CORPORATE-FARMING MEASURES IN A POST-*JONES* WORLD

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I. INTRODUCTION

Corporate-farming restrictions are one of the many areas of unique law that comprise agricultural law. Stated simply, these laws restrict corporations[1] from owning agricultural land and, often, engaging in production agriculture, unless the corporation is closely held (usually by family members) and active farmers or rural residents are included as owners. Nine states have these restrictions, prohibiting the use of the corporate form on approximately 312 million acres of farmland, which is approximately seventy-seven percent of the land in those states, and approximately one-third of all farmland in the United States.[2]

The normative foundation for corporate-farming laws has been difficult to pin down. At its broadest level, the debate over these sorts of laws takes on the flavor of a decades-old debate about industrialized agribusiness and the Jeffersonian family farm, with colorful references to the consequences of absentee ownership and feudalism.[3] But, in other respects, it is a debate about the consequences of limited liability.

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* Assistant Professor of Law, University of Nebraska College of Law. Many thanks to the American Agricultural Law Association for inviting me to speak on this topic. A McCollum Research Grant provided support for the research and writing of this Article. Portions of this work are derived from other work I have done on this subject, including an article in press with the *Nebraska Law Review*. *See* Anthony B. Schutz, *Corporate Farming Laws and Discriminatory Effects Under the Dormant Commerce Clause*, 88 NEB. L. REV. (forthcoming 2009). I was also involved in drafting the 2008 Nebraska legislation that is described here as a Dormant-Commerce-Clause-compliant substitute for Nebraska's unconstitutional constitutional provision dealing with corporate farming.

1 Generally, these measures restrict the use of any business form that involves limited liability, such as a corporation, a limited liability company, or a limited partnership. The scope of entities restricted varies from state to state. With the multitude of limited-liability entities that exist under state law, generalizations are difficult. However, each of the corporate-farming bans restricts the corporation, along with other sorts of limited-liability entities. Thus, this Article will refer to corporations as the relevant entities in the text, but the reader should be aware of differences amongst the states in terms of what other sorts of limited-liability may fall within the corporate-farming ban. Similarly, when this Article refers to the use of the corporate form, the reader should take that to mean the use of any limited-liability business form that the particular state's law restricts.

2. Rick Welsh et al., *On the Effectiveness of State Anti-Corporate Farming Laws in the United States*, 26 FOOD POL'Y 543, 544 (noting that Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin have such laws); *see* 1 USDA, 2007 CENSUS OF AGRICULTURE, ch. 2. Table 8 (2008) (reporting national total and state level data), *available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/index.asp.

3. On the topic of industrialization, see, for example, Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing System*, 45 DRAKE L. REV. 289, 302 (1997) (identifying corporate-farming restrictions as "arguably the most visible form of state policy designed to address a feature of indu-

As with most normative questions, matters are not subject to easy generalizations. As a matter of restricting absentee ownership, these measures are incomplete because they operate only on the ability to use a corporate form. They fully allow absentee ownership and production so long as the owners operate under the auspices of full personal liability. Even then, however, these laws cannot be chalked up to a simple suspicion concerning limited liability. After all, these provisions allow the corporate form; they simply limit its use to certain sorts of firms. Taken in that light, it is more accurate to characterize these restrictions as providing the benefits of the corporate form to certain favored firms.

There are five common justifications for this type of control.[4] First, the limited liability associated with the corporate form may free the operation of the

strialization"). For a wonderful collection on the future of farming taking place in the late 1980s, see IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM (Cary Comstock ed., 1987); and for a rigorous discussion of farm structure, see, FARMS IN TRANSITION: INTERDISCIPLINARY PERSPECTIVES ON FARM STRUCTURE (David E. Brewster et al. eds., 1983). *See also* INGOLF VOGELER, THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE (1981); MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION (Bison Books 2008 (1988)). Jim Chen has been, perhaps, the most forceful opponent of corporate-farming laws and other unique aspects of agricultural law. Fashioning the source of these laws as the "American Ideology", Chen states,

> Until the legal apparatus erected during the ascendancy of the American Ideology withers away, the food consumer will remain vulnerable to the political machinations of agrarian interest groups. Agrarian self-dealing polluted the very founding of the American republic and will likely remain until the newly risen system of global, industrialized, and consumer-driven food production completes its conquest of agriculture. Let the farming classes tremble at the feet of consumerism and competition. Bourgeois food consumers have nothing to lose but their bucolic illusions. They have a world to win.

Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 877 (1995); *see also* Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 403 (1997).

4. There is no small level of overlap amongst the various goals one could cite. Each articulated concern can, of course, prompt further questions into why a legislature might be concerned. And the process can be repeated, generating concerns at various levels of generality and specificity. I have distilled these common justifications (or the problems at which these restrictions are geared) from commentary and from my conversations with those seeking to enact such legislation. However, there are others who frame the goals or problems differently. *See, e.g.*, Chen & Adams, *supra* note 3, at 365-67; Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961, 984 (1976) (articulating the goals as "protection against feared vertical integration of family farms into national agribusiness, protection against absentee landlords, and possibly protection against continued rapid inflation of land prices"); Doug O'Brien, *Policy Approaches to Address Problems Associated With Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33, 34-35 (2004); Matt Chester, Note, *Anticorporate Farming Legislation: Constitutionality and Economic Policy*, 9 DRAKE J. AGRIC. L. 79, 81-83 (2004); Eric Voogt, *Pork, Pollution,*

restraints that liability would otherwise impose upon the owners. For instance, liability for environmental harms may not fulfill a remedial function when the offender is a thinly capitalized entity.

Second, economic arguments related to the structure of the production sector have been offered.[5] That is, to the extent vertical integration and horizontal consolidation are facilitated by the use of these business forms, or threatened by firms operating as entities, these restrictions help control further integration and consolidation. In the horizontal sense, this may keep firm sizes smaller and provide more competition amongst producers, though perhaps sacrificing some

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and Pig Farming: The Truth About Corporate Hog Production in Kansas, 5 KAN. J.L. & PUB. POL'Y 219, 220-23 (1996); 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, 836-37 (1996); Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311, 322-27 (1997); Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203, 204 (1993); 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, 431-32 (1995); Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679, 679 (1991); Roger D. Colton, *Old MacDonald (Inc.) Has a Farm . . . Maybe or Nebraska's Corporate Farm Ban: Is it Constitutional?*, 6 U. ARK. LITTLE ROCK L. REV. 247, 250-52 (1983); Alan L. Billings, Note, *The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting*, 16 VAL. U. L. REV. 277, 294-96, 306-10 (1982); Patricia Pansing Brooks, Note, *An Equal Protection Analysis of the Classifications in Initiative 300: The Family Farm Amendment to the Constitution of the State of Nebraska*, 62 NEB. L. REV. 770, 798-00 (1983) (examining the history preceding Nebraska's adoption); Neil E. Harl, *Farm Corporations—Present and Proposed Restrictive Legislation*, 25 BUS. LAW. 1247, 1258 (1969-1970) (providing helpful insights into the history of a few corporate-farming laws but concluding that the policy reasons underlying these restrictions "remain to be articulated"); William R. Phelps, Jr., *Corporate Farming Statutes*, 2 WHITTIER L. REV. 441, 461-64 (1979); David B. Gaebler & Andrew J. Ogilvie, Comment, *Proposed Anticorporate Farm Legislation*, 1972 WIS. L. REV. 1189, 1193-05, 1209-11 (1972); Curtis S. Jensen, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer*, 20 S.D. L. REV. 575, 575 (1975); Don MacDonald, *The Family: How Are You Going to Keep Them Down on the Farm?*, 35 MONT. L. REV. 88, 89-93 (1974); Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 396-402 (1992); Bruce Johnson, *Corporate Restrictions in U.S. Production Agriculture: Economic Implications*, 59 J. AM. SOC'Y OF FARM MANAGERS & RURAL APPRAISERS 21, 21 (1995); Charles R. Knoeber, *Explaining State Bans on Corporate Farming*, 35 ECON. INQUIRY 151, 153 (1997) (explaining that these laws are primarily geared at maintaining the strength of the farm lobby, a form of indirect rent seeking); VIRGINIA G. COOK, COUNCIL OF ST. GOV'TS, CORPORATE FARMING AND THE FAMILY FARM 3 (1976).

5. *See* Morrison, *supra* note 4, at 993-94; Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional – Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, 37 CREIGHTON L. REV. 285, 285-86 (2004); *see also* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 805-06 (Mo. 1988).

scale efficiencies. In the vertical sense, this sort of restriction can maintain a commercially distinct production sector, which may lead to more competition amongst producers and maintain a clear pricing point as products move from producers to buyers. Again, however, this aspect of the restriction may come at the cost of eliminating the efficiencies that come from vertical integration.[6]

Third, some argue that non-qualifying corporations are less likely to be influenced by non-formal or social controls that influence qualifying corporations' behavior.[7] For instance, a large corporation operating without any local owners in a given area may care less about costs it imposes on neighbors in the form of, for example, environmental damage, than firms that are locally owned and operated.

Fourth, corporate ownership of agricultural land may facilitate perpetual ownership. That, in turn, may be seen as a barrier to entry for new farmers which may negatively impact innovation in the field, the existence of farming as it has historically been conceived, or both.[8]

Finally, the trend toward larger landholdings has an impact on rural populations. The use of the corporate form may facilitate concentrated absentee ownership.[9] Thus, its use may contribute to rural depopulation or, at least, dimi-

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6. *See* Morrison, *supra* note 4 (noting the tendency to look at these laws as being designed "to shield local economic units [from] competition from 'economically' superior out-of-state entities" is a difficult case to make because the prohibited firms may or may not be economically superior).

7. A correlating area of scholarly attention is that devoted to corporate social responsibility. *See*, *e.g*., Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002) (one of many articles in a symposium issue on corporate social responsibility).

8. USDA, A TIME TO CHOOSE: SUMMARY REPORT ON THE STRUCTURE OF AGRICULTURE (1981), *reprinted in* KEITH G. MEYER ET AL., AGRICULTURAL LAW: CASES AND MATERIALS 35-41 (West 1985). In addition, the inflationary impact of corporate-market activity on land prices may pose an impediment to beginning and smaller farmers. Colton, *supra* note 4, at 250-51. The price impact of these laws is, however, more complicated than many let on. Agricultural land markets are very segmented, and the price is of course tied to the income potential of the property. *Id.* In the run of cases, then, the price impact of corporate bidders, at least those putting the land to agricultural use, would depend in part on the efficiency of the bidding firms. Thus, the debate over how these restrictions affect land prices can be taken as related to a debate about which firms are more efficient. But it is not altogether clear that these restrictions diminish land values. Nonetheless, some authors have attributed a desire to avoid inflationary pressure on land prices as a reason for these restrictions. *See, e.g.*, Morrison, *supra* note 4, at 996 (noting, however, that these laws are likely ineffective at stabilizing land prices).

9. *See* Morrison, *supra* note 4, at 994-95 (stating that one aim is to exclude absentee landlords). A concern for absenteeism is susceptible to the further question, "Why?". Morrison mainly frames the concern as one for maintaining the "operating independence of a family farmer." *Id.* at 995. However, absenteeism is easily translated into the need for rural people, the effectiveness of informal controls, or both. The matter is also related to the proper size for agricultural

nish the number of people in rural areas who own and operate farms. This, in turn, damages the social and economic fabric of rural environments.[10] Damage may also take the form of a residual population of low-wage farm workers, struggling moderately sized operations, or both. This diminishes the size of the rural middle class, leaving in its wake a small group of wealthy landowners and a large class of relatively poor laborers.[11]

While the list could go on,[12] it is sufficient to stop here. Indeed, in popular debate, the normative foundation for a corporate-farming law is seldom taken beyond the phrase, "protect the family farm." This rallying cry is often used as a shortcut reference to an unarticulated set of traits denoting a vision of farming with which few can disagree without (at least historically) running significant political risks.[13] Unfortunately, this also means that the extent to which corpo-

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landholdings, which overlaps considerably with concerns about consolidation. *See* Phelps, *supra* note 4, at 444-48 (addressing the size issue).

10. Christy Anderson Brekken, *South Dakota Farm Bureau, Inc. v. Hazeltine: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 LAW & INEQ. 347, 349-55 (2004).

11. *See, e.g.*, STRANGE, *supra* note 3, 85-88; U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY, PUBLIC POLICY, AND THE CHANGING STRUCTURE OF AMERICAN AGRICULTURE: A SPECIAL REPORT FOR THE 1985 FARM BILL 25-26 (1985); DEAN MACCANNELL, AGRIBUSINESS AND THE SMALL COMMUNITY 7 (1983) ("Everyone who has done careful research on farm size, residency of agricultural land owners and social conditions in the rural community finds the same relationship: as farm size and absentee ownership increase, social conditions in the local community deteriorate. . . . Communities that are surrounded by farms that are larger than can be operated by a family unit have a bi-modal income distribution with a few wealthy elites, a majority of poor laborers, and virtually no middle class.).

12. For instance, in the 1970s, one commonly cited effect of corporate-farming restrictions was to counteract the effect of federal tax provisions that encouraged the use of agricultural land as a tax shelter. *See, e.g.*, MacDonald, *supra* note 4, at 100-01. The list Nebraska offered to the district court in *Jones v. Gale* was as follows: (1) economic competition, (2) reduced stewardship of natural resources, (3) reduced participation in local government and volunteer activity, (4) vertical integration of agricultural production, (5) efficiencies of scale reducing demand for labor, (6) reduced demand for products and services from local businesses, and (7) reduced availability of land for purchase upon death or retirement of the resident owner. Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 22, Jones v. Gale, 405 F. Supp. 2d 1066 (D. Neb. 2005) (No. 8:04-cv-00645).

13. *See, e.g.*, J. W. LOONEY ET AL., AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS 550 (1990) ("The fear is that large corporations would enter farming and eventually displace 'family farms'."); Morrison, *supra* note 4 ("[T]here is one overriding purpose, the protection of the family farm as a basic economic unit. . . ."). The concerns can be bottled in different blanket statements as well. *See, e.g.*, Asbury Hospital v. Cass County, 326 U.S. 207, 214 (1945) (recognizing for Equal Protection purposes the validity of a "state policy against the concentration of farming lands in corporate ownership."); Omaha Nat'l Bank v. Spire, 389 N.W.2d 269, 283 (Neb. 1986).

rate-farming laws avoid whatever problems they are geared at dealing with is difficult to measure, and serious discussions about these laws' underpinnings and ramifications are sometimes difficult to find.[14] Nonetheless, these laws at least represent a collective statement about what producers are best for production agriculture.[15]

This collective statement and its underlying rationales have been cast aside, or perhaps found wanting, in recent litigation under the Dormant Commerce Clause (DCC) doctrine. This Article explores the continued validity of corporate-farming restrictions after *Jones v. Gale*, a recent Eighth Circuit Court of Appeals decision striking down Nebraska's restriction under the DCC doctrine.[16] Elsewhere, I have explained why *Jones* was a difficult case and why

14. *But see* Morrison, *supra* note 4, at 992-96; Phelps, *supra* note 4; BRUCE B. JOHNSON ET AL., INST. OF AGRIC. & NATURAL RES., CORPORATE FARMING AND CORPORATE FARMING RESTRICTIONS IN NEBRASKA 28-44 (1988); John R. Schroeter et al., *Anti-Corporate Farming Laws and Industry Structure: The Case of Cattle Feeding*, 88 AM. J. OF AGRIC. ECON. 1000, 1013 (2006) (concluding that there was "no strong evidence that Initiative 300 affected the dynamics of feedlot industry structure in Nebraska"); RICK WELSH & THOMAS A. LYSON, ANTI-CORPORATE FARMING LAWS, THE "GOLDSCHMIDT HYPOTHESIS" AND RURAL COMMUNITY WELFARE 11 (2001) (concluding that corporate-farming measures were "likely to have been beneficial to rural communities"); Welsch et. Al., *supra* note 2; *DAVID* J. PETERS, MO. DEP'T OF ECON. DEV., REVISITING THE GOLDSCHMIDT HYPOTHESIS: THE EFFECT OF ECONOMIC STRUCTURE ON SOCIOECONOMIC CONDITIONS IN THE RURAL MIDWEST 23-26 (2002); Johnson, *supra* note 4, at 24 ("A reasoned assessment of corporate farming restrictions in . . . today's production agriculture points to one basic conclusion: they are no longer serving their original intent of promoting a family-farm based agriculture and, in fact, may be running counter to it.").

Obviously, there are counterpoints to each of these policy rationales and more arguments that can be made. For instance, the corporation's separation of ownership and management may facilitate innovation and provide for a more efficient production model. The point here, however, is simply to provide a brief understanding of the policy goals these measures seek to advance.

15. Morrison, *supra* note 4, at 997.

> The significance of the laws thus stands not in their specific provisions, but in their symbolic character. They are a warning that the abuse of economic position by agribusiness (or, indeed, the excessive use of the permissible avoidance techniques) will unleash the same political forces which enacted this body of legislation. It is this symbolic character which may provide the greatest protection for the family farmer.

16. This is an important limitation on the scope of this Article. I am concerned only with the prospect of discrimination arising from qualifying criteria that can be met by residents more easily than non-residents. Thus, for example, I am not concerned with the prospect of DCC doctrine challenges based on discrimination that could arise from geographically neutral criteria that happen to identify proportionately more non-resident firms for burdensome treatment than resident firms. Indeed, such may be the case with any farmer-oriented policy enacted by any midwestern state.

corporate-farming measures may not be discriminatory for purposes of the DCC doctrine.[17] Here, I take *Jones* at face value, and evaluate the balance of state corporate-farming laws for discrimination. In so doing, I provide a helpful synthesis of corporate-farming measures, which should allow policymakers to see how these laws differ from state to state. This should inform the necessity of amendments, provide some examples of amendments that may satisfy the DCC doctrine in the wake of *Jones*, and provide guidance to those interpreting and applying existing restrictions.

While there are broader overviews of how corporate-farming measures resemble one another,[18] no article as of this writing provides an analysis of the common traits of corporate-farming measures with the DCC doctrine's concept of discrimination in mind. This is likely because every commentator to consider the question concluded that corporate-farming measures were not discriminatory under the DCC doctrine.[19] Post-*Jones*, however, discrimination has placed these

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Nor am I concerned with the prospect of challenges based on the extraterritoriality principle embedded in the DCC doctrine. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 640-43 (1982); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987); Norman R. Williams, *The Foundation of the American Common Market*, 84 NOTRE DAME L. REV. 409, 412 (2008); DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 272-77 (2004); Michael J. Ruttinger, Note, *Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545 (2007). Such a challenge could, perhaps, be made to state laws that regulate farm entities by restricting the total amount of landholdings such entities may have both within and beyond the state's boundary.

17. *See* Anthony B. Schutz, *Corporate Farming Laws and Discriminatory EffectsUnder the Dormant Commerce Clause, 88* NEB. L. REV. *(forthcoming 2009).*

18. *See, e.g.*, Johnson, *supra* note 4; Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385, 388-89 (1999); Haroldson, *supra* note 4; JULIAN CONRAD JUERGENSMEYER & JAMES BRYCE WADLEY, AGRICULTURAL LAW, § 30.12 (1982); Fred L. Morrison, *Restrictions on Corporate and Alien Ownership and Operation of Farms, in* 2 JOHN H. DAVIDSON, AGRICULTURAL LAW §§ 7.07–.12 (1981); Morrison, *supra* note 4; Colton, *supra* note 5, at 253-57; Phelps, *supra* note 4, at 448-56; FRED L. MORRISON & KENNETH R. KRAUSE, USDA, AGRIC. ECON. REPORT NO. 284, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION (1975); Harrison M. Pittman, Annotation, *Validity, Construction, and Application of State Constitutional and Statutory Provisions Regarding Corporate Farming*, 125 A.L.R. 5th 147 (2005).

19. *See generally* John C. Pietila, Note, "*[W]e're Doing This to Ourselves": South Dakota's Anticorporate Farming Amendment*, 27 J. CORP. L. 149, 164-68 (2001) (predicting how corporate-farming restrictions would fare under the DCC doctrine); Morrison, *supra* note 4, at 982-87 (noting the possibility of a discrimination analysis, but settling on *Pike* and evaluating corporate-farming measures under that frame); Colton, *supra* note 4, at 268-270 (concluding that Nebraska's measure passed muster under *Pike*).

laws in serious question. In order to understand which laws might be discriminatory, a new look at how corporate-farming laws operate is necessary.

The following discussion first introduces some of the general aspects of corporate-farming measures to situate the reader within the broad framework of these laws. From there, the Article describes the *Jones* court's analysis, gleaning from it the most important aspects of corporate-farming restrictions for purposes of the DCC doctrine's anti-discrimination rule—those qualifying activities that have geographic implications and thus discriminate against non-residents. With that basic premise in mind, the Article digs into the finer points of corporate-farming restrictions and identifies those approaches that are and are not placed in question by *Jones*.[20]

This Article also uses Nebraska's experience after *Jones* to provide an example of amendments that could bring a state's corporate-farming measure into compliance with the DCC doctrine. The upside of engaging in these efforts is renewed attention to the various underlying rationales for corporate-farming restrictions. Nebraska's experience also offers some short-term evidence of the sort of debate ensuing in the wake of *Jones*.

There are three important items that this Article does not do that deserve mention at the outset. First, this Article does not take up the task of identifying which state's corporate-farming laws may have been enacted with an illicit discriminatory purpose. For instance, a set of provisions in the South Dakota Constitution[21] was declared unconstitutional under the DCC doctrine in *South Dakota Farm Bureau, Inc. v. Hazeltine*[22] based on the discriminatory purpose behind its passage. The *Jones* court also relied upon the presence of discriminatory purpose as an alternative means of triggering the DCC doctrine's strict scrutiny. Because this Article focuses on the *Jones* court's facial discrimination conclusion, *Hazeltine*'s treatment of South Dakota's constitutional provision is of marginal relevance,[23] as is the purpose inquiry that the *Jones* court undertook.

Second, this Article does not engage the question of whether a state corporate-farming restriction can be justified under the test that ensues for discrimi-

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20. Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006). While this Article is fairly comprehensive relative to its purpose, there are a variety of minutia that are not covered. For example, trusts created for the benefit of family members are usually dealt within the ownership structure. And generally, ownership may not be layered among entities. The focus of this Article, however, is on the qualifying-activities criteria and the geographical implications of those criteria.

21. S.D. CONST. art. XVII, § 21.

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

23. Thus, I also do not discuss the terms of South Dakota's constitutional amendment in this Article. That language was declared invalid for reasons unrelated to its language and, in any event, it was closely modeled after Nebraska's. However, South Dakota continues to restrict corporate farming by statute. Those statutory restrictions are covered in this Article.

natory legislation.[24] While there are arguments to be made, practically speaking, very few state laws pass muster under this standard.[25] Indeed, given the slippery nature of the underlying purposes of corporate-farming measures, the ability to articulate alternative approaches to the underlying problems will almost always eliminate the state's ability to prove the absence of alternatives, as it must under the DCC doctrine.[26] Thus, the best argument for sustaining corporate-farming measures is to make them non-discriminatory and hope for the best under a lesser standard of review.

Finally, this Article does not discuss the Americans with Disabilities Act (ADA) implications of these laws. The district court in *Jones* used the ADA as an alternative ground for striking down Nebraska's law,[27] but the Eighth Circuit refused to reach the issue.[28] It would take the analysis too far afield to delve into the applicability of the ADA[29] and the parameters of the ensuing reasonable-modification duty placed on states when they allow firms to use the corporate form.[30]

24. "A discriminatory law is virtually per se invalid, and will survive only if 'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" Dep't of Revenue of KY. v. Davis, 128 S. Ct. 1801, 1808 (2008) (quoting Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 93, 101 (1994)).

25. The only example at the Supreme Court level is *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986) (allowing a ban on the importation of baitfish).

26. *See* Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006) (concluding that Nebraska failed to adequately justify its law given the presence of adequate alternatives and assuming that a "mere desire to maintain the status quo" cannot constitute a legitimate local interest).

27. Jones v. Gale, 405 F. Supp. 2d 1066, 1085-87 (D. Neb. 2005); *see also* S.D. Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1039-43 (D. S.D. 2002), *rev'd on other grounds*, 340 F.3d 583, 589-91 (8th Cir. 2003).

28. Jones, 470 F.3d at 1271.

29. *See* 42 U.S.C. § 12132 (2006) (''no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

30. In addition, the question of whether a particular plaintiff is a "qualified individual with a disability" and the "essential eligibility requirements" involved in this context would deserve considerably more attention than the district court gave them. *See* 42 U.S.C. § 12131(2) (2006).

II. General Attributes of Corporate-Farming Restrictions[31]

Thirteen states restrict the use of the corporate form in the agricultural sector.[32] Nine of these states have what one would generally refer to as corporate-farming laws. They are Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.[33] North Dakota's is perhaps the oldest, dating to 1932,[34] but restrictions on the use of the corporate form date back much further and are far from uncommon.[35] Texas,[36] West Virginia,[37] South Carolina,[38] and Arizona[39] have other restrictions that affect corporate ownership of agricultural land.[40]

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31. Some of the text appearing in this part of the Article was presented in a report to the Nebraska Legislature submitted in December 2007. Anthony B. Schutz & J. David Aiken, Research Area 4: "Compile the Definitions of Engaging in Farming and Ranching from USDA Program Qualification, Regulatory Definitions, [and] Case Law" 4-19 (2007).

32. McEowen & Harl, *supra* note 5, at 286; 6 Neil E. Harl, Agricultural Law § 51.04(2) (2008).

33. 6 Harl, *supra* note 32.

34. *See* Ross H. Espeseth, Note, *North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law*, 58 N.D. L. Rev. 283, 283 (1982).

35. *See* T. P. McElroy, *North Dakota's Anti-Corporate Farming Act*, 36 N.D. L. Rev. 96, 96-97 (1960) (addressing North Dakota's 1932 corporate-farming act and noting that similar laws existed in the mortmain statutes of the thirteenth century—"'dead-hand' statutes which prohibited religious bodies from indefinitely holding lands devised to them"); 6A Fletcher Cyclopedia of the Law of Private Corporations § 2802 (2005); Great-West Life Assurance Co. v. Courier-Journal Job Printing Co., 288 S.W.2d 639, 641 (Ky. Ct. App. 1956) (noting purpose of restriction on real-estate holdings for corporations was "like that of the old English mortmain statutes, which were to prevent property from falling into 'dead' or unserviceable hands or to limit monopolistic ownership and control of the land by concentrated wealth of corporations"); Morrison, *supra* note 4, at 975-77 (tracking historical development); Phelps, *supra* note 4, at 441-48 (tracking historical roots to the Magna Carta). On the broader transition that has culminated in the present widespread use of business forms, see, Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 Am. U. L. Rev. 81 (1999). For coverage of the existing statutory exceptions to the general rule of limited liability, see, Thomas E. Rutledge, *Limited Liability (Or Not): Reflections on the Holy Grail*, 51 S.D. L. Rev. 417 (2006).

36. Texas Business Corporation Act § 2.01(B) (2005).

37. W. Va. Code § 11-12-75 (2009) (imposing a five cent per acre tax on all corporations owning more than 10,000 acres of land in the state).

38. S.C. Code Ann.§12-43-220(d)(1) (2009) (imposing different tax rates on agricultural land held by corporations depending on whether the corporation is closely held or not).

39. Ariz. Const. art. X, § 11 (prohibiting individuals, corporations or associations from purchasing more than 160 acres of agricultural land or more than 640 acres of grazing land); Ariz. Rev. Stat. Ann. § 37-240 (2008). It is unclear whether this restriction prohibits the ownership of larger tracts of land, or merely the quantity involved in a particular purchase. It does appear, however, that this restriction applies only to the acquisition of lands from the State of Arizona. *Cf.* BNA Tax Mgmt. Portfolios, Estates, Gifts, and Trusts Series, Valuation, No. 833-2d §

Each of the nine state's corporate-farming laws has three main parts. First, they prohibit corporations from engaging in certain activities. Second, with regard to those restricted activities, the laws provide industry-specific exceptions. Third, in addition to industry-specific exceptions, each state's law provides exceptions to certain qualified entities.

The third aspect of these laws—qualified-entity exceptions—is the most relevant for DCC purposes. As the name implies, qualifying-entity exceptions provide a set of criteria that must be met in order to engage in the restricted activities. These criteria can fall into two categories: criteria that identify family farm entities and criteria that identify other authorized (non-family) entities.

The following discussion delves into each part of state corporate-farming restrictions. Once the stage is set for the qualifying-entity exceptions for family-farm entities, the litigation concerning those provisions under the DCC doctrine is described and the analysis expanded to consider the effect of that litigation on other states' family-farm exceptions. From there, the analysis considers the impact of this litigation on other aspects of these measures, including the authorized-entity exceptions found in many states.

A. *Restricted Activities: Owning Agricultural Land and Farming*

Each of the nine states' measures defines what activities are restricted. Most provisions create a general rule that prohibits the corporation from owning or acquiring an interest in[41] agricultural land.[42] In addition, many restrictions

XIII (2008) (characterizing this restriction as "a limit on the quantity of real property owned by a corporation").

40. Texas' and Arizona's restrictions are the most direct of the four states mentioned here in restricting corporate ownership; however, they do not involve distinctions between corporations based on their ownership structures, the activities of their owners, or both. Arizona's measure also only involves the sale of state lands. *See* ARIZ. REV. STAT. ANN. § 37-240 (2008). Similarly, Colorado has some laws that exhibit favoritism for small operations, but it is not paradigmatically a corporate-farming law. *See* COLO. REV. STAT. §§ 25-7-109, 25-7-138, 25-8-501, 25-8-504 (2008) (regulating large hog operations' waste management activities, but exempting smaller operations); *see also* 6 HARL, *supra* note 32, at § 51.04(2)(n) (describing Colorado program).

41. This Article uses the term "owning" to simplify matters somewhat. In reality, the restrictions apply to various levels of ownership interests that the corporation may acquire. *See* IOWA CODE § 9H.4 (2009); KAN. STAT. ANN. § 17-5904 (2008); MINN. STAT. § 500.24(3) (2009); MO. ANN. STAT. § 350.015 (West 2008); NEB. CONST. art. XII, § 8(1); N.D. CENT. CODE § 10-06.1-02 (2008); OKLA. STAT. tit. 18, §§ 951, 955 (2009); S.D. CONST. art. XVII, § 21; S.D. CODIFIED LAWS § 47-9A-3 (2008); WIS. STAT. § 182.001 (2009). To make matters more complex, corporate-farming bans often contain exceptions for encumbrances that one could classify as ownership interests. *See e.g.* NEB. CONST. art. XII, § 8(1)(L) ("These restrictions shall not apply to: . . . A bona fide encumbrance taken for purposes of security"). In the event such encumbrances are called upon

prohibit the corporation from farming.[43] The two restrictions are, however, related because restrictions on ownership generally apply to agricultural land—land used in farming. Thus, the definition of farming helps define what lands are subject to the ownership restriction, even in states that contain no restriction on engaging in farming.[44] The definition of farming in some of the acts is also used to identify production agriculture (or land used for production agriculture) and

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by the holder of the interest (e.g., as security for a debt), corporate-farming restrictions often have time limits and obligations that the holder must comply with. *See e.g.* NEB. CONST. art. XII § 8(1)(K) (requiring that such lands be "disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of, except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch").

42. IOWA CODE § 9H.4 (2009) (prohibited entities may not "either directly or indirectly, acquire or otherwise obtain or lease any agricultural land in this state"); KAN. STAT. ANN. § 17-5904(a) (2008) (stating that no prohibited entity may "directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state"); MINN. STAT. § 500.24(3) (2009) (prohibited entities may not "directly or indirectly, own, acquire, or otherwise obtain any interest, in agricultural land"); MO. ANN. STAT. § 350.015 (West 2008) (prohibited entity may not "directly or indirectly, acquire, or otherwise obtain an interest, whether legal beneficial or otherwise, in any title to agricultural land in this state"); NEB. CONST. art. XII, § 8(1) (prohibited entity may not "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state"); N.D. CENT. CODE § 10-06.1-02 (2008) (prohibited entities "are prohibited from owning or leasing land used for farming or ranching"); OKLA. STAT. tit. 18, § 955 (2009) (prohibited entities may not "own or lease any interest in land to be used in the business of farming or ranching"); OKLA. STAT. tit. 18, § 951 (2009) (providing that "no foreign corporation shall be formed or licensed under the Oklahoma General Corporation Act for the purpose of . . . owning or leasing any interest in land to be used in the business of farming or ranching" but allowing domestic corporations to engage in such activities if they meet certain requirements); S.D. CONST. art. XVII, § 21 (prohibited entities may not "obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state"); S.D. CODIFIED LAWS § 47-9A-3 (2008) (prohibited entities may not "directly or indirectly, own, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or capable of being used for farming in this state"); WIS. STAT. § 182.001 (2009) (prohibited entity may not "own land on which to carry on farming operations").

43. Kansas appears to restrict only land ownership (broadly defined). *See* KAN. STAT. ANN. § 17-5904(a) (2008) (delineating ownership as the only prohibited activity). South Dakota's statute also appears to restrict only the "owning, leasing, holding or otherwise controlling agricultural land to be used in the business of agriculture." S.D. CODIFIED LAWS § 47-9A-1 (2008). However, one provision in South Dakota's statutes restricts operations: "No corporation, except a family farm corporation, may own or operate any hog confinement facility. " S.D. CODIFIED LAWS § 47-9A-13.1 (2008). Iowa also appears to restrict only the acquisitions of interests in agricultural land. IOWA CODE § 9H.4 (2009). The remaining states generally include both ownership and operations. *See e.g.* OKLA. STAT. tit. 18, § 955 (2009) (prohibited entities may not "engage in farming or ranching"); *see also* MINN. STAT. § 500.24(3) (2009); MO. REV. STAT. § 350.015 (2008); N.D. CENT. CODE § 10-06.1-02 (2008); WIS. STAT. § 182.001 (2009); Johnson, *supra* note 4, at 26.

44. *See e.g.* IOWA CODE § 9H.1(2) (2007) (defining agricultural land as "land suitable for use in farming"); IOWA CODE § 9H.1(12) (2007) (defining "farming" (quoted *infra* footnote 45)).

distinguish it from the further steps of processing crops or livestock. Additionally, the definition of farming sometimes also excludes some sectors of production agriculture from the reach of these laws.[45]

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45. *See* IOWA CODE § 9H.1(12) (2007) ("'Farming' means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming shall not include the production of timber, forest products, nursery products, or sod and farming shall not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services."); KAN. STAT. ANN. § 17-5903(h) (2008) (using the same definition as Iowa); MINN. ANN § 500.24(2)(a) (2009) ("'Farming' means the production of (1) agricultural products; (2) livestock or livestock products; (3) milk or milk products; or (4) fruit or other horticultural products. It does not include the processing, refining, or packaging of said products, nor the provision of spraying or harvesting services by a processor or distributor of farm products. It does not include the production of timber or forest products, the production of poultry or poultry products, or the feeding and caring for livestock that are delivered to a corporation for slaughter or processing for up to 20 days before slaughter or processing."); MO. ANN. STAT. § 350.010(6) (West 2009) ("'Farming' means using or cultivating land for the production of (a) agricultural crops; (b) livestock or livestock products; (c) poultry or poultry products; (d) milk or dairy products; or (e) fruit or other horticultural products, provided; [sic] however, "farming" shall not include a processor of farm products or a distributor of farming supplies contracting to provide spraying, harvesting or other farming services."); NEB. CONST. art. XII, § 8(1) ("[T]he cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or . . . the ownership, keeping or feeding of animals for the production of livestock or livestock products."); N.D. CENT. CODE § 10-06.1-01 (2009) ("[C]ultivating land for production of agricultural crops or livestock, or the raising or producing of livestock or livestock products, poultry or poultry products, milk or dairy products, or fruit or horticultural products. It does not include production of timber or forest products, nor does it include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services."); S.D. CODIFIED LAWS § 47-9A-2(4) (2009) ("[T]he cultivation of land for the production of agricultural crops; livestock or livestock products; poultry or poultry products; milk or dairy products; or fruit or other horticultural products. It shall not include the production of timber or forest products; nor shall it include a contract whereby a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services."); WIS. STAT. ANN. § 182.001(3) (2009) ("[T]he production of dairy products not including the processing of such dairy products; the production of cattle, hogs and sheep; and the production of wheat, field corn, barley, oats, rye, hay, pasture, soy beans, millet and sorghum.").

South Dakota's statutes are somewhat unique. The quoted language applies only to the "cultivation of land" for articulated purposes. Separate provisions cover the livestock production side of agriculture. S.D. CODIFIED LAWS § 47-9A-3.2 (2009) (exempting "facilities acquired by a corporation for the purpose of feeding poultry for the production of meat or eggs."); S.D. CODIFIED LAWS § 47-9A-10 (2009) (exempting "agricultural land operated by a corporation for the purpose of raising breeding stock for resale to farmers . . . ."); S.D. CODIFIED LAWS § 47-9A-11 (exempting "agricultural lands acquired by a corporation solely for the purpose of feeding livestock."); S.D. CODIFIED LAWS § 47-9A-13.1 (2009) (prohibiting the corporate ownership or operation, except by family farm corporations, of hog confinement facilities and further defining hog confinement facility to mean "any real estate used for the breeding, farrowing and raising of swine.").

These restricted activities are the reason why the DCC doctrine applies. Both fall within Congress's broad power to regulate interstate commerce and, thus, the DCC doctrine restricts states' legislative authority. However, placing restrictions on these activities does not, itself, run afoul of the DCC doctrine as interpreted and applied in *Jones*. Indeed, a complete prohibition on corporations engaging in these activities would not constitute the sort of discriminatory treatment with which the DCC doctrine is concerned. However, no state imposes a complete prohibition. All provide exceptions.

B. *Industry-Specific Exceptions*

All of the states make industry-specific exceptions for certain activities that would otherwise fall within the scope of the restricted activities (land ownership and production). These exceptions[46] take many forms, but the most common are exceptions for certain sectors of production agricultural like poultry production,[47] swine production facilities,[48] and feedlots.[49] The *Jones* opinion cannot be said to raise the prospect of successful DCC doctrine challenges to these aspects of corporate-farming measures.

C. *Family-Farm Corporations Exceptions*

Some corporations, however, are allowed to engage in otherwise prohibited activities—i.e., activities that are restricted and not within an industry-specific exception. These exceptions reflect a legislative judgment about who should be allowed to farm using limited-liability business forms. To qualify for

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Oklahoma does not define the term "engaging in farming or ranching" used in OKLA. STAT. ANN. tit. 18, § 951 (2009), or "engage in farming or ranching" used in OKLA. STAT. ANN. tit. 18, § 955 (2009).

46. These exceptions may mean that there are some things that the legislature does not regard as yeoman farming anymore. Perhaps some in the legislature (or in the electorate) believe these are farming activities, but the art of political compromise kept the total vision from coming to fruition. Yet another explanation could be that those excepted segments are areas in which economically efficient scales are more likely to be achieved through consolidation and integration. The existence of entities achieving such scales at the time the measures are adopted or amended also helps explain in less "special interest" terms the idea of political compromise.

47. S.D. CODIFIED LAWS § 47-9A-3.2 (2009) (excepting "facilities acquired by a corporation for the purpose of feeding poultry for the production of meat or eggs").

48. MO. ANN. STAT. § 350.016 (West 2009) (excepting some counties from the corporate-farming restriction in Missouri).

49. KAN. STAT. ANN. § 17-5904(a)(8) (2009); S.D. CODIFIED LAWS § 47-9A-11 (2009) (exempting "agricultural lands acquired by a corporation solely for the purpose of feeding livestock"); *but see* NEB. CONST. art. XII, § 8(1) (making no such exception).

these exceptions, the corporation must fulfill certain criteria. The most common set of criteria define family-farm corporations and it was this sort of an exception that the *Jones* court concluded ran afoul of the DCC doctrine.

1. *Ownership Structure*

The requirements that family-farm corporations must meet differ from state to state, but all states specify a particular ownership structure. That is, all nine states require that the corporation be closely held. Wisconsin, for example, only restricts the ownership structure— it limits the corporation's ownership to fifteen shareholders who are natural persons.[50] It allows, however, "[l]ineal ancestors and lineal descendants, whether by blood or by adoption, and aunts, uncles and 1st cousins thereof" to count as one shareholder, provided "this collective authorization shall not be used for more than one family in a single corporation . . ."[51] The other states' ownership-structure requirements also reflect a favored status for familial ownership, though often in different ways.[52]

2. *Income Tests*

Oklahoma and Iowa require not only a certain ownership structure, but also require that the corporation receive a percentage of its income from farming.[53] These sorts of provisions reflect a policy against vertical integration, nonfarmer ownership, or both.

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50. WIS. STAT. § 182.001(1)(a), (c) (2009).

51. WIS. STAT. § 182.001(1)(a) (2009).

52. *See, e.g.*, IOWA CODE § 9H.1(8)(a) (2007) (requiring family members to own a majority of the voting stock of the family farm corporation); IOWA CODE § 9H.1(9) (2007) (similar requirements for family farm limited liability company), IOWA CODE § 9H.1(10) (2007) (similar requirements for family farm limited partnerships); OKLA. STAT. tit. XVIII, § 951(A)(1),(3) (2009) (corporations have a ten shareholder limit unless additional shareholders are family members); OKLA. STAT. tit. XVIII, § 955(A)(4) (2009) (partnerships and limited partnerships also have a ten partner limit unless additional partners are family members); OKLA. STAT. tit. XVIII, § 955(A)(5) (2009) (limited liability companies have a thirty member limit unless additional members are family members). Counting family members as one shareholder is similar to the federal tax code's treatment of family members in an S Corporation. *See* 26 U.S.C. § 1361(c)(1) (2007).

53. OKLA. STAT. tit. XVIII, § 951(A)(2) (2009) (providing a 35% limit on income from non-farming or ranching sources); OKLA. STAT. tit. XVIII, § 955(A)(4)(c), (5)(c) (requiring that 65% of entity income come from farming or ranching sources for partnerships, limited partnerships, and limited liability companies); IOWA CODE § 9H.1(8)(c) (2007) (providing 60% gross farming-revenue requirement for family farm corporations).

3. *Qualifying Activities*

The remaining six states – Kansas, Minnesota, Missouri, Nebraska, North Dakota,[54] and South Dakota – require not only a certain ownership structure, but also require that someone associated with the corporation—a qualifying individual—perform certain qualifying activities. The six states differ, however, in terms of what qualifying activities the individual must perform and who must perform them. As for qualifying individuals, some states require that the qualifying individual be a shareholder,[55] some require that he be a shareholder who is a family member,[56] and some require only that she be a family member.[57] As for qualifying activities, the six states differ in the finer points of their requirements, but they generally require that the qualifying individual either reside on the farm or be actively engaged in farming.

Farm residency does not differ from state to state. All six of these states allow farm residency to qualify the corporation.[58] That is, if the qualifying individual resides on the farm or ranch (and it has the correct ownership structure), then the corporation may engage in the prohibited activities (own agricultural land or engage in farming).[59]

54. N.D. CENT. CODE § 10-06.1-12(7),(8) (2009) (explaining gross income requirements and limitations that require qualifying individuals to perform qualifying activities); *cf.* N.D. CENT. CODE § 10-06.1-08 (2009) (requiring seventy-five percent of cooperative corporations' members or shareholders be "actual farmers or ranchers residing on farms or ranches or depending principally on farming or ranching for their livelihood").

55. S.D. CODIFIED LAWS § 47-9A-14 (2009) (allowing the qualifying individual to be a shareholder); *see also* KAN. STAT. ANN. § 17-5903(j)(3) (2009) (similarly allowing the qualifying individual to be a shareholder); MO. ANN. STAT. § 350.010(5) (West 2009).

56. MINN. STAT. ANN. § 500.24(2)(c) (West 2009) (arguably requiring that the family member own shares); s*ee also* NEB. CONST. art. XII, § 8(1)(A) (also arguably requiring that the family member own shares); N.D. CENT. CODE § 10-06.1-12 (2009) (allowing corporations or limited liability companies of which all shareholders or members are family members, requiring that the officers, directors, governors and managers be shareholders who are "actively engaged in operating the farm or ranch" and requiring that at least one of the shareholders or members reside on or operate the farm or ranch).

57. MINN. STAT. ANN. § 500.24(2)(c) (West 2009) (arguably allowing the family member performing the qualifying activities to own no shares). *See also* NEB. CONST. art. XII, § 8(1)(A) (similarly allowing the family member performing the qualifying activities to own no shares).

58. KAN. STAT. ANN. § 17-5903(j)(3) (2009); MINN. STAT. ANN. § 500.24(2)(c) (2009); MO. ANN. STAT. § 350.010(5) (West 2009); NEB. CONST. art. XII, § 8(1)(A) (2009); N.D. CENT. CODE § 10-06.1-12(6) (2009); S.D. CODIFIED LAWS § 47-9A-14 (2009).

59. N.D. CENT. CODE § 10-06.1-12(6) (2009) (North Dakota is somewhat of an exception because it requires that the shareholder officers and directors (for corporations) or the shareholder governors and managers (for limited liability companies) actively operate the farm. Thus, shareholder residency is not enough to qualify such a corporation or limited liability company.).

With active engagement, the states diverge markedly in the standards they set to identify individuals who are actively engaged in farming. This divergence is understandable because there is no universal view of who farmers are. At a strict level, one could define farmers as those people who personally perform all of the farm's labor and make all decisions related to the operation's business. At a more relaxed level, one could define farmers as those people whose contributions to the operation are exposed to production risk.[60] In between these extremes, there are various levels of involvement that a one could conclude separate those who farm from those who do not.

Corporate-farming restrictions try to require that the qualifying individual be an active farmer by using standards that identify people within this spectrum of active engagement. However, the matter is complicated by vague standards employed by many of the states. Specifically, Minnesota, Missouri, North Dakota, and South Dakota require that the qualifying individual "operate" or "actively operate" the farm.[61] It is therefore unclear how much or what the qualifying individual must do to qualify in these states.

The vague approach to active engagement has not been the subject of much judicial interpretation. Two unreported cases in Minnesota deal with a closely related provision that gives unincorporated "family-farms" special rights. They appear to be inconsistent.[62] Case law aside, these vague standards place those who implement the measure in the position of choosing a level of involvement with production agriculture that is sufficient to deem the qualifying individual a farmer.

Kansas, Missouri, and Nebraska provide more definite standards for determining who is actively engaged.[63] Kansas requires that the qualifying individ-

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60. *See, e.g.*, 7 C.F.R. §1400.207 (2009).

61. MINN. STAT. ANN. § 500.24(2)(c) (West 2009); MO. ANN. STAT. § 350.010(5) (West 2009); N.D. CENT. CODE § 10-06.1-12(6) (2009) (officers, directors, governors, and managers must be "actively engaged in operating[,]" while the additional qualifying individual must be "operating" the farm or ranch); S.D. CODIFIED LAWS § 47-9A-14 (2009).

62. *See* Bornhorst v. Budzik, No. C8-90-393, 1990 WL 119348, at *1 (Minn. Ct. App. Aug. 21, 1990) (concluding that an absentee landlord was not "actively engaged in farming" for purposes of MINN. STAT. § 500.24(2)(b) (defining an unincorporated family farm) where the landlord "(1) received one-third of the crops; (2) paid for the taxes, crop insurance and minor improvements; and (3) helped decide what crops were to be produced"); *but see* Fed. Land Bank of Saint Paul v. Wessels, No. C7-88-2233, 1989 WL 38400, at *2 (Minn. Ct. App. April 25, 1989) (concluding that an owner confined to a nursing home may be actively engaged and an absentee owner/daughter may be actively engaged in farming if she was "actively involved in financial or other aspects of the farming operation that do not require her physical presence in Minnesota.").

63. Minnesota could also be added to this list with regard to livestock operations. Minn. Stat. Ann. § 500.24(2)(f)(5) (West 2009) includes more specific provisions concerning livestock

ual contribute labor or management to the farming operation.[64] Missouri, although it is in the vague "actively operating" camp, is similar to Kansas because it allows a management contribution to fulfill the "actively operating" criterion. Such a management contribution is, however, only a statutory example of what qualifies as "actively operating."[65] Nebraska requires both labor and management.[66] Thus, the more definite standards require labor, management, or both as a means of identifying farmers in these three states.

However, each of these three states differ in terms of the extent or significance of the necessary contribution. Missouri's example of someone who is "actively operating" the farm is an owner who "exercises *some* management *control or direction*."[67] Kansas provides that the person must be "*actively engaged* in the labor or management."[68] Nebraska provides that the person must be "*actively engaged* in the *day to day* labor and management."[69] All of these emphasized terms (e.g., "active"[70]) are subject to further interpretation.

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operations. In addition to family farm corporations, it allows "[a]uthorized livestock farm corporations" to produce livestock if 75% of its shareholders are farmers and at least 51% of those farmers are "actively engaged in livestock production." *See also* Minn. Stat. Ann. § 500.24(3)(a) (West 2009) (providing exception). Minn. Stat. Ann. § 500.24(2)(o) (West 2009) defines "Actively engaged in livestock production" as "performing day-to-day physical labor or day-to-day operations management that significantly contributes to livestock production and the functioning of a livestock operation." Minn. Stat. Ann. § 500.24(2)(n) (West 2009) defines "Farmer" as "a natural person who regularly participates in physical labor or operations management in the person's farming operation and files 'Schedule F' as part of the person's annual Form 1040 filing with the United States Internal Revenue Service."

64. KAN. STAT. ANN. § 17-5903(j)(3) (2009) ("actively engaged in the labor or management of the farming operation").

65. MO. ANN. STAT. § 350.010(5) (West 2009).

66. NEB. CONST. art. XII, § 8(1)(A).

67. MO. ANN. STAT. § 350.010(5) (West 2009) (emphasis added) ("a person who has an ownership interest in the family farm corporation and exercises some management control or direction."); s*ee also supra* note 63 (explaining Minnesota's more specific provisions concerning livestock operations).

68. KAN. STAT. ANN. § 17-5903(j)(3) (2009) (emphasis added).

69. NEB. CONST. art. XII § 8(1)(A) (emphasis added).

70. No measure is clear as to whether labor and management contributions can be purchased by the qualifying individual. Those measures that use the term "active" to modify labor or management may be taken to restrict these contributions to personal performance, but that question remains open. The federal payment eligibility rules, for example, require that the person provide "active *personal* labor or management." Under that language, hired labor or management services do not count as "active personal labor or active personal management," but such services do count as contributions to the farming operation for other purposes. *See* 7 C.F.R. §§ 1400.3, 1400.201 (2009); *see also* Roger A. McEowen & Neil E. Harl, *Federal Court Strikes Down Nebraska Corporate Farming Law*, 23 AGRIC. L. UPDATE No. 1, 4-5 (Jan. 2006).

There is only one case applying the more definite active-engagement standard. The Nebraska Supreme Court applied Nebraska's active-engagement standard to a corporation that owned a hog confinement facility in *Hall v. Progress Pig, Inc.*[71] The sole shareholder of the corporation at issue resided on a farm a few miles away from the facility, but the corporation did not own the land upon which the residence was located.[72] The court concluded that the shareholder, who appeared to manage the operation,[73] was not actively engaged in the *day-to-day* labor and management because he did not perform the physical chores of the operation nor oversee the performance of those activities. The court refused to allow the essential nature of the shareholder's activities to qualify the operation.[74] Rather, it concluded that "actively engaged in the day to day labor and management" required "that the shareholder be involved in all aspects of the activity, whether it be labor or management, on a daily basis."[75] To the court, the phrase referred to the "activities that occur as a routine part of the farm or ranch operation."[76] Further, the court found that "labor" required physical activity or toil, while "management" referred to the "mental and business activities of the operation."[77]

Thus, the language of Nebraska's provision was interpreted relatively strictly within the broader spectrum of active engagement. Other states do not employ the same language. State measures that are more definite but allow labor or management to qualify the entity (e.g. Kansas and Missouri) could not be said to require both. Nonetheless the significance or extent of the labor or management contribution remains subject to interpretation in these states. And even in states that articulate the qualifying activity at a broad level (e.g. Minnesota, Missouri, North Dakota, and South Dakota), the interpretational problem of selecting the appropriate type and level of contributions remains. The language of those provisions could be interpreted as strictly as Nebraska's, or it could be interpreted to require much less.

71. Hall v. Progress Pig, Inc., 610 N.W.2d 420, 427-29 (Neb. 2000).

72. *Id.* at 425.

73. *Id.* (Zahn, the sole shareholder, was responsible for the business's administration, finance, personnel management, herd nutrition and feeding, herd health, maintenance, and marketing).

74. *Id.* at 427.

75. *Id.* at 429.

76. *Id.* at 427.

77. *Id.* at 428.

4. *Location: "The Farm"*

All six of the states that require qualifying-activities—Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota—require that some or all of the qualifying activities occur in relation to "the farm." Residency in all six states refers to residency on "the farm." And the active-engagement alternative focuses on "the farm" in five of the six states. Kansas is the exception.[78] In Kansas, a stockholder qualifies the corporation so long as he or she is "actively engaged in the labor or management of the farming operation."[79] In the remaining states the active-engagement standard they employ must be met with respect to "the farm."

The interpretational possibilities associated with "the farm" involve two extremes. On the one hand, the farm may include all land owned by the corporation used in the farming operation. This operational view of the farm would allow qualifying activities to occur anywhere, and would serve to ensure that the qualifying individual is actively engaged in farming or residing on a farm somewhere. A narrower view would regard each parcel of agricultural land (or, perhaps, each noncontiguous parcel) as a separate farm upon which qualifying activities must take place in order to qualify the corporation to own or operate that farm. Taken in light of the qualifying activities, this narrow view ensures that the corporation will not own more land than its owners (or whoever else may be a qualifying individual) can farm or reside upon. Thus, this parcel-based view may limit the overall size of the operation.[80]

The extent to which the parcel-based view actually limits size depends upon the qualifying activities that must occur on each farm. For example, if active engagement is established by management, then the corporation could own or operate more land than in states where the active engagement standard is higher. The higher the standard, the more likely it is that the qualifying individual

78. Minnesota is also an exception, but only with regard to livestock operations. *See supra* note 63 (explaining Minnesota's approach to livestock operations, which does not require that qualifying activities occur on "the farm", but rather that they occur with regard to a farming operation).

79. KAN. STAT. ANN. § 17-5903(j)(3) (2009).

80. The notion of noncontiguous tracts constituting a farming operation has arisen elsewhere. When the FSA recently explained its consolidated regulations for direct loans it chose to delete a proposed regulation that would have included restrictions on noncontiguous parcels of land in a single farming operation. "[T]he agency concluded that there is not a policy concern associated with operating non-contiguous tracts. The changing structure of agriculture and increased urban uses of farmland in many localities require some operators to farm widely-dispersed tracts in order to assemble an economically viable operation." Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs, 72 Fed. Reg. 63,242, 63,256 (Nov. 8, 2007) (to be codified as 7 C.F.R. pt. 764.62).

must live close to the farm in question. For example, if day-to-day labor is required on each parcel of the corporation's land, then the qualifying individual must live close enough to the parcel to perform such activities. "Close enough" would, of course, differ from area to area depending on the nature of the farming activities conducted on that farm.[81]

One case dealing with Nebraska's law has touched on the notion of what "the farm" is. There are no cases from other jurisdictions on the subject, aside from one unpublished opinion in Minnesota dealing with a related statute containing language that did not restrict the qualifying activities to "the farm."[82] The Nebraska case arguably takes a parcel-based view of "the farm." In *Hall v. Progress Pig, Inc.*, the sole shareholder of the corporation resided on "a farm" three miles from a hog confinement facility that the corporation owned.[83] The Nebraska Supreme Court concluded that this residency did not fulfill Nebraska's qualifying-activities requirement.[84] It is unclear from the opinion, however, why the court reached that conclusion. The court indicated at one point that it was because the corporation did not own the farm upon which the shareholder lived; thus, that parcel was not within the corporation's farming operation—i.e., it was not part of "the farm."[85] On the other hand, the court included language in the opinion supporting a narrow parcel-based view of the farm: "[Nebraska's corporate-farming provision] requires that the shareholder must be on the farm or ranch, either by residing *on the site* or being actively engaged in the day-to-day labor and management."[86]

81. For example, non-irrigated wheat would require much less labor than a sow-farrowing operation.

82. In *Wessels*, 1989 WL at *2 the court concluded that an owner confined to a nursing home may be actively engaged in farming and an absentee owner/daughter may be actively engaged in farming if she was "actively involved in financial or other aspects of the farming operation that do not require her physical presence in Minnesota." Notably, the active engagement requirement for an unincorporated "family farm" under the statute at issue in *Wessels* reads "actively engaging in farming." MINN. STAT. ANN. § 500.24(2)(b) (West 2009). The statutory language applicable to a family farm corporation requires that the qualifying individuals be "actively operating the farm." MINN. STAT. ANN. § 500.24(2)(c) (West 2009). The latter raises geographic considerations. The former is less susceptible to such a construction.

83. Hall v. Progress Pig, Inc., 610 N.W.2d 420, 425 (Neb. 2000).

84. *Id.* at 429.

85. *Id.* at 426 ("[it] is undisputed that Zahn owns all of the stock of the corporation and that at no time did Zahn reside on the land owned by the corporation").

86. *Id.* at 429 (emphasis added).

III. THE DCC DOCTRINE AND THE *JONES* VIEW OF DISCRIMINATION

The DCC doctrine is one of the most complex bodies of constitutional law.[87] The challenges the doctrine provides to courts and scholars range from the highly theoretical[88] to the typical task of identifying the appropriate doctrinal rules.[89] The root source of confusion, of course, is the presence of conflicting cases. Reconciliation is, perhaps, impossible. Thankfully, much of this confusion can be avoided here. My point is not to engage the finer points of the DCC doctrine, rather it is to simply to take *Jones* at face value and figure out what it means for state corporate-farming restrictions. Nonetheless, a very brief primer on the DCC doctrine is in order.

The Court has developed two distinct tests for evaluating whether or not state laws with commercial impacts are sufficiently justified. State laws that are discriminatory are tested under "a virtually *per se* rule of invalidity."[90] Such laws must "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" to pass muster.[91] Once discrimination is shown, the burden of proof shifts to the state to justify its law.[92] Nondiscriminatory laws are tested under a more flexible balancing approach set forth in modern form by Justice Stone in *Pike v. Bruce Church*.[93] That test charges the court with the task of balancing the "putative local benefits" of the state law against the burden it places on interstate commerce.[94] The nature of the burden imposed is relevant to the analysis as is the absence of alternative means of achieving the local benefits at issue.[95] If the burdens on outsiders are "clearly excessive in relation to the putative local benefits"[96] the state's law must be struck down. The burden of proof lies with the challenger throughout the analy-

87. For full coverage of the doctrine and its complexity, *see* COENEN, *supra* note 15 at 209-342; BORIS I. BITTKER & BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01-6.08 (Cumulative Supp. 2009).

88. *See, e.g.*, Brannon Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM & MARY L. REV. 417, 425 (2008); Williams, *supra* note 16 at 409, 412.

89. *See, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986).

90. Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

91. Id. at 489 (quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).

92. *See* United Haulers Ass'n, v. Oneida-Herkimer, 550 U.S. 330, 338-39 (2007) (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).

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

94. *Id.*

95. *Id.*

96. *Id.*

sis. Most laws that remain in the *Pike* arena are upheld, while only one discriminatory law has passed muster.[97] Thus, one of the most important, and vexing, issues in modern DCC jurisprudence has been the initial fight about whether a state law discriminates or not.[98] Discrimination can be found on the face of a state law, from the effects a state law has, or from the purpose of those enacting the law.[99]

In addition to the anti-discrimination rules found in the DCC doctrine, there are three main doctrinal exceptions that allow states to discriminate. The market-participant exception allows states to discriminate amongst in-state and out-of-state economic interests when it is participating in a market as a buyer or seller of a product or service.[100] The second exception is congressional approval of discriminatory laws. That is, because the DCC doctrine polices state action in the absence of Congress's use of its authority to regulate interstate commerce, Congress has the final say in whether a particular regulation affecting commerce should be allowed.[101] Thus, Congress may expressly allow states to do what they otherwise could not under the DCC doctrine. Authorization has been utilized with regard to the insurance industry,[102] banking,[103] and hunting and fishing.[104] Finally, subsidies (direct expenditures, not tax exemptions or credits) doled out on a discriminatory basis—given to in-state, but not out-of-state, market participants—may not run afoul of the DCC doctrine.[105] As explained briefly below,

97. Maine v. Taylor, 477 U.S. 131, 151 (1986).

98. Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1906 (2007).

99. Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006); Coenen, *supra* note 16, at 224.

100. *See* COENEN, *supra* note 16, at 302-14; Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 474 (2008).

101. *See* COENEN, *supra* note 16, at 292-96; William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 406-10 (1983).

102. The McCarran-Ferguson Act allows states to discriminate against insurance companies chartered in other states. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 412, 437 (1946); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985).

103. Ne. Bancorp, Inc. v. Bd. Of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) (discussing the Bank Holding Company Act and the Douglas Amendment).

104. Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, S. 339, 109th Cong. § 2 (2005). The impetus for this legislation was cases like *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 999 (2002), where the court found that state regulation capping non-resident hunting was discriminatory and subject to strict scrutiny under the DCC doctrine.

105. COENEN, *supra* note 16, at 297-301; Williams, *supra* note 100, at 478-81; Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 967-68 (1999); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business De-*

these exceptions may provide options to states if they choose to reconfigure their corporate-farming laws in the wake of *Jones*, but the current slate of restrictions do not appear to fall within these exceptions.

Insofar as *Jones* is concerned, there are two important related aspects of the DCC doctrine. The first is the notion that only discriminatory laws trigger the DCC doctrine's very strict standard of judicial review.[106] The second is that discrimination can be established through discriminatory effects that are detected by looking no further than the text of the state's measure.[107]

As explained above, Nebraska's corporate-farming restriction provided a qualified-corporations exception that allowed family-farm corporations to engage in the restricted activities (owning agricultural land and engaging in farming or ranching).[108] In identifying such firms, the measure required that a majority of the entity's ownership be held by family members, at least one of whom is actively engaged in the day-to-day labor and management of the farm or resides on the farm.[109] The *Jones* court read these provisions as requiring a physical presence in Nebraska to qualify as a family-farm corporation.[110] Thus, it concluded that the measure, on its face, discriminated in favor of Nebraska residents and against non-Nebraskans.

To reach this conclusion, the court employed Nebraska's qualifying activities (farm residency or a high level of active engagement) in conjunction with the strict interpretation of the term "the farm."[111] The state did not argue with the parameters of the qualifying activities Nebraska required, but it did argue for the operational view of the farm. If the operational view were correct, it would have

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velopment Incentives, 81 CORNELL L. J. 789, 791 (1996); *Cf.* Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 30-31 (2002) (arguing the nondiscrimination principle in regard to state taxes should be abandoned due to the lack of a convincing basis by which to distinguish taxes and direct subsidies). *But see* Brannon P. Denning, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623 (2007). *But see* Edward A. Zelinsky, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653 (2007); *see also* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 473-76, 479-80 (1989); *see also* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487 (1981); *see also* Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 466 (1997).

106. Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006).

107. For an expanded treatment of the sorts of disparate allocations of a law's burdens that constitute discrimination *see* Schutz, *supra* note 17.

108. NEB. CONST. art. XII, § 8(A).

109. *Id.*

110. *Jones*, 470 F.3d at 1267-68.

111. *Jones*, 470 F.3d at 1268.

eliminated the prospect of facial discrimination.[112] The Eighth Circuit, however, rejected the interpretation and refused to follow the interpretational canon that requires courts to employ reasonable interpretations that avoid constitutional violations.[113] To the court, the text of the amendment—regulating the ownership of land and production "in *this* state"[114] and requiring daily labor and management "of *the* farm or ranch"[115] were enough to deem the state's operational-view argument a "heroic effort to develop a plausible alternative construction."[116] Further support came from *Hall*, discussed above, as well as the ballot's language, reporting that the measure would prohibit the acquisition of agricultural land "by any corporation . . . other than . . . a *Nebraska* family farm corporation."[117] Thus, the court concluded, "the language of Initiative 300 plainly requires residing or working on *a Nebraska farm*."[118] Given the textual hook upon which the court rested—the term "the farm"—this reasoning implicitly adopts the parcel-based view of "the farm" described above.[119]

Even then, however, the restriction did not correlate with state residency very well. There were many state residents who could not fulfill the requirements of Nebraska's law on many farms in the state while many non-residents could. The court rejected the notion that this meant there was no discrimination, concluding that the measure was discriminatory because the family-farm exception "on its face . . . favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them."[120] The lack of a close fit between in-state and out-of-state residency to the criteria was summarily rejected by both the district

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112. *See also* Brock H. Cooper, *Corporate Farming: How Interpretation of the Commerce Clause is Making Restrictions More Difficult*, 14 MO. ENVTL. L. & POL'Y REV. 475, 489 n.108 (2007).

113. *See Jones*, 470 F.3d at 1268-69.

114. NEB. CONST. art. XII, § 8 (emphasis added).

115. *Id.* (emphasis added).

116. *Jones*, 470 F.3d at 1268.

117. Id. (citing Jones v. Gale, 405 F. Supp. 2d 1066, 1073 (D. Neb. 2005) (emphasis added)).

118. *Id.* at 1269 (emphasis added).

119. For an expanded discussion of why this interpretation was misguided, especially in the context of livestock feeding operations, *see* Schutz, *supra* note 17.

120. *Jones*, 470 F.3d at 1267-68 (citing Jones v. Gale, 405 F. Supp. 2d 1066, 1081 (D. Neb. 2005) (relying on Smithfield Foods Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003) in which the court struck down an Iowa law that allowed only cooperatives formed under Iowa law that were actively engaged in farming to own or control pork production. Notably, the district court's opinion in that case appears geared at the discrimination against cooperatives that were not formed under Iowa law, not the geographic implications of active-engagement criteria.))

court and the Eighth Circuit. The district court concluded that a law could be "facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification."[121] And the Eighth Circuit stated, "We do not think that an inter-state commerce claim is precluded by . . . the fact that some Nebraska corporations may suffer a negative impact under Initiative 300."[122]

Finally, the absence of any explicit reference to non-residents in Nebraska's law did not trouble the court. The Eighth Circuit summarily rejected any formal distinction between facial discrimination and discriminatory effect, stating "We do not think that an inter-state commerce claim is precluded by the absence of an express prohibition on non-resident ownership . . . ."[123] Thus, the court concluded Nebraska's law facially discriminated against out-of-state economic interests because its discriminatory effect was obvious enough.

The end result of the court's analysis is that any provision that seeks to provide favorable treatment to people with a physical connection to in-state farmland will be deemed discriminatory and facially so. The following discussion examines other state's laws for the prospect of this sort of discrimination and evaluates how such laws can be interpreted or amended to comply with *Jones*.

IV. CONSEQUENCES: FAMILY FARM ENTITIES

Jones most clearly impacts the qualifying activities that family-farm exceptions employ. Basically, any qualifying activity that requires a physical presence within the regulating state will be deemed discriminatory and, thus, will trigger a level of scrutiny that is hardly ever met. States have at least two options for modifying their corporate-farming restrictions: (1) remove all qualifying-activities criteria and focus on income testing and size restrictions or (2) ensure

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121. Jones v. Gale, 405 F. Supp. 2d 1066, 1081 (D. Neb. 2005) (relying on Fort Gratoit Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992); Dean Milk Co. v. Madison, 340 U.S. 349 (1951); and Brimmer v. Rebman, 138 U.S. 78 (1891)).

122. *Jones*, 470 F.3d at 1267 (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)).

123. *Id*. Facial discrimination usually involves a situation where the law "'artlessly disclose[s] an avowed purpose to discriminate.'" SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995) (quoting Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)). Looking to the effect of a law at least highlights how difficult it is to separate the modes of discrimination, and it may skew the notion of "facial discrimination." The parties stipulated that an effects analysis was not appropriate for summary judgment because it was too fact intensive. *Jones*, 405 F. Supp. 2d at 1078. There is support for the notion that the "practical effect" of a law helps determine whether a law is facially discriminatory. *See* Wyoming v. Oklahoma, 502 U.S. 437, 456 (1992). In any event, a law that clearly discriminates against out-of-state economic interests, expressly or in practical effect, is subject to the same demanding level of scrutiny.

that their qualifying activities have no geographic implications relative to the state's border.

As for the first option, Wisconsin, Iowa, and Oklahoma are existing examples of this approach. These states, as explained above, require no qualifying activities, but rather require that all entities remain closely held, require that a certain percentage of their income come from farming, or both. These provisions raise no problems under *Jones* and other states could employ the same approach. However, this option is less than satisfying for those states that have historically viewed the family farm as something more than a closely-held business that derives most of its income from farming.

To retain some indicia of active engagement or rural placement, states must employ the second option; they must interpret or amend their corporate-farming laws in such a way as to eliminate the geographic implications of the qualifying activities relative to the state's boundaries.[124] Geographic implications arise from (1) the required activity itself (residency or active engagement) and (2) the place at which such activity must be performed.[125] In some instances, changing the required activities can solve the *Jones* problem. However, as I explain below, this approach only allows states to use a low management standard to identify active farmers and prohibits them from using farm residency as a qualifying activity. But broadening the place at which qualifying activities may occur eliminates the geographic implications of any qualifying activities, notwithstanding a strict active-engagement standard or the use of farm residency as a qualifying activity.

The first problematic aspect of Nebraska's provision was the selection of qualifying activities that necessarily involve a physical location.[126] The qualifying activities Nebraska employed were, alternatively, active engagement or farm residency. With regard to active engagement, Nebraska's standard required that the individual be actively engaged in day-to-day labor and management.[127] That standard, in turn, required the qualifying individual to perform activities that would necessarily involve a physical location. To remove the geographic implications of this active-engagement standard, one option is to choose a less stringent standard. The most viable option is to employ a standard that requires the individual to merely manage the farm in question. For example, in those states

124. *See* Cooper, *supra* note 112, at 497 (suggesting that Missouri could avoid facial challenges by changing the language of its corporate-farming law to reflect the interpretation Nebraska argued for).

125. *See generally Jones*, 470 F.3d at 1268.

126. NEB. CONST. art. XII, § 8.

127. *Id.*

where management is enough, there may be no geographic implications to the qualifying activity. Whether or not there are will depend upon the extent or significance of the management that must be established. Nebraska, for example, employed an interpretation that basically required a presence at the place where farming activities were occurring, given its use of the terms "day to day" and "actively engaged" to delineate the requisite management contribution. Such a standard, even if it were presented as an alternative to a labor requirement (unlike Nebraska's approach), would likely still favor residents over non-residents because the individual's distance from the regulating state would make it more difficult to satisfy the standard. However, if the standard were more lenient--requiring, for example, only decision making with regard to marketing--then such management could be performed from beyond the state's boundary with ease. In other words, distance (and thus geographic location relative to the state's boundary) would be rendered irrelevant. To the extent management does not necessitate any actual on-site oversight of production activities, there are no geographic overtones to the restriction. Those states that employ such a standard, or have the interpretational leeway to employ such a standard under a vague notion of active engagement, could establish compliance with the DCC doctrine under *Jones*. As explained above, those states include Kansas, Minnesota, Missouri, North Dakota, and South Dakota.

Of course, there are a number of variations between qualifying from beyond a state's borders and being on-site. Would, for instance, a requirement that the qualifying individual visit the farm, perhaps for even one hour, be discriminatory? Under the Eighth Circuit's reasoning, the possibility exists.[128] To be safe, the ability to perform the qualifying activity from anywhere needs to be maintained.

Matters are more complicated with regard to using labor as part of the active-engagement standard. If that labor must be personally performed within the regulating state, then distance (and thus geographic location relative to the state's boundary) remains an impediment to meeting the standard. Unlike with management, manipulating the extent or significance of the labor contribution does not itself create an unfettered ability to meet the standard from beyond the state's boundary. Arguably, if any amount of labor must be personally performed within the state, the *Jones* court's reasoning means that the geographical implications of such a requirement will trigger strict scrutiny. Of course, a state could employ a personal-performance labor standard that only requires a small amount of labor within the regulating state. And that would be different than the "actively engaged in day-to-day labor" Nebraska required. But there is little logical

128. *See generally* Jones v. Gale, 470 F.3d 1261, 1267-68 (8th Cir. 2006).

reason to expect that the difference would distinguish Nebraska's law for purposes of the *Jones* court's DCC analysis. After all, the day-to-day labor required of a non-irrigated wheat farm in Nebraska was slight, but the measure was still discriminatory. Thus, it is somewhat likely that all states employing labor as a means of establishing active engagement (textually, like Kansas or Missouri, or as an interpretation of a more general standard) must rethink their approach.

This is probably the case even in states like Kansas which, unlike Nebraska, use labor as an alternative to management for purposes of establishing active engagement. If a state provides people physically located within the state (or close enough to the state) with the ability to use the corporate form simply because they perform labor there, then the state necessarily deprives those located further away from equal treatment because they will have a more difficult time meeting the standard. Under the Eighth Circuit's reasoning, this constitutes facial discrimination.

Alternatively, a state could use an active-engagement standard that requires labor, on-site management, or both, so long as it does not require that these activities be personally performed. Such a standard would not favor people physically located within the regulating state because it would allow nonresidents to perform the qualifying activities from afar using employees.[129] However, if the proxy approach to active engagement were taken, then there is little reason to retain active engagement as a qualifying activity. In all firms, the owners or employees will perform the labor and on-site management and, in no case, would the qualifying activity go unfulfilled. Moreover, if the purpose of these restrictions is to keep production in active farmers' hands, then the standards employed must necessarily identify producers who personally perform production activities and distinguish them from mere owners or employers. Nonetheless, this remains an option for those states that are unconcerned with this policy goal. The better approach for those states, however, may be simply to do away with active engagement altogether.

The alternative to active engagement as a qualifying activity is farm residency. Nebraska and the other five states with qualifying-activities requirements employ farm residency as an alternative to the active-engagement criteria. Residency will always occur at some place. Thus, as with a personal-performance labor standard, its geographic implications cannot easily be eliminated by manipulating what constitutes residency. These provisions must therefore be removed or somehow adjusted to allow out-of-state farm residency as a

129. *See* McEowen & Harl, *supra* note 70, at 4-5 (criticizing *Jones* for failing to take this into account).

qualifying activity. If out-of-state farm residency does not qualify, then these measures by definition provide in-state farm residents with an opportunity to qualify that is denied out-of-state residents. Such treatment is discriminatory under *Jones*. And it would remain discriminatory even if a state's active-engagement standard were not.

Allowing out-of-state farm residency as a qualifying activity can be accomplished by defining "the farm." In fact, defining the farm at an operational level eliminates the geographic implications of both active engagement and farm residency because it expands the place at which the qualifying activities must be performed. As explained above, all of the states utilizing qualifying-activities criteria (farm residency or active engagement) provide that such activities must occur on or with respect to "the farm." In Nebraska, the parcel-based view of the farm (in conjunction with a high active-engagement standard and the residency alternative) meant that the activities had to occur on each Nebraska farm within an operation. That, in turn, meant that non-residents had to travel to those Nebraska farms to perform the qualifying activities. But if "the farm" were interpreted at an operational level, then this aspect of the law is eliminated. Thus, even if a state selects geographically dependent qualifying activities (like farm residency, labor, or on-site management), the performance of those activities beyond the state's boundaries would qualify the entity and avoid the *Jones* discrimination conclusion. With such a set of qualifying activities, the state boundary would be rendered irrelevant. The state would retain the freedom to recognize farm residency as a favored status, maintain a somewhat strict view of who active farmers are, and reward both with the use of the corporate form.

Nebraska's recent statutory effort is an example of a set of provisions that achieves this result. In the 2008 and 2009 legislative sessions, the Nebraska legislature considered a bill designed to regulate the corporate form in agriculture and comply with the *Jones* ruling.[130] The operative clause of the measure stated that "No entity shall acquire or otherwise obtain an interest, whether legal, beneficial, or otherwise, in title to real estate used for farming or ranching in this state

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130. *See generally* Legis. B. 1174, 100th Leg., 2d Sess. (Neb. 2008); Legis. B. 593, 101st Leg., 1st Sess. (Neb. 2009). The text of the 2009 bill is included in the Appendix following this Article. The initial 2008 legislation presented to the Agricultural Committee would not have complied with the *Jones* decision. After the committee hearing on the bill, the language was reworked into an amendment (AM 2319) that would have replaced the entire bill's language. The Committee reported the bill to the full Legislature with a recommendation to adopt AM 2319 and the bill as amended. The Committee vote was 7-1 to advance the bill and its amendment to the floor. The amendment and the bill failed on the floor by a narrow margin. In 2009, the amended legislation was reintroduced as LB 593. As of this writing, the bill remains in committee. Nebraska legislation can be accessed at http://www.nebraskalegislature.gov/bills/.

or engage in farming or ranching." [131] An exception to the operative clause applied for "a family farm or ranch entity."[132] Such entities were defined, in relevant part, to include an entity

> [I]n which majority ownership, and in the case of a corporation the majority of voting stock, is held by members of a family . . . related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is an individual actively engaged in the day-to-day labor and day-to-day management of the family farm or ranch entity's farming or ranching operation . . . .[133]

In turn, "farming or ranching operation" was defined to include "all farming or ranching occurring on agricultural lands or within agricultural structures, regardless of whether such activities, lands, or structures are located within or outside of Nebraska . . . ."[134]

The bill adopted a broad operational view of "the farm", but it retained criteria geared at distinguishing farmers from non-farmers. Thus, active engagement by a qualifying individual occurring anywhere would qualify the operation to use a limited-liability business form. All entities that did not involve active farmers would be unable to purchase, own, or operate agricultural land.

Kansas's active-engagement standard is also susceptible to this construction. Recall that Kansas requires that the qualifying individual be "actively engaged in the labor or management of the farming operation."[135] The reference to "the farming operation" opens up the possibility of qualifying activities occurring beyond the state's boundary.[136] Those states employing the term "the farm" for active engagement or farm residency are also susceptible to this interpretation and it should be employed to avoid unconstitutionality under the DCC doctrine.

Notably, Nebraska's bill abandoned farm residency as a qualifying activity. While such a requirement would not violate the DCC doctrine if out-of-state farm residency were a qualifying activity, a bare preference for farm residents is

131. Legis. B. 593 § 4(1). The term "entity" was defined to include all business organizations that limit liability.

132. *Id.* § 4(2)(a).

133. *Id.* § 2(2).

134. *Id.* § 2(4). In addition, "Farming or ranching" was defined to include "(a) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products or (b) the ownership, keeping, or feeding of animals for the production of livestock or livestock products." *Id.* § 2(3).

135. KAN. STAT. ANN. § 17-5903(j)(3) (2008).

136. Another example is Minnesota's provisions regarding livestock operations. *See supra* note 63.

difficult to justify in terms of a concern for the structure of agriculture.[137] One could argue that the farm-residency qualifying activity allows retired farmers to maintain their corporate status after they stop actively farming. However, the long grace period that follows from non-compliance[138] serves to shield such entities from the consequences of non-compliance in the event of retirement or other events that may interfere with the individual's ability to remain actively engaged.

V. OTHER COMPLICATIONS ARISING FROM *JONES*: AUTHORIZED ENTITIES

The family does not reign supreme in all states. Some states' measures allow non-family corporations to qualify, subject to qualifications that are similar to the family-farm corporation qualifications. This section addresses DCC doctrine concerns with these authorized-entity exceptions. Four states--Missouri, South Dakota, Okahoma, and Wisconsin--do not require qualifying activities of their authorized entities. I consider them collectively. Four more states--Kansas, Iowa, Minnesota, and North Dakota--have qualifying activities for authorized (non-family) entities.[139] However, unlike family-farm entities, generalities are more difficult to make. Thus, I largely consider each one in turn. Finally, this section concludes by discussing Nebraska's bill, which employs non-discriminatory qualifying activities.

A. *Missouri*, *South Dakota*, *Oklahoma & Wisconsin*

As with family-farm entities, some states do not employ qualifying activities at all. Missouri allows authorized farm corporations on terms that are similar to Iowa's and Oklahoma's approach to family-farm corporations. That is, Missouri allows authorized farm corporations so long as all shareholders are natural persons and at least two-thirds of the entity's total net income is from farm-

137. Herein, perhaps, is one disconnect between policy with production agriculture in mind and policy geared at maintaining the vitality of rural communities. *See* Don Paarlberg, *Farm and Food Policies: Issues of the 1980s*, *in* AGRICULTURAL LAW: CASES AND MATERIALS 1, 5 (West 1985) (identifying rural development as an item "placed on the [policy] agenda over the protests of the agricultural establishment" by "the 85 percent of rural people who are not farmers") (modification added).

138. LEGIS. B. 593 §4(3).

139. KAN. STAT. ANN. § 17-5904(a) (2008); IOWA CODE § 9H.4(1) (2007); MINN. STAT. § 500.24(2)(c) (2009); N.D. CENT CODE § 10-06.1-02 (2008).

ing.[140] Neither of these requirements has geographical implications and, thus, neither qualifies as discriminatory.[141]

South Dakota's statute is similar to Missouri's. South Dakota allows an "authorized farm corporation" to engage in farming so long as it has ten or fewer shareholders who "are all natural persons or estates," and the corporation's "revenues from rent, royalties, dividends, interest, and annuities do not exceed twenty percent of its gross receipts."[142] With no qualifying activities, this measure poses no problem under the *Jones* reasoning.

Similarly, Oklahoma[143] and Wisconsin[144] impose uniform restrictions on all corporations whether they are family owned or not. Both contain limits on the number of shareholders, with a preference given to family members in both states. Oklahoma imposes an income restriction,[145] but Wisconsin does not[146]. Neither include qualifying activities that could run afoul of *Jones*.

Again, however, states will not be satisfied to rely on these minimum requirements if they see appropriate farm operations as something other than closely held and predominately reliant on farm income.

B. *Kansas*

Kansas allows "authorized farm corporations" to own agricultural land (the only prohibited activity in Kansas). Such entities are defined as follows:

> (k) 'Authorized farm corporation' means a Kansas corporation,[[147]] other than a family farm corporation, all of the incorporators of which are Kansas residents [or]

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140. MO. REV. STAT. § 350.010(2) (2008).

141. *See id.*; Jones v. Gale, 470 F.3d 1261, 1267-69 (8th Cir. 2006) (There is, of course, a narrow argument that a disproportionate number of firms barred under this criteria are outsiders, but insofar as the *Jones* reasoning is concerned, they are not problematic).

142. S.D. CODIFIED LAWS § 47-9A-15 (2008).

143. OKLA. STAT. tit. 18 § 951(A) (2009).

144. Wis. Stat. ANN § 182.001(1)(a) (2009).

145. *Id.* § 951(A)(2).

146. *See id.* § 182.001.

147. Unlike the family-farm-corporation exception, this measure allows only "Kansas corporations" to qualify under the "authorized farm corporation" exception. *Compare* KAN. STAT. ANN. § 17-5903(a) (2008) (defining corporation as a "domestic or foreign corporation") *and* KAN. STAT. ANN. § 17-5903(j) (2008) (describing the three statutory requirements to become a "family farm corporation") *with* KAN. STAT. ANN. § 17-5903(k) (2008) (delineating an authorized farm corporation as "a Kansas corporation" that fulfills numerous requirements). Such differential treatment between Kansas corporations and other corporations likely raises Dormant Commerce Clause concerns. *See infra* Part VI.

> family farm corporations . . . and which is founded for the purpose of farming and the ownership of agricultural land in which:
>
> (1) The stockholders do not exceed 15 in number; and
>
> (2) the stockholders are all natural persons [or] family farm corporations . . . or persons acting in a fiduciary capacity for the benefit of natural persons [or] family farm corporations . . . ; and
>
> (3) if all of the stockholders are natural persons, at least one stockholder must be a person residing on the farm or actively engaged in labor or management of the farming operation.[148]

Here, aside from the requirements geared at the identity of the "incorporators" and their state residency or corporate status, the requirements are somewhat similar to what is typically seen with family-farm entities. The measure restricts who may own the entity, how many may be involved, their corporate identities, and, again, provides qualifying activities—residency or active engagement.[149] Again, how narrowly one construes those terms will determine the discrimination question. If the term "the farming operation" (with regard to active engagement) and the term "the farm" (with regard to farm residency) contained in subsection (k)(3) have an operational meaning, then prospects are good that there is no discrimination. If those terms are narrowly construed, then one would need to argue that the term "actively engaged in the labor or management"[150] of the Kansas farming operation could be fulfilled by performing these activities from remote locations beyond the state's boundary. Even then, however, farm residency would still discriminate against non-Kansas farm residents and trigger strict scrutiny.

Kansas's measure is also problematic because of the way it treats eligible "incorporators" in subsection (k). The reference to "Kansas residents" as incorporators is clearly invalid under *Jones*.[151] The addition of "family-farm corpora-

148. KAN. STAT. ANN. § 17-5903(k) (2008). Omitted from this quote is the reference to "family farm limited liability agricultural companies." Such entities are limited liability companies with the same basic requirements as "family farm corporations" described above. That is, the majority of the members must be related and at least one member must perform qualifying activities. *See* KAN. STAT. ANN. § 17-5903(w) (2008).

149. *See id.* § 17-5903j(3), k(1)-(3) (Given the confluence of the authorized-farm-corporation and family-farm-corporation provisions, it is impossible to have an authorized farm corporation that does not have a stockholder who resides on the farm or is actively engaged in the labor or management of the operation. If the authorized farm corporation is not owned entirely by natural persons, the only other permitted owners are family-farm corporations. Within that entity, there must be a stockholder who performs the qualifying activities).

150. *See id*. § 17-5903(d)(3).

151. *See generally* Jones v. Gale, 470 F.3d 1261, 1264, 1267-69 (8th Cir. 2006).

tions" as an eligible incorporator may provide non-residents with the ability to form an authorized farm corporation, depending on how the family-farm provisions are applied. However, those non-residents still face a hurdle that Kansas residents do not—forming a "family-farm corporation."[152] Such a state of affairs should trigger strict scrutiny in the Eighth Circuit.

C. *Iowa*

Iowa allows "authorized farm corporations" to own agricultural land and engage in farming so long as all stockholders are natural persons and there are no more than twenty-five of them.[153] Unlike the family-farm corporation in Iowa, there is no revenue restriction on authorized farm corporations. However, Iowa further restricts the landholdings of such entities to 1500 acres,[154] with exceptions for lands leased back to the immediate prior owner[155] and lands held and maintained "to protect significant elements of the state's natural open space heritage."[156] There is no discrimination problem attending these provisions.

Iowa also has a fairly complex set of networking provisions that allow farmers to create entities to own and operate a limited amount of agricultural land.[157] Restrictions are placed on the amount of land that can be held by these entities and there are provisions dealing with the ownership of multiple entities.[158] Insofar as is relevant here, and unlike its provisions for authorized farm corporations or family-farm corporations, Iowa imposes restrictions on the ownership of these networking firms that identify qualifying individuals and require such individuals to perform qualifying activities. Thus, for example, "qualified farmers" must hold at least 51% of the shares of a "networking farmers corporation."[159] Qualified farmers include those natural persons who are "actively engaged in farming,"[160] which means the person does any of the following:

152. Whether it does or not would depend upon whether the criteria for family farm corporations discriminated against outsiders or not. That aspect of Kansas's measure is described above. It may or it may not, depending upon how the term "actively engaged in the labor or management of the farming operation" is interpreted. *See* KAN. STAT. ANN. § 17-5903(k) (2008).

153. IOWA CODE § 9H.1(3) (2009).

154. *Id.* § 9H.5(1).

155. *Id.* § 9H.5(1)(a).

156. *Id.* § 9H.5(1)(b).

157. *See id.* § 10.1(8), (9), (16), (17) (allowing "networking farmers entity," "networking farmers limited liability company," "farmers cooperative association," and "farmers cooperative limited liability company").

158. *See id.* §§ 10.3-10.4 (dealing with networking farmers corporations).

159. *Id.* § 10.1(15)(a)(1).

160. *Id.* § 10.1(19)(a).

> a. Inspects the production activities periodically and furnishes at least half of the value of the tools used for crop or livestock production and pays at least half the direct cost of crop or livestock production.
>
> b. Regularly and frequently makes or takes an important part in making management decisions substantially contributing to or affecting the success of the farm operation.
>
> c. Performs physical work which significantly contributes to crop or livestock production.[161]

These qualifying activities may favor Iowa residents over outsiders. All of them can be interpreted to require some level of physical presence at the place where inspection, management, and physical work is directed. But, again, there are two arguments. First, perhaps in-state production or management activities, if required, can be performed from afar. Importantly, even though these are framed in the alternative, the presence of any one that can only be performed in-state would favor Iowa residents over non-residents. Thus, all would need to be susceptible to out-of-state performance to qualify as non-discriminatory under *Jones*. Second, perhaps the performance of these activities outside of Iowa will serve to qualify the farmer as actively engaged for purposes of Iowa's law. The lack of any reference to "the farm" and the use of terms like "the farm operation" in (b) lend themselves to an operational view of where the required activities must be performed. Under either scenario, discrimination would not follow. Short of that, however, Iowa’s networking provisions are likely subject to strict scrutiny under *Jones*.

D. *Minnesota*

Minnesota (like Iowa) limits the total landholdings for authorized farm corporations to 1500 acres. Minnesota also imposes further requirements that are in some ways similar to its approach to family-farm corporations. That is, it requires that the corporation have no more than five shareholders (husband and wife count as one), all of its shareholders must be natural persons, its revenue "from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts" and "shareholders holding 51 percent or more of the interest in the corporation reside on the farm or are actively engaging in farming."[162] "Actively engaging in farming" is not defined. And, importantly, this

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161. *Id.* § 10.1(1).

162. MINN. STAT. § 500.24(2)(e) (2008). Minnesota also exempts "authorized livestock farm corporations" from its restrictions and uses qualifying activities to delineate such operations.

language (unlike the family-farm-corporation exception in Minnesota and the farm-residency requirement used here) does not explicitly tie the qualifying activities to "the farm."

Again, the term "actively engaging in farming" needs to be construed in a manner that makes geography irrelevant. The lack of the term "the farm" opens up the possibility of taking an operational view that eliminates the law's geographic implications. Alternatively, the term "actively engaging" may be interpreted broadly enough to allow qualifying in-state active engagement to be performed from other states. The term "reside on the farm" is problematic, as described above. Again, the only option for expanding the geography that this activity implicates is to interpret "the farm" operationally.

E. *North Dakota*

North Dakota allows certain cooperative corporations to engage in the business of farming or ranching and to own agricultural land.[163] A cooperative will qualify if "seventy-five percent of [the] members or shareholders are actual farmers or ranchers residing on farms or ranches or depending principally on farming or ranching for their livelihood."[164] Financial dependence is geographically neutral, and the reference to residency—"residing on farms"[165] does not appear to require the qualifying farmer-members to live on North Dakota farms. Thus, it is likely not discriminatory.[166]

F. *Nebraska's Bill*

Nebraska's bill also provides an example of an authorized entity that still required active engagement from its owners. Recall that Nebraska's bill sought to reconfigure the qualifying activities for family-farm entities by requiring such activities at the operational level.[167] In addition, an exception for a "qualified owner-operator controlled farm or ranch entity" was built into the legislation to allow entities without the familial ownership structure.[168] Such entities were

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For a discussion of those provisions, which do not appear to entail performance in Minnesota, see *supra* note 63.

163. *See* N.D. CENT. CODE § 10-06.1-08 (2008).

164. *Id.*

165. *Id.*

166. Presumably, "actual farmers or ranchers" exist beyond North Dakota's borders and would qualify.

167. Legis. B. 593, §§ 2(2), 2(4) 101st Leg., 1st Sess. (Neb. 2009).

168. *Id.* §2(5).

defined as "an entity in which all ownership is held by five or fewer individuals actively engaged in day-to-day labor and day-to-day management of farming or ranching operations, at least one of whom is actively engaged in the day-to-day labor and day-to-day management of the entity's farming or ranching operation."[169] This was designed to allow active farmers, wherever located, to join together in an entity formation. The requirement that one of them be actively engaged in the entity's farming operation was consistent with the legislative judgment that owner-operated farming operations were the most appropriate for the industry. In effect, this would mean that this qualifying individual would need to own at least one share of the entity.[170] Again, the qualifying activities could occur anywhere.

VI. More Facial Discrimination: Foreign Corporations qua Foreign Corporations

Foreign corporations, as a matter of state law, are typically thought of as all corporations organized under the law of some other state. Domestic corporations are those organized under the regulating state's law. Some corporate-farming measures involve the express differential treatment of domestic and foreign corporations. For example, Iowa's networking provisions allow "networking farmers corporations" to engage in certain activities only if they are organized under Iowa law.[171] Oklahoma expressly declares that

> [N]o foreign corporation shall be formed or licensed under the Oklahoma General Corporation Act for the purpose of engaging in farming or ranching or for the purpose of owning or leasing any interest in land to be used in the business of farming or ranching. A domestic corporation may, however, be formed under the Oklahoma General Corporation Act to engage in such activity . . . .[172]

169. *Id.*

170. Press Release, Center for Rural Affairs, Restriction on Corporate Farming Rejected in Nebraska Legislature (Apr. 2 2008), *available at* http://www.cfra.org/node/1148.The five-person limitation was more a tool for negotiation than it was a limitation on equity. In 2008, when the same legislation was advanced to the floor, proponents likely would have been willing to increase that number had they realized they needed the votes.

171. Iowa Code § 10.1(15) (2007). Contrast this language with section 9H.1, which defines a "corporation" as a "domestic or foreign corporation" subject to Iowa law. Iowa Code § 9H.2 used to provide an exemption for cooperatives organized under Iowa law until this provision was struck down by a district under the DCC doctrine. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 994 (S.D. Iowa 2003). The provision was later amended, removing the exception for Iowa cooperatives. *See* Iowa Code § 202B.201 (2007).

172. Okla. Stat. tit. XVIII, §951(A) (2009).

Kansas authorizes only a "Kansas corporation" to qualify as an "authorized farm corporation."[173] North Dakota also provides its family-farm exception only to "domestic corporation[s]," and its business corporations act does not expressly give foreign corporations the same rights and privileges as domestic corporations.[174]

Nebraska also limits the ownership of real estate by foreign corporations, qua foreign corporations:

Aliens and corporations not incorporated under the laws of the State of Nebraska are prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, except as provided in sections 76 403 to 76-405.[175]

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173. KAN. STAT. ANN. § 17-5903(k) (2008). While section 17-5903(a) defines a "corporation" as a "domestic or foreign corporation" the use of "Kansas" as an adjective in subsection (k) appears to limit the "authorized family corporation" to only domestic corporations. The definition of "family farm corporation" does not use that modifier. *See id.* § 17-5903(j) (2008).

174. *See* N.D. CENT. CODE § 10-19.1-132(2) (2008) (providing that "[a] foreign corporation holding a valid certificate of authority in this state has no greater rights and privileges than a domestic corporation."). That language appears to capforeign corporations' authority, unlike the typical approach that provides for equal treatment. *See, e.g.*, NEB. REV. STAT. § 21-20,172(2) (2008) ("A foreign corporation with a valid certificate of authority shall have the same but no greater rights and shall have the same but no greater privileges as . . . a domestic corporation of like character.").

175. NEB. REV. STAT. § 76-402 (2008). Various exceptions are included in later sections of the Nebraska statutes for liens, railroads, public utilities, common carriers, real estate used for manufacturing or industrial establishments, petroleum facilities, and real estate within cities and villages or within three miles of those municipalities. *See* NEB. REV. STAT. §§ 76-411-414 (2008). Notably, this set of Nebraska statutes has no exception for family-farm corporations. It also applies only to corporations. Thus, limited liability companies, limited partnerships, and other business forms that involve limited liability do not fall within its strictures. Nonetheless, the statute remains on the books and has been in place since 1889.

These statutes seem to have faded into oblivion with the onset of I-300. At the time of I-300's passage, commentators conducting CLE programs noted the § 76-402 restrictions. *See* Alan Curtiss, *Real Estate Interest of Agricultural Corporations as Affected by Escheat, Involuntary Dissolution, Initiative 300 and Similar Factors*, *in* NEB. CLE, INC., REAL ESTATE DEVELOPMENTS (1983) (discussing both 76-402 and I-300); Kelley, Steinmeyer, Jr. & Byrne, *Initiative 300 – Panacea or Pandora's Box*, at 12, in NEB. CLE, INC., TAXES AND INITIATIVE 300 (1983); Vard R. Johnson, *Initiative 300 – "The Rest of the Story"*, in NEB. CLE, INC., REAL ESTATE DEVELOPMENTS (1985) (discussing I-300 but noting 76-402 as the "ancient pedigree" of Nebraska's restrictions on land ownership). And it continues to get passing glances. *See* A. Eugene Crump, *Forfeitures: Alien Ownership and Initiative 300*, in NEB. CLE, INC., REAL ESTATE LAW (1990). However these statutory restrictions were not mentioned in the litigation challenging I-300.

These sorts of restrictions generally do not raise difficult constitutional questions. For Privileges and Immunities Clause purposes, corporations have no protection.[176] For Equal Protection purposes, a state can refuse to recognize the existence of a corporation organized under another state's law so long as it has a rational basis for the refusal.[177] Thus, for both Equal Protection and Privileges

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Nebraska's corporations code also appears to have left them behind. Before the model act was adopted in 1995, the provision declaring the effect of a foreign corporation's certificate of authority included an express limitation that incorporated other law. NEB. REV. STAT. § 76-402 (2008). The former certificate-of-authority provision read "corporations not incorporated under the laws of this state are subject to all prohibitions applying to them contained in any other laws or acts of this state." NEB. REV. STAT. § 21-20,106 (Reissue 1991). Today, the corporations statutes give foreign corporations with certificates of authority all rights and powers that a domestic corporation would have, except as provided in the corporations act. *Id.* § 21-20,172(2) (providing that "[a] foreign corporation with a valid certificate of authority shall have the same but no greater rights and shall have the same but no greater privileges as, and except as otherwise provided by *the act*, shall be subject to the same duties, restrictions, penalties, and liabilities now or alter imposed on, a domestic corporation . . . " (emphasis added)). Thus, if a foreign corporation receives a certificate of authority, it would be entitled to hold land and produce to the same extent as a domestic corporation.

Other changes accompanied the 1995 move, which further complicate matters. For instance, "owning, without more, real or personal property" does not constitute "doing business" within the state. Thus, there is no need to get a certificate of authority and, thus, the certificate of authority provisions cannot displace statutes such as section 76-402. NEB. REV. STAT. § 21-20,168(i). Under the pre-1995 statutes, that provision did not exist. *See* NEB. REV. STAT. § 21-20,105 (Reissue 1991).

In the end, Nebraska's corporations law is somewhat cumbersome with regard to land ownership and foreign corporations. By the terms of § 76-402 and the statutes accompanying it, foreign corporations cannot own farmland. And if they own farmland, without more, they need not get a certificate of authority. However, if they do more (e.g., engage in farming operations in Nebraska), then the certificate of authority required under the corporations statutes should entitle them to the same rights, privileges and duties as domestic corporations. Thus, it may be that mere ownership is all that § 76-402 operates to restrict at this point. Anything more would constitute "doing business," which would necessitate the certificate of authority, which would entitle the corporation to domestic treatment in all areas not covered by the corporations act.

176. Paul v. Virgina, 75 U.S. (8 Wall.) 168, 181 (1869) (concluding for Privileges and Immunities Clause purposes that foreign corporations cannot complain of discriminatory treatment because entities are not "citizens"--admission "may be granted upon such terms and conditions as [a consenting state] may thing proper to impose"--but avoiding the DCC doctrine by concluding that the business of insurance was not interstate commerce); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

177. W. & S. Life Ins. Co. v. Cal. Bd. of Equalization, 451 U.S. 648, 667-68 (1981) (providing that "[W]hatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose."); Asbury Hosp. v. Cass County, 326 U.S. 207, 211 (1945) (concluding that "the Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from

and Immunities Clause purposes, there is little to limit state authority over foreign corporations. However, the DCC doctrine's anti-discrimination rule provides a significant limitation.[178]

The DCC doctrine's protection for foreign corporations likely means that the state cannot discriminate amongst domestic and foreign corporations unless it can meet the strict scrutiny test employed for discriminatory state laws. Thus, it cannot allow a domestic corporation to do what it prohibits a foreign corporation from doing, at least not if the activity is one falling within the bounds of Congress' authority to regulate interstate commerce.[179] And a familiar tenant of corporations law is that the Commerce Clause requires states to allow foreign corporations to conduct interstate commerce within their borders.[180] Perhaps a more precise formulation of that statement would be that the DCC doctrine requires states to allow foreign corporations to conduct interstate commerce within their borders on the same terms as they allow domestic corporations to engage in such commerce.[181]

In the corporate-farming-law context, however, this raises the interesting and vexing question of what interstate commerce is. The provisions at issue here prohibit foreign corporations from owning agricultural land, engaging in farming, or both. Production, of course, has be within Congress's power to regulate since *Wickard v. Filburn*.[182] Thus, those provisions prohibiting production by foreign

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doing business or acquiring or holding property within it." Also noting the "unqualified power of the state to preclude [foreign corporation's] entry into the state . . . " for such purposes); *see also* Paul v. Virginia, 75 U.S. 168, 181 (1868) (providing that admission "may be granted upon such terms and conditions as [a consenting state] may think proper to impose.").

178. Neither *Asbury Hospital* nor *Western & Southern Life Insurance Company*, nor the Privileges and Immunities cases involved the commerce question. It was not raised in *Asbury Hospital* and, in *Western & Souther Life Insurance Company* discrimination for DCC purposes had been taken off the table by the McCarran-Ferguson Act. *See supra* note 102.

179. *Cf.* George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunity Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 384, 386 (1988) (arguing that the early rejection of corporate protection under the Privileges and Immunities Clause, specifically *Bank of Augusta v. Earle*, was premised on a presumption of equal treatment).

180. Butler Bros. Shoe Co. v. U.S. Rubber Co., 156 F. 1, 14 (8th Cir. 1907) ("there can be no doubt that no state in the Union retains the power to exclude a foreign corporation from . . . its constitutional right to carry on interstate commerce in recognized staple articles of commerce within the limits of the state"); *see also* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE 6-65 (Aspen Publishers 1999 & Supp. 2009).

181. *Cf.* Lewis v. BT Inv. Managers., Inc., 447 U.S. 27, 53 (1980) (striking down state law prohibiting holding companies with their principal places of business outside Florida from owning or controlling Florida businesses that provided investment or advisory services).

182. Wickard v. Filburn, 317 U.S. 111, 118-19 (1942).

corporations while allowing production by domestic corporations are likely invalid under the DCC doctrine.

Agricultural land ownership, however, has not yet been deemed interstate commerce. If such ownership is interstate commerce, then a state must allow foreign corporations to own land within the state if it allows domestic corporations to do so.[183] If it is not interstate commerce, then a state's power to exclude under other constitutional provisions is largely unaffected by the interstate-commerce character of the foreign corporation's activities.[184] It is difficult to argue that interstate commerce is not involved because land in the agricultural setting is the means of agricultural production. Thus, it would appear that the DCC doctrine limits state's ability to discriminate among foreign and domestic corporations with regard to the ownership of agricultural land.

While there is much more to this interesting puzzle, the writing on the wall is emerging. Given the expansive reach of the Commerce Clause and the likelihood of invalidity under the DCC doctrine's discrimination tier, states should strongly consider treating foreign corporations in the same manner as domestic corporations.

VII. OTHER POSSIBLE DCC DOCTRINE SOLUTIONS & THE PROSPECT OF DISCRIMINATORY PURPOSE

There are other options for Nebraska and other states.[185] One is Congressional authorization to restrict corporate entry in these markets according to

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183. This is not to say that the two could not be subject to the same conditions. That appears to be what Nebraska's and many other states' corporate-farming restrictions do. The matter under scrutiny here is the exclusion of foreign corporations, qua foreign corporations, that is found in some corporate-farming measures.

184. Of course, if that is true, then one could argue that restrictions on the ownership of land raise no DCC problems at all. One further intriguing question may be whether or not the definition of "interstate commerce", for purposes of the DCC doctrine, includes activities that Congress could reach only under its Necessary and Proper Clause embellishments. If so, then the instances in which states can rest assured that there is no DCC doctrine limitation on their authority are quite narrow indeed.

185. Of course, if one digs deeper into the reasons why the restricted entities may be regulated, the possibilities for different approaches to certain aspects of the problems emerge. *See, e.g.*, Kathryn Benz, Student Article, *Saving Old McDonald's Farm After South Dakota Farm Bureau, Inc., v. Hazeltine: Rethinking the Role of the State, Farming Operations, the Dormant Commerce Clause, and Growth Management Statutes*, 46 NAT. RESOURCES J. 793, 829-830 (2006) (advocating the use of "a land use regulatory scheme that utilizes a comprehensive management plan for the unified use of the state's resources" modeled after Vermont's Act 250); James C. Chostner, Casenote, *Buying the Farm: The Eighth Circuit Declares South Dakota's Anti-Corporate Farming Amendment Violates the Dormant Commerce Clause*, 11 MO. ENVTL. L. & POL'Y REV. 184, 193 (2004) (suggesting direct marketing and stronger environmental laws).

the owners' ties to the land at issue.[186] Authorization has been utilized with regard to the insurance industry,[187] banking,[188] and hunting and fishing.[189] Proposed legislation for the corporate-farming context has also been drafted, but it has not yet been introduced in Congress.[190] The political dynamics may be such that the legislation would have a chance. After all, family farming has historically occupied a special place in Congressional policymaking and those states make up a significant portion of the Senate.

Another option would be a state-level subsidy program that favors in-state family-farm producers who are actively engaged in farming in the sense that Nebraska envisioned. While a tax break is impermissible,[191] direct subsidies may be constitutionally permissible.[192] Such subsidies could lower the price of land for family farmers and price other competitors out of the market. In fact, such subsidies could effectively price individuals who do not use the corporate form out of the market. Thus, if active farmers are the favored class, this may be a more effective means of fostering such producers than restricting who may use the corporate form or restricting entity entry. The Court has not, however, squarely confronted the notion of whether direct subsidies are permissible means of achieving the same results as regulatory measures achieve.[193]

Yet another option would be to utilize the market-participant exception to the DCC doctrine. While state purchases of farmland and subsequent sales or leases to active farmers are unlikely, states like Nebraska already own large tracts

186. *See* Chester, *supra* note 4, at 99-100.

187. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 412, 437 (1946); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985).

188. *See* Ne. Bancorp, Inc. v. Bd. Of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) (discussing the Bank Holding Company Act and the Douglas Amendment).

189. Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, S. 339, 109th Cong. § 2 (2005).

190. Reaffirmation of State Regulation of the Form of Agricultural Business Entities Act of 2007 (on file with author).

191. This would be true as a matter of state constitutional law in some states as well. In Nebraska, for example, the state constitution imposes limits on the ability to classify property for purposes of the property tax. In *Constructors, Inc. v. Cass County Board of Equalization*, 258 Neb. 866 (2000), the Nebraska Supreme Court was faced with the question of whether taking into account mineral interests for purposes of valuation on some lands violated the uniformity clause of the state constitution where other lands with mineral interests were not so valued. The court concluded this was improper; "[d]ifferential tax treatment can only be based on the use or nature of the property, not upon who controls the property, i.e., mining companies versus farmers." *Id*. at 876.

192. *See* sources cited *supra* note 105.

193. Williams, *supra* note 100, at 478.

of land that they dedicate to funding public schools.[194] Such lands could be rented only to active, resident farmers without running afoul of the DCC doctrine, or higher rents could be charged to the sorts of entities or individuals that the state finds problematic.

Whatever the authority of states to engage in other approaches, the simplest one at this point is to reconfigure corporate-farming measures to rid them of their geographical implications. But, recall, the presence of a discriminatory effect (or "facial" discrimination) is not the only means of triggering strict scrutiny. While there is little room here to discuss the discriminatory purpose trigger that lies within the DCC's discrimination tier, the limitations this judicial inquiry places on state legislatures should be considered as states take up the task of amending or interpreting their provisions. What exactly the courts will look for and the causal role of an illicit purpose in the midst of other purposes are difficult questions.[195] However, the advice to states is simple: be careful of the record created.[196] States must avoid the imprimatur of hostility toward outsiders. When harmful firms are identified, insider firms should be identified whenever possible. And, in any event, the legislative body should be careful to articulate what exactly is undesirable about such firms. Legislative bodies must also be wary of mentioning benefits to their electorate. Such statements, although common in legislative debate, carry with them a possible connotation that outsiders are not worth benefiting. That perceived favoritism, especially with legislation that has economic impacts, could be taken as hostility to those not mentioned and may be taken as evidence of a discriminatory purpose.

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194. *See, e.g.,* Nebraska *ex rel.* Walker v. Bd. Of Comm'rs for Educ. Lands and Funds, 3 N.W.2d 196, 198 (Neb. 1942).

195. *See* Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1067-71, 1090 (2002) (arguing that the standard from Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977) ought to be used).

196. *See generally* Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase,* 70 NEB. L. REV. 754, 833 (1991). I do not view this sort of caution as the equivalent of subterfuge. *See id.* at 831 (cautioning that subterfuge will not work). Rather, this cognizance helps legislative bodies think about the nature of the problem at issue. For example, if a problem exists beyond the state's boundaries, then this cognizance can result in debate about what exactly is problematic. However, I tend to think the DCC's focus on purpose is misplaced and, despite the benefits of fostering insider cognizance of outsider effects, an effects rationale is a more appropriate and as effective grounding for the DCC doctrine. I will return to that topic in another piece.

VIII. CONCLUSION

The precise fate of corporate-farming measures rests on the details of their construction. Even though Nebraska's restriction was struck down,[197] this does not necessarily mean that all state's restrictions are invalid. My hope is that this Article has shed some light on what is and is not susceptible to challenge under *Jones*.

The upside of the *Jones* case is the potential for a renewed debate concerning the structure of agricultural production and the value of family farms. Perhaps the romanticized notion of family farming has faded and states will find themselves confronting the difficult question of what sorts of restrictions are appropriate in production agriculture. Without the handy label of family farms, the policy gap left by corporate-farming laws' demise may cause legislatures to think in more finely grained and concrete ways about economic structure, environmental harms, and rural vitality. So perhaps the Eighth Circuit's opinion will take the debate to a new level. No longer will it be sufficient to draw upon some preference for "active farmers" and their families as the epitome of production agriculture.

In the initial stages of considering how Nebraska should respond to *Jones*, I was involved in an informal committee hearing in which the participants quickly concluded that the whole world of agricultural policy was at its doorstep. Vertical integration, consolidation, rural development, family farms, limited liability, corporate responsibility, and environmental stewardship were all matters that the state was faced with regulating because all of these interests were embodied in Nebraska's law. Despite this exciting opportunity, the prospect of a better, renewed debate did not come to fruition in Nebraska. In 2008, the legislation mentioned in this Article drew the ire of opponents who argued that times had changed since the 1980s when Nebraska's electorate added the corporate-farming law to their constitution, but no discussion of how times had changed ensued. They also argued that the legislature ought not tie the hands of producers. Rather, it should allow them to form entities that suit their needs. But they offered no proposed amendment to increase the number of unrelated farmers or further refine the active-engagement standard. Indeed, they did not articulate the sorts of arrangements that they believed were beneficial. Rather, another main criticism emerged: "This has not been done for other industries, why should it be done for production agriculture?" Of course, no one sought to evaluate the question of whether production agriculture was different than, for example, retail grocery

197. Jones v. Gale, 470 F.3d 1261, 1264 (8th Cir. 2006).

stores or similar to areas where the use of limited liability is legislatively circumscribed. Sadly, the proponents were also content to argue that voting for the bill furthered the intent of the voters who enacted I-300 only to have it struck down by the federal courts.[198]

The prospect of debate aside, the Eighth Circuit's opinion definitely makes legislative cognizance of active farmers more difficult. The primary difficulty is the extent to which a state may pursue any agricultural policy that involves identifying farmers, their connection to the land, or the rural and local ramifications of farming. The fear, inspired by the enigmatic DCC doctrine, is that touching agriculture is to touch interstate commerce. And to touch interstate commerce is uncertain business under the DCC doctrine. In short, the Eighth Circuit has imposed a significant hurdle to those who champion many farmer, food, and rural policies. The policies of local will, for the foreseeable future, remain difficult at the state level.

198. Arguing about intent may have been a decent political move for the proponents but it was not a wise move as far as the DCC doctrine as construed by the Eighth Circuit was concerned. Indeed, if the purpose of I-300 was invidious and that was why it was struck down, it was foolish to draw upon that purpose as a reason for passing the legislation.

APPENDIX – LB 593, NEBRASKA LEGISLATURE (2009).

Sec. *1*.

(1) The Legislature finds that it is in the public interest to encourage ownership and control of agricultural production and agricultural assets by individuals and families engaged in day-to-day labor and day-to-day management of farming or ranching operations to ensure the most socially desirable mode of agricultural production and to enhance and promote the stability and well-being of rural society. Communities surrounded by owner-operated farming or ranching operations have less poverty and score better on most measures of socioeconomic vitality than communities surrounded by farming or ranching operations owned by individuals and families that are not engaged in day-to-day labor and day-to-day management of such operations. Restricting the use of limited liability entities in the agriculture sector has been shown to result in rural communities with less poverty, less unemployment, and higher percentages of farming and ranching operations realizing cash gains. Therefore, it is in the public interest to limit the use of limited liability entities and their competitive benefits to farming and ranching operations owned by individuals or families engaged in day-to-day labor and day-to-day management of such operations. The Legislature finds that government has conferred liability limits on certain forms of business organizations and thus government has a responsibility to ensure their benefits are used in the public interest by establishing involvement in day-to-day labor and day-to-day management as an essential eligibility requirement of individuals and families allowed to use limited liability entities in farming and ranching operations.

(2) Additionally, the Legislature finds that it is in the public interest to safeguard the health and productivity of natural resources. Owners of farming and ranching operations who are also engaged in the operation of such operations have historically been more responsible stewards of natural resources than uninvolved investors. Investors not intimately involved in the operation of farming or ranching operations are less likely to be responsible stewards of natural resources if they are allowed to shield themselves from liability for their negative environmental impacts through use of limited liability entities. Therefore, it is in the public interest to restrict the use of limited liability entities by investors not involved in day-to-day labor and day-to-day management of farming or ranching operations.

(3) The Legislature finds that it is in the public interest to allow a total of five or fewer owner-operated farming or ranching operations to combine to form limited liability entities that will conduct farming or ranching operations to enable owner-operated farming and ranching operations to achieve economies of size by pooling resources.

(4) The Legislature finds that the federal government has also found that it is in the public interest to foster and encourage farming or ranching operations owned by the individuals or families that operate them and to limit certain benefits created by government to owner-operated farming or ranching operations. In 7 U.S.C. 2266(a), as such section existed on January 1, 2009, Congress states that "the maintenance of the family farm system of agriculture is essential to the social well-being of the Na-

tion and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of nonfamily-owned, large-scale, corporate-farming enterprises will be detrimental to the national welfare". Consistent with that policy, Congress requires recipients of federal loans for farming or ranching operations to be "primarily and directly" engaged in farming or ranching and in the case of entities, requires the individuals holding majority interest to become "owner-operators of not larger than family farms". In addition, Congress has limited farm commodity program payments to farm operators who are actively engaged in labor or management of their farming operations.

Sec. *2. For purposes of sections 1 to 5 of this act:*

(1) Entity means any legal entity organized under the laws of any state of the United States or any country that limits the liability of the entity's owners for the liabilities of the entity. Entity includes a corporation; limited liability company; limited liability partnership; limited partnership; cooperative association, corporation, or company, with or without stock; or limited cooperative association. Entity also includes any partnership of which an entity is a partner;

(2) Family farm or ranch entity means an entity in which majority ownership, and in the case of a corporation the majority of voting stock, is held by members of a family, or a trust or family trust as defined in section 76-1511 or 76-1512 created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is an individual actively engaged in the day-to-day labor and day-to-day management of the family farm or ranch entity's farming or ranching operation, and none of whose stockholders or members are nonresident aliens or entities or partnerships, unless all of the stockholders, members, or partners of such entities or partnerships are individuals, or spouses of individuals, related within the fourth degree of kindred to the majority of stockholders or members in the family farm or ranch entity;

(3) Farming or ranching means

(a) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products or

(b) the ownership, keeping, or feeding of animals for the production of livestock or livestock products;

(4) Farming or ranching operation means all farming or ranching occurring on agricultural lands or within agricultural structures, regardless of whether such activities, lands, or structures are located within or outside of Nebraska; and

(5) Qualified owner-operator controlled farm or ranch entity means an entity in which all ownership is held by five or fewer individuals actively engaged in day-to-day labor and day-to-day management of farming or ranching operations, at least one of whom is actively engaged in the day-to-day labor and day-to-day management of the entity's farming or ranching operation.

Sec. *3.*

Any interpretation or application of sections 1 to 5 of this act involving a qualified individual with a disability shall include reasonable modifications required under the federal Americans with Disabilities Act of 1990.

Sec. *4.*

> (1) No entity shall acquire or otherwise obtain an interest, whether legal, beneficial, or otherwise, in title to real estate used for farming or ranching in this state or engage in farming or ranching.
>
> (2) Subsection (1) of this section shall not apply to:
>
> (a) A family farm or ranch entity;
>
> (b) A qualified owner-operator controlled farm or ranch entity;
>
> (c) Nonprofit corporations;
>
> (d) A farming or ranching operation conducted by an Indian tribal corporation within the bounds of its own reservation;
>
> (e) Agricultural land which, as of the effective date of this act, is being farmed or ranched by an entity, is owned or leased by an entity, or in which there is a legal or beneficial interest in the title to such land directly or indirectly held by an entity, so long as such land or interest in such land is held in continuous ownership or under continuous lease by the same entity and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For purposes of this subsection, land purchased on a contract signed as of the effective date of this act shall be considered as owned on the effective date of this act;
>
> (f) A farming or ranching operation conducted for research or experimental purposes if any commercial sales from such operation are only incidental to the research or experimental objectives of the operation;
>
> (g) A farming or ranching operation conducted for the purpose of raising poultry for the production of poultry products, including eggs, or as a poultry hatchery;
>
> (h) Land leased by alfalfa processors for the production of alfalfa;
>
> (i) A farming or ranching operation conducted for the purpose of growing seed, nursery plants, or sod;
>
> (j) Mineral rights on agricultural land;
>
> (k) Agricultural land acquired or leased by an entity for immediate or potential use for nonfarming or nonranching purposes. An entity may hold such agricultural land for a period not to exceed five years in such acreage as may be neces-

sary to its nonfarm or nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, such land shall not be used for farming or ranching except under lease to farming operations that do not violate this section;

(l) Agricultural lands or livestock acquired by an entity by process of law in the collection of debts or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of except under a lease to farming operations that do not violate this section;

(m) A bona fide encumbrance taken for purposes of security;

(n) Custom spraying, fertilizing, or harvesting;

(o) Livestock futures contracts, livestock purchased for slaughter within two weeks, or livestock purchased and resold within two weeks; and

(p) The interest of an entity acting as trustee with regard to agricultural land held in a trust for the benefit of an individual or entity that qualifies to own such land under this section.

(3) If a family farm or ranch entity ceases to be a family farm or ranch entity, it shall have fifty years to either requalify as a family farm or ranch entity or dissolve and return to personal ownership if

(a) majority ownership of such entity continues to be held by individuals related to one another within the fourth degree of kindred or their spouses or a trust created for the benefit of such individuals and

(b) the landholdings of the family farm or ranch entity are not 1 increased. With regard to agricultural land leased by the family farm or ranch entity at the time it ceases to be a family farm or ranch entity, a renewal of the entity's lease on such agricultural land or the entity's purchase of such agricultural land shall not constitute an increase in landholdings.

Sec. *5*.

(1) The Secretary of State shall monitor purchases of agricultural land by entities and the farming and ranching operations of entities and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that an entity is violating section 4 of this act, he or she shall commence an action in district court to enjoin any pending illegal land purchase or livestock operation or forced divestiture of land held in violation of section 4 of this act. The court shall order any land held in violation of section 4 of this act to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

(2) If the Secretary of State or Attorney General fails to perform his or her duties under this section, Nebraska citizens and entities shall have standing in district court to seek enforcement.