Corporate Farming: How Interpretation of the Commerce Clause is Making Restrictions More Difficult. Jones v. Gale

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CORPORATE FARMING: HOW INTERPRETATION OF THE COMMERCE CLAUSE IS MAKING RESTRICTIONS MORE DIFFICULT

Jones v. Gale

I. INTRODUCTION

In the 1970s, many states, like Nebraska, became concerned about the negative effects on rural societies associated with non-family farming corporations. Nebraska decided that restrictions on corporate ownership of family farms were necessary to safeguard the landscape of rural Nebraska and to promote the continued existence of independent family farms. In 1982, Initiative 300 ("I-300") was put before the voters of Nebraska and passed. I-300 prohibited corporations from owning farm land in Nebraska with the exception of family-owned farms in which the majority shareholder either lived on the land or actively participated in the day-to-day management of the farm.

The Eighth Circuit’s decision in Jones v. Gale declared I-300 to be unconstitutional under the dormant commerce clause. In route to this determination, the court applied a two-tiered analysis that first considered whether I-300 was discriminatory. Because I-300 only allows people who live on their farms in Nebraska or who are able to conduct daily operations on the farm to qualify for the exemption to corporate ownership, it is clear that I-300 does discriminate against out-of-state Nebraska land owners and

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1 Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006).
3 Id. Nebraska’s landscape, from the beginning, had been shaped by the independent family farm. Id. Nebraska farmers were concerned that corporately owned farms would continue to concentrate ownership of farm land into fewer and fewer units because of the increased borrowing potential created by limited liability and lower tax rates. Id.
4 Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006).
5 Id. This exemption accomplishes the goal of having a large number of independent family farms, but still allows farmers to take advantage of the tax incentives and increase capital that comes with the corporate designation.
6 Id. at 1270.
7 Id.
the heightened scrutiny that the court applied was appropriate. However, in the second part of the analysis, the court’s discussion of Nebraska’s legitimate local interests is superficial at best. In its discussion of whether there was any other means to advance a legitimate local interest, the court does not discuss any factual findings presented by the proponents of I-300. The lack of discussion is disturbing because there were numerous studies done on the adverse environmental impacts as well as adverse social and economic impacts of large scale corporate farming. This case note asserts that when a law is challenged under the dormant commerce clause, (1) the severity of the discrimination should be proportional to the justification needed to support the discriminatory law, or (2) at a minimum, the interests and studies in support of I-300 deserved well-reasoned consideration instead of a conclusory finding of unconstitutionality.

II. FACTS AND HOLDING

In this case, a group of six Nebraska land owners filed an action against the Secretary of State and the Attorney General for the state of Nebraska in their official capacities. The plaintiffs brought this suit to challenge I-300, the amendment to the Nebraska Constitution passed in 1982. I-300 prohibited corporations or non-family-owned limited partnerships from buying Nebraska land used for farming or ranching or from participating in the practice of farming or ranching within the state of Nebraska. The plaintiffs asserted that I-300 violated the commerce

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8 Id. at 1269.
9 Id. The court does not seem to want to delve into the issue of the negative effects on rural Nebraska. Id. Instead, the court just says that it does not know what this means and that a desire to maintain the status quo cannot be a legitimate local interest. Id.
10 Id.
12 Id. at 1264.
13 Id.
14 Id. Initiative 300 appeared on the ballot in the 1982 general election and was accompanied with a title prepared by the Attorney general that read as follows: “Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . .?” Neb. Stat. § 32-1410(1).
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clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the United States Constitution. They also asserted that the amendment violated the Americans with Disabilities Act ("ADA").

Family farms or ranch corporations are specifically exempted from coverage of I-300, which plaintiffs argued was an unconstitutional burden on out-of-state interests under the commerce clause.

The plaintiffs' claims in this case are representative of the situations of two plaintiffs in particular. One of the plaintiffs, Terrance Schumacher, resides in Boulder, Colorado and owns interests in farmland in five counties in Nebraska. Schumacher wanted to be able to transfer his farmland to a limited liability entity in order to improve fiscal planning, operational management of the farmland, and to provide more favorable options for estate planning. Because Schumacher did not qualify for the family farm exemption of I-300, Nebraska law would not allow him to form a limited liability farm corporation. Schumacher claimed that he suffered large economic losses as a result of the preclusion from forming a family farm corporation.

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15 Id. The court ultimately determined that it would not make a decision on the ADA claim unless the plaintiffs at a future time wished to recover attorney's fees that could only be recovered under a successful assertion of the ADA claim. Id. at 1271.

16 Id. at 1265. Initiative 300 was adopted as a part of the Nebraska state constitution in 1982. See Neb. Const. art. XII, § 8.

17 Id. The act defines a family farm or ranch corporation as "a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family... at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." Neb. Const. art. XII, § 8.

18 Id. at 1266. Schumacher does not qualify for the family farm corporation exemption for two reasons. Id. First, neither he nor any of his relatives live on any of his farmland in Nebraska. Second, he lives far enough away that it is not possible for him to perform the day-to-day labor or management of the farm. Id.

19 Id.

20 Id.

21 Id. Without the ability to form a corporation farmers suffer reduced fiscal and operational management efficiencies, reduced marketing opportunities, and have much less borrowing power. Id. Farmers such as Schumacher also experience higher administrative expenses than those that have formed corporations and higher federal estate taxes. Id. These farmers are also exposed to more personal liability than farmers who are allowed to form corporations. Id. These personal liabilities include "liability for debts, obligations, contracts, and torts related to [their] Nebraska farmland." Id.
A second plaintiff, Robert Beck III, is a resident of rural Kearney, Nebraska. Beck owns a cattle feedlot and many of the cattle that his feedlot houses are owned by non-Nebraska residents. Beck claimed that Initiative 300 prevented him from contracting with non-exempt out-of-state corporations in connection with his cattle feeding business. Initiative 300 prevented Beck from selling interest in his cattle operation to non-exempt entities which made it much more difficult for him to gain access to the working capital necessary to run his business. Beck did not claim, however, that he attempted to enter into any actual contracts with non-exempt out-of-state entities. Instead, he claimed that if he were to enter into any contract with a non-exempt out-of-state entity, Initiative 300 would prevent such an action, and his inability to enter into such contracts caused him economic harm.

Prior to trial, all parties submitted motions for summary judgment. The district court granted summary judgment to the plaintiffs on their claim that Initiative 300 violated the United States Constitution. The court reasoned that summary judgment was appropriate for the plaintiffs because Initiative 300 violated both the ADA and the Commerce Clause. The district court, however, granted summary judgment to the defendants on the claims that Initiative 300 violated the equal protection clause and the privileges and immunities clause of the United States Constitution.

22 Id.
23 Id.
24 Id. This inability to contract with out-of-state corporations has caused Beck to lose business, income, and borrowing power. Id. Beck claims that he wants to be able to enter into the national cattle market, but Initiative 300 has placed restrictions on his business that have made this difficult to accomplish. Id.
25 Id. Additionally, Initiative 300 precludes farmers such as Beck from gradually transferring ownership of their farmland to employees that work on the farm. Id. Beck claims that this part of the law prohibits him from creating the succession plan that he desires for his farm. Id.
26 Id.
27 Id.
28 Id. at 1264.
29 Id.
30 Id.
31 Id. The fact that the state won summary judgment on the questions of equal protection and privileges and immunities does not offer much help. It indicates only that those questions were not proper on the instant appeal. Even though the District court found for
state officials initiated the appeal to the Eighth Circuit and contended that at the very least summary judgment was inappropriate on the constitutional issues of the commerce clause and the ADA.\textsuperscript{32}

The Defendants in this case first claimed that the court lacked jurisdiction because the plaintiffs' lacked Article III standing to assert their claims.\textsuperscript{33} The court looked at plaintiffs Schumacher and Beck and determined that because they suffered a concrete and particularized harm that is actual in nature and that can be redressed by the court, the plaintiffs met the requirements of Article III.\textsuperscript{34} Because these two plaintiffs met the necessary Article III standing requirements, the court held that it did have jurisdiction over the case.\textsuperscript{35}

The Eighth Circuit then analyzed whether I-300 violated the dormant commerce clause of the United States Constitution.\textsuperscript{36} The defendant state officials argued that I-300 is not facially discriminatory because it does not prohibit out-of-state residents from owning land in Nebraska and it in fact excludes many in-state corporations as well as out-of-state corporations.\textsuperscript{37} The court found that I-300 was facially discriminatory and therefore subject to strict scrutiny.\textsuperscript{38} Even though the determination of facial discrimination made further determination unnecessary, the Court also determined that I-300 was drafted with discriminatory intent.\textsuperscript{39} The court then held that I-300 does not meet the

the state on two issues of constitutionality the law was still determined to be unconstitutional so it is still struck down.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} at 1265. The issue of standing is reviewed \textit{de novo} on appeal, and as long as one plaintiff has sufficient standing then the court can hear the case. \textit{Id.}

\textsuperscript{34} \textit{Id.} at 1265-67.

\textsuperscript{35} \textit{Id.} at 1267.

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.} The defendants are arguing that if the law is not facially discriminatory that a challenge under the commerce clause cannot be successful. \textit{Id.} The court flatly rejects this and says that discriminatory impact is enough by itself to sustain a challenge under the commerce clause. \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.} at 1267-70. The court notes that either discriminatory intent or facial discrimination would be sufficient to invoke strict scrutiny. \textit{Id.} at 1270.
test of strict scrutiny and is therefore unconstitutional as a violation of the dormant commerce clause. 40

Next, the defendant state officials argued that I-300 should not be struck down in whole, but rather that it should be broken up and allowed to remain in part. 41 The plaintiffs contended that if the law was not struck down as a whole that there would be no workable plan and that the other valid portions would not be independently enforceable. 42 The court held that because the overall goal of the law would be frustrated by repealing only part of I-300, the law should be struck down as a whole. 43

Finally, the Eighth Circuit determined that because I-300 was unconstitutional on the grounds that it violated the dormant commerce clause, there was no reason to determine whether it also violated the ADA. 44 The court did note, however, that it may become necessary in the future to determine the validity of the ADA claim. 45 The court noted that if the plaintiffs move for and are awarded attorney’s fees in the district court, which are only awardable under the ADA claim and not the constitutional claim, the court would, at that time, review the validity of the ADA claim. 46

The Eighth Circuit held that because I-300 discriminates against non-residents of Nebraska on its face and because the “legitimate local interests” asserted by Nebraska for such discrimination could be accomplished by non-discriminatory means, I-300 violated the dormant commerce clause and therefore I-300 was struck down as unconstitutional. 47

40 Id. In order to meet the test set forth by the court the defendants would have had to show that “Nebraska could not advance a legitimate local interest without discriminating against non-resident farm corporations and limited partnerships.” Id.
41 Id. at 1270-71.
42 Id. at 1271.
43 Id. The court alludes to the fact that the voters who passed the initiative were induced to vote for the initiative by the very provisions that were found to be unconstitutional and therefore it would not make sense to keep the rest of the law. Id.
44 Id.
45 Id.
46 Id.
47 Id. at 1270.
III. LEGAL BACKGROUND

In 1972, following the lead of several other Midwestern states, several bills were introduced in the Nebraska legislature to place limits on corporate owned farmland and livestock within the state of Nebraska.\(^{48}\) However, the original bills all failed because the state's Attorney General believed that the proposed bills were unconstitutional under the Nebraska Constitution.\(^{49}\) In 1982, an amendment to the Nebraska Constitution ("I-300") was put before the voters.\(^{50}\) The initiative was passed by the voters of Nebraska by a margin of 56% to 44%, and it purported to ban all corporations and syndicates from owning farmland in Nebraska unless they qualified under a family-farm exemption provided in I-300.\(^{51}\)

The first court case challenging I-300 was heard in the Nebraska state courts in 1986.\(^{52}\) In that case, the Nebraska Supreme Court first determined that because I-300 was an amendment to the Nebraska Constitution and not a statute, it could not be held unconstitutional under the Nebraska Constitution.\(^{53}\) The Nebraska Supreme Court then held that because I-300 does not discriminate based on a protected class, but instead was merely economic legislation, the challenge under the Equal Protection

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\(^{48}\) http://www.i300.org/history.htm. Similar bills were adopted in seven other Midwestern states such as Missouri, Kansas, Minnesota, Wisconsin, North Dakota, South Dakota and Iowa. Id.; see MO. REV. STAT. § 350.010 (2006); KAN. STAT. ANN. § 17-5901 (repealed); MINN. STAT. § 500.24 (2004); WISC. STAT. § 182.001; N.D. CENT. CODE § 10-06.1-02; S.D. CONST. ART XVII § 21-24 (held unconstitutional); IOWA CODE ch. 9H).

\(^{49}\) Id.

\(^{50}\) Id. The signatures required for the initiative were collected by a coalition of farm and church groups that had been battling the Nebraska legislature and Attorney General for 10 years. Id. Opponents of the initiative argued that it would drive down land prices and push cattle operations out of the state. Id. The law passed primarily on the strength of the rural counties in the state. Id.

\(^{51}\) Id. Exemptions allowed small family owned farm operations to be classified as corporations, but the exemption was limited to in-state owners. Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006). After the initiative was adopted by the voters, the Nebraska legislature then repealed the Corporate Reporting Act so that violators of the amendment could not be identified. http://www.i300.org/history.htm. The Nebraska legislature has also considered numerous bills to repeal or change the law, but all such attempts failed primarily because of the opposition from the citizens of Nebraska. Id.


\(^{53}\) Id. at 222.
Clause of the 14th Amendment to the United States Constitution would receive rational basis review.\textsuperscript{54} Rational basis review is a very low standard which only requires the state to prove that the law is "rationally related to a legitimate state interest," and the court easily found such a rationally related legitimate interest in this case.\textsuperscript{55}

A Nebraska bank corporation brought a second case in federal district court in Nebraska, again challenging I-300 on the basis that it violated the Equal Protection Clause.\textsuperscript{56} The District court held that I-300 was constitutional, and the case was appealed to the Eighth Circuit.\textsuperscript{57} The Eighth Circuit first determined that I-300's classification scheme did not involve a fundamental right or a suspect classification, and therefore as long as the state could show that I-300 was rationally related to a legitimate state interest the law would be upheld.\textsuperscript{58} The Eighth Circuit noted the importance of this case by stating that eight other Midwestern states have laws similar to I-300, including Missouri, Iowa, and Kansas.\textsuperscript{59} The plaintiffs contended that the law was not rationally related to the state's purpose of preserving the family farm because the exemptions in the law could result in a higher percentage of corporate farms than family owned farms.\textsuperscript{60} The Eighth Circuit held that the state did not have to show that I-300 would actually work to achieve the state interest; it was instead enough that there was a tendency for the law to accomplish the goal.\textsuperscript{61} Therefore, the Eighth Circuit upheld I-300 as valid under the Equal

\textsuperscript{54} Id.
\textsuperscript{55} Id. at 230-31. The court said that when economic legislation is challenged under equal protection that it would almost always defer to the findings of the legislature in passing the law. \textit{Id}. The court did not specifically point to a particular legitimate state interest, but under the low threshold of rational basis review the Nebraska Supreme Court determined that I-300 was constitutional on the grounds of Equal Protection. \textit{Id}. at 232.
\textsuperscript{56} MSM Farms, Inc. v. Spire, 927 F.2d 330, 331 (8th Cir. 1991).
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 332.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 333.
\textsuperscript{61} Id. at 334. The plaintiffs also attempted to raise a due process challenge to I-300 because the law requires a corporation who acquires Nebraska land in violation of I-300 to divest the land within two years after the state acquires a court order requiring divestment. \textit{Id}. The Eighth Circuit refused to pass on the issue because it was not properly raised first before the district court. \textit{Id}. 

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Protection Clause.\footnote{Id.} Two other cases were brought in the Nebraska state courts in which the interpretation and enforcement of I-300 was questioned.\footnote{Id.} In 1997, the Nebraska Supreme Court heard a case in which the plaintiff attempted to assert that its hog operation fell within the exception to I-300.\footnote{Pig Pro Nonstock Cooperative v. Moore, 253 Neb. 72, 74 (Neb. 1997).} The plaintiff claimed that because the non-stock cooperative was a non-profit corporation, it should be allowed to exist under the exemption to I-300.\footnote{Id.} The Nebraska Supreme Court looked at the language of I-300 and the amendment as it was presented to the voters of Nebraska and determined, “[t]he voters have placed in their Constitution words which forbid a corporation to obtain, in any way, any kind of interest (‘legal, beneficial, or otherwise’) in certain real estate. It is clear that any interest obtained by a corporation must be something.”\footnote{Id. at 84. This interpretation makes clear that the effect of I-300 is very real. Id. The decision limits the people who can qualify for the exemption under I-300 to a small class of people who live on their land in Nebraska. Id.} One additional case was filed by citizens of Nebraska to force the Attorney General of Nebraska to enforce the provisions of I-300.\footnote{Hall v. Progress Pig, 254 Neb. 150, 152 (Neb. 1998).} There the court held that because the county attorney possessed knowledge that the defendant Progress Pig was in violation of the exemption to I-300, in that the majority shareholder did not live on the land, a suit for an injunction by the citizens of Nebraska was proper.\footnote{Id. at 160. This basically sets the stage for future litigation in that there will be no doubt that the eminency requirement of standing could easily be met for any future Constitutional challenges. Even if the state failed to enforce I-300, the citizens could do it themselves.} On remand to the trial court, the court found that Progress
Pig was in violation of I-300, and therefore could not be a corporate owner of the Nebraska farmland.  

In the mid 1990's, the Nebraska legislature dealt with other questions about I-300 through the enactment of new statutes. First, the legislature addressed the question of whether limited liability companies and partnerships would be considered syndicates for purposes of I-300. The new legislation spelled out in clear language that only family-owned limited liability partnerships and companies could own farmland in Nebraska. In 1998, the Nebraska legislature passed a law that would require corporations to report their activities to the state.

The Jones v. Gale case came to the federal courts in Nebraska with this litigation over I-300 looming in the past. The plaintiffs in this case, however, attempted a new approach to challenging I-300. Because challenges under the Equal Protection clause of the 14th Amendment had failed, the plaintiffs attempted to prove that I-300 violated the dormant commerce clause of the United States Constitution. With this strategy they hoped to force the court to look at I-300 through the lens of strict scrutiny rather than the easily met rational basis test.

The Commerce Clause of the United States Constitution grants the United States Congress the authority to regulate interstate commerce. The dormant commerce clause is the negative implication raised by the commerce clause that “states may not enact laws that discriminate against or unduly burden interstate commerce.” In order to determine if a state

http://www.i300.org/history.htm. The Nebraska Supreme Court agreed with the trial court’s decision on subsequent appeal and stated “to be actively engaged in the day-to-day labor and management of the farm or ranch requires that [a] person be involved on a daily or routine basis in all aspects of the farm... activities, be it labor or management.”

This additional language provided by the legislature probably was not necessary as it was thought that the term syndicates was sufficient to cover such entities, but the Nebraska legislature wanted to make sure that this was the case.

The 1998 bill LB 1163 required all limited liability entities to report their ownership of Nebraska farmland to the state, and it gave the Secretary of State and Attorney General the power to enforce the reporting law and I-300.

By recognizing the dormant Commerce Clause the courts have recognized “the Framers’ purpose to ‘preven[t] a State
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law violates the dormant commerce clause, the first question is “whether the challenged law discriminates against interstate commerce.” If the law is found to be discriminatory, the presumption is that the law is invalid unless the proponents of the law “can demonstrate under rigorous scrutiny, that [they have] no other means to advance a legitimate local interest.” If the law is found to be non-discriminatory, the law will be upheld unless “the burden it imposes on interstate commerce is clearly excessive in relation to its putative local benefits.”

In order to analyze the question of whether or not the law is discriminatory, the Supreme Court has set forth three indicators of discrimination against out-of-state interest. The first indicator is evidence in the record that would support a finding that the law has a discriminatory purpose. Second, the law could discriminate on its face against out-of-state interests. Finally, even if the law does not have a discriminatory purpose and it is not facially discriminatory, it could have a discriminatory effect. A plaintiff may assert that a given statute is discriminatory for all of the foregoing reasons, but the court only has to

76 Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006) (quoting Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality, 511 U.S. 93, 99 (1994). The type of discrimination that scrutinized here is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” Id. at 593 (other citations omitted).

77 S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d at 593 (quoting C & A Carbone, Inc. v Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994)).

78 Id. (quoting Pike v Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

79 Id.

80 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984). In Bacchus Imports, the Hawaii legislature had enacted a statute that exempted locally grown wines from the alcohol tax. Id. The Hawaii legislature stated that its reason for creating the exemption was to help the local wine industry. Id. The Supreme Court said that it would take this finding by the legislature at face value and the law therefore had a discriminatory purpose. Id. at 271.

81 Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 342 (1992). In Hunt the state of Alabama had enacted a law that charged more to dispose of chemicals that came in from out of state. Id. The Supreme Court said that this charge of a higher tariff was constituted facial discrimination in violation of the Commerce Clause. Id.

find that the law is discriminatory for one of the reasons in order to invoke the strict scrutiny standard.  

The burden of proving that the law has a discriminatory purpose or effect is on the plaintiff. One of the best and most obvious sources of evidence of a discriminatory purpose are often found in the notes of the drafters of the law that accompany it, or discriminatory statements that accompany the law when it is presented to voters. If the plaintiff meets his burden of showing that the law is discriminatory then the burden shifts to the defendant to show that they have no other means to promote their legitimate local interest. The standard to determine when there is no alternative means to achieve the legitimate local interest is one of strict scrutiny in which the law is deemed to be per se invalid unless the proponents of the law can prove otherwise. In order to find a legitimate local interest, the discrimination found in the statute must be justified by a "valid factor unrelated to economic protectionism," or in other words there must be a non-economic justification for the discrimination. Even though there is presumption of invalidity with a law that is found to be discriminatory, the court must consider "the overall effect of the statute on both local and interstate activity." The Eighth Circuit previously

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83 S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d at 593.  
85 Hazeltine, 340 F.3d at 593.  
86 C & A Carbone v. Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994). In Carbone, the town of Clarkstown was trying to assert that they had a legitimate local interest in regulating the flow of trash that entered into their landfill facility. Id. at 392-393. The court rejected this because the town had any number of nondiscriminatory alternatives that would address the legitimate local interest. Id. at 393.  
87 Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006).  
88 New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988). In Limbach, the state of Ohio created a tax break for producers of ethanol inside the state, and out of state producers that operated in states that gave tax breaks to the Ohio producers. Id. Ohio advanced the legitimate local interests of health and increased use of ethanol in support of the statute. Id. at 279. The Supreme Court said that any health affects that were achieved were only incidental to the real purpose of providing tax benefits to Ohio companies, and that the increase use argument was merely speculative. Id.  
determined that promoting family farms is a legitimate state interest.\textsuperscript{90} Much more burdensome than a finding of a legitimate local interest, however, is the defendant’s burden to demonstrate that there is no non-discriminatory alternative to accomplish the legitimate local interest.\textsuperscript{91}

IV. INSTANT DECISION

In Jones v. Gale, the Eighth Circuit first addressed the threshold question of the plaintiff’s standing to bring suit.\textsuperscript{92} In making the standing determination, the court had to determine if Plaintiff Schumacher had suffered an injury in fact as required by Article III standing.\textsuperscript{93} The Eighth Circuit held that because Schumacher could realistically be prevented from creating a corporation because of where he lived, he had suffered an injury in fact. Thus, he had standing to challenge I-300.\textsuperscript{94} Even though the

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  \item \textsuperscript{90} S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d at 596 (citing MSM Farms, Ind. v. Spire, 927 F.2d 330, 333 (8th Cir. 1991). In Hazeltine, the Eighth Circuit says that the promotion of the family farm and the protection of the environment are legitimate local interests under the commerce clause. Id. Even though the court found a legitimate local interest, the defendants had to the show that there was no non-discriminatory way to advance that interest. Id.
  \item \textsuperscript{91} Hazeltine, 340 F.3d at 597. The court in Hazeltine says that the defendant is in the best position to provide economic and environmental forecasts for the effectiveness of possible non-discriminatory alternatives. Id. The court in Hazeltine even went so far as to say that the defendant has the burden of coming up with these alternative as well as explaining why they will not work. Id. In this case the defendant apparently denied the existence of any alternative and none were specifically provided by the plaintiff, but yet the court searched the record and found four alternatives that it felt were non-discriminatory and would promote the legitimate local interest. Id. Ultimately the court struck down the South Dakota law, which is similar to I-300, because the proponents of the law did not show that other non-discriminatory alternatives would not advance the legitimate local interest. Id.
  \item \textsuperscript{92} Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006). The state officials claimed the district court should not have even reached the plaintiff’s commerce clause claim because the plaintiffs lacked standing. Id.
  \item \textsuperscript{93} Id. The State Officials argued that a correct interpretation of I-300 does not require the main shareholder of the farm to live on the farm or manage the day-to-day activities of the farm. Id. at 1268.
  \item \textsuperscript{94} Id. at 1266. The court determines that the standing issue really goes to the substance of the claim and should not be discussed as a preliminary issue to preclude jurisdiction in this case. Id.
\end{itemize}
standing requirement is only necessary for one plaintiff, the court went on to address the standing of another plaintiff. The state officials claimed that Plaintiff Beck did not have standing because his farm had been incorporated under I-300 and he did not have any actual contracts with out of state corporations. The Eighth Circuit held that because Plaintiff Beck had demonstrated that he had suffered a negative effect on his business, in that he was unable to contract with non-exempt entities or risk losing his own exempt status, Beck had standing to challenge I-300.

After the court’s initial holding that the plaintiffs had standing, the Eighth Circuit addressed the issue of whether I-300 violates the dormant commerce clause of the United States Constitution. The first question in the commerce clause analysis is whether the law is discriminatory in any one of three ways: on its face, through its purpose, or through its effect. In order to make a determination on the issue of whether or not I-300 is facially discriminatory, the court had to interpret the language of the amendment. The Eighth Circuit focused on the plain meaning of the language of I-300, in which the most natural and obvious meaning of the words were considered in its analysis of whether I-300 is facially discriminatory. The court found that the language of the exemption to I-300 allowed corporate ownership for people who lived in Nebraska or in close proximity thereof to be able to conduct the daily operations of the farm. The court held that because I-300 clearly discriminates against Nebraska landowners that reside outside of the state, I-300 was discriminatory on its face.

95 Id. Plaintiff Beck is a Nebraska resident and actually owns a farm that qualifies for the exemption, which allows it to be classified as a corporation. Id.
96 Id. Beck claims that because I-300 does not allow him to contract with non-exempt out-of-state corporate entities, he has lost business, income, and borrowing power. Id.
97 Id. at 1267. These two plaintiffs demonstrate that not only are out of state land owners affected by the terms of I-300, but also people who qualify for the exemption and actually incorporate their farms are strongly affected by the real possibility that they will lose their exemption if they contract with non-exempt entities. Id.
98 Id.
99 Id.
100 Id. at 1268.
101 Id. at 1269.
102 Id.
103 Id. This holding was based on the premise that when interpreting statutes that the court should first look to the plain meaning of the statute’s language. Id.
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The state officials argued that the exemption to I-300 did not require the majority shareholder to live on or perform a majority of the daily activities on the Nebraska farm. Instead, the state officials asserted that in order to qualify, the majority shareholder just had to operate or live on a family farm in any state. The state officials gave the example that a family farm owner that lived and worked on his farm in Colorado and that also owned land in Nebraska could incorporate his Nebraska farm under the exemption in I-300. The state officials further asserted that given two possible interpretations, the court should prefer the interpretation that avoided a constitutional conflict. The court rejected these arguments by the state officials because the language of the exemption talks only about land in the state of Nebraska and refers only to farms in the state of Nebraska, but the exemption does not mention anything about the possibility of out of state ownership. The court also rejected this argument because it would have been contrary to the Nebraska Supreme Court’s interpretation of the amendment as well as contrary to the purpose of the Initiative as it was presented to the voters.

Even though the affirmative holding of facial discrimination made determining the amendment’s discriminatory intent unnecessary, the Eighth Circuit considered the alternative reason for finding I-300 to be discriminatory. The court considered the wording of I-300 as well as other evidence such as statements by the legislature and material presented to the voters that resulted in passage of the amendment. The court first cited a ballot title to I-300 that accompanied the initiative that told voters

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104 Id. at 1268.
105 Id.
106 Id.
107 Id.
108 Id. This could be one possible way for states to get around the commerce clause problem without giving up all of the benefits of the law. In other words, by allowing people to qualify for the exemption no matter where the farm they live or work on is located, the states could avoid the problem of discrimination under the commerce clause.
109 Id. at 1269.
110 Id.
111 Id. The Nebraska Supreme court previously held that they would only look to the words of the amendment itself in determining if there is a discriminatory purpose to the amendment. Id. The Eighth Circuit explicitly states that it is not bound by this decision and would consider other sources of discriminatory intent, consistent with prior Eighth Circuit precedent. Id.
that I-300 would “prohibit[ ] ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation.”112 The court also referred to a television advertisement that was presented to voters to encourage the adoption of I-300 which 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.”113 The Eighth Circuit held that because television advertisements and other propaganda presented to voters in support of I-300 clearly demonstrated a discriminatory intent, I-300 is discriminatory in intent as well as on its face.114

Because I-300 was deemed discriminatory, the Eighth Circuit considered it to be “per se invalid unless [the state] can demonstrate, under rigorous scrutiny, that [it has] no other means to advance a legitimate local interest.”115 The State Officials put forth three examples of what they claimed to be legitimate local interests in support of I-300.116 The State Officials contended that unrestricted corporate ownership of Nebraska farmland would result in (1) “absentee owners of land, (2) negative effects on the social and economic culture of rural Nebraska, and (3) a lack of good stewardship of the state’s land, water, and natural resources.”117 The court first noted that under the State Official’s interpretation of I-300 that the amendment would not even work to prevent absentee ownership of Nebraska land, therefore this could not be a legitimate local interest sufficient to overcome the presumption of unconstitutionality.118 Despite the contradictory interpretation by the State Officials, the court said that all three legitimate reasons were insufficient because the defendants failed to give any reason why environmental and

112 Id.
113 Id. at 1270.
114 Id. at 1269-70.
115 Id. at 1270 (quoting S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d at 593; C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994)) (internal quotes omitted).
116 Id.
117 Id.
118 Id. The State Officials have supported an interpretation of I-300 that would not require the majority shareholder to live on the farm or perform daily activities on the farm. Id. The court is basically saying that the defendants must go with one interpretation without really giving a reason why they cannot argue in the alternative. Id.
land use regulations could not be used to accomplish the same goals.\textsuperscript{119} The court noted that the interests asserted by the State Officials were not concrete enough to allow the court to come up with its own alternatives, but the court pointed out that if the interests were more clearly stated they could better discern whether the state’s interests could be met by other regulations.\textsuperscript{120} The Eighth Circuit held that because the State Officials failed to demonstrate that they could not meet their legitimate local interest by other means, I-300 violated the dormant commerce clause.\textsuperscript{121}

The final issue decided by the Eighth Circuit was whether I-300 was unconstitutional in its entirety or whether only the discriminatory sections of I-300 are unconstitutional and severable from the valid portions.\textsuperscript{122} The court stated that by severing the invalid portions of I-300 there would still be a valid plan that is independently enforceable.\textsuperscript{123} However, the voter’s intent would likely be violated by severing the portions of I-300 that were discriminatory.\textsuperscript{124} The Eighth Circuit held that because eliminating the unconstitutional section would completely disrupt the original intent of I-300, the entire amendment was unconstitutional.\textsuperscript{125}

V. COMMENT

Because eight states other than Nebraska restrict corporate ownership of farm land,\textsuperscript{126} it is imperative that the Eighth Circuit’s

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.} Under this strict scrutiny test the burden in on the state to come up with reasons why this discriminatory law is the only way to advance the legitimate local interest. \textit{Id.} Basically, once the plaintiff has shown that the law is discriminatory the burden shifts to the defendant as the proponent of the presumptively invalid law. \textit{Id.}
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} \textit{Id.} The court states that the statute is severable if there is still a “workable plan” after severance, the parts not severed are independently enforceable, the invalid parts were not the only reason the law was, and the intent of the legislature will not be violated through severance. \textit{Id.} at 1271.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} This includes the day-to-day management and residency provisions of the family farm exception. \textit{Id.}
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} Friends of the Constitution, A History of Initiative 300, www.i300.org/history/htm. The states that have introduced similar anti-corporate farming legislation include Kansas, Minnesota, Wisconsin, South Dakota, Iowa, North Dakota, and Missouri. \textit{Id.}
\end{itemize}
decision to strike down I-300 under the commerce clause be closely scrutinized. There are two parts to the court’s analysis under the commerce clause. The first determination in the analysis is whether or not the law is discriminatory. In Jones v. Gale, the court’s ultimate finding that the law is discriminatory, and subject to heightened scrutiny, is inevitable based on the language of I-300 and the propaganda that supported its passage. In the second part of the analysis, the court applies strict scrutiny to determine if there is any other way to accomplish the legitimate local interest. The court should attempt to make a distinction between protectionist discrimination that seeks to cut the state off from the rest of the country and lesser forms of discrimination. Even if the state cannot show that there is no other reasonable non-discriminatory means to accomplish the legitimate interest, the court must sufficiently discuss every justification put forth by the state in order to give guidance to subsequent defendants that face challenges to laws similar to I-300. Finally, this comment provides an analysis of the Missouri Corporate farming statute and suggestions for how the proponents of the law might overcome commerce clause challenges.

In Jones v. Gale, the Eighth Circuit concentrated on the determination of whether or not I-300 was discriminatory either facially or through its purpose. The court’s discussion of that issue was well thought out and very clear. The court discussed a possible interpretation of the statute, advanced by the state officials, which would not have been discriminatory. However, in common sense fashion, the court found that the state’s interpretation just simply could not be supported by the

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127 Jones v. Gale, 470 F.3d 1261, 1267-70 (8th Cir. 2006).
128 Id.
129 Id. at 1269-70.
130 Id. at 1267-70.
131 Id.
132 Id. The state argued that I-300 did not require the majority shareholder to live or work on the farm in order to qualify for the corporate exemption. Id. at 1268. The court supports this interpretation from the fact that the ballot proposal “stated that the amendment’s purpose was to prohibit further purchases of agricultural land ‘by any corporation . . . other than . . . a Nebraska family farm corporation.’” Id.
133 Id. The court even takes the time to go through an entire analysis for discriminatory purpose even though it has given a completely rational explanation that I-300 is discriminatory on its face. Id. at 1269.
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language of the statute or the propaganda that accompanied the initiative as presented to the voters. Once the court closely examined the statutory language and the purpose of the amendment as presented to the voters, the only possible outcome was to find that I-300 did discriminate against out-of-state interests. The court’s holding on the issue of discrimination was, ultimately, determinative of the overall outcome to the suit. This is because a statute that is non-discriminatory will almost always be upheld, and a statute that is discriminatory will nearly always be struck down. There are a few exceptions, but for the most part a statute that burdens out of state interests more than in-state interests will be struck down as unconstitutional. The problem with such an all or nothing approach is that the analysis does not take into account the severity of the discrimination. One court has held that a less serious form of discrimination should require a lesser justification for the discrimination. This is a form of intermediate scrutiny for discrimination that is not drastically more burdensome on out of state activities than in state activities. This intermediate sliding scale scrutiny is more advantageous because courts would not be forced to strike down laws that burden out of state activities minimally more than in state activities. In order to prevent laws that minimally burden out of state activities from being treated the same as laws that heavily burden out of state interests, the sliding scale of scrutiny should be adopted by the Eighth Circuit when laws are challenged under the Commerce Clause. The Seventh Circuit has found that there is Supreme Court authority indicating that discrimination under the Commerce Clause should be analyzed the

134 Id.
135 Id.
136 Sestric v. Clark, 765 F.2d 655, 664 (7th Cir. 1985). In Sestric, a Missouri lawyer challenged an Illinois law that required practicing attorneys that lived out of state to take the Illinois bar exam in order to be admitted to the bar, but allowed attorneys that resided in Illinois to be admitted to the bar without taking the Illinois exam. Id. at 656. The Seventh Circuit first addressed the claim under the Privileges and Immunities clause and found the law to be constitutional. Id. at 664. The court then goes on to address the constitutionality of the law under the commerce clause, and it concludes that the analysis under the commerce clause does not require a more heightened scrutiny analysis than under the privileges and immunities clause. Id. The court goes on to apply the same standard as it did under the privileges and immunities clause and declares the law to be constitutional. Id. at 665.
same as discrimination under the Privileges and Immunities Clause. In the majority opinion, Judge Posner extends the sliding scale standard for analyzing discrimination under the privileges and immunities clause to the Commerce Clause by the fact that courts cite to the two clauses almost interchangeably.

Despite the difficulty in distinguishing between levels of discrimination in the context of the Commerce Clause, the policy rationale of maintaining a unified national economy provides courts with a starting point to separate levels of discrimination. Most courts seem to be particularly concerned about laws that attempt to cut the state off from the rest of the union in a protectionist manner. It could be argued that the discrimination in Jones v. Gale is not highly egregious because out of state people can qualify for the corporate exemption as long as they perform a majority of the day to day activities on the farm land and because all non-family corporate entities are prohibited from owning farm land. If a court agrees that this type of discrimination only required an intermediate form of scrutiny, there would be a much better chance of upholding I-300 or similar laws.

After determining that I-300 is discriminatory, the court gave a very short and cursory explanation of why I-300 does not meet the strict scrutiny test mandated by a finding that I-300 is discriminatory. The lack of depth to this discussion is presumably due to the fact that once the law is found to be discriminatory, it is per se invalid unless the law’s proponent meets the burden of establishing that there is a legitimate local

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137 Id. at 664. The standard under the privileges and immunities clause is that when the discrimination is not serious there is less required to justify that discrimination. Id. (citing Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

138 Id. The court recognizes that there is a divergence in the law between the privileges and immunities clause and the commerce clause, but it goes on to state that when discrimination falls within either clause courts “cite to decisions under either clause interchangeably.” Id. (citing Hicklin v. Orbeck, 437 U.S. 518, 532-34 (1978)).

139 Id. The court states that the court should examine the “gravity of the interference with interstate trade” in making a determination of the level of discrimination under the commerce clause. Id. The court also says that laws that are obviously protectionist should be struck down without much hesitation, but that a law that is apparently evenhanded should be upheld unless the burden on interstate commerce is clearly greater than the benefit of the local interest. Id.

140 Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006).

141 Id. at 1270.
interest that cannot be met by any other means. Because the Eighth Circuit did not fully consider I-300’s effect on agricultural and societal issues within the state of Nebraska, the court’s holding was deficient. An in depth discussion of these issues was necessary to make a determination if there is a non-discriminatory means to accomplish these benefits of the law, which was the next step in the analysis after finding a legitimate local interest. Because the court never expressly states whether or not Nebraska has a legitimate local interest in I-300, it is not clear if the discussion of the effects of I-300 were left out because the court did not believe there was a legitimate local interest or if there just was no non-discriminatory way to accomplish these goals. If the reason the court did not go into depth about the social and agricultural benefits of I-300 was the latter, that suggests I-300 should have been upheld even under the strictest of scrutiny. Because it is impossible to determine from the Eighth Circuit opinion whether I-300 was struck down because the state failed to assert a legitimate local interest or because the interest could have been accomplished by non-discriminatory means, the Eighth Circuit analysis is not complete and should be reviewed.

Because a number of Midwestern states other than Nebraska have legislation similar to I-300, the Eighth Circuit’s decision in Jones v. Gale could greatly affect the rural social landscape of the Midwest. The court says that it cannot accurately conceptualize the “negative effects on the social and economic culture of Rural Nebraska.” Simply because the court cannot put its finger on a satisfactory definition for the legitimate local interest, does not mean that the interest deserves no discussion. The proponents of I-300 came forward with numerous studies which conclude that large scale corporate farming has a significant impact on the social structure of rural communities. These studies found that in rural communities without large scale corporate farming compared to

142 Id.
143 See id.
144 Id.
145 Id.
146 See id.
147 Id.
148 Brief for Minnesota & Iowa et al. as Amici Curiae Supporting Appellants at 8-11, Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006) (No. 06-1308), 2006 WL 1117922.
communities with such corporate entities incomes were on the average higher; there were more business enterprises, and they were more profitable; there were more social amenities such as parks, paved streets, and sewers; there were more schools, clubs, and churches; and there were more local newspapers and formal institutions for local political decision-making. The crucial difference is that in the family farm community, most of the population was self-employed; in the other, two-thirds were agricultural workers. These studies show that there is a very real societal impact that is accomplished by maintaining small family farms instead of large corporate farms. Because the court failed to recognize this very real impact, its discussion failed to focus on the "no other means" aspect of scrutiny under the commerce clause. If the court would have recognized the very real impact of I-300 on rural society, it would have been nearly impossible find that there was a reasonable non-discriminatory way to accomplish the benefits associated with I-300.

After Jones v. Gale it is obvious that laws similar to I-300 in other Midwestern states, such as Missouri, are susceptible to a Commerce Clause challenge. It is also important to note that because I-300 was an amendment to the Nebraska Constitution, it was not subject to scrutiny under the Nebraska Constitution. However, the Missouri law that limits corporate ownership of farm land is statutory and can be challenged under the state constitution. The fact that the Missouri law is a statute may in fact turn out to be an advantage because it could be changed by the Missouri legislature to avoid both Missouri Constitution and Federal Constitution challenges. The best way that Missouri could insure the validity of its statute is to make sure that the law is not discriminatory, in

149 Id.
150 Id.
151 See id.
152 Jones v. Gale, 470 F.3d 1261, 1270 (8th Cir. 2006).
153 See MO. REV. STAT. § 350.010 (2006). The Missouri law defines a “family-farm corporation” that would qualify for the corporate exemptions as “a corporation incorporated for the purpose of farming and the ownership of agricultural land in which at least one-half of the voting stock is held by and at least one-half of the stockholders are members of a family related to each other within the third degree of consanguinity or affinity including the spouses, sons-in-law and daughters-in-law of any such family member according to the rules of the common law, and at least one of whose stockholders is a person residing on or actively operating the farm.” Id.
terms of the Commerce Clause, and that it does not burden out of state interests more than in state interests.

When analyzing the Missouri corporate farming statute in comparison with I-300, the two laws are nearly identical in their definition of the family-farm. One advantage the Missouri law may have over I-300 and the South Dakota law, struck down on similar grounds, is that the Missouri law was not presented to the voters of the state. The courts in both Jones v. Gale and Hazeltine relied heavily upon the language of the propaganda presented to the voters in determining whether or not the law was discriminatory. The language in this type of propaganda is not the type of language used in either amendment in the prior cases, but the court thought that the voters must have had a discriminatory intent when they voted to pass the amendments. In the case of the Missouri corporate farming law, the court will only be able to look to the intent of the drafters of the legislation and not propaganda that tends to present a discriminatory motive.

The definition of a qualifying family-farm in the Missouri law is also nearly identical to the definition found in the Nebraska law. This is a problem for Missouri law makers because I-300 was found to be discriminatory on its face as well as in its purpose. This means that even though it will be much more difficult to prove a discriminatory intent behind the Missouri law, the law could still be struck down as facially discriminatory. This problem could easily be remedied by the Missouri legislature by changing the wording of the Missouri law to reflect the interpretation that the Nebraska state officials argued for in Jones v. Gale. It might be argued that by changing the qualifications of the exemption the purpose of the statute would be defeated. It is true that such a change would alter the effect of the law, but the law would still serve the purpose of controlling large scale corporate ownership of farm land.

154 See Jones v. Gale, 470 F.3d 1261, 1268. See also Hazeltine, 340 F.3d at 594.
155 Id.
156 See NEB. CONST. ART. XII § 8. See also MO. REV. STAT. § 350.010.
157 Jones, 470 F.3d 1261, 1269-70.
158 Id. at 1268. This formulation would allow people who have a family farm in another state to perform the daily activities on the farm in that state and still qualify for the exemption. Id.
If the Missouri law is challenged before changes can be made to avoid the finding of facial discrimination, it will be up to the state to advance a legitimate local interest and to convince the court that there is no reasonable non-discriminatory way to accomplish the legitimate local interest. It will not work to assert the legitimate local interest of protecting the environment because the court will likely conclude that there are environmental laws or regulations that would accomplish the same goals. In Jones, the defendants attempted to assert a new legitimate local interest of avoiding adverse effects on the rural social landscape. The court was unwilling to analyze this legitimate local interest in great detail because it was very broad and the court felt that the defendants could have narrowed the definition considerably. If this interest could be more narrowly focused to concentrate on the creation of a two class rural system created by large scale corporate farming, the court would be forced to determine whether or not there was a non-discriminatory means of accomplishing this goal. The proponents of the Missouri law could at the very least make a cognizable argument that there is no reasonable non-discriminatory way to accomplish this goal.

VI. CONCLUSION

The controversy with the Jones v. Gale decision is in the possibility that there could be a ripple effect across other states in the Midwest to strike down similar laws in other states. The biggest problem with this decision is that there is insufficient discussion of Nebraska's legitimate local interest to give any guidance to the other eight states with similar laws. The court does comment that the decision might be different if Nebraska had more clearly defined their legitimate local interest, but there were numerous findings and reports Nebraska and other amicus curiae submitted that at the very least deserved the court's discussion.

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159 See S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d at 597. The court emphasized that it is the defendant's burden to prove that there are no reasonable non-discriminatory alternatives to achieve the legitimate local interest. Id. The court in Hazeltine also found that there were other ways of promoting the legitimate local interest of promoting family farms. Id.

160 Jones, 470 F.3d at 1270.

161 Id.
Once the Eighth Circuit found I-300 to be discriminatory, it was a foregone conclusion that they would strike down the law. If the court had taken into account the severity of the discrimination in this case, it would have been a much closer case of whether or not the justifications for I-300 were sufficient to overcome this discrimination. Because the effects of large scale corporate farming could be catastrophic to the social structure of the rural Midwest, it is imperative that states come up with ways insure that their corporate farming statutes are not found to be unconstitutional under the Commerce Clause. When other states are faced with a challenge to their law under the Commerce Clause, they need to do everything they can to convince the court that their law is not discriminatory. If such a state is unsuccessful in this argument, it will be imperative that the state clearly define its legitimate local interest. Hopefully, the Jones v. Gale decision does not deter the Nebraska legislature from attempting to pass legislation to restrict corporate farming in the future because the rural social landscape as it exists in Nebraska today could depend on it.