

Winter 1982

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Recommended Citation

Alan L. Billings, *The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting*, 16 Val. U. L. Rev. 277 (1982).

Available at: <https://scholar.valpo.edu/vulr/vol16/iss2/3>

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NOTES

THE FAMILY FARM: REGULATING FARM ACT AVOIDANCE TECHNIQUES THROUGH RESTRICTIONS ON VERTICAL INTEGRATION AND PRODUCTION CONTRACTING

INTRODUCTION

An evolving national economy has spawned a new entity in the affairs of agriculture. The presence of integrated agribusiness¹ in agricultural commodity production is as offensive to the traditional family farmer as it is encouraging to advocates of centralized coordinate systems of economy.² While the existence of integrated agribusiness was foretold,³ only recently have family farm advocates reacted to the integrator's presence.

Those advocates determined to preserve the family farm expressed that determination through the enactment of "family farm acts."⁴ Eight states in the Great Plains now have such acts.⁵ These

1. Businesses engaged in the processing, storage, or distribution of farm supplies and commodities are agribusinesses. Integration in the production of agricultural commodities occurs when an agribusiness owns or controls other businesses in two or more successive stages of the food production chain. Integration of the stage of commodity production is the focus of this paper. See note 32 *infra* and accompanying text.

2. Coordination in decision-making and operation of the businesses in the various stages of production is the objective of the integrator. Under such a coordinated system of production, central decision-making for the production, processing and marketing of agricultural products is possible. See note 33 *infra* and accompanying text.

3. As early as 1960 more than thirty percent of all livestock produced in this country was produced under some form of vertical integration. COOPERATIVE EXTENSION SERVICE, COLLEGE OF AGRICULTURE, UNIVERSITY OF ILLINOIS, SPECIAL PUBLICATION 27, WHO WILL CONTROL U.S. AGRICULTURE? 8 (1972) [hereinafter cited as WHO WILL CONTROL U.S. AGRICULTURE?].

4. The "family farm acts" are state laws that prevent various forms of corporate involvement in agriculture. The purpose of the acts is to protect the family farm unit through the corporate prohibition.

5. IOWA CODE ANN. §§ 172C.1 to .15 (West Supp. 1981) (enacted in 1975); KAN. STAT. ANN. §§ 17-5901, to 02 (1974) (enacted in 1973); MINN. STAT. ANN. § 500.24 (West Supp. 1981) (enacted in 1973); MO. ANN. STAT. §§ 350.010 to .030 (Vernon Supp. 1982) (enacted in 1975); N.D. CENT. CODE §§ 10-06-01 to 06 (1976) (enacted in 1932); OKLA. STAT. ANN. tit. 18 §§ 951-56 (West Supp. 1981) (enacted in 1971); S.D. CODIFIED LAWS ANN. §§ 47-9A-1 to 23 (Supp. 1981) (enacted in 1974); WIS. STAT. § 182.001 (West Supp. 1981) (enacted in 1974).

acts vary particularly in that some prohibit corporate involvement in "farming"⁶ while others prohibit corporate ownership of agricultural land.⁷ Although the acts employ different means, their common goal is to eliminate large corporations from agricultural commodity production.

Notwithstanding the farm act promoters' intentions to protect the family farm from corporate invasion, the acts have a significantly limited practical impact.⁸ Statutory avoidance techniques and explicit statutory exemptions for various types of corporations and for specialized corporate agricultural activity⁹ allow for considerable corporate involvement in commodity production. These exemptions, however, do not vitiate the fundamental aim of the acts. That aim is the preservation of the family farm as a basic economic and social unit. The vertical integration of family farms, accomplished through statutory avoidance techniques, must be prohibited if that purpose is to be realized.¹⁰

Vertical integration can eliminate the family farm through either one of two means. Integration can be accomplished through direct and formal corporate ownership of the farm or indirectly through a production contract¹¹ with the family farmer, an arrange-

6. "Farming" is usually defined in the acts as the production of various agricultural commodities. However, this definition does not encompass production via the production contract. Consequently, employment of the production contract is not "farming" and therefore is not prohibited by the acts. See, e.g., MINN. STAT. ANN. § 500.23(2)(a) (West Supp. 1981).

7. The acts do contain exemptions for various corporations. The activities of "family farm corporations" and "qualified corporations" are not prohibited by the acts. The acts vary in their definitions of these corporations, but the definitions generally restrict large corporations with substantial income from sources other than farming. See, e.g., MO. ANN. STAT. § 350.010 (Vernon Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 47-9A-14 to 15 (Supp. 1981).

8. A variety of statutory avoidance techniques limit the acts' effectiveness in most circumstances. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961, 989 (1976).

9. Corporate activities in agricultural research and experimentation and in raising certain specialty crops are exempted from the acts' coverage. IOWA CODE ANN. §§ 172C.1, 172C.4(3) (West Supp. 1981); MO. ANN. STAT. § 350.015(4) (Vernon Supp. 1982); OKLA. STAT. ANN. tit. 18, § 954 (West Supp. 1981); S.D. CODIFIED LAWS ANN. § 47-9A-9 (Supp. 1981); WIS. STAT. ANN. § 182.001(2)(d) (West Supp. 1981).

10. Integration, as defined in note 1 *supra*, is in reference to vertical integration. Horizontal integration, an expansion at the same stage of production, is not relevant to this note.

11. Production contracts are contracts between the agribusiness and the family farmer which specify the terms under which the farmer must produce the commodity. See note 17 *infra* and accompanying text.

ment which can relegate the family farm to that of an operating unit of the agribusiness.¹² Aside from the exempted corporations, the family farm acts effectively restrict direct corporate ownership and control of farms. Yet, the absence of restrictions on "indirect" corporate control of farm production through the technique of production contracting has led one writer to conclude that the significance of the laws is limited to their symbolic character.¹³

This note will first examine agribusiness vertical integration through employment of production contracts. Legislative efforts to curtail production contracting and potential constitutional challenges to this legislation are then discussed. Government policies affecting integration and production contracting and the effect of production contracts upon the economic and social workings of the family farm are considered. Finally, the family farm acts are analyzed for their effectiveness in achieving their ostensible goals and a proposed amendment to the acts is presented.

I. THE ELEMENTS OF THE PRODUCTION CONTRACT

The employment of a production contract creates the functional equivalent to direct corporate ownership of the land and production facilities and provides the same economic advantages to the integrator. For the integrator "there remains more than one way to do the job."¹⁴ Where family farm acts with land ownership prohibitions have been enacted, agribusiness integration is limited to the use of production contracts. With the exception of a single provision in Iowa's farm act, which specifically addresses vertical integration and production contracting,¹⁵ the use of production contracts is wholly unregulated by the state family farm acts.

12. To become an operating unit is to lose the independent decision-making power that is characteristic of the family farmer. The farmer would merely operate his farm in accordance with agribusiness directives. See generally *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977).

13. The indirect techniques functionally provide agribusiness with the same control over production that direct ownership would. Professor Morrison concludes therefore, that the specific provisions of the laws are not significant, but rather the laws are limited to a symbolic significance. Morrison, *supra* note 8, at 997.

14. Whether an agribusiness is expanded via contract or via direct ownership of production facilities depends on the people involved and their particular needs, desires, and capabilities. Both methods accomplish the goal of integration. L. SCHRADER, *EGG PRODUCTION CONTRACTS*, 1975, at 4 (1975) (printed by the Department of Agricultural Economics, Purdue University).

15. IOWA CODE ANN. § 172C.2 (West Supp. 1981). This provision is discussed at length in note 56 *infra* and accompanying text.

Production contracting involves a contract between a family farmer and an agribusiness which specifies the terms under which the farmer is to produce the commodity and the price to be paid for the commodity.¹⁶ Production contracts are usually made before production begins, with contract provisions controlling the farm practices to be employed in producing the commodity.¹⁷ Both parties to the contract expect to gain income or some other satisfaction, such as the reduction of risk, from the contractual arrangement. The agribusiness, by contracting, is essentially obtaining the use of the farmer's land and production resources. In egg production contracts, for instance, the farmer provides the hen house, equipment, utilities, and requisite labor for caring for the hens and gathering the eggs.¹⁸ The agribusiness provides the pullets, feed, medication, and serviceman assistance.¹⁹

Besides controlling production inputs, the marketing of the commodity produced is also regulated by the contract. The marketing is controlled by the agribusiness. The contract only implies that the agribusiness will sell the product for whatever the agribusiness can get.²⁰ Although the contract may be beneficial to the farmer, a long-term contractual arrangement can tie the farmer's production and operational decisions to the agribusinesses' desires.²¹

Variability in Contractual Arrangements

Although the production contract controls the terms of production and the price and marketing of the product, contracts range from those setting a flat fee for an agreed quantity of produce to arrangements resembling joint ventures with production risks being equally shared.²² The contract can be varied according to the farmer's

16. SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 96TH CONG., 2D SESS., FARM STRUCTURE 80 (Comm. Print 1980) [hereinafter cited as FARM STRUCTURE].

17. The nature of production contracts requires some contractor involvement in the farmer's operation. NATIONAL ECONOMICS DIVISION; ECONOMICS, STATISTICS, AND CO-OPERATIVE SERVICE, SECOND ANNUAL REPORT TO CONGRESS, STATUS OF THE FAMILY FARM, AGRICULTURAL ECONOMIC REPORT No. 434, at 12 (1979) [hereinafter cited as STATUS OF THE FAMILY FARM].

18. L. SCHRADER, *supra* note 14, at 5.

19. *Id.*

20. *Id.* at 8.

21. Rigid coordination between the production and processing stages is important to the integrator because operational decisions at the production stage will affect later processing and marketing stages. Consequently, the integrator seeks to control production decisions in order to enhance coordination throughout the vertical chain of production. *See Morrison, supra* note 8, at 991.

22. By the term joint venture, Professor Schrader is referring to the financial

needs or according to the amount of risk the farmer can assume. For example, the contract may transfer financial risk to the agribusiness which the farmer would be unable to bear.²³ In some instances the contract may provide the opportunity to farm when it otherwise would have been denied the farmer for financial reasons. Where the contracting parties want to share the returns in proportion to their individual contribution, full profit and loss sharing arrangements have been used.²⁴ This type of contract arrangement has a built-in incentive for the farmer to expend more fully his expertise and personal care over the commodity. In this regard, the contract gives the farmer the same economic incentive he had as an independent producer. Integrating processors and marketers²⁵ may also contract to provide some of the farmers necessary debt capital.²⁶ This feature serves farmer interests by assuring a source of capital. It is also convenient to receive capital from the integrator since the farmer is then less likely to have to seek other sources of financing.

Production contract arrangements serve the interests of the integrator just as they serve the farmer's interests. A production contract with a farmer has the advantage of assuring the integrator that a supply of products at a controlled price will be available.²⁷ A predetermined supply gives the integrator security and foreseeability upon which to make processing and marketing decisions. Contractual

arrangement established in the production contract, not a joint venture status for tax or legal liability purposes. L. SCHRADER, *supra* note 14, at 5.

23. Despite the potential decision making control that the contract may give to the agribusiness, the properly designed contract can allow all parties to be better off than without the contract. *Id.* at 2.

24. This arrangement provides for an initial estimate of the input from each party which determines the initial share of returns. When the production contract is terminated, the shares are recomputed and any appropriate adjustments are then made. For instance, where the contract specifies returns based upon a definite feed cost and the price of feed changes during the contract period, the final share for each party is recomputed upon the changed costs. The method of calculating the various costs must be known and agreed upon by all parties in advance. If the farmer is willing and able to assume the risk of feed price fluctuations, he can also reap the benefits if the fluctuation is in his favor. *See generally* L. SCHRADER, *supra* note 14, at 5-7.

25. Processors and marketers of farm commodities are the integrators most responsible for the marketing structural changes occurring in agriculture through the use of production contracts. *See STATUS OF THE FAMILY FARM, supra* note 17, at 9.

26. The integrator who provides the credit is generally better able to tap debt capital markets than is the individual producer. FARM STRUCTURE, *supra* note 16, at 80.

27. The production contract is advantageous to the integrator since he is assured of supply and price without the burden of initial investments in production resources. Morrison, *supra* note 8, at 991.

integration, unlike direct ownership integration, makes this coordination possible without forcing the integrator to expend capital resources in land and machinery.

Another advantage of contract integration accrues through lower labor costs to the integrator. The family producer often settles for lower wages than the agribusiness would have to pay hired labor had the production unit been directly owned.²⁸ Production and marketing coordination advantages under the single management of direct ownership integration may be offset by these labor cost and capital-investment savings under contractual integration. The critical variables that the integrator must consider when choosing one mode over the other are capital, the cost of labor and labor performance.²⁹ The family farmer's livelihood as an independent producer often depends upon his expertise and patient care in producing the commodity, a performance level which hired labor, because no incentives exist for being responsible, may not achieve. These factors suggest that the contract fully serves the integrator's interest and that the integrator is not disadvantaged when family farm acts prohibit direct farm ownership.

II. ACCOMPLISHING VERTICAL INTERGRATION THROUGH PRODUCTION CONTRACTING

To understand the integrator's interest in controlling farm production, it is important to recognize his interest in coordinating the stages of food production. Agricultural commodities pass through five vertical stages in the food production chain. Each stage of production is an operating process with a potential market, since each stage is capable of producing a salable product or service.³⁰ The five

28. Managers of the integrated unit have had varied experiences regarding labor performance. Some managers desire hired labor while others find the family farmer's labor performance more preferable. One criticism leveled at contract farming is that the farmer is in effect made an employee of the integrator. Unless the contract gives the family farmer incentive to perform as he did as an independent producer, his performance may be no better than hired labor. See *generally* STATUS OF THE FAMILY FARM, *supra* note 17, at 11; L. SCHRADER, note 14 *supra*.

29. L. SCHRADER, *supra* note 14, at 3-4.

30. MIGHELL & JONES, VERTICAL COORDINATION IN AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 19 (Economic Research Service, United States Department of Agriculture 1963); cited in L. SCHRADER, PRICING PROBLEMS IN THE FOOD INDUSTRY: BROILER CHICKENS AND EGGS 1 (1978) (Symposium on Pricing Problems in the Food Industry, March 2-3, 1978, Washington, D.C.) (printed by the Department of Agricultural Economics, Purdue University).

vertical stages are: (1) input of raw materials and production resources (feed, seed, machinery, equipment, energy); (2) commodity production (planting, cultivating, crop harvesting, livestock husbandry); (3) production adjuncts (insecticides and herbicides, medicines, vaccines, irrigation); (4) handling and processing (transportation, storage, transformation of commodity to a consumable form); and (5) marketing and distribution (location and selection of buyers, sale, delivery of commodity).³¹

Vertical integration occurs when an agribusiness links, either through ownership or control, businesses in two or more successive stages of the food production chain.³² The vertical integrator's objective in employing the production contract is to control, and therefore, closely coordinate, successive stages.³³ When production on the family farm is controlled via the production contract, the farm is "integrated" since farm production decisions are closely coordinate with decisions in the processing and marketing stages.³⁴ This centralized decision coordination minimizes production and market risks, protects against supply shortages by coordinating output with market demand, and takes advantage of production and market technologies.³⁵ Long standing contractual arrangements also provide advantages in assembling and distributing the product.³⁶

31. E. ROY, CONTRACT FARMING AND ECONOMIC INTEGRATION 2 (1972), cited in Brown, *United States v. National Broiler Marketing Ass'n: Will the Chicken Lickin' Stand?*, 56 N.C.L. REV. 29 (1978).

32. This definition assumes that production contracts afford enough coordinating power to the agribusiness to bring the production stage under the control of the agribusiness. Without being brought under the control of the integrating agribusiness, there is no vertical integration. See FARM STRUCTURE, *supra* note 16, at 80.

33. Without the coordination made possible by the production contract, the production stage would remain an independent stage in the food production chain. Brown, *United States v. National Broiler Marketing Ass'n: Will the Chicken Lickin' Stand?*, 56 N.C.L. REV. 29, 33 (1978).

34. Although an intermediate stage between commodity production and commodity processing has been identified, see note 31 *supra* and accompanying text, integration nevertheless occurs when production is coordinated with processing, though not successive stages. This is possible because the processor who contracts with a farmer often has previously integrated firms dealing with production adjuncts. The production contract often specifies that the integrator is to supply some of these production adjuncts to the farmer. See note 19 *supra* and accompanying text.

35. See Brown, *supra* note 33, at 56.

36. L. SCHRADER, PRICING PROBLEMS IN THE FOOD INDUSTRY: BROILER CHICKENS AND EGGS 11 (1978) (Symposium on Pricing Problems in the Food Industry, March 2-3, 1978, Washington, D.C.) (printed by the Department of Agricultural Economics, Purdue University).

The combination of these factors may increase the efficiency of the food production chain.

Prior to being integrated, each stage of production has the potential to generate a market, since there is an intermediate product at each stage.³⁷ The integrator seeks to eliminate these "open spot markets" through the close coordination of the integrated system.³⁸ Integrated coordination allows transfer of intermediate products from stage to stage without going through the open market and without exposure to the risks inherent therein. Consequently, farm commodities produced under contract are transferred to the processor. Buying from a processor avoids the need to purchase the products in the open market from the farmer.

The decline of traditional open market transactions has disfavored small family farmers. The replacement of these farm markets with the contract marketing technique favors larger producers. This results from the inability of small farmers to produce the minimum volume of most commodities needed to encourage an integrator to contract.³⁹ As a result, small farmers may have difficulty finding market outlets if traditional markets continue to decline in favor of contractual arrangements.⁴⁰

The marketing and production advantages that accrue to agribusiness through avoiding open market transactions⁴¹ have resulted in an increasing volume of agricultural products produced

37. See note 30 *supra* and accompanying text.

38. "Open Spot Markets" refers to the intermediate markets at each stage of production where the buying and selling of goods is done by negotiation between interested parties. The integrator seeks to eliminate these markets because negotiation involves risk, the risk that the final negotiated price for the product will be less than the negotiator expected. The open market can also determine priority among products with marketers vying for those products that are demanded the most by consumers. A change in consumer preference entails risk to the producer since he may also be forced to change to meet new consumer demands. The food production integrator who is integrated from the producer to the retailer is in a better position to avoid the risks of consumer change. This results from the producer-to-retailer integrator's ability to manipulate the market so that the consumer is inundated with a cheap, available product, a condition that may dissuade change in consumer preference. Cf. L. SCHRADER, note 36 *supra* (Professor Schrader concedes that the broiler market is susceptible to market manipulation and that integrators realize the positive external benefits of the open market pricing process though seeking to avoid that market).

39. STATUS OF THE FAMILY FARM, *supra* note 17, at 10.

40. *Id.*

41. See note 35 *supra* and accompanying text.

under contract.⁴² Decisionmaking in the production process continues to shift to integrators and away from farmers as larger amounts of farm commodities are produced under contract. Arguably the role of a greater number of farmers resembles that of an agricultural laborer.⁴³ It is noteworthy that the farmer's actual ownership of the land has done little to deter the shift of decisionmaking power to the integrator.⁴⁴ The integrator's access to the market is a more important economic factor than who owns the land.⁴⁵

Even though the family farm acts insure that land ownership will remain in the farmer, that ownership is meaningless in protecting the farmer's independent decisionmaking power. Yet it is precisely the farmer's independence that the farm acts seek to preserve. The acts' promoters are determined that the family farm should remain in-

42. ESTIMATED PERCENTAGE OF OUTPUT PRODUCED UNDER CONTRACT AND VER-
TICAL INTEGRATION IN 1960 and 1970.

| Commodity | 1960 | 1970 |
|----------------------------|-------|-------|
| <i>Crops</i> | | |
| Feed Grains | .5 | .6 |
| Food Grains | 3.0 | 2.5 |
| Fresh Vegetables | 45.0 | 51.0 |
| Processing Vegetables | 75.0 | 95.0 |
| Potatoes and Sweetpotatoes | 70.0 | 70.0 |
| Citrus Fruits | 80.0 | 85.0 |
| Dry Beans and Peas | 36.0 | 2.0 |
| Other Fruits and Nuts | 35.0 | 40.0 |
| Sugar Beets | 100.0 | 100.0 |
| Sugar Cane | 100.0 | 100.0 |
| Cotton | 8.0 | 12.0 |
| <i>Livestock</i> | | |
| Fed Cattle | 13.0 | 22.0 |
| Sheep and Lambs | 4.0 | 10.0 |
| Hogs | 1.4 | 2.0 |
| Fluid-grade milk | 98.0 | 98.0 |
| Manufacturing-grade milk | 27.0 | 26.0 |
| Eggs | 15.0 | 40.0 |
| Broilers | 98.0 | 97.0 |
| Turkeys | 34.0 | 54.0 |

WHO WILL CONTROL U.S. AGRICULTURE?, *supra* note 3, at 8.

43. See note 28 *supra*.

44. Decision-making in the production process has largely shifted away from the person who provides the labor and housing to the integrator of the whole process. Ownership of land has had little role in the shift in control, nor has it been affected much by the change in the organization of agriculture. *Proposed Amendment to the Clayton Act: Hearings on S.334 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 314 (1979)* (statement of Bob F. Jones) [hereinafter cited as *Hearings on S.334*].

45. *Id.*

dependent to continue fostering virtues central to American life.⁴⁶ Without farm independence, these virtues are jeopardized. Consequently, until the issue of contract farming is statutorily addressed, attributes of family farming will be afforded little protection.

III. LEGISLATIVE ATTEMPTS AT CONSTRAINING VERTICAL INTEGRATION AND PRODUCTION CONTRACTING

It is recognized that social and economic attributes of family farming are threatened by production contract integration. This recognition has generated isolated bits of legislation directed at integration curtailment. Iowa's family farm act⁴⁷ and the Family Farm Antitrust Act of 1979⁴⁸ are two such attempts. This legislation seeks to restrict integrators' production and marketing choices. Choices which may be "economically optimal" under existing economic conditions.⁴⁹ If one disregards market inputs from without the "free market" which helped create existing market forces⁵⁰ and ignores the economic and social externalities that will accompany continued promulgation of these forces,⁵¹ one may conclude that this legislation restricts optimal free market choices. Nevertheless, because the legislation imposes economic costs by restricting economic choice, it may have to justify itself through its social ends and through its elimination of the anticompetitive effects of vertical integration.⁵²

The Iowa family farm act⁵³ pursues both of these goals. Iowa

46. One of this country's precious resources is its pool of independent farmers. The family farm is an environment in which the central virtues of American life are fostered. It is a business, a job, and a set of family relationships. It does not provide an easy life but it provides a good life, and one in which independence, industry, hard work, foresight, cooperation, and other qualities central to America's needs are fostered. For most of our history, the family farm has been the seedbed of our culture. Nelson, *Forward to W. GOLDSCHMIDT, AS YOU SOW* at vii (1978).

47. IOWA CODE ANN. § 172C.1 (West Supp. 1981).

48. *Hearings on S. 334, supra* note 44, at 5.

49. The legislation is characterized as "political" since it impinges upon decisions which some entrepreneurs think most favorable in the "free market." Economists who argue that this is a per se reason for objecting to the legislation take no account of the variables discussed in note 139 *infra* and accompanying text. See generally Morrison, *supra* note 8, at 962.

50. See note 131 *infra* and accompanying text.

51. See note 158 *infra* and accompanying text.

52. The state farm acts and federal legislative proposals are entirely consistent in their goals. Both specifically seek to preserve the family farm and also to prevent monopoly, protect consumers, and preserve free and private enterprise. See, e.g., MINN. STAT. ANN. § 500.24(1) (West Supp. 1981); IOWA CODE ANN. § 172C.2 (West Supp. 1981); *Hearings on S. 334, supra* note 44, at 5-6.

53. IOWA CODE ANN. § 172C.1 (West Supp. 1981).

has the only state farm act which specifically addresses the issue of production contracting and attempts to restrict its use. The Kansas farm act⁵⁴ may restrict contract farming though no provision particularly enunciates that objective. The Kansas statute simply provides that "[n]o corporation shall directly or indirectly engage in the agricultural or horticultural business of producing, planting, raising, harvesting, or gathering"⁵⁵ Ostensibly, this statute prohibits all production contracting since production contracting is an indirect means of farm production.

The Iowa act has a narrower application than the Kansas act. The Iowa act enumerates specific limits upon production contract arrangements. Iowa's farm act seeks to ensure the family farmer some independent marketing choice by regulating livestock delivery terms. The statute provides "where the contract sets a date for delivery which is more than twenty days after the making of the contract it shall . . . specify the month for the delivery, and shall allow the farmer to set the week for the delivery within such month and processor . . . to set the date for delivery within such week."⁵⁶ This section obviously does not prohibit production contract use entirely. Rather, the farmer is insured some decisionmaking freedom regarding the marketing of the product, notwithstanding the production contract. In this regard, the provision is an inroad into the integrator's overriding market power.⁵⁷

The Iowa provision is a compromise. It maintains existing production and marketing relations but infuses into those relations marketing power in the farmer's favor. In the absence of this provision, the integrator could specify any date for the farmer's delivery of the produce. Presumably the integrator would choose a day when the price was low, thus paying the farmer less. By requiring the integrator to set the month for delivery in advance, while allowing the farmer to choose the week for delivery, the risk of market price

54. KAN. STAT. ANN. § 17-5901 (1974).

55. *Id.*

56. IOWA CODE ANN. § 172C.2 (West Supp. 1981).

57. Decision-making power in commodity production has shifted to the integrator notwithstanding the farmer's actual ownership of the land. This results from the integrator's access to the market, a factor far more important than who owns the land. See note 44 *supra* and accompanying text. Also, the marketing of the product is generally controlled by the integrator under the production contract. See note 20 *supra* and accompanying text. The Iowa provision gives the farmer some marketing choice by mandating the delivery terms and in doing so returns to the farmer some decision making and marketing power.

fluctuation falls upon both parties.⁵⁸ While long-range foreseeability of market fluctuation is a factor which may favor the integrator, this advantage is partially offset by the farmer's choice of delivery week. The farmer's decision casts the weekly price fluctuation risk upon both parties, thereby distributing a risk that otherwise would be forced upon the farmer by the integrator's arbitrary choice of delivery. Although the provision allows the integrator to set the delivery day, this affords little advantage. In a long-term arrangement where the day of delivery is set in advance, daily price foreseeability may be so limited that the integrator's choice is meaningless. The total provision denies the integrator, by imposing market price risks upon the integrator as well as the farmer, its prior ability to despoil farmer profits. As such, the provision is an important first step in reallocating marketing power.

Notwithstanding this farmer-oriented provision, the Iowa act fully permits long-term production contracting. The act permits the integrator to choose between the above provision⁵⁹ and one which allows the integrator alone to set the delivery date. The alternative provision states, "where . . . delivery which is more than twenty days after the making of the contract the contract shall . . . [s]pecify a calendar day for delivery of the livestock."⁶⁰ Since this clause requires the setting of a specific delivery date, it incorporates some of the advantage of the alternate provision. The integrator can not force the farmer to market his livestock at the integrator's whim, presumably when the price is low. Under this provision the integrator must assume the risk that the price will be high on the date chosen. Assuming equal bargaining power in setting the calendar date for delivery, both parties share the risk of price fluctuation equally. This assumes too much, however, considering the integrator's overriding market power and his regular employment of form contracts.⁶¹ Consequently, if the integrator chooses this alter-

58. This discussion assumes that the price to be paid for the produce under the contract is determined by the open market price on the day of delivery.

59. See note 56 *supra* and accompanying text.

60. The Iowa provision which directly addresses the issue of integration regulates only the cattle and hog business. The general provisions of the act address the production of agricultural crops, the production of eggs, milk, fruit or other horticultural crops, the raising of poultry, and the grazing of livestock. The act prohibits direct integration in all of these commodities but regulates "indirect" integration only in cattle and hog production. IOWA CODE ANN. §§ 172C.1, 2, 4 (West Supp. 1981).

61. Even if the integrator chooses the provision whereby the farmer may set the week for delivery, this positive decision-making power means little when the integrator's form contract otherwise precludes genuine negotiation. See generally Morrison, *supra* note 8, at 991.

native, no positive marketing or decisionmaking power is given to the Iowa family farmer. The provisions only effect is to allocate price fluctuation risk to both parties. Moreover, since both alternatives address only the issue of the integrator's marketing control, the standards and requirements for the husbandry of the livestock may still be contractually controlled by the integrator.

Although Iowa's total integration provision does not confer much positive marketing power on the farmer, it at least addresses the issue of direct integration through ownership of feedlots in which hogs and cattle are fed for slaughter. The statute declares that "it is unlawful for any processor of beef or pork . . . to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter."⁶² "Control" or "operation" does not preclude indirect control through the use of production contracts.⁶³ Neither does "operation" prevent processors from owning and operating facilities to provide normal care and feeding of livestock "for a period not to exceed ten days immediately prior to slaughter, or for a longer period in an emergency."⁶⁴ But, direct and formal integration is precluded. This assures that actual ownership of land and production facilities remain in the farmer. This is an important initial step in guaranteeing farm independence since it would be ineffectual to restrict contracting without restricting direct integration.

Since restrictions on direct integration are prerequisite to meaningful restrictions on indirect integration, the utility of Oklahoma's farm act⁶⁵ is doubtful. The agribusinesses most apt to engage in production contracting are exempted from the Oklahoma act's restrictions on direct integration. Oklahoma's agribusinesses need not expend any entrepreneurial ingenuity in developing indirect techniques in order to integrate. The act's restrictions on direct ownership of agricultural lands "[do] not apply to corporations engaging in food canning operations, food processing, or frozen food

62. See note 56 *supra*.

63. See note 56 *supra* and accompanying text. Indirect control is specifically addressed in a separate provision. The provision neither affords much positive decision making power to the farmer nor does it deprive the integrator of much control over the farmer's production and marketing decisions.

64. IOWA CODE ANN. § 172C.2(2) (West Supp. 1981). Livestock processing requires holding pens for the care and feeding of the stock until it can be slaughtered and processed. This provision accounts for that necessity. The ten day maximum holding period insures that the processor is not using the facilities for the actual fattening of the livestock, an activity prohibited by the act. The practical application of the provision is to mandate a complete turnover in stock every ten days.

65. OKLA. STAT. ANN. tit. 18 § 951 (West Supp. 1981).

processing insofar as such corporations engage in the raising of food products for aforesaid purposes."⁶⁶ This clause invites direct agribusiness integration into the production facet of agriculture, eliminating the agribusinesses' need to employ production contracts. To the contrary, the Iowa act avoids this incongruous result by initially prohibiting direct integration and then further restricting, at least minimally, the use of production contracts.

In addition to its restriction on direct integration and production contracting, the Iowa act contains a provision requiring divestment of unlawfully held property.⁶⁷ This provision applies retroactively. Any processor that owned, controlled, or operated a feedlot on the date of the statute's enactment is given ten years in which to divest itself of the property. This clause, like a very similar one in North Dakota's farm act,⁶⁸ raises questions of the deprivation of property without due process of law. The North Dakota act was constitutionally challenged on due process grounds and subsequently met the test. The United States Supreme Court in *Ashbury Hospital v. Cass County*⁶⁹ held that a state's power to limit the nature of corporate business conducted in the state does not cease once the corporation has acquired real property within that state.⁷⁰ The fourteenth amendment's due process clause⁷¹ requires only that the cor-

66. OKLA. STAT. ANN. tit. 18 § 953(c) (West Supp. 1981).

67. The Iowa act, which became effective on August 15, 1975, provides that "[a]ny processor or limited partnership which owns, controls, or operates a feedlot on August 15, 1975 shall have until July 1, 1985 to dispose of the property." IOWA CODE ANN. § 172C.2(2) (West Supp. 1981).

68. The North Dakota act provides:

[A]ll corporations, both domestic and foreign, which now own or hold rural real estate which was acquired prior to July 29, 1932, and which is used or usable for farming or agriculture, except such as is reasonably necessary in the conduct of their business, shall dispose of the same on or before July 29, 1942, and said corporations may farm and use said real estate for agricultural purposes until such date. The ownership limitation provided by this section shall be deemed a covenant running with the title to the land against any grantee, successor, or assignee of a corporation, which is also a corporation.

N.D. CENT. CODE § 10-06-02 (1976).

69. 326 U.S. 207 (1945). *Ashbury Hospital*, a Minnesota non-profit corporation owning farm land in North Dakota, sought a declaratory judgment that the North Dakota act's divestment provision was unconstitutional.

70. The Court stated; "a state's power . . . to limit the nature of the business [the foreign corporation] may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent legislation excluding such a corporation from continuing in the state has been sustained as an exercise of . . . general power. . . ." *Id.* at 211-12.

71. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

poration "is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale."⁷² Since North Dakota's divestment requirement was upheld in *Ashbury Hospital*, Iowa's identical provision is valid. This insures that feedlots directly integrated in the future in Iowa and those previously integrated will be disbanded.

A state's ability to force property divestiture and to generally regulate economic activity within its borders was recently affirmed in *Exxon Corp. v. Governor of Maryland*.⁷³ The due process clause was interpreted as not giving the judiciary power to act as a "superlegislature" to weigh the economic wisdom of legislation.⁷⁴ The Court found that regardless of the ultimate economic efficacy of a statute, if it "bears a reasonable relationship to the state's legitimate purpose," it passes any due process challenge.⁷⁵ The Iowa act, unlike its North Dakota counterpart, has not been challenged on due process grounds. Nevertheless, it certainly meets the standards set forth in *Ashbury Hospital* and *Exxon Corp.* The act prescribes a ten year divestment period, a fair opportunity for integrators to "realize the value of the land." The act's divestment provision and contract restrictions bear a reasonable relationship to the state's purpose of protecting the family farmer.

IV. FEDERAL LEGISLATIVE ATTEMPTS TO REGULATE PRODUCTION CONTRACTING

It has been suggested that all state family farm legislation is destined to be short-lived.⁷⁶ It is argued that the larger, more

72. *Ashbury Hosp. v. Cass County*, 326 U.S. at 212-13.

73. 437 U.S. 117 (1978). The Exxon case, although not dealing with the divestment of farm land, exemplifies a state's ability to regulate economic activities within its borders and to force divestment of property without violating the due process clause. Exxon Corp., a gas producer and refiner, owned thirty-six gas stations in Maryland. During the 1973 shortage of petroleum, gasoline stations operated by producers and refiners had received preferential treatment of the short supply. Maryland, in response, passed a statute designed to correct the inequities in the distribution and pricing of gasoline. The Maryland statute required gasoline producers and refiners to discontinue operating retail gasoline stations within the state.

74. The Court stated that "[t]he evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the due process clause does not empower the judiciary to sit as a superlegislaure to weigh the wisdom of legislation." *Id.* at 124.

75. *Id.* at 125.

76. Professor Morrison suggests that the family farmer is following the same line of defense in promulgating family farm acts as small businesses pursued in enacting regulations such as the chain-store tax. The chain-store tax was intended to pro-

"economically efficient" agribusiness can produce cheaper agricultural commodities and that consumers will eventually force repeal of the acts. The integrator's economic efficiency, however, may be the result of the monopolistic effect of integration.⁷⁷ Because the state farm acts may be "short-lived," they are perhaps an inappropriate vehicle for confronting this potential monopoly.

These monopolistic tendencies⁷⁸ are ostensibly regulated by the Clayton Act.⁷⁹ This federal antitrust legislation is not applicable to the monopolistic situation of integrated agribusiness, however.⁸⁰ Because this federal antitrust legislation is inapplicable and state family farm legislation may be "short-lived," federal legislators have sought other means for protecting the family farmer.

One attempt to protect the family farmer was Senator James Abourezk's proposed amendment to the Clayton Act which specifically addressed vertical integration and indirect control of farm production.⁸¹ Although this amendment was rejected, it would

protect small business from the developing national chain store. Political pressures and avoidance techniques led to the eventual repeal of the chain-store tax. Professor Morrison is suggesting that if integrated agribusiness is a more efficient way of producing food than the family farm unit, consumers demanding lower food prices could force repeal of the family farm acts. See Morrison, *supra* note 8, at 994.

77. Senator Abourezk contends that integration in the agricultural industry by corporations involved in the processing, distributing, or retailing of the agricultural commodity, tends to create monopolies. See Abourezk, *Agriculture, Antitrust and Agribusiness: A Proposal For Federal Action*, 20 S.D.L. REV. 499, 499-500 (1975).

78. Integration tends to create monopolies because traditional open markets are eliminated by integration. The small farmer who has neither the production contract nor the open market may find that no outlet for his produce exists. Consequently, unless the small farmer produces the minimum volume of a commodity needed to attract a contractor, he will be forced out of business. As small farmers are forced out of business, production and marketing correspondingly concentrate under the integrator's central control. The tendency for monopoly is spawned in that centralized production and marketing control. See *generally* STATUS OF THE FAMILY FARM, *supra* note 17, at 10, 18. For a discussion of the integrator's marketing and production power in the broiler and egg business, see note 88 *infra* and accompanying text.

79. 15 U.S.C. § 18 (1973).

80. The Clayton Act does not apply to integrated agriculture because it fails to regulate indirect control of farm production through production contracts or the leasing of farm property. To compensate for the deficiency of the Clayton Act, Senator Abourezk proposed a bill to amend that act. That bill specifically addressed direct and indirect integration of the family farm. See Abourezk, *supra* note 77, at 503.

81. The restrictive provisions of Senator Abourezk's proposed amendment are as follows:

[N]o person engaged in commerce (or affecting commerce) in a business other than farming, whose nonfarming business assets exceed \$3,000,000, shall (1) engage directly or indirectly in farming or the production of

have filled the gap between the existing state family farm acts and federal antitrust laws. The Family Farm Antitrust Act of 1979,⁸² also introduced as an amendment to the Clayton Act, was similar to the bill introduced by Senator Abourezk. The nurture of private enterprise, the protection of consumers and small business (including the family farmer), and the prevention of monopolies and anticompetitive trade practice in the agricultural industry were cited in support of the amendment.⁸³ The amendment sought to accomplish these goals by prohibiting all persons "engaged in commerce (or affecting commerce) in a business other than farming, whose nonfarming business assets exceed \$15,000,000 . . . [to] control, or attempt to control, directly or indirectly, the production of raw farm products through ownership or long-term leasing of agricultural land."⁸⁴ Like its counterpart in the states, it exempted from its prohibitions cooperatives, agricultural research and experimental businesses, land acquired for non agricultural development and integrated producers who are engaged in production on the date of enactment.⁸⁵

For all practical purposes these federal proposals provide no greater protection to the family farmer than existing state farm acts. If anything, these amendments would allow greater access to farm production by large corporate farms and non-farm businesses.⁸⁶

agricultural products, (2) control, or attempt to control, agricultural production through the ownership or leasing of land for agricultural purposes, or (3) participate in farming through corporate integration or merger, or by any other means of acquisition or control of another person who is engaged in farming.

Abourezk, *supra* note 77, at 512.

82. *Hearings on S. 334, supra* note 44, at 5.

83. These considerations are noted in the amendment's findings and declaration of policy. *Id.* at 5, 6.

84. *Id.* at 7.

85. Only the Iowa act, IOWA CODE ANN. § 172C.2 (West Supp. 1981), and the North Dakota act, N.D. CENT. CODE § 10-06-02 (1976), require divestment of agricultural land held by the corporation on the effective date of the act. The remainder of the state farm acts allow for continued corporate holding of land acquired before the act's enactment. For example, Wisconsin's farm act provides that this section [on corporate restrictions] does not apply to land: 1. Owned by a corporation on the effective date of this act. 2. Acquired by a corporation in the normal expansion of land owned by the corporation and used for agricultural purposes on the effective date of this act, provided that such expansion does not increase the acreage of such land by more than 20% in any 5-year period.

WIS. STAT. ANN. § 182.001(2)(c) (West Supp. 1981).

86. For instance, the Family Farm Antitrust Act of 1979 would require only sixty percent of the producer's gross income to be proceeds from farming, whereas the state farm acts typically require sixty-five to eighty percent of gross income to be

These amendments are significant, however, because they represents an alternative approach to the problem of integration. The emphasis of these federal proposals is upon the anticompetitive and monopolistic tendencies of integration. Although the Justice Department may be reluctant to enforce such legislation,⁸⁷ the breaking up of agricultural monopolies is perhaps a more acceptable justification for prohibiting integration than the state farm acts' social goals in preserving the farm family. Even though the objective of federal and state legislation is the same, consumers and legislators may be more responsive to economic arguments and the threat of monopoly than to sociological arguments concerning the threatened nuclear farm family.

V. THE EFFECT OF INTEGRATION UPON THE MARKET

Regardless of whether state or federal law proves more acceptable in prohibiting agribusiness integration, both seek to protect the family farmer from the integrator's concentrated market power. The egg production and broiler business aptly exemplify the effect of integration upon the market. The producers in the 384 plants which produced a substantial portion of all eggs in the United States universally desired not to participate in the open market.⁸⁸ These producers view integration as a means of avoiding the "market imperfections" associated with openly negotiated prices. Integration in egg production exists in some cases from the producer to the retailer.⁸⁹ The producer-to-retailer integrator eliminates all potential

farming proceeds. See, e.g., MINN. STAT. ANN. § 500.24(2)(d)(4) (West Supp. 1979). The \$15,000,000 asset limitation is considered to be so high that substantial non-farming interests would have access to farm production. Also, the bill is not likely to stop the decline in farm numbers or the continued concentration of land into larger units. Because of its major exclusions, it would not stop large family farm operations from getting larger nor would it stop integration in livestock production where control shifts to the integrator without direct control over land. See *Hearings on S.334, supra* note 44, at 316, 329.

87. The federal legislation would not be more effective in restricting integration than the state farm acts. The Justice Department is less likely to initiate a suit under the federal legislation until the alleged conduct reaches a stage where the suit will be successful. At that point numerous family farmers have incurred damage. Also, because the market for agricultural products is broadly delineated, even a notable trend toward concentration might not be considered anticompetitive. See Abourezk, *supra* note 77, at 504.

88. "The fundamental problem of pricing eggs is the almost universal desire . . . by firms not to participate in the open market. Marketing (viewed by the individual) is the antithesis of selling a homogeneous product in an open and 'perfect market.'" L. SCHRADER, *supra* note 36, at 5, 6.

89. *Id.* at 2.

intermediate markets⁹⁰ where exchange could have been made on a negotiated basis. The loss of these open competitive markets is reflected in the integrator's ability to manipulate prices in what is essentially a "non-price coordinated system."⁹¹ This coordinated system not only affords the potential for price manipulation, but definitely impedes market access for independent producers.⁹² In the egg and broiler business, this is the result of the use of production contracts and long standing production arrangements.⁹³ The anticompetitive effect of contractual integration is manifested by the farmer's inability to find a market for his produce.

In egg production, this highly integrated "non-price" system is developed to the point where there is no longer an open market capable of generating a quotable market price.⁹⁴ With the open market extinguished, the prospective broiler farmer's entrance and continued independence in the market is not protected. Indeed, the loss of independent access to a market is so pervasive that if the farmer wishes to sell broilers he must do so through a fixed price contract or not at all.⁹⁵ It is precisely this situation that the state farm acts seek to prevent.

Because the state acts can be circumvented through indirect production under a production contract, federal legislators sought to fill this gap with agricultural antitrust measures. Senator Abourezk's proposal and the Family Farm Antitrust Act of 1979 both addressed the issue of indirect farm production. However, these measures did not muster enough support to become law. Perhaps the most feasible means of restricting integration is to amend the existing state farm acts with provisions specifically addressed to contract farming. Amendments to the state acts are justified on the basis of preventing monopoly. Preventing monopoly

90. See note 30 *supra* and accompanying text.

91. This terminology is used to describe the integrated method of transferring goods from one stage to another. Transfer prices under the production contract are determined by formula, not on a negotiated basis. Without the open market, the ability to manipulate the price of goods is enhanced. Such manipulation can occur in the egg and broiler business. See generally L. SCRADER, *supra* note 36, at 3, 10.

92. See note 39 *supra* and accompanying text.

93. L. SCHRADER, *supra* note 36, at 10.

94. *Id.* at 3.

95. The chicken farmer is no longer protected by competitive bidding in the marketplace. If a farmer wants to sell chicken, he must sell to a corporation through a contract with a fixed formula price or not at all. *Role of Giant Corporations: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st & 2d Sess. 3693 (1971-1972) (statement of Harrison Welford).

may increase the state acts' overall credibility by providing a basis that is not "short-lived." Since the state legislators' original intent was to prevent situations like that in the egg industry, amendments presumably would be supported.⁹⁶

VI. CONSTITUTIONAL CHALLENGES TO FAMILY FARM LEGISLATION

A. *Due Process And Equal Protection Challenges*

Although the existing state farm acts, with the exception of Iowa and Kansas, do not restrict production contract integration, preventing the effects of integration is unquestionably their goal. This goal is expressed in the farm acts' declarations of policy. The policies are stated as preserving economic and moral stability,⁹⁷ protecting consumers, preserving free and private enterprise and preventing monopoly,⁹⁸ and promoting the well-being of rural society.⁹⁹ Because the acts' promoters have declared their intent and have attempted to execute that intent by restricting agribusiness growth, the acts quite expectedly have been subjected to constitutional challenge.

The first family farm act¹⁰⁰ was opposed on equal protection and due process grounds. The North Dakota act met both challenges in *Ashbury Hospital v. Cass County*.¹⁰¹ The equal protection claim stemmed from the right of cooperative corporations¹⁰² to own farm

96. The author has proposed such an amendment. It is directed toward preventing the monopolistic and anticompetitive effects of integration. I believe this approach toward restricting integration will find more support than the federal anti-trust approach. See Appendix.

97. "The Legislature of the state of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the legislature recognizes that the existence of the family farm is threatened by conglomerates in farming." S.D. CODIFIED LAWS ANN. § 47-9A-1 (Supp. 1981).

98. "In order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is unlawful for any processor . . . to own, control, or operate a feedlot in Iowa in which hogs or cattle are fed for slaughter." IOWA CODE ANN. § 172C.2 (West Supp. 1981).

99. The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family. MINN. STAT. ANN. § 500.24(1) (West Supp. 1981).

100. The North Dakota family farm act, N.D. CENT. CODE § 10-06-01 (1976) (enacted in 1932), served as the prototype for the remainder of the state farm acts, all enacted between 1971 and 1975. See note 5 *supra*.

101. 326 U.S. 207 (1945).

102. The single exemption in the North Dakota act allows cooperative corporations to own farm land and engage in farming. The exemption nevertheless insures

land while prohibiting all other corporations from doing so.¹⁰³ The Court held that the test of validity for equal protection "is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made."¹⁰⁴ The Court reasoned that statutory discrimination between classes which are in fact different, is "presumed to be relevant to a permissible legislative purpose and is not . . . a denial of equal protection if any state of facts could be conceived which would support it."¹⁰⁵

Ashbury Hospital is an important holding because it insures the continued validity of the state farm acts under the equal protection clause. The acts have exemptions for cooperatives, family farm corporations, or some form of qualified corporation.¹⁰⁶ With these special classifications, the existing acts are vulnerable to the equal protection challenge. Nevertheless, all the acts should meet that challenge under the *Ashbury Hospital* analysis because the classes exempted in all the acts are similar to the class upheld in *Ashbury Hospital*. The exempted classes are similar in their purpose to restrict ownership of agricultural land to the individuals who actually work the land and produce the commodity with their own labor. The classes exempted "are in fact different" and the "differences between them are pertinent to the subject with respect to which the classification is made."¹⁰⁷ Cooperatives, family farm corporations, and

that non-farm interests are not permitted to engage in farming or own farm land. The provision states, "nothing in this chapter shall be construed to prohibit cooperative corporations, seventy-five percent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood, from acquiring real estate and engaging in cooperative farming or agriculture." N.D. CENT. CODE § 10-06-04 (1976).

103. "All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture." *Id.* at § 10-06-01.

104. *Ashbury Hosp. v. Cass County*, 326 U.S. at 214.

105. *Id.* at 215.

106. A qualified corporation is typically defined as a corporation meeting the following standards: (1) Its shareholders do not exceed five in number; (2) All its shareholders, other than any estate, are natural persons; (3) It does not have more than one class of shares; and (4) Its revenues from rent, royalties, dividends, interest and annuities does not exceed 20 percent of its gross receipts; and (5) A majority of the shareholders must be residing on the farm or actually engaging in farming.

MINN. STAT. ANN. § 500.24(2)(d) (West Supp. 1979). The qualified and family farm corporations are defined so as to insure that ownership and control of land remains in the individuals who actually work the land.

107. *Ashbury Hospital*, 326 U.S. at 214.

qualified corporations are different from the agribusiness integrator. These corporations are incapable of acquiring the extensive market power of the integrator. This difference is the basis for protecting these corporations but not the corporate integrator. Under the *Ashbury Hospital* analysis, since these classes are in fact different, the discrimination between them will be presumed relevant to a permissible legislative purpose.

Since the farm acts have engendered very little equal protection litigation, it is anticipated that the additional restrictions on production contracting such as those imposed by the Iowa act should not present any additional equal protection problem. Restrictions aimed specifically at prohibiting production contracting seek only to insure that the named classes are functionally as well as legally separate.¹⁰⁸ Therefore, additional restrictions should not expose the acts to any greater equal protection challenge.

The due process challenge to the farm acts was also decided by the *Ashbury Hospital* case. That challenge involved the forced divestment of agricultural land.¹⁰⁹ As long as a corporation has a fair opportunity to realize the land's value, the state may force the divestment of unlawfully held land without violating due process of law.¹¹⁰

B. Commerce Clause Challenges

Although meeting equal protection and due process standards, the state farm acts, especially with additional restrictions on production contracting such as those proposed, may face a challenge under the commerce clause.¹¹¹ Because the acts protect local economic enterprise from competition on a national scale, they are subject to challenge as restrictions on free commerce.¹¹² Legislation that affects both interstate and local business vis-a-vis that which restricts only out-of-state enterprise, may survive commerce clause scrutiny if it is

108. Because the production contract is the functional equivalent of direct ownership, see note 14 *supra* and accompanying text, without legally restricting the production contract, there is no functional separation of the named classes.

109. See note 69 *supra* and accompanying text.

110. *Id.*

111. U.S. CONST. art. I, § 8.

112. Professor Morrison suggests that commerce clause issues raise more serious problems for the state farm acts than the due process-equal protection issues. He points out that state legislatures are not afforded the broad discretion under the commerce clause that they are under the due process clause. Under the commerce clause, state acts must be tested against national interests and free trade. Morrison, *supra* note 8, at 980.

narrowly drawn.¹¹³ The applicable commerce clause test was enunciated in *Pike v. Bruce Church, Inc.*¹¹⁴ Legislation that evenhandedly regulates in favor of local interests, and which incidentally affects interstate commerce, is valid unless the burden imposed on interstate commerce is "clearly excessive" in relation to the putative local benefits.¹¹⁵ The Court in *Pike* went on to explain that the tolerable burden depends on the nature of the local interest and on whether that interest is promotable with a lesser impact on interstate commerce.¹¹⁶

Under the *Pike* analysis, it appears that the existing farm acts, and potentially more restrictive acts, will survive commerce clause challenges. The acts affect both foreign and domestic corporations evenhandedly. Except for the exempted corporations, all corporations are prohibited from owning farm land and engaging in farming. The burden imposed on interstate commerce vis-a-vis local benefits can hardly be characterized as "clearly excessive." In view of integration's monopolistic tendency,¹¹⁷ environmental considerations,¹¹⁸ effect upon farm-related business,¹¹⁹ potential ramifications of labor unionization in agriculture,¹²⁰ and the debilitating effect upon the nuclear family absent this legislation,¹²¹ the family farm acts do not seem "clearly excessive" in relation to their effect on interstate commerce. Furthermore, the local interests protected by the acts, including economic, environmental, social, and familial interests, are

113. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36, 100 S. Ct. 2009, 2015 (1980).

114. 397 U.S. 137, 142 (1970).

115. Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

116. *Id.*

117. See note 91 *supra* and accompanying text.

118. See note 163 *infra* and accompanying text.

119. See note 175 *infra* and accompanying text.

120. See note 167 *infra* and accompanying text.

121. The family farm is one of the few remaining bastions capable of providing an environment which will foster close family relations. These relations in turn foster virtues central to American life. As Senator Gaylord Nelson indicated, the farm family generates qualities of independence, industry, hard work, foresight and cooperation. See note 46 *supra* and accompanying text. Without the family farm environment, its associated close family and the qualities generated by that family will be lost.

not capable of being promoted "with a lesser impact on interstate activity."¹²² If these local interests are to be promoted, their present effect upon interstate commerce will not only continue, but, with additional restrictions on production contracting, will have more far-reaching economic consequences. Judicial balancing in future confrontations will determine the amount of protection afforded these local interests.

The test set forth in *Pike* was affirmed by the holding in *Exxon Corp. v. Governor of Maryland*.¹²³ Exxon argued that a Maryland statute forcing divestiture of Exxon property violated the commerce clause by unduly burdening interstate commerce and by controlling interstate commercial activity not amenable to state regulation.¹²⁴ In discussing this commerce clause challenge, the Court stated that even though the burden of a state regulation falls on interstate companies, that by itself does not establish a commerce clause violation.¹²⁵ The commerce clause protects the interstate market, not particular interstate firms, from burdensome regulation.¹²⁶

The crux of the commerce clause analysis in *Exxon Corp.* was whether a particular state act impedes the flow of goods from state to state.¹²⁷ The family farm acts affect the production of goods, not the flow of goods per se. At most, the acts affect the flow of goods indirectly by regulating who may produce those goods. Farm production under the independent family farmer presumably would continue if the farm had not been integrated. That produce would continue to flow into the interstate market via agribusiness buyers. Therefore, the acts do not impede the interstate flow of goods.

Exxon also argued that the statute would interfere with the "natural functioning of the interstate market" and would change the

122. Under the *Pike* analysis, the Court is simply balancing competing interests. The interests of economically powerful agribusinesses whose economic freedom is curtailed are balanced against the various economic, social, and familial factors surrounding the family farm. Presuming that the purpose of protecting these latter factors is legitimate, the question then becomes one of degree. I am suggesting that, at least for the present, the balance weighs in favor of the family farm. See note 115 *supra* and accompanying text.

123. 437 U.S. 117 (1978). For a statement of the facts in *Exxon Corp.* see note 73 *supra* and accompanying text.

124. *Id.* at 125.

125. The Court continued, "[i]f the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market-the regulation may have a discriminatory effect on interstate comerce." *Id.* at 126 n.16.

126. *Id.* at 127-28.

127. See note 125 *supra*.

market structure.¹²⁸ In response, the Court held that "the Commerce Clause [does not] protect the particular structure or methods of operation in a retail market."¹²⁹ Farm acts which incorporated provisions against production contracting would be vulnerable to a similar accusation since they would clearly affect the market structure. But that effect is not the determining factor for invalidating an act under the commerce clause. The effect upon the interstate flow of goods is of greater importance. Under the criteria set forth in these cases,¹³⁰ restrictions on agribusiness contractual integration meet commerce clause requirements.

VII. FACTORS RESPONSIBLE FOR INCREASED INTEGRATION

The necessity for additional family farm protection can only be fully understood after considering those factors which make economic integration feasible. The presence of integrated agribusiness in the food production chain results from several factors. National policies favorable to large-scale production are as responsible for the growth of integrated agriculture as any production efficiency the agribusiness might possess.¹³¹ National price and income support programs for agriculture¹³² emerged as the major federal farm policy following World War I.¹³³ Direct income

128. The crux of Exxon's claim was that regardless of whether the state had interfered with the movement of goods in interstate commerce, the statute had interfered "with the natural functioning of the interstate market," and would change the market structure. *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 127.

129. *Id.*

130. Besides *Exxon Corp.* and *Pike*, see also *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 367 (D. Conn. 1979); *Tober Foreign Motors v. Reiter Oldsmobile*, 376 Mass. 313, 381 N.E.2d 908 (1978).

131. The growth of corporate agriculture is not inevitably nor simply a product of efficiency, but it is rather a result of the emergence of national policies favorable to large-scale enterprises. Some of these policies were promulgated by corporate interest. Others, ostensibly at least, were formulated in the desire to protect the family farmer, but have the opposite effect.

W. GOLDSCHMIDT, *As You Sow* at xlviii (1978).

132. The Agricultural Marketing Act of 1929 created the Federal Farm Board. This was the first direct effort of government to influence farm prices. The Board's failure is attributed to the 1930's depression. The Agricultural Adjustment Act of 1933 provided for production adjustments by limiting production. It was declared unconstitutional and was replaced by the Soil Conservation and Domestic Allotment Act of 1936 and then the Agricultural Adjustment Act of 1938. Amendments and additions to these acts have been made every three to five years. Consequently, agriculture has been under some type of farm commodity income support since the 1930's. *WHO WILL CONTROL U.S. AGRICULTURE?*, *supra* note 3, at 10.

133. *Id.*

payments to the farmer comprised a substantial portion of the money available under these programs.¹³⁴ These payments were made in proportion to the size of individual farm operations and volume of sales. This Department of Agriculture¹³⁵ policy was designed to support the growth of large farms.¹³⁶ Since larger farming operations received larger benefits than smaller farms,¹³⁷ smaller farms have not remained economically viable. Indeed, without this governmental impetus, there would be twenty-four percent more farms today and the average farm size would be nearly twenty percent smaller.¹³⁸

The economic arguments which condemn family farm legislation as being contrary to "the realization of economic optima in a free market economy,"¹³⁹ seemingly overlook these governmental inputs. Inputs from without the market place vitiate the function of the free market. Despite views to the contrary, many agricultural economists insist that one- or two-man farm operations are still size efficient.¹⁴⁰ In light of this fact, it is perhaps appropriate to view family farm legislation as a counterweight to balance economic forces unleashed by governmental inputs. The assertion in opposition to the farm acts that the disappearance of the family farm is proof of its inability to compete economically overlooks the effects of market involvement by the government.

The government's price and income programs have provided price certainty that has affected agricultural production indirectly as well. Income stability promised by the programs has increased access to capital markets.¹⁴¹ Assured that commodity prices will not fall below price support levels, lenders have been more willing to extend credit to those eager to accumulate farm land and to invest in

134. Direct income payments for feed grain, wheat, and cotton programs in 1970 made up about 89% of all governmental payments to farmers. In the 1971 fiscal year, these programs accounted for about 46% of the total Department of Agriculture budget. *Id.*

135. Hereinafter cited as USDA.

136. Heady, *Externalities of American Agricultural Policy*, 7 U. Tol. L. Rev. 795, 811 (1975).

137. In 1970, 7.6% of all farms received 30.4% of all payments. WHO WILL CONTROL U.S. AGRICULTURE?, *supra* note 3, at 10.

138. L. SCHERTZ, ANOTHER REVOLUTION IN U.S. FARMING? 62 (U.S. Dep't of Agriculture, Agricultural Economic Report No. 441, 1979).

139. See note 49 *supra* and accompanying text.

140. *Hearings on S. 334*, *supra* note 44, at 2.

141. WHO WILL CONTROL U.S. AGRICULTURE?, *supra* note 3, at 11.

capital goods needed for large-scale farming.¹⁴² Although an indirect effect of federal programs, these lending practices have helped transform agricultural production into a highly mechanized process. Farm mechanization has in turn led to concentrated, single-commodity production, a situation favorable to integration.¹⁴³

Just as USDA price and income support policies encourage large-scale production and integration, the existing tax structure does also. Tax rates for corporations are less than the rates for sole proprietorships.¹⁴⁴ This fact has been an important incentive for the incorporation of family farms, and insofar as the family farmer may do so, he is not disadvantaged by this structure. On the other hand, the capital gains tax policy has worked to the integrator's advantage.¹⁴⁵ Only in those states permitting direct integration, can the integrator take advantage of capital gains. The integrator is able to adjust profits between the integrated stages.¹⁴⁶ It is advantageous for integrators to shift profits down the integrated chain by investing at the production stage. Gains made at this level, as in the sale of cattle, may fit the capital gains tax bracket. Consequently, the capital gains policy has encouraged investment and expansion of production resources, thereby furthering the concentration of production at the small farm's expense.

Research As A Factor Behind The Growth Of Integration

Government support programs and tax laws are only two factors that promote larger farms and the integrated form of

142. Federal commodity programs have accelerated the shift to large farms by supporting commodity prices and increasing the chances of significant price increases. These programs have increased the confidence of people willing to accumulate land and the willingness of lenders to extend credit to these kinds of people. L. SCHERTZ, *supra* note 138, at 3.

143. See note 151 *infra* and accompanying text.

144. Except at low levels of income, the tax rates for corporations are less than the rates for individuals. Therefore, farmers have an increased incentive to incorporate and not to elect use of *Subchapter S* of the *Internal Revenue Code*. L. SCHERTZ, *supra* note 138, at 68.

145. Capital gains are taxed at a lower rate than ordinary income. Thus, the more income that qualifies as a capital gain the lower the tax liability.

146. This is applicable, for example, where an integrated firm owns a cow herd, a feedlot, and a slaughtering plant. The slaughtering plant and feedlot can be operated with only minimal profits. All profits can be pushed down the integrated chain and converted into capital by investments in breeding stock. When the cattle are sold, any gain will be taxed at capital gains rates. P. RAUP, *CORPORATE FARMING IN THE UNITED STATES* 11 (Scientific Journal Series Paper No. 8187, 1972), cited in, W. GOLDSCHMIDT, *AS YOU SOW* at xxxv at (1978).

agriculture. Government sponsored research agencies have also furthered the interests of corporate integrated farming at the expense of the family farm.¹⁴⁷ The original farm orientation of this research has disappeared. The research is now directed toward agribusiness interests. Business interests, particularly those of farm machinery and farm chemical input companies, are asked to directly participate in the research stages of mechanization projects.¹⁴⁸ According to one commentator, "the interests of agribusiness literally are designed with the product. No one else is consulted."¹⁴⁹

The agribusiness orientation of research has had a marked effect on the continued existence of smaller farms. Of course, a few research technologies such as hybrid seeds and fertilizers can be implemented on smaller as well as larger production units. For many technologies, however, availability and adoptability are limited to large production units. Modern machinery is an apt example. In crop production and large-scale poultry, beef, dry lot dairy and hog confinement feeding units, the adoption of modern machinery and technologies results in high cost/low volume or low cost/high volume production.¹⁵⁰ The advent of machinery and technologies has mandated that the size of production units be increased. In many respects these technological advances are desirable. The concentrated production that results from their incorporation has, nonetheless, spelled the demise for numerous small farms.

New technologies with high volume/low cost production have mechanized farm production and have resulted in larger farms and in concentrated single commodity specialization.¹⁵¹ Today, one-half of

147. When American agricultural policy took root during the Civil War, it was recognized that research and development must be provided for farmers. The Department of Agriculture was established to provide programs for educating the rural population and for commercializing the American farm. This research and training was agrarian oriented. W. GOLDSCHMIDT, *AS YOU SOW* at xxxviii-xxxix (1978).

148. Big business interests are asked to participate directly in the planning, research and development stages of these projects. J. HIGHTOWER, *HARD TOMATOES, HARD TIMES: A REPORT OF THE AGRIBUSINESS ACCOUNTABILITY PROJECT ON THE FAILURE OF AMERICA'S LAND GRANT COLLEGE COMPLEX 31* (1973), *cited in*, W. GOLDSCHMIDT, *AS YOU SOW* at xxxix (1978).

149. *Id.*

150. L. SCHERTZ, *supra* note 138, at 2.

151. This transformation of agriculture into a highly mechanized system resulted in farms producing high volumes of only a single commodity. In egg production, for instance, it is common for each farm to have more than 20,000 laying hens; in broiler production each farm sells at least 60,000 chickens. The mechanization of agriculture also resulted in a substantial reduction of farm labor. *See generally* Heady, *supra* note 136, at 810.

all cattle fed in this country are fed in 422 feedlots.¹⁵² Five thousand farms accounted for nearly seventy percent of United States egg production; 16,000 farms accounted for ninety percent of broiler production; 15-20 firms annually market between 50,000 to 200,000 hogs and 5,000 farms accounted for ninety percent of turkey production.¹⁵³ Federal price support and research policies which advance technology and mechanization have played a significant role in developing this concentrated production.

VIII. SUITABILITY OF THE CONCENTRATED PRODUCTION UNIT FOR INTEGRATION

Mechanized farming, in large part resulting from federal agricultural policies, demands large capital investment. The corporate potential to generate excess capital is particularly valuable in meeting these capital needs.¹⁵⁴ The family farmer acquires equity capital mainly through savings while corporations have the advantage of obtaining outside equity capital. This additional capital buys capital-intensive machinery and this mechanization, in turn, gives corporations a high-volume production capacity. This capacity is apparent from the fact that the largest 50,000 farms in the United States are responsible for more than one-third of all farm sales.¹⁵⁵

The development of mechanized, high-volume capacity farming makes integration particularly attractive to the corporate agribusiness. Agribusinesses that are involved in food processing and distribution can minimize their costs and inconvenience by buying and assembling farm products in large volume lots.¹⁵⁶ Integration through production contracts becomes appealing to both the

152. Each of these cattle feedlots averages over 30,000 head per year. L. SCHERTZ, *supra* note 138, at 4.

153. These are 1974 production statistics. Because of the trend toward concentrated production and integration, see note 42 *supra*, these figures could be higher today. Each of the 5,000 turkey farms noted raised at least 3,200 birds. L. SCHERTZ, *supra* note 138, at 6.

154. Corporate involvement in agriculture did not become a serious possibility until capital-intensive mechanization and the increased size of production units made the capital-accumulating potential of corporations valuable. Morrison, *supra* note 8, at 977.

155. L. SCHERTZ, *supra* note 138, at 1.

156. Increased concentration in food processing and distribution by integrated firms may cause a commensurate increase in the size of farms and the concentration of farm production. These firms desire to purchase agricultural products in large volume lots. By integrating into the production stage, these processing and distributing firms can control quality and quantity tightly. WHO WILL CONTROL U.S. AGRICULTURE?, *supra* note 3, at 11.

agribusiness processor and the high-volume producer. The integrated coordination eliminates open market transaction risks for both. The producer is assured that its products will be marketed at the contractual price. The processor can make long-range processing and marketing decisions based upon the contract's assured supply of products. This integrated coordination ultimately enhances the participants' ability to control market activity and price.

IX. THE EXTERNALITIES OF CONCENTRATED PRODUCTION AND INTEGRATION

Concentrated production and agribusiness integration are heralded by those who equate size with efficiency.¹⁵⁷ Conversely, equally adamant arguments suggest that both farmers and domestic consumers at-large would benefit from a family farm protection policy which limited the size and growth of farms.¹⁵⁸ Advocates of the family farm protection policy indicate several factors that counterbalance possible efficiencies in large-scale production. Cost advantages for large-scale livestock, poultry, and hog production are partly offset by an increased incidence of disease.¹⁵⁹ Large-scale crop production is affected by additional costs which arise from space and distance factors;¹⁶⁰ energy costs being a primary factor. Energy could become so expensive that it would alter existing labor, land, and capital input proportions, thereby increasing the relative proportions of labor and land to capital.¹⁶¹ The present trend toward

157. See, e.g., L. SCHRADER, note 14 *supra*; L. SCHRADER, note 36 *supra*.

158. [T]otal farm income would be greater with small farms . . . farm employment, purchase of inputs in the community and off-farm income generated within the community all decline with [increase in] farm size. Consumer food costs are only slightly higher under smaller farms because the value of farm products per se represents a minor portion of food costs at retail. With medium sized family farms . . . [d]omestic consumers at-large also would be benefited along with farmers by a family farm income protection policy directed at limiting the size and growth of farms.

Heady, *supra* note 136, at 829-30.

159. WHO WILL CONTROL U.S. AGRICULTURE?, *supra* note 3, at 19.

160. *Id.*

161. The prospects of higher energy costs inject uncertainty into the future of U.S. farming, particularly the way in which it will be organized and managed. Transportation costs from producers to consumers will continue to rise with energy costs. This could encourage a shift in production from the Southwest and Pacific Northwest to producers closer to the more metropolitan, consumer centers of the North. Energy costs will also stimulate farmers to adjust the mix of resources they employ in farm production. Cost changes and the energy efficiencies of available technologies will influence the use of these technologies which will in turn affect farm size. L. SCHERTZ, *supra* note 138, at 79.

larger and fewer farms undoubtedly would reverse should energy costs continue to rise.

A. *Environmental Externalities*

The additional costs incurred by large-scale farmers are but a fraction of the total cost to society that results from concentrated industrial-type farming. When all of the externalities generated by the system are considered, industrial-type farming has developed to the point of being counter-productive and inefficient.¹⁶² This type of farming utilizes increasing amounts of production inputs including chemical pesticides, herbicides, and inorganic chemical fertilizers which generate larger amounts of environmental pollutants.¹⁶³ Soil erosion increases because large-scale farmers develop massive unbroken land tracts.¹⁶⁴ Concentrated livestock production creates a waste disposal and pollution problem unassociated with family size farming. Large-scale livestock feedlots generate amounts of animal wastes that present immediate environmental problems.¹⁶⁵ Large-scale producers, instead of returning animal wastes to the soil, continue to depend upon inorganic fertilizers to maintain the soil's productive capacity.¹⁶⁶ While many of the environmental externalities may not be of concern to the integrator in the short-run, they represent costs associated with industrialized farming that inevitably must be confronted.

B. *Effect on Labor*

Besides adverse environmental effects, large-scale corporate farming also affects rural labor requirements. This could significantly change existing farm labor relations. The mechanization of farms

162. "Policy makers, however, must realize that 'bigger' is not always 'better' and in this case, the move to larger industrial farms is actually contraproductive and inefficient when one considers the economic externalities emanating from such developments." Heady, *supra* note 136, at 832.

163. See generally B. COMMONER, *SCIENCE AND SURVIVAL* (1966), cited in, Heady, *supra* note 136, at 818 n.122.

164. Heady, *supra* note 136, at 819.

165. These problems include nitrate contamination of soil and ground water, breeding of insects, odors, and disseminations of agents infectious to man and animals. Rosenberg, *Vertical Integration in the Cattle Feeding Industry and the Packers and Stockyards Administration*, 7 U. TOL. L. REV. 935 (1976).

166. The possibility that these inorganic inputs are depleting the natural fertility of farmland is currently being investigated. In 1949 it took 11,000 tons of fertilizer to produce yields that in 1968 required 57,000 tons. B. COMMONER, *THE CLOSING CIRCLE* 150 (1971).

with capital-intensive labor-saving devices has resulted in rural depopulation and the loss of rural employment opportunities.¹⁶⁷ But the seeds of new agricultural labor relations have been sown which could affect wages paid to laborers of integrated agribusinesses.

These laborers, including the two and one-half million workers who constitute the largest block of disadvantaged workers in this country,¹⁶⁸ are entirely excluded from labor protection provided by the National Labor Relations Act (NLRA).¹⁶⁹ *Bayside Enterprises, Inc. v. NLRB*¹⁷⁰ reflects a growing concern and realization that protection should be afforded to laborers in the agricultural industry.¹⁷¹

167. When a tractor draws a combine . . . the farmer is employing hundreds of hours of urban manpower. All who work in the tractor and farm equipment plants, in fertilizer and pest-control chemical plants, and a fair portion of those producing oil, steel and other ingredients for our mechanical farms, are in fact part of the agricultural production team. The farming sector of our economy appears to have dwindled remarkably, when in fact a large portion are agriculturists working in the urban industrial environment. But of course the true irony of our agricultural economy is that we promulgate labor saving devices . . . and create thereby an army of low paid farm workers and a large pool of unemployed.

W. GOLDSCHMIDT, *AS YOU SOW* at xxxii (1978).

168. Many of the two and one-half million agricultural laborers are migrant workers. The high degree of concentration in agricultural production is evident by the fact that 800 organizations control the employment of 80% of these laborers. The low wages paid to these workers are disadvantageous to family farmers since the family farmer's income is determined in large part from the value of his labor input. Because commodity prices are affected by wages, the family farmer who competes with low paid workers receives less compensation for his work. W. GOLDSCHMIDT, *AS YOU SOW* at xxxvii-viii (1978).

169. The National Labor Relations Act (NLRA) protects labor union organization and has been instrumental in increasing the power of the urban laborer through organization. Agricultural laborers are prohibited from forming unions and thus are excluded from the protection provided by the NLRA. This is apparently the result of an attitude among legislators that the farmers needed the protection from the power of organized labor. *Id.*

170. 429 U.S. 298 (1977).

171. *Bayside Enterprises* is a vertically integrated poultry business contracting with 119 farms for the production of chickens. *Bayside* delivers the chicks to the farmers and picks them up for processing nine weeks later. During the nine-week period, the contract farmers feed the chicks with poultry feed delivered to their feedlots by *Bayside* drivers. These drivers pick the feed up at *Bayside's* feedmill and deliver it to individual farmers. *Bayside* argued that these drivers were "agriculture laborers" as defined by the National Labor Relations Act, thus excluding these drivers from the protection of the Act. The NLRB contended that these drivers were "employees" as defined by the Act, "employees" having the protection of the Act and given the right to unionize. The Court held that the status of these drivers was determined by the character of the work which they performed for *Bayside* and concluded

Recognizing the right of laborers of integrated agribusinesses to unionize could substantially affect food prices since prices partially reflect labor costs. Any advantage that agribusinesses previously had in keeping prices low as a result of low wages would be quickly lost through unionization. Since the farmer who produces the commodity for the integrator resembles an employee, he eventually may be afforded NLRA protection as well.¹⁷²

C. Other Effects of Integration

The mode of commodity production has ramifications beyond those classified as environmental or labor related. Production which is extremely concentrated may overlook a necessary human element since it tends to preclude participation by the family farm in the production process.¹⁷⁴ The absence of this human element has been expressed as follows:

when that crop grew, and was harvested, no man had crumbled a hot clod in his fingers and let the earth sift past his fingertips. No man had touched the seed, or lusted for the growth. Men ate what they had not raised, had no connection with the bread. The land bore under iron, and under iron gradually died; for it was not loved or hated, it had no prayer or curses.¹⁷⁴

that these drivers resembled "employees" more than "agricultural laborers." *Id.* at 303.

172. The relegation of the farmer to an "employee" of the agribusiness is evidenced by the lack of farm management control in the farmer. This lack of independent farmer management is demonstrated by Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977). Bayside contracted with farmers to raise the chickens it hatched. The company provided the farmers with chicks, feed, medicine, supplies, and fuel and paid them for raising the chickens until they were ready for slaughter and processing. Most important, at no time could the farmer claim the chickens he was raising as his own, for at all times Bayside retained title to the chickens. Bayside's attitude towards its "independent" contract growers is insightful. Bayside argued that the activity on the independent farms should be considered as "farming operations" of Bayside. This argument reflected Bayside's attitude toward the independence afforded the contract grower. Its attempt to attribute the activity on the farm as its own productive activity suggests that for practical purposes Bayside considered the farms directly integrated. Indeed, Bayside's argument was supported by the "character of its control over the raising of the chicks, its ownership of the chicks, its assumption of the risks of casualty loss and market fluctuations, and its control over both the source and the destination of the poultry." *Id.* at 302.

173. "A reasonable estimate of economic organization must allow for the fact that, unless industry is to be paralyzed by recurrent revolts on the part of outraged human nature, it must satisfy criteria which are not purely economic." R. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1973).

174. J. STEINBECK, THE GRAPES OF WRATH (1939).

The reality that human emotional factors influence productivity and the longevity of a particular mode of production has been demonstrated. One study has shown significant social and economic differences between production organized on a small farm basis and on a large-scale corporate basis.¹⁷⁵ Because family farms support more farmers and non-farm businessmen than the large-scale corporate farm, a more cohesive and productive rural community develops. Family farms create a social mood premised on feelings of equality. This mood encourages participation in the local community.

The Arvin-Dinuba study demonstrated that large-scale production promoted a large class of agricultural laborers, who typically were landless, with low, insecure incomes.¹⁷⁶ There is no reason to believe that the same kind of alienation between management and labor that exists in the industrial sector will not develop between farm workers and agribusiness employers. That alienation is already manifested by a lack of economic and social interests on the part of workers in the community.¹⁷⁷ The combination of these factors does not nourish the cohesiveness and gentleness rightly attributed to the family farm and farm community.

X. DEFICIENCIES OF EXISTING FAMILY FARM LEGISLATION

Externalities of concentrated production, and integration's monopolistic tendency of eliminating markets essential to the family farmer's viability resulted in a hue and cry among family farm advocates in state legislatures. The resultant legislative efforts were not without effect as the family farm acts that emerged were suc-

175. The Arvin-Dinuba study demonstrated that the small farm community supported nearly twice as many separate businesses as did the large-farm community, since businesses such as implement dealers, hardware stores, lumber yards, and feed stores required a large number of farm customers. The number of farm families in a trade area also directly affects businesses like grocery stores, drug stores, and filling stations. The study indicated that in the small-farm community, retail trade was greater by 61%. Generally, small farm structure supports 20% more people in the local community per dollar volume of agricultural production. Notwithstanding their greater number, members of the small-community had a better average standard of living. In the small-farm community, more than 50% of the breadwinners were independently employed businessmen, in the large-farm community the proportion was less than one-fifth. Less than one-third of the breadwinners in the small-farm community were agricultural wage laborers as compared to two-thirds of the breadwinners in the large-farm community. In addition, the small-farm community provided more recreational facilities, newspapers, churches, and civic organizations. W. GOLDSCHMIDT, *As You Sow*, at 282-85 (1978).

176. *Id.*

177. *Id.*

cessful in prohibiting direct ownership integration of family farms. But, the acts fell short of preventing contract farming's functional control of farms, an issue that necessarily needs addressing if the social and economic attributes of the family farm are to be preserved. A review of the existing acts and their deficiencies may be helpful in guiding future legislative efforts directed at regulating the use of production contracts.

North Dakota enacted the first and most stringent of all farm acts. The act prohibits all corporations from engaging "in the business of farming or agriculture."¹⁷⁸ Corporations which owned farm land when the act was passed were required to divest themselves of the land within ten years.¹⁷⁹ Farmland can be acquired by corporations through judicial process or operation of law (mortgage, lien, or other encumbrance held by the corporation) but this land will escheat to the state if the corporation does not divest itself within ten years.¹⁸⁰

*Ashbury Hospital*¹⁸¹ demonstrates the effectiveness of the act in preventing corporate integration or involvement in farm production. But the act's means of preventing corporate involvement are perhaps too restrictive. The act does not allow for incorporation of the family farm. This can adversely effect the family farm because it deprives the farmer of the tax advantages associated with incorporation.¹⁸² In this respect, the act perhaps is overinclusive. Never-

178. North Dakota's act exempts only cooperative cooperative corporations from this provision, *see* note 102 *supra*, but otherwise provides "[a]ll corporations both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture." N.D. CENT. CODE § 10-06-01 (1976) (enacted in 1932).

179. *See* note 68 *supra* and accompanying text.

180. In case any corporation, either domestic or foreign, violates any provision of this chapter or fails, within the time fixed by this chapter, to dispose of any real estate to which it has acquired title and which is not reasonably necessary for the conduct of its business, then title to such real estate shall escheat to the county in which such real estate is situated upon an action instituted by the state's attorney of such county, and such county shall dispose of the land within one year at public auction to the highest bidder, and the proceeds of such sale, after all expenses of such proceedings shall have been paid, shall be paid to the corporation which formerly owned the land.

N.D. CENT. CODE § 10-06-06 (1976).

181. *Ashbury Hosp. v. Cass County*, 326 U.S. 207 (1945).

182. *See* Kelley, *The Farm Corporation as an Estate Planning Device*, 54 NEB. L. REV. 217 (1975); Kelly, *Estate Tax Reform and Agriculture*, 7 U. TOL. L. REV. 897 (1976).

theless, the act's stringent provisions protect against agribusiness integration into farm production.

The Iowa and Kansas acts' constraint on contract farming has been previously discussed.¹⁸³ The Iowa act is the only farm act which specifically addresses contract farming. The Oklahoma act, however, explicitly permits contract farming by integrators.¹⁸⁴ Wisconsin's act¹⁸⁵ focuses on the prohibition of corporate land ownership, not on the prevention of indirect control of farm production.¹⁸⁶ The act only goes so far as to declare "those farming operations prohibited . . . are the production of dairy products [and] the production of cattle, hogs and sheep. . . ."¹⁸⁷ Corporations are prohibited from owning land on which to carry on these activities but no provision is addressed to indirect corporate production control where the corporation does not own the land.

Missouri's act¹⁸⁸ is similar to Wisconsin's as it narrowly focuses on land ownership without addressing potential contract farming issues. Its restrictive provision declares, "nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, . . . any title to agricultural land in this state."¹⁸⁹ This note has demonstrated that title to the land is not synonymous with farmer control of the production resources.¹⁹⁰ For this reason both the Missouri and Wisconsin acts are ineffectual in preserving family farm independence.

For the same reason, South Dakota's act¹⁹¹ is ineffectual in preventing contract farming. The South Dakota act, like the Oklahoma act, invites integration. The South Dakota act's restrictions on corporate land ownership do not apply to "lands acquired by a corporation solely for the purpose of feeding livestock."¹⁹² The processor of livestock is unequivocally vested with the right to integrate into livestock production. Although the South Dakota legislature recognized "that the existence of the family farm is

183. See notes 53-60 *supra* and accompanying text.

184. See note 66 *supra* and accompanying text.

185. WIS. STAT. ANN. § 182.001 (West Supp. 1981).

186. "No corporation or trust may own land on which to carry on farming operations . . ." *Id.*

187. *Id.* at § 182.001(3).

188. MO. ANN. STAT. § 350.010 (Vernon Supp. 1982).

189. *Id.* at § 350.015.

190. See note 44 *supra* and accompanying text.

191. S.D. CODIFIED LAWS ANN. § 47-9A-1 (Supp. 1981).

192. *Id.* at § 47-9A-11.

threatened by conglomerates in farming,"¹⁹³ its subsequent act did little to expell that threat.

Finally, Minnesota's farm act,¹⁹⁴ while also being land-ownership oriented, additionally declares that "no corporation shall engage in farming."¹⁹⁵ The act defines farming as the production of agricultural, livestock, milk, and fruit products.¹⁹⁶ The act does not indicate, however, whether "production" encompasses indirect production through contracts. Accordingly, the majority of the state farm acts are ineffective in protecting the family farmer. Only with additional provisions specifically addressed to production contracting will that protection be afforded.

XI. PROPOSED LEGISLATION

Although the existing farm acts protect the family farm from direct agribusiness integration, they do not protect against direct integration's functional equivalent, the production contract. To meet this deficiency, the existing farm acts could be amended with the bill which the author has set out in the appendix. The author believes this bill's total prohibition on the use of production contracts is the only approach that will insure the family farmer's continued viability. In order to redevelop an open market system of commodity transaction and to reallocate production and marketing control, the production contract must be prohibited.

Section one of the bill is a declaration of policy. The policy focuses on the anticompetitive and monopolistic potential of integration. The focus is not on the family farm per se in order to avoid accusations that family farm legislation is "social" and therefore "short-lived" legislation. The policy concentrates instead on the adverse economic effects of integration. Section two also provides specific provisions regarding production contracting. The provisions explicitly prohibit indirect production through production contracts. Further restrictions are set out in order to avoid any attempt by agribusinesses or farmers to establish a contract arrangement, though not calling that arrangement contractual. These restrictions

193. "The legislature of the state of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the legislature recognizes that the existence of the family farm is threatened by conglomerates in farming." *Id.* at § 47-9A-1.

194. MINN. STAT. ANN. § 500.24 (West Supp. 1981).

195. *Id.* at § 500.24(3).

196. *Id.* at § 500.24(2)(a).

specify that commodities must be purchased through negotiation in the open market.

Section two also provides an exemption for cooperative corporations and for those contracts in existence at the time of the bill's enactment. The farm cooperative is exempt only if seventy-five percent of its members are actually farmers. This insures that the cooperative is farm based and will genuinely support the interests of farmers. The cooperative is exempted because it is an organization that can develop bargaining power to confront agribusiness buyers. Existing contracts are also exempted in order to avoid constitutional challenges involving impairment of contracts.

Section three is a definition section. The most significant definition is 'production contract.' Production contracts include contracts and "contractual-type relations." The broad term "contractual-type relations" is incorporated in order to encompass production arrangements which may not be strictly contractual, but are in the nature of a contract. The term is used in anticipation of agribusinesses' attempt to circumvent the bill with techniques not strictly defined as contractual.

Section four provides for civil penalties for violators. Additionally, part (b) of section four gives the court power to dissolve unlawful contracts and to allocate the civil penalty according to a party's deliberateness in violating this law. Additionally, part (b) protects those parties without knowledge that their activities are in violation of the law.

CONCLUSION

The family farm acts were passed in response to the perceived threat which integrated agribusiness posed to the family farmer. However, integrators can circumvent the farm acts with indirect production techniques such as the production contract. Despite the integrator's power to eliminate traditional open markets, by replacing them with a manipulatable "non-price" coordinated system, Iowa is the only state that has specifically sought to restrain indirect integration.

Although the Iowa act has not been constitutionally challenged, similar provisions in the North Dakota act have passed due process and equal protection challenges. None of the farm acts have been tested on commerce clause grounds. Commerce clause standards, as established in recent cases, suggest that the farm acts meet commerce clause requirements.

The necessity for additional restrictions on production contracting can only be fully understood after considering factors from without the free market which instigated the family farm's demise. Federal price and income support policies made large farms larger while eliminating smaller family farms. Lenders, encouraged by price stability, were more eager to lend to larger expanding farmers. Research policies designed to concentrate commodity production, support large-scale corporate production. Mechanized industrial-type farming, with its extremely concentrated production, in turn is highly suitable for integration.

Before policymakers can make an informed decision on the issue of integration, the externalities of integration must be considered. Environmental factors, integration's effect on labor relations, and the Arvin-Dinuba social and economic findings must be considered. Policymakers have opted for the family farm alternative but have failed to protect against production contracting. To make that choice functionally, as well as legally meaningful, the existing farm acts should be amended to include the concept embodied in the following proposal.

Alan L. Billings

APPENDIX

A Bill

To amend the existing state corporate farm law to provide additional regulation of anticompetitive and socially and economically harmful developments in the agricultural industry.

Section 1. *Findings and Declaration of Policy*

(a) The Legislature finds that—

(1) in order to preserve free and private enterprise, prevent monopoly, and protect consumers, it is necessary to prevent indirect control of agricultural production through the employment of production contracts;

(2) vertical integration through production contracting in the agricultural industry by persons, limited partnerships, and corporations engaged in processing, marketing, distributing, and retail industries, tends to create monopolies in the agricultural industry, to foster anticompetitive trade practices in that industry, and to result in unfair competition for the family farmer;

(3) the participation of integrated firms within agricultural commodity production through production contracting will lead to the demise of the family farm capable of fostering values central to our society;

(b) The Legislature declares that it is the policy of this state and the purpose of this Bill to restore competition to the production facet of agriculture by prohibiting production contracting and to provide for the continued existence of the family farm.

Section 2. *Restrictions on Production Contracting*

(a) Except as provided in subsection (b) of this section, no person, limited partnership, or corporation engaged in processing, marketing, distributing, or retail industries shall—

(1) engage directly or indirectly in farming or the production of any agricultural products through the employment of production contracts;

(2) participate in farming through vertical integration or by means of acquisition or control of another person who is engaged in farming;

(3) acquire ownership or control of any agricultural products except by negotiation in the open market with the farmer who has produced the commodity;

(b) The provisions of subsection (a) of this section shall not apply to—

(1) any cooperative corporation or association, seventy-five percent of whose members or stockholders are actual farmers residing on farms or depending principally on farming for their livelihood;

(2) any contract in existence at the time of this Bill's enactment between any person, limited partnership or corporation engaged in processing, marketing, distributing, or retailing and any farmer engaged in the production of any agricultural commodity, provided that the contract is not altered thereafter in order to extend the duration of the contract.

Section 3. *Definitions*

For purposes of this Bill—

(1) the term 'agricultural product' means any unprocessed grain, fruit, vegetable, milk, poultry, eggs, hogs,

sheep, cattle, cotton, tobacco, rice, tree nuts, hay, or other forage, potatoes, or peanuts;

(2) the terms 'agricultural production' and 'farming' mean the use of land for the production of any agricultural product;

(3) the term 'production contract' means any contract or contractual-type relation in which the processor, marketer, distributor, or retailer controls or attempts to control the conditions under which the farmer must produce the commodity or controls or attempts to control the price or marketing of the agricultural product regardless of the duration of any such contract or contractual-type arrangement.

Section 4. *Civil Penalty For Violation*

(a) Whoever violates section 2 (a) of this Bill shall be subject to a civil penalty not to exceed [] per day that such person, limited partnership, or corporation is in violation of this section.

(b) If any contract or contractual-type arrangement has been entered in violation of section 2 (a) of this Bill, the court shall dissolve the contract in a way which is fair and equitable to all parties and may penalize parties according to their knowledge of the violation and deliberate attempt to circumvent this Bill so long as such penalty shall not exceed the amount provided in subsection (a) of this section of this Bill.

