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Saving Old McDonald's Farm after South Dakota Farm Bureau, Inc. v. Hazeltine: Rethinking the Role of the State, Farming Operations, the Dormant Commerce Clause, and Growth Management Statutes

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ABSTRACT

Farm production and organization in the United States is changing, shifting from smaller, individual farms to larger, more intensive operations. This change has greatly increased environmental degradation as well as economic and social stratification in rural communities. In response to these problems, several midwestern states have adopted legislation to limit corporate farm ownership. But these statutes generally run afoul of the dormant Commerce Clause and have yet to adequately address the aforementioned conditions, as the Eighth Circuit determined in the 2003 South Dakota Farm Bureau, Inc. v. Hazeltine case. This article argues that many of the agriculturally related environmental harms have less to do with farm ownership than with the aggregation of agricultural operations. By reframing the problem, this article analyzes the Hazeltine decision and proposes a new solution: a statewide growth management regulatory scheme modeled after Vermont’s Act 250. Midwestern states concerned with addressing the problems associated with farm aggregation could adopt this solution and avoid the dormant Commerce Clause problems plaguing the current anti-corporate farming statutes.

INTRODUCTION

For those whose only knowledge of America’s heartland is what they see of it from a plane window, the current state of midwestern
agriculture might come as a surprise. The romantically idyllic image of a small-to-moderately sized family farm producing a variety of our nation's food often portrayed in movies and history books has now largely been replaced by a much more solitary and manufactured reality: Farm production in the United States is largely specialized
\footnote{1. Robert A. Hoppe & Penni Korb, Large and Small Farms: Trends and Characteristics, in \textit{Structural and Financial Characteristics of U.S. Farms: 2004 Family Farm Report} 5, 21 (David E. Banker & James M. MacDonalds eds., 2005) (U.S. Dep't of Agric., Agric. Info. Bull. No. 797), available at \url{http://www.ers.usda.gov/publications/aib797}.} and is aggregating, shifting to larger,\footnote{2. When I refer to the aggregation of farm land and farm operations, I am referring to the aggregation of acres of land or the aggregation/accumulation of livestock on fewer acres of land. For purposes of this article, I consider aggregation to be a form of resource development. The U.S. Department of Agriculture notes that the amount of farm sales may be a better indicator of farm size. Hoppe & Korb, \textit{ supra} note 1, at 21. From statistics provided by Hoppe and Korb, there appears to be a correlation between sales and the number of acres on a farm. \textit{See id.} at 7 fig. 1-3.} more concentrated operations.\footnote{3. Robert A. Hoppe & David Banker, \textit{Production Shifting to Very Large Family Farms}, \textit{Amber Waves}, June 2005, at 6, available at \url{http://www.ers.usda.gov/AmberWaves/June05}.}

There are a number of important outcomes of this agricultural reorganization. Growth in farm size is one such observable outcome.\footnote{4. \textit{See} Hoppe & Korb, \textit{ supra} note 1, at 20-21. Agriculture is not very concentrated by traditional measures, "although concentration is approaching a level for some commodities where it may become a concern." \textit{Id.}} Over the years, the number of individual farms and the number of individuals involved in farming has decreased, but the total amount of farmland has remained relatively stable. Thus, the remaining farms have more acreage on average\footnote{5. The number of farms with fewer than 50 acres also increased; it is the number of mid-sized farms that is in decline. Hoppe & Korb, \textit{ supra} note 1, at 7.} and are likely concentrated in the hands of fewer people.\footnote{6. \textit{Id.} at 5 fig. 1-1. Today the average farm size ranges from 1,000 to 2,200 acres for high-sales small farms, large family farms, and very large family farms. \textit{Id.} at 15.} Data from the U.S. Department of Agriculture Economic Research Service (USDA ERS) show a growing trend in farm size toward large farms, measured both by acreage class and sales class (those farming at least 500 acres or selling at least $250,000 in farm products per year).\footnote{7. U.S. farms are generally still controlled by individual families or, more frequently, family corporations. \textit{See generally} Judith E. Sommer et al., \textit{Structural and Financial Characteristics of U.S. Farms}, 1995: 20TH ANNUAL FAMILY FARM REPORT TO THE CONGRESS 2 (U.S. Dep't of Agric., Agric. Info. Bull. No. 746) (1998), available at \url{http://www.ers.usda.gov/Publications/aib746}.} This fact is important because, as will be seen later in this article, the trend toward aggregation of farm land and farm operations,
particularly in areas such as livestock concentration, can lead to serious degradation in environmental quality.

Despite a trend toward aggregation, a number of small farms, small farming co-operatives, and independently owned farms persist alongside their larger counterparts. Currently, small farming operations "hold about 68 percent of all farm assets, including 60 percent of the land owned by farms." Further, economies in Iowa, Nebraska, and South Dakota (among others) are largely dependent on revenue generated by farming activities; these states use taxes and farm revenue, funneled back into the state in the form of consumer spending, to finance their schools, police and fire departments, and other social programs. However, the move toward larger farms and the aggregation of agri-businesses has radically altered state and local economies, increased environmental degradation, and increased economic and social stratification in these communities.

Fearing increasing "competition and economic threat to family farmers and ranchers and an adverse impact on...traditional family farms and rural communities by large corporate entry," nine midwestern states adopted legislation that limited corporate farming activities and corporate ownership of farmland in an effort to address diminished environmental, economic, and social conditions in rural and farming communities. These states focused on prohibiting non-family owned corporate agri-business in order to address the aforementioned problems. However, in passing the anti-corporate farming legislation, the states also recognized that other factors helped create the problems, noting that "it is the secondary effects of the corporate structure that are

9. The U.S. Department of Agriculture (USDA) defines small farms as those that have annual sales below $250,000. Hoppe & Banker, supra note 3, at 6.

10. Hoppe & Korb, supra note 1, at 12.


13. See NEB. CONST. art. XII, § 8; OKLA. CONST. art. XXII, § 2; S.D. CONST. art. XVII, §§ 21–24; IOWA CODE §§ 9H.1-9H.15 (2001); KAN. STAT. ANN. §§ 17-5902 to 17-5904 (1995); MINN. STAT. § 500.24 (2002); MO. ANN. STAT. § 350.015 (West 2001); N.D. CENT. CODE §§ 10-06.1-01 to 10-06.1-27 (2001); S.D. CODIFIED LAWS §§ 47-9A-1 to 47-9A-23 (2003); WIS. STAT. § 182.001 (2002). Family farm corporations are typically exempt from the ownership restrictions found in the anti-corporate farming legislation. Keith D. Haroldson, Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts, 41 DRAKE L. REV. 393, 403 (1992). In order for a family farm to be exempt from these regulations, "a relationship [must exist] between...shareholders,...[and]...at least one of the shareholders [must] reside at the farm or be actively engaged in the farm's day-to-day labor and management." Id.
problematic—larger operations, absentee ownership, monopolistic effects on local markets, and the associated social and environmental degradation.”

“Amendment E” was South Dakota’s response to the agricultural changes and the problems listed above. Passed in 1998, the constitutional amendment prohibited corporations from acquiring or otherwise obtaining an “interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state.” The law also prohibited corporations from engaging in farming unless the corporation fit within one of the exempted categories.

While Amendment E and other similar laws have faced numerous constitutional challenges, these challenges have remained largely unsuccessful until the Eighth Circuit decided *South Dakota Farm Bureau v. Hazeltine*.

In *Hazeltine*, the Eighth Circuit held that Amendment E violated the dormant Commerce Clause and was unconstitutional. Specifically, the court found that the law was motivated by a discriminatory purpose. Critics of the opinion claim that the decision heralds “the loss of one of the last protections for the family farm and rural economies from corporate concentration” and worry that many other anti-

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16. Amendment E’s 15 exemptions include family farm corporations and syndicates. Id. § 22(1). A family farm corporation or syndicate is “engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family.” Id. Familial membership is limited to those within the “fourth degree of kinship according to civil law, or their spouses.” Id. Other exemptions include farming cooperatives where a majority of the members are “natural persons actively engaged in the day-to-day labor and management of a farm,” id. § 22(2), and non-profit corporations. Id. § 22(3).


18. 340 F.3d 583 (8th Cir. 2003).

19. Id. at 597. Farm activities fall under the dormant Commerce Clause. Therefore, regulating farming activities such as producing, maintaining, and adding value to farm commodities may impact interstate commerce. See Wickard v. Fillburn, 317 U.S. 111, 118-19 (1942) (Commerce Clause applied to production of wheat, even though production was only intended for consumption on the farm).


corporate farming laws face a similar fate. Indeed, many of these laws in other states have language similar to Amendment E and share the "common purpose of protecting the family farm way of life."23

Because the problems facing farming communities and the legislatures in these states are real and pressing, this Article proposes a new way of thinking about agriculture, a state’s natural resources, and land-use planning in the Midwest. The Article begins by briefly laying out a primary cause of a number of problems plaguing midwestern communities and economies: agricultural aggregation. Contrary to the focus of previous state legislatures, the current problems of the farming community are not solely caused by the presence or operation of large national corporations. Indeed, in 2001, 97 percent of farms were some type of family farm and even the largest farms tended to be family farms.24 Given such statistics, and evidence that suggests that farms and farming operations are getting larger (and perhaps more intensive in nature), this article argues that many of the problems facing the Midwest have less to do with farm ownership and more to do with the vertical and horizontal aggregation of agriculture.25 Thus, any solution must adequately address the problem of aggregation and land use.

Part I of the Article begins by discussing some of the problems caused by the aggregation of farm land and farm production, specifically

22. The proverbial writing may already be on the wall for midwestern anti-corporate farms laws. In May 2004, a mere two months after deciding Hazelbine, the Eighth Circuit heard the case of Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004). In Miller, pork processors challenged the Iowa statute forbidding certain pork processors from owning or controlling pork production within the state as a violation of the dormant Commerce Clause. Although the court was unable to determine whether the law possessed a discriminatory purpose, it remanded the case to the district court to determine whether the law “unconstitutionally discriminates against interstate commerce.” Id. at 1066. This case has not been petitioned to the Supreme Court.

More recently, the U.S. District Court for the District of Nebraska heard the case of Jones v. Gale, 405 F. Supp. 2d 1066 (D. Neb. 2005), in which owners of farms and ranches challenged the constitutionality of Nebraska’s Initiative 300, alleging, among other claims, that the Amendment violated the dormant Commerce Clause. Judge Smith held that Initiative 300 was unconstitutional because it had a discriminatory purpose. Further, the court found that the amendment was facially discriminative against interstate commerce by treating out-of-state economic interests less favorably than in-state economic interests. Id. at 1078-83.

24. Hoppe & Korb, supra note 1, at 11.
25. This Article focuses on horizontal integration; however, who may own/run the farm may become an issue, particularly in cases of vertical concentration. If a small number of firms dominate any industry, then who or what organization makes up that industry may make a difference for the purposes of anti-trust and market power inquiries.
focusing on environmental and natural resource issues. Based on studies that show that as farm size increases, environmental degradation also increases, Part I advances a hypothesis that demonstrates a correlation between increased environmental degradation and the aggregation of agri-business. This Part further notes that if a state were to implement the regulatory model suggested at the end of this Article, it would have to provide empirical evidence of this correlation before the scheme can be implemented and pass constitutional muster. This Part of the Article concludes by noting that midwestern states may enact laws, including land-use laws that may have incidental effects on interstate commerce, if the laws are enacted to protect a legitimate judicially recognized interest like protection of a state’s environment.

Part II briefly explains the Midwest’s previous solution to the problems discussed in Part I, focusing on South Dakota’s Amendment E. This Part then reviews the rationale underlying the Eighth Circuit’s decision in Hazeltine to strike down Amendment E as unconstitutional. Part III begins by examining how Vermont has maintained the state’s cultural and natural resources while addressing the issue of development. Specifically, this Part looks at Vermont’s land management statute, Act 250, and describes how the Act works and why application of Act 250 has survived past dormant Commerce Clause constitutional challenges.

Finally, Part IV proposes a land use regulatory scheme, modeled after Vermont’s Act 250, that will provide the desired protection to the Midwest environment, rural communities, and state economies. This Part describes how applying a statewide growth management strategy similar to Vermont’s Act 250 in the Midwest would not only promote farm-size diversity and environmental sustainability, but would also avoid the dormant Commerce Clause problems plaguing the current anti-corporate farming statutes. Ultimately, this Article demonstrates that, based on legal precedent and innovative land use strategies, a Midwest state legislature is not powerless to “protect and conserve the lands and the environment of the state...to insure that these lands and environment are devoted to uses that are not detrimental to public welfare and interests....”

I. REFRAMING THE PROBLEM

Since World War II, the total number of farms in the United States has declined while the remaining farms have continued to grow

larger in size, encompassing more acreage. Data from the USDA ERS show a growing trend in farm size toward large farms, measured both by acreage class and sales class (those farming at least 500 acres or selling at least $250,000 in farm products a year). So who owns these large farms? While the “control of farm production by large-scale corporate farms has long concerned social scientists,” the largest farms in terms of sales tend to be family farms, and these large family farms operate more acreage (on average) than non-family farms. In fact, while “[l]arge and very large family farms make up only 7 percent of total U.S. farms, they produce more than half (58 percent) of agricultural production.” As of 2001, 97 percent of farms in the United States were family farms; conversely, the share of farms and sales accounted for by non-family corporations is small (approximately 14 percent) and has been relatively stable since 1978.

If corporate entry into agriculture is not the root cause of the waning number of mid-size farms and declining environmental, economic, and social conditions in the midwestern states, the debate surrounding the current agricultural situation in this region needs to be re-framed. As noted above, it does not appear as though the real problem is being addressed, and the above statistics from the USDA ERS seem to support the hypothesis that something else—for example, aggregation—is the true culprit. Non-family corporate ownership may play a role in the problem, but the current anti-farming legislation has been too shortsighted, focusing on a political foe that does not seem to be the only suspect. Until politicians, state agencies, and citizens are willing to re-examine the situation, taking into account statistics and conducting further studies to determine the real cause of the problems, any future solutions will be considered politically and culturally reactive by the courts and will continue to be struck down as unconstitutional.

27. Hoppe & Korb, supra note 1, at 5.
28. Id. at 20.
30. Hoppe & Korb, supra note 1, at 11, 16 & fig. 1-2.
31. Id. at 12. See also id. at 20 (“The share of production accounted for by farms with sales of at least $250,000...grew from 51 percent in 1982 to 72 percent [in] 1997.”). Large family farms and very large family farms are categorized as farms with sales between $250,000 and $499,999 and farms with sales of $500,000 or more, respectively. U.S. Dep’t of Agric., Econ. Research Serv., Briefing Rooms: Farm Structure: Glossary, http://www.ers.usda.gov/Briefing/FarmStructure/glossary.htm (last visited Jan. 16, 2006).
32. Hoppe & Korb, supra note 1, at 11-12 & figs. 1-6, 1-7.
Consequences of Agricultural Aggregation

For a number of midwestern states, the proverbial chickens have come home to roost: the evolution of agriculture toward larger, more industrial farming operations has, in part, "depopulated the countryside, destroyed the economic and social texture of small towns, and made certain that ordinary [citizens] are defenseless against the pollution of factory farming." Indeed, a number of social scientists have studied the connection between the viability, health, and sustainability of rural communities and the structure of agriculture. In the 1940s, anthropologist Walter Goldschmidt found that "communities surrounded by large-scale farms fared poorly, on a number of important social indicators, when compared to communities surrounded by small-to-moderate farms." Further, Dean MacCannell found that, "[a]s farm size and absentee ownership increase, social conditions in the local community deteriorate." Included in this deterioration, arguably, is the deterioration of the region's environmental and natural resources. Although the environmental consequences of agricultural aggregation have rarely been considered in these types of studies on rural welfare, there is emerging concern about this predicament, and it should be considered by Midwest legislatures when addressing the problems associated with aggregation.

33. Verlyn Klinkenborg, Keeping Iowa's Young Folks at Home After They've Seen Minnesota, N.Y. TIMES, Feb. 9, 2005, at A22.

34. Rick Welsh & Thomas A. Lyson, Anti-Corporate Farming Laws, the "Goldschmidt Hypothesis" and Rural Community Welfare 2 (Aug. 2001) (based on a paper presented at the annual meeting of the Rural Sociological Society), available at http://www.i300.org/anti_corp_farming.htm (last visited Feb. 6, 2006). It is not clear whether the authors are talking about large scale farms in terms of acres or, keeping in line with the USDA definition of large farms, in terms of sales. It would appear from the context of the article, however, that they are referring to operations with more acreage.


36. See, e.g., Hoppe & Korb, supra note 1, at 21 (warning that "[t]he effects of [agricultural] concentration on the environment may actually be more of a concern than effects on market power"). See also NAT'L COMM'N ON SMALL FARMS, supra note 35, at 9 (noting the "tendency of the large agricultural integrators to...pass both the risks and costs on...to society at large in the form of water and soil pollution").

37. This is not a well-studied area. Indeed, if a state were to implement the regulatory model suggested in this article, it would have to provide specific empirical evidence of the correlation between aggregation of farm land and farm operations and harm to natural resources before the scheme can be implemented and pass constitutional muster. One way
All farming operations, big or small, have some negative environmental impact on the land. Nauseating odors caused by livestock operations can be smelled for miles. Pesticides may run off into surface water, causing contamination of larger water systems downstream. Exposure to the elements may erode precious top soil and contribute to sedimentation of lakes and rivers. Further, agricultural practices constitute the largest use of water resources. Therefore, it is clear that no farm is entirely environmentally friendly, and both large and small farms must engage in efforts to preserve the state’s environmental resources.

However, the conventional wisdom is that small farms do not produce the same harms to the environment that large farms produce. This belief stresses that ties to the community—who wants to admit to their neighbors that it was their hog lot that caused the contamination of the local well water?—and greater environmental awareness through familiarity with the community’s land have generally meant that small farm operators have acted as better stewards of the land than larger farm operators.

This wisdom may be supported by the findings of a study performed by K. Hadri and J. Whittaker. In that study, Hadri and Whittaker found that, while small farms may not be more environmentally benign, there is a slight correlation between increased

38. For further discussion of farms and environmental impact, see J.B. Ruhl, Farms, Their Environmental Harms, and Environmental Law, 27 ECOLOGY L.Q. 263 (2000).
39. See, e.g., Dean Smith, Comment, Soil Depletion in the United States: The Relationship Between the Loss of the American Farmer’s Independence and the Depletion of the Soil, 22 ENVTL. L. 1539, 1563 (1992) (“The accelerated loss of soil relates to the increased size of farms....”). See also NAT’L COMM’N ON SMALL FARMS, supra note 35, at 8 (“Small farms contribute more than farm production to our society....Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits.”). However, not every one shares this sentiment. But see Jim Chen, Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation, 48 OKLA. L. REV. 333, 337 (1995) (stating that “smallness and family ownership bear a negative correlation to environmental protection”); Ruhl, supra note 38, at 332-33 & n.397 (questioning whether a “small is better” mentality proves true with regard to environmental protection).
40. Chen, supra note 39, at 336 (Chen disputes this belief but notes that, “[a]ccording to agrocological dogma, not every farmer is an equally capable steward, and not every farm deserves the same measures of environmental trust. Small farms are better and small family farms are best.”).
farm size and greater use of environmental contaminants.\footnote{Id. at 353.} Given this finding, it would make sense that aggregation of agriculture, resulting in larger, more resource-intensive farms, has the potential to cause more or greater levels of environmental damage in a community than non-aggregation.

Simply taking a closer look at some of the current environmental problems caused by larger farm operations may support the correlation found by Hadri and Whittaker:

\begin{quote}
The rise of corporate farm operations has led to more industrialization in farming—where one type of operation is done on a mass scale...in livestock production, greater concentrations of animals are confined in smaller areas resulting in serious odor problems and ground and surface water contamination from large manure lagoons.\footnote{Brekken, supra note 14, at 351-52.}
\end{quote}

Furthermore, remember that it is large and very large farms that produce over half of all agricultural products, including livestock.\footnote{Hoppe & Korb, supra note 1, at 12-15 & figs. 1-7, 1-11. “The share of production accounted for by farms with sales of at least $250,000...grew from 51 percent [in] 1982 to 72 percent [in] 1997.” Id. at 20.} Thus, it would appear that the ability of a farm to purchase and raise more animals creates a difference in the amount of waste created and the potential for sustainable management.\footnote{Simply stated, raising 1,000 head of cattle on ten acres does not create the same level of environmental detriment that raising 100,000 cattle on the same amount of acreage does. See Hoppe & Korb, supra note 1, at 21 (“The concentration of livestock production on fewer farms and less land can lead to environmental problems if farms raising livestock do not have enough land to absorb the manure produced.”).} As Linda Lobao noted in her book, \textit{Locality and Inequality: Farm and Industry Structure and Socioeconomic Conditions}, “There is evidence that large industrialized farms are associated with certain environmental damages because they have more resources that enable them to engage in excessive detrimental practices.”\footnote{LOBAO, supra note 29, at 221.} Therefore, it is possible to argue that farm size does matter when looking at the amount and type of environmental damage.

\textbf{States' Right to Protect Their Environment via a Regulatory Scheme}

The contamination of water, air, and soil caused by the aggregation into larger-scale farming operations impacts all state citizens—whether they are directly involved in farming or not.
Recognizing the "tendency of the large agricultural integrators to...pass both the risk and costs on...to society at large in the form of water and soil pollution," as well as the fact that the "structure of corporate-owned farms leads them to be poor neighbors to rural communities, and poor stewards of the land," in passing anti-corporate farming statutes, it would appear as though midwestern legislatures were expressing an interest in using regulatory schemes to remedy environmental and health problems caused by an unfettered development of these resources.

The Supreme Court has recognized that a state has "'every right' to protect 'its residents'...'environment,'" and that a state's interest in preserving natural resources like water is "well within its police power." Another example where a court has upheld a regulation preserving a state's natural resource against a dormant Commerce Clause challenge occurred in New York State Trawlers Ass'n v. Jorling. New York amended its Environmental Conservation Law to prohibit

47. NAT'L COMM'N ON SMALL FARMS, supra note 35, at 9.
50. Sporhase v. Nebraska, 458 U.S. 941, 946 (1982). The Court held, however, that Nebraska's reciprocity requirement that other states share water resources in order to receive water from Nebraska operated as "an explicit barrier to commerce between...States." Id. at 957.
51. 16 F.3d 1303 (2d Cir. 1994). See also Maine v. Taylor, 477 U.S. 131, 140 (1986) (upholding a facially discriminatory Maine statute prohibiting the importation of out-of-state baitfish); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (upholding city's smoke abatement ordinance on steam vessels operating in interstate commerce); United States v. McDougall, 25 F. Supp. 2d 85 (N.D.N.Y. 1998) (upholding ban on the transportation of American eels). It is important to note that not all regulations dealing with natural resource protection have been upheld against dormant Commerce Clause challenges. The Supreme Court has "consistently recognized that resource protection is not a sufficiently legitimate state concern that would justify overt interference with interstate commerce," Thompson, supra note 49, at 225, where such protectionism constitutes hoarding of a state's resource and where "protectionist effects...lie in the means as well as the ends." Id. at 228. See also Christine A. Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1, 4 (2003) (arguing that "the modern Court has been consistently hostile to environmental regulation" and as a result, "both federal and state efforts to protect the natural environment have been rendered constitutionally suspect").

However, the instant case is not illustrative of a state impermissibly hording its natural resources. The argument here is more about regulation of resource development than protectionist resource conservation at the expense of out-of-state commercial actors. Moreover, as will be shown in Part IV of this article, unlike the cases where the Supreme Court has struck down the state regulation as unconstitutional, the proposed growth management solution is not protectionist in either its means or its ends.
anyone who owned or operated a vessel equipped with trawling nets from taking, landing, or possessing lobsters in Long Island Sound. The Trawlers Association sued, alleging, among other claims, that New York's law violated the dormant Commerce Clause. The Second Circuit noted that, although the law differentiated "between New York residents and non-residents for the purpose of issuing lobster permits, its prohibition of the possession or taking of lobsters by trawlers applie[d] equally to resident and non-resident trawlers." Further, important to the court's decision was the fact that the law was trying to prevent the death and subsequent waste of a unique New York natural resource, the lobster. Holding that the law did not impermissibly burden interstate commerce, the court stated that "protection of the environment and conservation of natural resources— including marine resources—are areas of 'legitimate local concern.'" 

These case findings reflect the courts' understanding that when business activities have a negative impact on a state's unique natural resources—the Midwest's unique resources are its land and soil—the state is able to express its legislative concern by enacting laws that protect the health and welfare of its citizens, even if that regulation incidentally affects interstate commerce. Thus, in the Midwest's case, doubt as to the legitimacy of the states' interest in regulating the use of their natural resources when they passed the anti-corporate farming statutes is diminished; however, Midwest legislatures may not have found a constitutional method by which to adequately address the problems associated with farm aggregation.

II. THE EVOLUTION OF SOUTH DAKOTA'S ANTI-CORPORATE FARMING LEGISLATION

In passing the now-contested anti-corporate farming legislation, it appears as though midwestern legislatures were attempting to rectify a problem decades in the making: the situation stemming from "the... wholehearted, uncritical embrace of industrial agriculture." South Dakota's anti-corporate statute, Amendment E, grew out of the same

52. Jorling, 16 F.3d at 1307.
53. Id. at 1308 (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)).
54. See, for example, the Eighth Circuit's comment in Hazeltine where it recognized that "promoting family farms is a legitimate state interest," and "environmental protection is equally legitimate." Hazeltine, 340 F.3d at 597.
55. See Klinkenborg, supra note 33 (editorial discussing how the Iowa state legislature is attempting to spur economic development and prevent a "brain drain" following the "social erosion" caused by the state's boom in industrial agriculture).
situational history: agricultural trends throughout the country, including in South Dakota, showed an increase in the size of farms but a decrease in overall farm population. Although legislative reports concluded that “the presence of farm corporations in South Dakota [did] not appear to be a major cause of rural decline,” there was concern that the agricultural trends, and subsequently diminishing economic, social, and education standards in rural areas, were being caused by “large corporate entry and ‘expansion of nonfarm investment in agriculture.’” Amid the “fears of increased competition” and fear of “a decline in family farm ownership,” the South Dakota legislature passed the Family Farm Act of 1974.

As the precursor to Amendment E, “the Family Farm Act was aimed...at restricting new corporate expansion and curtailing the growth of existing farm corporations.” For a time, the Family Farm Act seemed to address the interests of local agri-businesses and the needs of the South Dakota economy. However, in 1988, the state became the target for expansion in hog production facilities. The impetus for this targeting was the attorney general’s interpretation of the Family Farm Act’s scope: “[C]ontrary to the intent of the Act, the Attorney General narrowly construed the language of the [Family Farm Act, opening] the door for major feeding operations [to relocate/expand operations] in the state....” Upset by the results of the Attorney General’s opinion, anti-corporate legislation proponents sought to further restrict corporate presence in the state; Amendment E, a constitutional amendment, was presented as the vehicle by which to accomplish this goal.

Proponents of Amendment E argued that its passage was necessary to “prevent corporate manipulation of livestock markets, protect the environment, and safeguard the social and economic well-being of rural communities.” Those against the measure argued that it

57. Id. at 805 (quoting John C. Pietila, Note, “[W]e’re Doing This to Ourselves”: South Dakota’s AntiCorporate Farming Amendment, 27 J. CORP. L. 149, 153 (2001)).
58. Id.
59. Id.
61. Banks, supra note 12, at 806.
62. Id.
63. Brekken, supra note 14, at 356.
64. Banks, supra note 12, at 807.
65. Pietila, supra note 57, at 156.
would “fail to achieve its proposed objectives.”\footnote{Banks, supra note 12, at 807. Opponents also argued that the amendment would “harm access to capital and financing for family farmers and cooperatives.” Id.} Put to a vote, Amendment E garnered approval from nearly 60 percent of voters and was adopted in 1998.\footnote{Pietila, supra note 57, at 157.} The constitutional amendment prohibited corporations from acquiring or otherwise obtaining an “interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state”\footnote{S.D. CONST. art. XVII, § 21.} but specifically exempted family farm corporations and syndicates, regardless of size.\footnote{Id. § 22(1).}

Though the scope of Amendment E’s regulatory scheme did not appear to be supported by empirical evidence,\footnote{See supra note 56 and accompanying text. See also supra Part I.} and although other anti-corporate farming statutes had been subject to constitutional challenges,\footnote{See generally Asbury Hosp. v. Cass County, 326 U.S. 207 (1945) (upholding North Dakota farm regulatory law that divested corporately owned farm land, against Privileges and Immunities Clause, Contract Clause, due process, and equal protection challenges); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (upholding Nebraska constitutional amendment restricting non-family farm corporate activities against equal protection challenge); Omaha Nat’l Bank v. Spire, 389 N.W.2d 269 (Neb. 1986) (dismissing an equal protection challenge to Nebraska’s anti-corporate farming laws).} Amendment E continued to be good law until the \textit{Hazeltine} decision.

**Dormant Commerce Clause**

The dormant Commerce Clause provides that states may not enact laws that discriminate against or unduly burden interstate commerce.\footnote{Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).} “Although it is often categorized as a confusing and impracticable judicial creation,”\footnote{Banks, supra note 12, at 813.} courts employ the dormant Commerce Clause in order to fulfill the “Framers’ purpose to ‘prevent[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.’”\footnote{Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996) (quoting Okla. Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995)).}

A state law or regulation challenged on dormant Commerce Clause grounds is subject to a two-tiered test. The first question in a dormant Commerce Clause analysis is whether the state’s action discriminates against interstate commerce. A law may be facially
discriminatory or discriminatory in its purpose or effect. If the law is facially discriminatory, it is per se invalid unless the state can advance a compelling and legitimate non-economic interest and show that it has no other means to advance that interest. The state’s burden under this prong is “a heavy one that proponents rarely overcome.”

If the law is facially neutral—that is, it regulates even-handedly against both in-state and out-of-state groups—the test’s second tier, the so-called Pike balancing test, states that the law will be struck down only if the “burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Under the Pike balancing test the courts look to see whether the statute regulates even-handedly, effectuates a legitimate local public interest, and whether the effects on interstate commerce are only incidental. Courts have greater judicial deference in analyzing statutes under this tier.

Hazeltine’s Facts and Procedural History

After Amendment E was added to the South Dakota Constitution in 1998, 13 plaintiffs brought suit alleging that the amendment violated the dormant Commerce Clause. Among the parties challenging the legality of Amendment E were two South Dakota corporations, an unincorporated livestock-feeding business in South Dakota, an Arizona cattle ranch corporation that did business in the state, and the South Dakota Farm Bureau. The plaintiffs sought a declaratory judgment that Amendment E was unconstitutional and an injunction prohibiting state officials from enforcing the Amendment.

The district court agreed with the plaintiffs’ argument and concluded that Amendment E was unconstitutional. In applying a dormant Commerce Clause analysis to the facts of the case, the district

77. Taylor, 477 U.S. at 138.
78. Banks, supra note 12, at 814 (citing Taylor, 477 U.S. at 151–52) (citation omitted).
80. Id.
81. A small subset of the plaintiffs also alleged that Amendment E violated the Americans with Disabilities Act. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587 (8th Cir. 2003). Consideration of those claims is beyond the scope of this Article.
83. Id.
court found that the Amendment was facially discriminatory against out-of-state corporations, and that the law's burdens on interstate commerce were excessive compared to the local benefits of protecting the environment and family farms. The South Dakota secretary of state and the state attorney general appealed the decision to the Eighth Circuit Court of Appeals.

The Eighth Circuit reviewed the case de novo but ultimately agreed with the district court's determination that Amendment E violated the dormant Commerce Clause. The Eighth Circuit noted that there was direct evidence that the drafters of Amendment E intended to discriminate against out-of-state businesses. The court specifically noted that "[t]he record contains a substantial amount of such evidence...the most compelling of which is the 'pro' statement on a 'pro-con' statement compiled by Secretary of State Hazeltine and disseminated to South Dakota voters prior to the referendum." The statement told voters that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers...or fall into the grasp of a few large corporations." The court found that the "pro" statement was brimming with "protectionist rhetoric."

The court rejected the State's argument that the record contained sufficient and accurate information to support Amendment E's goals. Although the court accepted the State's argument that "promoting family farms is a legitimate state interest" and "environmental protection is equally legitimate," it noted that, because the "evidence in the record demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less drastic alternatives," it was unlikely that "Amendment E would actually be an effective remedy for the problems it was purportedly designed to address." Thus, the court found that the amendment was exactly the type of law the dormant Commerce Clause was designed to protect against.

Given the court's finding that Amendment E was motivated by a discriminatory purpose, the State was forced to demonstrate that it had no other method by which to advance its legitimate local interests. The Eighth Circuit noted that the focus of this part of the test is of the

84. Id. at 1050.
85. Hazeltine, 340 F.3d at 592.
86. Id. at 593–94.
87. Id. (quoting Constitutional Amendment E: Attorney General Explanation).
88. Id. at 594 (quoting SDDS, Inc. v. South Dakota, 47 F.3d 263, 268 (8th Cir. 1995)).
89. Id. at 597.
90. Id. at 595.
"strictest scrutiny." Thus, the court’s focus was not on the strength of the interests advanced by the challenged law, but whether “reasonable non-discriminatory alternatives exist to advance the interests.” Here the court found that the State failed to meet its burden because it could not present evidence that it had tried to advance its interests through other non-discriminatory alternatives. Ultimately the court concluded that Amendment E violated the dormant Commerce Clause.

III. VERMONT’S SOLUTION: INNOVATIVE MEANS TO ADDRESS EMERGING LAND USE HARMs

One remedy to the harms stemming from aggregation is to control the problem through land use planning, specifically growth management statutes. The success of any growth management statute relies on a state-wide vision of the type of culture and economy that the state legislature wants to promote, as well as a comprehensive management plan for the unified use of the state’s resources. Growth management statutes are intended to “delay or prevent unwanted changes in the character of the community,” and one model successful in achieving this goal is Vermont’s Act 250.

As this Part will show, Act 250 is a regulatory scheme based on a comprehensive holistic view of how Vermont hopes to shape its overall rate of development and land use. This goal is accomplished in a manner consistent with the requirements of the dormant Commerce Clause.

Introduction to Vermont’s Act 250

In 2004, the entire state of Vermont, a small rural state with 600,000 inhabitants, was placed on the National Trust for Historic Preservation’s list of the eleven most endangered historic places. The catalyst for this listing was Wal-Mart’s proposal to locate seven new...
mega-stores in various sites throughout Vermont. But Vermont’s campaign to maintain its cultural identity and preserve its famous natural resources by regulating economic growth began before the National Trust’s listing.

Vermont’s economy has long been supported by farming and logging and the tourists who come to the state to enjoy its “beautiful natural environment.” However, an increase in tourism over the last 50 years has led to pressure for the importation and development of national retail chains. By exercising local planning and zoning powers, rural towns in southern Vermont were the first to address concerns over the sustainability of development in the state. However, given a municipal government’s limited jurisdiction, environmentalists raised concerns that not enough was being done to curb sprawl and protect the regional natural resources from the unfettered development that spilled across jurisdictional boundaries. Responding to public demand for a different system of land use control and more government involvement,}

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97. This is not to say that, at the time of the National Trust’s listing, there were no Wal-Marts located in Vermont. According to the National Trust for Historic Preservation, “During the 1990s Wal-Mart located three of its four Vermont stores in existing buildings and kept them relatively modest in size.” Id. The relatively small size of the stores, their location, and the fact that the pervasiveness of the stores was kept to a minimum allowed small retailers in Vermont communities to adequately compete with the big-box giant. See generally Dwight H. Merriam, Nonplussed About Nonpareil: Wal-Mart as a Land Use Phenomenon, ZONING & PLAN. L. REP., Dec. 2004, at 1. In contrast, if Wal-Mart were allowed to build mega stores, the demands for retail floor space and sufficient parking would require stores to be located outside of the village’s traditional area and would “shift[] retail activity outside of established commercial areas.” Patricia E. Salkin, Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail, 6 VT. J. ENVTL. L. 55, 65 (2004–2005) (internal quotes omitted). Drawing tourists away from the retail area would likely result in a “degradation of [Vermont’s] unique sense of place, economic disinvestment in historic downtowns, loss of locally-owned businesses, and an erosion of the sense of community that seems an inevitable by-product of big box sprawl.” Nat’l Trust for Historic Preservation: Vermont, supra note 96.


100. Dreisewerd, supra note 98, at 328.

101. See id. (discussing a growing national concern that local governments cannot adequately address trans-jurisdictional environmental problems, including those problems found in Vermont).
The Vermont legislature passed the Vermont State Land Use and Development Act of 1970 (Act 250).102

The Mechanics of Act 250

Vermont’s growth management plan “has sought the sustainable development ideal in its recognition of carrying capacity, its commitment to conservation of farm, forest lands, energy and wildlife resources,...its limits placed upon extinction of non-renewable natural resources and its permitting of a community’s development conditional upon protecting natural resources.”103 Indeed, Act 250’s stated purpose is to “protect and conserve the lands and the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests.”104 The Act, a growth control statute, achieves this goal by “plac[ing] explicit limits on the overall rate of development within a locality.”105 Specifically, Act 250 develops a comprehensive, state-administered growth management program that requires case-by-case project review.106 Even though the program requires the state to “directly review...most large development projects, permit[ting] only those that comply with set criteria,”107 “Act 250 [does] not supplant local control of land use decisions. Rather, it ensure[s] a system of concurrent control, both at the state and municipal levels, by providing an overlay on local planning and zoning.”108

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103. BROOKS ET AL., COMMUNITY SUSTAINABILITY, supra note 98, ch. 1, at 3.
105. Shoemake, supra note 95, at 897. As Shoemake notes, growth control ordinances or statutes are enacted with at least one of two purposes in mind: (1) “to ensure that development within a jurisdiction does not proceed so quickly that the local government is unable to meet the increased demands on it for public services,” id. at 897, or (2) “to delay or prevent unwanted changes in the character of a community.” Id. Although it is the second purpose that this article focuses on, it should be noted that Vermont lacks a general statewide development plan requiring local governments to plan in conformance with statewide goals. This drawback means that “growth is ‘managed,’ if at all, in a piecemeal fashion.” Id. at 904. See also Jay, supra note 99, at 951 (“Act 250...,reformed or not, still fails to prospectively address large-scale statewide development.”).
107. Id.
108. Dreisewerd, supra note 98, at 330. See the notes accompanying Dreisewerd’s article for a more detailed explanation of the structure and legislative history of Act 250. However, as Dreisewerd argues, “the enactment of local and regional land use laws is...authorized by the Vermont Planning and Development Act.” Id. n.37 (citing VT. STAT. ANN. tit. 24, §§ 4301–4494 (1997)). The Planning Act was amended in 1988 by the Vermont
The Act requires “state review and permitting of projects of regional significance.”\textsuperscript{109} The Vermont legislature appears to have tied Act 250’s review triggering mechanism, or the development’s characteristic that makes it a “project of regional significance” subject to permitting review, to the size and location of the project. Indeed, “the threshold level of review is very low as it affects all public and private construction projects involving ten or more units,”\textsuperscript{110} “industrial or commercial developments of over ten acres...and developments above an elevation of 2500 feet.”\textsuperscript{111} By requiring a case-by-case review and focusing on the size and location of a project, rather than ownership, to determine who must apply for a permit, the state ensures that it is not favoring certain types of development over others and that both in-state and out-of-state developers will be required to appear before the district environmental commission.\textsuperscript{112}

Once it has been determined that a developer must obtain an Act 250 permit before proceeding with the project, the commission must determine whether the project conforms with local and regional land use plans,\textsuperscript{113} and whether “all of the pertinent criteria have been met.”\textsuperscript{114} Act 250 provides a list of ten conditions to assist the commission members in

\textsuperscript{109} Growth Management Act (Act 200) and this amendment “strengthened the state and regional planning process.” \textit{Id.} n.37 (citing \textsc{VT. STAT. ANN. tit. 24, §§ 4341, 4345a, 4347, 4348 (1997)}). As amended, the Act provides for the creation of regional planning commissions that “prepare regional development plans that guide and encourage appropriate economic development.” \textit{Id.} While municipalities are not required to participate in the regional planning commissions, “if a local growth management plan is not approved under the Planning Act, only the regional plan, and not the local plan, will be considered during the Act 250 permit-review process.” \textit{Id.} (citing \textsc{DANIEL R. MANDEKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 867 (4th ed. 1995)}).

\textsuperscript{110} Salkin, \textit{supra} note 97, at 64. “Act 250 created nine district environmental commissions throughout the state. The power to issue permits is vested in the district commissions.” Dreiseward, \textit{supra} note 98, at 331–32. Before a recent amendment to the statute, a challenge to a district commission’s decision was appealed to the Vermont Environmental Board and Board decisions were appealable to the Vermont Supreme Court. \textsc{See} Shoemake, \textit{supra} note 95, at 903.

\textsuperscript{111} Jay, \textit{supra} note 99, at 949.

\textsuperscript{112} Shoemake, \textit{supra} note 95, at 903.

\textsuperscript{113} Also important to note for purposes of a dormant Commerce Clause analysis is the fact that Act 250’s definition of “person” is extremely broad and includes any “individuals or entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.” \textsc{See} \textsc{VT. STAT. ANN. tit. 10, § 6001(14)(A)} (LexisNexis Supp. 2005). Furthermore, this definition does not seem to draw a distinction between out-of-state permit applicants/developers and in-state permit applicants/developers.

\textsuperscript{114} \textsc{VT. STAT. ANN. tit. 10, § 6086(a)(10)} (LexisNexis Supp. 2005).

\textsuperscript{115} Jay, \textit{supra} note 99, at 949.
making permit determinations. The act's criteria require that the commissioners consider the environmental, social, and economic impacts of a proposed development on the town or region where the development will be located. For example, the district commission must make findings that the subdivision or development will not result in "undue water or air pollution" or "cause unreasonable soil erosion." Further criteria require that the district commission consider whether the project will have an "undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites[,] or rare and irreplaceable natural areas." Additional conditions were later added to specifically address growth control concerns: "These criteria require the district commissions and the [Vermont] Environmental Board to consider as part of the application review process the anticipated additional costs of education, public services, and facilities associated with a proposed development" and any "other factors relating to the public health, safety and welfare...."

Act 250 includes a number of procedural safeguards for the dissatisfied applicant whose permit is denied; decisions made by the district commissions may be appealed to the environmental court. However, the commission's wide degree of discretion in both interpreting and applying the criteria provides a "number of bases on which to deny a development permit...[and] creates the possibility that Act 250 may be used in a manner that encroaches on constitutional protections like the dormant Commerce Clause."

**Constitutional Challenge to Act 250: Omya, Inc. v. Vermont**

Over the past ten years, denials of development permits based on Act 250 criteria have been subject to a number of challenges. One such relevant example occurred in 2002, when the Second Circuit heard the case of *Omya, Inc. v. Vermont.* There, the plaintiff, a quarry operator, challenged the constitutionality of the Vermont Environmental Board's order limiting the number of truck trips allowed between the quarry and the processing center. Specifically, the plaintiff in *Omya* appealed the Board's refusal to grant an exemption to the restriction on the number of

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116. Id. § 6086(a)(1), (4).
117. Id. § 6086(a)(8).
118. Dreisewerd, supra note 98, at 333–34.
120. Id. § 6089.
121. Shoemake, supra note 95, at 905.
122. Omya, Inc. v. Vermont, 33 F. App'x 581 (2d Cir. 2002).
daily round-trips permitted by plaintiff's tractor-trailer trucks transporting goods through Brandon, Vermont, claiming that the restriction had a disparate effect on interstate commerce and thus violated the dormant Commerce Clause.

The Second Circuit began its analysis by looking at whether Act 250 or the Board's permit restriction facially discriminated against interstate commerce. The court concluded that neither was discriminatory. It noted that neither Act 250 nor the permit restriction "imposes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" The court found that, without evidence of discriminatory intent, "the mere fact that plaintiff alone has been burdened by the scheme is not sufficient to trigger heightened review."

Moving to the second tier of the dormant Commerce Clause analysis, the court, without much analysis, stated that Act 250 did not have a disparate effect on interstate commerce. Further, even if Act 250 did have a disparate impact on interstate commerce, the court found that the regulation satisfied the Pike balancing test. Because the "permit restriction significantly enhances aesthetic and historic preservation goals and helps reduce traffic congestion," the court concluded that "any marginal burden imposed on interstate commerce is unquestionably not 'clearly excessive in relation' to these benefits." For these reasons, the Second Circuit concluded that Act 250 and the Environmental Board's permit denial did not violate the dormant Commerce Clause.

IV. GROWTH MANAGEMENT STATUTES IN THE MIDWEST: UTILIZING VERMONT'S STRATEGY TO PROMOTE SUSTAINABLE LAND USE PRACTICES

In the first part of this article, the debate on the current state of agri-business in the Midwest was reframed and the cause of the current problems redefined. The article ultimately noted that any state-

123. Id. at 581.
124. Id. In his appeal to the district court, the plaintiff also claimed that the regulations violated the Supremacy, Equal Protection, and Due Process clauses. The district court dismissed all claims. On appeal, the plaintiff argued that the district court erred in dismissing the Commerce Clause and Supremacy Clause claims. Id. at 582.
125. Id. at 582–83.
126. Id. (quoting Automated Salvage Transport v. Wheelabrator, 155 F.3d 59, 74 (2d Cir. 1998)).
127. Id. at 583.
128. Id.
129. Id. (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
sanctioned solution to the loss and destruction of natural resources, and subsequent harm to the state’s citizens and economy, must adequately address the problem of aggregation. A state is entitled to enact legislation that defends a legitimate state interest, like preservation of a state’s environment, but it must do so in a constitutional manner. Like the Midwest, Vermont is dealing with environmental and economic problems stemming from increased and unfettered development of the state’s land. However, while many midwestern states’ previous solutions—like South Dakota’s Amendment E—were too politically reactive, “brimming with protectionist rhetoric,” Vermont has successfully addressed its development problem in a way that is not only effective in protecting its natural resources, but is constitutional as well.

Part IV argues that, if states like South Dakota follow the spirit as well as the general format of Vermont’s Act 250, the regulatory scheme is unlikely to run into problems with the dormant Commerce Clause. While Act 250 was upheld against dormant Commerce Clause in Omya, it is important to expand on the Second Circuit’s analysis to fully understand why a growth management statute structured like Act 250 would be upheld under myriad factual challenges. Thus, Part IV of this article subjects Act 250 to a rigorous dormant Commerce Clause analysis, clearly explaining why Vermont officials have acted constitutionally when they implemented, and continue to implement, the Act’s provisions. By analogy, if a midwestern state were to adopt a similar regulatory model, supported by studies and evidence that link the state’s environmental problems to aggregation, this growth management scheme would also survive a dormant Commerce Clause challenge.

130. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003).
131. This is not to say that no dormant Commerce Clause challenge would succeed. Scholars have noted that there is a “difficulty of predicting the outcome of dormant Commerce Clause cases generally.” Shoemake, supra note 95, at 920. However, for purposes of arguing that similar statutes should be enacted in midwestern states in order to provide these states with a way to protect their citizens against the harms of aggregation, it is fairly certain that such regulatory schemes would survive this type of constitutional challenge.
132. The analysis in Part IV draws heavily on the analysis by Shoemake, supra note 95, with the addition of new case law and insights of my own.
133. Given the physical, historical, and cultural differences between Vermont and midwestern states, a wholesale implementation of Act 250, without modifications, would not adequately address development problems in the Heartland. Therefore, state legislatures must modify certain mechanics of such an act.
A Growth Management Statute Modeled after Act 250 Is Not Discriminatory in Its Purpose

If a foreign plaintiff could prove that either the Vermont Legislature or the Environmental Board intended to discriminate against out-of-state entities by enacting Act 250 or creating subsequent regulations, the plaintiff would succeed in proving a dormant Commerce Clause violation. However, finding direct evidence of facial discrimination in this case seems unlikely for a number of reasons. First, Act 250's stated purpose is to "protect and conserve the lands and the environment of the State and to ensure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." The statute says nothing about economic protectionism for the benefit of local entities. In fact, the Act defines best interest not to exclude farming development/changes from its permitting requirements. Another problem with Act 250 (a problem not discussed in-depth because it is beyond the scope of this article) is the fact that Vermont has not developed a comprehensive state-wide development plan. Rather, each regional reviewing board is left to decide the permit applications on a case-by-case basis. Shoemake, supra note 95, at 904. Obviously it would be better if a state were to have a unified vision of the direction in which it wished to take its land and people, and it would be my hope that an implementing legislature would consider this goal.

It should also be noted that proposing an entire model growth management statute is beyond the scope of this article. Part IV merely makes the argument that, if the Midwest were to adopt the framework and spirit of Vermont's land-use plan, it would withstand a dormant Commerce Clause challenge. Thus, in discussing a theoretical challenge to a midwestern Vermont-type land-use plan, I will rely on the general language, structure, and legislative intent of Act 250.

134. In his article, Shoemake notes that, if, for example, a developer were to challenge Act 250's fiscal criteria upon which the commission relied in denying a permit application, the developer would be "challenging not Act 250 itself but the interpretation of that Act by the Environmental Board and the Vermont Supreme Court, neither of which is likely to offer offhand, unwise indications of its discriminatory intent (assuming for the moment that such intent exists)." Shoemake, supra note 95, at 921. This could be the type of challenge raised in a case involving a midwestern version of the statute, but, as Shoemake notes, "in order to put forward a successful dormant Commerce Clause challenge to the interpretation [the challenger] would have to demonstrate intent indirectly, by showing that the interpretation has a discriminatory impact on out-of-state interests. This would require...the reviewing court...to dive into the murky waters of assessing burdens." Id. at 921-22.


136. Contrast this with the legislative history of Amendment E or other anti-corporate farming laws. While there is some argument that the language of Amendment E was neutral on its face, applying to any non-family farm corporation or syndicate operating a farm or purchasing farmland in South Dakota, the legislative history tells another story. See 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
“development” as an improvement on a tract of land involving more than ten acres for commercial or industrial purposes\textsuperscript{137} - the statute does not distinguish between in-state and out-of-state developers. Additionally, “the Vermont Supreme Court was careful, as the Environmental Board had been at the earlier stage of the [\textit{In re Wal-Mart}] dispute, to emphasize that the consideration of market competition was relevant only because of the effect that competition can have on property values, and, hence, local tax bases.”\textsuperscript{138} States are well within their power to enact legislation that protects their citizens’ welfare and interests.\textsuperscript{139}

Note that an analysis under this prong of the dormant Commerce Clause would require the court to focus on the specific language and/or the legislative history of the enabling statute. But based on the analysis above, if a midwestern statute were enacted with similar legislative goals and language, it is unlikely that a challenge would succeed based on the argument that there was a discriminatory intent in enacting this type of regulatory scheme.

\textbf{Application of a Growth Management Statute Modeled after Act 250 Is Facially Neutral}

In the Midwest and Vermont, arguably, the land use goals are similar in that both are striving to preserve a “natural resource economy.”\textsuperscript{140} As a natural resource economy - the area’s economic activities are dependent on and complementary to the region’s natural resources - the state must regulate development of their lands in order to preserve their resources from waste and to protect against a subsequently disastrous effect on the state’s economies and the welfare of its citizens. Further, in both regions, the problem is not how to keep out development and aggregation, “but how to accommodate [development] without harm to the environment.”\textsuperscript{141} Based on the

\textsuperscript{138} Shoemake, \textit{supra} note 95, at 921.
\textsuperscript{140} BROOKS ET AL., COMMUNITY SUSTAINABILITY, \textit{supra} note 98, ch. 2, at 20 (elaboration on Vermont’s “natural resources economy”).
\textsuperscript{141} \textit{Id.} ch. 5, at 32. Arguably, without preservation of these resources, preservation of the state’s economy could be at risk. For instance, if South Dakota continues to allow more intensive and larger farming practices to operate unregulated, the rich topsoil that supports its agrarian economy will be wasted. Similarly, if Vermont had not enacted Act 250, its
similar land use goals of the two areas, regulation requires a solution that takes into "account and effectively manages in a coordinated fashion, the interconnectivity and impacts of such development on all neighboring municipalities." The triggering point or characteristic that would alert the state that a review of the proposed development/use is necessary thus should be similar in both Vermont and the Midwest.

Act 250's criteria, "and the expansive interpretation of them approved by the Vermont Supreme Court, are not facially discriminatory"; in other words, the Act does not provide different treatment for in-state interests and out-of-state interests, benefiting the former and burdening the latter. The Vermont legislature did not randomly pick acre sizes in order to determine what a "project of regional significance" would be. Rather, in creating a comprehensive state capability and development plan, the legislature relied in part on information from the Gibb Report.

On May 14, 1969, then-Governor Davis appointed a Governor's Commission on Environmental Control, which included some of the leading environmental, business, and political leaders in Vermont and was headed by Representative Arthur Gibb. In beginning their study, "the Commission recognized that Vermont's environment was under siege from large developers...but distinguished between ordinary land use problems of traffic, billboards, litter, 'landscape blight' [and focused on] the deeper threats affecting the ecological balance of the environment." The detailed Gibb report expressed concern about the "problems of large-scale residential development and recommended reform of municipal subdivision laws," but also focused on identifying a number of other environmental problems plaguing Vermont. The report not only recognized environmental problems, it also identified the sources of these problems, including industrial pollution, public waste disposal, and development. In the end, the Commission made a number of recommendations to address the environmental issues, including statewide zoning of higher elevations in order to "keep the ecological disturbances at these elevations.... to an absolute minimum."
Vermont’s Act 250 was introduced “as a result of recommendations made by the Governor’s Commission on Environmental Control”\(^\text{149}\) and was designed to “establish policies and procedures for control of land development...based upon the capability of the environment to support development.”\(^\text{150}\) Using the information from the Gibb Report, as well as information gleaned from hearings before the senate Natural Resources Committee, the legislature developed guidelines for utilization of the lands by focusing on determining which types and size of projects would “have the greatest environmental impact and...[be] subject to less municipal level review.”\(^\text{151}\) Larger projects, industrial or commercial developments over ten acres within a five mile radius of a municipality, industrial, or commercial development of one acre or more within a municipality without a permanent zoning ordinance, and developments above an elevation of 2,500 feet\(^\text{152}\) were determined to fit this criteria and thus became the trigger point for review.\(^\text{153}\)

There appears to be no evidence that setting the triggering criteria discriminates against out-of-state developers or forces them to appear before the review board more often than Vermont developers. Nor is there evidence that setting the criteria at this level means that out-of-state proposals are rejected more frequently than in-state developers. In fact, in recognizing the importance of economic growth, the focus of Act 250 is not on “barring development, but on molding it to minimize

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149. Id. at 3.
150. Id.
151. Id. at 4 n.35. “An initial proposal called for any development, without regard to the size of the lot. The administrative burden would have been too great so it was decided to use the ten acre lot size.” Id. (citing Hearing on H. 417 Before the S. Natural Res. Comm., 50th Biennial Sess., Adj. Sess. 1 (Mar. 16, 1970)). It would appear that, between the Gibb Report and the information presented to the Senate’s Natural Resources Committee, the legislature relied on a study to pinpoint the size of development not supported by the environment’s capacity. However, if such a study did not specifically address this issue, then Vermont must also do a definitive study to determine at what point the development’s impact on the environment outweighs its benefit to the state. Jon T. Anderson, Defining the Limits of Act 250 Jurisdiction, 31 Vt. B.J., Spring 2005, at 41, 41.
152. Shoemake, supra note 95, at 903.
153. See generally James Murphy, Vermont’s Act 250 and the Problem of Sprawl, 9 ALB. L. ENVTL. OUTLOOK. 205, 223–27 (2004). “The most important determining factors in deciding whether to grant a permit, according to recent Board and district commission decisions..., are the scale of a project and how it blends with its surroundings.” Id. at 223. For examples of large projects that were denied permits and which of the criteria they violated, see id. at 223–27.
its environmental impact.” Although denial of a permit is possible, over 97 percent of permits are approved.

A similar trigger point emphasizing the potential impact of the improvement on a tract of land could be set in the Midwest. This Article has shown that conventional wisdom holds that, as a farm increases in size, its environmental impact increases. However, no definitive study has been done to determine at what point (measured by either acreage or sales class) the farm’s impact on the environment outweighs its benefit to the state or is inconsistent with the (hopefully forthcoming) stated land-use goals/plans. Each agricultural state would have to undertake this study, and, based on the state’s findings, it is perhaps at that farm size that a farm operation would need to apply for a permit before it could plow additional acres or add to its inventory of livestock. Based on the model presented by Act 250, any farm operation, regardless of ownership, that fell into the category of “projects of significance” would have to apply for the permit in order to complete future land expansions or transactions. Requiring farm operations that fall into this category to apply for a permit would likely capture both in-state and out-of-state farming operations in the regulatory scheme. Thus, like the triggering mechanism in Vermont, a similar triggering mechanism in the Midwest would likely avoid the problem of unduly discriminating against out-of-state businesses. Finally, any potential discrimination could be further avoided by reviewing applications on a case-by-case basis. Individual

155. BROOKS ET AL., COMMUNITY STABILITY, supra note 98, ch. 9, at 2 n.24. Although these permits may contain conditions placed upon the development, it does not appear as though out-of-state developers have been issued conditional permits more frequently than in-state developers. In fact, when the environmental board or commission denies an application, it must base its decision on findings of fact and conclusions of law. Legitimate factual reasons for denying a permit include whether the “proposed subdivision or development [would be] detrimental to the public health, safety or general welfare.” VT. STAT. ANN. tit. 10, § 6087(a) (LexisNexis Supp. 2005).
156. Although no such study exists for environmental impacts and farm size, determining the appropriate “trigger point” is clearly possible and has been established for other social impacts like poverty and unemployment. One study showed that diversity in agriculture structure, including farm size, may reduce poverty and unemployment in agriculturally dependent rural communities. However, beyond a certain size (or if there are too many large farms and not enough small farms), the benefit to the community ceases. See Welsh & Lyson, supra note 34, at 11.
157. Remember, large and very large family farms (more likely owned by in-state residents) and non-family (corporate, non-resident) farms account for 72 percent of total production. See generally Hoppe & Korb, supra note 1, at 20. These large industrialized farms are more likely to be associated with certain environmental damages because “they have more resources that enable them to engage in excessive, detrimental practices.” LOBAO, supra note 29, at 221.
review would allow the review board to determine whether one large farm employs more sustainable techniques, has less of an impact on the environment, and is more in tune with the state’s vision of its overall land use plan than another large farm of equal acreage or in a similar sales class.

If the Midwest were to base who is required to obtain a development or use permit not on ownership type but on size and potential impact on state resources, a reviewing court would likely find that the intent of the permit review board was not to burden or discriminate against out-of-state entities, but rather “to protect and conserve the lands and the environment of the State and to ensure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests.”

Application of a Growth Management Policy Modeled after Act 250 Does Not Produce Discriminatory Effects

In essence, plaintiffs, like the plaintiff in Omya, who challenge the Vermont Environmental Board’s permitting restrictions do so by arguing that, regardless of the intent behind the Board’s action, Act 250, as a regulatory scheme, “too conveniently favors in-state, existing businesses over out-of-state business.” However, claims that characterize the Act 250 application process and its criteria as creating a competitive advantage for in-state businesses over out-of-state businesses are also unlikely to be persuasive. Although the Supreme Court has held that a law providing a competitive advantage to state residents is akin to a statute being discriminatory in effect, no

159. Shoemake, supra note 95, at 923. This was essentially the argument that Shoemake said Wal-Mart would have made if it had brought a dormant Commerce Clause claim in In re Wal-Mart:

Wal-Mart would basically argue that the consideration of market competition, in combination with the ten-acre “trigger” for Act 250, operates effectively to prevent large retailers from building stores in Vermont...the limitation on market competition benefits all those with an existing interest in commercial developments in Vermont by ensuring that those developments will not have to compete with newer, larger developments if such competition would mean a decline in the fortunes of existing developments.

Id. at 922-23.
160. In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), a North Carolina law required that all closed containers of apples sold or shipped into the state bear the statement, “no grade other than the applicable U.S. grade or standard.” Id. at 339. Although the law was facially neutral—it applied to all apples sold in the state,
advantage is present in this case. Act 250 does not distinguish between those required to apply for a development permit; rather, the focus of the application process is on the size and the environmental impact of the activity, not who is perpetuating the activity. Thus, any commercial or industrial purposes development project involving more than ten acres of land within a five mile radius of the municipality or more than one acre within a municipality is required to apply, regardless of whether the developer is a local resident or is from out of state.\(^6\) If a developer could show that "no in-state retailers are likely to require more than ten acres on which to build a store,"\(^6\) then it may be possible for a plaintiff to claim that "out-of-state interests are burdened [in favor] of in-state interests (as well as out-of-state interests who do not fall within [the Act's] ambit)."\(^6\)

Shoemake argued that an out-of-state business's best argument is that a statute like Vermont's Act 250 "is stripping those retailers of their competitive advantage by forcing them to do business in a different way."\(^6\) But after the Supreme Court's decision in Exxon Corp. v. Governor of Maryland,\(^6\) this argument is unlikely to convince a court that a state's growth management statute violates the dormant Commerce Clause.\(^6\)

In Exxon, oil companies brought an action to challenge the validity of a Maryland statute restricting producers or refiners of petroleum products from operating any retail service stations within the

\(^6\) 161. VT. STAT. ANN. tit. 10, § 6001(3) (LexisNexis Supp. 2005). In interpreting Act 250, the Environmental Board has enacted rules that include commercial residential dwellings within the Act's concept of "commercial or industrial purpose," thus requiring a permit before such development can begin. Environmental Board Rules 2(L) at 2(A)(2). Courts have also construed Act 250 and the Environmental Board's rules to cover projects undertaken by non-profit organizations. See In re Spring Brook Farm Found., Inc., 671 A.2d 315, 319 (Vt. 1995). Since many different types of projects and developers are included within Act 250's ambit, it makes the discriminatory effects argument much more difficult to prove.

\(^6\) 162. Shoemake, supra note 95, at 924.

\(^6\) 163. Id.

\(^6\) 164. Id. at 925.


\(^6\) 166. Shoemake, supra note 95, at 925.
The law was enacted in response to evidence that, during the 1973 petroleum shortage, gas stations operated by producers or refiners received preferential treatment. The oil companies' complaint challenged the validity of the statute on both constitutional and federal statutory grounds. The complaint alleged that the statute violated the Commerce Clause "by discriminating against interstate commerce, ... by unduly burdening interstate commerce[,] and ... by imposing controls on a commercial activity of such an essentially interstate character that it is not amenable to state regulation." The Court rejected Exxon's argument, holding that the statute was not discriminatory because it did not treat in-state and out-of-state companies differently. The fact that the burden of the statute fell solely on the interstate companies did not, by itself, establish a violation of the dormant Commerce Clause. The Court noted that the law did not create barriers against interstate dealers and did not create a competitive advantage, prohibit the flow of interstate goods, place added costs upon dealers, or distinguish between in-state and out-of-state companies in the retail market. According to the Court's opinion, "[t]he absence of any of these factors fully distinguishes this case from those in which the state has been found to have discriminated against interstate commerce." The Court also noted that, even if the statute caused some of the refineries to cease selling petroleum in Maryland, this did not mean that

167. Exxon, 437 U.S. at 119-23.
168. Id. at 121. No petroleum products are produced or refined in Maryland; all of the gasoline sold by Exxon in Maryland is transported into the state from refineries located elsewhere. Id. at 121, 123.
169. Id. at 125.
170. Id.
171. Id. at 126.
172. Id.
173. Id. The Court contrasted the facts of the Exxon case with the facts in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), in which the statute was deemed unconstitutional. It has been noted that the Exxon decision is difficult to reconcile with Hunt. Shoemake, supra note 95, at 926. However, the two may be reconciled if one notices "that, in Hunt, the Court found the statute ineffective at serving its avowed public purpose." Id. Thus, the two cases can be read to suggest that the Court, when it makes its discrimination determination, may consider more than just the discriminatory intent or effect of a measure (even though, according to the doctrine, how well a measure serves its purpose is not to be taken into account until after the discrimination determination has been made).

Id. Indeed, Shoemake's interpretation is supported by the Supreme Court's claim in Exxon Corp. v. Governor of Maryland, 437 U.S. at 126, that, unlike the statute in Exxon, the statute in Hunt raised the cost of doing business for out-of-state dealers and in other ways favored the in-state dealer in the local market.
the statute impermissibly burdened interstate commerce. The Court firmly stated that the Commerce Clause does not protect “the particular structure or methods of operation in a retail market...[nor does the Commerce Clause protect] particular interstate firms] from prohibitive or burdensome regulations.” For these reasons, the Court declined to invalidate the statute under the dormant Commerce Clause. Given the Court’s unambiguous analysis in Exxon, a law modeled after Act 250 that permissible regulates a way of doing business rather than unconstitutionally restricting the flow of goods will be upheld against this type of constitutional challenge.

Additionally, the criteria used to evaluate a development permit in Vermont do not impede or limit the flow of goods or suppress out-of-state competition, but merely regulate the way in which business is conducted. If a statute does not treat in-state and out-of-state companies differently, merely forcing a business to modify the way in which it does business is not necessarily an excessive burden capable of invalidating a growth management statute. In Exxon, the potentially extreme fact that the “burden of the statute happened to fall exclusively on out-of-state interests did not lead...to a conclusion that the State is discriminating against interstate commerce at the retail level.” Thus, even if application of a growth management statute results in the denial of a development permit, as it did in Omya, or the fact that one agri-business in South Dakota, for example, may have to apply for an aggregation permit more frequently than another before the first can increase the number of hogs it raises or before it can purchase additional

174. Exxon, 437 U.S. at 127.
175. Id. at 127-28.
176. Contrast these facts with the facts of Hunt, 432 U.S. at 350-54, where the Supreme Court found that “the [North Carolina] statute ha[d] the effect of stripping away from the Washington Apple Industry the competitive and economic advantages it had earned for itself through its expensive inspection and grading system.” Id. at 351. See also Shoemake, supra note 95, at 929-30 (analyzing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) (holding that New York’s denial of Plaintiff’s license application to expand its milk distribution to facilities within the state was unconstitutional, and the denial of the permit served to suppress competition)).
177. Exxon, 437 U.S. at 125-27. See also supra notes 162-175 and accompanying text.
178. Shoemake, supra note 95, at 925 (internal quotation and citation omitted). The problems in Exxon would not necessarily be an issue in the case of applying a growth management statute in the Midwest. Here, midwestern states are interested in regulating an operation that has a particular impact on the environment—the regulation is not necessarily based on a type of ownership (corporate versus family farmer). Because some of the largest, most frequently aggregating farms are owned by family farmers who operate the business from within the state, it is not likely that the impact of the growth management policy will be felt on out-of-state farmers more frequently than in-state farmers.
acreage for planting is not excessive in light of the “numerous (and not purely financial) local benefits flowing from a careful application”\textsuperscript{179} of growth management criteria.

For a reviewing court to find otherwise would ignore both the state’s right to enact regulation that protects its residents’ environment and the fact that the interests protected by the dormant Commerce Clause are “defined in terms of the market as a whole; they are not the interests of particular firms.”\textsuperscript{180} Based on the analyses in Exxon and Omya, and without evidence that a Midwest growth management statute creates barriers against interstate deals, creates a competitive advantage to help in-staters at the expense of out-of-staters, prohibits the flow of interstate goods, or distinguishes between in-state and out-of-state companies in the retail market, it is unlikely that a reviewing court will find that the state has used its regulatory power to impermissibly discriminate against interstate commerce.

**Even If There Is a Burden on Interstate Commerce, the Burden Is Not “Clearly Excessive” in Light of the Local Benefits**\textsuperscript{181}

Because a growth management policy modeled after Act 250 neutrally regulates both in-state and out-of-state groups, it will be struck down only if the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”\textsuperscript{182} The \textit{Pike} balancing test is a “more nuanced, more expansive inquiry” and “explicitly allows a court to consider the nature of the public interest being served by a measure.”\textsuperscript{183} Under this balancing test, courts will also examine whether the law’s effects on interstate commerce are only incidental.\textsuperscript{184}

\textsuperscript{179} Id. at 930.


\textsuperscript{181} Quoted language taken from \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 142 (1970).

\textsuperscript{182} Because the Eighth Circuit found that South Dakota’s right-to-farm statute was motivated by a discriminatory purpose, it did not reach an analysis under the \textit{Pike} balancing test. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003). It is possible to argue that, if South Dakota had provided enough evidence to support the claim that it had a rational reason to enforce the discriminatory law, the Eighth Circuit may have upheld the law under the second prong of the \textit{Pike} test. However, this article does not focus on that argument. Instead, it argues that states may achieve the aforementioned goals and avoid future constitutional challenges by implementing a growth management policy modeled after Act 250.

\textsuperscript{183} Shoemake, \textit{supra} note 95, at 929.

\textsuperscript{184} \textit{Pike}, 397 U.S. at 142.
If the purpose of regulations like Act 250 and its ilk was to preserve a local industry from collapse by protecting it from the rigors of interstate competition, it would be fairly clear that the interest being served by the regulation was clearly excessive in light of the burden imposed on interstate commerce. "Courts are likely to be wary when it appears that competition is being suppressed," and this suspicion was evidenced by the Supreme Court in its decision in West Lynn Creamery, Inc. v. Healy. In West Lynn Creamery, Massachusetts milk dealers brought suit challenging milk pricing orders as violations of the Commerce Clause. The milk pricing order subjected all fluid milk sold by dealers to Massachusetts retailers to make a monthly premium payment into the Massachusetts Dairy Equalization Fund. Though most of the milk was produced out of state, the entire order was applied to Massachusetts dairy farmers. The Court rejected the state's argument that the orders' incidental burden on commerce was justified by the benefit of saving an industry from collapse, noting that the "'distinction between the power of the State to shelter its people from menaces to their health or safety...and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.'" Ultimately, the Supreme Court found that the pricing order violated the dormant Commerce Clause, reasoning that to accept the respondent's arguments would "make a virtue of the vice that the rule against discrimination condemns."

Suppression of economic competition is not the goal of Act 250, nor would it be the purpose of a similar policy enacted in the Midwest to address the problems of farm aggregation. As noted above, growth management statutes aim to "delay or prevent unwanted changes in the character of the community" by protecting a state's environment and ensuring that the land is not used to the detriment of the public welfare and its interests. With this in mind, the function of a Midwest land-use regulatory scheme is to strike a balance between the environmental impacts of big and small, traditional and more-industrialized farming operations—not to promote a certain type of farming activity, hoard a

185. Shoemake, supra note 95, at 929.
187. Id. at 190–91.
188. Id. at 206 n.21 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949)).
189. Id. at 205.
190. Shoemake, supra note 95, at 897.
natural resource, or protect in-state farmers from their out-of-state competitors. Unlike West Lynn Creamery, where the purpose of the measure was purely economic protectionism to benefit private local interests, here, the goal of the proposed regulation is not suppressing competition, but rather environmental preservation and the resulting health and welfare of the state's citizens.

Finally, under the Pike balancing test, examining whether a law is effective in achieving its stated goals helps a court to determine whether the law's burdens on commerce are "clearly excessive" in relation to its benefits. For example, in Hazeltine, the Eighth Circuit expressed its concern that "[w]hether Amendment E would protect family farmers and the environment is unknown." This was also a concern for the Court in Hunt. There, the Supreme Court was concerned that the apple labeling statute was inefficient in achieving its primary objective—consumer protection from confusion and deception in the marketing of foodstuffs—because it did nothing to "purify the flow of information at the retail level." In contrast, Act 250 has proven to be effective in curbing the impact of rampant development in Vermont. The law's effectiveness is in part due to the streamlined structure and clear focus of the regulatory scheme: in establishing a permitting scheme that contains criteria addressing the potential problems that certain development projects could cause, Act 250 is narrowly tailored to achieve its objectives. The Second Circuit came to this exact conclusion in Omya, finding that the aesthetic and historic preservation criteria used in analyzing whether or not to grant the plaintiff a permit were directly related to Act 250's overall development objectives. In fact, the Second Circuit noted that, even if Vermont's permit restrictions imposed a burden on interstate commerce, such a burden was not clearly excessive in relation to the

192. See supra Part I.
193. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 595 (8th Cir. 2003).
195. See generally supra Part III and the beginning of Part IV.
196. See generally Shoemake, supra note 95, at 926–29. Shoemake points out, for example, that protecting the tax base has been recognized as an exercise of the police power rationally related to promoting the public welfare. Further, protecting environmental benefits has long been recognized as a valid state interest that may be protected by state regulation. See Hazeltine, 340 F.3d at 597 ("the purpose of environmental protection is...legitimate"); N.Y. State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1308 (2d Cir. 1994) (upholding New York regulation and noting that "protection of the environment and conservation of natural resources are areas of 'legitimate local concern'" (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981))).
197. Omya, Inc. v. Vermont, 33 F. App'x 581, 583 (2d Cir. 2002).
enhancement of aesthetic and historic preservation goals and the reduction of traffic congestion and pollution.\textsuperscript{198}

The geographical organization and the expertise of the environmental board and the district commissions aid in the ability to successfully achieve Act 250's goal of environmental sustainability. For example, Vermont's environmental commissions, organized at the regional level, are in the best position to know how development will impact that region and are able to apply this knowledge when reviewing the permit applications.\textsuperscript{199} Furthermore, the state-level environmental board's policy decisions are presumed by the Vermont courts to further the purpose of the statute.\textsuperscript{200} Based on the aforementioned reasons, the Eighth Circuit's concerns about the effectiveness of right-to-farm statutes (and their burden on agri-businesses) could be addressed through implementation of a similar regulatory system in the Midwest. Despite incidental impacts on interstate commerce (if any), a long-term growth solution modeled after Act 250 would likely not only benefit the people of the Midwest, but would be an effective alternative to the problems raised earlier in this Article.

In general, any growth management statute passing dormant Commerce Clause muster is less occupied with explicitly regulating market competition for the sake of providing its vendors a competitive edge and more concerned with managing state resources in a manner that encourages environmental and economic sustainability. Thus, it would be difficult "to imagine a situation in which a growth-management statute, without being discriminatory, would be so ineffective at accomplishing its purpose and so burdensome to interstate commerce.

\textsuperscript{198} Id.
\textsuperscript{199} There are nine district environmental commissions throughout the state, and these districts "roughly correspond to the various topographic features of the state." Dreiseward, supra note 98, at 332 n.45. Each district commission consists of three citizens, appointed by the governor, and the structure of these "decentralized commissions reflect[s] Vermont's tradition of the town meeting form of government." Id. (citing BROOKS ET AL., COMMUNITY SUSTAINABILITY, supra note 98, ch. 2, at 1, ch. 5, at 4).
\textsuperscript{200} Thomas R. McKeon, Comment, State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine and Florida, 19 B.C. ENVTL. AFF. L. REV. 385, 394 (1991) ("In reality, although the court has overturned Board decisions, it typically grants the Board a great deal of deference, giving the Board's interpretation of its enacting statutes a presumption of validity."). See also In re Wal-mart Stores, Inc., 702 A.2d 397, 400 (Vt. 1997) ("We give deference to the Environmental Board's interpretation of Act 250 and its own rules, and to the Board's specialized knowledge in the environmental field."); In re Spring Brook Farm Found., Inc., 671 A.2d 315, 317 (Vt. 1995) ("Indeed, the Board's application of Act 250 to a specific project is entitled to a presumption of validity.").
commerce that it would be invalidated by a court under the balancing test of *Pike*.”

Regional planning accurately addresses the “economic and environmental health of a region, while also providing for the needs of individual localities.” Further, policies like Act 250 are attempts to address the impacts of significant development activity on the state’s natural resources and economic sustainability. Given the long-term recognition of these legitimate state interests and the right of states to enact legislation to protect these interests, any constitutional challenge to a similar growth management statute would “have to take into account...a state’s...very legitimate, and very weighty, interest in ensuring that its lands are used in a manner that is beneficial, in tangible and intangible ways, to the people of the state.”

**CONCLUSION**

Recently, farming operations in the Midwest have been doubling in size “with a regularity that rivals the seasons.” While Americans normally embrace a bigger is better attitude, to do so in the Heartland’s case could lead to its demise. This is in part because larger more intensive farming operations are associated with an increase in the degradation of the state’s natural resources. Unregulated environmental degradation, in turn, creates problems for a state striving to preserve an economy based in part on utilization of its natural resources. Without a viable economy, a host of additional social problems arise. While states have a recognized legal right to adequately address diminished environmental and social conditions in rural and farming communities by preserving valuable and unique natural resources via a regulatory scheme, they must provide sufficient empirical evidence of a correlation between the problem and the regulated source to satisfy constitutional review. Previous solutions, such as South Dakota’s Amendment E, have failed to focus on the real source of these problems—aggregation, regardless of ownership—and have been struck down as unworkable, ineffective, and unconstitutional.

If a state like South Dakota could provide sufficient empirical evidence of a correlation between environmental degradation and aggregation, one potential antidote to the problems would be to enact a land use regulatory scheme that utilizes a comprehensive management

201. Shoemake, *supra* note 95, at 930.
plan for the unified use of the state’s resources. Such a solution could help delay or prevent unwanted changes in the community and, if modeled in fact as well as in spirit after Vermont’s Act 250, would provide the desired protection against the myriad problems associated with aggregation in a manner that is consistent with the requirements of the dormant Commerce Clause.