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THE DORMANT COMMERCE CLAUSE—A CONSTITUTIONAL BARRIER TO SUSTAINABLE AGRICULTURE AND THE LOCAL FOOD MOVEMENT

Chris Erchull
Western New England University, chrisewne@gmail.com

NOTES

THE DORMANT COMMERCE CLAUSE—A CONSTITUTIONAL BARRIER TO SUSTAINABLE AGRICULTURE AND THE LOCAL FOOD MOVEMENT

> Better food—more local, more healthy, more sensible—is a powerful new topic of the American conversation. It reaches from the epicurean quarters of Slow Food convivia to the matter-of-fact Surgeon General's Office; from Farm Aid concerts to school lunch programs. From the rural routes to the inner cities, we are staring at our plates and wondering where that's *been*. For the first time since our nation's food was ubiquitously local, the point of origin now matters again to some consumers. We're increasingly wary of an industry that puts stuff in our dinner we can't identify as animal, vegetable, mineral, or what.[1]

INTRODUCTION

As sustainable agriculture[2] has become increasingly popular, many state and local governments have joined the movement by creating Food Policy Councils in an effort to promote sustainable practices in food

1. BARBARA KINGSOLVER WITH STEVEN L. HOPP & CAMILLE KINGSOLVER, ANIMAL, VEGETABLE, MIRACLE 17 (2007).

2. Congress defines *sustainable agriculture* as:

> an integrated system of plant and animal production practices having a site-specific application that will, over the long-term—
>
> (A) satisfy human food and fiber needs;
>
> (B) enhance environmental quality and the natural resource base upon which the agriculture economy depends;
>
> (C) make the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls;
>
> (D) sustain the economic viability of farm operations; and
>
> (E) enhance the quality of life for farmers and society as a whole.

7 U.S.C. § 3103(19) (2006). For more information on the history and use of the term in a regulatory context, see Mary V. Gold, *Sustainable Agriculture: Information Access Tools*, USDA NAT'L AGRIC. LIB. (July 18, 2012), http://www.nal.usda.gov/afsic/pubs/agnic/susag.shtml.

production.[3] There is a great need for governmental support and encouragement of the sustainable agriculture movement because there are serious environmental and economic problems that have arisen due to the industrialization of agriculture over the past several decades.[4] The federal government has long supported industrial practices in agriculture, and it is unlikely that a sudden shift in federal policy is on the horizon.[5] State governments have an important interest in encouraging sustainable food production on a local level.[6]

A constitutional doctrine known as the dormant Commerce Clause stands in the way of states wishing to promote sustainable agriculture.[7] As an implied negative aspect of Congress's power under the Commerce Clause of the Constitution,[8] courts use the dormant Commerce Clause to strike down state actions that interfere with interstate commerce.[9] To test[10] whether a state act is invalid under this doctrine, courts first determine if the act is discriminatory on its face,[11] in its purpose,[12] or in its effect.[13] If it is found to be discriminatory against out-of-state

3. *See* CFSC LIST OF FOOD POLICY COUNCILS IN NORTH AMERICA, 1-67 (May 2012), *available at* http://www.markwinne.com/wp-content/uploads/2012/09/fp-councils-may-2012.pdf. The burgeoning Food Policy Councils may look to resources such as this Note and the *Good Laws, Good Food* Toolkit for guidance in implementing policies that will promote sustainable agriculture in their communities. *See* THE HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC, GOOD LAWS, GOOD FOOD: PUTTING STATE FOOD POLICY TO WORK FOR OUR COMMUNITIES (2012).

4. *See infra* note 27.

5. *See infra* Part I.B.

6. *See infra* Part I.D.

7. Other potential constitutional barriers exist, but they are outside the scope of this Note.

8. U.S. CONST. art. I, § 8, cl. 3.

9. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (explaining that the reason the Constitution gives complete authority over interstate commerce to Congress is "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

10. Note that there is not agreement on whether a clear test has been employed by courts. In fact, dormant Commerce Clause doctrine has been criticized for its unpredictability. *See* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 221 (1997) ("[I]t might be well for courts to ask whether current tests serve as accurate shortcuts for imputing either protectionist or nonprotectionist effect to legislative enactments.").

11. *Hughes*, 441 U.S. at 337 (1979) (explaining that "facial discrimination by itself may be a fatal defect").

12. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352 (1977) (inferring that the discriminatory impact of a statute "was not an unintended byproduct" but rather the motivation for state legislators).

13. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978) (explaining that discriminatory effect can be sufficient to compel dormant Commerce Clause scrutiny). *See* Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV.

interests, it is considered "virtually *per se* invalid,"[14] and then may be upheld only if the legislation substantially serves a *legitimate* state interest and there is no less discriminatory alternative to achieve the local goal.[15] Economic protectionism is the presumed motivation behind discriminatory legislation, and it is always an impermissible intention.[16] If an act is not discriminatory, but it nonetheless interferes with interstate commerce, a balancing test is used to establish constitutionality by determining whether the out-of-state burdens outweigh the in-state benefits.[17] Despite the chilling effect of this doctrine that limits the ability of state governments to experiment with sustainability where interstate commercial activity is involved, it is likely that legislation, if carefully crafted to support sustainable agriculture, can survive constitutional challenges.[18]

Part I of this Note will discuss the goals of the sustainable agriculture movement and how they relate to federalism. Part I.A will

1203, 1239-45 (1986) (describing the three types of discrimination recognized by courts).

14. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994) ("'[D]iscrimination' simply means different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid.").

15. *Hunt*, 432 U.S. at 353-54. *See also* Smith, *supra* note 13, at 1231 ("It is settled Supreme Court doctrine that if a regulation is discriminatory, the state bears the burden of justifying it. First, the state must prove that it has a legitimate interest to be served by the regulation. Second, it must show that the regulation serves this interest to a substantial extent. Third, it must prove that it has no available alternatives to the regulation that are less discriminatory."). There is a major exception under the dormant Commerce Clause doctrine that applies to situations in which a state is acting as a market participant, but the exception is beyond the scope of this Note. *See* South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82, 93 (1984) (plurality opinion) ("[I]f a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."). This exception applies to local procurement statutes that compel state organizations to prefer food produced within the state when making purchases. *See* Amy S. Ackerman, *Buy Healthy, Buy Local: An Analysis of Potential Legal Challenges to State and Local Government Local Purchase Preferences*, 43 URB. LAW. 1015, 1019-22 (2011) (discussing how the market participant exception applies to state procurement statutes that favor local sourcing).

16. *See* H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532 (1949) ("[A] state may not promote its own economic advantages by curtailment or burdening of interstate commerce."); *cf. City of Phila.*, 437 U.S. at 626-27 ("[T]he evil of protectionism can reside in legislative means as well as legislative ends . . . . we assume [each state] has every right to protect its residents' pocketbooks as well as their environment . . . [b]ut whatever [the State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.").

17. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

18. *See infra* Part III.

define sustainable agriculture, while Part I.B will show how federal regulation and industrial agriculture are closely connected. Part I.C will discuss the relationship between small farms and sustainability. Part I.D will argue that many of the problems addressed by the sustainable agriculture movement fall within the police power of local and state governments. Part II will analyze the relationship between the dormant Commerce Clause and the movement towards agricultural sustainability. Part II.A will explain how the dormant Commerce Clause treats state policies with respect to agriculture, and then Part II.B will compare how the doctrine is applied to other industries, emphasizing how the treatment of different industries is unequal. Part III of this Note will discuss and analyze a variety of actual and hypothetical state efforts to promote sustainable agriculture through the lens of the dormant Commerce Clause, arguing that the doctrine should be interpreted to allow such policies.

I. SUSTAINABLE AGRICULTURE AND FEDERALISM

A. *What Is Sustainable Agriculture?*

In attempting to realize the goals of sustainable agriculture,[19] an elusive and amorphous term, advocates have pursued a variety of approaches.[20] The commercially popular organic food movement[21] has been particularly successful in providing food to consumers that is grown without the use of synthetic fertilizers and pesticides.[22] The

19. *See supra* note 2.

20. *See* Jason J. Czarnezki, *Food, Law & The Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 265 (2011) (discussing the possibility of "[a]n 'alternative' food system [that] would incorporate organic foods, eco-labeled foods, direct marketing, fair trade, local foods, farmers markets, and buying clubs" (citation omitted)); *see also* Margaret Sova McCabe, *Reconsidering Federalism and the Farm: Toward Including Local, State and Regional Voices in America's Food System*, 6 J. FOOD L. & POL'Y 151, 162 (2010) ("[F]ood 'movements' have a powerful influence on food systems. These grass roots movements are important, but so too are formal efforts to engage local, state, and regional voices in food system reform.").

21. *U.S. Organic Industry Overview*, ORGANIC TRADE ASS'N (2011), *available at* http://www.ota.com/pics/documents/2011OrganicIndustrySurvey.pdf; *see* A. Bryan Endres, *An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organics and Other Legal Challenges for the Industry's Next Ten Years*, 12 DRAKE J. AGRIC. L. 17, 18 (2007) ("The organics industry has entered its commercial and regulatory adolescence and now claims the fastest growing market share of food purchases in the United States.").

22. *Pesticides and Food: What "Organically Grown" Means*, U.S. EPA, http://www.epa.gov/pesticides/food/organics.htm (last updated May 9, 2012); Claire S. Carroll, Comment, *What Does "Organic" Mean Now? Chickens and Wild Fish Are Undermining the Organic Foods Production Act of 1990 (Evolution of the Legal Definition of "Organic"-Business Interests Must Be Stopped from Re-Defining "Organic" Contrary to the Purposes of the*

"'Slow Food' movement" encourages farming practices that "improv[e] agricultural efficiency, maintain[] cultural lifelines, and sustain[] the environment."[23] The Local Food movement shares many of the same goals, but focuses primarily on sourcing food for communities from nearby farms[24] or from farms that sell directly to consumers.[25] In general, local food is produced on small farms.[26] Policies that support slow food, local food, and small farms have the potential to improve the impact of agriculture on our environment, health, and safety.[27] These

Organic Foods Production Act of 1990), 14 SAN JOAQUIN AGRIC. L. REV. 117, 119 (2004) ("In 1972, Robert Rodale, J.I.'s son, verbalized the definition of 'organically grown' that is now commonly known: 'Food grown without pesticides; foods grown without artificial fertilizers.'" (citations omitted)). Unfortunately, large organic farms share traits in common with industrialized agricultural practices that will be discussed in more detail *infra*. *See* Czarnezki, *supra* note 20, at 275 ("The organic food market is flourishing, and, as a result, the modern organic production and distribution system is now dominated by large-scale 'industrial organic' or 'big organic' producers. 'The rise of commercial and industrial conventions is clear in organic distribution and consumption . . . .'" (quoting Laura T. Raynolds, *The Globalization of Organic Agro-Food Networks*, 32 WORLD DEV. 725, 738 (2004)).

23. H. David Gold, *Legal Strategies to Address the Misrepresentation of Vermont Maple Syrup*, 59 FOOD & DRUG L.J. 93, 95 (2004). Slow Food USA, a nonprofit organization, describes its mission: "[T]o counter the rise of fast food and fast life**,** the disappearance of local food traditions and people's dwindling interest in the food they eat, where it comes from, how it tastes and how our food choices affect the rest of the world." *About Us*, SLOW FOOD USA, http://www.slowfood.com/international/1/about-us (last visited May 13, 2014).

24. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods*," 33 HAMLINE J. PUB. L. & POL'Y 49, 56 (2011) ("From a practical standpoint, the local foods movement is exactly what it sounds like: a purposeful effort by consumers to buy food products from farmers and producers in the cities, regions, and states in which they live.").

25. STEPHEN MARTINEZ ET AL., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES iii (May 2010) (defining local food by "direct-to-consumer arrangements"), *available at* http://www.ers.usda.gov/media/122868/err97_1_.pdf.

26. *Id.* at 18 ("[S]mall farms accoun[t] for the largest number of farms engaged in direct sales.").

27. *See* Gail Feenstra, Chuck Ingels & David Campbell, *What is Sustainable Agriculture?*, AGRIC. SUSTAINABILITY INST. AT UCDAVIS, http://www.sarep.ucdavis.edu/about-sarep/def (last visited May 14, 2014). "Sustainable agriculture integrates three main goals—environmental health, economic profitability, and social and economic equity. . . ." *Id.* Furthermore, sustainability includes "consideration of social responsibilities such as working and living conditions of laborers, the needs of rural communities, and consumer health and safety both in the present and the future." *Id*; *see also* Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 611-12 (2010) ("[P]esticides can . . . caus[e] contamination to drinking water sources, contamination of fish that humans consume, and direct skin contact ... in contaminated waters . . . . [Also], industrial agriculture can impact human health indirectly, by influencing the foods people eat."); *see also id.* at 602-03 ("[I]ndustrial agriculture has led to . . . high-risk working and living conditions for farm laborers . . . and a decline of economic and social conditions in rural communities . . . . A range of industrial agricultural practices

policies, if implemented on a broad scale, can help to counteract some of the negative effects that have resulted from the industrialization of agriculture.

B. *Industrial Agriculture and Federal Policy*

Over the past seventy years, the federal government has gradually increased its control over agricultural policy.[28] This coincides with, and has provided support to, the industrialization of agriculture.[29] Along with efficiency in food production, industrialization has brought negative consequences to the environment, to human health and safety, and to animal welfare, culminating in its impact on climate change.[30]

A period of severe drought and wind storms in the 1930s known as the Dust Bowl led to the implementation of federal programs that were meant to help farmers avoid destitution while maintaining sufficient food production.[31] Perhaps the most significant piece of legislation to

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contribute to environmental harms."); *cf.* Johnson & Endres, *supra* note 24, at 99 ("[T]he policy justifications supporting the notion of 'small producer exceptionalism' are, empirically, a mixed bag . . . . Given the current state of research, the big challenge for local foods advocates is to reconcile their best-supported argument (economics) with their least-supported argument (food safety).").

28. *See infra* notes 31-33 and accompanying text.

29. *See infra* note 37.

30. David N. Cassuto & Sarah Saville, *Hot, Crowded, and Legal: A Look at Industrial Agriculture in the United States and Brazil*, 18 ANIMAL L. 185, 186-87 (2012) (exploring the negative impact of industrialized agriculture).

31. *Surviving the Dust Bowl*, PBS, http://www.pbs.org/wgbh/americanexperience/films/dustbowl/ (last visited May 14, 2014). Policies included the Emergency Banking Act of 1933, the Emergency Farm Mortgage Act, the Farm Credit Act of 1933, and the Emergency Relief Appropriation Act. Congress followed this legislation with the creation of the Soil Erosion Service in 1933 and implementation of the Soil Erosion Act of 1935. *Id.* Additionally, the 1933 Agricultural Adjustment Act, also known as the first Farm Bill, was meant to stabilize the agricultural industry during the Great Depression. The shift toward strong federal control over the agriculture industry helped cement the role of the U.S. in the international agriculture market:

> Before the New Deal, politicians considered agriculture the province of the states. After the New Deal, agriculture became the economic concern of the federal government, and it has remained so since 1937. Before the Depression, no federal law existed that imposed a penalty on a farmer who saved crops for his own or local use rather than selling on the national or international market. However, the economic downturn and the needs of the national and international grain market ended the farmer's practice of crop saving to promote market stability. As a result, the Commerce Clause (including the dormant, or negative, commerce clause) and the national and international market became paramount in agricultural policy. Local farms, local markets, and local preferences ceded to the economic stability of "the unitary national market." Moreover, that market served to position the U.S. as a global trading partner.

Margaret Sova McCabe, *Foodshed Foundations: Law's Role in Shaping Our Food System's*

come out of this national disaster was the first Farm Bill, known at the time as the Agricultural Adjustment Act of 1933.[32] The Act introduced subsidies into American agricultural policy, providing relief during an economic and environmental crisis by decreasing market supply and preventing prices from plummeting.[33] The Farm Bill was "well-intentioned at the outset," but its "subsidy program has gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers."[34]

In the decades following the first Farm Bill, prices for agricultural produce continued to decline as industrial efficiency transformed farming practices by introducing new machinery, hybridized crops, synthetic pesticides and fertilizers, and animal confinement methods; it became more difficult for small family farms to be successful.[35] Consequently, farmers "respond[ed] by reducing overhead and labor, and by ensuring markets for their production" and "increasing [the] size of farm operations."[36] Federal policy continued to evolve, controlling the market supply of certain crops to keep prices high, and encouraging the over-production of other crops to keep prices low.[37] Federal policy goals have shifted over the decades, yet through each phase of development, the viability of large, industrial agribusiness continues to improve while small farms have all but disappeared from the nation's agrarian landscape.[38]

Future, 22 FORDHAM ENVTL. L. REV. 563, 578-79 (2011).

32. *See* William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 219 (2009).

> [T]he 1933 Farm Bill ambitiously sought to do many things: bring crop prices back to stability by weaning the nation from its affinity for agricultural overproduction, utilize surplus crops productively to combat widespread hunger and provide nutritional assistance to children in the form of school lunch programs, implement strategies to prevent further erosion and soil loss from poor land conservation policies and weather events, provide crop insurance and credit assurances for subsistence farmers, and build community infrastructure for rural farming towns.

Id.

33. *Id.*

34. *Id.* at 221.

35. DENNIS KEENEY & LONI KEMP, INST. FOR AGRIC. & TRADE POL'Y & MINN. PROJECT, A NEW AGRICULTURAL POLICY FOR THE UNITED STATES 7 (2002), *available at* http://www.mnproject.org/publications/New%20Agricultural%20Policy%20for%20the%20US.pdf.

36. *Id.*

37. *Id.* at 8.

38. For a more in-depth discussion of federal farm policy and its effects on the U.S. agriculture industry, see Eubanks, *supra* note 32, at 221, and KEENEY & KEMP, *supra* note 35.

Still, the federal policies persist. Despite some efforts at the federal and state levels to support small farms and sustainable agriculture,[39] the current policy in place reflects the crisis that brought about the New Deal:

> It is often argued that federal U.S. agricultural program benefits are an anachronism, an unnecessary throwback that today's farmers could and should be forced to do without. Yet the programs stubbornly remain, seemingly defying gravity as they transfer tens of billions of dollars from taxpayers to relatively wealthy farmers.
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> . . . .
>
> While U.S. farm policy has changed incrementally over the past five decades, by many measures recent government involvement in agriculture is as great as it has ever been. Agricultural policy persists, despite huge changes in the socioeconomic characteristics of U.S. farmers and farm landowners.[40]

Current federal policy has the effect of favoring industrial production,[41] which works against the success of small farms and stands as an obstacle to the goals of the sustainable agriculture movement.[42]

C. *Small Farms*

Food originating from small farms is more likely to be sustainably produced than food that comes from large farms, and it is also more likely to come from a local farm if it is produced on a small farm.[43] Small farms that sell directly to consumers not only offer immediate access to fresh food, but are also accountable to their communities.[44]

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39. *See, e.g.*, Mary Jane Angelo et al., *Small, Slow, and Local: Essays on Building a More Sustainable and Local Food System*, 12 VT. J. ENVTL. L. 353, 372 (2011) ("The 2008 Farm Bill established a process by which local farmers selling at farmers' markets may accept food stamps, thereby making locally grown foods more readily available to food stamp recipients.").

40. David Bullock & Jay S. Coggins, *Do Farmers Receive Huge Rents for Small Lobbying Efforts?*, *in* AGRICULTURAL POLICY FOR THE 21ST CENTURY 146-47 (Luther G. Tweeten & Stanley R. Thompson eds., 2002) (citation omitted).

41. *See* Eubanks, *supra* note 32, at 218.

42. *See infra* Part I.C.

43. *See* Gerard D'Souza & John Ikerd, *Small Farms and Sustainable Development: Is Small* More *Sustainable?*, 28 J. OF AGRIC. & APPLIED ECON. 73, 82 (Jul. 1996) ("[T]he characteristics of small farms seem to most closely resemble those of sustainable systems. . . . [S]mall is more sustainable than large."), *available at* http://ageconsearch.umn.edu/bitstream /15243/1/28010073.pdf.

44. *See* Monika Roth, *Overview of Farm Direct Marketing Industry Trends*, AGRIC. OUTLOOK FORUM 1999, at 4 (Feb. 1999), *available at* http://ageconsearch.umn.edu/bitstream /32905/1/fo99ro01.pdf ("Direct marketing gives farmers the opportunity to respond to consumer needs, test new products and services, explore niche markets, and measure

Furthermore, the carbon footprint of food production is smaller when the food is produced locally and on a small farm.[45] But small farms are disappearing in the United States.[46]

Federal policy has continued to support industrialized agriculture, despite decades of research and scholarship dedicated to informing the government of the imminent disappearance of the family farm from the landscape of the United States.[47] In 1998, the United States Department of Agriculture's National Commission on Small Farms produced a study, *A Time to Act*, pleading with the federal government to implement policies to save small family farms from extinction.[48] The message was clear: "If we do not act now, we will no longer have a choice about the kind of agriculture we desire as a Nation."[49] This study was the second of a series, which began in 1981 with *A Time to Choose*,[50] but at that time, "talking about the structure of agriculture [was] politically incorrect."[51]

The Supreme Court once considered the regulation of agriculture an inherently local power reserved to the states.[52] In fact, many aspects of agriculture are inherently local in nature.[53] The size, output, and

consumer response.").

45. A small farm only has a small carbon footprint if its production methods are efficient, but small farms are generally efficient. *See* Miguel A. Altieri, *Agroecology, Small Farms, and Food Sovereignty*, 61-03 MONTHLY REV. 102, 105 (2009) ("Although the conventional wisdom is that small family farms are backward and unproductive, research shows that small farms are much more productive than large farms if total output is considered rather than yield from a single crop.").

46. *See infra* notes 47-54 and accompanying text.

47. *See* Desmond A. Jolly, *Small Farms Re-emerge in National Agenda*, 53(6) CAL. AGRIC. 2, 2 (1999), *available at* http://ucce.ucdavis.edu/files/repositoryfiles/ca5306p2-67421.pdf (discussing the origin of the movement to restore to U.S. policy the Jeffersonian ideal of small farms).

48. USDA NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT 4-5 (1998), *available at* http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf.

49. *Id.* at 5.

50. USDA NAT'L COMM'N ON SMALL FARMS, A TIME TO CHOOSE (1981).

51. Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 625 (1994).

52. "[T]he supervision of agriculture . . . [is] proper to be provided for by local legislation." McCabe, *supra* note 20, at 151; *see also* United States v. Butler, 297 U.S. 1, 68 (1936) (invalidating parts of the Agricultural Adjustment Act of 1933 because "[i]t is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government"); CHRISTINE A. VARNEY, U.S. DEP'T OF JUSTICE, ANTITRUST FEDERALISM: ENHANCING FEDERAL/STATE COOPERATION 6-7 (2009) (discussing the local nature of agricultural antitrust regulation), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf.

53. *See* Kenneth E. Barker, *The New Federalism: Time for States to Pull the Plow in*

profitability of farms vary dramatically by state.[54] The federal government has taken steps toward reforming its policy to support sustainable agriculture, but the impact has been very limited, and local governments are better equipped to enact policies that promote small farm development within their jurisdictional boundaries.[55] Also, groups of small farmers engaged in lobbying efforts are better positioned to appeal to state and local governments because access to the federal government requires greater resources.

D. *State-Level Interest in Sustainable Agriculture*

Local and state governments are well-suited to enact legislation that promotes sustainable agriculture by supporting small farmers, despite the post-Depression role that the federal government has assumed in regulating the agricultural industry.[56]

States have an important interest within their police power that justifies promoting sustainable agriculture, even in states where the absence of very large farms means that industrialized agriculture does not cause direct harm.[57] The police power interest includes human

Soil Conservation, 30 S.D. L. REV. 546, 551 (1985) (discussing soil conservation as an inherently local activity that should be regulated by the states), *available at* http://nationalaglawcenter.org/publication/note-the-new-federalism-time-for-states-to-pull-the-plow-in-soil-conservation-30-south-dakota-l-rev-546-573-1986/wppa_open/; Marci A. Hamilton, *Federalism and the Rehnquist Court*, ASS'N OF AM. L. SCHS., http://www.aals.org /profdev/constitutional/hamilton.html (last visited May 13, 2014) ("Real property is tied to a particular location, and its use immediately impacts a singular group, the local community.").

54. *See*, USDA NAT'L AGRIC. STATISTICS SERV., AVERAGE FARM SIZE BY STATE (2006) *available at* http://www.nass.usda.gov/Charts_and_Maps/Farms_and_Land_in_Farm s/fncht6.asp. Note that every state in New England has an average farm size of less than 200 acres, less than half the national average. *Id; see also Agricultural Productivity in the U.S.*, USDA ECON. RESEARCH SERV., AGRICULTURAL PRODUCTIVITY IN THE U.S. *available at* http://www.ers.usda.gov/data-products/agricultural-productivity-in-the-us.aspx#28250. Six of the eight states with the lowest agricultural output in 2004 are New England states. *Id.* at table 20.

55. *See* McCabe, *supra* note 20, at 152 ("[U]nless reforms to the food system include local, state, and regional contributions and control, chances at curbing food-related diseases, improving poor nutrition, and reconnecting with the natural environment will diminish."). *But see* USDA, ASSISTING AMERICA'S SMALL FARMERS AND RANCHERS IN THE 21ST CENTURY (2003) (reporting on progress made by the USDA toward policies that support small agricultural operations), *available at* http://www.csrees.usda.gov/nea/ag_systems/pdfs/ meeting_challenge_time_to_act.pdf.

56. "[T]he supervision of agriculture . . . [is] proper to be provided for by local legislation . . . . " McCabe, *supra* note 20, at 151 (quoting THE FEDERALIST NO. 17 (Alexander Hamilton)). "New Deal federalism and its progeny created distance between Americans and their food, contributing to the sense that Americans do not shape the food system, but allow it to shape us." McCabe, *supra* note 20, at 152.

57. Every state has constitutional authority to legislate to promote the health, safety,

health as exemplified by the American obesity epidemic, environmental conservation related to the preservation of farmland, regional food security, and the traceability of contaminated food outbreaks.[58]

1. Access to Fresh Food and the Obesity Epidemic

Lack of access to fresh food has contributed to problems related to poor health in this country.[59] Among the scientific community, research suggests that "[t]here is a growing understanding that the availability of residential neighborhood resources that support . . . healthy food choices may influence obesity rates."[60]

As the USDA notes, there is unquestionably "a correlation between food accessibility and BMI and obesity," but other factors also contribute to health problems among Americans.[61] Therefore, ideally, state and local governments will address obesity and diet-related health problems with comprehensive planning. However, that planning should include improving access to fresh food as a critical component.[62]

2. Farmland Preservation and the Environment

Farmland across the country has been disappearing rapidly, at a rate faster than an acre per minute.[63] According to American Farmland

and environment of its citizens. *See* U.S. CONST. amend. X.

58. *See generally* McCabe, *supra* note 31, at 574-81 (discussing the inherent power of states to regulate food production).

59. In one particular study on the correlation between health and access to grocery stores, "[t]he presence of supermarkets was associated with a lower prevalence of overweight, obesity, and hypertension." Kimberly Morland et al., *Supermarkets, Other Food Stores, and Obesity: The Atherosclerosis Risk in Communities Study*, 30 AM. J. PREVENTIVE MED. 333, 335 (2006), *available at* http://deepblue.lib.umich.edu/bitstream/handle/2027.42/57754/Supermarkets%20other%20food%20stores%20and%20obesity.pdf;jsessionid=A14333BFF2BA47B51D7A1D868CED9C3E?sequence=1.

60. Andrew Rundle et al., *Neighborhood Food Environment and Walkability Predict Obesity in New York City*, 117 ENVTL. HEALTH PERSPECTIVES 442, 442 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661915/#b35-ehp-117-442.

61. USDA, FOOD ACCESS AND ITS RELATIONSHIP TO DIET AND HEALTH OUTCOMES, ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES 51, 56 (2009), *available at* http://www.ers.usda.gov/media/242606/ap036d_1_.pdf.

62. Former Mayor of Boston, Thomas Menino, has voiced support for programs that improve access for children to fresh food: "[w]hen I go to work in the morning, I see kids standing at the bus stop eating chips and drinking a soda. . . . I hope this will help them change their eating habits and lead to a healthier lifestyle." Natasha Singer, *Eat an Apple (Doctor's Orders)*, N.Y. TIMES, Aug. 12, 2010, at B1 (covering a pilot program in Massachusetts where health professionals "prescribe" fruits and vegetables to children with diet-related health problems), *available at* http://www.nytimes.com/2010/08/13/business/13veggies.html?_r=0.

63. *Farmland Protection*, AM. FARMLAND TR., http://www.farmland.org

Trust, this poses an environmental threat to the affected areas:

> Well-managed agricultural land supplies important non-market goods and services for our environment. Farm and ranch lands provide food and cover for wildlife, help control flooding, protect wetlands and watersheds and maintain air quality. They can absorb and filter wastewater and provide groundwater recharge. New energy crops even have the potential to replace fossil fuels.[64]

This puts farmland preservation squarely within the police power of state and local governments.

3. Regional Food Security

"Food security," according to the federal government, "is achieved when all people at all times have physical and economic access to sufficient food to meet their dietary needs for a productive and healthy life."[65] This includes maintaining access to food even in the wake of crises like earthquakes, hurricanes, and terrorist attacks.[66] State and local governments have a great interest in ensuring access to food, especially considering the great distance food has to travel when local food systems are not available to provide resources in an emergency.[67]

4. Outbreaks

Common sense indicates that it is easier to trace outbreaks when the food is produced, distributed, and consumed locally. A large producer may distribute vegetables from a contaminated crop across a wide geographic area, and when it becomes clear that the produce is contaminated, it will be difficult to trace the contamination back to the original source.[68] It is also difficult to identify the final destination of

/programs/protection/default.asp (last visited May 13, 2014) ("Every minute of every day, we have been losing more than an acre of agricultural land to development.").

64. *Id*; *see also* Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237 (1998) (analyzing the issue of farmland preservation as a global concern).

65. U.S. ACTION PLAN ON FOOD SECURITY, A MILLENNIUM FREE FROM HUNGER 2 (2000).

66. A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD & DRUG L.J. 405, 405 (2009) (explaining that food security requires "maintain[ing] sufficient food supplies in a time of crisis, in addition to an individual's basic right to daily, adequate nutrition").

67. *See id.* at 407 ("The federal government has not considered the role of regional and local food networks in its national homeland security planning.").

68. Note that the question of whether local foods are safer "has not been fully addressed by scientific literature." *See* Johnson & Endres, *supra* note 24, at 91-96, and sources cited therein.

every item that originated from the contaminated crop.[69] When contaminated food is grown, sold, and eaten within one community, identifying the source of the contamination is a much simpler task.[70] The ability to trace the outbreak of foodborne illnesses is undoubtedly a legitimate health and safety concern for a state government.[71]

State governments are well-equipped to promote the sustainable production of food.[72] States are highly motivated to foster locally produced foods because it benefits the local economy in addition to bolstering regional food security and preserving farmland within the state.[73] These benefits come at the risk of increased isolationism among the states, an economic tendency that courts have historically struggled to temper by way of the dormant Commerce Clause.[74]

II. DORMANT COMMERCE CLAUSE

Courts recognize an implied negative aspect to the Commerce Clause of the Constitution,[75] and under this doctrine, states are prohibited from enacting legislation that interferes with interstate commerce.[76] Because the federal government has taken a prominent role

69. *Id.*

70. The FDA has suggested there is no evidence of elevated risk arising from small-scale egg regulation. Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74 Fed. Reg. 33030, 33036 (July 9, 2009) (to be codified at 21 C.F.R. pt. 16, 118). For more commentary on this issue:

> Imagine if a large industrial food conglomerate sold Salmonella-tainted spinach to 100 local restaurants. Because the conglomerate dealt directly with the restaurants instead of a network of distributors and wholesalers, the source of the Salmonella outbreak would be immediately identifiable. This is essentially the "built-in" safety advantage of local food.

Peter Anderson, Comment, *Empowering Local and Sustainable Food: Does the Food Safety Modernization Act's Tester-Hagan Amendment Remove Enough Barriers?*, 9 J.L. ECON. & POL'Y 145, 167 (2012).

71. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 28-29 (1905) (holding that a state may require vaccinations in exercise of its police power to protect public health by preventing the spread of disease).

72. *See, e.g.*, *infra* Part II.A.1 and cases cited therein.

73. For a discussion of state agricultural legislation benefitting the local economy, see Megan Galey & A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J.L. & POL'Y 3, 25-27 (2012).

74. *See infra* Part II. A primary justification for the dormant Commerce Clause offered by the Supreme Court is "to avoid the tendencies toward economic Balkanization . . . among the States." Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

75. U.S. CONST. art. I, § 8, cl. 3.

76. *See* Gibbons v. Ogden, 22 U.S. 1, 189-91 (1824) (defining commerce as "commercial intercourse . . . regulated by prescribing rules for carrying on that intercourse" and reserving that power *exclusively* to Congress, thereby preempting legislation by states that attempt concurrent regulation). Notably, in his opinion, Chief Justice Marshall exempted state

in the regulation of the agriculture industry,[77] state laws in this industry are especially vulnerable to challenge under the dormant Commerce Clause.[78]

Critics say that courts apply the dormant Commerce Clause with unpredictable results.[79] The unpredictable application of the dormant Commerce Clause has a chilling effect on potentially revolutionary state legislation.[80] The Constitution has long been interpreted to impose restrictions on what states can do to promote local agriculture.[81] But the standards used by courts in deciding cases in the context of some industries not related to the production of food are arguably more

laws that "are, in their nature, *health* laws." *Id.* at 20.

77. *See supra* Part I.B.

78. *See infra* Part III.

79. Justice Stevens criticized the application of the dormant Commerce Clause by noting that "our law in this area is something of a 'quagmire' and the 'application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" Quill Corp. v. N.D. By & Through Heitkamp, 504 U.S. 298, 315-16 (1992) (quoting Nw. States Portland Cement Co. v. Minn., 358 U.S. 450, 457 (1959)). A federal court in Vermont opined that "it is probably an understatement to say that the Court's dormant Commerce Clause jurisprudence, particularly as it relates to limits on state taxation powers, is unpredictable." Barringer v. Griffes, 801 F. Supp. 1282, 1286 (D. Vt. 1992) *rev'd*, 1 F.3d 1331 (2d Cir. 1993). *See also* Lincoln L. Davies, Note, *If You Give the Court a Commerce Clause: An Environmental Justice Critique of Supreme Court Interstate Waste Jurisprudence*, 11 FORDHAM ENVTL. L.J. 207, 252-53 (1999) ("[I]t is impossible to draw from [the application of the dormant Commerce Clause] any coherent and consistent theoretical framework. Indeed, modern constitutional law texts all seem to have their own take on the issue, analyzing the doctrine in their own, rather different ways. The doctrine is also unpredictable.").

80. According to an astute analysis:

> "Results in Dormant Commerce Clause cases are notoriously unpredictable," and this lack of predictability unnecessarily complicates national economic policy. The effect of the confusion is to chill state innovation, encourage lengthy litigation, and require Congress to intervene to remedy improvident judicial decisions. A clear policy that allows the states to regulate in the absence of congressional action would be preferable.

Sherry Young, *Is "Due Process" Unconstitutional? The NCAA Wins Round One in its Fight Against Regulation of its Enforcement Proceedings*, 25 ARIZ. ST. L.J. 841, 866 (1993) (quoting Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 399 (1986)); *see also* Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1066 (2002) ("To the extent that the courts' indiscriminate approach in finding discriminatory purpose increases the potential for unwarranted and unpredictable judicial interference, it chills state and local creativity in crafting environmentally friendly waste management policies and undermines the dormant Commerce Clause as a doctrine."); s*ee generally* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987) (criticizing the lack of rigor applied to dormant Commerce Clause challenges).

81. *See infra* Part II.A.

relaxed from the doctrine as applied to agriculture.[82]

A. *Application of Dormant Commerce Clause to Agriculture*

1. Agriculture in the Supreme Court

Since *Wickard v. Filburn*, the Supreme Court has consistently held that the federal government has primary regulatory authority over the agriculture industry.[83] A series of Supreme Court cases thwarted attempts by states to favor local agricultural production, processing, and distribution, relying on the dormant Commerce Clause.[84] In particular, the Court's decisions in *Bacchus Imports, Ltd. v. Dias* and *West Lynn Creamery, Inc. v. Healy* come the nearest to addressing the issue of whether it is constitutional for a state to favor local foods.[85]

At issue in *Bacchus* was a tax applied to all sales of alcohol in Hawai'i,[86] with the exceptions of an alcoholic beverage made from a root native to Hawai'i, known as *'okolehao*, in addition to pineapple wine and other non-grape fruit wine.[87] The tax was primarily intended to benefit the burgeoning pineapple wine industry in Hawai'i.[88] The Court flatly dismissed the state's argument that the *'okolehao* and pineapple wine

82. *See infra* Part II.B.

83. Wickard v. Filburn, 317 U.S. 111 (1942) (holding that Congress has authority under the Commerce Clause to limit the amount of wheat grown for personal use on private farmland).

84. *See, e.g.*, Granholm v. Heald, 544 U.S. 460 (2005) (invalidating laws that favor in-state wine producers); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (invalidating an act that applied a tax to all companies selling milk in Massachusetts, but distributed the benefits of the tax exclusively to in-state dairy farmers); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (invalidating a Hawaiian law that favored production of alcoholic beverages made from native plants); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) (invalidating a North Carolina rule that required disadvantaged, out-of-state apple producers to use a strict safety inspection standard); Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951) (invalidating a Madison ordinance that required all milk sold in the city to have been pasteurized at a plant within a five mile radius of the city). In each of these cases, the Court conducts a careful dormant Commerce Clause analysis before reaching a conclusion, and none of these opinions forecloses the possibility that states may regulate agriculture in such a way that does not discriminate impermissibly against interstate commerce.

85. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

86. In Hawai'i, the preferred spelling of the name of the state includes a form of punctuation known as an 'okina, which closely resembles an apostrophe. In an effort to be sensitive to the people of Hawai'i, I have chosen to follow this convention. *See* A Handbook of Citation Form for Law Clerks at the Appellate Courts of the State of Hawai'i, Hawai'i State Judiciary, at 23 (2008) ("The Hawai'i Judiciary has adopted a policy that encourages spelling and punctuating Hawaiian words correctly, i.e., using the 'okina . . . .").

87. *Bacchus Imports, Ltd.*, 468 U.S. at 265.

88. *Id.*

industries were separate and distinct from the industry of other alcoholic beverages, and that there was no direct competition among the industries.[89] While the tax exemption did not discriminate against out-of-state interests on its face, the Court found discriminatory intent and effect.[90] By determining that the markets were the same and the tax discriminatory, the Court made it clear that states attempting to favor local agricultural production through discriminatory taxes, at least in the production of alcoholic beverages, would be susceptible to constitutional challenges.[91] This threat looms over the sustainable agriculture movement today.

The Court reached a similar holding in *West Lynn Creamery*, where a Massachusetts pricing order required the collection of an assessment on all milk sales.[92] The proceeds were then distributed only to in-state dairy farmers.[93] The assessment at issue did not facially discriminate against out-of-state interests because it applied equally to all dairy retailers.[94] However, the fact that all of the proceeds were distributed to local dairy farmers[95] resulted in a discriminatory impact.[96] The Court reasoned that the assessment "not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'"[97] By invalidating legislation based on the benefits provided to local agricultural enterprises, the decision in *West Lynn* casts a foreboding shadow over prospective legislation that might seek to advance the Local Food movement.

2. Anti-Corporate Farming Initiatives

Laws that limit the corporate ownership of farmland have been enacted in at least fourteen states.[98] Some of the explanations that are offered in support of anti-corporate farming initiatives include

89. *Id.* at 268-69.

90. *Id.* at 271.

91. *Id.*

92. *W. Lynn Creamery, Inc.*, 512 U.S. at 186.

93. *Id.*

94. *Id.* at 191-92.

95. *Id.* at 191.

96. *Id.* at 194.

97. *Id.* at 199 (1994) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).

98. Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional—Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, 37 CREIGHTON L. REV. 285, 285 n.5 (2004) (listing laws in each of fourteen states).

circumventing the limited liability of corporations, controlling the economic structure of food production and distribution, the lack of investment in local interests by out-of-state corporations, opening land for use by new farmers, and the negative socioeconomic impact of agribusiness on rural communities.[99]

A landmark 2003 case struck down an amendment to the South Dakota State Constitution outlawing corporate ownership of in-state farmland.[100] The Eighth Circuit decision in *South Dakota Farm Bureau, Inc. v. Hazeltine* "is viewed as critical to the future viability of anti-corporate farming restrictions in other states and, more generally, to the ability of state legislatures to shape the structure of agriculture within their borders."[101] The opinion signaled the death of a constitutional amendment that was supported by a majority of voters in South Dakota in 1998.[102]

The decision rested on the finding of a discriminatory purpose in the constitutional amendment.[103] This impermissible purpose was determined based on the court's analysis of the drafting process.[104] The court also criticized the lack of supporting evidence for the claim that the amendment would be beneficial to the environment.[105] The discriminatory intent made the amendment virtually *per se* invalid in the eyes of the court.[106] Since less discriminatory methods of achieving the same goals were plausible, such as rigorous enforcement of enhanced environmental regulations,[107] the amendment was stricken.[108]

A few years later, the Eighth Circuit echoed the dormant

99. Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 DRAKE J. AGRIC. L. 97, 99-102 (2009).

100. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003), *aff'g* 202 F.Supp. 2d 1020 (D. S.D. 2002).

101. McEowen & Harl, *supra* note 98, at 285 (citation omitted).

102. McEowen & Harl, *supra* note 98, at 288 (citation omitted).

103. *South Dakota Farm Bureau, Inc.*, 340 F.3d at 594.

104. *Id.*

105. *Id.* at 595 ("[T]he less information concerning the potential impact of [the amendment] that the drafters had, the less likely that [it] would actually be an effective remedy for the problems it was purportedly designed to address. A low probability of effectiveness can be indirect evidence of discriminatory purpose."). The court also acknowledged that the intent of the voters who supported the amendment was unknowable, but concluded that this was not an important fact. *Id.* at 596 ("We . . . 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.").

106. *Id.* at 597.

107. *Id.* ("[T]he State could introduce stricter environmental regulations or could more aggressively enforce its current environmental laws.").

108. *Id.* at 598.

Commerce Clause analysis in *Hazeltine* in response to a challenge to a 1985 anti-corporate farming amendment to the Nebraska State Constitution.[109] Once again, the court easily identified the discriminatory intent of the drafters of the amendment.[110] The court determined that, just as in South Dakota, the legislators in Nebraska had less discriminatory alternatives for reaching the environmental goals supported by the amendment, like improved "land use and environmental regulations."[111] The amendment was held unconstitutional under the dormant Commerce Clause.[112]

While no other courts have addressed anti-corporate farming initiatives, the Eighth Circuit holdings (in addition to the other dormant Commerce Clause cases discussed above) provide a basis for determining whether legislation that promotes sustainable farming[113] would survive dormant Commerce Clause scrutiny. They may also potentially impact whether similar legislation may be enacted in other states.[114] The following section of this Note will argue that careful framing of prospective legislative initiatives will result in legislation that can survive dormant Commerce Clause challenges, but only where steps are taken to position the initiatives in a nondiscriminatory manner that does not interfere with interstate commerce. Generally, courts approach evaluation under the dormant Commerce Clause based on the specific nature of the challenged legislation,[115] which provides some context for exploring how local governments may encourage sustainable agriculture

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

110. In fact, the intent was clearer in Nebraska than in Iowa. *Jones*, 470 F.3d at 1270 ("[T]elevision advertisements that supporters of Initiative 300 produced before its adoption concluded by stating: '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.' It is clear beyond cavil that these ads bristle with an animus against out-of-state corporations.").

111. *Id.*

112. *Id.* at 1271 ("We . . . have no other option than to . . . hold that the entire amendment . . . is unconstitutional.").

113. Note that policies that support the consumption of sustainably produced food are distinct from the goals of anti-corporate farming laws, which intend to "restrict corporations from owning agricultural land." Schutz, *supra* note 99, at 98.

114. *See* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URB. LAW. 567, 587 (1986) ("Because the outcomes of the cases are so unpredictable, the doctrine may well have a chilling effect on legitimate state regulation."), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1307&context=facpubs; *see also* McEowen & Harl, *supra* note 98, at 302 ("The opinion [in *Hazeltine*] could also have a chilling effect on further legislation impacting the future structure of agriculture.").

115. *See* Brief Amicus Curiae of Constitutional Law Professors in Support of Petitioners at 5, DIRECTV, Inc. v. Levin, 133 S. Ct. 51 (2012) (No. 10-1322) ("The Court's precedent eschews rigid, formalistic rules, and instead requires a textured and fact-specific inquiry into the purpose and effect of the state legislation.").

while withstanding constitutional scrutiny.

3. Inconsistent Lower Court Decisions

The decision in *Granholm v. Heald* stated unequivocally that Amendment XXI, which repealed Prohibition[116] while leaving states wide latitude in regulating alcoholic beverages,[117] does not guarantee local governments the right to enact discriminatory laws that favor the local alcoholic beverage industry.[118] Since *Granholm*, several attempts have been made to circumvent dormant Commerce Clause scrutiny through legislation that does not facially discriminate against out-of-state interests.[119]

Two circuit court opinions have examined whether a statute can be in violation of the dormant Commerce Clause by way of facial discrimination *against* larger producers of wine in favor of smaller producers; the First Circuit struck down a Massachusetts statute[120] and the Ninth Circuit upheld an Arizona statute.[121] The statutes were very similar, having both been passed in the wake of *Granholm v. Heald*, and both trying to accomplish the same kind of regulation that *Granholm v. Heald* found unconstitutional.[122] Both statutes allowed some winemakers to sell directly to consumers and retailers, thus bypassing the requirement to sell only to wholesalers.[123] That advantage was only available to small producers, forcing large producers to continue to sell only to wholesalers.[124] In Massachusetts, there were no in-state producers of wine that exceeded the production limit, known as the gallonage cap.[125] In Arizona, there was exactly one producer in the state that met the threshold.[126] Both statutes were challenged based on the

116. U.S. CONST. amend. XXI, § 1.

117. *Id.* at § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

118. Granholm v. Heald, 544 U.S. 460, 461 (2005).

119. Kevin C. Quigley, Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1888 (2011).

120. *See* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010).

121. *See* Black Star Farms LLC v. Oliver, 600 F.3d 1225 (9th Cir. 2010).

122. Quigley, *supra* note 119, at 1888 ("Some states, for example, revised their direct shipping laws so that they discriminated in incidental effect . . . . In the resulting litigation, federal courts have been unable to reach a consistent interpretation of the *Granholm* mandate.") (citations omitted).

123. *Id.*

124. *Id.*

125. *Family Winemakers*, 592 F.3d at 4.

126. Black Star Farms LLC v. Oliver, 600 F.3d 1225, 1228 (9th Cir. 2010).

effects they would have on the wine market: consumers would purchase more wine from small wineries, and since small wineries are, as a practical matter, more likely to be successful locally, the statutes altered the balance between in-state and out-of-state wine purchasing, thus impermissibly interfering with interstate commerce.[127]

There is an explanation in *Black Star Farms LLC v. Oliver* for why the two courts reached different conclusions about the constitutionality of the respective statutes: "[T]he plaintiffs in that case, unlike the plaintiffs here, had evidence to prove their contentions."[128] The First Circuit opinion did not discuss the evidence presented by the plaintiffs showing the discriminatory effects of the statute. The court did refer to the Arizona district court case upheld in *Black Star Farms LLC v. Oliver*, distinguishing it only by saying: "[W]e [do not] find the reasoning . . . to be persuasive."[129]

The two circuit court cases involve actions of state legislators that seem to have obvious protectionist purposes. The statutes in place at the time of *Granholm v. Heald* in both states were no longer valid, and so both states enacted these statutes presumably with the intent to serve the same local protectionist needs. Generally, when the motivations of legislation are challenged in court, "[i]nterests are found to be illegitimate only when the state, in the Court's words, 'artlessly discloses' the aim of favoring its own people economically."[130] If the different outcomes in these two circuit court cases are due to "artless disclosure" or a test of "whether the legislature has a stupid staff,"[131] then the credibility of the dormant Commerce Clause as a rigorous doctrine is further undermined.[132] Alternatively, it may be more appropriate to attribute the disparate outcomes to different understandings of the doctrines in the two circuits.

127. *Family Winemakers*, 592 F.3d at 10; *Black Star Farms LLC*, 600 F.3d at 1231.

128. *Black Star Farms LLC*, 600 F.3d at 1233. While helpful, this analysis raises more questions than answers. For example, how prudent is a constitutional doctrine that would reach opposite conclusions regarding state laws in similar cases based solely on how the attorneys present the cases?

129. *Family Winemakers*, 592 F.3d at 13 n.14.

130. Smith, *supra* note 13, at 1235 (citing Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)). Note that the content of the statute and the true intentions of legislators are only part of a dormant Commerce Clause analysis; because the record of a case may incidentally bear on the outcome, it may result in disparate outcomes.

131. *See* Gregory S. Weber, *Forging A More Coherent Groundwater Policy in California: State and Federal Constitutional Law Challenges to Local Groundwater Export Restrictions*, 34 SANTA CLARA L. REV. 373, 479 (1994) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 n.12 (1992)) (drawing attention to the unreliability of a test based on statements by legislatures).

132. *See supra* notes 79-80 and accompanying text.

The First Circuit's invalidation of the Massachusetts statute in *Family Winemakers* was foreshadowed by an earlier case involving discrimination that effectively favored small businesses in Puerto Rico.[133] In *Walgreen Co. v. Rullan*, the First Circuit decided whether a grandfather clause that allowed pharmacies in operation in Puerto Rico in 1979 to open new stores without first seeking a specific permit.[134] This clause was held unconstitutional by the First Circuit because the vast majority of pharmacies existing in Puerto Rico at the time (92%) were locally owned and operated.[135] When considered with *Family Winemakers of Cal. v. Jenkins*, this case demonstrates a level of consistency in the reasoning of the First Circuit.

Conversely, another interesting case out of Puerto Rico, *Coors Brewing Co. v. Mendez-Torres*, demonstrates the inconsistent application of dormant Commerce Clause doctrine.[136] The district court opinion was overturned on grounds unrelated to the dormant Commerce Clause analysis because a federal comity decision made it procedurally invalid for the statute to be challenged in federal court without exhausting state court remedies.[137] The legislative act at issue in this case was a tax that applied only to large producers of beer.[138] The district court dismissed the claim of discriminatory intent brought by the challenger, reasoning: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[139] The district court further reasoned that the statute did not discriminate in effect because "[b]rewers from other states may also qualify as small brewers and, indeed, have, during the relevant period."[140] The First Circuit never had the opportunity to apply the dormant Commerce Clause doctrine in *Coors*, but the decisions in *Family Winemakers of California* and *Walgreens* imply that this tax would have been invalidated.[141] Outside the First Circuit, however, some industries have typically received much more relaxed treatment under the dormant

133. Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005).

134. *Id.* at 53.

135. *Id.* at 52-53.

136. 787 F. Supp. 2d 149 (D.P.R. 2011), *aff'd in part, vacated in part*, 678 F.3d 15 (1st Cir. 2012).

137. Coors Brewing Co. v. Mendez-Torres, 678 F.3d 15 (1st Cir. 2012).

138. *Coors Brewing Co*., 787 F. Supp. 2d at 157, *aff'd in part, vacated in part*, 678 F.3d 15 (1st Cir. 2012).

139. *Id.* at 171 (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

140. *Id.* at 172.

141. Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010).

Commerce Clause.[142]

B. Lenient Application of Dormant Commerce Clause to Other Industries

1. Dissimilar Business Entities

Some other industries outside the realm of agriculture have historically been treated more leniently under the dormant Commerce Clause. The distribution of oil falls into this category. A separate outcome of Supreme Court analysis indicates that when a state act discriminates against one type of business in favor of a differently situated business, it is not unconstitutional under the dormant Commerce Clause, despite the fact that the challenged legislation in each case favors a type of business with local ties.[143] For example, the statute at issue in *Exxon Corporation v. Governor of Maryland* was enacted in response to problems that arose from the U.S. petroleum shortage crisis of 1973.[144] During the crisis, gasoline was not fairly distributed among retailers in Maryland because producers favored company-owned retail stations to the detriment of independent retail stations.[145] In response, Maryland enacted a law forbidding gasoline producers and refiners from operating stations within the state.[146] The law discriminated against oil producers and refiners, all of which were outside the state of Maryland, and the benefits of the statute fell to independent station operators.[147] The Court points out that "there are several major interstate marketers of petroleum that own and operate their own retail gasoline stations" in Maryland.[148] The Court also refers to the fact that since all gasoline sold in Maryland originated outside the state, the flow of gasoline into the state is not affected by the statute.[149]

Similar reasoning was echoed in 1989 when the Court decided

142. *See infra* Part II.B.

143. *See* General Motors Corp. v. Tracy, 519 U.S. 278 (1997) (upholding an Ohio tax exemption only for natural gas sales by companies that are subject to state regulations); Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't of Treasury, 490 U.S. 66 (1989) (upholding legislation that discriminates against companies that both filed taxes in New Jersey and paid a federal windfall tax for oil profits); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (upholding a Maryland law that prohibits producers and refiners of oil and gasoline from selling gasoline directly to consumers).

144. *Exxon Corp.*, 437 U.S. at 121.

145. *Id.*

146. *Id.* at 119.

147. *Id.* at 125.

148. *Id.* at 125-26.

149. *Id.* at 125.

Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Department of Treasury.[150] This case assessed the validity of a New Jersey tax law that forced oil producers to pay taxes on income related to federal windfall profits, even though no in-state corporations or individuals were subject to the tax.[151] The tax was upheld by the Court in an opinion written by Justice Blackmun,[152] the sole signer to a dissent in *Exxon* eleven years prior.[153]

The line of cases where the Court invalidated agricultural legislation can be distinguished from the oil distribution line of cases, where each act was upheld, based on the way the Court characterized the industry impacted by state regulation.[154] In each case in the oil distribution line, the Court determined that in-state and out-of-state entities that were similarly situated were treated even-handedly, separately viewing the entities burdened by the legislation as dissimilar and not in direct competition with the favored entities.[155] In the agricultural line, however, the Court determined that burdened entities were in the same competitive industry as the favored entities.[156] To put the contrast into sharp relief: according to *Exxon*, oil refiners and independent oil distributors were dissimilar and not in direct competition;[157] but in *Bacchus*, pineapple wine producers were similarly situated to all other producers of alcoholic beverages and were competing for the same market.[158]

1. Cable and Satellite

In recent years, state tax legislation that benefits cable companies at

150. 490 U.S. 66 (1989).

151. *Id.*

152. *Id.*

153. *Exxon Corp.*, 437 U.S. at 134-35.

154. *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997) ("[T]here is a threshold question whether the companies are indeed similarly situated for constitutional purposes.").

155. *Id.*

156. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 269 (1984) ("Surely one way that the tax exemption might [foster local industries by encouraging increased consumption] is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit.").

157. *Exxon*, 437 U.S. at 126 ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."); *see also Gen. Motors Corp.*, 519 U.S. at 310 ("[T]he enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause.").

158. *Bacchus*, 468 U.S. at 269 ("[W]e are unwilling to conclude that no competition exists between the exempted and the nonexempted liquors.").

the expense of satellite subscribers has been challenged in several cases under the dormant Commerce Clause.[159] Cable companies invest in local labor and infrastructure in any state where they operate, whereas satellite companies do not depend on local infrastructure and hire relatively few local employees for their operations.[160] States receive an obvious benefit from incentivizing investment in local infrastructure. The local benefits are primarily economic, distinguishing the issue from agriculture, where the benefits of local production are much more widespread.[161]

Satellite companies argue that the unequal taxation schemes are discriminatory and should therefore be stricken under the dormant Commerce Clause.[162] The states that defend these statutes argue that there is no discrimination because cable and satellite companies are not similarly situated, and therefore differential treatment is not discriminatory.[163] State courts in Ohio and North Carolina upheld the contentious tax schemes;[164] however, a strongly worded dissent in the case out of Ohio suggests that the issue may not be resolved to the satisfaction of all courts and may come up again in the future.[165]

The Supreme Court has recently denied certiorari on whether states may institute tax legislation that favors cable television providers.[166] The challenger's petition insisted that the Court must address the doctrinal uncertainty that exists in contemporary Commerce Clause jurisprudence, emphasizing the dissonant outcomes of *Family Winemakers of California* in the First Circuit and *Black Star Farms LLC*

159. Douglas R. Cole & Charles M. Steines, *State Supreme Court Rejects Commerce Clause Challenge to Sales Tax Statute; a Dissent Strongly Differs*, 21-7 J. MULTISTATE TAX'N & INCENTIVES 25, 25 (2011).

160. DIRECTV, Inc. v. Treesh, 487 F.3d 471, 473-74 (6th Cir. 2007).

161. *See supra* note 27 and sources cited therein.

162. DIRECTV, Inc. v. Levin, 941 N.E.2d 1187, 1191 (Ohio 2010), *cert. denied*, 133 S. Ct. 51 (2012).

163. *Id.* at 1193-94 ("[D]ifferential tax treatment of 'two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities,' does not violate the dormant Commerce Clause.") (quoting Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep't. of Treasury, 490 U.S. 66, 78 (1989)).

164. *Id.* at 1197; DIRECTV, Inc. v. State, 632 S.E.2d 543, 550 (N.C. Ct. App. 2006).

165. *See DIRECTV, Inc.*, 941 N.E.2d at 1202 (Brown, C.J., dissenting) ("In sum, the sales tax treats competing industries differently, effectively (and perhaps intentionally) favoring the industry with extensive local ties over the one with comparatively few. Such a law violates the Commerce Clause. For these reasons, I respectfully dissent and would reverse the judgment of the court of appeals.").

166. DIRECTV, Inc. v. Levin, 133 S. Ct. 51 (2012).

in the Ninth Circuit.[167] It is unclear whether the Supreme Court would view cable and satellite companies as similarly situated entities, and it is also unclear whether small and large farms would be examined under the same lens. This uncertainty leaves room for crafting legislation that may survive dormant Commerce Clause review, even where a court may otherwise find it discriminatory.

III. POTENTIAL FOR STATES TO PROMOTE SUSTAINABLE AGRICULTURE[168]

The dormant Commerce Clause doctrine, as discussed in the preceding section, may be employed to challenge any state action that benefits producers of local foods.[169] State actions may survive constitutional challenge if care is taken to craft legislation that does not offend contemporary dormant Commerce Clause jurisprudence. Several options that states may take to survive review are considered below.

A. *Double Food Stamps at Farmers' Markets*

Wholesome Wave began its Double Value Coupon Program in 2008.[170] The nonprofit organization initiated the program in Connecticut, Massachusetts, and California with the goal of providing incentives for low-income families to purchase fresh food directly from producers at farmers' markets.[171] The program works by securing donations that double the value of federal benefits such as the Supplemental Nutrition Assistance Program (SNAP) and Supplemental Special Nutrition for Women, Infants, and Children (WIC).[172] The

167. Petition for Writ of Certiorari at 27-28, DIRECTV, Inc. v. Levin, 133 S. Ct. 51 (2012) (No. 10-1322), 2012 WL 1594681, at *27-28. ("[T]here is no way to reconcile these two lines of cases. They represent fundamentally different — indeed opposite — views of the Commerce Clause, where the outcome depends not on the facts of the case, but on the state that passes the statute."). *See also* Brief Amicus Curiae of Constitutional Law Professors in Support of Petitioners at 5, DIRECTV, Inc. v. Levin, 133 S. Ct. 51 (2012) (No. 10-1322), 2012 WL 2135015, at *5 ("The amici have no direct stake in this litigation, but do have an interest in seeing Commerce Clause jurisprudence develop in a sound manner. Failure to correct the decision below could threaten that development. The amici agree with the petitioners' description of the splits to which the decision below contributes.").

168. This Note does not attempt to explore all potential methods states may employ to promote sustainable agriculture. A variety of alternatives exist, from innocuous advertising programs that encourage consumers to shop at farmers' markets to an outright ban on the sale of goods produced in other states.

169. *See supra* Part II.A.

170. *Double Value Coupon Program (DVCP)*, WHOLESOME WAVE, http://wholesomewave.org/dvcp/ (last visited May 13, 2014).

171. *Id.*

172. *Id.*

success of this program has allowed it to expand, and now there are beneficiaries in at least twenty-four states who are able to purchase fresh produce directly from farmers, improving the health of low-income families and providing support to farmers who make their food available to these families.[173] The reliance on donor funding, however, places limits on how broadly the program can be implemented.[174]

States have a powerful interest in lending financial support to programs like the Double Value Coupon Program, which encourages better nutrition among low-income residents.[175] Because of the strong correlation between the obesity epidemic and socioeconomic status,[176] entitlement benefits may be employed to improve the health of state citizens. There is an added incentive for farmers' markets to be made accessible to low-income families, which may be a step toward solving the problem of food deserts.[177] Furthermore, the Double Value Coupon Program promotes other important state interests, like the preservation of farmland and the economic viability of local food production, [178] by providing financial benefits to local farmers who sell their goods at farmers' markets.[179]

If a state were to fund a similar program, a dormant Commerce Clause challenge may have traction because the benefits would fall to local interests at the expense of out-of-state food producers. For example, a small farm in Massachusetts can benefit from increased sales at a local farmers' market due to the availability of entitlements from the state, while a large vegetable producer in California would not have equal access to those benefits. In fact, interstate commerce will be burdened by a market shift toward local purchases.[180]

173. *Id.*

174. Deborah Geering, *SNAP Challenge: Live on 'Food Stamps' for a Week*, ATLANTAMAGAZINE.COM (Oct. 23, 2013) ("The nonprofit organization uses private donations to double the value of SNAP benefits."), *available at* http://www.atlantamagazine .com/covereddish/2013/10/23/snap-challenge-live-on-food-stamps-for-a-week/print.

175. *See Double Value Coupon Program*, *supra* note 170.

176. *See supra* Part I.D.1.

177. *See* Vicki A. McCracken et al., *Do Farmers' Markets Ameliorate Food Deserts?*, 29 FOCUS 21, 24 (2012) ("There is evidence that farmers' markets in both rural and urban areas help to alleviate food deserts; however, rural markets are more likely to be disconnected from Farmers' Market Nutrition Programs [in Washington State]."), *available at* http://www.irp.wisc.edu/publications/focus/pdfs/foc291f.pdf. "Several studies . . . have used the term 'food deserts' to describe geographic areas where nutritious and affordable food is difficult to obtain." *Id.*

178. *See supra* Part I.D.2.

179. *See Double Value Coupon Program*, *supra* note 170.

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

There is no precedent for dormant Commerce Clause challenges to succeed against entitlement benefits meant to provide support for low-income families. On this basis alone, it is likely that a program that doubles food stamp benefits will not be challenged under the dormant Commerce Clause. States are generally not restricted by the Constitution in how public assistance in the form of social welfare may be distributed to state citizens.[181]

It is important that, in implementing a program such as this, states avoid facial discrimination against out-of-state interests. As asserted by the Fifth Circuit in 1980, out-of-state producers must be permitted to sell at in-state farmers' markets and have access to the state-sponsored benefits, because otherwise there would be discrimination against out-of-state interests.[182] If out-of-state farmers are permitted to sell produce at farmers' markets in the state, then doubling the value of food stamps at these markets with state funds should not be vulnerable to constitutional challenges under the dormant Commerce Clause.

B. *Direct Subsidies for Local Farmers*

States may choose to provide direct subsidies to local farmers as a way to promote sustainable practices and to encourage the preservation of farmland. This is a method by which states may offset the harmful effects of federal subsidies.[183] Some states already make grants available for agricultural businesses.[184] For example, Vermont recently passed legislation to implement the Working Lands Enterprise

to "consume less of" products outside that category).

181. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 603-04 (1997) (Scalia, J., dissenting) ("Our cases have always recognized the legitimacy of limiting state-provided welfare benefits to bona fide residents.").

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

183. According to William S. Eubanks II, federal subsidies have been a cause of great harm to food production in the United States:

> The decisions made by those in power have resulted in the gradual narrowing of commodity subsidies to a select handful of crops, distortion of the agricultural market by artificially supporting only these select crops, and the slow, painful death of small farming in the United States. This "death" has transformed rural America into a wasteland of large commercialized farms and abandoned fields that once served as symbols of hope to the families that depended on their plentiful yields.

William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10493, 10495 (2009).

184. *See, e.g.*, VT. STAT. ANN. tit. 6, § 4603 (2012).

Initiative,[185] which subsidizes "agricultural… and forest products based businesses."[186] Similarly, Massachusetts offers small grants to new farm businesses.[187] The program was implemented "to assist farmers whose goal is to raise agricultural products and who aspire to develop their farms into commercially viable operations."[188]

Direct subsidies are generally not subject to invalidation under the dormant Commerce Clause.[189] However, the fact remains that subsidies are discriminatory by nature because they provide a benefit to local economic interests while excluding similarly situated out-of-state competitors.[190]

Furthermore, the Supreme Court has stopped short of declaring an outright exception to the dormant Commerce Clause for direct business subsidies.[191] In *West Lynn Creamery, Inc. v. Healy*, the Court invalidated a direct subsidy that was offered to Massachusetts dairy producers, but in that case, the funding for the subsidies came "principally from taxes on the sale of milk produced in other States."[192] In this way, the Court distinguished the subsidy at issue from "[a] pure subsidy funded out of general revenue[, which] ordinarily imposes no burden on interstate commerce, but merely assists local business."[193] The implication here is that subsidies are likely constitutional when they are funded out of the state's general treasury; the same is not true in cases where the source of the funding "burdens interstate commerce."[194] Therefore, care must be taken to ensure that the funds for subsidies to local farmers come from the general treasury of the state and not a tax specifically linked to the benefit.[195] States, and courts if the subsidies

185. *Id.*

186. *Working Lands Enterprise Initiative: Purpose and Legislation*, VERMONT.GOV, http://workinglands.vermont.gov/wlei/working_lands_summary (last visited May 13, 2014).

187. *Matching Enterprise Grants for Agriculture Program*, MASS.GOV, http://www.mass.gov/eea/agencies/agr/about/divisions/mega.html (last visited May 13, 2014).

188. *Id.*

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

190. *But see* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (explaining that a "pure subsidy" provides a local economic benefit but does not impermissibly burden interstate commerce).

191. "We have never squarely confronted the constitutionality of subsidies, and we need not do so now." *Id.* at 199 n.15 (1994).

192. *Id.* at 199.

193. *Id.*

194. *Id.*

195. For an in-depth discussion of business subsidies and their treatment under the dormant Commerce Clause, post-*West Lynn Creamery*, see Dan T. Coenen, *Business*

are challenged, should look favorably to this option for promoting local agriculture.

C. *Taxes on Goods Produced on Large Farms*

Taxes in any form are generally analyzed carefully by courts when challenged under the dormant Commerce Clause.[196] Some discriminatory taxes are upheld,[197] but often they are not.[198] In light of the fact that direct subsidization of local businesses is generally permissible,[199] disfavoring taxes that discriminate against out-of-state interests may appear contradictory. Both selective subsidies and discriminatory taxes have the effect of giving a financial advantage to some participants in the marketplace, which inarguably puts other participants at a disadvantage. Treating subsidies differently from taxes appears to be a focus on form over substance.[200] There is a lack of clarity on this issue, which suggests that further guidance may be required from the Court in the future before the outcome of dormant Commerce Clause challenges will be reliably predictable. However, there is ample jurisprudence for examining the current rules regarding differential taxation by state governments.[201]

The primary fundamental question asked by courts is whether the tax is discriminatory against out-of-state interests.[202] If a tax is explicitly levied only against agricultural goods produced out-of-state, then it will be virtually *per se* invalid.[203] It is almost impossible for any tax to survive this standard of review.[204] Therefore, if a state wishes for a tax

Subsidies and the Dormant Commerce Clause, 107 YALE L.J. 965 (1998).

196. *See West Lynn Creamery*, 512 U.S. at 199 (deciding that the presence of a tax triggers an analysis of whether a subsidy violates the dormant Commerce Clause).

197. *See, e.g.*, *supra* note 165 and accompanying text.

198. *See West Lynn Creamery*, 512 U.S. at 199; Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 265 (1984).

199. *See supra* Part III.B.

200. Edward A. Zelinsky & Brannon P. Denning, Debate, *The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. ONLINE 196, 197-98 (2007), *available at* http://www.pennlawreview.com/debates/index.php?id=7. Professor Zelinsky questions: "What, I respectfully ask, is the point of all of this? Why are state subsidies constitutionally acceptable in the form of direct cash grants, but become discriminatory protectionism when undertaken by means of economically equivalent tax breaks?" *Id.* at 198-99.

201. *See id.*

202. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

203. Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid.").

204. *See* Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 574

encouraging sustainable agriculture to pass constitutional muster, the tax must be applied even-handedly to in-state and out-of-state interests.

A state tax may be crafted to exclude goods that meet specific production standards of sustainability. For example, if produce is grown without the use of synthetic chemical fertilizers, on a farm meeting very high environmental standards, and transported using a minimal amount of fossil fuels, then the producer may be exempt from the tax. A tax that is structured in this way might not be facially discriminatory against out-of-state interests, but implementation would be highly impractical. A state would have to devote tremendous resources to evaluating the claims of producers in order to ensure that those exempted meet the stringent criteria.

In order to simplify the hypothetical tax structure, food produced on small farms may be exempted. This would serve the purpose of benefitting food that is produced more sustainably, because small farms tend to employ more sustainable practices than large farms.[205] It is unclear how courts will respond to taxes that treat food produced on small farms differently than food produced on large farms. Two important factors to consider in predicting the constitutionality of such a tax are the definition of "small" and whether the court will find that small and large farms are differently situated business types.

The threshold for being taxed as a small farm could be determined based on the income of the farm. The USDA defines small farms as those earning less than $250,000 per year.[206] Most farms in the U.S. are small farms under this definition.[207] In Massachusetts, for example, only 6.5% of farms would be taxed as large farms.[208] However, since there is a greater percentage of large farms outside the state than inside, the burden of a discriminatory tax would fall disproportionately on out-of-

(1997) ("As the standard's name suggests, a discriminatory regulation will almost never survive review under the virtual per se invalid standard of scrutiny.").

205. For a discussion of how small farm practices tend to be more sustainable, see D'Souza & Ikerd, *supra* note 43. "[T]he characteristics of small farms seem to most closely resemble those of sustainable systems." *Id.* at 82. *See also supra* Part I.C.

206. 7 C.F.R. § 4284.902 (2013).

207. According to the 2007 Agriculture Census, the USDA reported that 91% of all U.S. farms were small farms. *2007 Census of Agriculture: Small Farms*, U. S. DEPT. OF AGRIC., at 1, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Farm_Numbers/small_farm.pdf. Notably, 91% of farms only produced about 15% of the total farm income in the U.S. in 2007. *Id.*

208. USDA NAT'L AGRIC. STATISTICS SERV., *Tbl. 2. Market Value of Agricultural Products Sold Including Landlord's Share and Direct Sales: 2007 and 2002*, 2007 CENSUS VOLUME 1, CHAPTER 1: STATE LEVEL DATA (MASSACHUSETTS), http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/st25_1_002_002.pdf (last visited May 14, 2014).

state interests. Furthermore, in-state sales by small farms are likely to be primarily made by in-state small farms; therefore the benefits of being exempt from the tax are disproportionately going to fall to in-state interests.

For legislation to be found discriminatory under the dormant Commerce Clause, the type of business being benefitted must be similarly situated to the type of business being burdened.[209] This analysis considers whether the businesses are in competition with each other and whether they receive a share of the market that shifts after the legislation is enacted.[210] It is likely that a court would consider small farms to be similarly situated in comparison to large farms because small and large farms compete for shares of the same food production market and, moreover, different types of agricultural production have been held to be similarly situated in the past.[211]

It is possible, however, that courts would reach a different outcome. The typical point of sale for small farms is more frequently through direct sale to consumers, while large farms are more likely to use an intermediate channel, such as sales at a supermarket.[212] This distinction may not appear material on the surface; everybody needs to eat, so small and large producers are certainly in competition for the same market. But cable and satellite television providers are competing for increased market share among television audiences, just like small and large food producers are competing for increased market share among consumers.[213] In fact, from the point of view of the consumer, the

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

210. *See* Gen. Motors Corp. v. Tracy*,* 519 U.S. 278, 300 (1997) (considering "actual or prospective competition between the supposedly favored and disfavored entities" relevant to whether a provision discriminates against interstate commerce).

211. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) ("[A]s long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect.").

212. *See* Renée Johnson, Tadlock Cowan & Randy Alison Aussenberg, *The Role of Local Food Systems in U.S. Farm Policy*, CONGRESSIONAL RESEARCH SERVICE 6 (Jan. 20, 2012), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC 5097249.

213. Generally, companies seek an increase in market share. *But see What is Market Share?*, WISE GEEK, http://www.wisegeek.org/what-is-market-share.htm (last visited May 14, 2014) ("Despite this, having a larger market share isn't always a good thing. It might not be profitable if the increase is associated with expensive advertising or a big price decrease. A company may not be able to meet the demand of an increased percentage of the market without huge investments in new equipment and employees. Too much of an increase also may not be beneficial if it violates a country's anti-trust laws. Additionally, if a company values its share of the market above sustainable practices, it can cause big problems in the

difference between cable and satellite television is similar to the difference between points of sale for large and small food producers. The argument that cable and satellite television providers are differently situated business types has prevailed in courts,[214] so it is also possible that the argument would be successful regarding a tax that treats large and small food producers differently.

It is difficult to assess a particular size above which a farm becomes a differently situated business type, either based on annual income or number of acres, for the purposes of establishing differential tax treatment.[215] Simply using the size threshold determined by the USDA is an option.[216] However, there is no evidence that *all* farms with income greater than $250,000 each year are *always* less sustainable than farms with income below that threshold. The opinion of one expert is that "the farmer must ultimately decide how big a farm should be" to remain sustainable.[217] A large farm may employ practices that make it relatively sustainable, while a small farm may employ practices that are especially harmful to the environment. An arbitrary size threshold may be a practical way to differentiate between sustainable and non-sustainable farms as different categories of businesses, but it is important to recognize that it will not be a precise division. A court may determine that the use of an arbitrary threshold to distinguish two types of businesses fails; a farm that earns $251,000 per year is not necessarily a different type of business from a farm that earns $249,000 per year.

A tax that applies to food produced on large farms, which would exempt food produced on small farms, will face constitutional obstacles under dormant Commerce Clause scrutiny.[218] Double food stamps at farmers' markets and direct subsidies to sustainable farming operations are more likely to survive constitutional challenges.[219]

D. *Avoiding the Pitfalls of Dormant Commerce Clause Scrutiny*

Because scrutiny under the dormant Commerce Clause can be, at times, unpredictable, it is important that legislators take care to avoid pitfalls that might send signals of economic protectionism to a court. It

long run.").

214. *See supra* Part II.B.2.

215. *See* John Ikerd, *How Big Should a Small Farm Be?*, NAT'L SMALL FARM TODAY CONF. AND TRADE SHOW (2002), *available at* http://web.missouri.edu/ikerdj/papers/SmFmHowBig.html#_ftn1.

216. *See* 7 C.F.R. § 4284.902 (2013).

217. Ikerd, *supra* note 215.

218. *See supra*, Part III.C.

219. *See supra*, Part III.A-B.

is important, for example, that legislators do not put themselves on the record as motivated to support legislation because of the local economic benefits that come from shifting the market share to local producers.[220] Avoiding statements suggesting that the intent of legislation is economic protectionism can make it more difficult for a challenger to prove discriminatory purpose.[221]

Furthermore, when supporting legislation, it is important to recognize that extraterritorial benefits, meaning benefits that reach outside of the jurisdiction enacting the legislation, are not within the authority of local legislators.[222] For example, sustainable practices in Massachusetts may cause less environmental harm than industrial practices in a faraway state; however, Massachusetts does not have the authority to legislate to protect the environment in the faraway state.[223] Instead, lawmakers should emphasize the local health, safety, and environmental benefits that are promoted by legislation supporting sustainable agriculture.[224]

From 1992 to 2005, the Supreme Court decided "thirteen major dormant Commerce Clause cases," ten of which invalidated the challenged state actions.[225] During that period, however, two Supreme Court Justices evolved in their interpretation of the doctrine; both Justice Scalia and Justice Thomas have stood against the majority of the Court and voted to uphold state laws when they are not facially discriminatory.[226] In fact, Justice Thomas appears to have rejected the doctrine altogether, even dissenting to the decision in *Granholm v. Heald*, which was admittedly discriminatory on its face, and later dismissing the doctrine outright as "hav[ing] no basis in the Constitution and . . . unworkable in practice."[227] Also notable, the Court has not

220. Smith, *supra* note 13, at 1241. *But see* United States v. O'Brien, 391 U.S. 367, 384 (1968) ("We decline to void essentially on the ground that it . . . could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

221. *See supra* note 130-132 and accompanying text.

222. *See* C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 393 (1994) (explaining that states do not have the power to regulate the environment outside state borders because it is tantamount to regulating interstate commerce).

223. *Id.* ("Clarkstown [may not] justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds.").

224. *See supra* Part I.D.

225. David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 3 (2007).

226. *Id.* at 51.

227. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

invalidated any cases under the dormant Commerce Clause since *Granholm v. Heald* was decided in 2005.[228] There are several new members of the Court since *Granholm* was decided,[229] but the Justices most resistant to the dormant Commerce Clause, Justices Scalia and Justice Thomas, are still serving.[230] It has yet to be seen how the new Roberts Court will approach dormant Commerce Clause issues.

We may have a while to wait, since the Court has denied recent petitions for certiorari.[231] With the inconsistent application of the doctrine in circuit courts, it seems inevitable that the Supreme Court will address the inconsistency eventually, and it is possible that we will see a trend that allows states to regulate in areas like sustainable agriculture without being pre-empted by Congress's Commerce Clause authority.[232]

CONCLUSION

The negative effects of industrialization can be mitigated when food is produced on small farms and distributed locally. State and local governments should embrace policies that promote sustainability in agricultural production. The federal government may have preemptive authority to regulate agriculture on the national level, but this is not a complete barrier to states that want to encourage sustainable practices.

228. Few cases have gone before the Court since *Granholm* was decided, and challengers have not succeeded in any of them. *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (upholding a tax on out-of-state bonds that did not apply to in-state bonds under the market participant exception); *United Haulers Ass'n*., 550 U.S. 330 (upholding legislation that requires in-county disposal of waste at state run facilities under the market participant exception); Am. Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005) (upholding an annual fee placed on *intra*state haulers, even though strictly intrastate haulers are subject to the same fee as mixed haulers who do not receive the same benefits of intrastate commerce as their strictly intrastate counterparts).

229. Chief Justice John Roberts joined the Court in 2005, followed by Justice Samuel Alito in 2006, Justice Sonia Sotomayor in 2009, and Justice Elena Kagan in 2010. *See Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members.aspx (last visited May 13, 2014).

230. *Id.*

231. *See* DIRECTV, Inc. v. Levin, 941 N.E.2d 1187, 1191 (2010), *cert. denied*, 133 S. Ct. 51 (2012).

232. *Compare* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (holding that a Massachusetts state statute favoring small wine producers over large producers violates the dormant Commerce Clause), *and* S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (holding that a South Dakota state statute favoring small farms over incorporated farms violates the dormant Commerce Clause), *with* Black Star Farms LLC v. Oliver, 600 F.3d 1225 (9th Cir. 2010) (holding that an Arizona statute favoring small wine producers over large producers does not violate the dormant Commerce Clause), *and* Coors Brewing Co. v. Mendez-Torres, 787 F. Supp. 2d 149, 172 (D.P.R. 2011), *aff'd in part, vacated in part*, 678 F.3d 15 (1st Cir. 2012) (holding that a Puerto Rico statute favoring small beer producers over large producers does not violate the dormant Commerce Clause).

State and local governments have the ability to craft legislation that does not violate the principles of the dormant Commerce Clause. Some forms of legislation are likely to prevail against a constitutional challenge, like programs that double the value of federal food stamps at farmers' markets or programs that provide direct subsidies to small farms. Other types of legislation, like differential tax treatment, may be less likely to survive, but the unpredictable nature of the dormant Commerce Clause means that the outcome is open-ended.

Chris Erchull[*]

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