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NOTE

Corporate Ownership Restrictions and the United States Constitution

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I. Introduction

Many states have adopted measures restricting corporate ownership of farm lands. The restrictions vary from limitations on foreign corporate ownership of farmlands to the prohibition of farmland ownership by any nonfamily corporation. All states adopting such measures have done so statutorily, except Nebraska, which has done so via a state constitutional amendment.[1] This Article will discuss the constitutionality of such restrictions, focusing on equal protection and commerce clause analyses. The Nebraska constitutional amendment will be examined extensively.[2]

Typically, such measures are adopted in an effort to preserve the "family farm" by making it difficult for nonfamily corporations to gain any type of monopoly power in agriculture. A common explanation for this protectionism is the special place family farms hold in so many people's lives. Many people feel that they have some farm ties even

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1. Iowa Code Ann. §§ 172C.1-.15 (West Supp. 1989); Kan. Stat. Ann. §§ 17-5901 to -5904 (1988); Minn. Stat. Ann. § 500.24 (West 1990); Mo. Ann. Stat. § 350.015 (Vernon Supp. 1990); N.D. Cent. Code §§ 10-06-01 to -15 (1985 & Supp. 1989); Okla. Stat. Ann. tit. 18, § 951-56 (West 1986 & Supp. 1990); S.D. Codified Laws Ann. §§ 47-9A-1 to -23 (1983 & Supp. 1989); Wis. Stat. Ann. § 182.001 (West Supp. 1989).

2. This Article will focus on the Nebraska amendment rather than a typical statute because the Nebraska amendment is structurally and functionally similar to the typical corporate ownership restriction statute and because the Nebraska Supreme Court is one of the few courts to have ruled on the federal constitutionality of such a measure. *See* Neb. Const. art. XII, § 8.

though only a small minority of Americans are currently farmers.[3] What was once a nation of farmers is now a nation of urban dwellers who came from farmers at some point in their past.

Restrictions on corporate ownership of farmlands are not new. In the early twentieth century, a Mississippi statute prohibited corporate ownership of farmland, but the Mississippi Supreme Court mentioned no constitutional infirmity when discussing the application of this statute in *Middleton v. Georgetown Mercantile Co.*[4]

Other states did not go so far as to ban corporate ownership of farmlands. Instead, lesser restrictions on corporate ownership of farmlands became a common method of dealing with the perceived need to protect family farms. For example, Oklahoma limited corporate ownership of farmlands to corporations that were strictly farming corporations.[5]

Today, several states regulate corporate ownership of farmlands: Iowa, Kansas, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota, and Wisconsin have statutes that restrict or prohibit corporate ownership of farmlands.[6] In 1982, Nebraska adopted a constitutional amendment barring corporate ownership of farmland.[7] Before a constitutional examination of such measures may be undertaken, the following background information must be discussed.

II. Discussion

A. Due Process

The due process clause of the fourteenth amendment to the United States Constitution mandates that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[8] Businesspersons have made due process challenges, claiming a loss of property and liberty rights, when the state has impeded business operations through restrictive or regulatory action, but such challenges generally have not

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3. In 1969, the farm population of the United States was roughly 1/3 of what it was in 1935. U.S. Dept. of Comm., Bur. of the Census, Historical Statistics of the U.S.: Colonial Times to 1970, pt. 1, at 458. The farm population has continued to decrease since 1969. U.S. Dept. of Comm., Bur. of the Census, 1987 Census of Ag., U.S. Data, vol. 1, pt. 51, table 1, at 1.

4. 117 Miss. 134, 77 So. 956 (1918). The court simply held that only the *state* could challenge corporate ownership of farmland under the statute.

5. *See* LeForce v. Bullard, 454 P.2d 297 (Okla. 1969); Texas Co. v. State *ex rel* Coryell, 198 Okla. 565, 180 P.2d 631 (1947).

6. *See* statutes cited *supra* note 1.

7. Neb. Const. art. XII, § 8.

8. U.S. Const. amend. XIV, § 1.

been successful. In *Nebbia v. People of State of New York*,[9] a grocer was charged under a statute that fixed the retail price of milk. In upholding the statute and dismissing the grocer's due process argument, the United States Supreme Court stated: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned."[10]

The Court considers a corporation to be a citizen within the due process and equal protection clauses of the Constitution.[11] Thus, a corporation may bring a due process challenge against legislation. However, the due process clause was not offended by North Dakota's statute restricting corporate ownership of farmland (the statute also required lands currently owned by corporations to be disposed of within ten years).[12] In *Asbury Hospital v. Cass County, North Dakota*,[13] the Court upheld the statute despite due process and equal protection challenges. Regarding due process, the Court stated that "[t]he Fourteenth Amendment does not deny to the state power to exclude a . . . corporation from doing business or holding property within it."[14] Therefore, due process is not violated by a state's "unqualified power . . . to preclude [a corporation's] entry into the state" to engage in farming.[15]

The Court in *Nebbia* was not receptive to due process challenges to local economic regulations:

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, *a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose*. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary

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9. 291 U.S. 502 (1934).

10. *Id.* at 527-28 (footnotes omitted).

11. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

12. 1933 N.D. LAWS 494, 495 (as amended by Chap. 89, Laws 1933, and Chap. 111, Laws 1935).

13. 326 U.S. 207 (1945).

14. *Id.* at 211 (citations omitted).

15. *Id.* Apparently, the state is not required to provide a reason for the exclusion: "Legislation excluding . . . a corporation from continuing [operations] in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process." *Id.* at 212. No reason was given for the exclusion in this case.

> nor discriminatory, the requirements of due process are satisfied . . . .[16]

This statement seems to reflect the Court's desire to steer economic challenges away from the due process clause. This deference to local legislative decisions regarding economic matters continues to be the Court's method of analyzing such suits brought on due process grounds.[17] Therefore, a corporation must look beyond the due process clause to make a successful attack on corporate ownership restrictions.

B. Equal Protection

The equal protection clause of the fourteenth amendment[18] is a better vehicle for pursuing a challenge to corporate restriction of farm ownership. By its very nature, such a restriction treats one class of persons[19] differently than other classes, which is the essence of an equal protection challenge.

Equal protection cases are reviewed under three tiers of scrutiny, depending upon the nature of the subject class.[20] At the highest level of scrutiny is the suspect class. A suspect class involves the classification of a group that has historically been the victim of discrimination, such as a classification based upon race.[21] Under the strict scrutiny applied to a suspect class, the statute will be upheld only if it is found to be necessary to the attainment of some compelling governmental objective.[22]

The middle tier of scrutiny is typically applied to gender-based classifications.[23] A gender-based classification will be upheld only when the classification serves important governmental objectives and is substantially related to the achievement of those objectives.[24]

The lowest tier of scrutiny is reserved for classes created and affected by most economic and social welfare legislation — those cases not involving suspect classes or gender-based classes.[25] Under this level of scrutiny, the classification will be upheld when the means chosen by the

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16. *Nebbia*, 291 U.S. at 537 (emphasis added).

17. *See, e.g.*, North Dakota St. Bd. of Pharmacy v. Snyder's Drug Store, 414 U.S. 156 (1973).

18. U.S. Const. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

19. A corporation is a "person" for equal protection purposes. *See supra* note 11.

20. Michael M. v. Superior Ct. of Sonoma Co., 450 U.S. 464, 468-69 (1981).

21. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

22. *See, e.g.*, University of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

23. *See, e.g.*, *Michael M.*, 450 U.S. 464.

24. *Id.*

25. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979).

legislature bears a rational relationship to a legitimate legislative purpose.[26] Restrictions on corporate ownership of farmland would be reviewed under this low level of scrutiny.[27]

The cases utilizing this low level of scrutiny indicate the deference the Court gives the legislative branch. In *Vance v. Bradley*,[28] the Court's reluctance to act is demonstrated by the following language:

> The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, *we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.*[29]

In *Vance*, the Court had to decide "whether Congress violate[d] the equal protection [clause] . . . by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system."[30] The complainant's argument was that the Foreign Service's mandatory retirement age discriminated on the basis of job classification. Using this test, the Court sustained the retirement age.[31]

The government cited the goal of maintaining

> the professional competence, as well as the mental and physical reliability, of the corps of public servants who hold positions critical to our foreign relations, who more often than not serve overseas, frequently under difficult and demanding conditions, and who must be ready for such assignments at any time.[32]

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26. *Id.* at 97. While the "magic words" articulating this test are virtually identical to the due process test mentioned earlier, the tests involve different regulatory schemes. In the typical due process case, the complainant alleges that state action has deprived it of a property or liberty interest without affording it due process of law. In the typical equal protection case, the challenge is to a statutory scheme treating one statutorily created class differently from other allegedly similar classes. There is still little difference between the two tests — both grant much deference to the state. However, language in equal protection cases indicates that the Court is more willing to entertain challenges to economic regulations based on equal protection rather than on due process grounds.

27. *See, e.g.*, Asbury Hosp. v. Cass County, N.D., 326 U.S. 207 (1945).

28. 440 U.S. 93 (1979).

29. *Id.* at 97 (emphasis added).

30. *Id.* at 94-95.

31. *Id.* at 112.

32. *Id.* at 97.

The Foreign Service officers challenging the retirement age in *Vance* did not question the legitimacy of this goal.[33] The dispute centered on whether the retirement age was rationally related to this purpose.

The Foreign Service claimed that the retirement age fostered superior achievement through the assurance of a reasonable "pyramid of promotion"[34] and that younger persons could more easily handle the rigors of overseas duties.[35] The Court held that the duty to disprove those claims rested with the complainants, and that this burden had not been met: "In an equal protection case of this type [a statutory classification], . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[36] The complainants did admit that the basis of the classification was arguable. Having failed to prove that Congress had no reasonable basis for creating the classification, the statute was upheld.[37]

In *Minnesota v. Clover Leaf Creamery*,[38] the Court held that the burden is the same regarding a challenge to a state statutory classification:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[39]

In *Clover Leaf*, the Court upheld a Minnesota statute that banned the retail sale of milk in plastic nonreturnable containers but permitted milk to be sold in other nonreturnable containers.[40]

Vance and *Clover Leaf* demonstrate that a party challenging restrictive farm ownership legislation on equal protection grounds must overcome the presumption of validity by clearly showing that the re-

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33. *Id.*

34. *Id.* at 100-01.

35. *Id.* at 103.

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

37. The Court stated: "[I]t is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute." *Id.* at 112.

38. 449 U.S. 456 (1981).

39. *Id.* at 464.

40. *Id.* at 458, 474. Both types of containers admittedly caused environmental problems. However, the Court held that Minnesota's stated purpose, to encourage development of returnable and reusable packaging, was reasonably fostered by a ban on plastic containers (which were the more popular of the two types of containers). *Id.* at 470-74.

striction is irrational. As mentioned above, the Court decided in *Asbury Hospital* that such restrictive legislation *is* valid (under equal protection analysis).[41] *Asbury Hospital* further demonstrates that an equal protection challenge to such legislation, when the complainant offers no proof of irrationality, is almost impossible: "Statutory discrimination between classes which are in fact different *must* be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection *if any state of facts could be conceived which would support it.*"[42] If the challenging party produced no evidence showing the irrationality of the measure, a court faced solely with an equal protection challenge to a statutory corporate farming restriction could uphold the statute by simply relying on the state's claim that such a restriction is rationally related to the desire to protect the family farm from being swallowed up by large corporate farm organizations.

However, if the challenging party is able to show that the reason given is *not* factually supported, that party would have a chance to overturn the legislation. For example, if a party were able to show that the purpose of restrictive legislation was to protect family farms, and if that party were further able to demonstrate that nonfamily corporations were not a threat to family farms, the legislation *might* be deemed irrationally based, and therefore contrary to the equal protection clause.

The abstractness of the perceived corporate threat makes this a risky undertaking at best. However, unlike the due process challenges to such legislation, success seems possible under this approach. The sentimentality associated with people's views of family farms certainly is an aid that should be utilized when making such a challenge. A demonstration that sentimentality was the basis of the decision to restrict corporate ownership, as opposed to actual data demonstrating that corporations pose a threat to family farms, could create a suspicion that would persuade a court to give the case serious consideration. Once that was done, given the burden placed on the challenging party by *Asbury Hospital* and the subsequent line of cases,[43] the challengers must present uncontradicted evidence that corporations do not pose a threat to family farms.[44] This process is discussed below after the Nebraska case that has arisen from Nebraska's corporate ownership ban.

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41. *See* Asbury Hosp. v. Cass County, N.D., 326 U.S. 207 (1945).

42. *Id.* at 215 (emphasis added). Inevitably, the state will enumerate facts to support such challenged legislation during a court battle.

43. *E.g.*, Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981); Vance v. Bradley, 440 U.S. 93 (1979).

44. No such showing was attempted by the complainant in *Asbury Hospital*. The corporation merely claimed that its constitutional rights were violated when North Dakota took away its ability to hold agricultural land, a right it had exercised prior to the statute. *Asbury Hospital*, 325 U.S. at 209-10.

It is conceivable that a challenging party could prevail under an equal protection theory, although the extreme burden required of the challenging party would make a favorable outcome doubtful. However, the chances of success seem greater than those available to the party who challenges corporate restrictions on due process grounds. Supreme Court decisions indicate that a commerce clause challenge might be a more successful way to attack restrictions on corporate ownership of farmland than either due process or equal protection challenges.

C. Commerce Clause

"The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States . . . ."[45] This delegation of power has proven to be one of the most powerful clauses in the Constitution. The cases interpreting Congress's power regarding commerce are far-reaching.[46] Two circumstances exist that call for interpretation of the commerce clause in response to legislative action: (1) situations in which Congress has acted directly to regulate commerce,[47] and (2) situations in which Congress has not acted on a matter regarding commerce but a state has acted (commonly referred to as dormant commerce clause cases).[48] The first class of cases is relevant to this discussion because it articulates the scope of Congress's ability to regulate commerce. These cases indicate that agricultural matters come within the purview of the commerce clause, and therefore may by regulated by Congress.[49] The dormant commerce clause cases are directly applicable to this discussion because any commerce clause challenge to state corporate ownership restrictions would be made under dormant commerce clause principles given the current state of congressional abstinence from the field.[50] When a state, as opposed to Congress, regulates commerce, dormant commerce clause principles govern.

Early in the judicial history of the United States, the scope of the commerce clause was addressed.[51] The early debate centered on whether Congress had the exclusive right to regulate interstate commerce or merely a right superior to the states' rights to regulate commerce.[52]

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45. U.S. Const. art. I, § 8.

46. *E.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); Wickard v. Filburn, 317 U.S. 111 (1942); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1.

47. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

48. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 244.

49. *See, e.g.*, *Wickard*, 317 U.S. 111.

50. *Willson*, 27 U.S. (2 Pet.) 244.

51. *See, e.g.*, *Willson*, 27 U.S. (2 Pet.) 244; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1.

52. *See, e.g.*, *Willson*, 27 U.S. (2 Pet.) 244; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1.

The first case to present the question to the Supreme Court was *Gibbons v. Ogden*,[53] which involved New York's refusal to recognize Gibbons's federal steamboat operator's license because New York had granted Ogden the exclusive right to operate a steam vessel in New York waters. The case was decided on grounds of federal supremacy.[54] Chief Justice Marshall, in invalidating the New York law, avoided the question of the extent of a state's commerce regulating powers when there is congressional silence by finding a congressional mandate on the issue.[55] However, Chief Justice Marshall indicated a willingness to embrace a concept of federal exclusivity regarding the commerce power.[56] Under such a view of the commerce clause, the federal government would have exclusive control over interstate commerce, and the states would be powerless to take action affecting interstate commerce even when no congressional action had been taken. However, this view of federal exclusivity was never adopted by the Court. Such a view was expressly rejected in *Willson v. Black Bird Creek Marsh Company*,[57] in which the Court held that a state could regulate commerce in the face of congressional silence.[58] Therefore, by 1829, the two classes of commerce cases had been delineated.

Cases involving federal statutes demonstrate that even farming regulations that deal with purely local matters fall within the scope of the commerce clause. For example, the Court in *Wickard v. Filburn*[59] allowed Congress to regulate the amount of crops grown by a farmer, even if grown for purely local consumption rather than for placement in the stream of interstate commerce. The *Wickard* Court reasoned that if purely local matters are part of an entire class of acts that has a substantial effect on interstate commerce, Congress may regulate the entire class.[60] It is undisputed that the production of agricultural products is inextricably entwined with interstate commerce. Although restrictions on corporate ownership of farmlands are arguably a local concern, the *Wickard* test indicates that production of agricultural products is part of an entire class of acts that has a substantial effect on interstate commerce. Although restrictions on farmland ownership could affect the production of agricultural products, the federal government has not acted to restrict

53. 22 U.S. (9 Wheat.) 1.
54. *Id.* at 210.
55. *Id.*
56. *Id.* at 209.
57. 27 U.S. (2 Pet.) 244.
58. *Id.* at 252.
59. 317 U.S. 111 (1942).
60. *Id.* at 129.

ownership of farmlands. Therefore, the validity of state restrictions on farm ownership falls within the scope of dormant commerce clause principles.

The cases involving the dormant commerce clause typically involve a balancing of local interests (those allegedly fostered by the state statute) against the national interest in preserving free flowing interstate commerce.[61] This balancing approach is best explained in *Southern Pacific Co. v. State of Arizona*.[62] In invalidating Arizona's restriction of train lengths, the Court stated:

> Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson v. Black Bird Creek Marsh Co*. . . . and *Cooley v. Board of Wardens* . . . , it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws *governing matters of local concern* which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it . . . . When the regulation of matters of local concern is local in character and effect, and *its impact on the national commerce does not seriously interfere with its operation*, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.[63]

Southern Pacific further emphasizes the balancing test required:

> The decisive question is whether *in the circumstances* the total effect of the law [regarding its purpose] *is so slight* or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect . . . .[64]

The Court held that Arizona's statutory effort to improve railway safety was completely ineffective, and that it therefore did not "outweigh the national interest in keeping interstate commerce free from interferences."[65]

In *Southern Pacific*, the challenging party was able to present uncontradicted evidence that safety would not be enhanced by the contested

61. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).
62. 325 U.S. 761 (1945).
63. *Id*. at 766-67 (emphasis added) (citations omitted).
64. *Id*. at 776 (emphasis added).
65. *Id*. at 775-76.

measure.[66] A state highway regulation affecting truck-trailer lengths was similarly overruled in *Raymond Motor Transport, Inc. v. Rice*.[67] The rule from *Southern Pacific* and its progeny is that when there is a strong national interest in interstate commerce, coupled with evidence that the promoted local concern affecting interstate commerce will not be served by the contested local measure, the local statute will be invalidated. This rule also applies to corporate ownership restrictions.

A case concerning corporate ownership restrictions involves a strong national interest (keeping the production of agricultural products free from interferences) that is at odds with a local measure (the restriction on corporate ownership of farmland) and is designed to address a local concern (the protection of the family farm from inundation by corporate producers). In such instances, the challenging party would have to show uncontradicted evidence that the measure simply does not address the concern, or if it does, that its effect is slight and does not outweigh the national interest in keeping the production of agricultural products free from interference. In other words, the challenging party must demonstrate that the restriction on corporate ownership does not protect family farms.

The commerce clause is a better vehicle with which to pursue challenges to restrictions on corporate ownership of farms, especially if the challenging party can produce strong evidence that the professed concern about family farms is not being met under the current statute. Indeed, dormant commerce clause attacks accompanied by such evidence have fared much better than attacks based on equal protection which are analyzed under the rational relationship test.[68] Cases decided under dormant commerce clause principles receive a higher level of scrutiny than the deferential treatment commonly associated with the rational relationship tests for due process and equal protection violations.[69]

D. The Cases

Two recent cases have dealt squarely with the constitutionality of restrictions on corporate ownership of farmlands.[70] In *Omaha National Bank v. Spire*,[71] the Nebraska Supreme Court held that Nebraska's constitutional amendment barring nonfamily corporate ownership of farmlands did not violate the equal protection clause of the United States

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66. *Id.* at 775-79.

67. 434 U.S. 429 (1978).

68. *See, e.g.*, *Raymond Transp.*, 434 U.S. 429; *Southern Pac.*, 325 U.S. 761.

69. *See, e.g.*, *Raymond Transp.*, 434 U.S. 429; *Southern Pac.*, 325 U.S. 761.

70. A third case, MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991), was decided as this Article was being prepared for publication. In *MSM Farms*, the Eighth Circuit affirmed the judgment of the Federal District Court for the District of Nebraska, which upheld Nebraska's family farm amendment.

71. 223 Neb. 209, 389 N.W.2d 269 (1986).

Constitution.[72] In *State ex rel Webster v. Lehndorff Geneva, Inc.*,[73] the Missouri Supreme Court, using equal protection analysis, upheld Missouri's statute requiring a nonfamily corporate owner of farmland to divest itself within two years.[74]

On November 2, 1982, Nebraska voters approved Initiative 300 as an amendment to the Nebraska State Constitution.[75] Nebraska is currently the only state having such a constitutional provision restricting corporate ownership of farmlands.[76] Initiative 300, appearing in Article XII, section 8 of the Nebraska Constitution reads in pertinent part:

> Sec. 8(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.
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> * * *
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> These restrictions shall *not* apply to :
>
> (A) *A family farm corporation.*
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> * * *
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> (D) Agricultural land, which as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet requirements of pollution control regulations.[77]

As revealed by this quotation, the amendment reads very much like a statute.[78] The effect of the "family farm amendment" is to prohibit new buying of agricultural land by nonfamily farm corporations. No nonfamily farm corporations currently owning agricultural land are required to divest themselves of that land.[79] The *Omaha National Bank*

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72. *Id.* at 232, 389 N.W.2d at 283.

73. 744 S.W.2d 801 (Mo. 1988).

74. *Id.* at 805-06.

75. 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, 771 (1983).

76. *Id.* at 771.

77. Neb. Const. art. XII, § 8 (emphasis added).

78. Part of the complainant's argument in *Omaha Nat'l Bank* was that the amendment was in fact an improperly adopted statute, but this argument was unsuccessful. *Omaha Nat'l Bank*, 389 N.W.2d at 276.

79. *See* Neb. Const. art XII, § 8.

case arose when Omaha National Bank brought an action in district court challenging the validity of the family farm amendment. Omaha National wished to continue its trust business, which often entailed owning and operating farmland in Nebraska.[80]

The only constitutional challenge made against the family farm amendment in *Omaha National Bank* was that it violated the equal protection clause of the United States Constitution.[81] Quoting *City of New Orleans v. Dukes*,[82] the Nebraska Supreme Court quickly dismissed the equal protection challenge: "When a local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."[83] The court further reasoned that because a state constitutional provision was being challenged, rather than merely a statute, the United States Supreme Court "would even more readily defer to the state constitutional determination as to the desirability of particular constitutional discriminations."[84] Finally, the court relied on *Asbury Hospital,*[85] and without even conducting a rational relationship test, held that the family farm amendment did not violate the equal protection clause of the United States Constitution.[86] No evidence of any kind was offered by Omaha National in an attempt to show the irrationality of the amendment. When the bank's lackluster attempt at challenging the amendment is considered with the deferential status afforded under the rational relationship test from United States Supreme Court equal protection doctrine already discussed, it is not surprising that the Nebraska Supreme Court ruled as it did.

In *Lehndorff*, a corporation fought Missouri's attempts to force a divestiture of the corporation's farm lands as required by Missouri statute.[87] As in *Omaha National Bank*, the corporation's main defense was that its equal protection rights were being abridged.[88] Stating that

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80. *Omaha Nat'l Bank*, 389 N.W.2d at 272.

81. *Id.* at 272, 282.

82. 427 U.S. 297, 303 (1976).

83. *Omaha Nat'l Bank*, 389 N.W.2d at 282.

84. *Id.* The Nebraska Supreme Court cited no authority for this proposition. The logic appears to be that a constitutional amendment is more rationally based than a statute merely because it is a constitutional amendment.

85. 326 U.S. 207 (1945).

86. *Omaha Nat'l Bank*, 389 N.W.2d at 283.

87. *Lehndorff*, 744 S.W.2d at 803-04. The statute reads in pertinent part: "After September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural land in this state . . . ." Mo. Ann. Stat. § 350.015 (Vernon Supp. 1990).

88. *Lehndorff*, 744 S.W.2d at 805.

the legitimate governmental interest involved was the protection of traditional farming entities from nonfamily corporations, the *Lehndorff* court found a rational relationship between the statute and its purpose.[89] The court stated, "The statute is rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional [farm operators]."[90] Again, no attempt was made to demonstrate that the statute did not protect the traditional farm operator.

E. A Method of Attack

An examination of Supreme Court doctrine and statistical data regarding Nebraska farmlands indicates that Omaha National could have made a stronger case. By limiting its case to an equal protection challenge, Omaha National needlessly subjected itself to the deferential rational relationship test. Omaha National did little to show that the classification prohibiting corporate ownership of farms in Nebraska was irrational. Omaha National should have based its claims on equal protection *and* commerce clause grounds.

The cases announcing the rational relationship test for equal protection violations indicate that if a local economic regulation is challenged on more than equal protection grounds, a court may not give the legislative determination the great deference of the rational relationship test. As the court stated in *City of New Orleans*, "When local economic regulation is challenged *solely* as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."[91] The Supreme Court seems to be saying that it will not grant such great deference if the equal protection challenge is coupled with another constitutional argument.[92]

If Omaha National had succeeded in invoking a higher level of scrutiny than the rational relationship test, which is a very deferential

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89. *Id.* at 805-07.

90. *Id.* at 806.

91. *City of New Orleans*, 427 U.S. at 303 (emphasis added). Note that this was the very quote relied upon by the Nebraska Supreme Court in dismissing Omaha National's equal protection argument.

92. Although the plaintiff in *MSM Farms*, *supra* note 70, challenged Nebraska's family farm amendment on due process *and* equal protection grounds, 927 F.2d at 331, there appears to have been no attempt to force a less deferential analysis based upon the language of *City of New Orleans*, 427 U.S. at 303. As a result, the Eighth Circuit gave great deference to the amendment, although arguably a more pointed attempt to show irrationality was made than was made in *Omaha Nat'l Bank*. *MSM Farms*, 927 F.2d at 331. No commerce clause argument was made in *MSM Farms*.

standard of review when corporate ownership restrictions are involved, statistical data might have been enough to show that the Nebraska amendment is irrational. In other words, a dormant commerce clause argument coupled with the equal protection argument might be enough to take the case beyond the deferential rational relationship test and defeat the family farm amendment.[93]

Saving the family farm was the theme of the initiative campaign supporting Nebraska's family farm amendment.[94] But did Nebraska's family farms need saving? If so, did they need saving from corporate farms? A glance at some statistics shows that the answer to these questions is "no"!

In 1978, nonfamily corporations held only one-half of one percent (.5%) of Nebraska's 46,113,973 acres of farmland.[95] By 1982, in the years just prior to adoption of Nebraska's family farm amendment, that percentage had *dropped* to four-tenths of one percent (.4%) of Nebraska's 44,961,371 acres of farmland.[96] It is true that the number of nonfamily corporate farms in Nebraska increased from 205 to 281 during this time, but the *total* number of acres farmed by these corporations dropped by nearly one-fourth during the same time.[97] In other words, the number of nonfamily corporate farms was increasing, but the amount of Nebraska land farmed by these corporations was decreasing even before the family farm amendment was adopted. From 1978 to 1987, the amount of farmland held by nonfamily corporations in the United States remained virtually unchanged at one and one-half percent (1.5%) of all farmland.[98]

The relative absence of nonfamily corporate farms in Nebraska makes a strong case for the irrationality of the family farm amendment under the equal protection doctrine. The amount of land in Nebraska farmed by nonfamily corporations was declining even prior to the adoption of the family farm amendment.[99] There was not even a nationwide increase in the number of nonfamily corporate farms prior to (or since) adoption

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93. If the message of *City of New Orleans* is applied literally, such a two-pronged argument will be more successful than if the case is brought under equal protection or dormant commerce clause principles separately — even if the same data are used in support of the challenge in each case.

94. Note, *supra* note 75.

95. U.S. Dept. of Comm., Bur. of the Census, 1978 Census of Ag., State Data: Nebraska, vol. 1, pt. 27, table 5, at 3.

96. U.S. Dept. of Comm., Bur. of the Census, 1982 Census of Ag., State Data: Nebraska, vol. 1, pt. 27, table 5, at 4.

97. Id.

98. U.S. Dept. of Comm., Bur. of the Census, Census of Ag., United States, 1978, vol. 1, pt. 51, table 5, at 3; 1982, vol. 1, pt. 51, table 5, at 4; 1987 vol. 1, pt. 51, table 20, at 16.

99. *See supra* notes 96-97.

of the amendment.[100] An equal protection argument, coupled with a commerce clause claim, might be enough to move the Court to abandon its strict deference for the Nebraska amendment and view it under a rational relationship test "with teeth."[101]

The balancing test announced in *Southern Pacific* coupled with the data mentioned above makes a strong case for invalidating the amendment under dormant commerce clause grounds. Omaha National should have made such a challenge on equal protection *and* commerce clause grounds and forced the Nebraska Supreme Court to at least examine the family farm amendment in more than a cursory fashion.

III. Conclusion

Restrictions on corporate ownership of farmlands have existed throughout the twentieth century. Challenges to these restrictions based on due process and equal protection grounds routinely have failed. Therefore, an innovative challenger should combine equal protection and dormant commerce clause doctrines to shape a persuasive argument that should be worthy of serious consideration.

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100. *See supra* note 98.

101. Such a rational relationship test "with teeth" seems, as indicated above, to have been contemplated by the Supreme Court when it announced its deference in cases brought *solely* under equal protection grounds and did *not* state such deference would be granted in *all* equal protection cases. *City of New Orleans*, 427 U.S. 297.