STRATEGIES FOR PROMOTING SMALL AND SUSTAINABLE FARMING PRACTICES: AVOIDING THE PITFALLS OF THE DORMANT COMMERCE CLAUSE

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ABSTRACT

Over decades, farm production and organization in the United States has changed from smaller, individual farms to larger, more intensive operations. This change has greatly increased environmental degradation as well as economic and social stratification in rural communities. In response to these problems, several states have adopted legislation to attempt to protect family farms and promote small and sustainable farming practices. Many of these legislative attempts face a constitutional barrier: the Dormant Commerce Clause. Several statutes in Midwest states have already been invalidated for violating the Dormant Commerce Clause, and other statutory measures such as financial incentives and land-management statutes face similar dangers. The aim of this Article is primarily practical. It seeks to provide practitioners, legislators, and policy advocates with an understanding of the Dormant Commerce Clause, an explanation of why family farm statutes have been ruled unconstitutional as violating the Dormant Commerce Clause, and a guidebook for revising and writing family farm laws to immunize them from Dormant Commerce Clause challenges. In doing so, this Article argues that states should place greater emphasis on the environmental benefits of their farming laws, stress the importance of food security in the wake of COVID-19, and acquire evidence that farm laws are addressing the problems they seek to remedy. Finally, the Article looks at strategies other than family farm laws, such as Vermont's land-management statute, farmer's market food stamps, and state land leasing schemes, that could be used to promote small and sustainable farming. In doing so, this Article provides guidance to help legislators avoid Dormant Commerce Clause pitfalls when drafting their state-based strategies to support small or sustainable farming.

"Any abundance, in any amount, is illusory if it does not safeguard its producers."

— Wendell Berry, The Unsettling of America: Culture and Agriculture

I. INTRODUCTION

Looking out of an airplane window, American agriculture seems to be doing well. Small farmhouses in heartland states, surrounded by checkered fields of corn, wheat, and other crops, dot the countryside. But this idyllic, forty-thousand-foot view hides the struggles that small-to-medium sized family farms face on a day-to-day basis. Because of the continuing growth of corporate and industrial farming, states are struggling to protect family farms and promote sustainable farming practices. The family farm, even with the rise of the local food movement, is still in crisis. Small farm operations are largely being replaced by a

much more solitary and manufactured reality:[1] Farm production in the United States is largely specialized,[2] is aggregating,[3]and is shifting to larger,[4] more concentrated operations.[5]

There is a great need for states to find ways to support and encourage small family farming and sustainable agriculture because there are a multitude of environmental and economic problems that are caused by the industrialization of farming.[6] In response to these problems, several Midwest states have adopted legislation to limit corporate farm ownership.[7] Other states, such as Vermont, have passed detailed land use planning statutes to guide agricultural development statewide.[8] But these statutes have faced challenges under the Dormant Commerce

1. Kathryn Benz, *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. RES. J. 793, 794 (2006).

2. ROBERT A. HOPPE & PENNI KORB, LARGE AND SMALL FARMS: TRENDS AND CHARACTERISTICS 21 (2005).

3. Benz, *supra* note 1, at 794. When I refer to aggregation, I am referring to the same definition used by Benz. *Id.* When Benz refers to the aggregation of farm land and farm operations, they are "referring to the aggregation of acres of land or the aggregation/accumulation of livestock on fewer acres of land. For purposes of this article, [] consider aggregation to be a form of resource development." *Id.* 794 n.1.

4. Robert A. Hoppe & David Banker, *Production Shifting to Very Large Family Farms*, AMBER WAVES (June 1, 2005), https://www.ers.usda.gov/amber-waves/2005/june/production-shifting-to-very-large-family-farms/ [https://perma.cc/ZQ7K-PFWM].

5. *See* HOPPE & KORB, *supra* note 2, at 20-21. Agriculture is not very concentrated by traditional measures, "although concentration is approaching a level for some commodities where it may become a concern." *Id.* at 20.

6. *See* Mary Jane Angelo, *Corn Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 602-03, 611-12 (2010) ("[I]ndustrial agriculture has led to . . . high-risk working and living conditions for farm laborers . . . and a decline of economic and social conditions in rural communities. . . . A range of industrial agricultural practices contribute to environmental harms. . . . Pesticides can . . . caus[e] contamination to drinking water sources, contamination of fish that humans consume, and direct skin contact . . . in contaminated waters. . . . [Also], industrial agriculture can impact human health indirectly, by influencing the foods people eat."); Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods,"* 33 HAMLINE J. PUB. L. & POL'Y 49, 99 (2011) ("[T]he policy justifications supporting the notion of 'small producer exceptionalism' are, empirically, a mixed bag. . . . Given the current state of research, the big challenge for local food advocates is to reconcile their best-supported argument (economics) with their least-supported argument (food safety).").

7. James C. Chostner, *Buying the Farm*: *The Eighth Circuit Declares South Dakota's Anti-Corporate Farming Amendment Violates the Dormant Commerce Clause.* South Dakota Farm Bureau v. Hazeltine, 11 MO. ENVTL. L. & POL'Y REV. 184, 185 (2004).

8. *See* VT. STAT. ANN. tit. 10, § 6001 (2021).

Clause.[9] Midwestern family farm laws generally run afoul of the Dormant Commerce Clause, have not yet been revised to cure Dormant Commerce Clause deficiencies, and fail to adequately address the problems they are intended to remedy.[10] Vermont's growth management law, for example, has withstood Dormant Commerce Clause challenges, but its law may be difficult to replicate in other states.[11] Other states have passed financial incentives to encourage local and sustainable farming, but each of these face their own set of Dormant Commerce Clause challenges.[12]

The purpose of this Article is practical—it first briefly examines the history and current practice of agriculture in the United State and then examines the various ways that states have attempted to promote local, sustainable, or small farm practices. Special emphasis will be placed on family farm laws in Midwest states as well as Vermont's land use planning law in order to understand how the Dormant Commerce Clause poses problems for laws that attempt to promote small and sustainable farming practices. This article will also analyze more targeted state strategies to promote family farming, such as the adoption of a food stamps program that encourages the purchase of locally grown produce. As each one of these strategies for promoting small or sustainable farming is examined, this Article will describe the challenges the Dormant Commerce Clause poses to those strategies and will then provide advice on how states can increase the likelihood that a particular strategy will pass Dormant Commerce Clause muster.

II. BACKGROUND: AMERICAN AGRICULTURE PAST AND PRESENT

A. The Cultural Weight of American Farming

Farming has been a part of American society and culture since the nation's founding. To understand the importance farming holds within the American imagination, one must recognize how agricultural practices have changed over time and that farming is connected to a variety of cultural and moral values—some of which states have sought to protect through family farm laws.[13] In *The New Culture of Rural America*, Jedidiah Purdy explains that in some ways farming

9. Chostner, *supra* note 7, at 184.

10. *See generally id.*

11. *See generally* VT. STAT. ANN. tit. 10, § 6001 (2021).

12. *See* Lisa Held, *How States are Helping Farmers Adopt Sustainable Practices*, CIVIL EATS (Oct. 16, 2019), https://civileats.com/2019/10/16/how-states-are-helping-farmers-adopt-sustainable-practices/ [https://perma.cc/YY4V-CZVN].

13. Michael J. Boomershine, *The Battle Over America's Farmlands: Corporate Farming Practices and Legislative Attempts at Preserving the Family Farm*, 21 DRAKE J. AGRIC. L. 361, 372 (2016).

communities and the American farmer have been thought to represent generalized, American cultural traits:

> America long thought of itself as essentially connected with farming and farm communities. According to this idea, landholding produced self-reliant, free-thinking citizens, unlike the immigrants of the cities who were dependent on their priests and party bosses. In a tradition famously identified with Jefferson, the man who worked the land was upright, reliable, and uniquely able to serve his local village and defend his country.[14]

By making this claim, Purdy implies that many have viewed the essence of America through the lens of the farmer and farming communities. As the quote briefly notes, that sentiment is shared by one of America's Founding Fathers—Thomas Jefferson.[15] Jefferson, in a letter to a fellow Founding Father and statesman, James Madison wrote:

> Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation. If we do not the fundamental right to labour the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state.[16]

Jefferson's writings and Purdy's commentary demonstrate that contemporary notions regarding farming are "deeply rooted in the fibers of American culture and that significant values are attached to these practices."[17] In some rural states, these cultural values are viewed as critical to the very identity of the state.[18] This increases the urgency that those states feel to pass family farm laws as demonstrated by the fact that one of the primary goals of many family farm

14. Jedidiah Purdy, *The New Culture of Rural America*, AM. PROSPECT (Nov. 15, 2001), https://prospect.org/features/new-culture-rural-america/ [https://perma.cc/S6FT-HJME].

15. *Id.*

16. THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd et al. eds., Princeton Univ. Press 1950), https://press-pubs.uchicago.edu/founders/documents/v1ch15s32.html [https://perma.cc/R7XD-ZJ47].

17. Boomershine, *supra* note 13, at 366.

18. *Id.* at 375.

laws is to protect the values and culture of rural farming communities.[19]

B. The History of American Agriculture

Prior to the widespread impact that the industrial revolution had on agriculture, farming was conducted through intensive human and animal labor.[20] Animals and primitive machinery were used to aid humans in basic farming tasks.[21] Because pre-industrial revolution farming was so labor intensive, it generally was not feasible to be carried out on a large scale.[22] As such, in the early 20th century, a substantial percentage of the United States population lived on small, diversified farms.[23]

American agriculture began to change rapidly after World War II due to technological developments, including advances in the mechanization of labor and the availability of chemical inputs.[24] As the 20th century progressed, hybridized plants also led to the creation of new varieties of grains that produced larger crop yields, such as wheat, rice, and corn.[25] These larger crop yields were made possible because farmers were able use large amounts of water, fertilizers, pesticides, and fossil fuels.[26] The USDA reported that in 2007 alone, American crop farmers used 684 million pounds of pesticides.[27] Over half of this amount was used for corn production; however, many other common fruits and vegetables, such as onions and watermelons, were also treated with pesticides.[28]

This industrial transformation of agriculture prompted a rapid growth in

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19. *Id.*

20. *Id.* at 367.

21. *Id.*

22. *Id.*

23. CAROLYN DIMITRI ET AL., U.S. DEP'T AGRIC., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2 (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf?v=0 [https://perma.cc/UAY6-GARW].

24. *Id.* at 6.

25. William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENV'T L. J. 213, 251 (2009).

26. *Id.* at 252 (describing why the hybrid plants were successful in higher crop yields).

27. U.S. DEP'T OF AGRIC., AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 21 (Craig Osteen et al. eds., 2012), http://large.stanford.edu/courses/2012/ph240/briggs1/docs/eib98.pdf [https://perma.cc/PHV2-ZTUN] (noting that farmers spent $7.87 billion on the millions of pounds of pesticides they used).

28. *See id.* ("U.S. corn, cotton, fall potatoes, soybeans, and wheat accounted for nearly two-thirds of pesticide quantities applied."); Nicole E. Negowetti, *Exposing the Invisible Cost of Commercial Agriculture, Shaping Policies with True Cost Accounting to Create a Sustainable Food Future*, 51 VAL. U. L. REV. 447, 448-49 (2017).

average farm size and a corresponding decline in the number of small crop-diverse farms.[29] By cultivating just a handful of crops, or even just one, farmers were able to further industrialize and enlarge their production.[30] Even though this move toward monoculture farming lessened the cost of labor and allowed farms to expand, contemporary research indicates that monoculture farming leads to negative environmental, social, and health impacts.[31]

C. Industrial/Corporate and Family Farming

Corporate farming is defined as "large-scale agricultural companies who engage in [industrial] business practices."[32] This is distinguishable from traditional, small-scale farmers engaged in more localized agricultural operations, whereas corporate farms are incorporated agricultural entities.[33] Importantly, small- and mid-size family farms can be incorporated, but corporate farming in this Article only refers to those corporate farming operations that engage in large-scale farming operations or factory farming (including large-scale family farms). "General characteristics of corporate farming operations include large-scale farming operations or factory farming, vertical integration, and other practices consistent with corporate culture,"[34] and with an "emphasis on production and output."[35] Generally, corporate farming involves large-scale agricultural companies focused on profitability and increased production.[36]

D. What Is a Family or Small Farm?

The common view of family farming is associated with a traditional view—an "independently owned farm situated in rural America."[37] A family farm involves an individual or a family engaging in the majority of the operation, labor, and capital equity.[38] Unlike corporate farms, family farms tend to be small- or

29. DIMITRI ET AL., *supra* note 23, at 6 (arguing that advances in mechanization and increases in chemical input have led to the decline of small farms).

30. *See* Negowetti, *supra* note 28, at 449.

31. *See id.*; *The True Cost of American Food*, SUSTAINABLE FOOD TRUST (2016), http://sustainablefoodtrust.org/wp-content/uploads/2013/04/TCAF-report.pdf [https://perma.cc/P6E2-XLG5].

32. Boomershine, *supra* note 13, at 363.

33. *Id.* at 363-64.

34. *Id.* at 364.

35. *Id.*; *see* Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. POL'Y 203, 205 (1993) (discussing agricultural land as an enterprise asset for corporate farmers seeking an appreciating investment).

36. Boomershine, *supra* note 13, at 364.

37. *Id.*

38. *Id.* at 364-65.

medium-sized, are not vertically integrated, and are typically not mono-cultural.[39]

Sourcing food from small farms comes with many benefits. For example, "[f]ood originating from small farms is more likely to be sustainably produced than food that comes from large [corporate] farms," and it is more likely to be fresh.[40] Additionally, farmers offering food locally are more accountable to their communities and have a smaller carbon footprint.[41]

It is important to note, however, that promoting small farming is not identical to promoting sustainable farming. Small farms are more likely to be sustainable farms, but the term sustainable farm relates less to the size of the farm and more to the kinds of practices farmers use on their land.[42]

III. FAMILY FARM LAWS

A. What Is a Family Farm Law?

During the rise of industrial farming, many states passed family farm laws to protect small- and medium-sized family farms.[43] These statutes or state constitutional provisions restrict the power of certain corporations to engage in farming or agriculture.[44] Some of these laws do so by preventing corporate farms from acquiring, purchasing, or otherwise obtaining land that is used or usable for agricultural production.[45] Such legal provisions are commonly referred to as

39. *Id.* at 364.

40. Chris Erchull, *The Dormant Commerce Clause—A Constitutional Barrier to Sustainable Agriculture and the Local Food Movement***,** 36 W. NEW ENG. L. REV. 371, 378 (2014).

41. *See id.* at 379.

42. *See* Gail Feenstra et al., *What is Sustainable Agriculture?*, SUSTAINABLE AGRIC. RES. & EDUC. PROGRAM (Feb. 23, 2022, 6:05 PM), https://asi.ucdavis.edu/programs/ucsarep/about/what-is-sustainable-agriculture [https://perma.cc/EX8B-M33G] ("The goal of sustainable agriculture is to meet society's food and textile needs in the present without compromising the ability of future generations to meet their own needs. Practitioners of sustainable agriculture seek to integrate three main objectives into their work: a healthy environment, economic profitability, and social and economic equity. . . . In addition to strategies for preserving natural resources and changing production practices, sustainable agriculture requires a commitment to changing public policies, economic institutions, and social values. Strategies for change must consider the complex, reciprocal and ever-changing relationship between agricultural production and the broader society.").

43. *See Corporate Farming Laws – An Overview*, THE NAT'L AGRIC. L. CTR. (Feb. 23, 2022, 6:11 PM), https://nationalaglawcenter.org/overview/corporatefarminglaws/ [https://perma.cc/2G3P-CDM3].

44. *Id.*

45. *Id.*

corporate farming laws or family farm laws.[46] And most are enacted as statutes rather than constitutional amendments.[47] Nine states have statutory provisions that prohibit or limit corporate farm ownership: South Dakota, North Dakota, Oklahoma, Iowa, Minnesota, Wisconsin, Nebraska, Missouri, and Kansas.[48]

The primary goal of family farm laws has historically been to protect the economic viability of family farms from the threat of competition with corporate-owned or corporate-managed farms.[49]

> [Family farm] laws vary from state to state but typically establish a general prohibition on corporate farming activities, set out certain exemptions to the general prohibition, and provide a legal mechanism for forcing corporations to divest ownership of land held in violation of the law. Some corporate farming laws exempt cooperative associations from their restrictions, provided certain conditions are satisfied. Others permit certain corporations to acquire farmland even though the corporation would otherwise be prohibited from engaging in farming or purchasing the agricultural land. For example, corporate farming laws typically permit a bank to acquire agricultural land if the acquisition is undertaken for the purpose of collecting a debt or enforcing a legal security interest. The same laws, however, will generally limit the amount of time the bank or other permitted corporation can maintain an interest in that agricultural land and will often restrict the ability of the corporation to use that land.
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> Several corporate farming laws exempt "family farm corporations." To qualify as a family farm corporation, the entity typically must be comprised of family members who are within a certain degree of kinship and who must own a majority of the voting stock in the corporation. A common requirement is that the shareholders in a family farm corporation be natural persons rather than a corporate entity. Six of the state statutes limit the number of shareholders an authorized corporation can have. Another common requirement to satisfying the family farm corporation exemption is that at least one family member must reside on the farm to prevent "absentee ownership," a characteristic proponents of corporate farming laws often attribute to corporate farming activities.[50]

Some proponents also argue that corporate-owned or managed farms are more likely than family farms to inflict serious environmental damage.[51] Instead

46. *Id.*
47. *See id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

of being held responsible for these environmental harms, corporate farms, unlike family farms, will be protected from liability by the farms' corporate status.[52] On the other hand, opponents of corporate farming laws commonly argue that these laws are unnecessarily restrictive, ineffective, anti-capitalistic, and unconstitutional "because they impede a vibrant free trade economy among the states."[53]

B. Why Do States Pass Family Farm Laws?

The development of agriculture toward larger, more industrial farming operations has in many ways "depopulated the countryside, destroyed the economic and social texture of small towns, and made certain that ordinary [citizens] are defenseless against the pollution of factory farming."[54] States pass family farm laws to address these negative impacts, and the following section examines some of those negative impacts in detail.

1. Protect Agrarian/Rural Values

One of the main reasons that states pass family farm laws is to protect agrarian/rural values.[55] Minnesota's family farm statute, for example, begins with a proclamation regarding the importance of the family farm to Minnesota culture: "The legislature finds that it is in the interests of the state to encourage and protect the family farm … to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family."[56] This proclamation stresses the social, cultural, and moral values Minnesota aims to safeguard by protecting the family farm. Industrial corporate farming is seen as a threat to those values because it likely leads to a decline in rural populations[57] and facilitates increased absentee ownership.[58] This decrease in population and in-person landownership arguably diminishes the social, cultural, and economic stability of rural areas.

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52. *Id.*

53. *Id.*

54. Verlyn Klinkenborg, *Keeping Iowa's Young Folks at Home After They've Seen Minnesota*, N.Y. TIMES (Feb. 9, 2005), https://www.nytimes.com/2005/02/09/opinion/keeping-iowas-young-folks-at-home-after-theyve-seen-minnesota.html [https://perma.cc/6DQ4-M65K].

55. *See* Benz, *supra* note 1, at 800.

56. MINN. STAT. § 500.24 (2021).

57. Grace Garwood, *How Rural Population Decline Impacts U.S. Agriculture*, THE FOOD INST. (March 4, 2022, 4:27 PM), https://foodinstitute.com/focus/how-rural-population-decline-impacts-u-s-agriculture/ [https://perma.cc/RDQ4-CQBF].

58. *See* Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961, 992-96 (1976).

Moreover, family farming—unlike industrial farming—is often associated with agrarianism, which itself connotes deeply rooted notions of morality and community.[59] Social philosophers have observed three basic tenets associated with the agrarian lifestyle:

> The first tenet connects agrarianism to nature; through contact with nature, the agrarian acquires virtues of honor, self-reliance, and moral integrity. Next, agrarianism engenders a sense of belonging to a community. Jefferson believed that agricultural pursuits keep citizens in touch with communities and that Democracy requires such a connection. Finally, agrarianism checks against the evils of urbanism, capitalism, and the imbalances of modern society. Jefferson believed that if each farm was a self-sustaining enterprise and if a substantial portion of the populace could be employed as independent farmers, the country would stave off the power-seeking schemes of massive economic concern.[60]

Protecting family farms preserves these values. Even outside rural areas, Americans tend to associate these agrarian ideals with farming.[61] Some scholars go so far as to argue that the bedrock purpose of lawmakers in passing family farm laws is to avoid commodifying or eliminating agrarian values by maintaining a sense of virtue and pride for the practice of family farming.[62] In other words, states pass family farm laws in part to "insulate the rural lifestyle, or culture, that is found on family farms from economic competition, and resulting destruction, by large corporations."[63]

59. *See* Margot Pollans & Michael Roberts, *Setting the Table for Urban Agriculture*, 46 URB. LAW. 199, 204 (2014).

60. *Id.* at 204-05.

61. *Id.* at 206.

62. *See* Boomershine, *supra* note 13, at 374.

63. Brian F. Strayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679, 679 (1991).

2. Economic Benefits

Many of these statutes aim to preserve the family farm as the "basic economic unit" of a state.[64] There are several goals that could be cited, and many scholars frame the goals differently.[65] There are, however, five primary economic arguments that are made to support family farm laws.

First, some courts are hesitant to accept the limited liability associated with the corporate form, especially when the corporate form is used by an industrial farm, frees the operation from the restraints limited liability would otherwise impose on the farm.[66] For example, liability for injuries caused by pesticides or

64. *See* MINN. STAT. § 500.24 (2021).

65. *See, e.g.*, Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 365-67 (1997); Morrison, *supra* note 58, at 984; 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, 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); Prim, *supra* note 35, at 204; 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); Strayton, *supra* note 63, at 679; 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. J. 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, 798-800 (1983); Neil E. Harl, *Farm Corporations—Present and Proposed Restrictive Legislation*, 25 BUS. LAW. 1247, 1258 (1969-1970); 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).

66. *See generally* Anthony Schutz, *Nebraska's Corporate-Farming Law and Discriminatory Effects Under the Dormant Commerce Clause*, 88 NEB. L. REV. 50, 63-67 (2009).

water pollution may not actually fulfill their remedial function when the offending corporate farm is able to provide greater financial protection to owners.

Second, there are economic arguments related to the structure of the production and distribution of farm products under corporate forms.[67] Namely, family farm laws strive to curb vertical integration and horizontal consolidation by limiting the use of business forms that facilitate those processes.[68] In the horizontal sense, family farm laws could be seen as a way to keep farm sizes small to provide competition among producers.[69] In the vertical sense, family farm laws can keep the production, distribution, and sale sectors of the industry separate, which may lead to more competition among entities while also allowing for more accountability related to quality control.[70]

Third, some argue that industrial corporate farms are less likely to be influenced and held accountable by some of the informal social controls that influence small-to-moderate sized family farms.[71] For example, a large industrial corporate farm may care less about the environmental and quality-of-life (e.g., smell, noise) impacts its mega-hog farm has on its neighbors than would a small farmer living in the local community.

Fourth, some fear that corporate farming could lock agricultural land ownership in corporate control in perpetuity.[72] As corporate farms acquire more land that they appear to be able to hold forever, some fear it will become much more difficult for new farmers to enter the farming business or for current farmers to acquire or lease land to bolster their farms due to economic pressures.[73]

Fifth, corporate farming seems to cause rural populations to decline while simultaneously concentrating absentee ownership.[74] A decline in farms leads to a decrease in rural populations, which causes economic contraction in rural towns,

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67. *See* Morrison, *supra* note 58, 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* State *ex rel.* Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 805-06 (Mo. 1988).

68. *See* Morrison, *supra* note 58, at 993-94.

69. *See id.*

70. *See id.*

71. *See* Schutz, *supra* note 66, at 101.

72. *See* Brooks, *supra* note 65, at 779.

73. *See id.*

74. *See* Morrison, *supra* note 58, at 994-95 (stating that one aim is to exclude absentee landlords). However, fear of absenteeism is easily translated into the need for rural people, the effectiveness of informal controls, or both. *Id.* The matter is also related to the proper size of farms, which overlaps considerably with concerns about aggregation and consolidation. *Id.*; *See also* Phelps, *supra* note 65, at 444-48 (addressing the issue of farm size).

which triggers a seemingly unstoppable cycle of rural atrophy in which historical communities wither away.[75]

3. Environmental Impacts

While the environmental impacts of industrial agriculture are severe, states do not typically emphasize how family farm laws could curb environmental harms. Many family farm laws make passing mention of the environmental benefit of family farms, but that benefit takes a backseat to social and economic benefits.[76] However, if family farm laws are to be more successful in resisting constitutional challenges under the Dormant Commerce Clause, then the environmental benefits of those laws will need to be further emphasized.[77] Small farms are less harmful to the environment because they tend to grow crops that are more diverse, are more accountable to their communities, and produce a smaller carbon footprint than industrial farms.[78] This subsection walks through the various environmental harms that industrial farming can cause but which small-to-medium family farming might be able to mitigate.

i. Damage to Soil

Industrial farming results in soil erosion, which endangers the future productivity of agricultural land while also causing other environmental issues such as water quality deterioration due to runoff.[79] Nearly half of all land in the United States is used for some form of farming—animal or crop.[80] Unfortunately, soil on agricultural land is eroding far faster than is being replaced.[81] Even more worryingly, "soil that is lost is essentially irreplaceable."[82] Erosion impacts farm

75. *See* Bahls, *supra* note 65, at 327-28.

76. *See* Christy Anderson Brekken, Note, South Dakota Farm Bureau, Inc. v. Hazeltine*: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 LAW & INEQ. 347, 351-52 (2004).

77. *See infra* section V.B. As is noted later in this Article, before states emphasize the environmental benefits of small farming, they need to conduct further research to determine what the environmental benefits actually are.

78. *See* Erchull, *supra* note 40, at 378-79.

79. *See* Eubanks *supra* note 25, at 269.

80. *See id.* at 261 (finding that 1.03 billion of the 2.3 billion acres of U.S. land are used by farmers and ranchers).

81. *See* Nancy M. Trautmann et al., *Modern Agriculture: Its Effects on the Environment*, NAT. RES. CORNELL COOP. EXTENSION (2012), http://psep.cce.cornell.edu/facts-slidesself/facts/mod-ag-grw85.aspx [https://perma.cc/8L7L-7BC8] (expressing that soil erodes ten times as much from fields as is replaced by natural soil formation processes).

82. *Id.* (explaining that it takes up to 300 years for one inch of agricultural topsoil to form).

productivity because it removes nutrient rich surface soils, which help to retain water and nutrients near plant roots.[83] After surface soil is eroded, the remaining subsoils are typically "less fertile, less absorbent, and less able to retain pesticides, fertilizers, and other plant nutrients."[84] This terrifying situation is connected to the shortsightedness of industrial agriculture, which aims to maximize profits by maximizing crop yields in the present with little eye toward the future.[85]

Some erosion control measures and technologies are admittedly expensive, but such expense must be measured alongside the significant cost resulting from the long-term harm of erosion—declining soil fertility and water retention.[86] In the near term, industrial farms and family farmers may be able to counter the effects of soil erosion with more intense irrigation and fertilization but such practices cannot stop the long-term decline of farmland productivity.[87] In fact, these irrigation practices likely accelerate erosion, creating even more intense environmental damage.[88]

Regrettably, many government policies have encouraged and continue to encourage practices that cause soil erosion.[89] The government encourages farmers to maximize their production of commodity crops, corn, and other subsidized crops, such as soybeans.[90] To do this, farmers often neglect to rotate those crops with other crops that could prevent erosion and replace nutrients in farmland soil.[91] In some scenarios, the soil erosion can render once profitable farmland utterly worthless.[92] There is already historical precedent for this found in the Dust Bowl.[93] The American Dust Bowl of the 1930s was caused by unsustainable farming practices such as aggressive tillage, which created severe soil erosion throughout several farming states.[94]

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83. *See id.* (stating that surface soils contain organic matter, plant nutrients, and fine soil particles).

84. *Id.*

85. *See id.* (analyzing how the use of fertilizers and pesticides to increase short-term productivity of farms has caused excessive erosion).

86. *See* Negowetti, *supra* note 28, at 451.

87. *See id.*; *see also* Trautmann et al., *supra* note 81 (discussing how the negative effects of soil erosion have been masked by improved technology).

88. *See* Negowetti, *supra* note 28, at 451; *see also* Trautmann et al., *supra* note 81 (discussing how the negative effects of soil erosion have been masked by improved technology).

89. Eubanks *supra* note 25, at 262 (2009) (explaining how the Farm Bill encourages the production of commodity crops).

90. *Id.*

91. *Id.*

92. *See id.*

93. Negowetti, *supra* note 28, at 452.

94. *Id.*

In addition to the harm caused to land productivity, soil erosion can also negatively impact water quality.[95] Eroded soils often contain chemicals and nutrients that can impair water sources.[96] For example, drinking water impacted by soil erosion from farms may have a higher chance of containing dangerous concentrations of nitrate or other organic compounds that violate public health standards.[97] Soil erosion can also cause surface waters to be disrupted or clogged by excessive plant growth in the waters.[98]

Finally, soil erosion also has severe impacts on the climate.[99] Erosion from unsustainable, corporate farming practices can lead to the release of billions of tons of carbon dioxide into the atmosphere.[100] When soil is tilled, the tilled organic matter in the soil absorbs oxygen from the atmosphere.[101] Once this organic matter is exposed to oxygen and decomposes, the soil releases carbon dioxide into the air.[102] When erosion occurs, it removes the already decomposing topsoil away and uncovers a new layer of topsoil or a subsoil to the decomposition process.[103]

ii. Water Contamination

Industrial farming of commodity crops can also cause water pollution by inserting nutrients, pesticides, and sediments into surface waters.[104] These farms often discharge manure,[105] fertilizer, and pesticides into streams, lakes, and reservoirs, which increases the levels of bacteria, nutrients, and synthetic organic compounds in the water.[106] Fertilizers do increase crop yields, but, because they are composed of high percentages of phosphorus and ammonium nitrate, they have also caused extensive environmental damage.[107] Crops cannot use all of the

95. *Id.*

96. *See* Trautmann et al., *supra* note 81.

97. *See id.*

98. *Id.*

99. Negowetti, *supra* note 28, at 452.

100. *Id.*; *see* Eubanks, *supra* note 25, at 262 (concluding that when the carbon dioxide is released the soil is tilled).

101. *See* Eubanks *supra* note 25, at 262.

102. *See id.*

103. *See id.* at 262-63 (arguing how sustainable farming methods include no-till farming, cover cropping, crop rotation, and residue mulching, but these practices are not incorporated into commodity crop production).

104. Trautmann et al., *supra* note 81.

105. *See* Jon Devine & Valerie Baron, *CAFOs: What We Don't Know Is Hurting Us*, NAT'L RES. DEF. COUNCIL, INC., https://www.nrdc.org/resources/cafos-what-we-dont-know-hurting-us [https://perma.cc/5MJW-QJZ3].

106. Trautmann et al., *supra* note 81.

107. *See* Eubanks *supra* note 25, at 255 (discussing the negative environmental impacts of

ingredients in a fertilizer—a problem amplified by the overapplication of fertilizers.[108] Because not all the ingredients are used by the plants, unused fertilizer migrates to surface or groundwater via rain, flooding, snow, or other means.[109] These fertilizers damage marine life in freshwater and harm commercial fisheries in coastal waters.[110] "[D]ead zones," for example, can form when nutrients from crop production cause expansive algae blooms in the ocean that drain the water of oxygen causing other organisms to die off.[111]

The runoff from fertilizers and pesticides also implicates the health of the general human population.[112] Pesticides are used by farmers—especially on industrial monocultural farms—to combat pests that disturb crops.[113] These pesticides can leach into public waterways used for drinking water and violate various water quality standards for human consumption.[114]

In addition to its impact on water quality, industrial farming also creates problems regarding water quantity.[115] More than 135 billion gallons of water are used by farms each day, and water use is extremely intensive in commodity crop production which requires large irrigation systems.[116] As freshwater resources continue to be exhausted, at least thirty-six states anticipate water shortages in the near future.[117]

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fertilizers).

108. *See Dead in the Water*, ENV'T. WORKING GRP. (Apr. 10, 2006), http://www.ewg.org/reports/deadzone [https://perma.cc/LN6F-T6YF] (analyzing how taxpayers' money is being used to fund the use of fertilizers, further aggravating the issue of soil erosion); *see generally* Marc Ribaudo et al., *Nitrogen in Agricultural Systems: Implications for Conservation Policy*, U.S. DEP'T OF AGRIC. 1, 14 (Sept. 2011), http://www.ers.usda.gov/Publications/ERR127/ERR127.pdf [https://perma.cc/NCA9-KY8N] (confronting overuse and misapplication of nitrogen fertilizers).

109. *See* Linda K. Breggin et al., *It's Time to Put a Price Tag on the Environmental Impacts of Commodity Crop Agriculture*, 43 ENV'T. L. REP. 10130, 10131 (2013) (explaining that when cropland becomes saturated from rainfall, snowmelt, irrigation, or flooding, migration occurs).

110. *See* Eubanks *supra* note 25, at 255 (explaining how the use of fertilizers affect the fishing community that rely on the water bodies that can be affected).

111. *See* Breggin et al., *supra* note 109, at 10131 (stating the chain of events that occurs when algae blooms are produced).

112. *See* Negowetti, *supra* note 28, at 454.

113. *See id.* at 454-55.

114. *See id.* at 455.

115. *See* Eubanks *supra* note 25, at 253 (stating that over one-third of U.S. freshwater is used for agricultural irrigation).

116. Negowetti, *supra* note 28, at 455.

117. *See id.* at 456.

iii. Diminished Air Quality

Industrial farming can also diminish air quality by ejecting large amounts of fossil fuels into the atmosphere through tractors and machinery, and by releasing greenhouse gases (GHGs) to the atmosphere as a result of soil erosion.[118] In addition to GHG emissions caused by soil erosion, agriculture is also responsible for the majority of nitrous oxide emissions in the United States.[119] Furthermore, the distribution of commodity crops thousands of miles away from the farms where the crops were grown adds further GHG emissions to the atmosphere from the vehicles used to transport the crops.[120]

iv. Loss of Biodiversity and Wildlife Habitats

Pesticides, fertilizers, and habitat destruction implemented by industrial agriculture have significant impacts on wildlife biodiversity.[121] Of all the animals and plants to receive designation as "endangered or threatened," 84% received such status due, at least in part, to agriculture—mostly the result of pesticide contamination.[122] Moreover, bio-rich regions such as wetlands are often converted into croplands—destroying critical habitats.[123] Many researchers connect the use of pesticides and the conversion of wildlife habitats into industrial croplands as one of the main causes of the worldwide loss of pollinators that is now occurring.[124]

Given the well-documented deleterious effects of industrial agriculture, states should place greater emphasis on the ways that family farm laws could mitigate the environmental harms of corporate farming.

118. *See* Eubanks *supra* note 25, at 266-68 (describing that air pollutants are produced by fossil fuel dependent farming).

119. *Id.* at 267.

120. *Id.* at 267-68.

121. *See id.* at 263-264 (discussing how wildlife habitats and biodiversity are affected by commodity agriculture).

122. *Id.*

123. *See id.* at 264 (emphasizing how the conversion is a classic market failure because the wildlife and biodiversity is completely disregarded).

124. *See* EPA, *Pollinator Health Concerns*, (Nov. 6, 2016), https://www.epa.gov/pollinator-protection/pollinator-health-concerns [https://perma.cc/6W3W-CZT7] (indicating that pesticides are one of the major reasons for the death of insects).

C. Examples of Family Farm Laws

1. Minnesota[125]

Minnesota's anti-corporate farming law is one of the more complex statutes still on the books. The statute begins with a proclamation about the importance of the family farm to Minnesota culture:

> The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.[126]

As this quote makes clear, Minnesota wants to promote the family farm not just for economic reasons but also because it sees the family farm as the foundation of Minnesota's rural community.[127] The state frames the statute not as a mere desire to favor in-state landowners over out-of-state landowners but as a law aimed at promoting a specific social end—the stability and continuance of rural life and culture.[128]

The law prohibits a corporation, limited liability company, pension or investment fund, trust, or limited partnership from engaging in farming or owning agricultural land unless that land is acquired for purposes of a security.[129] It further provides exceptions for companies or trusts owned in part by families where at least one member of the family is still on the farm.[130] Moreover, the law—like many of the anti-corporate laws—provides exceptions for religious farms, aquatic farms, non-profit organizations, and gifted land.[131]

If a corporation does not qualify for any of the statute's exceptions, Minnesota allows that entity to petition the Commissioner of Agriculture for an exemption from the blanket prohibition against corporate farming.[132] The commissioner may issue an exemption if the entity meets the following criteria: (1) the exemption would not frustrate the purpose of the statute and (2) "the petitioning entity would not have a significant impact upon the agriculture industry

125. *See* MINN. STAT. § 500.24 (2021).
126. *Id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. *Id.*

and the economy" of the state.[133] To promote efficiency and transparency, Minnesota requires the commissioner to rule on permit requests within one year of receiving them and mandates all approved permits be sent annually to the chairs of the Minnesota Senate and House of Representatives Agricultural Policy Committee.[134]

Finally, the statute includes clear enforcement processes. When a corporation is found in violation of the law by owning agricultural land, the state attorney general must commence an action in the district court where any unlawfully held agricultural land is being held.[135] If the court find that the lands are held in violation of the statute, then it is required to issue an order for the corporation to surrender those lands within five years.[136]

2. Nebraska[137]

Unlike most states, Nebraska did not pass an anti-corporate farming statute and instead passed an anti-corporate farming constitutional amendment. The amendment prohibits corporations and syndicates from acquiring or obtaining an interest in any real estate in Nebraska used for farming or ranching.[138] The amendment provides exceptions to the general prohibition for family farm or family ranch corporations, as well as several other entities such as non-profits and Indian tribes.[139]

The amendment also includes an enforcement section. If a qualifying family farm loses its family farm status, that entity will have fifty years to re-qualify as a family farm.[140] If the entity fails to meet that deadline, then the farm will be dissolved.[141] If a corporation owns or farms land in violation of this amendment, the Nebraska attorney general must bring an action in court requesting an order for the land to be sold.[142] If land is ordered by the court to be sold, that land must be divested by the corporation in two years.[143]

The amendment includes a citizen's suit provision allowing Nebraska

133. *Id.*
134. *See id.*
135. *Id.*
136. *See id.*
137. *See* NEB. CONST. art. XII, § 8.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*

citizens and entities to have standing to enforce the amendment in district court.[144] But this provision is only activated when the Secretary of State or attorney general fail to perform his or her duties as directed by the amendment.[145]

3. South Dakota

More than any other state, South Dakota's statute explicitly points out the threat posed by industrial farming companies: "South Dakota recognizes the important of the family farm to the economic and moral stability of the state, and . . . recognizes that the existence of the family farm is threatened by conglomerates in farming."[146] Notably, like Minnesota's law, this opening statement also recognizes the importance of the family farms for South Dakota culture. The law provides a blanket prohibition on corporate farm ownership—domestic or foreign.[147] The law then provides for several exceptions including dairy, poultry, rabbit, and egg farming as well as all the usual exceptions for non-profits, debts, and securities.[148]

The statute notes the importance of allowing family farms to continue farming and defines a family farm as requiring at least one "kindred" to be a resident of a farm for the farm to qualify as a family farm.[149] This definition of the family farm caused the Eighth Circuit to declare the South Dakota statute unconstitutional under the Dormant Commerce Clause in 2003.[150]

IV. RISE AND SUCCESS OF DORMANT COMMERCE CLAUSE CHALLENGES TO FAMILY FARM LAW

Several courts, including the United States Supreme Court, have heard challenges to family farm laws on the basis that they were in violation of the Equal Protection Clause, Due Process Clause, Privileges and Immunities Clause, and Contract Clause of the United States Constitution. In the context of these challenges, courts have consistently upheld the constitutionality of the anti-corporate statutes. "During the twentieth century, no state appellate court or federal court held that a state's family farming law was unconstitutional."[151] But in the twenty-first century, courts began to invalidate these laws under the Dormant

144. *Id.*
145. *Id.*
146. S.D. CODIFIED LAWS § 47-9A-1 (2021).
147. *Id.* § 47-9A-3.
148. *See id.* §§ 47-9A-4 to -12.1.
149. MINN. STAT. § 500.24 (2021).
150. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003).
151. *Corporate Farming Laws—An Overview*, *supra* note 43.

Commerce Clause.[152]

A. What is the Dormant Commerce Clause? A Primer

The Commerce Clause grants Congress the power to regulate commerce among the states.[153] The negative implication of this power—the Dormant Commerce Clause—prohibits states and municipalities from enacting economically protectionist measures that discriminate against interstate commerce by burdening out-of-state competitors to benefit in-state economic interests.[154] Courts employ the Dormant Commerce Clause in order to fulfill the "Framers' purpose to 'preven[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'"[155]

A state law or regulation challenged under the Dormant Commerce Clause is subject to a two-tiered test. The first question in the analysis is whether the state's action discriminates against interstate commerce by favoring in-state economic interests or transactions over out-of-state interests or transactions.[156] A state law may be facially discriminatory or discriminatory in its purpose or effect.[157] If the law is facially or in effect discriminatory, it is per se invalid.[158] Once a court finds a law to be discriminatory, the burden shifts to the state to justify its law under the "strictest scrutiny."[159] This is satisfied by demonstrating (1) that the state has a valid purpose for the law unrelated to economic protectionism and (2) that the state does not have any nondiscriminatory alternatives for achieving that valid purpose.[160] The state's burden under this analysis is a heavy one that proponents rarely overcome.[161]

Importantly—and confusingly—the United States Supreme Court has not

152. *See id.*

153. U.S. CONST. art. I, § 8, cl. 3.

154. *See* Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).

155. Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996) (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995)).

156. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99-100 (1994).

157. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994); Maine v. Taylor, 477 U.S. 131, 138 (1986).

158. *Taylor*, 477 U.S. at 138; *City of Philadelphia v. New Jersey*, 437 U.S. at 623-24.

159. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

160. *See* Wyoming v. Oklahoma, 502 U.S. 437, 453-54 (1992); *Taylor*, 477 U.S. at 138.

161. *See generally Taylor*, 477 U.S. at 151-52.

been precise in defining how searching the inquiry into nondiscriminatory alternatives is. The Court has made clear that, in determining a law's constitutionality under the Dormant Commerce Clause, the court must consider whether the state could enact a nondiscriminatory measure that could advance the same local interest.[162] In *Hunt v. Washington State Apple Advertising Commission*, for example, the Court invalidated a North Carolina apple labelling law for discriminating against Washington state apples.[163] The Court invalidated this law in large part because it believed North Carolina could achieve its purpose of preventing deceptive apple marketing practices using nondiscriminatory means.[164] The nondiscriminatory practices included (1) permitting out-of-state apple farmers to use labels only if they marked their shipment with applicable national USDA labels or (2) banning state grading labels that were not equal to or superior to the USDA grading standard.[165]

In apparent contrast to *Hunt*, the Court in *Maine v. Taylor* rejected a Dormant Commerce Clause challenge to Maine's ban on the import of baitfish from out-of-state.[166] The Court found the ban was justified to advance a legitimate state environmental concern—the protection of Maine's native fisheries from parasitic and non-native invasive species.[167] The Court rejected the challenger's contention that the state could devise better testing and inspection procedures to protect native fisheries without impeding interstate commerce.[168] As the Court noted, the abstract possibility of the state devising other procedures that may or may not work does not establish that non-discriminatory alternatives are in fact available for purposes of analyzing the constitutionality of a statute under the Dormant Commerce Clause.[169]

Hunt and *Taylor* seem difficult to reconcile, but scholars may have discerned a rule that explains these two and other seemingly contradictory cases. "[W]hen evaluating a Dormant commerce clause challenge, the courts consider the availability of actual non-discriminatory alternatives, rather than the abstract possibility of a state deciding on and enacting an alternative."[170] In other words, in

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162. PRACTICAL LAW GOVERNMENT PRACTICE AND PRACTICAL LAW LITIGATION**,** DEFENDING AGAINST A DORMANT COMMERCE CLAUSE CHALLENGE: OVERVIEW, w-008-5716 (2022).

163. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-54 (1977).

164. *Id. at* 354.

165. *Id.*

166. *See Taylor*, 477 U.S. at 151.

167. *See id.* at 148.

168. *See id.* at 147.

169. *See id.*

170. *See* PRACTICAL LAW GOVERNMENT PRACTICE AND PRACTICAL LAW LITIGATION,

Hunt, the challengers were able to point to very clear alternative measures that the state could have taken that would reach the same result.[171] In *Taylor*, however, the challengers simply claimed that alternative measures existed without explaining what those measures could be.[172] Thus, challengers are more likely to be successful if they can describe actual measures that the state could have taken to achieve its goal in lieu of the challenged statute or regulation.

If a court finds that the law is facially neutral and neutral in its purpose and effect, the Dormant Commerce Clause analysis proceeds to the second tier—the so-called Pike balancing test.[173] Under the *Pike* balancing test, a law or regulation will only be struck down if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[174] In administering this test, courts look to see whether the statute actually regulates even-handedly, effectuates a legitimate local public interest (this requires the state to have evidence of efficacy), and whether the effects on interstate commerce are only incidental.[175] Courts give significantly more deference to state laws analyzed under the *Pike* balancing test.[176] Because a state law or regulation is far more likely to be upheld under the *Pike* balancing test, attorneys defending laws against Dormant Commerce Clause challenges often try to convince a court to deploy *Pike* balancing.[177] Attorneys argue that the challenged law (1) regulates in-state and out-of-state interests even-handedly, (2) is not blatantly protectionist, (3) is not motivated by a discriminatory purpose.[178]

A critical aspect of the Dormant Commerce Clause that often gets overlooked is that the Commerce Clause does not protect states broadly; rather, it protects markets and market participants.[179] Therefore, "the overriding constitutional concern" under a Dormant Commerce Clause analysis, "is the maintenance of a free national marketplace and free access to the nation's markets by similarly situated competitors."[180] The Dormant Commerce Clause therefore strikes down a state law only if that law creates a local preference in a market,

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supra note 162.

171. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-54 (1977).

172. *See Taylor*, 477 U.S. at 147.

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

174. *Id.*

175. *Id.*

176. *See* Benz, *supra* note 1, at 807.

177. *See* PRACTICAL LAW GOVERNMENT PRACTICE AND PRACTICAL LAW LITIGATION, *supra* note 162.

178. *See id.*

179. *See id.*

180. *Id.*

which requires actual or prospective competition between the benefitted and disfavored entities in a single market.[181] In other words, if a state can successfully argue that its law does not discriminate against similarly situated competitors, then the Dormant Commerce Clause analysis does not apply at all and the state law will be permitted to stand.[182]

B. Dormant Commerce Clause Strikes Down Family Farm Laws

A court first struck down a family farm law under the Dormant Commerce Clause in 2003.[183] The Eighth Circuit Court in *S.D. Farm Bureau, Incorporated v. Hazeltine* invalidated a South Dakota family farm provision based on the discriminatory purpose against out-of-staters that animated passage of the law.[184] The *Hazeltine* decision opened the door for challenges against other states' family farm laws under the Dormant Commerce Clause.[185] This section examines two cases following *Hazeltine* to develop a better understanding of why courts found these laws in violation of the Dormant Commerce Clause.

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181. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 296-300 (1997) (reasoning that natural gas companies that sell to residential consumers and natural gas companies that sell to industrial purchasers were not similarly situated competitors because they served different markets); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (noting commerce clause jurisprudence ensures consumers and producers have free access to a national market).

182. *See Gen. Motors Corp.*, 519 U.S. at 296-300; Alaska v. Arctic Maid, 366 U.S. 199, 204 (1961) (rejecting a Dormant Commerce Clause claim because the allegedly disfavored entity did not compete with the allegedly favored in-state entity). "Arctic Maid concerned a four percent tax Alaska imposed on the value of the salmon a freezer ship catches and freezes for transport and canning in Washington state. Alaska did not tax the value of the salmon a fisherman catches, freezes, and transports to an Alaskan cannery for retail sale, but it imposed a one percent tax on the salmon a local fish processor sells to the consumer market. The Court noted the competitors of freezer ships were not local fish processors who received the beneficial tax treatment, but Alaskan canneries, which paid a six percent tax on the value of the salmon they can. The Court therefore held that the imposition of a four percent tax on the freezer ships' salmon did not implicate the Dormant Commerce Clause because the freezer ships and local fish processors do not compete in the same market." PRACTICAL LAW GOVERNMENT PRACTICE AND PRACTICAL LAW LITIGATION, *supra* note 162.

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

184. *Id.* at 593.

185. *See, e.g.*, Jones v. Gale, 470 F.3d 1261, 1267-68 (8th Cir. 2006) (holding that Initiative 300 precluded non-family-owned limited partnerships from acquiring an interest in real estate used for ranching or farming in Nebraska, violated the Dormant Commerce Clause making it unconstitutional); N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900, 925 (D.N.D. 2018) (holding that although one section of North Dakota's corporate farming law violated the Dormant Commerce Clause, this section was severable, and the rest of the law could be left in place).

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

In *Jones v. Gale*, the Eighth Circuit Court of Appeals reviewed a decision where the United States District Court for the District of Nebraska ruled that Nebraska's corporate/family farm law was unconstitutional under the Dormant Commerce Clause.[186] Owners of farms or ranches brought the lawsuit against the state of Nebraska challenging the constitutionality of Nebraska's constitutional amendment, Initiative 300, which prohibited farming or ranching by corporations and syndicates except for family farm or ranch corporations in which at least one family member was a person residing or actively engaged in the farming operation.[187] The Eighth Circuit affirmed the district court ruling and held that "Neb. Const. art. XII, § 8 violates the Dormant Commerce Clause both on its face and based on its discriminatory intent."[188]

The court began its Dormant Commerce Clause analysis by considering whether Initiative 300 was discriminatory on its face.[189] The court reasoned that the law was facially discriminatory because the exception to corporate ownership applied only to family farms in which at least one family member lived on or worked daily on the farm.[190] This exception favored Nebraska residents over out-of-staters because Nebraskans are far more likely than out-of-staters to be able to live close enough to Nebraska farms to make the daily commute feasible.[191]

The court found further evidence that Nebraska's law was facially discriminatory from the ballot language that accompanied the text of Initiative 300 and from the Nebraska Supreme Court's interpretation of the amendment.[192] The ballot language reported that the measure would prohibit the acquisition of agricultural land "by any corporation . . . other than . . . a Nebraska family farm corporation."[193] The court reasoned that this language "cannot reasonably be read to mean that family corporations in other states could qualify" for the law's exception.[194] Furthermore, the court pointed to the Nebraska Supreme Court's statement that the "the 'plain language of Article XII §8' prohibits 'absentee ownership and operation of farm and ranch land by a corporate entity.'"[195] If the Nebraska Supreme Court decided the amendment was meant to prohibit absentee

186. *Jones*, 470 F.3d at 1264.
187. *Id.*
188. *Id.* at 1270.
189. *Id.* at 1267.
190. *Id.* at 1267-68.
191. *Id.* at 1268 (quoting Jones v. Gale, 405 F. Supp. 2d 1066, 1081 (D. Neb. 2005)).
192. *Id.*
193. *Id.* (quoting Jones v. Gale, 405 F. Supp. 2d 1066, 1073 (D. Neb. 2005)).
194. *Id.*
195. *Id.* (quoting Pig Pro Nonstock Coop v. Moore, 568 N.W.2d 217, 228 (Neb. 1997)).

ownership, then that would be further evidence the family farm exception would not apply to a family farm corporation located in some other state.[196] The court, therefore, held Initiative 300 to be facially discriminatory because it favors in-state economic interests over out-of-state economic interests.[197]

The court went on to decide the initiative also had a discriminatory intent.[198] The court reasoned that discriminatory purpose can be found by looking to "statements and conduct of the amendment's drafters" and by examining pamphlets and other materials "prepared for voters by the state attorney general."[199] The court held that the ballot language expressed a discriminatory purpose because it demonstrates that "the manifest purpose of Initiative 300 . . . was to differentiate . . . between family farm corporations located in Nebraska as opposed to those located elsewhere."[200]

The court further determined that the campaign history to pass the Initiative displayed a discriminatory purpose.[201] One television advertisement in support of the Initiative stated: "Let's send a message to those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300."[202] Looking at this ad, the court declared: "it is clear beyond cavil that these ads bristle with an animus against out-of-state corporations."[203] Based on the text of the Initiative, the ballot language, and the campaign history, the court held that the amendment had a discriminatory purpose.[204]

After finding that the amendment was both facially discriminatory and discriminatory in purpose, the court moved to the second prong of the Dormant Commerce Clause inquiry. If the law is discriminatory against out-of-staters, then the law "is 'per se invalid' unless the [State] 'can demonstrate, under rigorous scrutiny, that [it has] no other means to advance a legitimate local interest.'"[205] In this case, Nebraska argued that its anti-corporate/family farm amendment mitigates many of the harms that come from unrestricted corporate ownership,

196. *Id.*

197. *Id.* at 1269 (quoting S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003)).

198. *Id.*

199. *Id.* (citing *Hazeltine*, 340 F.3d at 593); SSDS, Inc. v. S.D., 47 F.3d 263, 268 (8th Cir. 1995).

200. *Jones*, 470 F.3d at 1269 (8th Cir. 2006).

201. *Id.* at 1269-70.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* (quoting S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593-96 (8th Cir. 2003)).

such as "absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's land, water, and natural resources."[206]

The court did not find any of these arguments persuasive. First, the court stated that other forms of regulation could address any environmental harm.[207] Second, the court determined that the state provided no evidence for why land use and environmental regulation alone could not resolve the problems associated with absentee ownership.[208] Third, the court reasoned that any argument based on "negative effects on the social and economic culture of rural Nebraska" is too vague.[209] The court remarked that if the social and cultural interests were "more clearly defined" then the court would be able to consider whether the amendment actually addressed those interests.[210] But the court made clear that, "a mere desire to maintain the status quo cannot in itself be a 'legitimate local interest.'"[211] In very strong concluding language, the court declared that the desire to maintain local social or cultural values is a "kind of xenophobia that the Dormant commerce clause sets its face against."[212]

2. N.D. Farm Bureau, Incorporated v. Stenehjem, 333 F. Supp. 3d 900 (D.N.D. 2018).

In contrast to *Jones v. Gale*—which struck down a state constitutional amendment—the district court in *Stenehjem* left most of the North Dakota's family farm law in place while severing the portion of the law that it found to be an unconstitutional violation of the Dormant Commerce Clause.[213] In this case, a group of plaintiffs including non-profits, individual farmers, and business organizations (hereinafter "Plaintiffs") filed a declaratory judgment action challenging the constitutionality of North Dakota's family farm law.[214] Ultimately, the court held that the law violated the Dormant Commerce Clause, but did not strike down the entire law. Instead, the court simply severed the offending language of the family farm exception from the statute.[215]

206. *Id.* at 1270.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *See generally Jones*, 470 F.3d 1261; *see also* N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900 (D.N.D. 2018).
214. *See Stenehjem*, 333 F. Supp. 3d at 905-06.
215. *Id.* at 925-27.

The Plaintiffs had a multi-faceted Dormant Commerce Clause argument against the family farm exception.[216] First, the Plaintiffs argued the family farm exception "prohibits out-of-state individuals and corporations from engaging in farming and ranching in North Dakota."[217] Second, the Plaintiffs argued the family farm exception prevented North Dakota farmers from having access to critical out-of-state capital and resources.[218] In advancing these arguments, the Plaintiffs targeted a few phrases in the family farm exception: "specifically, the Plaintiffs object[ed] to the phrases 'domestic corporation' or 'domestic limited liability company' and 'actively engaged in operating the farm or ranch' and 'residing on or operating the farm or ranch' found in the language of the family farm exception."[219] The Court addressed the Plaintiffs' arguments about each of these phrases by engaging in a detailed analysis of the text and legislative history.

After establishing the framework for Dormant Commerce Clause analysis, the court assessed whether the farming law discriminates on its face.[220] To do this, the court addressed the challenged clauses in the family farm exception.[221] First, the court examined the phrases "domestic corporation" and "domestic limited liability company."[222] To define those phrases, the court looked to other North Dakota laws whose definitions were incorporated into the family farm exception.[223] Those definitions made clear the plain meaning of domestic corporation required the entity applying for a family farm exception to be a North Dakota corporation or a limited liability company.[224] Based on this reading, the court concluded the domestic corporation requirement clearly discriminates "against out-of-state interests in violation of the Dormant Commerce Clause."[225]

The court next considered the language of the family farm exception establishing the operational requirement. The operational requirement provides:

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216. *Id.* at 914.

217. *Id.*

218. *Id.*

219. *Id.* at 914-15.

220. *Id.* at 915.

221. *Id.* at 914-15.

222. *Id.* at 915.

223. *Id.* at 915-16.

224. *Id.* at 916. To rebut this conclusion, North Dakota argued the phrase "domestic" meant any American national corporation and only excluded foreign national corporations from taking advantage of the exception. The court found this interpretation of the statute unreasonable. Importantly, however, the court seemed to agree if the family farm law had only excluded foreign nations and not other states in the union, then it would not have violated the Dormant Commerce Clause. *See id.*

225. *Id.*

> If a corporation, the officers and directors of the corporation must be shareholders who are actively engaged in operating the farm or ranch and at least one of the corporation's shareholders must be an individual residing on or operating the farm or ranch. If a limited liability company, the governors and managers of the limited liability company must be members who are actively engaged in operating the farm or ranch and at least one of its members must be an individual residing on or operating the farm.[226]

After noting this text, the court reasoned that (1) these phrases were not defined in the statute and (2) both parties asserted reasonable interpretations of these laws.[227] Plaintiffs argued that the provision requires physical activity on the farm.[228] North Dakota argued the provision could be satisfied by someone performing out-of-state management activities.[229]

The court ultimately held that North Dakota's interpretation of the provision was more reasonable.[230] North Dakota pointed to an Attorney General Opinion from 1982, the year after the family farm exception was added to the law, which stated that the provision could be satisfied through off-site management activity.[231] Moreover, North Dakota pointed to two other District of North Dakota opinions that interpreted the provision to be satisfied through off-site management activities.[232]

In addition to weighing these arguments, the court found it very persuasive that the Nebraska and South Dakota family farm law at issue in *Jones* and *Hazeltine* "included explicit language requiring a physical presence on the farm", unlike North Dakota's family farm exception.[233] North Dakota's law was not nearly as explicit as those laws and simply required that owners be actively engaged in the operation of the farm.[234] After reviewing the Attorney General's opinion from 1982, the two district court cases, the legislative histories, and the text, the court held that the operational requirements did not violate the Dormant Commerce Clause.[235]

The court then went on to hold that the law was not discriminatory in its

226. *Id.* at 917-18 (quoting N.D. CENT. CODE § 10-06.1-12(6)).
227. *Id.* at 918.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 919.
232. *Id.*
233. *Id.* at 922.
234. *Id.*
235. *Id.*

purpose or intent.[236] In coming to this determination, the court looked to direct evidence, such as statements by lawmakers and conduct by drafters, and indirect evidence, such as "'irregularities in the drafting process' that 'hint at such a purpose.'"[237] After a careful review of all 160 pages of the legislative history, the court determined that the history expressed a "desire to protect family farms but makes no mention of out-of-state or outside interests."[238] Therefore, the court reasoned that it did "not see how [the legislative history] can be read as supporting discrimination against out-of-state interests."[239]

The court also did not find irregularities in the drafting process of the law.[240] Plaintiffs argued that the legislature neglected to collect enough evidence to support the contention that the family farm exception would benefit family farms.[241] The court rejected this argument by pointing to evidence that had been gathered by the legislature when it was considering the law to help it understand the benefits of such a law.[242]

Finally, the court noted that the intent behind the family farm exception, which was added to the corporate farming law in 1981, could not be construed as the intent behind the bulk of the corporate farming law which was passed in 1932.[243] The 1932 law prohibited all corporations from acquiring and holding real estate regardless of its use.[244] The law did not mention any differences in applicability between in-state and out-of-state corporations, rather it applied to both equally.[245] In 1981, the legislature added the family farm exception to the law.[246] The legislative history of that amendment showed that the state "intended to help preserve family farms through the limited use of corporations. Economic protectionism was not its intent."[247]

After finding there was no discriminatory purpose or intent, the court quickly found that the family farm exception (1) had a discriminatory effect based on its language favoring North Dakota corporations and (2) that the State did not

236. *Id.* at 924.
237. *Id.* at 923 (quoting S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003)).
238. *Id.*
239. *Id.*
240. *Id.* at 923-24.
241. *Id.* at 923.
242. *Id.*
243. *Id.* at 925.
244. *Id.* at 924.
245. *Id.*
246. *Id.*
247. *Id.* at 925.

provide evidence to survive the strict scrutiny of the Dormant Commerce Clause.[248] The court responded by severing the offending language from the 1981 family farm exception.[249] In doing so, the court simply declined to enforce "the offending domestic corporation and domestic limited liability company language of the family farm exception", while leaving in place the remainder of the exception that still included the operational requirement.[250]

3. Vulnerability of Other Family Farm Laws

The precise fate of other family farm laws rests on the details of their construction; however, it seems likely that these laws, as currently written, are in some ways vulnerable to Dormant Commerce Clause challenges. The primary difficulty posed by these recent court decisions is that they have complicated the means by which states can pursue specific agricultural policies that involve identifying groups of farmers, require connection to the land, or rely primarily on the local and cultural benefits of certain kinds of farming.[251] In short, the Eighth Circuit has created substantial hurdles for legislators and advocates who wish to champion small farming, sustainable farming, and rural policies.[252]

C. Solutions for Writing and Defending Family Farm Laws

1. States Need More Evidence on the Efficacy of Family Farm Laws.

To bolster the likelihood that a family farm law will survive a Dormant Commerce Clause challenge, legislatures should conduct studies about the harms the law seeks to remedy and the likely efficacy of the law in achieving its goals. The courts in both *Jones* and *Stenehjem* looked to legislative history to see if the states gathered any evidence while drafting the law.[253] The absence of such evidence in *Jones* provided an additional reason for the court to find the law unconstitutional,[254] but the presence of such evidence in *Stenehjem* led to the conclusion that the law did not have a discriminatory purpose.[255] These two cases demonstrate that if a state can produce relevant legislative history as evidence to justify the drafting of the law, then that law will have a better chance of surviving a Dormant Commerce Clause challenge.

248. *Id.*

249. *Id.* at 926-27.

250. *Id.*

251. *See* Schutz, *supra* note 66, at 51-52.

252. *See generally Stenehjem*, 333 F. Supp. 3d at 925; Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006).

253. *See Stenehjem*, 333 F. Supp. 3d at 924; *Jones*, 470 F.3d at 1269-70.

254. *Jones*, 470 F.3d at 1270.

255. *Stenehjem*, 333 F. Supp. 3d at 923.

There is currently a substantial gap in empirical research regarding the efficacy of family farm laws. Some studies do exist regarding the ability of such laws to protect the social and cultural fabrics of rural life.[256] However, while these studies indicate that family farm laws have generally succeeded in achieving those goals by slowing the growth of corporate and industrial farming, they are far from conclusive.[257] Moreover, there has been little to no research conducted by scientists about whether the environmental benefits of family farm laws have been actually realized.[258] As noted in this Article, there is a great deal of information about the environmental harms of industrial farming, but no study has been conducted that examines whether family farm laws have mitigated such impacts or could.[259] If states gathered additional research about the social, economic, and environmental effects of family farm laws, it would not only bolster state arguments defending such laws but also enable states to revise their family farm laws to more precisely address their stated goals.

2. States Should Place Greater Emphasis on the Environmental Benefits of Family Farm Laws

Most family farm laws state that their primary purpose is the protection of a particular rural way of life.[260] This purpose poses two challenges for Dormant Commerce Clause litigation. First, states may have a hard time gathering evidence that the law is accomplishing this benefit.[261] Second, courts have not been deferential to state attempts to accomplish this purpose.[262] One way to avoid these two problems is for states that pass family farm laws to place greater emphasis on the environmental benefits of those laws.

In general, states have a right to protect their environments through the regulatory scheme of their choice. Research shows that the aggregation of small farms into larger scale farming operations has negative impacts on water, air, and soil quality.[263] This contamination of water, air, and soil affects all state citizens

256. *See* Linda Lobao & Curtis W. Stofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, 25 AGRIC. & HUM. VALUES 219, 219 (2008); Thomas A. Lyson & Rick Welsh, *Agricultural Industrialization, Anticorporate Farming Laws, and Rural Community Welfare*, 37 ENV'T & PLAN. 1479, 1479 (2005).

257. Lobao & Stofferahn, *supra* note 256, at 228.

258. *Id.*

259. *See id.* at 229.

260. *See generally Corporate Farming Laws – An Overview*, *supra* note 43.

261. *See* Jones v. Gale, 470 F.3d 1261, 1269 (8th Cir. 2006).

262. *See Jones*, 470 F.3d at 1270 (declaring that the desire to maintain local social or cultural values "is a kind of xenophobia that the dormant commerce clause sets its fact against").

263. *See* Negowetti, *supra* note 28, at 449-57.

whether they are directly involved in farming or not. In light of this evidence, it is the "tendency of the large agricultural integrators to . . . pass both the risk and costs on . . . to society at large in the form of water and soil pollution"[264] as well as the fact that the "structure of corporate-owned farms leads them to be poor neighbors to rural communities, and poor stewards of the land."[265] Therefore, states should be clear that family farm laws are established regulatory schemes intended to remedy those environmental and health problems.

Somewhat confusingly, the *Jones* court gave no deference to Nebraska's stated environmental interest in having its family farm law.[266] The *Jones* court brushed aside the argument by stating that Nebraska failed to provide evidence that its environmental goals could not be achieved in any other way.[267] In other words, the *Jones* court shifted the burden entirely to the state to demonstrate that its stated environmental benefit could only be achieved with a family farm statute.[268] That heavy burden on the state combined, however, with the utter lack of deference to Nebraska's environmental interest seems out-of-step with United States Supreme Court precedent.[269]

The United States Supreme Court has recognized that a state has "'every right' to protect 'its residents' . . . environment,'"[270] and that a state's interest in preserving natural resources like water is "well within its police power."[271] In *Maine v. Taylor*, the Court considered a Dormant Commerce Clause challenge to a Maine statute prohibiting the import of live baitfish from out-of-state for use in Maine's waterways.[272] Maine argued that it passed the law to advance two environmental goals:

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264. U.S. DEP'T OF AGRIC., NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 15 (1998), https://www.iatp.org/sites/default/files/258_2_106175.pdf [https://perma.cc/UK89-2K7P].

265. Brekken, *supra* note 76, at 354.

266. *Jones*, 470 F.3d at 1270.

267. *Id.*

268. *See id.*

269. *See* Andrew D. Thompson, Note, *Public Health, Environmental Protection, and the Dormant Commerce Clause: Maintaining State Sovereignty in the Federalist Structure*, 55 CASE W. RES. L. REV. 213, 227-28 (2004) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978)).

270. *Id.*

271. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 946 (1982). The Court later held, however, that Nebraska's reciprocity requirement that other states share water resources in order to receive water from Nebraska operated as "an explicit barrier to commerce between . . . States." *Id.*

272. Maine v. Taylor, 477 U.S. 131, 132 (1986).

> First, Maine's population of wild fish . . . would be replaced at risk by three types of parasites common in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of [out-of-state] live baitfish could disturb Maine's aquatic ecology to an unpredictable extent . . ..[273]

The challenger to Maine's law argued that these environmental goals acted as cover for an economically protectionist purpose.[274] As evidence that the law did not achieve its environmental goals, the challenger argued (1) the parasites feared by Maine would not actually threaten Maine's wildlife; (2) the threat identified by Maine was merely speculative; and (3) Maine could devise other less-discriminatory means to regulate live baitfish from out-of-state, such as the implementation of inspection procedures.[275]

The Court considered the arguments of both sides and ultimately concluded that Maine's statute did not violate the Dormant Commerce Clause even though the law was facially discriminatory.[276] The Court found that the law was facially discriminatory because the statute explicitly prohibits the import of out-of-state goods to Maine.[277] This caused the Court to apply the Dormant Commerce Clause's strict scrutiny.[278]

In response to the challenger's arguments, the Court reasoned that Maine is allowed to speculate about environmental harm and can legislate against "environmental risks."[279] The Court declared, "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible."[280] The Court further reasoned that the state only needed to take reasonable measures to avoid impacting interstate commerce, and these reasonable measures did not include coming up with an inspection procedure that only existed in abstract theory.[281]

In summarizing its reasoning, the Court quoted the district court's language:

> The constitutional principles underlying the [C]ommerce [C]lause cannot be read as requiring the State of Maine to sit idly by and wait

273. *Id.* at 140-41.
274. *Id.* at 133.
275. *Id.* at 142-43.
276. *Id.* at 151.
277. *Id.* at 139.
278. *Id.*
279. *Id.* at 148.
280. *Id.*
281. *Id.* at 147.

> until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.[282]

As long as a state does not "needlessly obstruct interstate" trade or seek to isolate itself economically, the state "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."[283]

Another example of a court upholding a regulation preserving a state's natural resource against a Dormant Commerce Clause challenge occurred in *New York Trawlers Association v. Jorling*.[284] In that case, the state of New York amended its Environmental Conservation Law to prohibit anyone who owned or operated a vessel equipped with trawling nets from taking, landing, or possessing lobsters in Long Island Sound.[285] The Trawlers Association sued, alleging, among other claims, that New York's law violated the Dormant Commerce Clause.[286] The Second Circuit noted that, although the law differentiated "between New York residents and non-residents for the purpose of issuing lobster permits, its prohibition of the possession or taking of lobsters by trawlers applie[d] equally to resident and non-resident trawlers."[287] Important to this decision was the fact that the law was trying to prevent the waste of a unique New York natural resource – the lobster.[288] Holding that the law did not impermissibly burden interstate commerce, the Court stated that, "protection of the environment and conservation of natural resources—including marine resources—are areas of 'legitimate local concern.'"[289]

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282. *Id.* at 148 (quoting United States v. Taylor, 585 F. Supp. 393, 397 (D. Me. 1984)).

283. *Id.* at 151.

284. *See* N.Y. Trawlers Ass'n v. Jorling, 16 F.3d 1303 (2d Cir. 1994); *see also Taylor*, 477 U.S. at 140 (upholding a facially discriminatory Maine statute prohibiting the importation of out-of-state baitfish); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (upholding city's smoke abatement ordinance on steam vessels operating in interstate commerce); United States v. McDougall, 25 F. Supp. 2d 85 (N.D.N.Y. 1998) (upholding ban on the transportation of American eels). It is important to note that not all regulations dealing with natural resource protection have been upheld against Dormant Commerce Clause challenges. The United States Supreme Court has "consistently recognized that resource protection is not a sufficiently legitimate state concern that would justify overt interference with interstate commerce," where such protectionism constitutes hoarding of a state's resource and where "protectionist effects . . . lie in the means as well as the ends." *See* Thompson, *supra* note 269, at 227-28.

285. *N.Y. Trawlers Ass'n*, 16 F.3d at 1306.

286. *Id.*

287. *Id.* at 1307.

288. *Id.* at 1308.

289. *Id.* at 1308 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)).

Taylor and *Jorling* collectively demonstrate:

> the courts' understanding that when business activities have a negative impact on a state's unique natural resources—the Midwest's unique resources are its land and soil—the state is able to express its legislative concern by enacting laws that protect the health and welfare of its citizens, even if that regulation incidentally affects interstate commerce. Thus, in the Midwest's case it is easy to doubt the legitimacy of the states' interest in regulating the use of their natural resources when they passed their family farm statutes because this goal was not adequately emphasized at the time of passage. By placing greater emphasis on the environmental benefits of family farm laws, backed up by substantial research, states will increase the likelihood that family farm laws could become a constitutional method by which to address the problem of farm aggregation.[290]

3. In Light of COVID-19, States Should Emphasize the Importance of Small and Sustainable Agriculture to Promote Food Security

COVID-19 has not only brought on an economic crisis, but it also created and perpetuated a food crisis. In just a matter of weeks, the virus had exposed the underlying risks, fragilities, and inequities of global and national food systems.[291] Many of these problems could be mitigated if the nation, including individual states, moved to support small and sustainable farming practices.[292] In fact, global experts note that industrial agriculture creates food insecurity, especially during a pandemic.[293] Industrial food systems rely on long supply chains, monoculture farming, and a food distribution process that concentrates growing, harvesting, and processing food in a few select areas.[294] As a result, grocery stores have struggled to keep shelves stocked with adequate food at affordable prices.

Even in non-pandemic conditions, industrial agriculture weakens the resiliency of food supply chains.[295] Additionally, industrial agriculture relies on

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290. Benz, *supra* note 1, at 804; *contra* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENV'T L. REV. 1, 4 (2003) (arguing "the modern Court has been consistently hostile to environmental regulation" and, as a result, "both federal and state efforts to protect the natural environment have been rendered constitutionally suspect").

291. Int'l Panel of Experts on Sustainable Food Sys. [IPES-Food], *COVID-19 and the Crisis in Food Systems: Symptoms, Causes, and Potential Solutions*, at 1, Communiqué by IPES-Food (Apr. 2020).

292. *See id.* at 5-6.

293. *Id.* at 7.

294. *See generally COVID-19 and the Crisis in Food Systems: Symptoms, Causes, and Potential Solutions*, *supra* note 291, *at* 9.

295. *See generally id.* at 1-3.

long supply chains that are international in scope. While it is true that COVID-19 has put strain on both short and long food chains, long food chains are experiencing disruption due to their reliance on complex flows of people, and production inputs.[296] Travel restrictions, for example, between states and between nations are already preventing the arrival of millions of seasonal laborers who cross borders each year to work on farms.[297] In some instances, unharvested food has been left to rot in fields or in storage facilities.[298] Because of these disruptions to industrial food chains, people are being forced to eat less nutritious food. A decreased supply of fresh vegetables, fruit, and meat has caused diets in the United States to shift toward consumption of heavily processed items.[299]

In addition to food security, states should stress the increased risk of widespread viruses that result from industrial farming practices. Scientists already know that "industrial agriculture is driving habitat loss and creating the conditions for viruses to emerge and spread."[300] The risks of a virus infesting humans from animals is increased by industrial agriculture through two main pathways.[301] First, the probability of outbreaks of pandemic-like animal diseases is "increased by the confinement of large numbers of animals in small spaces, narrowed genetic diversity, fast animal turnover, and habitat fragmentation through the expansion of livestock herds."[302] Second, risks are amplified by increased human-wildlife interaction, such as when farms begin to encroach on the habitats of animals that normally live farther away from human society.[303] This encroachment makes it easier for viruses from wild animals to spread among livestock and humans.[304]

To mitigate all the risks that come with a food system based on global industrial agriculture, states can argue that they need laws that promote small farms and sustainable agriculture. Small farmers that sell in local farmers markets are less dependent on global supply chains, so they are more immune from disruption in times of pandemic.[305] Sustainable agriculture promotes the farming of diverse crops and livestock, making the crops and animals more resistant to disease while also ensuring that a community does not depend on a single long food chain to

296. *Id.* at 3.
297. *Id.*
298. *Id.*
299. *Id.* at 5.
300. *Id.* at 2.
301. *Id.*
302. *Id.*
303. *See id.*
304. *See generally id.* (discussing the causes and prevalence of animal to human disease transmission in relation to industrial agriculture).
305. *Contra id.*

acquire a specific food product.[306] For example, instead of relying on broccoli from California, corn from Indiana, and apples from Washington, a town in Tennessee could have at least some of its supply of each of those vegetables grown in-state by small farm operations.

State-wide or regional food systems would not only allow for shorter supply chains, but they would also enhance access to fresh food, improve public health, and ensure greater value goes to the farmer.[307] If more diverse crops grown on small local farms were sold in local areas, people would be more likely to have access to food that did not travel thousands of miles to get to them. This localization means they could have the opportunity to eat food containing fewer preservatives and chemicals. Fewer preservatives and chemicals would make it more likely that a state's population would be able to consume fresher, healthier food. Furthermore, if there was enough local food purchasing, the farmers who did most of the work to grow that food would receive a greater share of the value of their crops, making it possible for small farmers to stay in the business of growing a secure food system for their communities.

In short, COVID-19 has revealed that food security should be a critical goal for states who wish to pass laws or regulations to promote small and sustainable farming practices.[308] In light of the significant interests states have in ensuring that their citizens have food, states may argue small and sustainable farming laws are critical to achieving important government goals. These arguments could increase the likelihood a law can withstand a Dormant Commerce Clause challenge under either the strictest scrutiny tier or Pike-balancing test.[309]

4. What to Avoid When Drafting a Family Farm Law

As is immediately apparent on any perusal of cases dealing with Dormant Commerce Clause challenges to family farm laws, and as was discussed above, the legislative history of the law is critical in determining whether the law will survive the Dormant Commerce Clause's strict scrutiny or the Pike-balancing test.[310] This section provides short, practical advice about what to do and not do when drafting family farm statues. Additionally, this section provides advice to states with existing family farm laws that are concerned the legislative history evinces animus toward out-of-staters.

306. *Id.* at 8.
307. *Id.* at 9.
308. *Id.* at 5.
309. *See generally* Erchull, *supra* note 40, at 388.
310. Erchull, *supra* note 40, at 388.

i. No Attacks on Out-of-Staters During Legislative Debate, Advocacy Campaigns, or in the Statute Itself

The lesson for states here is simple: be careful of the record created. When family farm laws are being drafted, state legislators can avoid triggering Dormant Commerce Clause strict scrutiny under discriminatory purposes by avoiding attacks on out-of-staters at all stages of the drafting process.[311] Legislators and groups supporting the legislation should not put forward protectionist messages or statements expressing fear of or hostility toward out-of-state individuals or companies.

In *Jones*, the court found a discriminatory purpose by looking to "statements and conduct of the amendment's drafters" and by examining pamphlets and other materials "prepared for voters by the state attorney general."[312] The *Jones* court also looked to television advertisements aimed at encouraging voters to support the ballot initiative.[313] One advertisement stated "[l]et's send a message to those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300."[314] Based on the text of Initiative 300, the ballot language, and the campaign history, the court held that the amendment had a discriminatory purpose.[315]

In contrast to *Jones*, the court in *Stenejhem* only found two statements by two legislators that could be construed as exhibiting animus toward out-of-staters.[316] The remaining legislative and campaign history demonstrated the law's purpose was to protect small farms rather than to benefit in-state interests over out-of-state interests.[317] Therefore, the court in *Stenejhem* reasoned that the legislative history and campaign activities did not support a finding of discriminatory purpose.[318] Reading these two cases side by side emphasizes the importance of avoiding discriminatory language in the legislative history, ballot language, or advertisements leading to the passage of a family farm law. If ballot language or campaign advertisements naming a firm or company are necessary to pass a law, states should make sure the language in advertisements also identifies in-state firms or companies that the statute will impact.[319]

311. *Id.* at 387.

312. Jones v. Gale, 470 F.3d 1261, 1269 (8th Cir. 2006).

313. *Id.* at 1270.

314. *Id.*

315. *Id.* at 1269-70.

316. *Compare id.* at 1269, *with* N.D. Farm Bureau, Inc. v. Stenehjem, 333 F. Supp. 3d 900, 923 (D.N.D. 2018).

317. *Stenehjem*, 333 F. Supp. 3d at 924.

318. *Id.* at 925.

319. *See Jones*, 470 F.3d at 1269-70; *Stenehjem*, 333 F. Supp. 3d at 925.

Finally, another obvious place to avoid language that discriminates against out-of-staters is in the text of the statute itself.[320] Preambles and statements of purpose are areas of particular concern because these sections tend to be less technical than other aspects of a statute.[321] As a result, language can slip into sections that makes it seem like the statute is aimed at protecting in-state farmers or keeping large corporations out of a state. Instead, language in preambles and purpose statements should be written or revised to focus on promoting small or sustainable farming or specific social, cultural, historical, environmental, and food security goals.

ii. Eliminate Residency Requirements

In order to decrease the likelihood a family farm law is found facially discriminatory or discriminatory in effect, states should write new laws or reconfigure existing laws to eliminate their geographical implications. This language can be accomplished by eliminating exceptions for "domestic" farms, corporations, or limited liability companies and by removing operational requirements mandating workers to live and work on the farm.[322]

Eliminating exceptions for in-state farming entities ensures a family farm law applies equally to in-state and out-of-state firms. In both *Jones* and *Stenehjem*, the courts found the family farm exceptions in the laws problematic because those exceptions could not be claimed by out-of-state farms.[323] This issue gave in-state farms a significant competitive advantage over out-of-state farms.[324] Moreover, exceptions for in-state farms aimed at promoting small farms or sustainable practices could undermine arguments about the statute's purpose.[325] For example, a law prohibiting a specific industrial farming model because of its environmental harms with an exception for in-state industrial farming operations presents a hollow environmental argument because it is more likely the actual purpose of the law is to protect in-state farming.

Eliminating or clarifying operational requirements is also critical. If a state law requires someone to live and work on the farm to qualify as a family farm, the operational requirement is likely to be viewed as facially discriminatory or

320. *See generally Stenehjem*, 333 F. Supp. 3d at 919 (noting the state district court, in two cases, looked to the text of the statute and principles of statutory construction to make determinations regarding the purpose of the law).

321. *See generally id.*

322. *See Jones*, 470 F.3d at 1268; *Stenehjem*, 333 F. Supp. 3d at 925.

323. *See Jones*, 470 F.3d at 1268; *Stenehjem*, 333 F. Supp. 3d at 905-06.

324. *See generally Jones*, 470 F.3d at 1268; *Stenehjem*, 333 F. Supp. 3d at 925.

325. *See Jones*, 470 F.3d at 1268; *Stenehjem*, 333 F. Supp. 3d at 925.

discriminatory in effect.[326] In *Jones*, Nebraska's operational requirement was held to be facially discriminatory and discriminatory in effect because it would be difficult for a non-resident to conduct daily work on a Nebraskan farm.[327] Conversely, in *Stenehjem*, the operational requirement was not seen as discriminatory because the requirement could be fulfilled by out-of-state management activity.[328] The lesson from these two cases is that operational requirements must be purged of any rigid standard that requires physical residency or daily bodily activity on the farm.

But the distinction between the two cases also makes clear that states need not be overzealous by ridding their family farm laws entirely of operational requirements. States may retain, without violating the Dormant Commerce Clause, operational requirements that can be fulfilled by out-of-state activity, such as daily management conducted out-of-state.[329] Importantly, it may be hard, as it was for Nebraska, to argue that the family farm law as written allows operational requirements to be fulfilled by out-of-state activity.[330] Therefore, many laws will need to be revised to clarify the definition of the operational requirement or, as in *Stenejhem*, the state attorney general will to need issue guidance about the enforcement of the operational requirement, which defines such a requirement to allow out-of-state activity.[331] Importantly, the option of using a state attorney general opinion may not be as efficacious for other states as it was for North Dakota. In North Dakota, the attorney general outlined a broad definition of the operational requirement within a year of the family farm exception being added to the family farm law; furthermore, the text of North Dakota's statute did not require a narrow reading of the requirement as mandating physical presence on the farm.[332]

Once discriminatory provisions and definitions are removed from, or never added to, a statute, that law will stand a greater chance of withstanding Dormant Commerce Clause challenges because it will be much more likely to be analyzed under the more permissive *Pike* balancing test.[333] The precise fate of family farm statutes rests on the details of their construction.

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

327. *See id.* at 1268.

328. *See* Stenehjem, 333 F. Supp. 3d at 922.

329. *See id.*

330. *See id.*

331. *See id.*

332. *See id.* (citing Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006); S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 587-88 (8th Cir. 2003)) ("Unlike North Dakota's family farm exception, both the Nebraska and South Dakota laws at issue in *Jones* and *Hazeltine* included explicit language requiring a physical presence on the farm.").

333.*See generally* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

5. Additional DCC Solutions for States with Family Farm Laws

States that have family farm laws possess other options beyond revising their statutes to conform to the strictures of recent Eighth Circuit cases. Those states, for example, could seek congressional authorization to restrict corporate or industrial entry into agricultural markets based on the owners' ties to the state land at issue.[334] This congressional authorization would essentially allow the family farm laws to remain in place unchanged. Congressional authorization allowing states to have wider latitude in regulating market participants is not unprecedented. Authorization has been used in areas such as the insurance industry,[335] banking,[336] hunting,[337] and fishing.[338] Another constitutional option for states would be the proposal of a nationwide family farm law—something Congress could do without violating the Dormant Commerce Clause because Congress would be utilizing its section eight commerce powers to regulate interstate commerce. While these congressional strategies are technically options, the likelihood of Congress acting on this issue seems improbable.[339]

V. NON-FAMILY FARM LAW STRATEGIES TO SUPPORT SMALL OR SUSTAINABLE FARMING

A. Growth Management Statutes: Vermont Act 250—A Case Study

Other than family farm laws, land use planning statutes, specifically growth management statutes, may be an effective way to address the harms of industrial farming. For a growth management statute to succeed, a state must have a unified vision of the kind of culture and economy it wants to promote. Moreover, the state must have a detailed and comprehensive strategy for managing its growth plan. Growth management statutes are intended to "delay or prevent unwanted changes in the character of the community,"[340] and one statutory model that has been

334. *See* Schutz, *supra* note 66, at 99.

335. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 412, 437-38 (1946); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985).

336. *See* Ne. Bancorp, Inc. v. Governors, FRS, 472 U.S. 159, 174 (1985) (discussing the Bank Holding Company Act and the Douglas Amendment).

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

338. *Id.*

339. *But see* Schutz, *supra* note 66, at 139 (arguing that legislation restricting the use of the corporate form for agricultural entities may be politically possible.) 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. *Id.*

340. Justin Shoemake, Note, *The Smalling of America?: Growth Management Statutes*

successful in achieving this goal is Vermont's Act 250. This section will explain Vermont's Act 250, and, in a later section, this Article will explain why Vermont's law has withstood challenges under the Dormant Commerce Clause.

Vermont enacted Act 250, its growth management law, in 1970, when the state was "undergoing significant development pressure."[341] This law is described as a "public, quasi-judicial process for reviewing and managing the environmental, social, and fiscal consequences of major subdivisions and developments in Vermont."[342] Act 250 ensures "larger developments compliment Vermont's unique landscape, economy, and community needs."[343]

Vermont is a small rural state with only about 625,000 residents, and its economy has long been based on farming, logging, and tourists who come to the state to enjoy its "beautiful natural environment."[344] However, a significant increase in tourism in recent decades has increased pressure on small Vermont towns to build retail developments that allow national chains to invade the region.[345] Leading the rest of Vermont, rural towns in the southern part of the state attempted to use municipal zoning powers to restrict these developments, but the limited powers of small towns could not stop the sprawl or "protect the regional natural resources from the unfettered development that spilled across jurisdictional boundaries."[346] In response to the outcry of municipalities and individuals across the state, Vermont passed a law that transformed the state's approach to land use control by allowing for more state level involvement—the Vermont State Land Use and Development Act of 1970 (Act 250).[347]

Vermont's Act 250 "has sought the sustainable development ideal in its recognition of carrying capacity, its commitment to conservation of farm, forest lands, energy, and wildlife resources, . . . its limits placed upon extinction of non-renewable natural resources and its permitting of a community's development

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and the Dormant Commerce Clause, 48 DUKE L. J. 891, 897 (1999).

341. *Act 250 Program*, VT. NAT. RES. BD. (Feb. 23, 2022, 6:19 PM), https://nrb.vermont.gov/act250-program [https://perma.cc/LTZ3-4VDL].

342. *Id.*

343. *Id.*

344. *See* Sherry Keymer Dreisewerd, *Staving Off the Pillage of the Village: Does* In re Wal-Mart Stores, Inc. *Offer Hope to Small Merchants Struggling for Economic Survival Against Box Retailers?*, 54 WASH. U. J. URB. & CONTEMP. L. 323, 327 (1998) (citing Richard Oliver Brooks et al., *The History, Plans, and Administration of Act* 250, *in* 2 TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250, at 1, 6 (1997)).

345. *See* Jessica E. Jay, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 937 (1997).

346. Benz, *supra* note 1, at 810.

347. *Id.*; *see also* VT. STAT. ANN. tit. 10, §§ 6001-6111 (2021).

conditional upon protecting natural resources."[348] From the outset, Act 250 makes clear that its purpose is to "protect and conserve the lands and the environmental of the state and to ensure that these lands and environment are devoted to uses that are not detrimental to the public welfare and interests."[349] The law accomplishes this bold goal by "plac[ing] explicit limits on the overall rate of development within a locality."[350] This rate of development is guided by a detailed, state administered growth-management program that requires case-by-case review.[351]

The program requires the states to "directly review[] most large development projects, permit[ting only] those that comply with statewide criteria."[352] Enacting "Act 250 [does] not supplant local control of land use decisions. Rather, it ensure[s] a system of concurrent control, both at the state and municipal levels, by providing an overlay on local planning and zoning."[353] "State review and permitting of projects of regional significance" is required by Act 250.[354] The Act permit applications are reviewed by one of nine district Environmental Commissions, which are staffed by volunteer citizens.[355] There are five district offices located in the state providing Staff support by full-time District Environmental Coordinators.[356] District Coordinators issue Jurisdictional Opinions on the requirement of an Act 250 permit.[357]

The triggering finding that a project is of "regional significance" is tied to the size and location of the project not ownership of the project.[358] Indeed, "the threshold level of review is very low, as it affects all public and private construction projects involving ten or more units."[359] Specifically, an "industrial or commercial development[ ] of over ten acres . . . and developments above an elevation of 2,500 feet" fall within the valuation of size and location of a project.[360] By tying project review to the size and location of the project, rather than

348. Benz, *supra* note 1, at 811.

349. Shoemake, *supra* note 340, at 902-03 (citing An Act to Create an Environmental Board and District Environmental Commissions (Act 250), § 1, 1969 Vt. Acts & Resolves 237-38).

350. *Id.* at 897.

351. George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and a Synthesis*, 10 NAT. RES. & ENV'T 13, 14 (1996).

352. *Id.*

353. Dreisewerd, *supra* note 334, at 330.

354. Benz, *supra* note 1, at 812.

355. *Act 250 Program*, *supra* note 341.

356. *Id.*

357. *Id.*

358. Benz, *supra* note 1, at 812.

359. Jay, *supra* note 345, at 949.

360. Shoemake, *supra* note 340, at 903.

ownership, to determine what developments will receive permits, Vermont ensures that it is not favoring in-state owners over out-of-state owners.[361] In other words, both in-state and out-of-state developers must appear before a district environmental commission to have their projects permitted.[362]

Once a project is determined to be a development of "regional significance," the owner of the development must obtain an Act 250 permit before the project may proceed.[363] At this stage, the commission must determine whether the project conforms with local and regional plans, and whether "all of the pertinent criteria have been met."[364] Vermont's law provides ten criteria to guide the commissioners in reaching their determination.[365] These criteria require the commissioners to consider, *inter alia*, the environmental, social, and economic impacts of the proposed development on the town or region where the project will be located.[366] For example, the commission must make findings that the development will not result in "undue water or air pollution" or "cause unreasonable soil erosion."[367]

1. Dormant Commerce Clause Fails to Strike Down Vermont's Act 250

Over the last several decades there have been several lawsuits brought challenging the denial of Act 250 permits. One such lawsuits challenged Vermont's Act 250 as a violation of the Dormant Commerce Clause—*Omya, Incorporated v. Vermont*.[368]

In *Omya*, a quarry operator challenged the constitutionality of a Vermont Environmental Board (the "Board") order limiting the number of tractor-trailer truck trips between the quarry and the operator's processing center.[369] The order was made pursuant to Vermont's Act 250.[370] While the quarry operator brought multiple constitutional challenges against the Act 250 order at the district court level, the Second Circuit only reviewed the Dormant Commerce Clause and

361. Benz, *supra* note 1, at 812.

362. *Id.*; *see* VT. STAT. ANN. tit. 10, § 6001(14)(A)(iii) (2021). Act 250's definition of "person" is broad and includes any "individuals [or] entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land." *Id.*

363. *See* Benz, *supra* note 1, at 812.

364. Jay, *supra* note 345, at 949.

365. *See* VT. STAT. ANN. tit. 10, § 6086(a) (2021).

366. *See* Benz, *supra* note 1, at 813.

367. VT. STAT. ANN. tit. 10 § 6086(a)(4) (2021).

368. Omya, Inc. v. Vermont, 33 F. App'x 581, 581 (2d Cir. 2002).

369. *Id.* at 582.

370. *Id.*

Supremacy Clause claims.[371] Under the Dormant Commerce Clause, the quarry operator alleged that the Board's refusal to grant an exemption on the number of daily trips by trucks transporting goods through Brandon, Vermont had a disparate effect on interstate commerce.[372] According to the quarry operator, therefore, the Board's Act 250 order violated the Dormant Commerce Clause.[373]

The Second Circuit's analysis of the Dormant Commerce Clause claim was brief. The court began by looking at whether Act 250 or the Board's order facially discriminated against interstate commerce.[374] The court held that neither were discriminatory.[375] It reasoned that neither Act 250 nor the order "imposes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[376] The court found that absent evidence of discriminatory intent, "the mere fact that plaintiff alone has been burdened by the scheme is not sufficient to trigger heightened review" under the Dormant Commerce Clause.[377]

Having found that the Dormant Commerce Clause's "strictest scrutiny" did not apply to this case, the court moved to the second tier of the Dormant Commerce Clause analysis—the Pike balancing test.[378] Without much explanation, the court declared that Act 250 "does not have a disparate effect on interstate commerce."[379] The court went on to hold that even if Act 250 had a disparate effect on interstate commerce, it would still pass the Pike balancing test.[380] This is because the burden imposed on interstate commerce by the Board's order "is not 'clearly excessive in relation to the putative local benefits.'"[381] Because the "permit restriction significantly enhances aesthetic and historic preservation goals and helps reduce traffic congestion," the court concluded that "any marginal burden imposed on interstate commerce is unquestionably not 'clearly excessive in relation' to these benefits."[382]

The Second Circuit therefore affirmed the District Court's dismissal of the

371. *See id.* at 583.
372. *Id.* at 582.
373. *Id*.
374. *See id.* at 582-83; Maine v. Taylor, 477 U.S. 131, 138 (1986).
375. *Omya*, 33 F. App'x at 582-83.
376. *Id.* (quoting Automated Salvage Transport v. Wheelabrator, 155 F.3d 59, 74 (2d Cir. 1998)).
377. *Id.* at 583.
378. *Id.*; *see* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
379. *Omya*, 33 F. App'x at 583.
380. *Id.*
381. *Id.* (quoting *Bruce Church*, 397 U.S. at 142).
382. *Id.*

quarry operator's Dormant Commerce Clause claims against Act 250 and the Board's order.[383] This case gives hope that states might be able to look to Vermont's Act 250, as a statutory strategy for protecting small, family farms.

2. Can Vermont's Success be a Model for Other States?

Vermont's Act 250 likely could be a successful model for other states who seek to regulate development of their land. Like Vermont, the Midwest and other rural states are dealing with the environmental and economic problems that can result from increased and uncontrolled development. But unlike family farm laws in the Midwest, which are highly vulnerable to Dormant Commerce Clause challenges, Vermont's law successfully addresses the state's development problem; it's not only effective at protecting the state's natural, historical, and cultural resources, but is also constitutional.[384] Therefore, if states follow the general format and spirit of Vermont's Act 250, the regulatory scheme will likely avoid Dormant Commerce Clause problems.[385] This section briefly expands on the Second Circuit's analysis in *Omya* in order to understand why a land use or growth management statute similar to Act 250 could withstand constitutional challenges.

First, a land use management statute modeled after Act 250 would not be discriminatory in purpose. Whereas many family farm laws directly declare or imply the law's purpose as keeping absentee landowners from acquiring state land, Act 250's stated purpose is to "protect and conserve the lands and the environment of the State and to ensure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests."[386] The purpose of the statute says nothing about economic protectionism for the benefit of local entities and contains no animus toward out-of-staters.[387] Furthermore, Act 250 environment review is triggered not by the nature or geographic location of the entity or person seeking the permit, but by the scale of the project. The Act defines "development" as an improvement on a tract of land involving more than ten acres for commercial or industrial purposes.[388] This definition does not distinguish between in-state or out-of-state developers. As long as legislation modeled on Act 250 avoids discriminatory intent, then a court will likely conclude it has no discriminatory purpose.

383. *Id.* at 583-84.

384. Benz, *supra* note 1, at 813.

385. *Id.* at 813-14.

386. Shoemake, *supra* note 340, at 903 (citing An Act to Create an Environmental Board and District Environmental Commissions (Act 250), § 1, 1969 Vt. Acts & Resolves 237-38).

387. Benz, *supra* note 1, at 816-17.

388. VT STAT. ANN. tit. 10, § 6001(3)(A) (2021).

Second, a law modeled on Act 250 would be facially neutral. In Vermont, as in other rural states, the land use goals of such a statute are to preserve a natural resource economy while also protecting historical, cultural, and social values.[389] States with natural resource economies such as farming often depend on economic activities that "are dependent on and complementary to the region's natural resources . . .."[390] To protect that economy, the state must regulate the development of its land.[391] The land must be regulated because natural resources can be easily wasted and this type of waste or accelerated degradation of a state's natural resources, such as soil and water, would have disastrous effects on the state's economy and citizens.[392] But "[t]he triggering point . . . that would alert the state that a review of a proposed [agricultural] development [or other use] is necessary" must be similar to Vermont's acreage or income triggering provision.[393]

Vermont's review is triggered by projects of a certain size.[394] Critically, the "legislature did not randomly pick acre sizes in order to determine what a 'project of regional significance' would be."[395] Rather, in drafting Act 250's triggering language, the legislature relied in part on information from a study known as the Gibb report, which was drafted by the Governor's Commission on Environmental Control.[396] Based on the evidence of this report, as well as information obtained from hearings before the Vermont Senate Natural Resources Committee, the legislature developed the triggering guidelines focused on the types and size of projects that would "have the greatest environmental impact and . . . [be] subject to less municipal review."[397]

> Larger projects, industrial or commercial developments over ten acres within a five mile radius of a municipality, industrial, or commercial development of one acre or more within a municipality without a permanent zoning ordinance, and developments above an elevation of 2,500 feet were determined to fit this criteria and thus became the

389. Benz, *supra* note 1, at 816-17.

390. *Id.* at 817.

391. *Id.*

392. *Id.* at 817-18 n.141 (2006) ("Arguably, without preservation of these resources, preservation of the state's economy could be at risk. For instance, if South Dakota continues to allow more intensive and larger farming practices to operate unregulated, the rich topsoil that supports its agrarian economy will be wasted. Similarly, if Vermont had not enacted Act 250, its scenic views and forests, mainstays of the state's important tourist industry, would have been lost to developers long ago.").

393. *Id.* at 818.

394. *Id.* at 812.

395. *Id.* at 818.

396. *See id.* at 818.

397. *See* Brooks et al., *supra* note 344, at 2.

trigger point for review.[398]

A similar triggering point emphasizing the potential impact of industrial agricultural development be set in other rural states. This Article has shown that industrial agriculture likely causes severe environmental impacts that over the long term could degrade a state's farming economy. However, no definitive study has been done to determine at what point a farm's impact on the environment outweighs its benefit to the state.[399] Each state that wishes to pass a land use or growth management statute similar to Vermont's would need to conduct a study similar to the Gibb report.[400] Based on its findings, they would then set the triggering requirements based on farm size, nature of the farm operation, or impact to local areas before a mandated review of the project and the issuance of a permit to plow additional acres, incorporate new technologies to its facilities, or add to its inventory of livestock.[401] Conducting such a study would enable the state to point to evidence supporting its triggering requirement in the event a Dormant Commerce Clause challenge were brought against the statute, and such a triggering requirement would not be facially discriminatory.[402]

Third, the application of a statute modeled on Act 250 does not produce discriminatory effects.[403] Act 250 does not distinguish between those required to apply for a permit; rather, "the focus of the application process is on the size and the environmental impact of the activity, not on who is perpetuating the activity."[404] Thus any developer who meets the triggering requirement must apply for a permit regardless of whether the applicant is in-state or out-of-state.[405]

Shoemake contends that the strongest argument for a discriminatory effect that an out-of-state developer could make is that it forces those retailers to lose their competitive advantage by making them carry out their business in a different way.[406] But in *Exxon Corporation v. Governor of Maryland*, the United States

398. Benz, *supra* note 1, at 819 (citing Shoemake, *supra* note 340, at 903); James Murphy, *Vermont's Act 250 and the Problem of Sprawl*, 9 ALB. L. ENVTL. OUTLOOK. 205, 223-27 (2004) ("The most important determining factors in deciding whether to grant a permit, according to recent Board and district commission decisions . . . are the scale of a project and how it blends with its surroundings."). Murphy provides examples of large projects that were denied permits and also notes the criteria they violated. *See id.* at 223-27.

399. Benz, *supra* note 1, at 820.

400. *Id.*

401. *Id.*

402. *Id.* at 819.

403. *Id.* at 822.

404. *Id.*

405. *Id.*

406. Shoemake, *supra* note 340, at 925; Benz, *supra* note 1, at 822.

Supreme Court rejected a similar argument brought by oil companies against a Maryland statute that restricted producers or refiners of petroleum products from operating any retail service stations within the state.[407] The law prohibited Exxon from operating its own Exxon retail stations to which Exxon supplied Exxon gasoline.[408] Instead, Exxon would need to sell its gasoline to stations it did not own. Exxon and other oil companies argued that this violated the Dormant Commerce Clause "by discriminating against interstate commerce . . . by unduly burdening interstate commerce[,] and . . . by imposing controls on a commercial activity of such an essentially interstate character that it is not amenable to state regulation."[409] As evidence of their claim, oil companies pointed to the fact that the law only burdened out-of-state companies since Maryland was not the home of any petroleum producer or refiner.[410]

The Court rejected the oil companies' argument, holding that the statute was not discriminatory because it did not treat in-state and out-of-state companies differently.[411] Even though the burden of the law fell solely on out-of-state companies, the Court held that this alone does not violate the Dormant Commerce Clause.[412] The Court reasoned that the law did not establish barriers against interstate petroleum dealers, did not discriminate between in-state and out-of-state companies in the retail market, and did not place added costs on dealers.[413]

Importantly for states who wish to regulate certain kinds of farming activity, the Court in *Exxon* recognizes that the Commerce Clause does not protect the structure or methods of operation in a retail market, nor does the Commerce Clause protect certain interstate firms from prohibitive or burdensome regulation.[414] For all these reasons, the Court held that the Maryland law did not violate the Dormant Commerce Clause.[415] Therefore, laws modeled on Vermont's Act 250 that permissibly regulate a way of doing business rather than restricting the flow of goods or targeting out-of-state developers, likely will not be seen as having a discriminatory effect under the Dormant Commerce Clause.[416]

Fourth, even if a law modeled on Act 250 places a burden on interstate

407.Exxon Corp. v. Governor of Md., 437 U.S. 117, 120-21 (1978); Shoemake, *supra* note 340, at 925.

408. *Exxon Corp.*, 437 U.S. at 119.

409. *Id.* at 125.

410. *Id.*

411. *Id.*

412. *Id.*

413. Benz, *supra* note 1, at 823 (citing *Exxon Corp.*, 437 U.S. at 126).

414. *Exxon Corp.*, at 118.

415. *Id.* at 152.

416. *See* VT. STAT. ANN. tit. 10, § 6007 (2021); *Exxon Corp.*, 437 U.S. at 117.

commerce, the burden will likely not be excessive in light of the local benefits and thus pass the Pike balancing test.[417] Land use laws modeled on Act 250 should focus on managing state resources in a manner that encourages environmental and economic sustainability, not explicit market competition regulation for the sake of providing in-state residents an advantage over out-of-staters.[418] Act 250 and similar laws attempt to address the negative impacts of significant development activity on a state's natural resources, communities, and economic sustainability.[419] Because these interests have long been recognized by courts as legitimate state interests that states can legislate to protect, any Dormant Commerce Clause challenge to a statute similar to Act 250 would "have to take into account . . . a state's . . . very legitimate, and very weighty, interest in ensuring that its lands are used in a manner that is beneficial, in tangible and intangible ways, to the people of the state."[420]

Therefore, it is "difficult to imagine a situation in which a growth-management statute, without being discriminatory, would be so ineffective at accomplishing its purpose, and so burdensome to interstate commerce, that it would be invalidated by a court under the balancing test of Pike."[421] But to make sure that a similar statute would survive Pike balancing, states should be clear about the interests that are being protected by the law and should gather studies and data demonstrating that the law effectively provides the purported benefits of the law.[422]

Finally, states other than Vermont may face some additional challenges in drafting a valid land use/growth management statute to address the problems of industrial farming.[423] Unlike Vermont, some states may struggle to point to unique historical or natural resources.[424] Other states may already have so many industrial farms operating within the state that courts will be skeptical of arguments centered around protecting historical or cultural rural values. To avoid these problems, states could take a few additional measures when creating their own statute modeled on Act 250. Each state could declare more towns and landscapes as areas of cultural or historical importance. This would add legitimacy to the claim that the laws were protecting historic and cultural values of the state.[425] And states with

417. Benz, *supra* note 1, at 807; *see* VT. STAT. ANN. tit. 10, § 6007 (2021).
418. *See* VT. STAT. ANN. tit. 10, § 6007 (2021); Benz, *supra* note 1, at 809.
419. Benz, *supra* note 1, at 829.
420. Shoemake, *supra* note 340, at 930.
421. *Id.*
422. *Id.* at 928.
423. *Id.* at 931.
424. *Id.* at 891.
425. *Id.* at 931.

significant industrial farming development could conduct studies documenting the harm that has been caused highlighting the importance of limiting further development.

In short, if other rural states modeled a statute on Vermont's Act 250 and took into consideration all the potential hurdles outlined in this section, then such a statute would likely survive Dormant Commerce Clause challenges and be an effective way to promote small farming, sustainable farming, or local farming.[426]

B. Other State Financial Incentives for Small or Sustainable Farmers

Because states may want to take other approaches to restrict industrial farming or boost sustainable farming practices, this section explores other methods that states have used to bolster small-to-medium sized farms, explains their vulnerability to Dormant Commerce Clause challenges, and offers guidance to minimize risks of such challenges.

1. Double the Value of Food Stamps at Farmers' Markets

One strategy a state could adopt to provide economic benefits to local farmers is initiating a state-funded program to double food stamps at Farmers' Markets.[427] As of today, no state has adopted such a system, but the non-profit Wholesome Wave has initiated programs in states such as Massachusetts, California, and Ohio with the goal of providing incentives for low-income families to purchase fresh food directly from producers at farmers' markets.[428] The program works by raising donations that go toward doubling the value of federal food benefits such as the Supplemental Nutrition Assistance Program (SNAP).[429] However, the reliance on funding from private donors limits the program's effectiveness.[430]

States have a strong police power interest in providing financial support to increase funding for farmers' market purchases.[431] For example, such a program encourages better nutrition among low-income citizens, which in turn could help address the national health issues related to obesity and nutrient-deficiency.[432] Moreover, providing low-income citizens the ability to buy food from farmers' market may help solve the problem of food deserts by incentivizing the

426. Benz, *supra* note 1, at 798.
427. Erchull, *supra* note 40, at 395.
428. *See id.*
429. *Id.*
430. *See id.* at 396.
431. *Id.*
432. *See id.*

establishment of farmers' markets in poorer areas.[433] Finally, doubling food stamps for farmers' markets would also serve important state interests such as preserving state farmland, securing the economic viability of local food production, and provide financial incentives to farmers to sell their goods in local markets.[434]

If a state rather than a non-profit were to provide the funds to double SNAP benefits when spent at farmers' markets, then that law may be vulnerable to a challenge under the Dormant Commerce Clause. Courts might be suspicious of such laws because they appear to benefit local interests at the expense of out-of-state food producers. For example, a small farm in Ohio might benefit from low-income individuals having more money to spend at the local farmers' market but such benefits would not accrue to a farmer in Nebraska. In fact, incentivizing local food purchases would almost certainly be seen as a burden on interstate commerce because increased funds for local food procurement will shift the market to more local purchases.[435]

However, there is no precedent for the Dormant Commerce Clause being used successfully to strike down state entitlement programs meant to benefit low-income state residents.[436] This fact may be because states are generally not restricted in how they disburse public assistance and social welfare to their respective citizens.[437] To minimize chances of a successful Dormant Commerce Clause challenge to a food stamp doubling law, states should be careful to avoid facial discrimination against out-of-state interests in the statute. For example, in 1980, the Fifth Circuit made clear that out-of-state producers must be permitted to sell at in-state farmers' markets and also have access to state-sponsored benefits.[438] Otherwise, the court reasoned, there would be discrimination against out-of-state interests.[439]

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433. *See* Vicki A. McCracken et al., *Do Farmers' Markets Ameliorate Food Deserts?*, 29 FOCUS 21, 24 (2012) ("There is evidence that farmers' markets in both rural and urban areas help to alleviate food deserts; however, rural markets are more likely to be disconnected from Farmers' Market Nutrition Programs [in Washington State].").

434. *See* Erchull, *supra* note 40, at 396.

435. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 269 (1984) (explaining that providing a benefit to a select category of producers is equivalent to encouraging consumers to "consume less of" products outside that category).

436. Erchull, *supra* note 40, at 397; *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 603-04 (1997) (Scalia, J., dissenting) ("Our cases have always recognized the legitimacy of limiting state-provided welfare benefits to bona fide residents.").

437. *Id.*

438. Smith v. Dep't. of Agric. of Georgia, 630 F.2d 1081, 1085 (5th Cir. 1980) (holding that it is a per se violation of the Dormant Commerce Clause to restrict participation in a state-sponsored farmers' market to in-state producers).

439. *Id.* at 1085.

2. Direct Subsidies for Local Farmers

States could also choose to provide direct subsidies to local farmers to promote sustainable farming practices and to encourage farmland preservation.[440] Currently, federal subsidies often work against small or local farmers and this strategy would help offset the harmful effects of those subsidies.[441] For example, Massachusetts provides small grants to new farm businesses.[442] The program's purpose is to assist "beginning farmers who are between 1 and 6 years in business by providing technical assistance and business planning for farm improvement strategies."[443]

In general, direct subsidies are not subject to invalidation by the Dormant Commerce Clause.[444] However, "subsidies are discriminatory by nature because they provide a benefit to local economies while excluding similarly situated out-of-state competitors."[445] It is important to note that the United States Supreme Court has stopped short of declaring an outright exception to the Dormant Commerce Clause for direct business subsidies.[446] In *West Lynn Creamery, Incorporated. v. Healy*, the Court invalidated a direct subsidy that was offered by Massachusetts to in-state dairy producers, but in that case the funding for the subsidies came "principally from taxes on the sale of milk produced in other states."[447] Noting this revenue source, the Court reasoned that Massachusetts's subsidy was not "a pure subsidy funded out of general revenue [which] ordinarily imposes no burden on interstate commerce, but merely assists local business."[448] The point is that subsidies are probably constitutional when they are funded by the state's general treasury but not if they are funded by a source that burdens interstate commerce.[449]

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440. Erchull, *supra* note 40, at 397.

441. *See id.*

442. *Matching Enterprise Grants for Agriculture*, MASS. DEP'T OF AGRIC. RES. (Feb. 23, 2022), https://www.mass.gov/service-details/matching-enterprise-grants-for-agriculture-mega [https://perma.cc/LH7B-75QA].

443. *Id.*

444. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Dormant Commerce Clause].").

445. *See* Erchull, *supra* note 40, at 398.

446. West Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 199 n.15 (1994) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now.").

447. *Id.*

448. *Id.*

449. Erchull, *supra* note 40, at 398.

3. Taxes on Goods Produced on Large Farms

States may try to favor small farms by crafting a state tax to exclude food grown on small farms from taxation. States could also directly bolster sustainable farming by passing a tax that "exclude[s] goods that meet specific production standards of sustainability."[450] For example, to support small farms, a tax could apply to all food grown on a farm that is more than 1,000 acres or that has an annual income in excess of $250,000.[451] Additionally, to support sustainable farming, a food tax could be structured to exempt produce grown without the use of chemical fertilizers.[452] While these taxes may achieve their ends, they may be very difficult to implement.

Due to the complexity of making sustainability determinations, a "state would have to devote tremendous resources to evaluating the claims of producers in order to ensure those exempted meet the stringent criteria."[453] However, the tax on small farms would be much easier to implement, and a tax exemption for food grown on small farms would likely bolster sustainable farming because food produced on small farms tends to be more sustainably produced.[454] Moreover, courts are generally very suspicious of taxes in any form when those taxes are challenged under the Dormant Commerce Clause.[455] The fundamental question courts ask about taxes is whether the tax is discriminatory. Some discriminatory taxes survive a Dormant Commerce Clause challenge, but frequently they are invalidated.[456]

Two important factors would likely determine whether a court would invalidate a small farm tax exemption: (1) the definition of "small," and (2) whether small and large farms are differently situated businesses.[457] To get the most amount of deference, a state could adopt the USDA's definition of small farm—farms that earn less than $250,000 per year.[458] Under this definition, the

450. *Id.* at 400.

451. *See id.* ("The USDA defines small farms as those earning less than $250,000 per year.").

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 399 (2014) (citing West Lynn Creamery, Inc. v. Healey, 512 U.S. 186, 199 (1999) (deciding that the presence of a tax triggers an analysis of whether a subsidy violates the Dormant Commerce Clause))).

456. *Id.* (citing *West Lynn Creamery, Inc.*, 512 U.S. at 199; Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 265 (1984)).

457. *Id.* at 400.

458. *Id.* (citing 7 C.F.R. § 4284.902 (2013)).

vast majority of farms qualify as small farms.[459] For example, in Massachusetts, "6.5% of farms would be taxed as large farms."[460] However, Dormant Commerce Clause problems would arise for Massachusetts due to a higher percentage of large farms outside the state than inside; therefore, the out-of-state interests would be disproportionately impacted by the tax.[461] On the flip side, this tax scheme would allow in-state sales by small farms to have a disproportionate benefit allowing the tax to benefit in-state businesses.[462]

In addition to the problem of a small farm definition benefiting in-state interests over out-of-state interests, courts are also likely to find that small and large farms are similarly situated businesses.[463] As outlined above, under the Dormant Commerce Clause, a law will only be found discriminatory if the legislation is found to be discriminatory against out-of-state businesses that are similarly situated to the type of business being favored.[464] This analysis requires a court to examine "whether the businesses are in competition with each other and whether they receive a share of the market that shifts after the legislation is enacted."[465]

Under this framework, a court may find that small and large farms are food businesses in competition with each other, and that the shift in the market after the legislation passes would be in favor of small farms inside the state where the law was passed.[466] As such, a tax that applies to food produced on large farms, but which would exempt food produced on small farms, may be invalid under the Dormant Commerce Clause.[467]

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459. *Id.*

460. *Id.*

461. *Id.* at 400-01.

462. *Id.* at 401.

463. *Id.*

464. *Id.*; s*ee* DIRECTV, Inc. v. Levin, 941 N.E.2d 1187, 1201 (Ohio 2010) ("The problem of comparing mismatched sets of 'interstate players' is answered by the requirement that the favored and disfavored parties be similarly situated.").

465. Erchull, *supra* note 40, at 401; *see* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 300 (1997) (considering "actual or prospective competition between the supposedly favored and disfavored entities" relevant to whether a provision discriminates against interstate commerce).

466. Erchull, *supra* note 40, at 401.

467. *Id.* at 401-02. ("The typical point of sale for small farms is more frequently through direct sale to consumers, while large farms are more likely to use an intermediate channel, such as sales at a supermarket. This distinction may not appear material on the surface; everybody needs to eat, so small and large producers are certainly in competition for the same market. But cable and satellite television providers are competing for increased market share among television audiences, just like small and large food producers are competing for

4. Use the DCC's Market-Participant Exception to Lease Land to and Buy Food from Small or Sustainable Farms

Another alternative method for states to support small or sustainable farming would be to utilize the market-participation exception to the Dormant Commerce Clause to lease land or buy food from small or sustainable farms. The market-participation exception exempts laws from the Dormant Commerce Clause "if the laws have an impact on the market that benefits the state as a market participant."[468] In addition, "[w]here a state itself is a market participant, as opposed to merely a market regulator, the state may enact laws that favor the state and its citizens without offending the Dormant Commerce Clause."[469] To use this exception, states, in their own right as sovereigns, would need to purchase a significant amount of farmland and then lease that land only to active, resident farmers. Many states that have family farm laws already own a great deal of land that they lease for other public purposes, such as public schools. While it is unlikely that states would expend the capital to purchase significantly more farmland, states could make the active choice to lease the land they already own only to small, in-state farm operations without violating the Dormant Commerce Clause.

States could also use the market-participation exception by purchasing food from small farmers or farms that use sustainable farming methods. States already purchase a significant amount of food for public purposes. For example, states purchase food for public school and university cafeterias as well as food for state prisons. If states chose to supply those public entities from small or sustainable farmers, then the state would avoid Dormant Commerce Clause issues while successfully benefitting those farmers.

VI. CONCLUSION

In his provocative book *The Unsettling of America*, Wendell Berry wrote, "The true measure of agriculture is not the sophistication of its equipment, the size of its income, or even the statistics of its productivity but the good health of the

increased market share among consumers. In fact, from the point of view of the consumer, the difference between cable and satellite television is similar to the difference between points of sale for large and small food producers. The argument that cable and satellite television providers are differently situated business types has prevailed in courts, so it is possible that the argument would be successful regarding a tax that treats large and small food producers differently.").

468. PRACTICAL LAW GOVERNMENT PRACTICE AND PRACTICAL LAW LITIGATION, *supra* note 162.

469. *Id.*

land."[470] Many people and several states throughout America are only now realizing this truth. And this realization has inspired individuals and states to advocate for a change in farm policies that aim to promote small farms and sustainable farming practices to better ensure the health of the land and the people who live there. Through this Article, I hope scholars, activists, legislators, policy makers, and citizens will find helpful advice and guidance in their varied missions to improve the overall health and well-being of nature and all people, from the individual farmer to the individual food consumer.

470. WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE 192 (1977).