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**Market Concentration, Horizontal Consolidation, and
Vertical Integration in the Hog and Cattle Industries:
Taking Stock of the Road Ahead**

by

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Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries: Taking Stock of The Road Ahead¹

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I. Introduction

The level of market concentration in virtually every segment of the agricultural sector in the United States has increased significantly over the past several decades.² The number of firms and actors within the sector, including producers, input suppliers, output processors, and food retailers, has decreased as their size has increased. The hog and cattle industries are two portions of the agricultural sector that have been the focus of recent litigation due to market concentration concerns brought about by horizontal consolidation and vertical integration.³

The Packers and Stockyards Act of 1921⁴ (PSA) and anti-corporate farming laws, both of which have been the basis of recent judicial activity, are two legal mechanisms implicated in the debate over market concentration in the hog and cattle industries. The issue of market concentration and the application of the PSA and corporate farming laws in the context of concentration in the hog and cattle industries is of paramount importance to packers and processors, retail food outlets, producers, consumers, and society, as are the implications of several recent judicial decisions brought under the PSA or states' corporate farming laws.

1. This article is an abbreviated version of a forthcoming article that will be published on this Web site.

2. See generally Neil E. Harl, *The Structural Transformation of Agriculture* (Mar. 2003) [hereinafter *Structural Transformation*], at <http://www.econ.iastate.edu/faculty/harl/StructuralTransformationofAg.pdf>.

3. See generally James M. MacDonald et al., *Consolidation in U.S. Meatpacking* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 785, Feb. 2000) [hereinafter MacDonald]; Doug O'Brien, *Developments in Horizontal Consolidation and Vertical Integration* (Jan. 2005), at http://www.nationalaglawcenter.org/assets/articles/obrien_antitrust.pdf [hereinafter O'Brien]; and William D. McBride and Nigel Key, *Economic and Structural Relationships in U.S. Hog Production* (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 818, Feb. 2003) [hereinafter McBride]. See also C. Robert Taylor, *Where's the Beef? Monopoly and Monopsony in the Beef Industry*, Agriculture and Resource Policy Forum (Auburn University) Mar. 2002, available at <http://www.auburn.edu/~taylocr/topics/beef/beefmarginsforum.htm>.

4. 7 U.S.C. §§ 181-229 (2000).

This article reviews the status of the PSA and corporate farming laws in light of the decisions in *London v. Fieldale Farms, Corp.*,⁵ *Pickett v. Tyson Fresh Meats, Inc.*,⁶ *South Dakota Farm Bureau, Inc. v. Hazeltine*,⁷ and *Smithfield Foods, Inc. v. Miller*.⁸ The article also examines the historical development and current structure of the hog and cattle industries and presents a brief overview of the PSA and corporate farming laws.

II. Background

Market concentration is a measure of market dominance by a few large packing firms typically measured by the share of the industries' output held by the four largest firms in the respective industries.⁹ Horizontal consolidation refers to the number and size of firms, such as cattle or hog meatpacking firms, that exist in a particular market.¹⁰ Vertical integration is a form of legal coordination under which a single organization controls two or more adjacent stages of production, processing, or marketing of a commodity, typically through ownership but also through contractual arrangements.¹¹ Vertical integration has occurred in the cattle and hog industries primarily through packer-owned livestock and "captive supplies," which is defined to include "livestock that is procured by a packer through a contract or marketing agreement that has been in place for more than 14 days, or livestock that is committed to a packer more than 14 days prior to slaughter."¹²

Opinions differ over the wisdom and legality of the level of market concentration in the agricultural sector generally and in the hog and cattle industries specifically. One side of the debate characterizes market concentration through horizontal consolidation and vertical integration as "the

5. 410 F.3d 1295 (11th Cir. 2005).

6. 315 F.Supp.2d 1172 (M.D. Ala. 2004).

7. 340 F.3d 583 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2095 (2004). See also *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002) (holding that Amendment E violated dormant Commerce Clause but on grounds different than those espoused by the Eighth Circuit).

8. 367 F.3d 1061 (8th Cir. 2004). See also *Smithfield Foods, Inc. v. Miller*, 241 F.Supp.2d 978 (S.D. Iowa 2003) (holding that Iowa corporate farming law at issue violated dormant Commerce Clause).

9. Chuck Culver, *Glossary of Agricultural Production, Programs, and Policy* (4th ed.), available at <http://www.nationalaglawcenter.org> [hereinafter Culver] (defining "concentration"). See MacDonald, *supra* note 3, at 7.

10. O'Brien, *supra* note 3, at 2.

11. Culver, *supra* note 9 (defining "vertical integration"). See O'Brien, *supra* note 3, at 2 (explaining nuances to the definition of vertical integration in the livestock industry context and noting that definitions of relevant terminology differ).

12. O'Brien, *supra* note 3, at 3 n.5 (citing USDA GIPSA, *Captive Supply of Cattle and GIPSA's Reporting of Captive Supply*, at 2 (Jan. 11, 2002)). See also *id.* (explaining that definitions of captive supply vary).

deadly combination” that negatively affects the competition upon which a market economy depends.¹³ Another side of the debate contends that market concentration is a mere reflection of “fundamental economic forces” necessary for a firm to be efficient and remain competitive in a rapidly changing global economy.¹⁴

III. Discussion

A. Structural changes in hog and cattle industries

The hog industry has undergone dramatic structural changes over the past decades, especially in the last twenty years.¹⁵ The cattle industry has undergone similar structural changes during this same period but not to the extent seen in the hog industry.

Hog Industry

The number of hog producers has declined during the past two decades, although the size of hog operations has increased significantly. This dramatic decline in the number of hog producers and the corresponding increase in the size of hog operations is well-documented and not disputed.¹⁶ In 1974, there were approximately 750,000 hog producers in the U.S., but by 1999 the number of hog farmers declined to approximately 98,000.¹⁷ Despite this decline, the number of hogs in the U.S. has remained “relatively stable” at approximately 60 million head because the size of hog farms has increased.¹⁸ In 1994, farms with 2,000 or more hogs comprised approximately 37% of hog farms.¹⁹ By 2001, the percentage of hog farms with 2,000 or more hogs increased to 75%.²⁰ In 1996,

13. *Structural Transformation*, *supra* note 2, at 4.

14. Rod Smith, *Economics Driving Beef Mergers*, FEEDSTUFFS, June 20, 2005. See also Rod Smith, *American, Rosen Merger to Capture ‘Opportunity’*, FEEDSTUFFS, June 20, 2005. A discussion of the wisdom or legality of market concentration in the hog and cattle industries is not within the scope of this article.

15. See generally MacDonald, *supra* note 3.

16. See generally McBride, *supra* note 3; Douglas J. O’Brien, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. Corp. L. 651, 651-54 (1995); R.N. VanArsdall & K.E. Nelson, *Economies of Size in Hog Production*, (USDA, Econ. Research Serv., Technical Bulletin No. 1712, 1985) (predicting that “hog production will eventually be industrialized, breaking away from the traditional crop-livestock farm setting, as have fed beef and poultry”); and USDA, GIPSA, *Assessment of the Cattle and Hog Industries: Calendar Year 2001* ix (2002) [hereinafter *Assessment of Cattle and Hog Industries*].

17. *Id.*

18. McBride, *supra* note 3, at 5.

19. *Id.*

20. *Id.*

approximately 33% of hog farms had 5,000 or more hogs and pigs,²¹ and this number equaled over 50% by 2001.²² The percentage of hogs marketed by farmers marketing 50,000 or more hogs increased from 18% in 1994 to 52% in 2000.²³ The percentage of hogs produced by farmers marketing 500,000 or more hogs increased from 10% to 35% between 1994 and 2000. In 2002, approximately 50% of the U.S. hog inventory was owned by farming operations with over 50,000 head.²⁴

In the past two decades, the number of packing firms that slaughter hogs has decreased as the size of those firms has increased. The percentage of hogs slaughtered in the U.S. by the four largest packers “remained stable from 1963 through 1987, but then increased sharply between 1987 and 1992,”²⁵ from 30% to 43%. In 1995, the four largest packers’ slaughter share was 46%.²⁶ In 1996, the four largest packers slaughtered 56% of all hogs.²⁷ The percentage of hogs slaughtered in the U.S. by the four largest packers continued to increase, reaching 59% in 2001 and 64% in 2003.²⁸

The hog industry continues to become increasingly vertically integrated as the number of hogs raised under a production contract between a grower and a processor increases. “In 1992, only 5 percent of total hog production was through contracts.”²⁹ In 1998, approximately 19% of feeder pig operations and 34% of finished hog operations were produced under a production contract, “but these operations accounted for 82% of feeder pigs and 63 percent of finished hogs.”³⁰

Cattle Industry

The three basic stages of cattle production are breeding, feeding, and slaughtering, with each stage typically handled by specialized operations. A cow-calf operation produces calves and either feeds the animals until they are ready to be placed into feedlots or sells the animals to stockers who raise the animals until they are ready to be placed into feedlots. Cattle are fattened in feedlots until they are ready for slaughter and are then sold to a packer.

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. MacDonald, *supra* note 3, at 7.

26. *See id.* *See also Assessment of Cattle and Hog Industries, supra* note 16, at ix.

27. U.S. Gen. Accounting Office, *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices* (Pub. No. RCED-00-242m Sept. 2000) at 32 [hereinafter *Actions Needed to Improve Investigations*].

28. FEEDSTUFFS REFERENCE ISSUE 2001 (Sept. 22, 2003).

29. McBride, *supra* note 3, at 9.

30. *Id.* at 25.

The number of cattle producers has declined but not as precipitously as the decline in the number of hog producers. The cattle industry continues to be comprised of a large number of producers who operate small-scale operations.³¹

The number of feedlots has decreased as their size has increased. The number of feedlots declined from 190,000 to 111,000 between 1987 to 1997.³² In 2001, the one-time feeding capacity of the 10 largest feedlots was 3.1 million head, a 53% increase when compared to the capacity levels of 1988.³³ In 1988, the annual capacity of the 10 largest feedlots was 16% of total steer and heifer slaughter, and in 2001 this number equaled 24%.³⁴

The industry has become more concentrated at the packer level with fewer firms slaughtering a larger percentage of cattle. In 1980, the four largest firms' share of total steer and heifer slaughter was 35%. In 1989, the four largest firms' share of total steer and heifer slaughter was approximately 70% of the steer and heifer slaughter.³⁵ In 1993, this number equaled 81% "but has remained relatively stable since then."³⁶

The cattle industry has also become more vertically integrated. The industry has shifted away from the marketing of cattle on the spot market and towards the purchasing of cattle by packers through contractual arrangement between the producer and the packers.³⁷

B. Recent Judicial Developments

Before examining recent judicial developments involving the PSA and corporate farming laws, this article will briefly discuss for contextual purposes the PSA and corporate farming laws.³⁸

31. U.S. Gen. Accounting Office, *Packers and Stockyards Administration: Oversight of Livestock Market Competitiveness Needs To Be Enhanced* (Pub. No. RCED-92-36, Oct. 1991) [hereinafter *Oversight of Market*].

32. *Actions Needed to Improve Investigations*, *supra* note 27, at 33.

33. *Assessment of Cattle and Hog Industries*, *supra* note 16, at vii.

34. *Id.*

35. *Oversight of Market*, *supra* note 31, at 3.

36. *Assessment of Cattle and Hog Industries*, *supra* note 16, at vii.

37. *Actions Needed to Improve Investigations*, *supra* note 27, at 7.

38. For an excellent overview of the PSA, see Christopher R. Kelley, *An Overview of the Packers and Stockyards Act* (Apr. 2003) [hereinafter *Overview of PSA*], at http://www.nationalaglawcenter.org/assets/articles/kelley_packers.pdf. See also 10 NEIL E. HARL, AGRICULTURAL LAW Ch. 71 (1993). For a more extensive discussion of reported and unreported cases involving corporate farming laws, see Harrison M. Pittman, Annotation, *Validity, Construction, and Application of State Constitutional and Statutory Provisions Regarding Corporate Farming*, 125 A.L.R.5th 147 (2005). In addition, the National Agricultural Law Center Web site contains Reading Rooms for

Packers and Stockyards Act

The PSA is comprehensive legislation enacted in 1921 in response to concerns over market concentration and anticompetitive practices among packers in the livestock industry.³⁹ In 1918, the Federal Trade Commission (FTC) determined that five large meatpacking firms, commonly referred to as “the Big Five,” exercised monopolistic control over the livestock industry through their ownership and control of public stockyards, ownership of transportation and distribution networks, slaughter of approximately 66% of all livestock, and possession of financial interests in market outlets and retail stores.⁴⁰ In particular, the FTC found that “[i]t appears that five great packing concerns of the country— Swift, Armour, Morris, Cudahy, and Wilson— have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands”⁴¹ Congress responded to the FTC findings by enacting the PSA.

The PSA defines “livestock” as “cattle, sheep, swine, horses, mules, or goats— whether live or dead.” The Act regulates packers, swine contractors, and live poultry dealers. A “packer” is any person

engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.⁴²

The PSA prohibits packers from engaging in “a wide a range of practices from unfair and deceptive practices that harm an individual farmer to price manipulation and the creation of a

Corporate Farming Laws and the Packers and Stockyards Act, available at <http://www.nationalaglawcenter.org/readingrooms/corpfarming/> and <http://www.nationalaglawcenter.org/readingrooms/packersandstockyards/>, respectively.

39. See generally *Overview of PSA*, *supra* note 38.

40. *Actions Needed to Improve Investigations*, *supra* note 27, at 31. For a thoughtful and detailed description of the history of PSA, see 10 NEIL E. HARL, *AGRICULTURAL LAW*, §§ 71.01-71.05 (1993).

41. Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 *Agricultural Law* § 3.02 (John Davidson ed., 1981) (quoting FTC, *Report of the Federal Trade Commission on the Meat Packing Industry* 392 (1919)). See also *Oversight of Market*, *supra* note 31, at 3, (“The meat-packing industry became less concentrated after the act’s passage but, because of a number of mergers and acquisitions in recent decades, is now more concentrated than it was in 1921.”).

42. 7 U.S.C. § 191.

monopoly that harm many farmers system wide.”⁴³ In particular, § 202 of the PSA makes it unlawful for a packer to “[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device”⁴⁴

Corporate Farming Laws

Corporate farming laws are state statutory or constitutional provisions that restrict corporations from engaging in farming or agriculture, or that limit the authority of corporations to acquire, purchase, or otherwise obtain land that is used or usable for agricultural production. Most are enacted as statutory rather than constitutional provisions. These laws exist in nine states located primarily in the Midwest.⁴⁵ Proponents of corporate farming laws argue that these laws are necessary to protect family farms from the negative economic consequences of competition with corporate-owned or corporate-operated agricultural operations. Opponents of corporate farming laws argue that these laws are unconstitutional and an impediment to a vibrant free trade economy among the states.⁴⁶

Pickett v. Tyson

Pickett is significant because it strikes at the heart of the debate over market concentration in the cattle industry, and the ultimate outcome of this case will influence how market concentration through horizontal consolidation and vertical integration evolves within the livestock industry. In *Pickett*, a group of cattle feeders (hereinafter plaintiffs) brought a class action against IBP, Inc., which was subsequently acquired by *Tyson Fresh Meats, Inc.* (Tyson), arguing that Tyson used captive supplies to purchase cattle in a manner that manipulated cash market sales for cattle in violation of the PSA. The plaintiffs essentially argued that Tyson “was able to control the supply of cattle to the degree that the packer could affect the price of cattle that it buys from feeders on the open market.”⁴⁷

The jury determined the following:

(1) there is a nationwide market for fed cattle; (2) defendant’s use of captive supply had an anticompetitive effect on the cash market for fed cattle; (3) defendant lacked a legitimate business reason or competitive justification for using captive supply; (4)

43. Michael C. Stumo & Douglas J. O’Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 92 (2003).

44. 7 U.S.C. § 202. See also Jonathan M. Purver, Annotation, *Construction and Application of § 202 of Federal Packers and Stockyards Act (7 U.S.C.A. § 192) Prohibiting Certain Trade Practices By Meat Packers and Live Poultry Dealers or Handlers*, 5 A.L.R. Fed. 729.

45. See N.D. Cent. Code §§ 10-06.1 through 10-06.1-2; Kan. Stat. Ann. § 17-5904; Neb. Const. Art. XII, § 8; Wis. Stat. § 182.001; Minn. Stat. § 500.24; Iowa Code §§ 202B.101 through 202B.402; Mo. Rev. Stat. §§ 350.015 through 316.015; S.D. Codified Laws §§ 47-9A-1 through 47-9A-23; Okla. Const. Art. XXII, § 2; Okla. Stat. tit. 18, § 951.

46. The policy debate over corporate farming laws is more complex than these two arguments imply. A discussion of whether corporate farming laws are desirable or undesirable is not within the scope of this article, nor does this article does not argue whether corporate farming laws are constitutional or unconstitutional.

47. O’Brien, *supra* note 3, at 9.

defendant's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been; and (5) defendant's use of captive supply damaged the cash market price of fed cattle sold to defendant during the class period by . . . \$1,281,690,000.00.⁴⁸

Following the jury's verdict, Tyson filed a motion for judgment as a matter of law. The judge granted the Tyson's motion and set aside the jury's verdict, concluding that Tyson did not violate the PSA because the jury could not have determined that no legitimate business justification existed for using captive supplies. The matter is currently on appeal before the United States Court of Appeals for the Eleventh Circuit.

London v. Fieldale Farms Corp.

In *London*, a case decided by the Eleventh Circuit, it was held in a matter of first impression for the Eleventh Circuit that § 202 of the PSA required a plaintiff to prove that a defendant's "unfair, discriminatory or deceptive practice adversely affects competition or is likely to adversely affect competition."⁴⁹ Section 202 provides in relevant part that a packer or live poultry dealer is prohibited from engaging in or using "any unfair, unjustly discriminatory, or deceptive practice or device," a phrase that is not defined in the PSA.⁵⁰ Although *London* involved poultry production, it is an important precedent for the entire livestock industry, including the hog and cattle industries, because it speaks to the likelihood of success for litigants in PSA actions involving allegations of an unfair, discriminatory, or deceptive practice.

Plaintiffs Harold and Christine London grew poultry under production contracts with defendant Fieldale Farms Corporation. The defendant terminated the production contracts, which by their terms remained in effect indefinitely or until either party provided thirty days' notice of termination. Soon thereafter, the plaintiffs brought an action against the defendant that alleged, *inter alia*, that the defendant violated section 202 of the PSA because the contract termination was without economic justification.⁵¹ The jury ruled in favor of the plaintiffs on their termination claim and awarded them monetary damages. The district court set aside the jury's verdict, including the award of monetary damages. The plaintiffs appealed the district court's decision to the Eleventh Circuit.

The Eleventh Circuit considered "[w]hether the district court properly granted Fieldale's motion for judgment as a matter of law on the London's PSA termination claim because the Londons did not show that the termination had an adverse effect on competition."⁵² The court noted that the plaintiffs and the USDA Secretary asserted that "the plain language of the statute, the purpose of the PSA, and the . . . [Secretary's] interpretation all indicate that in order to prove that any practice is 'unfair' under § 202(a), it is not necessary to prove predatory intent, competitive injury, or likelihood of injury."⁵³

48. *Pickett*, 315 F.Supp.2d 1172, 1173.

49. *London*, 410 F.3d at 1303.

50. 7 U.S.C. § 202(a).

51. *London*, 410 F.3d at 1299.

52. *Id.* at 1301.

53. *Id.* at 1302.

The court explained that “several courts have held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA.”⁵⁴ After reviewing these decisions, the court adopted the view of “those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant’s unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition.”⁵⁵ The court added that elimination of the “competitive impact requirement” would undermine the policy justifications for enactment of the PSA. In this regard the court stated that

“Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.” . . . Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised.⁵⁶

The court also determined that it would not give *Chevron* deference to the interpretation of section 202 forwarded by the Secretary. It stated that

This court gives *Chevron* deference to agency interpretations of regulations promulgated pursuant to congressional authority. The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. Congress left that task exclusively to the federal courts. The absence of such delegation compels courts to afford no *Chevron* deference to the Secretary’s construction of Section 202(a).⁵⁷

South Dakota Farm Bureau, Inc. v. Hazeltine

In 1998 voters in South Dakota approved by nearly 60% a ballot initiative that amended the South Dakota constitution to prohibit corporations and syndicates, subject to certain exceptions, from acquiring or obtaining any interest in any real estate used for farming and from engaging in farming. The constitutional amendment is commonly referred to as Amendment E.

In *Hazeltine*, the Eighth Circuit held that Amendment E violated the dormant Commerce Clause of the United States Constitution.⁵⁸ The matter was on appeal from the United States District Court for the District of South Dakota, where it was determined that the amendment violated the dormant Commerce Clause.⁵⁹ The importance of the *Hazeltine* ruling is emphasized by the fact that it

54. *Id.* at 1303 (citations omitted).

55. *Id.*

56. *Id.* at 1304.

57. *Id.* (citations omitted).

58. For an excellent discussion of the origins, historical development, and current status of the dormant Commerce Clause, see BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, §§ 6.01-6.08 (1999).

59. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002).

marked the first instance in which a circuit court of appeal held that a corporate farming law was unconstitutional.⁶⁰

The Commerce Clause of the Constitution grants Congress the exclusive authority to regulate commerce.⁶¹ Thus, a federal law controls over a state law if the state law conflicts with a federal law enacted pursuant to the Commerce Clause. The Constitution, however, does not expressly define the extent of Congress' Commerce Clause authority in the event that Congress has not spoken. In a circumstance where Congress has not clearly spoken and where a state has enacted legislation that arguably regulates commerce, courts must sometimes grapple with a legal doctrine commonly referred to as the dormant Commerce Clause. The dormant Commerce Clause has been summarized as follows: "The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce."⁶²

Courts that consider dormant Commerce Clause challenges to state laws, including *Hazeltine*, apply a two-tiered analysis. Under the first tier, courts examine whether the challenged law discriminates against interstate commerce.⁶³ Discrimination in the dormant Commerce Clause context refers to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."⁶⁴ Three "indicators" have been identified to determine whether a challenged state law is discriminatory: (1) whether a statute was enacted with a discriminatory purpose, (2) whether a statute has a discriminatory effect, and (3) whether a statute discriminates against interstate commerce on its face.⁶⁵ If a challenged law is determined to be discriminatory, it is subject to the "strictest scrutiny" and will be upheld only if it can be shown that the law sought to accomplish a legitimate local interest and that there were no other means available to advance that legitimate local interest.⁶⁶

A law that is not discriminatory may still be held unconstitutional under the second tier of dormant Commerce Clause analysis. Under the second tier, commonly referred to as the *Pike*

60. See Harrison M. Pittman, *The Constitutionality of Corporate Farming Laws in the Eighth Circuit* (June 2004), available at http://www.nationalaglawcenter.org/assets/articles/pittman_corporatefarming.pdf.

61. U.S. Const. Art I, § 8, cl. 3 (stating that Congress has the authority to "regulate Commerce with foreign nations, and among the several States, and with Indian Tribes"). See also generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 8.1-8.11 (6th ed. 2000).

62. *Hazeltine*, 340 F.3d at 592 (citing *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

63. See *id.* at 593 (citing *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994)).

64. *Id.* (quoting *Or. Waste*, 511 U.S. at 99).

65. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061 (8th Cir. 2004) (citing and quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (discriminatory purpose), *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986) (discriminatory effect), and *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992) (facially discriminatory)).

66. *Hazeltine*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 93, 99 (1994)).

balancing test, a challenged law will be struck down “if the burden it imposes on interstate commerce ‘is clearly excessive in relation to its putative local benefits.’”⁶⁷

In *Hazeltine*, the Eighth Circuit held that Amendment E was discriminatory under the first tier of dormant Commerce Clause analysis because the evidence in the record established that Amendment E was enacted with a discriminatory purpose.⁶⁸ The court based its determination that Amendment E was enacted with a discriminatory purpose solely on “direct” and “indirect” evidence in the record. The only evidence the court considered direct evidence of a discriminatory purpose was an election pamphlet issued by the Secretary of State prior to the referendum on Amendment E that described “pro” and “con” arguments for and against Amendment E, statements made by individuals at Amendment E drafting meetings, and statements made at trial. The only evidence the court considered to be indirect evidence of a discriminatory purpose were “irregularities in the drafting process,” such as statements made at trial that referenced the drafting process.⁶⁹ The specific items of evidence considered by the court and the interpretation given them is discussed below.⁷⁰

Direct Evidence

The court explained that the “most compelling” evidence in the record indicating a discriminatory purpose was “pro” language contained in the election pamphlet distributed by the Secretary of State prior to the referendum. The court found two statements troublesome. The first was the statement that “without the passage of Amendment E, [d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations.”⁷¹ The second was a statement that “Amendment E gives South Dakota the opportunity to decide whether control of our state’s agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a

67. *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). See also David S. Day, Revisiting Pike: THE ORIGINS OF THE NONDISCRIMINATION TIER OF THE DORMANT COMMERCE CLAUSE DOCTRINE, 27 *HAMLIN L. REV.* 45 (2004).

68. Ironically, in *Hazeltine*, 202 F.Supp.2d 1020 (D.S.D. 2002) the district court explicitly held that Amendment E was not discriminatory on its face, in its purpose, or in its effect. Rather, the district court held that Amendment violated the dormant Commerce Clause under the *Pike* balancing test. In this sense, district court and circuit court *Hazeltine* opinions are paradoxical to one another.

69. See *Hazeltine*, 340 F.3d at 593 (stating “[t]he Plaintiffs have the burden of proving discriminatory purpose . . . and can look to several sources to meet that burden. The most obvious would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses.”) (citations omitted).

70. In relying on this evidence the court recognized that although the Supreme Court “has not laid out a specific test for determining discriminatory purpose,” it was “guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion.” The precedents cited by the court may be distinguishable in several ways from the facts, law, and circumstances of *Hazeltine*. A discussion of these precedents is outside the scope of this article.

71. *Id.* at 594 (citation omitted).

few, large corporations.”⁷² The court concluded that the “pro” statement (it did not specifically identify which statement) was “brimming with protectionist rhetoric.”⁷³

The court then examined statements made by individuals at Amendment E drafting meetings. The court pointed to a meeting in which discussions were held “concerning the best way to combat Tyson, Murphy, and others.”⁷⁴ It also pointed to a memorandum written by the director of Dakota Legal Action, a group that assisted in drafting Amendment E and a defendant in *Hazeltine*, that stated in reference to an earlier drafting meeting that “[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don’t want Farmland or Minnesota Corn Producers walking over them . . . either.”⁷⁵ The Eighth Circuit stated that these particular comments “concern the drafters’ desire to prohibit out-of-state cooperatives, in addition to corporations, from farming in South Dakota.”⁷⁶ The court further noted that the meetings that led to the drafting of Amendment E were known as the “hog meetings,” a description it considered to be “a specific reference to the out-of-state corporations who enter into contracts with South Dakota farmers to raise hogs.”⁷⁷

The court also determined that two statements made at trial were direct evidence that Amendment E was enacted with a discriminatory purpose. First, the court noted that a person who assisted in drafting Amendment E testified that Tyson Foods and Murphy Family Farms were proposing to construct hog farming facilities in South Dakota “and that Amendment E’s supporters wanted ‘to get a law in place to stop them.’”⁷⁸ Second, the court noted that a co-chairman of an organization that helped draft Amendment E testified that “Amendment E was at least motivated in part by ‘the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment.’”⁷⁹

Indirect evidence

The court explained that “irregularities in the drafting process” can be a “hint” of indirect evidence that Amendment E was enacted with a discriminatory purpose. It added the following:

Our concern in this case about the drafting process is the information used by the drafters. In this case, the record leaves a strong impression that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant

72. *Id.* (citation omitted).

73. *Id.* (citation omitted).

74. *Id.* (citation omitted).

75. *Id.* (citation omitted).

76. *Id.*

77. *Id.*

78. *Id.* (citation omitted).

79. *Id.* (citation omitted).

evidence in the record to suggest that the drafters made an effort to find such information.⁸⁰

As support for its determination that there were “irregularities in the drafting process” the court noted testimony given at trial by Mary Napton, the Secretary of the Amendment E drafting committee and a “registered environmental professional.” The court explained that Napton testified during the trial that she was “unfamiliar with all of South Dakota’s environmental regulations at the time Amendment E was drafted” but that she “nevertheless believed that Amendment E would be necessary even if the State’s current environmental regulations were enforced.”⁸¹ The court stated that it was “disconcerting that Napton . . . could not explain the present and future effects of the current environmental laws. If she lacked this information, we can presume that the entire committee did, too.”⁸²

The court also determined that based on the record there was insufficient evidence to show that the drafters of Amendment E considered how it would affect the economic viability of family farmers. The court noted that the drafters relied on studies that “correlated industrialized farming with higher levels of poverty” but that the record was devoid of evidence that the drafters “utilized or commissioned any economic forecasts as to the effect of wholly shutting out corporate entities from farming in South Dakota.”⁸³ The court concluded that “this lack of information serves as indirect evidence of the drafters’ intent to create a law specifically targeting out-of-state businesses, which the drafters viewed as the sole cause of the perils facing family farmers and leading potential cause of environmental damage.”⁸⁴ The court further concluded that “the evidence . . . demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less dramatic alternatives. We are thus left, like the South Dakota populace that voted on Amendment E, without any evidence as to the law’s potential effectiveness.”⁸⁵

Having held that Amendment E was discriminatory, the court considered whether there was any other method of advancing the legitimate local interests of promoting the family farm and

80. *Id.*

81. *Id.* (citations omitted).

82. *Id.* at 595.

83. *Id.*

84. *Id.*

85. *Id.* at 595-96. *But see* *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991). In *MSM Farms*, the Eighth Circuit rejected an equal protection clause challenge to the Nebraska corporate farming law, which like Amendment E, was a constitutional provision. In *MSM Farms*, the court stated that “[i]t is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process.” *MSM Farms*, 927 F.3d at 333. It added that “[w]e agree with the district court that voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland.” *Id.* *See also Hazeltine II*, 340 F.3d at 596 (examining the mindset of the *drafters* of Amendment E, rather than the mindset of the *voters* as it did in *MSM Farms*, to wit: “discerning the purpose of a constitutional provision is an impossible exercise. . . . We do, however, have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those *individuals* had a discriminatory purpose.”) (emphasis added).

protecting the environment existed. The court explained that although the record contained evidence that linked corporate farming with poverty and environmental degradation, it did not contain evidence “that suggests, evaluates, or critiques alternative solutions.”⁸⁶ The court also noted that the defendants submitted a federal government report that advocated regulations designed to favor family farms. After describing several of the alternatives proposed in the report, the court determined that the defendants had failed to satisfy the high burden of demonstrating the ineffectiveness of any of the proposals. The court therefore held that the defendants had failed to show that there was no other method of advancing the legitimate local interests of promoting the family farm and environmental protection.

Smithfield Foods, Inc. v. Miller

In *Smithfield Foods, Inc. v. Miller*, the Eighth Circuit was presented with another challenge to the constitutionality of a state’s corporate farming law. In *Smithfield*, Smithfield Foods, Inc. (Smithfield) challenged the Iowa corporate farming statute that generally prohibits processors from owning livestock feeding operations in Iowa. The Iowa statute defined a processor as

a person who alone or in conjunction with others directly or indirectly controls the manufacturing, processing, or preparation for sale of beef or pork products, including the slaughtering of cattle or swine or the manufacturing or preparation of carcasses or goods originating from the carcasses, if the beef or pork products have a total annual wholesale value of eighty million dollars or more for the person’s tax year⁸⁷

The statute also restricted the financing of a swine operation by a swine processor.

The federal district court that initially heard the challenge held that the statute violated the dormant Commerce Clause because it was facially discriminatory and was enacted with a discriminatory purpose.⁸⁸ The district court’s opinion was appealed to the Eighth Circuit, but the issue of whether the statute is constitutional remains unanswered. While the matter was on appeal to the Eighth Circuit, the Iowa legislature amended the statute at issue in the federal district court. Consequently, the Eighth Circuit remanded the matter, stating that “[s]ince . . . [the statute at issue] has been amended, we cannot resolve this important constitutional question on the current record and must remand the case to the district court for further consideration.”⁸⁹

IV. Conclusion

Market concentration has increased throughout the agricultural sector over the past several decades. This phenomenon is evident in the hog and cattle industries, where horizontal consolidation and vertical integration have evolved at a rapid pace for the last two decades. Debate over the

86. *Hazeltine*, 340 F.3d at 597. See also *MSM Farms*, 927 F.2d at 333 (holding in context of equal protection challenge that promoting family farms is a legitimate state interest).

87. Iowa Code § 202B.102(10).

88. 241 F.Supp.2d 978 (S.D. Iowa 2003).

89. It also stated that it could not determine whether an offending portion of the law could be severed from the statute so as to preserve the constitutionality of the remaining statute.

consolidation and integration of these industries will continue, which will in turn foster debate over the role that the PSA and corporate farming laws should play in addressing market concentration issues. *London* and *Pickett* provide important insight into the extent that the PSA may be applied in the debate over market concentration. *Hazeltine* represents a significant shift in the debate regarding whether the laws are constitutional under the dormant Commerce Clause, emphasizing the significance of the eventual outcome of *Smithfield* at both the federal district and circuit court levels.