted other apple producers advantages and placed Washington apple producers at a disadvantage.<sup>119</sup> From the Court’s opinion, it appears that if a law has a discriminatory purpose or effect, it will be held unconstitutional.

If the law in question is held to be nondiscriminatory either on its face, in its effect, or in its purpose, the final inquiry evaluates the burdens and benefits of the local law.<sup>120</sup> This “balancing test” is the second and final tier in a Dormant Commerce Clause challenge.<sup>121</sup> If the court decides that burdens on interstate commerce exceed local benefits, then the state law will be ruled unconstitutional.<sup>122</sup> In *Pike v. Bruce Church*, an Arizona law that required all cantaloupes grown in Arizona and offered for sale to be packed in Arizona was invalidated, because the benefit to Arizona was outweighed by the burden placed on interstate commerce.<sup>123</sup> The Court enunciated the burdens/benefits test as follows: “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in rela-

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113. See CHEMERINSKY, *supra* note 104, at 414.

114. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 350-53 (1977).

115. *Id.* at 339 (quoting N.C. GEN. STAT. §§ 106-189.1 (1973)).

116. *See id.* at 352.

117. *See id.* at 352-53.

118. *See id.* at 336.

119. *See id.* at 350-51.

120. CHEMERINSKY, *supra* note 104, at 418.

121. *Id.*

122. *Id.*

123. *See Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

tion to the putative local benefits.”<sup>124</sup> The Court noted further that “the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”<sup>125</sup>

The cantaloupe producer in *Bruce* grew cantaloupes in Arizona, but shipped them thirty-one miles to California to be packed.<sup>126</sup> The company reported that to construct a packing plant within the state would be an enormous financial burden.<sup>127</sup> The Court noted that “statutes requiring business operations to be performed in the home [s]tate that could more efficiently be performed elsewhere” were suspicious.<sup>128</sup> “Even where the State is pursuing a clearly legitimate local interest, this particular burden on [interstate] commerce has been declared to be virtually *per se* illegal.”<sup>129</sup> Thus, the Court held that the legitimate local interest in this case, protecting and enhancing the reputation of growers within the Arizona, was outweighed by the burdens the law imposed on interstate commerce.<sup>130</sup>

### C. Recent Developments—Dormant Commerce Clause Challenges to Anticorporate Farming Legislation

In May 2002, a federal district court in South Dakota held that South Dakota’s anticorporate farming amendment violated the Dormant Commerce Clause.<sup>131</sup> Eight months later, a federal district court in Iowa invalidated that state’s anticorporate farming statute on the theory that it violated the Dormant Commerce Clause as well.<sup>132</sup> These two blows dealt to anticorporate farming legislation will have wide-ranging effects on the future of anticorporate farming statutes.

In *South Dakota Farm Bureau, Inc. v. Hazeltine*, a federal district court, analyzing the second tier of the Dormant Commerce Clause inquiry, held that South Dakota’s anticorporate farming amendment unduly burdened interstate

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124. *Id.* at 142.

125. *Id.*

126. *Id.* at 139.

127. *See id.* at 145.

128. *Id.*

129. *Id.* (citations omitted).

130. *See id.* at 146.

131. *S.D. Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020, 1025 (D.S.D. 2002) (the South Dakota court also struck down the state’s anticorporate farming state constitutional amendment on the grounds that it violated the American With Disabilities Act).

132. *See Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978, 990 (S.D. Iowa 2003).



commerce.<sup>133</sup> Specifically, the court noted that the amendment placed a substantial burden on out-of-state utility companies who had to acquire farmland to provide electricity for the state.<sup>134</sup>

The South Dakota anticorporate farming amendment provided an exception for corporate ownership or leasing of agricultural land for potential nonfarming purposes.<sup>135</sup> The amendment did not allow, as has been done historically, easements for corporations (such as utility companies) across agricultural land.<sup>136</sup> This was too big a burden on interstate commerce for the federal district court to tolerate. As a result of the amendment, utility companies would incur substantial additional costs, because they would be forced to purchase or lease land, rather than use an easement.<sup>137</sup> The court noted that as a result, utility rates would likely increase within South Dakota and neighboring states, as many states derive power from South Dakota's generation of wind power.<sup>138</sup>

Eight months later, in January 2003, a federal district court in Iowa struck down that state's anticorporate farming statute as being unconstitutional in a farther-reaching opinion than *Hazeltine*.<sup>139</sup> In *Smithfield Foods, Inc. v. Miller*, a federal district court in Iowa concluded that Iowa's anticorporate farming statute was facially, purposefully, and effectually discriminatory and hence, unconstitutional under the first tier of the Dormant Commerce Clause inquiry.<sup>140</sup> The Iowa court held that the anticorporate farming statute "narrowly tailors its prohibitions to cast a wide net around [p]laintiffs' economic activities, all the while reserving the same economic activities for Iowa cooperatives or cooperatives with an Iowa component."<sup>141</sup>

While the court thought the preservation of family farmers was a "noble" goal<sup>142</sup>, in strong language the court held, "[a]fter careful consideration, the [c]ourt is left with but one conclusion, [Iowa's anticorporate farming statute], on its face, in its purpose, and in its effect unconstitutionality discriminates against out-of-state interests in favor of local ones."<sup>143</sup> Moreover, after the state argued that the specific clause in question be severed from the entire statute, the court responded, "simply severing the cooperative exemption from [Iowa's anticorpo-

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133. See 202 F. Supp. 2d at 1050.

134. *Id.*

135. *Id.* at 1034.

136. *Id.* at 1034-35.

137. See *id.* at 1050.

138. See *id.*

139. See *Smithfield Foods, Inc.*, 241 F. Supp. 2d at 994.

140. See *id.* at 992.

141. *Id.* at 990.

142. *Id.* at 993.

143. *Id.* at 990.

rate farming statute] does not remedy the statute's defects . . . the Act was passed with a discriminatory purpose to effect a discriminatory result. Accordingly, while severing the cooperative exemption might cure some of the facial defects, the Act's discriminatory purpose and effect persist."<sup>144</sup> Appeals from the rulings in *Hazeltine* and *Smithfield* are currently pending.<sup>145</sup>

## V. ECONOMIC IMPLICATIONS OF ANTICORPORATE FARMING LEGISLATION

### A. *Economic Implications for the Small Family Farmer*

The primary goal of anticorporate farming statutes is to preserve and protect small family farmers and the benefits they provide to society. Though the statutes were enacted with the hope of protecting the small family farmer, the statutes have not granted small family farmers great benefits. Instead, it seems that anticorporate farming legislation has, at best, maintained the status quo for small family farmers, or, at the very worst, hindered their progress. Anticorporate farming legislation, barring statutory exceptions, prohibits corporate farming. This, it was hoped, would lead to an increase in the number of small family farms. However, a look at a 1998 study by USDA suggests otherwise.<sup>146</sup> Significantly, the most recent census results report that in the seven states where anticorporate legislation exists, the number of farms has decreased since 1987.<sup>147</sup> This trend suggests that anticorporate farming legislation has not produced an increase in small family farms.

Additionally, the prohibition on corporate farming has led to a dramatic increase in land value within a majority of these seven states.<sup>148</sup> While proponents of anticorporate farming legislation might argue this is a benefit, it can also be argued that this poses problems for small family farmers. They are now "locked in" to their land; that is, even if they wanted to sell the land for profit, they can only sell to other small family farmers, those who are unlikely to be able to afford the increased price of the land.

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144. *Id.* at 991.

145. See Scott Bauer, *Nebraska Only State to Ban Corporate Farming*, ASSOCIATED PRESS, Dec. 13, 2002; Jerry Perkins, *Iowans Push for Packer Ban at Federal Level*, DES MOINES REG., Jan. 24, 2003, available at <http://www.desmoinesregister.com/business/stories/c4789013/20309978.html>.

146. See generally NAT'L COMM'N ON SMALL FARMS, USDA, *supra* note 1, § II.

147. See NAT'L AGRIC. STAT. SERV., USDA, 1997 CENSUS OF AGRIC. (1999), available at <http://www.nass.usda.gov/census/census97/volume1/vol1pubs.htm> (citing statistics from Nebraska, Iowa, Kansas, Minnesota, Missouri, South Dakota and North Dakota).

148. See *id.* (market value increase can be seen in data from 1987-1997).

The increased value of farmland has been dramatic. In Iowa, for example, the estimated market value of farmland and buildings, averaged per farm, jumped from \$283,597 in 1987 to \$566,587 in 1997.<sup>149</sup> The same holds true in Nebraska, where the value of land and buildings per farm has increased from \$344,253 in 1987 to \$567,468 in 1997.<sup>150</sup> It appears that by restricting potential buyers of farmland, anticorporate farming legislation has increased the value of land. However, the effect of the corporate prohibition means a small family farmer is prohibited from selling land to those who might be able to afford it, such as large agribusinesses. This effect of “locking in” small family farmers has hindered their financial status and success.

### B. *Economic Implications for Agribusiness*

Anticorporate farming legislation has not hurt corporate farmers or agribusiness. Corporate farmers have moved to states where there are less or no restrictions in place, and have been able to continue their profitability. In short, large-scale agribusiness has other options to get products to consumers and to continue productive and profitable ways.

In the last decade, the states with limited or no restrictions on corporate farming have seen a rise in the number of corporate farmers doing business within their borders.<sup>151</sup> Thus, agribusiness does not seem to be suffering at the hands of anticorporate farming legislation.

Additionally, corporate farmers have not seen a drop in their efficiency or profitability since the enactment of anticorporate farming legislation. Technology has led to increased efficiency and hence, desirability, for corporate farmers.<sup>152</sup> Moreover, in recent years, states that encourage corporate farming have been flourishing.<sup>153</sup>

### C. *Economic Implications for Consumers*

“[T]he bottom line to the consumer is that corporate farms mean lower prices at the store.”<sup>154</sup> “Family farms, on the average are not the most efficient food producers, and American consumers would be better served by corporate

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149. *Id.* (citing Iowa statistics on market value of land and buildings, average per farm).

150. *Id.* (citing Nebraska statistics on market value of land and buildings, average per farm).

151. *See* Stout, *supra* note 3, at 855-56 (explaining the increase in market share of states with no corporate restrictions, such as Colorado and North Carolina).

152. *Id.* at 839.

153. *See id.* at 855-56.

154. Prim, *supra* note 6, at 221.

farms.”<sup>155</sup> These conclusions serve as the major reasons why consumers may be against anticorporate farming legislation. A discussion of how corporations are able to deliver cheaper goods to the consumer follows.

Corporate efficiency holds many advantages. The efficient nature of the corporate entity has been adequately summed up as follows:

[Some] of a corporation’s strongest advantages [are] its ability to organize and pool the financial and other resources of many individuals and entities, . . . “the facilitation of intergeneration transfers, limited liability, pooling of capital, ease of transfer of ownership of fractional interests, favorable tax treatment, and increased availability of fringe benefits for both employer and employee.” Other advantages include the ability to raise and transfer funds from activities and sources outside of agriculture, and the economies of large scale operations which can result from investment of those funds.<sup>156</sup>

As a result of increased efficiency, corporate farming entities are able to effectively deliver goods to the consumer in a price-efficient way, whereas small family farmers are not able to reach the efficiencies realized by large agribusiness.<sup>157</sup> Small family farmers are caught “in a vicious cost/price squeeze caused by a low net income coupled with even lower purchasing power.”<sup>158</sup>

In response, proponents of small family farmers argue that “efficiency” is a loose term that can be defined in several ways.<sup>159</sup> Proponents of the prohibition on corporate farming argue that there are “hidden costs” that society is expected to absorb with corporate farming, including environmental costs and cultural costs.<sup>160</sup> Many argue that the environmental costs, including irresponsible management of resources associated with corporate farming, are too great a burden for society to tolerate.<sup>161</sup> Moreover, proponents of anticorporate farming legislation argue small family farms provide cultural and sociological benefits to society that corporate farmers do not.<sup>162</sup>

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155. *Id.*

156. Stayton, *supra* note 10, at 691-92 (quoting WINSTON SMART & ALLEN C. HOBERG, NAT’L CTR. FOR AGRIC. L. RES. & INFO., CORPORATE FARMING IN THE ANTI-CORPORATE FARMING STATES 2 (1989) (citations omitted)).

157. *Id.* at 691-92.

158. Prim, *supra* note 6, at 221 (quoting A.V. KREBS, THE CORPORATE REAPERS: THE BOOK OF AGRIBUSINESS 76 (1991)).

159. *Id.*

160. NAT’L COMM’N ON SMALL FARMS, USDA, *supra* note 1, § II.

161. *Id.*, § III.

162. *See* Stayton, *supra* note 10, at 693.

#### D. Economic Implications for States

Finally, anticorporate farming legislation has a major impact on agricultural states. As mentioned earlier, some states suffer economic harm as a result of anticorporate farming legislation.<sup>163</sup> As one scholar has argued, “[i]f the statutes have the effect of stifling the economic growth of the state, even if the growth is not in the desired form, the long-term interests of farmers, consumers, and the state may be hurt.”<sup>164</sup>

For instance, Kansas, as a direct result of its anticorporate legislation, lost two major industrial businesses, including a \$50 million processing plant and a \$50 million packing plant with 1400 jobs, to Colorado and Oklahoma, respectively.<sup>165</sup> With a decreasing farm population and current financial difficulties for small family farmers, states have begun to re-think the wisdom of corporate prohibition.<sup>166</sup> As one scholar has summed up, “[c]orporate barriers have proven to be a source of economic loss and stagnating ... industry.”<sup>167</sup>

### VI. CONCLUSION

#### A. Future of Anticorporate Farming Legislation—A National Ban?

With the current court split and undoubtedly more legal challenges on the way in the remaining states where anticorporate farming legislation exists (as a result of *Smithfield* and *Hazeltine*), the future of anticorporate farming statutes in individual states looks dim. However, several attempts at a national ban have recently made headway in Congress, providing a ray of hope for small family farmers.<sup>168</sup>

On November 27, 2001, Senator Tom Harkin, a Democrat from Iowa and member of the Committee on Agriculture, Nutrition and Forestry, proposed The Agricultural, Conservation, and Rural Enhancement Act of 2001 on the Senate floor.<sup>169</sup> The bill went through numerous changes, and included a provision (proposed by Charles Grassley, Republican Senator from Iowa) that generally prohib-

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163. *Contra* Stout, *supra* note 3, at 855-56 (explaining the benefits of corporate agriculture derived by states such as Colorado, Oklahoma, and North Carolina, states with no restrictions on corporate farming).

164. Stayton, *supra* note 10, at 692.

165. Stout, *supra* note 3, at 856.

167. *Id.* at 857.

167. *Id.*

168. See S. 1731, 107th Cong. (2001); H.R. 3810, 107th Cong. (2d Sess. 2002); H.R. 3803, 107th Cong. (2d Sess. 2002).

169. 147 CONG. REC. S12,053 (daily ed. Nov. 27, 2001) (statement of Sen. Harkin).

its packer arrangements where packers are not materially participating in the management of the farming operation, i.e., corporate ownership in the arena of packers.<sup>170</sup> This provision was approved by seven votes (53-46) in the Senate on February 12, 2002, but failed to survive the House/Senate Conference Committee on the Farm Bill and was ultimately excluded from the Act.<sup>171</sup> Two similar bills have been proposed in the House and are currently pending.<sup>172</sup>

Agricultural leaders have been pushing for a national ban since the rulings in *Smithfield* and *Hazeltine*.<sup>173</sup> However, support for a national ban has been waning. The nation's largest farm organization, the American Farm Bureau Federation, voted in late January 2003 to drop support for a federal ban on meat-packer ownership of livestock.<sup>174</sup> Politically, without the support of large numbers of farmers and farm organizations, coupled with the existence of opposing court decisions, passing a national ban is a tough proposition.

Constitutionally, a national ban on corporate farming would not have the same problems faced by state bans. The Dormant Commerce Clause, the vehicle used in *Smithfield* and *Hazeltine* to strike down anticorporate farming legislation, would not be applicable to a national ban. The only problem with a national ban would be an equal protection and/or due process challenge under the Fifth Amendment of the United States Constitution. As previously mentioned, such challenges have easily been struck down at the state level and would likely encounter little resistance on a national level.<sup>175</sup>

#### B. *Future of Anticorporate Farming Legislation—Constitutionality and Economic Policy*

State anticorporate farming legislation has run its course. This legislation was an experiment to protect the small family farmer, and the experiment seems, by surveying all data, to have failed. Based on the data, small family farmers are a dying breed in this country, and while it is arguable that they pro-

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170. See S. 1731, 107th Cong. (2001) (the original proposal); S. 557 107th Cong. (2d Sess. 2002) (the Grassley amendment).

171. See McEowen et al., *supra* note 23, at 268.

172. See H.R. 3803, 107th Cong. (2d Sess. 2002); H.R. 3810, 107th Cong. (2d Sess. 2002).

173. See Jean Caspers-Simmet, *A Terrible Blow to Family Farmers*, AGRINEWS, Jan. 28, 2003.

174. Philip Brasher, *Farmers Face Fight in Congress*, DES MOINES REG., Jan. 29, 2003, available at <http://www.dmregister.com/business/stories/c4789013/20349671.html>.

175. See *Asbury Hosp. v. Cass County*, 326 U.S. 207, 215 (1945); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-34 (8th Cir. 1991); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805 (Mo. 1988); *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269, 278 (Neb. 1986).

duce certain benefits large corporations may not – such as environmental benefits and cultural benefits – saving this dying class through legislation, while still retaining economic prosperity within the marketplace, may be nearly impossible.

Additionally, as a result of the *Smithfield* and *Hazeltine* opinions, it seems inconceivable that remaining anticorporate farming legislation will be upheld. Moreover, as the economy worsens and states begin to realize the economic benefits of agribusiness, anticorporate farming legislation will likely die out relatively soon.

A national anticorporate farming ban would be an even worse idea. Prohibiting corporate farming *per se* results in a disservice to our agricultural industry as well as our economic way of life. While the benefits of such a ban would mean the preservation of life on small farms in middle America, such a ban would mean the loss of thousands of jobs and revenue to individual states as well as increased prices at the store for consumers, both of which are far more disastrous to the country as a whole.

*Hazeltine* and *Smithfield* make it plain that there are constitutional problems with state anticorporate farming statutes. Moreover, the economic implications of such statutes provide further incentives for consumers, farmers, and states to oppose such legislation. Instead of rejecting industrialization (and lobbying state legislatures to prohibit industrialization through anticorporate farming statutes), the family farming community should attempt to work within it by forming cooperatives and competing with these strong market forces, by making their own operations as efficient as agribusiness, and by utilizing the inherent advantages of family farms (i.e. generations of customers, closer connection with farmland). States can choose to preserve or encourage the small family farmer through education, tax breaks and encouraging cooperative formation (or other similar aggregate structures).<sup>176</sup> Thus, by encouraging small family farmers, states will continue to derive the psychological and environmental benefits provided by small family farmers, and continue to derive economic benefits provided by corporate farming. However, the currently proposed solution, restrictive statutes prohibiting corporate farming, is not only unconstitutional, but is also bad economic policy.

### C. Recent Developments—*Eighth Circuit's Decision in Hazeltine*

On August 19, 2003, the Eighth Circuit upheld the lower court's ruling in *Hazeltine*, declaring South Dakota's anticorporate farming statute unconstitutional, reasoning that the law held an unconstitutional discriminatory purpose.<sup>177</sup>

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176. See Stout, *supra* note 3, at 859-60.

177. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003).

The Eighth Circuit concluded that the law failed the first-tier of the Dormant Commerce Clause analysis, because the drafters and supporters of the law intended to discriminate against out-of-state businesses.<sup>178</sup> The discriminatory evidence, the Eighth Circuit noted, included statements made by governmental officials,<sup>179</sup> notes obtained through the drafting and legislative process,<sup>180</sup> and a lack of information concerning the economic viability of the law regarding family farmers.<sup>181</sup> Some of the plaintiffs have vowed to appeal the decision.<sup>182</sup>

The significance of the Eighth Circuit's ruling in *Hazeltine* cannot be understated. The Eighth Circuit went one step further than the federal district court in striking down the law based on the first-tier of the Dormant Commerce Clause analysis.<sup>183</sup> The fact that the Eighth Circuit found the record so heavy with discriminatory intent, evidences the disdain courts will have in the future regarding economic protectionist legislation such as anticorporate farming statutes. The Eighth Circuit's decision in *Hazeltine* may prove to be the death knell to anticorporate farming legislation.

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178. *Id.*

179. *Id.* at 594.

180. *Id.*

181. *Id.* at 595.

182. See Molly McDonough, *Down on the Farm: Laws Aimed at Boosting Family Farmers May Violate Commerce Clause*, A.B.A. J., Nov. 2003, at 18, 20.

183. As mentioned previously, the federal district court invalidated the law based on the second-tier of the Dormant Commerce Clause analysis, not the first-tier.