Nebraska's Corporate-Farming Law and Discriminatory Effects under the Dormant Commerce Clause

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Anthony Schutz*

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I. INTRODUCTION

Laws dealing with agriculture have generated a great deal of constitutional law. This Article explores one more recent example. Corporate-farming laws are one hallmark of agricultural law. They regulate the use of limited liability business forms for owning agricultural land, engaging in production agriculture, or both on approximately 312 million acres of farmland in nine states. That is approximately 77% of the land in those states and approximately one-third of all farmland in the United States. These regulations generally take the form of restricting the use of limited liability to those producers that the legislature or electorate have deemed "real farmers" or "family farmers." This Article evaluates whether the "shadows cast by the congressional commerce power" prevent a state from defining for itself who Justice Jackson’s farmers are. Stated simply, can states give these farmers preferential access to the means of production without violating the dormant Commerce Clause ("DCC") doctrine?

Recent decisions from the Eighth Circuit Court of Appeals conclude that states may not entertain this preference. One decision in particular, Jones v. Gale, casts a great deal of doubt on the continued viability of state efforts to regulate the use of limited liability on agricultural lands. The most far reaching aspect of the Jones court’s decision is...

2. Jim Chen, The Potable Constitution, 15 CONST. COMMENT. 1 (1998); see also West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 206 n.22 (1994) (noting that "[a] surprisingly large number of our Commerce Clause cases arose out of attempts to protect local dairy farmers").
5. 470 F.3d 1261 (8th Cir. 2006).
6. There are, of course, many other areas of rural law and policy that could be preempted by Congressional silence under the DCC doctrine under the court’s reasoning. See, e.g., NEB. REV. STAT. §§ 70-1901–1909 (Cum. Supp. 2008) (providing...
analysis is its conclusion that Nebraska's corporate-farming law was facially discriminatory. This Article argues that corporate-farming laws like Nebraska's are not easily classified as facially discriminatory under the DCC doctrine. As I explain below, Nebraska's law had, at most, discriminatory effects.

Under the DCC doctrine, however, it is not possible to simply take a well-worn set of rules associated with discriminatory effects and critically evaluate Nebraska's law or the Jones court's decision. Thus, this Article also examines the difficult doctrinal question of discriminatory effects in an effort to better understand whether Nebraska's corporate-farming law was discriminatory. In so doing, the Article brings a level of synthesis to the Court's cases on discriminatory effects. The development of this aspect of the doctrine is obviously important to courts but, perhaps more fundamentally, it is important to state legislatures seeking to understand the parameters of this far-reaching restraint on their authority.

7. This doctrinal effort, however, is limited to the pieces necessary to put together the corporate-farming puzzle. Indeed, the DCC doctrine is one of the most notoriously complex bodies of constitutional law. DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 223 (2004). Enunciating the doctrinal rules at any level of specificity is a challenging exercise that has occupied many scholars. Treatise treatments include COENEN, supra, at 209–342 (2004); BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01–6.08 (1999), including the Cumulative Supplement authored by Brannon P. Denning; LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW §§ 6-1–6-23 (3d ed. 2000). Notable broader analyses include Regulation, Federalism, and Interstate Commerce (A. Dan Tarlock, ed. 1981); Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, 50 WM. & MARY L. REV. 417 (2008); Brannon P. Denning, Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine, 94 KY. L. J. 37 (2005); Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425 (1982); Michael A. Lawrence, Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework, 21 HARV. J. L. & PUB. POL’Y 395 (1998); Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 74 CAL. L. REV. 1203 (1986); Michael E. Smith, State Discriminations Against Interstate Commerce, 84 MICH. L. REV. 1091 (1986).

8. In this limited sense, the Article speaks to those primarily interested in the DCC doctrine. After all, the continued development of the DCC doctrine should consider the practicalities of its application. This Article provides one example of the DCC doctrine's application and hopefully elucidates the operation of the larger doctrine. In this sense it is "concerned with judicial generation of rules that implement or enforce constitutional meaning," which some have recently termed "new doctrinalism." See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 76–101 (2001); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 22–36 (2006); Mitchell N. Berman, Constitutional Decision Rules, 90 VA. L. REV. 1 (2004); Brannon P. Denning, The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller, 75 TENN. L. REV. 789 (2008); Den-
The necessary background is set forth in Part II, below. Part III evaluates the complex question of whether Nebraska's law had discriminatory effects for purposes of the DCC doctrine. The DCC doctrine's discriminatory effects rule generally prohibits a regulating state from placing outsiders at a competitive disadvantage relative to insiders. Three subsidiary tasks follow from this general rule. First, one must identify the relevant market and its competitors. Second, one must identify the relevant competitive advantage at issue. Finally, one must evaluate whether the regulating state bestows that competitive advantage on insider and outsider competitors in a discriminatory manner.

The first three sections of Part III explore these three tasks. Section III.A identifies the relevant markets in which Nebraska's law operated and the competitors affected by Nebraska's law within those markets. Section III.B identifies the competitive advantage at issue when a state regulates the use of the corporate form. Section III.C takes on the third task in three subsections. Subsection III.C.1 deals with an unanswered doctrinal question. Because the DCC doctrine's anti-discrimination rule protects competing market participants from discriminatory treatment based on insider-outsider status, I attempt to answer a seemingly simple question: "What makes an insider an insider and what makes an outsider an outsider for purposes of the DCC doctrine?" After addressing a few possible alternatives, I settle on residency and evaluate whether Nebraska's corporate-farming law treated resident and non-resident competitors differently.

Subsection III.C.2 focuses primarily on the text and operation of Nebraska's law, discussing the impact of its interpretation and operation on the question of discriminatory effect. The Jones court employed a narrow interpretation of Nebraska's corporate-farming law that was central to its discrimination conclusion. I conclude that a broader interpretation would eliminate the existence of discrimination. However, even under the narrow interpretation, the Jones court employed an imprecise look at what Nebraska's law did and how it did it. A closer look at what Nebraska's law allowed qualifying operations to do reveals a colorable, though perhaps unconvincing, argument that it had no discriminatory effect.

While this more demanding examination draws the Jones court's analysis into question, it also exposes a further doctrinal question. If one accepts residency as the determinant of insider-outsider status, and if one employs the Jones court's narrow interpretation of Ne-
braska's law, then Nebraska's law at most prevented some (but not all) outsiders from using the corporate form, while allowing some (but not all) insiders with the ability to use it. Subsection III.C.3 therefore explores whether and when this sort of treatment constitutes discrimination. In so doing, I reap a set of rules from the Court's DCC cases that helps explain when the Court is willing to deem the effects of a state's law discriminatory. As I glean those rules, I apply them to Nebraska's law, providing further support for the notion that corporate-farming laws do not easily qualify as discriminatory. This analysis concludes that the farm-residency requirement Nebraska used was discriminatory, but that Nebraska's active-engagement requirement was not.

In section III.D, I take a step back and evaluate the prospect of discriminatory effects within the feeding-services market. While the presence of discriminatory effects within other markets may be possible, my analysis shows that a look at the feeding-services market reveals no discriminatory effects.

The challenge of conducting this sort of a study is evident from the length of this Article. It deals with a somewhat complex state-law restriction operating within a diverse agricultural industry, while at the same time evaluating that law under a notoriously complex body of unsettled doctrine that, at times, needs further development. And it does this in response to a particular court's disposition of the issue. But complexity is far from atypical in DCC challenges. So I have resisted the temptation to oversimplify the DCC doctrine and corporate-farming measures in favor of a thorough analysis of both. In the end, this exercise sheds a great deal of light in the shadows of Congress' power to regulate commerce and states' ability to provide favorable treatment to those that it deems farmers.

II. BACKGROUND

A. Nebraska's Corporate-Farming Restriction

Nebraska's measure\(^9\) was adopted in 1982 as an amendment to the Nebraska State Constitution.\(^10\) "Initiative 300" (or "I-300") was placed on the ballot by popular initiative after various attempts at

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9. For a broader discussion of corporate-farming restrictions, placing Nebraska's in context with other states' laws and canvassing the various policy rationales for these laws, see Anthony B. Schutz, Corporate Farming Measures in a Post-Jones World, __ Drake J. Agr. Law __ (forthcoming 2009).

regulating corporate farming had failed in the Nebraska legislature.\textsuperscript{11} Nebraska's measure created a general rule that prohibited corporations\textsuperscript{12} from owning or acquiring an interest in agricultural land.\textsuperscript{14} In addition, Nebraska's law prohibited corporations from engaging in farming or ranching.\textsuperscript{15} Farming or ranching was defined as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products."\textsuperscript{16} The

The discussion below covers the relevant DCC traits of Nebraska's restriction. There are, of course, further details. For example, trusts created for the benefit of family members are dealt with in its provisions and, generally speaking, the ownership must not be layered among entities. The focus of this Article, however, is on Nebraska's qualifying activities and their geographic implications. Those aspects of Nebraska's law implicate the DCC doctrine.


12. I use the term corporation with some liberty here and throughout the Article. Nebraska's law restricted the use of all business forms that involved limited liability. NEB. CONST. art. XII, § 8(1) ("No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching."); id. (defining syndicate as "any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships."); NEB. REV. STAT. § 21-2602(2) (Reissue 1997) (defining prohibited "syndicates" for purpose of the corporate-farming measure to include limited liability companies); accord Bruce Johnson, Corporate Restrictions in U.S. Production Agriculture: Economic Implications, J.AM SOC'Y FARM MANAGERS AND RURAL APPRAISERS, Fall 1995, at 26, Table 2.

13. This Article uses the term "owning" to simplify matters somewhat. In reality, the restrictions apply to various levels of ownership interests that the corporation may acquire. NEB. CONST. art. XII, § 8(1) (prohibited entity may not "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state"). To make matters more complex Nebraska's law contained exceptions for encumbrances that one could classify as ownership interests. See NEB. CONST. art. XII, § 8(1)(L) ("These restrictions shall not apply to . . . . A bona fide encumbrance taken for purposes of security.").

14. NEB. CONST. art. XII, § 8(1) (prohibited entity may not "acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state").

15. NEB. CONST. art. XII, § 8(1) (prohibited entity may not "engage in farming or ranching").

16. The prohibition on farming could operate to protect some producers from overreaching corporate participants. See Fred L. Morrison, State Corporate Farm Legislation, 7 U. Tol. L. Rev. 961, 993-94 (1975-76). For instance, a corporate entity that made decisions for other farmers through the use of production contracts could be "engaged in farming." Such a corporation's activities would therefore run afoul of the corporate-farming law. Research has not revealed cases in
two notions, however, were related because the restriction on land ownership applied to land used for farming. Thus, the definition of farming helped define what lands were subject to the ownership restriction.

Despite the general rule prohibiting all corporate farming and farmland ownership, Nebraska’s law contained various exceptions. The relevant exception for DCC purposes was the exception for a “family farm or ranch corporation.” There were two main qualifications for this exception: (1) the entity had to have the correct ownership structure; and (2) a qualified individual had to perform certain qualifying activities. The ownership-structure qualification exhibited a preference for familial ownership. Thus, Nebraska’s provision identified such corporations as those in which “the majority of the voting stock is held by members of a family . . . related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses.”

The second qualification required that a family member, or perhaps a family member owning shares of the entity—a qualified individual—perform certain qualifying activities. There were two such activities: the individual had to be “[1] residing on or [2] actively en-

which this theory has been pursued under a corporate-farming restriction in Nebraska or any other state. A more likely source of relevant restrictions in this regard would be statutory limitations on production contracts. Neil D. Hamilton, State Regulation of Agricultural Production Contracts, 25 U. MEMPHIS L. REV. 1051 (1995); Neil D. Hamilton, Why Own the Farm If You Can Own the Farmer (and the Crop)?, 73 NEB. L. REV. 48 (1994); Doug O’Brien, Policy Approaches to Address Problems Associated With Consolidation and Vertical Integration in Agriculture, 9 DRAKE J. AGRIC. L. 33, 34–35 (2004).

17. “No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.” NEB. CONST. art. XII, § 8(1) (emphasis supplied).

18. Lands not placed in agricultural use were not, however, restricted. See Roger D. Colton, Old Macdonald (Inc.) Has a Farm . . . Maybe or Nebraska’s Corporate Farm Ban: Is It Constitutional, 6 U. ARK. LITTLE ROCK L. J. 247, 254 (1983). Thus, a corporation could own land in Nebraska and, for example, use it as a park.

19. NEB. CONST. art. XII, § 8(1)(A).

20. Id.; accord NEB. CONST. art. XII, § 8(1) (defining prohibited “syndicates” to exclude limited partnerships when all partners have the same familial relationship); NEB. REV. STAT. § 21-2602(2) (Reissue 1997) (defining prohibited “syndicates” for purpose of the corporate-farming measure to exclude limited liability companies in which all members have the same familial relationship).

21. Nebraska’s law was unclear in this regard. Its terse “at least one of whom” refers either to members of the family identified within the exception or to family members owning shares of the entity. NEB. CONST. art. XII, § 8(1)(A).
gaged in the day to day labor and management of the farm or ranch.”

Residency is a familiar legal concept, but the specific type of residency required here—“residing on . . . the farm or ranch”—is more circumscribed than state residency. Active engagement is a bit more difficult to pin down. The general thrust of this part of the qualification criteria was to require that the qualifying individual farm. But farming is difficult to define; there is no single answer to the question of what it means to farm. At a strict level, the definition could require that the qualifying individual personally perform all of the farm’s labor and make all decisions related to the operation. At a more relaxed level, one could define farmers as those whose contributions to the operation are exposed to production risk. In between these extremes, there are various levels of involvement that a state could conclude separate those who farm from those who do not.

The Nebraska Supreme Court has interpreted the qualifying-activities criteria narrowly. In *Hall v. Progress Pig, Inc.*, the court applied the qualifying-activities criteria to a corporation that owned a hog confinement facility and concluded that the sole shareholder did not perform the required qualifying activities. The sole shareholder resided on a farm a few miles away from the facility, but the corporation did not own the land upon which the residency was located. And while the shareholder appeared to manage the operation, he was not actively engaged in the day to day labor and management because he did not perform the physical chores of the operation nor oversee the performance of those activities. The court refused to allow the essential nature of the shareholder’s activities to qualify the operation. Rather, it concluded that “actively engaged in the day to day labor and management” required “that the shareholder be involved in all aspects of the activity, whether it be labor or management, on a daily basis.” To the court, the phrase referred to the “activities that occur as a routine part of the farm or ranch operation.” Further, the court

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22. *Neb. Const.* art. XII, § 8(1)(A); *accord Neb. Const.* art. XII, § 8(1) (defining prohibited “syndicates” to excluded limited partnerships when the qualifying individual performs the same activities); *Neb. Rev. Stat.* § 21-2602(2) (Reissue 1997) (defining prohibited “syndicates” for purpose of the corporate-farming measure to exclude limited liability companies in which a qualifying individual performs the same activities).

23. *See, e.g.*, 7 C.F.R. § 1400.207 (2008). Part 1400 offers a set of regulations designed to identify those farmers who are eligible for federal assistance under a variety of agricultural programs.


25. Zahn, the sole shareholder, was responsible for the business’s administration, finance, personnel management, herd nutrition and feeding, herd health, maintenance, and marketing. *Id.* 610 N.W.2d at 427-29.

26. *Id.* at 413-414, 610 N.W.2d at 427.

27. *Id.* at 414, 610 N.W.2d at 427.
found that "labor" required physical activity or toil, while "management" referred to the "mental and business activities of the operation." But, "[w]hat labor and management activities will be required depends in large part on the type of farm or ranch operation that is being conducted."

Both of these qualifying activities must also occur in relation to a specific place—"the farm or ranch." The interpretational possibilities associated with "the farm" involve two extremes. On the one hand, the farm may include all land owned by the corporation used in the farming operation. This operational view of the farm would allow qualifying activities to occur anywhere, and would serve to ensure that the qualifying individual is actively engaged in farming or residing on a farm somewhere. A narrower view would regard each parcel of agricultural land (or, perhaps, each noncontiguous parcel) as a separate farm upon which qualifying activities must take place in order to qualify the corporation to own or operate that farm. Taken in light of the qualifying activities, this view ensures that the corporation will not own more land than its family members can farm or reside upon. Thus, this parcel-based view limits the overall size of the operation and—in conjunction with the qualifying activities and ownership requirements—requires a close connection between firm ownership, the family, the land, and the farming activities. It thus establishes that these entities will be family owned and operated, at least beyond any farms that are qualified through the residency criteria.

The operational view of the farm also establishes these traits, but does not require as close of a connection to each farm within the operation. Thus, the only limitation on size that would emerge from an operational view of the farm is that effectively imposed by the ownership requirement.

Hall v. Progress Pig, Inc., also sheds some light on what "the farm" is. There, the sole shareholder of the corporation resided on "a farm"
three miles from the hog confinement facility that the corporation owned. The Nebraska Supreme Court concluded that this residency did not fulfill Nebraska's qualifying-activities requirement. It is unclear from the opinion, however, why the court reached that conclusion. The court appeared to indicate that it was because the corporation did not own the farm upon which the shareholder lived; thus, that parcel was not within the corporation's farming operation—i.e., it was not part of "the farm." Such reasoning is consistent with an operational view of "the farm" that requires common corporate ownership. However, the court also included language in the opinion indicating a narrow parcel-based view of the farm: "[Nebraska's corporate-farming law] requires that the shareholder must be on the farm or ranch, either by residing on the site or being actively engaged in the day-to-day labor and management."

Both the site where qualifying activities must take place and the nature of the activities required have important geographic implications. As I explain below, the geography associated with performing these activities is fundamental to the DCC inquiry.

B. The Dormant Commerce Clause Doctrine: A Brief Primer

The negative or dormant aspects of the Commerce Clause have been a part of constitutional law for nearly two centuries. While the doctrine's development is interesting, the various twists and turns—including local versus national subjects and the direct and indirect

31. "It is undisputed that Zahn owns all of the stock of the corporation and that at no time did Zahn reside on the land owned by the corporation." Hall, 259 Neb. at 411, 610 N.W.2d at 426.

32. Id. at 417, 610 N.W.2d at 429 (emphasis added). The operational versus parcel-based view of farming operation has arisen elsewhere. When the FSA recently explained its consolidated regulations for direct loans, it chose to delete a proposed regulation that would have included restrictions on noncontiguous parcels of land in a single farming operation. "The agency concluded that there is not a policy concern associated with operating non-contiguous tracts. The changing structure of agriculture and increased urban uses of farmland in many localities require some operators to farm widely-dispersed tracts in order to assemble an economically viable operation." Regulatory Streamlining of the Farm Service Agency's Direct Farm Loan Programs, 72 Fed. Reg. 63,242, 63,256 (Nov. 8, 2007).

test—are largely beyond the scope of this Article. The modern DCC doctrine has developed two specific approaches that the sort of regulation at issue here implicates. State laws that are discrimina-

34. COENEN, supra note 7, at 218–19.
35. One historical twist is marginally relevant to corporate farming restrictions. Historically, production was seen as something beyond Congress’s power to regulate under the Commerce Clause; and, thus, state regulation of production was beyond the scope of the DCC doctrine. See Kidd v. Pearson, 128 U.S. 1, 20–23 (1888). Of course, the distinction faded and Congress’s power was held to embrace production. See Wickard v. Filburn, 317 U.S. 111 (1942). The correlating extension of the DCC doctrine has not, however, resulted in different doctrinal rules for state laws dealing with production.

For its part, the Court has rejected the notion that “commerce” ought to have a narrower meaning in the negative sense than in the affirmative sense. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 573–75 (1997). For commentary discussing the affirmative/dormant aspects of the DCC doctrine, see Barry Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 U. CHI. L. REV. 1089 (2000); Christine A. Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1 (2003); Andrew I. Gavil, Reconstructing the Jurisdictional Foundation of Antitrust Federalism, 61 GEO. WASH. L. REV. 657, 660 (1993); Williams, supra note 33 (arguing that the scope of Congress’s authority under the Commerce Clause has not and should not define the scope of inquiry under the DCC doctrine).

In the end, the scope of the DCC doctrine appears to be at least as broad as Congress’s Commerce Clause authority, and the modern doctrine appears to contain no formal distinction between production and the ensuing commerce. See BITTKER, supra note 7, at §3.01; Morrison, supra note 16, at 985–86 (noting the relevance of the production cases to a Commerce Clause inquiry concerning corporate farming restrictions, but stating that “modern constitutional law is not so simple”); Williams, supra note 33, at 1867–69.

36. For broad descriptions of the doctrine see COENEN, supra note 7, at 220–22. Two individual Justices hold unique views of the doctrine that I do not explore here. Justice Thomas would strike the DCC doctrine from the Court’s jurisprudence, relying on the Privileges and Immunities Clause as well as the Import-Export Clause of Article I to reign in States. See Brannon P. Denning, Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155 (1999). Justice Scalia only agrees with the Court striking a state law on stare decisis grounds and does not believe Pike review should be conducted. See Brannon P. Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine, 88 MINN. L. REV. 384 (2003). This, in turn, appears to place more emphasis on the discrimination tier of the DCC doctrine. See David S. Day, The Mature Rehnquist Court and the Dormant Commerce Clause: The Expanded Discrimination Tier, 52 S.D. L. REV. 1, 49 (2007). However, aside from Justices Thomas and Scalia, it does not appear that the DCC is about to be jettisoned from constitutional law. See Jim Chen, A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause, 88 MINN. L. REV 1764, 1784 (2004); Denning, supra note 7, at 99. Thus, I do not explore the arguments for and against the continued existence of the doctrine.

37. There are two strands of the DCC doctrine that are not implicated by corporate-farming restrictions. One strand deals with state and local taxation. In this area, a specific test has been developed. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); COENEN, supra note 7, at 222. In the other strand, the Court has struck down state laws that have an impermissible extraterritorial
tory are tested under a "virtually per se rule of invalidity." Such laws must "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" to pass muster. Once discrimination is shown, the burden of proof shifts to the state to justify its law.

Non-discriminatory laws are tested under a more flexible balancing approach set forth in modern form by Justice Stone in *Pike v. Bruce Church*. That test charges the court with the task of balancing the "putative local benefits" of the state law against the burden placed on interstate commerce. The nature of the burden imposed is relevant to the analysis, as is the absence of alternative means of achieving the local benefits at issue. If the burdens on outsiders are "clearly excessive in relation to the putative local benefits" the state's law must be struck down. The burden of proof lies with the challenger.

Most laws that remain in the *Pike* arena are upheld, while only one discriminatory law has passed muster. Thus, one of the most important, and vexing, issues in modern DCC jurisprudence has been the initial fight about whether a state law discriminates. Nebraska's corporate-farming law was struck down under the anti-discrimination test; thus, this Article does not evaluate Nebraska's law under *Pike*.

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39. *Id.* at 489 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).
40. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007).
42. *Id*.
43. *Id*.
44. *Id*.
47. Notably, the rejection of the early distinction between production and ensuing commerce, *supra* note 35, has been said by some commentators to open production regulation up to inquiry only under the balancing approach. Williams, *supra* note 35, at 1903. I do not pursue that possibility here because I have not found modern courts employing the production/commerce dichotomy to alter the standard they employ in DCC cases. The existence of discrimination appears to be the sole determinant of the ensuing standard under the modern doctrine. However, given the prospect of insider-outsider status being ascribed based on the locus of production, see *infra* subsection III.C.1, perhaps discrimination can never
Discrimination can be found on the face of a state law, from its effects, or from the purpose of those enacting the law.\textsuperscript{48} Purposeful discrimination has been a favorite tool of the Eighth Circuit in recent years.\textsuperscript{49} Under that form of discrimination, all the nuance of determining the purpose of multi-member bodies emerges.\textsuperscript{50} I leave discriminatory purpose on the sidelines for this segment of the corporate-farming/DCC doctrine game.\textsuperscript{51} Here, I take up the task of identifying and evaluating the two other notions of discrimination at work in the DCC doctrine.

There is, however, some overlap between discriminatory purpose and discriminatory effect that deserves acknowledgement. At times, the Court may implicitly combine a somewhat disparate allocation of regulatory burdens with evidence of discriminatory purpose to trigger strict scrutiny under the DCC doctrine.\textsuperscript{52} Given the Jones' court's conclusion that Nebraska's law was enacted with a discriminatory purpose and had a discriminatory effect,\textsuperscript{53} this aspect of the doctrine is relevant. However, I address the question of discriminatory effect alone because the Eighth Circuit rested its opinion on discriminatory

\footnotesize{occur with regard to production. If that were the case, then \textit{Pike} would apply. However, there are alternative ways of conceptualizing insider-outsider status that can be used to find discrimination. \textit{See id.}}

\textsuperscript{48} Jones v. Gale, 470 F.3d 1261, 1267 (2006); \textsc{coenen}, supra note 7, at 224.

\textsuperscript{49} See South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003); SDDS, Inc. v. S.D., 47 F.3d 263 (8th Cir. 1995); Jones, 470 F.3d at 1269. \textit{But see} Walmart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1013 (E.D. Cal. 2006) (collecting authorities and concluding "'[i]n no Commerce Clause case cited or disclosed by research has a statute or regulation been invalidated solely because of the legislators' alleged discriminatory motives"); \textsc{coenen}, supra note 7, at 224.


I believe whether purpose, alone, is sufficient to trigger strict scrutiny remains an open question. \textit{See, e.g.}, Henneford v. Silas Mason Co., 300 U.S. 577, 586 (1937) ("motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful").

\textsuperscript{51} While courts and commentators continue to say that either discriminatory effects or purposes can trigger strict scrutiny, more work remains to be done when considering the theoretical coherence of using either intent or effect as a trigger for a strong legislative justification. \textit{See generally} Democracy and Distrust: \textit{A Theory of Judicial Review} 136–45 (1980); \textsc{John Hart Ely}, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); \textsc{Paul Brest}, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95 (1971); \textsc{Theodore Eisenberg}, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); \textsc{Caleb Nelson}, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1784 (2008).

\textsuperscript{52} \textit{See} Smith, supra note 7, at 1244–45.

\textsuperscript{53} \textit{See infra}, text accompanying notes 63–64.
effect as an independent form of discrimination—not as a condition that triggered strict scrutiny because it was accompanied by discriminatory purpose—and because the discriminatory effects portion of the DCC doctrine appears to be in dire need of scholarly attention.

Additionally, I focus on discriminatory effect because delving into the morass that is purpose analysis would make this Article unmanageable and tends to put the cart before the horse. For instance, purpose may be nothing more than a judicially supposed legislative desire to bring about a particular effect. Thus, as Farber and Hudec put it, “When we talk about protectionist motivation, what we really mean is that protectionist effect played a stronger causative role in the passage of the legislation than its purported regulatory benefits.”

Unfortunately, without some idea of the sorts of effects that constitute discrimination or protectionism, speaking of purpose or motivation or intent is largely incoherent. So, I have tabled the prospect of combining the types of discrimination within the doctrine to focus on effects.

C. Corporate-Farming Laws Meet the DCC Doctrine: Jones

Corporate-farming laws have been the subjects of numerous constitutional challenges over the years. Each time they withstood judicial scrutiny. However, the limitations placed upon states through the

55. See Asbury Hospital v. Cass County, N.D., 326 U.S. 207 (1945) (upholding North Dakota's act against a challenge under the Privileges and Immunities Clause of Article IV, and an Equal Protection challenge under the 14th Amendment); MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) (upholding Nebraska's law against Equal Protection and Due Process challenges); see also State ex. rel. Webster v. Lehnдорff Geneva, Inc., 744 S.W.2d 801, 805 (Mo. 1988) (en banc) (for equal protection purposes, “the effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of natural persons primarily engaged in farming”); Omaha Nat'l Bank v. Spire, 223 Neb. 209, 229–32, 389 N.W.2d 269, 282–83 (1986) (upholding Nebraska's law against Equal Protection challenge and quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 242–42 N.5 (1984) for the proposition that “the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. . . . Courts have never doubted that such statutes served a public purpose” and quoting Asbury, 326 U.S. at 214, for the proposition that “a state policy against the concentration of farming lands in corporate ownership” is legitimate); State v. Liberty Nat. Bank & Trust Co., 427 N.W.2d 307, 314 (N.D. 1988) (upholding North Dakota's law against Equal Protection and Due Process challenges, concluding that the North Dakota measure's divestiture provisions had the purpose of “prevent[ing] the accumulation of farmland and ranchland by such corporations”); State v. J.P. Lamb Land Co., 401 N.W.2d 713 (N.D. 1987); Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971).
DCC doctrine have eliminated corporate-farming laws in South Dakota and Nebraska.\footnote{56}

The Eighth Circuit's decision in \textit{South Dakota Farm Bureau, Inc. v. Hazeltine},\footnote{57} was based on the discriminatory purpose that animated passage of a corporate-farming law added to the South Dakota Constitution.\footnote{58} Because the law was “motivated by a discriminatory purpose,”\footnote{59} the court applied the DCC doctrine's strict form of scrutiny and concluded that alternative methods for achieving the policy goals at issue—promoting family farms and protecting the environment—meant that restricting the use of the corporate form could not pass muster.\footnote{60} This Article focuses on discrimination outside of the pur-

\begin{verbatim}

\footnote{56} Predictions of how corporate-farming restrictions would fare under the DCC doctrine can be found in Alan L. Billings, Note, The Family Farm: Regulating Farm Act Avoidance Techniques Through Restrictions on Vertical Integration and Production Contracting, 16 Val. U. L. Rev. 277, 298–301 (1981) (concluding production contracting and family farm acts pass muster under \textit{Pike} and \textit{Exxon}); Colton, supra note 18, at 264–70 (ignoring discrimination analysis entirely, but concluding that Nebraska's measure passed muster under \textit{Pike}); David B. Gaebler & Andrew J. Ogilvie, Comment, Proposed Anticorporate Farm Legislation, 1972 Wis. L. Rev. 1189, 1211–12 (1972) (concluding Wisconsin's proposed legislation would not discriminate and would pass muster under \textit{Pike}); Morrison, supra note 16, at 980–87 (noting the possibility of a discrimination analysis, but settling on \textit{Pike} and evaluating corporate farming measures under that framework); John C. Pietila, "[W]e're Doing This to Ourselves": South Dakota's Anticorporate Farming Amendment, 27 J. Corp. L. 149, 164–68 (2001) (predicting such laws pass muster under \textit{Pike} and \textit{Exxon}); Troshynski, supra note 55, at 1664–72 (concluding that Nebraska's law may not have passed muster under \textit{Pike}).

\footnote{57} 340 F.3d 583 (8th Cir. 2003).


\footnote{59} Hazeltine, 340 F.3d at 596.

\footnote{60} Id. at 597. For a discussion of \textit{Hazeltine}, see Kathryn Benz, Student Writing, \textit{Saving Old McDonald's Farm After South Dakota Farm Bureau Inc. v. Hazeltine: Rethinking the Role of the State, Farming Operations, the Dormant Commerce Clause and the Equal Protection Clause}, 29 Ind. L. Rev. 1255, 1260–61 (2006).}

\end{verbatim}

pose regime, so Hazeltine does not offer much analytical assistance. It is worth noting, however, that the district court in Hazeltine found no discriminatory effects and no facial discrimination associated with South Dakota's law.61

In 2005, the United States District Court for the District of Nebraska ruled that Nebraska's corporate-farming law was unconstitutional under the DCC doctrine.62 In Jones v. Gale,63 the Eighth Circuit affirmed.64 The courts rested on two independent forms of discrimination. First, as in Hazeltine, the courts concluded that Nebraska's law was enacted with a discriminatory purpose.65 More importantly for present purposes, the courts also concluded that the

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61. 202 F. Supp. 2d 1020, 1046–48 (D.S.D. 2002). The district court, however, struck down South Dakota's law under Pike because it provided no exception for utility corridors, thus burdening the interstate transportation of electricity. Id. at 1050 (relying on Kassel v. Consol. Freightways, 450 U.S. 662 (1981)).


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

64. Id. at 1271. The Eighth Circuit also addressed standing and severability issues, but this Article focuses on the court's DCC analysis. An Americans with Disabilities Act challenge was also successful in the district court. However, the Eighth Circuit did not reach the issue and the matter remains open.

65. To make this determination in the context of a popular initiative, the courts looked to the language of the amendment, the language presented to voters on the ballot, as well as the "history preceding the adoption of Initiative 300" which "bolster[ed] the plaintiffs' contention that discriminatory intent motivated voters to adopt Initiative 300." Id. at 1269–70. That history included a television advertisement in which the announcer stated, "Let's send a message to those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300." Id. at 1270. Notably, this campaign rhetoric arose in the context of campaign disclosures that identified outsider entities as the source of funding for the campaign against the corporate-farming measure. Of course that does not impugn the notion that this sort of speech may have caused voters to think in a certain way, but it does provide an interesting context for how notions of discriminatory intent can arise. In the end, a variety of interesting questions arise from the court's fairly cursory treatment of "purpose" or "intent" or "motive" when that intent is to be attributed to a legislative body of over 200,000 people at the summary judgment stage of litigation. Those questions, however, are beyond the focus of this article.
measure was "facially discriminatory" because the family farm and ranch corporation exception "on its face . . . favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them." The courts refused to consider the actual effects of Nebraska's measure, instead focusing on the text of the legislation.

While the district court did not discuss how "the farm" was to be interpreted, it did realize that Nebraska's law was not perfectly discriminatory against outsiders. Its qualifying activities allowed some (but not all) insiders to use the corporate form because only state residents who lived on farms or were actively engaged would fulfill the law's requirement. And it allowed some (but not all) outsiders to do so as well because some qualifying individuals would be non-residents who were actively engaged in farming in Nebraska. The district court, however, rejected this as irrelevant, concluding that a law could be "facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interest in the favored classification." And the Eighth Circuit agreed.

The Eighth Circuit squarely confronted the task of interpreting the term "the farm" as it related to Nebraska's qualifying activities. The state argued for the operational view of the farm before the Eighth Circuit. But the court rejected that interpretation, concluding that the canon requiring courts to employ reasonable interpretations that avoid constitutional violations did not bind it to the operational view because the operational view was an unreasonable interpretation of Nebraska's law. To the court, the text of the amendment—regulating the ownership of land "in this state" and requiring qualifying activities on "the farm or ranch"—were enough to deem the state's argument a "heroic effort to develop a plausible alternative construc-

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66. Jones I, 405 F. Supp. 2d at 1081; Jones II, 470 F.3d at 1268. The district court relied on another district court case, Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003), in which the court struck down an Iowa law that allowed only cooperatives formed under Iowa law that were actively engaged in farming to own or control pork production. Notably, the district court's opinion in that case appears geared at the discrimination against cooperatives that were not formed under Iowa law, not the geographic implications of Iowa's qualifying activities.

67. Jones I, 405 F. Supp. 2d at 1078, 1082; Jones II, 470 F.3d at 1267–70.


69. Jones II, 470 F.3d at 1267 ("We do not think that an interstate commerce claim is precluded by the absence of an express prohibition on non-resident ownership or the fact that some Nebraska corporations . . . may suffer a negative impact under Initiative 300[.]" (citation omitted)).

70. Jones II, 470 F.3d at 1268–69.
tion.” Further support came from Hall, discussed above, as well as the ballot's language, reporting that the measure would prohibit the acquisition of agricultural land “by any corporation . . . other than . . . a Nebraska family farm corporation.” Thus, the court concluded, “the language of Initiative 300 plainly requires residing or working on a Nebraska farm.”

As in Hazeltine, and as in most DCC cases involving the discrimination tier, Nebraska's measure could not be justified.

III. ANALYSIS

This analysis addresses the question presented by Nebraska's law as one of discriminatory effect. While the Jones court relied on the notion of “facial discrimination,” its analysis is clearly not based upon some explicit use of insider-outsider status in Nebraska's law. In distinguishing the language of Initiative 300, the court noted that the measure would prohibit the acquisition of agricultural land “by any corporation . . . other than . . . a Nebraska family farm corporation.”

As in Hazeltine, and as in most DCC cases involving the discrimination tier, Nebraska's measure could not be justified.

This argument is fairly specious because we do not know if the corporations in question were owned by family members who worked or lived on some tract of land that the corporation owned in another state. Moreover, these pleadings may be consistent with what the state would have to prove to establish a violation under its broad interpretation: No qualifying family-member met the requirements on any tract of land that the corporation owned. Thus, the pleadings cited by amici may demonstrate that the state has sought enforcement consistent with the operational view of “the farm.” Wisely enough, the court did not rely on the state's enforcement history in rejecting its “the farm” argument.

Facial discrimination usually involves a situation where the law “artlessly disclose[s] an avowed purpose to discriminate.” SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995) (quoting Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)). Looking to the effect of a law at least highlights how difficult it is to separate the modes of discrimination, and it may skew the notion of “facial discrimination.” The parties stipulated that an effects analysis was not appropriate for summary judgment because it was too fact-intensive. Jones v. Gale (Jones I), 405 F. Supp. 2d 1066, 1078 (D. Neb. 2005).
deed, the *Jones* court noted that Nebraska's law contained no "express prohibition" on outsiders, but nonetheless concluded that the measure was "overtly" discriminatory. Thus, the court appears to be saying that facial discrimination can exist in cases where discriminatory effects appear from the face of the legislation.

That line of reasoning has support. Most courts have expanded the concept of facial discrimination beyond those laws that explicitly mention insider-outsider status. The Court, for its part, has found non-explicit measures discriminatory using terms like "practical operation," "practical effect," and "as a practical matter." As Professor Day has argued, the concept of facial discrimination has expanded in recent years to encompass the use of discriminatory effect to bolster a facial discrimination conclusion. Professor Coenen carefully reclassifies "facial" discrimination as "overt" or "patent[ ]." And within the seemingly separate category of discriminatory effects, he summarizes the Court's cases as decisions that "continue to suggest that an ill-defined set of facially neutral state laws will trigger scrutiny more exacting than deferential *Pike* balancing' review if their effects are distinctively or obviously destructive of interstate commerce. The contours of this feature of dormant Commerce Clause doctrine remain under-developed."
Here, I seek to develop the contours of discriminatory effects in order to examine Jones and Nebraska's law. Given the court's case law, it is fairly clear that discriminatory effects can be found even in cases where a court purports to rely on the language of the law alone and does not receive actual data concerning the law's impact. Whether this discrimination is formally regarded as facial or in effect (as well as what those terms may mean) is largely unimportant.

The DCC doctrine's anti-discrimination rule prohibits a certain type of discrimination among competitors in a given market. Generally stated, discrimination in this arena consists of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." The anti-discrimination rule is often characterized as a rule against economic protectionism—states using legislation "to benefit in-state economic interests by burdening out-of-state competitors." Beyond these broad statements, the finer points of proceeding through a discriminatory effects analysis have not been clearly set forth. At least four steps emerge from the general rule against discrimination:

A) Identify the relevant market and the similarly situated competitors within that market.

B) Identify what regulatory burden is imposed on these competitors.

detected without evidence of actual impact amongst market participants. When discrimination is detected from looking at data substantiating the actual impact of a regulation in the marketplace, the conclusion may be that the measure has a discriminatory effect. But that could be simply an "as-applied" method of finding discriminatory effects. In any event, it appears that discriminatory effect can be detected from the practical operation of the statutory language or, perhaps, from data establishing the sort of allocations depicted below.


84. Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1808 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)). Protectionism is difficult to define in a way that separates it from discrimination. Given the particular allocation of burdens and benefits envisioned by the DCC doctrine, it would seem that any discriminatory measure is, by definition, protectionist. But protectionism seems to be an ex-post judgment that ensues only after a discriminatory measure has been exposed to judicial scrutiny and found wanting. That is, discrimination triggers review because such measures are often protectionist. The ensuing scrutiny—geared at justification—tells us whether the measure was protectionist. In this sense then, protectionism may be an intent-based conclusion, reliably reached through the application of the rules implementing the DCC doctrine. Of course, it could simply be a this-effect-is-not-justified conclusion. For commentary discussing this interesting question, see Catherine Gage O'Grady, Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause, 34 San Diego L. Rev. 571, 587–88 (1997). The canonical work on protectionism, which involves discussions of both protectionist motive and protectionist effect is Regan, supra note 7.
C) Evaluate whether that regulatory burden has been bestowed upon the relevant competitors in a manner that constitutes discrimination.

D) If discrimination is found, evaluate whether the discriminatory treatment is justified.

Below, I proceed through the first three tasks in the context of Nebraska's corporate-farming measure. Justification is so unlikely with discriminatory laws,85 that I will not take up the issue or the Eighth Circuit's conclusions on that subject. Rather, the point here is to rigorously evaluate whether Nebraska's law was discriminatory and, in so doing, generate doctrinal insights.

As a starting point, it is helpful to illustrate the steps of a discriminatory effects analysis by constructing a figure. As step A indicates, the initial effort is one geared at identifying a set of competitors within a given market. This can be represented with a simple box:

![Competitors in a Given Market](image)

The outer boundaries of this box delineate the relevant market and, more specifically, the similarly situated competitors within the particular market. Once the regulatory burden is identified (step B), it can be introduced as burdening a portion of this group. However, for purposes of discriminatory effects, the central inquiry is how this burden affects insiders and outsiders competing within a given market. Thus, before introducing the burden to this figure, insider-outsider status must be represented. This can be done by drawing a line through the center separating insiders from outsiders:

85. COENEN, supra note 7, (noting that the scrutiny imposed is theoretically strict but practically fatal).
Because insiders and outsiders will most often represent different shares of a given market, the question of discriminatory effects often turns on the question of proportionality. Rather than adjust the location of the center line, this can best be represented with the introduction of an axis along the bottom of the figure radiating from the center and depicting the percentage of insider competitors and the percentage of outsider competitors in the market. This, in turn, allows one to depict the percentages of insiders and outsiders that the state's law burdens (step C). The simplest example is a law that isolates outsiders for burdensome treatment relative to their insider competitors:

Here, the discrimination is perfect—the state has placed outsider competitors at a competitive disadvantage by (effectively or explicitly)
imposing a burden upon them. *City of Philadelphia v. New Jersey,* 86 is an example that fits this illustration. In that case, New Jersey prohibited the importation of waste into its landfills. The relevant market and its competing participants (step A) were consumers of the waste facilities' services. By banning the importation of waste, this law divested all out-of-state consumers of the service offered by New Jersey landfills (the relevant burden under step B) to the advantage of in-state consumers. All outsiders were barred from accessing New Jersey's landfills, while no insiders were saddled with this burden (step C). The Court concluded this law was discriminatory.

Of course, this simple example is only a starting point. As I proceed below, a number of subsidiary questions emerge within each step. For now, however, it provides a sufficiently workable framework within which one can consider Nebraska's corporate-farming law. Under this framework, the questions become (A) what is the relevant group of competitors, (B) what is the burden at issue, and (C) was this burden placed on outsiders in a discriminatory manner?

**A. The Relevant Market and Its Competitors**

The DCC doctrine looks for some market impact—some way in which insider economic interests are made better off vis-à-vis competing outsider economic interests. 87 Competition, of course, presupposes the presence of these interests in the same market. 88

In the corporate-farming context, the courts have not identified what market is at issue. There are two immediate possibilities: the market for farmland and the market for agricultural outputs. The market for farmland is obviously implicated by the restriction on who may use the corporate form to own farmland. The law also restricted who may use the corporate form to engage in farming—i.e., produce commodities. 89 Because a restriction on production necessarily impedes the producer's ability to sell the product, Nebraska's law presumably had an impact within the market for agricultural products.

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86. 437 U.S. 617 (1978).
88. *See Davis,* 128 S. Ct. at 1812; Tracy, 519 U.S. at 299; Regan, *supra* note 7, at 1095–96.
89. These commodities include the grain and livestock that farming operations produce. Of course, anyone could participate in the market for products as a buyer and seller, but the restrictions operate on who may produce or how one may structure the business that produces the outputs going to market. The corporate farming restrictions have no impact on mere traders of these products, only producers.
With the markets narrowed to these possibilities, the relevant competitors can be identified. Doctrinally, however, this aspect of the inquiry is somewhat muddled because there is some uncertainty about who or what the DCC protects.\textsuperscript{90} Some cases state that the DCC doctrine "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."\textsuperscript{91} However, some cases have recognized that "[t]he dormant Commerce Clause protects markets and participants in markets."\textsuperscript{92} And the Court is sometimes vague: "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"\textsuperscript{93}

In the end, though, all cases dealing with discrimination appear to be concerned with isolating the effect of regulation among some group of competitors within a market.\textsuperscript{94} Commerce does not exist without people or entities that produce, sell, or buy goods and services.\textsuperscript{95} Thus, distinguishing between an abstract notion of protecting the market and protecting the people or firms who do commerce serves only to needlessly complicate the analysis. For example, to say that a law discriminates against outsider goods or services is in all cases to say that the law discriminates against outsiders' goods or services. Indeed, the Court's market participant doctrine—which allows states to discriminate amongst those with whom it does business as a seller or a buyer—also bolsters the notion that the DCC doctrine is geared at participants.\textsuperscript{96} Further, participants have a location within or outside

\textsuperscript{90} Eule, supra note 7, at 444 (noting the problem and resolving it in favor of the actors in interstate commerce under Eule's process-based theory of DCC review); O'Grady, supra note 81, at 584.


\textsuperscript{92} Tracy, 519 U.S. at 300.

\textsuperscript{93} Davis, 128 S. Ct. at 1808 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)). The Court's language is vague because it raises the question of whether competitors are something different than economic interests.

\textsuperscript{94} See, e.g., Pharm. Research & Mfrs. of America v. Walsh, 538 U.S. 644, 670 (2003) (refusing to evaluate a state law as discriminatory because it "will not impose a disparate burden on any competitors"); Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1706 (1984) ("[I]n practice, discrimination against interstate commerce always turns out to be discrimination against out-of-staters at one or the other end of the transaction.").

\textsuperscript{95} O'Grady, supra note 81, at 584.

of a particular state's boundaries, which appear to be\(^{97}\) the characteristic protected by the DCC doctrine's discrimination rules.\(^{98}\)

Focusing on participants within the markets identified above creates four possibilities for the relevant groups of competitors affected by Nebraska's law. Each market has a seller and a buyer.\(^{99}\) Within the land market, there are sellers (land owners) and would-be buyers. And within the agricultural-products market, the sellers are would-be producers of agricultural goods who sell those goods to buyers.

Of these four groups, some can be eliminated from further consideration. While there are finer points to discrimination that are discussed below, a broader point serves to eliminate some of the possible groups of competitors at this point: discrimination may only exist

\(^{97}\) Detecting the relevant presence within or beyond that boundary is a question I turn to shortly. See infra subsection III.C.1.

\(^{98}\) Looking to participants, however, presents at least one complication. Often the discrimination or burden analysis that the DCC doctrine refers to is described as discrimination against or an undue burden upon \textit{interstate commerce}. This brings to light a distinction between intrastate commerce and interstate commerce, which may not correlate with the geographic location of market participants. In most if not all cases, discrimination against interstate commerce quickly becomes an analysis of whether a law discriminates against those who do interstate commerce, in favor of those who do intrastate commerce. Taken in that light, the matter is very close to discriminating against outsiders, in favor of insiders. However, some insider market participants may do both interstate commerce and intrastate commerce. Is discrimination against such insiders discrimination against \textit{interstate commerce}? The answer is yes, but it does not detract from the notion of identifying insider and outsider participants. Usually such insiders raise claims of discrimination based on how the regulation at issue affects their counterparts in the market. As applied to insider sellers in interstate commerce, for example, discriminating against them (for example by imposing an export ban or providing favorable tax treatment to those who serve insider consumers) really means that the legislature has preferred its insider consumers of the product over outsider consumers, both of which purchase from the sellers the state is regulating. See, \textit{e.g.}, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (finding discrimination against interstate commerce where a state property tax exemption applied only to in-state firms that served primarily in-state consumers, because it favored insider consumers over outsider consumers). In such cases, discrimination that adversely affects someone located within the state doing interstate commerce is cognizable by looking elsewhere in the market to some other group of competitors. Thus, looking at participants does not deprive those insiders doing interstate commerce of protection. Rather, the analysis simply shifts to the relevant participants. The insider interstate seller is not an outsider. But that seller's buyer is the outsider that is protected by the DCC doctrine against discrimination that favors competing insider buyers.

\(^{99}\) Pharm. Research & Mfrs. of America v. Walsh, 538 U.S. 644, 670 (2003) (refusing to strike down a state law that taxed drug manufacturers and distributed the revenue to pharmacists because manufacturers did not compete with pharmacists); Smith, \textit{supra} note 7, at 1225-28 (concluding that the inequality must be between competitors); see Regan, \textit{supra} note 7, at 1096 ("[P]roducers compete with producers, . . . workers compete with workers, distributors compete with distributors, consumers compete with consumers, and so on.").
when a state's law disfavors outsiders. That is, discriminatory treatment requires that a state place outsiders at a competitive disadvantage relative to their insider competitors. If a state were to place outsiders at a relative competitive advantage, even explicitly, the DCC doctrine would conclude discrimination does not exist. Unlike Equal Protection jurisprudence, discrimination in the DCC doctrine does not place a competitor's status as an insider or an outsider beyond legislative or administrative cognizance (except when justified). Rather, it prohibits only relative hostility toward outsiders.\footnote{The Court's garbage cases are good examples of the general notion that discrimination involves the burdensome treatment of outsiders. This results from identifying the relevant classes of insiders and outsiders competing with one another. See Coenen, supra note 7, at 225 (noting that these cases can be framed as either restrictions on the importation of waste or the exportation of waste-disposal services).}

Given the necessity of this general allocation of benefits and burdens, it would be extraordinarily difficult to claim that corporate-

\footnote{Some of these restrictions can be seen as barring the importation of waste from outsider waste producers. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res. 504 U.S. 353 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). These provisions benefit outside landfills in terms of the demand for their services because, assuming some waste was shipped into the legislating state, they increase the demand for outsider facilities. Similarly, insider landfills are burdened because they experience a loss in demand. Insider waste producers may benefit from decreased demand for their insider landfill's service, and outsider waste producers are burdened by the withdrawal of that service from the interstate market. The constitutionally objectionable allocation in this market appears to be between insider and outsider waste producers (i.e., consumers of the waste service). Environmentally speaking, the constitutionally objectionable allocation translates into a state hoarding its landfill space for use by its residents and not others, much like an export ban. Cf. Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (striking down a law allowing the sale of natural gas by private in-state firms only after local needs were satisfied); see generally Coenen, supra note 7, at 226 (collecting hoarding cases). Landfills, however, as market participants, are burdened by these measures in a non-objectionable sense: outsiders benefit while insiders are burdened.}

Restrictions that require local waste producers to send their waste only to a local facility, like those in C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994), are a bit different if they do not restrict a landfill's ability to receive outsider waste. Outsider waste producers (consumers of the landfill's services) may benefit from the withdrawal of local waste from the interstate market for waste disposal services. And insider waste producers may be burdened by the forced disposition of their product. But the constitutionally objectionable allocation arises as between insider and outsider landfills. Insider landfills benefit from the guaranteed supply of waste, and outsider landfills may be burdened by the decreased supply of waste.

Thus, regulating the flow of waste (mandating local disposal or barring outsider imports) has an economic effect within two different sets of insider-outsider interests. For import restrictions, the constitutionally objectionable allocation is between insider and outsider waste producers. For local disposal requirements, the constitutionally objectionable allocation is between insider and outsider landfills.
farming measures discriminate against outsider buyers of agricultural products. Regulating how producers may structure their operations does not disrupt the flow of agricultural goods to consumers in some discriminatory way. If, for example, restricting the use of the corporate form increases an operation's production costs, the extent to which those costs can be passed along to buyers will depend upon the conditions in multi-national markets for the commodities. It would seem highly unlikely that the increased cost could be passed on at higher levels to outsider buyers than insider buyers. Indeed, the producers' claims in Jones were not based upon discrimination affecting to whom they could sell. Rather the claims were grounded in the ability to produce within the state. Thus, buyers in this market can be eliminated from further consideration.

Three relevant groups of competing market participants remain: (1) sellers of agricultural land; (2) buyers of agricultural land; and (3) producers of agricultural products. Of these, sellers of agricultural land can be eliminated. As applied to land sellers, Nebraska's law affected the market for their land by restricting to whom they could sell. That is, it hindered buyers' ability to use the corporate form to own the land, which, in turn, may have diminished the number of willing buyers. As applied to land sellers, the burdens fall on insiders. Indeed, if we expand the relevant market beyond the state's borders—as we should if we are dealing with interstate commerce—outsider sellers in this market may benefit from the burden Nebraska imposed on its sellers. Such treatment is not constitutionally problematic. Thus, this group of sellers can be eliminated as a group of competitors within which discrimination may have occurred.

101. See Morrison, supra note 16, at 996 (noting that if the laws are successful in stabilizing the price of land "they will be simply penalizing one segment of the agricultural community to benefit another. The effective losers will be retiring farmers, or the heirs of deceased farmers, who will be receiving less for their property than otherwise would have been the case").
Two groups of competitors remain:102 buyers of agricultural land, and producers/sellers of agricultural products.103 The next step is to

102. Within these groups, one may be able to argue that the competitors burdened by corporate-farming measures are not similarly situated to those who are not burdened—i.e., those burdened do not belong in the same box as those who are not. Recently, the Court has been willing to entertain this argument. Dep't of Revenue v. Davis, 128 S. Ct. 1801 (2008); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1799 (2007) (Scalia, J., concurring in judgment); General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997); see Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 602 (1997) (Scalia, J., dissenting). Such an argument for corporate-farming restrictions would basically take the form of arguing that those operations that do not satisfy the qualifying criteria are different than those operations that do. If such a classification can be made when identifying similarly situated competitors, then there would be no discrimination within the classes—different competitors would simply be treated differently. While the argument is interesting, how much traction this step has with the Court in instances where the relevant participants are all private-sector competitors is far from clear. Thus, I leave the identification of the relevant groups of similarly situated competitors at these two groups.

103. These two economic activities do not occupy the same formal categories within the Court's "active" Commerce Clause jurisprudence. Land ownership and production may be cognizable subjects of Congressional regulation through the Necessary and Proper Clause. See Bittker, supra note 7, §§ 3.01, 5.01(B). If the shadow of the Commerce Clause defines the scope of operation for the DCC doctrine, then one might be able to argue that those activities within the penumbra of Congressional authority ought to be treated differently (or perhaps not at all) under the DCC doctrine. Cf. Camps Newfound/Owatonna, Inc., 520 U.S. at 609 (Thomas, J., dissenting) (noting that the Court's invalidation of a state statute providing a property tax exemption to those facilities that served mostly state residents created a "dormant" Necessary and Proper Clause to supplement the "dormant" Commerce Clause); Bittker, supra note 7, § 6.01[C] (quoting Hill v. Florida, 325 U.S. 538, 544 (1945) (Stone, C.J., concurring), and citing United States v. Darby, 312 U.S. 100, 119 (1941)), for the notion of considering the historic distinction between "activities affecting commerce" (like "agriculture, manufacturing, and mining") and "interstate commerce" as "a force in applying the dormant Commerce Clause to vital aspects of state regulations"). Indeed, if Necessary and Proper Clause jurisprudence is premised on deference to Congress, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–16 (1819), then one could ask why Congressional silence receives little deference in the DCC doctrine, even though such silence could be taken as a Congressional judgment that the subject is not appropriate for federal commercial regulation. Such an argument, however, must await another day.

Necessary and Proper Clause aside, the question of whether land ownership falls within the scope of Congressional power, and thus the DCC doctrine, has raised an eyebrow. Morrison, supra note 16, at 981–82; Colton, supra note 18, at 266–68 (concluding that ownership of land is within Congress's Commerce Clause authority); Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 IOWA L. REV. 1, 160 (1999) (concluding a federal mortgage code would be within federal authority because of the interstate commercial nature of financing and sales); Troshynski, supra note 52, at 1665–66. Again, however, taking the present analysis into the complexities associated with the scope of Congress's authority must await another day.
determine whether Nebraska's law imposed a relative burden on participants within these markets.

B. The Competitive Advantage

Nebraska's corporate-farming law can be framed in two different ways that are relevant to conceptualizing the burden it imposed within the relevant groups of competitors: (1) it can be taken as a restriction on corporations, or (2) it can be taken to restrict the business organization choices of the individual participants in the market. Thus far, I have framed the matter as a restriction on the ability to use the corporate form. Under this frame, the relevant participants are individuals who are restricted with regard to how they may compete for land or engage in production. If the corporate-farming

104. Whether a regulation is framed as providing a burden or a benefit does not matter, theoretically, or to the Court. See Brannon P. Denning, DaimlerChrysler Corp. v. Cuno, State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine, 2005-2006 CATO SUPREME COURT REVIEW 173, 185-86; Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 CORNELL L. REV. 789, 814 (1996). The matter may be different, however, with regard to direct subsidies. There, benevolence may be what separates lawful and discriminatory subsidies from unlawful and discriminatory tax breaks or regulation. See generally Dan T. Coenen, Business Subsidies and the Dormant Commerce Clause, 107 YALE L.J. 965, 1003 (1998); Edward A. Zelinsky, Restoring Politics to the Dormant Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation, 29 OHIO N.U.L. REV. 29 (2002).

105. Beyond this brief footnote and the next, I leave the Privileges and Immunities Clause for another day. That is, I do not evaluate the propriety of these laws under the Privileges and Immunities Clause, nor do I seek to examine whether the analysis here can be extended to that arena. Burdens imposed on individuals based on state citizenship are cognizable under the Privileges and Immunities Clause of Article IV. The ability to utilize the corporate form, however, does not appear to be within the scope of Privileges and Immunities Clause protection. See Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 388 (1978) (stating that the clause protects those rights which are "sufficiently basic to the livelihood of the Nation"). Of course, one might be able to frame such a burden as a burden on the ability to carry on a trade or own property. Under that frame, perhaps protection would ensue. See id. at 386 (articulating protection for "commercial-livelihood"). Nonetheless, the question of discriminatory treatment would ensue and the analysis contained below could be applicable. It is far from clear whether discrimination under the Privileges and Immunities Clause of Article IV means the same thing as discrimination under the DCC doctrine. Compare United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 221 n.10 (1984) (rejecting dissent's approach to discrimination as overly formalistic because it would allow subversion of an anti-discrimination principle simply by including some residents within a burdened class), with text accompanying notes 165 to 169, infra (explaining that discrimination exists when some (but not all) insiders are burdened along with all outsiders). See also Jones I, 405 F. Supp. 2d 1066, 1084 & n.15 (rejecting individuals' Privileges and Immunities Clause claim because Nebraska's law discriminated based on physical location, not state residency, and resolving the Camden similarity by stating that the city of Camden
measure is framed as operating on corporations, then these measures restrict market access—a restriction on who may buy or produce in the markets at issue.\textsuperscript{106}

The distinction between how one may structure her business (i.e., use a corporate form) and who may enter the markets at issue is
could have constitutionally required City employees or contract workers “whatever their residence or citizenship might be, to appear for work in the city of Camden”).

Additionally, the standard employed may not be as strict as that employed under the DCC doctrine. \textit{See Camden,} 465 U.S. at 222 (“[The Privileges and Immunities Clause of Article IV] does not preclude discrimination against citizens of other states where there is a ‘substantial reason’ for the difference in treatment.”).

106. Corporations are not protected under the Privileges and Immunities Clause of Article IV because they are not “citizens.” Paul \textit{v.} Virginia, 75 U.S. (8 Wall.) 168, 177 (1868); Bank of Augusta \textit{v.} Earle, 38 U.S. (13 Pet.) 519, 586 (1839); \textit{Tribe, supra} note 7, § 6–37 at 1269–70 & n.99. If corporations were citizens, the ability to own land would surely fall within the scope of the rights protected by that clause.

Because of this exclusion under the Privilege and Immunities Clause, some tout the DCC doctrine as a necessary supplement to the Court’s treatment of state laws impacting corporations. \textit{See Tribe, supra} note 7, at § 6–14 (classifying the DCC doctrine as worth preserving, given the incoherence that arises from the Court’s treatment of laws adversely affecting out-of-state corporations); Martin H. Redish & Shane V. Nugent, \textit{The Dormant Commerce Clause and the Constitutional Balance of Federalism,} 1987 Duke L.J. 569, 610–12 (1987) (arguing that the DCC doctrine should be supplanted by the Privileges and Immunities Clause of Article IV and responding to the absence of protection by noting the possibility of Congressional action protecting such entities).

One could add \textit{Asbury Hospital \textit{v.} Cass County,} 326 U.S. 207, 211 (1945) (concluding that “[t]he Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it” and noting the “unqualified power of the state to preclude [a foreign corporation’s] entry into the state” for such purposes) and \textit{W. & S. Life Ins. Co. \textit{v.} State Bd. Of Equalization,} 451 U.S. 648, 667–68 (1981) ("[W]hatever the extent of a State’s authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.") to the list of confusing precedent concerning discrimination and corporations that may justify the use of DCC doctrine protections for such entities.

But despite commentators’ statements that corporations should be protected under the DCC doctrine, it is not clear what exactly this means, at least in the context of a law that can be reasonably said to affect either the choice of business organization or the ability of existing organizations to engage in a particular business. In various settings we refer to restrictions on corporate activities as restrictions on the ability to use the corporate form to engage in the activity. But in many settings, we protect corporations as persons. \textit{See, e.g.,} S. Ry. Co. \textit{v.} Greene, 216 U.S. 400, 412 (1910) (equal protection); \textit{accord} Brannon P. Denning, \textit{Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine,} 88 Minn. L. Rev. 384, 405–407 (2003) (discussing “the corporations problem”); Redish & Nugent, \textit{supra} at 611.
troublesome because the nature of the burden changes depending on the frame. That is, barring some entrants is more objectionable than restricting how some entrants may structure their businesses. Under *Pike*, the nature of the burden is quite important. But, it complicates matters for different reasons under the discrimination rules. For present purposes, the framing effect has an impact on what competitive advantage is at issue. Barring outsider entities' access to the markets at issue, while allowing insider entities, would definitely inflict a burden on outsiders that benefits the relevant insider competitors. In one part of its *Jones* opinion, the Eighth Circuit seemed to frame the burden as operating on entities—"We have concluded that Initiative 300 discriminates against out-of-state entities." But elsewhere in the opinion, the court framed the restriction as barring access to the corporate form. Thus, when it addressed the plaintiffs' standing, (all of whom were individuals) it concluded that plaintiffs had standing to challenge a law that "has a direct negative effect on their borrowing power, financial strength, and fiscal planning." Even if the burden is framed in this manner, however, it is difficult to argue with the notion that the corporate form gives its owners competitive advantages. These benefits include better access to capital, limited owner liability for entity debts, more flexible estate planning, more favorable tax treatment, and limited entity liability for owner debts.

Nonetheless, those benefits are not subject to easy generalizations. For example, sufficient debt may be available to finance many operations. Similarly, the benefit of limited liability for the voluntary


108. Below, I examine a difficulty that ensues when identifying insider and outsider participants raises under these different frames. See infra subsection III.C.1.


110. *Id.* at 1267 (quotation omitted).


112. Indeed, a large chunk of federal policymaking is geared at making credit available to farmers. *See, e.g.*, 7 U.S.C. §§ 1921-2009ee-3 (2006) (providing various programs for extending credit to farmers). Interestingly, these programs often involve eligibility criteria geared at identifying the family farmer. For example, for farm ownership loans, 7 U.S.C. § 1922(a) provides as follows:

To be eligible for such loans, applicants who are individuals, or, in the case of cooperatives, corporations, partnerships, joint operations, trusts, and limited liability companies, individuals holding a majority interest in such entity, must . . . (3) be or will become owner-operators of not larger than family farms (or in the case of cooperatives, corporations,
debts of the entity is fairly fleeting because personal guarantees often accompany corporate debt in the agricultural sector. Whether a particular business organization will benefit the individual in tax or estate-planning terms depends on a variety of factors in an individual case. However, limited liability for non-voluntary obligations of the firm may be a fairly common economic advantage for the owners and their creditors. And lenders may also be more likely to lend money to an entity (maybe in conjunction with a personal guarantee) because the entity's assets will be shielded from the reach of the owners' personal creditors, at least to some extent. But perhaps the strongest support for the notion of an economic advantage in the corporate form is the very existence of these business forms in the industry.

To summarize matters thus far, two different boxes depicting competitors in given markets exist, as well as two different accounts of the participants and the burdens imposed upon them. The relevant competitors are buyers in the markets for farmland or producers of agricultural commodities. Those buyers and producers may be entities, individuals, or both. Nebraska's corporate-farming law can be construed as burdening these participants by restricting an individual's choice of business organization or as barring some entities from access to these markets.

C. Discrimination

Under step C, the next task is to determine whether or not the regulatory burden has been bestowed upon the relevant competitors in a discriminatory manner. To answer this question here, one must consider how Nebraska's law affected insiders and outsiders in these markets. And, in order to undertake that task, one must first determine what differentiates insiders from outsiders.

Indeed, the USDA has incorporated state-law restrictions on entity operations into its regulations implementing these programs. See 7 C.F.R. § 762.120(i), (j) (2008) (containing eligibility criteria for guaranteed loans that require the entity to be authorized by the state to own or operate farms under their control).

1. Insiders and Outsiders

Before a state law’s burden can be considered discriminatory against outsiders, one needs at least some understanding of what distinguishes insiders from outsiders. The Court appears to regard insider-outsider status as a person or entity’s location relative to a state’s political boundary. The Court’s general definition of economic protectionism says as much: “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”114 But there is no clear answer to the question of what makes economic interests or competitors “in-state” versus “out-of-state.” This issue is fundamental to the DCC doctrine’s anti-discrimination rule, but it has received scant attention from courts or commentators.115 A coherent account of discriminatory effects must address this question.116

Commentators often use residency without further inquiry, and sometimes the Court does as well.117 But, as the district court in Jones noted, discrimination in this setting is focused on the location of one’s economic interests, not his or her residency.118 For instance, suppose I were a Nebraska resident who owns a farming operation in Oklahoma. If my products originating in Oklahoma were barred from the Nebraska market, or if my Oklahoma operation were prohibited from consuming a product from Nebraska, I would presumably have a claim of discrimination under the DCC doctrine. If I did have such a


116. Pinning down the parameters of a protected trait is common to many discrimination claims, though it may go unnoticed. Disability discrimination is perhaps the most salient example of an analogously difficult situation. What it means to be disabled is a difficult question. See 42 U.S.C. § 12102(2) (defining “disability” as used in the Americans with Disabilities Act of 1990); 29 C.F.R. § 1630.3 (2008) (listing various exceptions to the statutory definition). Gender, can raise similarly difficult questions. See Zachary A. Kramer, Heterosexuality and Title VII, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 9), available at http://ssrn.com/abstract=1103095 (distinguishing between “sex,” “gender,” and “sexual orientation” and collecting sources), and race, see Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (equating race-based discrimination with “ancestry or ethnic characteristics”).

117. See Best & Co., Inc. v. Maxwell, 311 U.S. 454, 455–56 (1940) (concluding that a state statute shielding “regular retail merchants” from a state tax was discriminatory in favor of North Carolina residents because all North Carolina competitors would qualify as “regular retail merchants”).

118. Jones I, 405 F. Supp. 2d 1066, 1084 (“Initiative 300 does not discriminate against [the plaintiff] as an individual based on his citizenship or residency, although it does discriminate against out-of-state economic interests.”).
claim, then residency cannot be what distinguishes insiders from outsiders in all cases.

An alternative method of determining participants’ insider-outsider status would be to attribute a location to participants based on the location associated with their economic position in the market—the location of the economic activity the actor performs that the regulation burdens. For instance, when a measure discriminates against goods or services produced outside of a state or locality, the matter is fairly clear—the location of production determines outsider or insider status which is, in turn, attributed to the market participants engaging in that activity.119 Similarly, discrimination against outsider buyers in favor of insiders (for example, by hoarding a resource) focuses on the point of consumption, which is, in turn, attributed to the competing buyers.120 And, even in cases where goods aren’t moving, the economic activity can give us a relevant location. For instance, in-state processing requirements favor those insiders who perform the particular function within the state over those who would perform the function outside of the state.121 Thus, in many cases we can find a location tied to an actor’s commercial activity in the relevant market, which in turn ascribes a location to that actor relative to the regulating state’s boundary.

What does this mean for corporate-farming measures? As explained above, there are two possible groups of competitors at issue: buyers in the land market and producers/sellers of agricultural products. Within these groups, the inquiry should focus on detecting locations within the markets at issue that can be used to ascribe insider-

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119. For instance, generating waste beyond a state’s border is sufficient to vest outsider status to the waste generators which, in the market for waste disposal services, are buyers. See Or. Waste Sys., Inc. v. Dept of Envtl Quality, 511 U.S. 93 (1994) (striking down a state law as facially discriminatory for charging a higher surcharge on the disposal of waste “generated out-of-state”); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). Similar activities creating outsider status include, the production of alcoholic beverages within or outside of a state, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (striking down a Hawaii law that provide a tax break to a narrow class of alcoholic beverages manufactured in Hawaii), or the sale of such beverages from locations beyond the state’s boundaries, Granholm v. Heald, 544 U.S. 460 (2005) (striking down Michigan and New York laws prohibiting direct shipment of wine from out-of-state wineries, but allowing direct shipment for in-state wineries).

120. See supra note 97.

121. See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (striking down a Madison, Wisconsin law requiring all milk sold within the city to be bottled within five miles of the city’s central square); Toomer v. Witsell, 334 U.S. 385 (1948); Johnson v. Haydel, 278 U.S. 16 (1928); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Minnesota v. Barber, 136 U.S. 313 (1890); Coenen, supra note 7, at 228-31 (summarizing these cases).
outsider status to the participants. In these markets, the question is difficult because there are no goods or services moving across a state's boundary. For example, with regard to land sales, ownership changes but the land does not move. If the economic activity ascribes insider-outsider status, one could argue that the sale of land always involves insiders. Thus, by definition, there could be no discrimination that places outsiders at a relative disadvantage. Nonetheless, there is still interstate movement in a less tangible form. That is, the ownership interest (or, perhaps, the incidents of ownership) moves beyond the state boundary when the purchaser is located beyond the state's boundary. But what does it mean for a purchaser to be located beyond the state's boundary? Stated differently, what sort of location is sufficient to vest that buyer with outsider status?

The most immediate response is residency. Another way of thinking of this is to substitute tangible personal property for the land. In that case, we would have no trouble thinking of the buyers residing beyond the state's boundary as outsiders, but we would attribute insider-outsider status based on the receipt or consumption of the goods beyond the state's boundary.

Out-of-state residency is not generally protected under this logic. Rather, depending upon the particular market, the regulation affecting that market, and the competitors' place in that market, residency may work as a proxy for the location of one's economic interests relative to the state's boundary. For example, I am a resident of Nebraska. When I engage in economic activity, Nebraska may be the place to locate my economic activity, but it will depend upon the particular market at issue and my place in that market. As a buyer of goods, I am an insider relative to Nebraska's border if I buy and consume the particular goods at issue in Nebraska. As a seller of goods I produce within Nebraska, I am an insider because I produce the goods in and, perhaps more relevantly, sell those goods from Nebraska. As a processor, I am an insider because I perform that economic activity within Nebraska. But in no case am I an insider or an outsider simply because I reside here. Thus, if I were to produce goods in Oklahoma, that would be sufficient to vest me with outsider status (relative to Nebraska's border) in the market for those goods and allow me to make a DCC challenge to Nebraska regulations discriminating against me and my goods. So, my residency is a shorthand for my economic activity within the state in which I reside. It does so in many, but not in all, cases.

Early doctrine placed production beyond the reach of DCC doctrine inquiry as preceding commerce. While that distinction has faded,

122. Kidd v. Pearson, 128 U.S. 1, 20–23 (1888); see supra note 35.
there has been little to clarify how a state’s law could discriminate (if at all) for purposes of the DCC doctrine when it regulates in-state production. For instance, with corporate-farming laws there is little argument that these measures disrupted the flow of goods produced to buyers in some discriminatory manner by favoring goods produced in the state over competing goods produced outside of the state. However, a restriction on production is necessarily a restriction on the ability to sell the product produced. If Nebraska, in effect, restricted outsiders from producing in Nebraska it would necessarily restrict outsiders from selling goods produced in Nebraska. But both production and the ensuing sale (the economic activities at issue) reveal nothing helpful because they both occur within the state. In one sense, Nebraska’s provision preceded production and sale by restricting who could engage in those, by definition, in-state activities. So what makes these would-be participants insiders and outsiders?

Perhaps residency is a manageable way of distinguishing among these participants. But it is quite unclear why residency should work in this market. Focusing the inquiry on residency in the market for land is compelling if one substitutes moveable property for land. With production, one could question whether we should substitute some sort of entitlement for the ability to engage in production. If not, then perhaps in the corporate-farming context the only market within which discrimination can occur is the market for land because it is the only market that involves outsiders. But because restricting production restricts the ensuing commerce, perhaps residency should be used to determine insider-outsider status among producers. At the very least, however, residency appears workable for purposes of the land market.

Settling on residency, however, does not end the complexity of insider-outsider status. Residency raises a host of further questions because the term is not self-defining. Writ large, residency is simply a way of identifying those who are sufficiently vested within a particular state for a specific purpose. Depending upon the purpose, residency involves different levels of attachment to a given state. If residency were defined to require a certain number of days per year within the state, it would appear to be a somewhat imprecise way of attributing a location to the economic interests at stake. Many residents may have economic interests beyond a regulating state’s borders, while many outsiders may have economic interests within the state’s borders. If residency were defined in a less demanding manner, then the question would become one of selecting the appropriate

123. Notably, even if laws that regulate production qua production do not impact outsiders for purposes of the DCC doctrine, the Privileges and Immunities Clause would provide a non-discrimination principle to protect individuals. See supra notes 102 & 103.
quantum of ties to the regulating state. But the selection of any level of connection would appear to be somewhat arbitrary when those ties are unconnected to the market activity at issue. Why, for instance, should a discrimination claim in either the land market or the production market be made to turn on how many days one lives beyond a state's boundary, let alone some other metric unconnected to the economic activity being regulated? I am content, however, to rely upon a vague notion of residency as a method for ascribing insider-outsider status in these markets simply because it is a workable solution. And the Court seems to equate an undefined notion of residency with insider-outsider status at times.124

But relying on residency raises further problems when it comes to discrimination involving entities. Here, again, how one frames the target of Nebraska's law poses a problem. Recall that corporate-farming restrictions may be understood as prohibiting ownership or production by entities, as opposed to individuals. Entity residency is somewhat more complicated.125 A corporation is often said to reside within its state of incorporation.126 Using the entity's state of incorporation as its residency, it would appear that Nebraska's measure was entirely neutral—it seems neither likely nor unlikely that the qualifying activities would weed out outsider (foreign) corporations in favor of insider (domestic) corporations. After all, a qualifying corporation could be incorporated under Delaware law or Nebraska law. And many corporations incorporated under Nebraska law may not qualify. Thus, if a litigant can frame a corporate-farming law as operating on corporations and can assign insider-outsider status based on the state of incorporation, the corporate-farming law should not be discriminatory.127

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124. Granholm, 544 U.S. at 471 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.").

125. See Smith, supra note 7, at 1219–20. Notably, relying upon the location of relevant economic activities within a particular market serves to vest entities with insider-outsider status in the same way as it does for individuals. Thus, if residency were not the determinant of outsider status, and the location of a relevant market activity were, then the problem of figuring out entity residency does not arise. Of course, this method means there can be no discrimination with regard to production regulations, and perhaps no discrimination with regard to landownership regulations.

126. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93 (1987) (concluding Indiana has an interest in protecting shareholders of corporations incorporated under Indiana law, referring to such corporations as "in-state corporations" and distinguishing them from "nonresident corporations").

127. There are, however, some corporate farming measures that explicitly allow only entities formed under a state's law to qualify. See, e.g., Kan. Stat. Ann. § 17-5903(k) (2007) (defining "authorized farm corporation" to include only a "Kansas corporation"). This raises a somewhat difficult question of discrimination, given the uncertain nature of how insider-outsider status is determined. For example, Iowa restricted the ability of some entities to own livestock for extended periods
Perhaps, however, the DCC analysis need only identify a corporation's connection to a regulating state, regardless of the state of incorporation, before it is deemed a resident. In the absence of such a connection, the corporation would be deemed an outsider. The critical step, however, as with individuals, would come in defining that connection. If residency were defined to mean the corporation's principal place of business, it would still be difficult to determine whether such corporations are more able to satisfy the qualifying activities criteria than those that have their principle places of business elsewhere. Of course, if one attributes insider-outsider status to the entity based on the residency of the entity's owners, then matters are complicated by the same choices that must be made in defining individual residency.

before slaughter, but provided an exception for certain cooperatives organized under Iowa law. That restriction was struck down as facially discriminatory in Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003). The relevant location was the state of organization. The court rejected a non-discrimination argument premised on the lack of a correlation between the market participants' physical location and the state law under which the entity was created. Id. at 990 ("A cooperative organized under Iowa law is an Iowa entity regardless of where the entity is physically located."). The court gave no reason, however, for disregarding for discrimination purposes the ability of people physically located beyond the state's border to utilize the state's cooperative law. For a critique of Smithfield Foods, see Jennifer M. Vogel, Note, Iowa Code Chapter 9H.2: The State of Iowa's Battle Against Corporate Farming, 30 J. CORP. L. 199 (2004).

Iowa later removed the cooperative exception, which persuaded the Eighth Circuit to remand the case, directing the lower court to reconsider discrimination in light of the statutory changes. Smithfield Foods, Inc. v. Miller, 367 F.3d 1061 (8th Cir. 2004).

128. See Lewis v. BT Inv. Managers Inc. 447 U.S. 27, 39, 42 (1980) (concluding that a statute prohibiting out-of-state bank holding companies from owning investment subsidiaries within the state was "overtly" discriminatory because it made "the out-of-state location of a bank holding company's principal operations an explicit barrier to the presence of an investment subsidiary" and because it "discriminate[d] among affected business entities according to the extent of their contacts with the local economy").

129. Cf. CTS Corp., 481 U.S. at 93 (providing that further support for Indiana's interest in its in-state corporations can be found in the act in question's applicability "only to corporations that have a substantial number of shareholders in Indiana").

130. A substantial question could arise in terms of how many owners of the entity must be residents before the entity is deemed an insider or an outsider. That is, the economic interests of many entities could fall in many states if the residency of the owners attributes locations to entities. Cf. Edgar v. MITE Corp., 457 U.S. 624, 643-46 (1982) (concluding Illinois statute that regulated takeovers of any company in which 10% of the shares were held by Illinois residents flunked the Pike test). Perhaps a 10% shareholder requirement is enough to deem an entity an insider. However, the statute in Edgar did not fall on discrimination grounds. But the Court was focused on the burdens the law had on out-of-state transactions. Id. at 644.
All of this is not to say that Nebraska's law did not discriminate against outsiders. That prospect is explored in the next section. But it does mean that the notion of insiders and outsiders must be more fully considered in future cases. A strong argument can be made that the DCC doctrine views insider-outsider status as a function of the particular economic activity that the state is regulating. And support can be drawn from the arbitrariness of residency as a determinant of insider-outsider status in the case of both individuals and entities. However, I am content here to proceed without resolving this fundamental uncertainty within the DCC doctrine.\footnote{Resolving this quandary depends, in large part, on the constitutional harm that the DCC doctrine seeks to eliminate. If it is to ensure the existence of a common market for trade in goods and services, then it is more likely that the location of the economic activity should be used. If it is the disenfranchisement of outsiders in the state's political process, which may impede the existence of a common market, then residency (correlating with the right to vote) would be more appropriate. Notably, under process-oriented views, finding an insider-outsider status for entities remains difficult because entities have no vote. For a few different views on the relevant constitutional harm, see Coenen, supra note 7, at 209–216 (outlining the various "goals" of the DCC doctrine and "values" that drive its existence); Adler, supra note 112 (arguing for a principle of impartiality that requires legislators to "give reasoned consideration to out-of-state interests"); Bruce F. Broll, The Economic Liberty Rationale in the Dormant Commerce Clause, 49 S.D. L. Rev. 824 (2004); Day, supra note 36, at 51 (gleaning a concern for economic liberty from the cases under review); Denning, supra note 7 (political unity); Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 453–458, 466–67 (1996) (explaining that discrimination should "focus[ ] on the distortion of [economic] decisions" and diffusing the state-autonomy objection by eliminating the prospect of state competition); Eule, supra note 7 (shortfalls in the political process); Farber & Hudec, supra note 52, at 1438 ("No matter how a legal test is articulated, it cannot satisfactorily resolve the tensions between local autonomy and free trade in all conceivable cases. In the end, the law must have a certain irreducible messiness in dealing with such fundamental tensions."); Redish & Nugent, supra note 103 (rejecting almost all reasons for the DCC doctrine); Regan, supra note 7 (the avoidance of legislative protectionist purposes); Sunstein, supra note 91, at 1705–1708; Williams, supra note 37 (deliberative equality).}

A workable discrimination analysis can proceed on two assumptions that may deserve more attention in future cases: (1) corporate-farming restrictions operate to bar individuals from using the corporate form in the markets at issue and (2) those individuals are vested with insider-outsider status based on their residency. On these assumptions, discrimination would occur if Nebraska provided insiders with the ability to use the corporate form, but barred outsiders from doing so.

2. The Allocation, "The Farm," and Equality

In this context, the extent to which Nebraska's law burdened outsiders but not insiders turns in the first instance on how one inter-
interprets the phrase "the farm." That phrase imposes a geographic restraint on where the qualifying activities (farm residency or active engagement) may occur. Depending on how broadly one interprets "the farm," the analysis of whether those criteria effectively differentiate between insiders and outsiders changes.

The broad interpretation of "the farm" would have vitiated an effort to establish discrimination. If interpreted at the operational level, the qualifying activities do not effectively discriminate because qualifying activities could occur on any parcel of land in the operation. Thus, any operation in the United States could own land in Nebraska or engage in farming in Nebraska as a corporation so long as it had the requisite familial ownership and at least one member of the family lived on agricultural land properly included in the operation or was actively engaged in the day-to-day labor and management of the operation. Such activities could occur anywhere. If qualifying activities could occur anywhere in the United States, then there is no basis upon which an insider-outsider allocation could be found.

While I disagree with the court's rejection of this interpretation on textual and practical grounds, I am content to proceed with it for the time being. Under the narrow interpretation of "the farm," Nebraska's qualifying activities criteria required anyone who wanted to use the corporate form to own or operate a Nebraska farm to either reside on a farm or be actively engaged in the day-to-day labor and management of a farm. Recall that residency is the only insider-outsider attribute that has been identified. Thus, if the corporate-farming measure's "residing on the farm" qualification or its active-engagement criteria provided the competitive advantage to Nebraska residents over non-residents as land buyers or producers, then it was discriminatory.

a. Farm Residency

It appears obvious that the farm-residency requirement is discriminatory. That is, those who reside on Nebraska farms are able to do what those who reside outside of the state cannot: use the corporate


133. One interesting problem that would arise under this interpretation would be whether or not a corporately owned home in an urban area would qualify as part of "the farm."

134. See infra, section III.D (questioning this interpretation). Given the size-capping function of the narrow interpretation, there is also a plausible normative case for it. See supra text accompanying notes 29–30.
form to own or operate the Nebraska farm upon which they reside.\textsuperscript{135}

However, closer examination reveals some flaws in this reasoning.

One way of thinking of Nebraska's law is to envision it as setting forth requirements that individuals needed to meet before they could utilize the corporate form to engage in the restricted activities on the farm at issue. On this view, all non-farm residents, insiders and outsiders alike, needed to do the same thing—establish residency on the farm in question. Being a state resident did not matter to one's ability to buy or operate that farm. This ex-ante view does not reveal discrimination.

Discrimination, of course, typically raises the specter of inequality. And one can envision equality as imposing a uniform requirement on all participants regardless of residency.\textsuperscript{136} There is nothing in the DCC doctrine that would prohibit Nebraska from requiring its residents to establish farm residency before they could qualify to use the corporate form to own or operate a Nebraska farm. And if equal treatment is all the DCC doctrine requires, then it would appear that Nebraska should be able to extend the same treatment to outsiders on the same terms. Indeed, if the DCC doctrine regards a farm-residency requirement as discriminatory for purposes of the DCC doctrine, then Nebraska is forced to shield outsiders from a requirement that it may constitutionally impose on its own residents. If equality is the underlying premise of the DCC doctrine, then it generates a somewhat odd result here.

However, the result may not be that odd. Sometimes uniformity generates inequality. For example, minimum price laws requiring dealers to pay a minimum price for milk can be applied only to the purchase of milk from in-state producers.\textsuperscript{137} Applying such a law to dealers who purchase out-of-state milk burdens outsider producers by eliminating their opportunity to offer their milk at a lower price than

\textsuperscript{135} The term "residing on" was not defined in Nebraska's law. Thus, it may be that those who reside on Nebraska farms are not residents of Nebraska for purposes of the DCC. If this is true, then some outsiders will be able to utilize the residency requirement, making the proxy somewhat imprecise. However, this is a weak argument. The explicit use of residency in the corporate farming measure and residency's role in the DCC doctrine probably cannot be divorced by defining residency differently for purposes of the corporate farming measure.

\textsuperscript{136} Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 331 (1977) ("Equal treatment of interstate commerce . . . has been the common theme running through the cases in which this Court has sustained 'compensating,' state use taxes."); Henneford v. Silas Mason Co., Inc., 300 U.S. 577, 586 (1937) (upholding state use tax on imported goods where "equality and not preference is the end to be achieved"); see Richard S. Harnsberger, Josephine R. Potuto & Norman W. Thorson, Interstate Transfers of Water: State Options After Sporhase, 70 Neb. L. Rev. 754, 831 ("There is nothing in Commerce Clause theory that requires a state to disadvantage its own citizens . . . .").

\textsuperscript{137} Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939).
insider producers. In other words, equal treatment for all milk in a regulating state's market is prohibited by the DCC doctrine. So maybe, in some instances, the DCC doctrine requires that outsiders be shielded from a law that applies to insiders.

Another example of this phenomenon is *Hunt v. Washington State Apple Advertising Commission*. There, a uniform apple grading system adopted by North Carolina operated to the disadvantage of Washington apple sellers who had created their own superior grading system. There, the application of the North Carolina law had the "practical effect" of eliminating Washington apple sellers' competitive advantage, and the law was struck down. Again, uniformity was not allowed under the DCC doctrine.

It would, however, be difficult to argue that Nebraska's law eliminated a competitive advantage to outsiders that it did not also eliminate for insiders on the same terms. Nebraska's law prohibited the use of a corporate form by all non-farm residents on all tracts of land that the state could regulate and allowed that advantage to all farm residents on the farms upon which they resided. That distinguishes Nebraska's law from *Hunt* because in *Hunt* only the Washington outsiders were stripped of a competitive advantage. It may also distinguish the milk cases. However, it is not inconceivable that the DCC doctrine insulates outsiders from some regulation that a state may constitutionally apply to its own residents.

A more powerful counter to the uniform-treatment argument is to envision the law not as setting forth requirements for non-farm residents to meet before they may utilize the corporate form, but rather to recognize the existence of incumbent landowners and operators who

140. Id. at 350–52.
141. The specific competitive advantage eliminated in cases like *Hunt* and *Baldwin* may also be fundamentally different than that at issue with corporate-farming measures. If the ability to use the corporate form is the advantage at issue, it would seem that laws allowing for the creation of entities are not the same as the lower prices achieved by producers in the same industry or superior marketing techniques developed by competing producers. Rather, the use of the corporate form is a benefit bestowed by state law, not a "competitive and economic advantage" that some outsider group of competitors "has earned for itself." *Hunt*, 432 U.S. at 351.
142. The milk cases may also be examples of extraterritorial legislation. See Henneford v. Silas Mason Co., Inc., 300 U.S. 577, 585 (distinguishing *Baldwin* as an attempt by New York "to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there"). Given that understanding of the milk cases, Nebraska's law was distinguishable—it did not seek to regulate economic activity occurring beyond its borders. However, the Court's cases are far from clear on this matter. See generally, Coenen, *supra* note 7, at 231–39.
met the requirements at the time the provision was enacted.\footnote{143} Taken as such, there was a group of landowners and operators who were farm residents at the time of enactment. This group was, by definition, comprised of Nebraska residents and given the ability to utilize the corporate form. Perhaps it is this group of some, but not all, Nebraska residents who were given a competitive advantage.\footnote{144}

There is, however, a problem with this notion of incumbency in relation to the markets at issue and the competitors in those markets (land buyers and producers). Incumbent landowners were not competing with land buyers for the ability to purchase the farms upon which they resided—the farms that they could own using the corporate form. Thus, within the land market, it would not appear that the restriction had any impact on competition among buyers. Indeed, it would appear that the restriction's effect on potential buyers \textit{burdened} incumbent landowners (insiders) in the market for farmland. Thus, the question of incumbency is fraught with further difficulty insofar as farm residency is concerned in the land-buyer market. However, with regard to competing producers, incumbent farm residents were in competition with other producers. In this market, perhaps incumbency has some traction.

In the end, it is somewhat difficult to establish that the farm residency requirement did not vest some state residents with an advantage that was withheld from outsiders. However, it is clear that Nebraska also withheld this advantage from its own residents—those who were not farm residents, or would not establish farm residency. Thus, \textit{farm} residency is, at most, an imperfect proxy for \textit{state} residency.\footnote{145} Specifically, it is an over-inclusive way of placing outsiders

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\begin{itemize}
  \item \textbf{143.} Interestingly, land owned by existing corporations was excluded from the operation of Nebraska's law on the condition that the entity not expand its landholdings. \textit{Neb. Const. art. XII, § 8(1)(D)}. Thus, if the measure is thought of as restricting corporations, the set of incumbent landowning corporations was not comprised merely of farm-resident corporations. However, those corporations that did establish farm residency were allowed the benefit of further expansion.
  \item \textbf{144.} Notably, the group of incumbent owners and operators would fade over time until there was no owner or operator who did not have to establish farm residency before they met the qualification.
  \item \textbf{145.} I use the term "proxy" to simply refer to the general notion that the use of some characteristics may generate discriminatory effects. \textit{See, e.g., Farber & Hudec, supra} note 51, at 1416 (referring to this as the "use of a proxy characteristic"). Thus, it is synonymous with the notion of "practical effect," \textit{Hunt v. Wash. State Apple Adver. Comm'n}, 432 U.S. 333, 350 (1977), and justified by the general notion that discriminatory effects, alone, trigger demanding judicial review. Proxy, of course, has a different meaning when the existence of discriminatory effects is treated as a proxy for (or an indicator of) discriminatory purpose. \textit{See Hillside Dairy, Inc. v. Lyons}, 539 U.S. 59, 67 (2003) (refusing to answer the question, for Privileges and Immunities Clause purposes, whether a disparate impact should be problematic only when it serves as a proxy or whether it should be problematic simply because of its practical effect).
\end{itemize}
at a competitive disadvantage because it burdens all outsiders as well as some (but not all) insiders. Subsection III.C.3 evaluates whether this allocation constitutes a discriminatory effect.

b. Active Engagement

With regard to active engagement, matters are somewhat different. Recall that Nebraska's active-engagement criteria required that the qualifying individual be actively engaged in the day-to-day labor and management of the farm. The farm was interpreted to include each separate piece of land within the operation, and Nebraska courts interpreted the requisite activities strictly.

As above, the measure appears to treat insiders and outsiders who need to establish compliance equally—both would have to become actively engaged on that farm to engage in the restricted activities using a corporate form. And one could argue that the DCC doctrine does not require a state to treat outsiders better than its own residents.

As above, difficulties ensue with those arguments. Uniformity can sometimes create inequality. And there was a group of incumbent producers who were given a benefit relative to newcomer producers. Here, however, active engagement is not as strong of a proxy for state residency as farm residency was. As with farm residency, there were many insiders who would not satisfy the criteria. But unlike farm residency, active engagement could be established by non-residents. Non-residents in many areas and with many types of production could perform day-to-day labor and management as easily as many state residents, so long as they were close enough to the relevant farm.

"Close enough," varied depending on the specific operation at issue because different farming activities have different labor and management needs. Some crops—e.g. dry-land wheat—may require little daily involvement at certain times of the year. But some livestock operations—e.g. a swine farrowing operation—may require contact multiple times a day. To the extent the particular operation required less daily activity, it would be easier for a producer to fulfill the "actively engaged" criteria even though she resided in another state. The more contact required, the greater the difficulty for insiders and outsiders to satisfy the criteria. The less contact required, the easier for insiders and outsiders to satisfy the criteria. In any event, however, there were outsiders that would qualify and insiders that would not. Thus, Nebraska's active-engagement criteria was an over-inclusive and under-inclusive way of burdening non-residents because some re-

146. See supra note 29 and accompanying text.
147. In fact, given Nebraska's exemption for custom spraying, fertilizing and harvesting, Neb. Const. art. XII, section 8(1)(M), perhaps one trip to a dryland wheat field would have fulfilled the requirements.
residents were prohibited from qualifying and some non-residents were allowed to qualify.

c. A Hypothetical

To summarize matters thus far, consider the following hypothetical: A farmer residing in Colorado owns a tracts of Colorado farmland. He is actively engaged in farming on that farm. This farmer wants to buy a farm in Banner County, Nebraska, and produce dryland wheat without providing any personal labor. Another farmer resides on a farm in Sarpy County, Nebraska, and is actively engaged in farming there. He also wants to buy the Banner County farm for the same purpose as the Colorado farmer and will provide no personal labor.

Under the broad interpretation of the farm, either would qualify to own or operate the Banner County farm while using the corporate form and no discrimination would appear. Their residency or active engagement with respect to the operation ("the farm") would fulfill Nebraska’s requirements. But if one rejects that interpretation in favor of a narrower one, does discrimination emerge?

Arguably Nebraska has treated both farmers the same. Each farmer is assigned insider-outsider status based on his residency. Both the insider and the outsider need to either establish residency on "the farm" or become actively engaged on "the farm"—the Banner County tract. Neither, of course, will. Thus, neither can own nor operate the Banner County farm using the corporate form unless they fulfill the qualifying criteria. If Nebraska cannot impose its corporate-farming restriction against the Colorado farmer, then Nebraska would be forced to treat the Colorado farmer better than the Nebraska farmer because the Coloradoan is an outsider. Nebraska has, perhaps, achieved equality.148

But sometimes the DCC doctrine casts equality aside. And incumbency is somewhat helpful at establishing differential treatment between these two farmers. After all, the Nebraska farmer would be allowed to use the corporate form on his Sarpy County tract because he resides there and because he is actively engaged there, while the Colorado farmer cannot use the corporate form on any Nebraska farms. They are not, however, in competition with one another for the land already owned by the Sarpy County farmer—the land that the Sarpy County farmer can use the corporate form to own. In fact, the Nebraska farmer may be burdened by the restriction because it affects to whom he may sell his land. The two are, however, competing with one another as producers, and the Nebraska farmer can use the corpo-

rate form for his Sarpy County farm, while the newcomer will not be able to with regard to the Banner County farm.

At the very least, the hypothetical proves that Nebraska's law was an imperfect proxy for non-residency. With regard to farm residency, there are no outsiders who qualify (all will be treated like the Colorado farmer), but there are many non-farm-resident insiders (those like Nebraska farmer and people who do not live on farms) who also do not qualify. With regard to active engagement, there are both outsiders and insiders who qualify, and there are both outsiders and insiders who do not (like the Nebraska and Colorado farmers in this hypothetical). Given this disparate allocation of the relevant burden, the question becomes one of figuring out what sorts of allocations constitute discriminatory effects.

3. Disparate Allocations and Discriminatory Effects

At this point, it is helpful to return to the notion of discrimination illustrated at the beginning of this analysis. Both farm residency and active engagement under the narrow interpretation of the farm involve a burden that has been allocated in a way that deviates from that depicted in Figure 1. In that figure, perfect discrimination is depicted. It could occur explicitly or through the use of a set of provisions that effectively marks outsiders (and only outsiders) for burdensome treatment relative to their insider competitors. City of Philadelphia v. New Jersey,149 is an example. In that case, New Jersey divested all out-of-state landfill-service consumers of the service offered by New Jersey landfills and imposed no burden on competing in-state landfill-service consumers.150 Nebraska's law did not generate this sort of an allocation. It neither used a perfect proxy for insider-outsider status, nor did it explicitly use insider-outsider status to allocate its burdens.

Beyond perfect discrimination, there is a certain level of uncertainty concerning what allocations constitute the sort of discrimination worthy of strict scrutiny. Among commentators, Professor Collins has argued that the question is whether the law discriminates categorically amongst insiders and outsiders who are in direct competition with one another. Under Collins' view, if all benefited parties are

149. 437 U.S. 617 (1978).
150. Professor Eule argues that the case overlooked insider landfills that were more than happy to serve outsiders. Eule, supra note 7, at 463. However, the relevant participants were the insider and outsider consumers of the waste service. The claim was, thus, similar to that made (incoherently in this context) by feeding operations in Jones I. Professor Eule's point is that the outsider consumers had a reliable surrogate within the state to guard against legislative overreaching. While this may be true, the Court has not bought into the surrogacy theory under these circumstances, mainly because of its propensity to apply in all cases. See 1 Tribe, supra n. 8, 1055–57.
within the state and all burdened direct competitors are outside, then the measure is subject to strict scrutiny. And if a measure is only partially discriminatory—i.e., the measure "favors locals in its practical effect, but also benefits some outsiders" the measure is evaluated under *Pike*. But, as this section explains, the Court has easily struck down state laws that do not impose their burden on all outsiders. Indeed, Professor Smith stated simply, "It is not possible to specify how uneven the distribution of burdens and advantages must be to count as discrimination." And Professor Coenen has stated that this area remains "under-developed" with strict scrutiny ensuing when a measure is "distinctively or obviously destructive of interstate commerce." Professor Denning has attempted to sort out some of the cases, but I do not believe his analysis appreciates the distinction between the competitive burden at issue in the particular case and the allocation of that burden among competition.

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151. Collins, *supra* note 73, at 81 (citing *Hunt* as an example); *Id.* at 83–84 (contending that the difference between categorical discrimination and partial discrimination is justified in part by the prospect of "long-term market adjustments [that] reduce cost exporting and improve local political accountability"). Some courts appear to have gone even further, rejecting the notion that discriminatory effects trigger strict scrutiny at all, preferring to use *Pike* v. Bruce Church, Inc., 397 U.S. 137 (1970), when discrimination does not appear in the terms of the legislation, or at least, entertaining Collins view of partial discrimination. *See* Ill. Rest. Ass'n v. City of Chicago, 492 F.Supp. 2d 891 (N.D.Ill. 2007) (relying on United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (concurring opinion asking first, whether there is any sort of a disparate impact); Exxon Corp. v. Governor of Md., 437 U.S. 117, 127–28 (1978)); Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995), *followed in* Baude v. Heath, 538 F.3d 608 (7th Cir. 2008) (striking down a portion of a state law having a discriminatory effect like that depicted in Figure 2.a, infra, under *Pike*).

152. Smith, *supra* note 7, at 1219.


154. Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 Urb. Law. 907, 925–36 (2005). While I agree with most of what Professor Denning has written on this subject, I view his summary as mixing the question of discriminatory allocations with the relevant burden imposed on competitors. He summarizes the effects cases as follows:

> The clearest cases involve statutes whose effects insulate one locality's economic actors from competition by out-of-state economic actors. Discriminatory effects can take many forms, including, but not limited to: (1) using facially neutral criteria merely as a proxy for geographic origin; (2) effectively barring the import of out-of-state goods, or barring their sale once imported; (3) acting to raise the cost of doing business in a state for out-of-state competitors, which costs are not also borne by in-state actors; (4) stripping competitive advantages from out-of-state competitors; (5) otherwise leveling the playing field to the benefit of in-state economic actors; or (6) subsidizing in-state actors through mechanisms that are funded entirely (or largely) by out-of-state economic actors.
I read the Court's cases as indicating that only certain disproportionate regulations qualify as discriminatory. Specifically, if a measure that burdens some (but not all) insiders along with outsiders, it

Id. at 933 (emphasis omitted) (footnotes omitted).

While I agree that these are "forms" of discrimination, my analysis seeks to synthesize these examples by distinguishing between the relevant burden and the allocation of that burden amongst the competitors at issue. That is, each of these forms involves a relevant burden that was allocated on a discriminatory basis. The first, proxy use, does not identify a relevant burden, but raises the difficult question of what sorts of criteria can be thought of as a proxy for "geographic origin," which I take to mean insider-outsider status. Under my analysis, such a proxy exists when the criteria employed generate a discriminatory allocation of the relevant burden. The remaining examples differ in terms of the relevant burden imposed, but assume a discriminatory allocation by stating that the relevant burden is placed on "in-state" and "out-of-state" participants. My analysis seeks to identify the allocations that qualify as discriminatory.

155. There does not appear to be much controversy concerning whether the notion of discriminatory effects is one of proportionality when the insiders and outsiders competing with one another comprise different percentages of the relevant market (as they almost surely will). See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 579 n.13 (1997). Thus, it may not matter that Nebraska's land market generally contains relatively few out-of-state buyers. Data concerning the identity of buyers is contained in a series of reports published by Professor Bruce B. Johnson at the University of Nebraska, Department of Agricultural Economics. For instance, in 2007, 10% of buyers were out-of-state. BRUCE JOHNSON, BEN BLOMENDAHL & RYAN LUKASSEN, NEBRASKA FARM REAL ESTATE MARKET DEVELOPMENTS 2007-2008, 14, Table 8 (2008). Notably, out-of-state purchasers vary by region and over time. See id., Table 7 (reporting 50% out-of-state buyers in the North region), Table 8 (reporting percentage of out-of-state buyers on statewide basis since 1998); BRUCE B. JOHNSON, ET. AL, FARM REAL ESTATE OWNERSHIP TRANSFER PATTERNS IN NEBRASKA'S PANHANDLE REGION (2007) (evaluating ownership patterns from 2003 through the first half of 2006 and finding a high percentage of acres purchased by out-of-state buyers). Johnson's reports are available at http://www.agecon.unl.edu/realestate.html.

Johnson's data also show that out-of-state buyers are significant participants in Nebraska's land market, along with local non-farmers, non-local Nebraska resident non-farmers, and active farmers/ranchers. However, the terms "active farmer/rancher" and "non-farmers" are not defined. Moreover, the use of entity business forms is not reported. Thus, it is nearly impossible to draw conclusions regarding the impact of corporate farming measures. For instance, his data show that "active farmers/ranchers" comprised a larger percentage of buyers in 2007 (73%) than they did in 2005 (61%). However, it is unclear how Nebraska's corporate farming measure may have affected these buyers. Perhaps Jones facilitated "active farmers" purchases by making the corporate form available to "active farmers" who would not meet I-300's qualifying criteria. Or, perhaps Jones allowed more out-of-state buyers and non-qualifying local buyers to use the corporate form than otherwise would have been there and, thus, kept the percentage of active-farmer purchasers lower than it would have been if I-300 were in place. Without a definition of "active farmers" and an analysis that controls for other market influences that could impact insider and outsider buyers differently, these data do not show what impact I-300 had on the identity of buyers.

Similarly, while there have been large increases in land values between 2005 and 2007, attributing any portion of the increase to the courts' decisions striking down Nebraska's law would be speculation at this point. Moreover, even if Ne-
might be discriminatory. Whether it is or not depends upon the proportion of outsiders who are burdened. If all outsiders are burdened, the measure is discriminatory. But if only some outsiders are burdened, then the disproportionate impact (if any) does not qualify as discrimination under the DCC doctrine.

The district court in *Jones* noted that the Court has struck down laws that "burdened some in-state interests, or included some out-of-state interests in their favored classifications." 156 While the Court has struck down laws that do one or the other, it has not been willing to deem state laws discriminatory when they "burden some in-state interests" and "include[] some out-of-state interests in the favored classification." Indeed, the Court has upheld such laws.

The matter can best be explained by manipulating the burden represented within the illustration printed above. In essence, the Court is only willing to deem a measure discriminatory when the disproportionate impact is clear.

a. Under-Inclusive Burdens

For example, if a select group of outsiders are burdened by a measure, the disproportionate impact will be clear, even though the burden was under-inclusively distributed. The following figure depicts this result157:

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156. *Jones I*, 405 F. Supp. 2d at 1081.
157. Professor Eule would delineate both the depictions in Figure 1 and 2.a as having an "outsider impact percentage" of 100%. Eule, supra note 7, at 460. This means nothing more than the entire cost of the state's regulation is borne by outsiders.
Hunt is the most illuminating example. There a select group of outsiders—Washington apple sellers—were disadvantaged in the North Carolina market for apples by North Carolina’s insistence on a uniform grading system.\footnote{158} Other outsiders were not disadvantaged.\footnote{159}

Northeast Bancorp v. Board of Governors of the Federal Reserve System\footnote{160} is another example of this sort of distribution. There, Massachusetts enacted a statute allowing bank holding companies with their principal places of business in New England states to hold banking operations within Massachusetts. But for Congressional authorization, this would have been discriminatory. This, again, identifies a particular under-inclusive group of outsiders for burdensome treatment.

In Lewis v. BT Investment Managers, Inc.,\footnote{161} the Court struck down a Florida law prohibiting bank holding companies with their principal place of business outside of Florida from owning investment subsidiaries in Florida. No such restriction was placed on in-state bank holding companies, nor were any other sort of non-holding-company participants restricted. While this may have been explicitly discriminatory with regard to holding companies, the measure could also be thought of as singling out a particular swath of outsider providers of investment services for burdensome treatment.\footnote{162}

There is, however, one case in which the Court refused to deem a measure discriminatory even though its burdens appeared to be focused only on a select group of outsiders. In Minnesota v. Clover Leaf Creamery Co.,\footnote{163} the Court evaluated a law prohibiting the sale of milk in plastic nonreturnable containers. While there were many competitive groups of participants affected by this measure (including dairies packaging their own products and manufacturers of milk containers), an arguably discriminatory allocation of burdens could have existed amongst those who sell the raw materials used in milk containers. Plastic resin suppliers were all outsiders, while pulpwood suppliers were predominately insiders. The restriction on the use of plastic resin for non-returnable containers, then, reduced the demand for a product available only from outsiders that competed with a prod-

\footnotesize{\begin{itemize}
\item \footnote{159} Professor Collins describes this as an example of partial discrimination that was “practically categorical” and “should be invalidated to prevent easy technical avoidance of the rule against categorical discrimination.” Collins, supra note 73, at 82.
\item \footnote{160} 472 U.S. 159, 174 (1985).
\item \footnote{161} 447 U.S. 27 (1980).
\item \footnote{162} See also Best & Co., Inc. v. Maxwell, 311 U.S. 454, 456–57 (1940) (concluding that all insiders were shielded from a tax, while those outsiders unwilling to locate retail facilities in the state were not, and that this was discriminatory).
\item \footnote{163} 449 U.S. 456 (1981).
\end{itemize}}
uct available from both insiders and outsiders. The Court refused to see this as discriminatory and noted that the degree of burden was exaggerated by the challengers because plastics could still be used for returnable milk containers and the increase in demand for pulpwood could be met by outsider suppliers.\textsuperscript{164} Assuming, however, that there would be some disparate treatment that resulted from the measure, the Court treated the disparity under \textit{Pike} and concluded that Minnesota's law was justified.\textsuperscript{165}

\textit{Clover Leaf Creamery} is a difficult case for the narrow-group-of-outsiders allocation, but it could support two possible qualifications on the allocation depicted here. First, it could be that there is a \textit{de minimus} rule embedded in the only-outsiders allocation. That is, perhaps the Court will not allow a group of burdened outsiders to lay claim to striking down a state law when the burden imposed upon them is relatively small, unless they can show the law invalid under \textit{Pike}. This reading, however, conflicts with cases stating the familiar principle that such facts go only to the extent of discrimination, not its existence.\textsuperscript{166}

The second possible reading makes the most sense: Considering the allocation in the long run, it was not clear that insider pulpwood suppliers would capture the benefit created by prohibiting non-returnable plastic containers. Pulpwood is, after all, a good supplied by many firms within and outside of Minnesota. Those firms would be left to compete for the business freed up by the ban on plastic non-returnables. This reasoning fits with one reading of another important effects case, \textit{Exxon}, considered below.\textsuperscript{167}

However one might read \textit{Clover Leaf Creamery}, it would be of little help to Nebraska's law because Nebraska's law does not appear to have created this sort of an allocation in the first place. At least some insiders cannot use the corporate form under either of the qualifying activities. In no event is a select group of outsiders exposed to a burden that does not fall upon any insiders.

\textsuperscript{164} Id. at 472–73.
\textsuperscript{165} Id.
\textsuperscript{166} “Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field.” \textit{Wyoming v. Oklahoma}, 502 U.S. 437, 456 (1992) (quoting New Energy Co. v. Limbach, 486 U.S. 269, 276–77 (1988)). See BITTKER, supra note 7, § 6.06[A], at 6-47 to -48 (describing \textit{Wyoming v. Oklahoma}). This statement was made in \textit{Wyoming} in the context of an argument that no discrimination should exist when only a small portion of in-state goods is favored.
\textsuperscript{167} See infra, text accompanying notes 190 to 194.
b. *Over-Inclusive Burdens*

Another discriminatory allocation arises when a state law burdens all outsiders along with some insiders. While this allocation troubles commentators, the Court's treatment seems clear—this is discrimination.\(^\text{168}\) Stated simply, in some cases burdens placed on insiders will not insulate a measure from having a discriminatory effect:

- **Bacchus Imports, Ltd. v. Dias.**\(^\text{169}\) is a prime example. There, the Hawaii legislature passed a law exempting only a few Hawaii-produced beverages from a tax on alcoholic beverages. The Court had no trouble concluding, "the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products."\(^\text{170}\)

\(^{168}\) See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (striking down a measure that banned all long trucks but provided exemptions for only Iowa truck manufacturers and Iowa residents moving mobile homes); cf. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) (striking state tax measure down on discrimination grounds for providing a tax benefit to state and municipal retirees but not federal retirees and non-government retirees); *Coenen*, *supra* note 7, at 200–02 (noting differences of the Court in how to frame the existence of discrimination in "Davis").


\(^{170}\) *Id.* at 271; see also *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 220–21 & n.10 (1984) (finding a municipal ordinance preferring residents of the municipality discriminatory for purposes of the Privileges and Immunities Clause of Article IV, even though many state residents were burdened as well by the preference, and rejecting the dissent's argument that burdening state residents meant there was no discrimination based on state residency).
Many commentators’ consternation has come from process-based theories of the DCC doctrine. As the proportion of insiders burdened by the measure increases, the political protection for outsiders increases. Thus, some have argued that judicial intervention is improper when insider interests act as a surrogate for the impact on outsiders. The Court has, at times, been friendly to the process-based theory. But for present purposes, it is sufficient that the Court has found discrimination in such cases.

Nebraska’s farm-residency requirement falls within this allocation. Farm residency can be taken as barring all outsiders from the use of the corporate form as well as those insiders who do not reside on farms. This allocation would qualify as discriminatory. The courts were therefore right to disregard the inclusion of some burdened insiders where all outsiders were burdened. Thus, they correctly observed that “an interstate-commerce claim is [not] precluded by the fact that some Nebraska corporations (those that are not ‘family farm corporations’) may suffer a negative impact under Initiative 300.” The court framed the State’s argument as claiming that a measure cannot be discriminatory if it “does not exclude solely out-

The participants identified in the analysis, as well as the attribution of insider-outsider status to them, can have an impact on how one detects a discriminatory allocation. The Court in Boston Stock Exchange v. State Tax Comm’n, 429 U.S. 318, 333–35 (1977), the Court deemed discriminatory a New York tax break for non-residents who made in-state stock sales. The law at issue in Boston Stock Exchange was much like a local processing requirement. That is, the measure was discriminatory because of the effect it had on exchanges located within or beyond the states boundaries. Insider exchanges benefited from the favorable tax treatment, which was designed to draw business to in-state exchanges. And no outsider exchanges were given this same benefit because sales on their exchanges (and within the state’s taxing authority) were not given the tax break. Thus, the allocation would fall within Figure 1.

If the focus shifts to taxpayers, matters change somewhat. One’s initial reaction in considering an allocation among taxpayers is that there was no unconstitutional allocation of benefits. A select group of non-resident taxpayers were shielded from the tax, but all resident and the remaining non-resident taxpayers were taxed. Framed as such, the measure favors outsiders. But if insider-outsider status is determined by something other than residency, then a discriminatory allocation ensues. Consider, for example, what happens when the location of the sale is used to attribute insider-outsider status. This would vest non-residents who were given the tax exemption with insider status. If that were the case, only a select group of insiders (non-residents making in-state sales—a subclass of all people making in-state sales) would be exempt and all outsiders as well as remaining insiders would be burdened, a Figure 2.b allocation.

171. Tribe, supra note 7, at § 6-5, 1053, 1055; Eule, supra note 7, at 468 (“The existence of a substantial enough impact on represented entities may preclude the showing of the requisite [outsider impact percentage.]”);


173. Jones II, 470 F.3d at 1267.
of-state corporations." While the courts relied on Carbone, a better case to rely on would have been Bacchus Imports. As I explain below, Carbone's grounding as a local law enacted with a local boundary in mind makes it a somewhat weak basis for this allocation. But sufficient support exists for the court's discriminatory effects conclusion with regard to farm residency. It falls within Figure 2.b.

As a matter of process, however, it is difficult to understand why these allocations ought to be deemed discriminatory and exposed to strict scrutiny. The history of Nebraska's law is a good example. The constitutional amendment containing the measure was passed in 1982 by initiative. Before the initiative succeeded a variety of bills had been considered and rejected by the legislature. The initiative vote also evinces something less than overwhelming support—290,377 For and 224,555 Against. So what was the source of this political resistance? There are three possibilities: (1) non-farm residents within the state, (2) outsiders waging the political battle within the state; and (3) landowners who did not want to see their property decline in value as a result of the restriction. The most important sector of the resistance is the third. The first involves a group of buyers who may not be the best surrogates for outsider sellers. The second has never been recognized by the Court, though perhaps unjustifiably. But the third squarely provides a viable political check on outsider disenfranchisement. Landowners do not suffer from the political disorganization and common presence that plagues the notion of consumer-based surrogacy. Indeed, it may be that "the most palpable harm imposed" by this law is the effect it could have on land values. If that were the case, then "[t]here is no reason to step in and hand local [landowners and producers] a victory they could not obtain through the political process." Nonetheless, the Court has been unwilling to sanction discriminatory allocations among a group of competitors.

174. Id.
175. See, e.g., LB 668 (Neb. 1969).
177. Interestingly, the campaign against the measure was funded, in part, by outsiders; thus, the political fight actually involved outsiders. Indeed, the campaign materials relied upon by the Jones courts arose in this context. Ironically, those materials supported the courts' discriminatory-purpose rationale. But, at the same time, they seem to fulfill the process-based concerns underlying the DCC doctrine.
178. Tribe, supra note 7, at 1055; Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 132–33.
181. Id.
based on the quantum of insiders harmed by a measure that burdens all outsiders.

Even though farm residency may fall by this sword, active engagement does not. As explained above, the active-engagement criteria were both over-inclusive and under-inclusive. That takes the allocation out of Figure 2.b.

c. Non-discriminatory Disparities

Above, the allocation of burdens was clearly discriminatory, and I have discussed how Nebraska’s farm-residency criteria may fall within Figure 2.b. However, the Court’s cases finding no discriminatory effects provide a sound basis for arguing that Nebraska’s active-engagement requirement was not discriminatory.

When a measure burdens some, but not all, outsiders and insiders, matters become more complex. For example, equal allocations of the burden are not discriminatory.\(^\text{182}\)

![Figure 3.a](image)

If the burden falls more heavily on insiders, then no discrimination has occurred:

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182. Professor Eule would refer to this as having an “outsider impact percentage” of 50% because the burden is cast “equally upon those within and without the state.” Eule, supra note 7, at 460–61.
But if the burden falls more heavily on outsiders than insiders, then a disproportionate impact emerges:

The Court, however, has been somewhat unwilling to deem this allocation discriminatory. Some commentators have argued that it should, based primarily on the process-based implications of laws having this effect. That is, in these cases, outsiders were not ade-

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183. See Eule, supra note 7, at 472–75 (arguing for a sliding scale of review based on process concerns); Norman R. Williams, The American Common Market 53 (April
quately protected by the political processes in the regulating state. It may be that process is not the underlying concern of the DCC doctrine. But a more plausible explanation for the Court's refusal to find this allocation discriminatory is that it is generally too difficult in most cases to make the sort of proportionality determination that would place a measure's effects within Figure 3.c, as opposed to Figures 3.a and 3.b. This is especially so when a court's analysis is confined to the practical effect of the legislation, drawn primarily from the legislative text. Given these difficulties, this sort of disparate impact is generally left for analysis under Pike, with one narrow exception.

An example helps illustrate how the burden's allocation can become difficult when we move beyond the allocations depicted in Figures 1 and 2 to the allocations found in Figure 3. To simplify quite dramatically, assume there are 150 total competitors in a market, 100 of whom are insiders and 50 of whom are outsiders. If a law bars 50 insiders and 27 outsiders from the market based on some characteristic common to those 77 participants, but allows in the remaining 73 insiders and outsiders, then one could argue it is discriminatory in its effect, falling within Figure 3.c. That is 50% of the insiders are barred, and 54% of the outsiders are barred:

Thus, the measure burdens outsiders more than insiders. On balance, then, the ex-post market structure is roughly 68% insider and 32% outsider. Before the measure, about 67% were insiders and 33% were outsiders. Thus, the law had the effect of enhancing the insider

\[20, 2009\) (unpublished manuscript, on file with author) ("a measure has a discriminatory distribution of benefits and burdens when a substantial majority of its benefits accrue in-state and a substantial majority of its burdens fall on out-of-state interests").
position in the market, disproportionately impacting outsiders. But such proportionality inquiries are not the stuff of discriminatory effects under the DCC doctrine, at least not of the sort that triggers strict scrutiny.

The allocations covered in Figure 2 make the disproportionality clear. Working with the market-access example, if the measure allows some but not all insiders and bars all outsiders, the effect is to discriminate against outsiders. Thus, 100% of the outsiders are barred, and less than 100% of the insiders are barred. This allocation is found in Figure 2.b above. And if only a select group of outsiders are barred—Figure 2.a—then the disproportionate impact remains clear for similar reasons.

With Nebraska's law, there was simply no evidence to substantiate a Figure 3.c allocation. It is impossible to answer in the abstract whether Nebraska's active-engagement criteria disproportionately burdened non-residents. There may have been a large proportion of insiders who were burdened, while only a small proportion of outsiders were burdened. Of course, the opposite could have been true too. Much would depend on how the relevant insiders and outsiders are selected. If they were only those participants that would, absent the restriction, participate in the market, then the proportions may be different than if the participants included all of those who could, absent the restriction, participate. And the type of agricultural land and production would be relevant as well. Absent data supporting the claim, a conclusion on disproportionality is fraught with difficulty in this context.

184. See supra, text accompanying notes 143–44.

185. Moreover, even with data supporting a claim of disproportionality, at least four Justices have indicated that this sort of relative burden is more suited for Pike. See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (citing Pike v. Bruce Church, Inc. 397 U.S.137, 142 (1970)) (alteration in original) (equating the absence of a “disparate impact on out-of-state as opposed to in-state businesses” with the absence of an “incidental burden” under Pike, but concluding that “any arguable burden does not exceed the public benefits of the ordinances”).

From a process perspective, invoking something other than strict scrutiny in these sorts of circumstances makes sense. As with farm residency, the presence of a reliable surrogate suggests the political process was adequate. In addition, the insiders burdened by this measure were armed with the fact that a group of outsiders were not. That fact, in turn, provides further assurances that the political process adequately took account of the measure's burdens. Indeed, the DCC doctrine's tolerance for laws that predominately benefit outsiders supports this rationale. Stated in process terms (and artfully working in a concern for free trade), this tolerance can be explained by the presence of a reliable political check on a government skewing trade in favor of outsiders.

This point also provides the beginnings of an answer to the problem of state subterfuge. The possibility that a state may too easily avoid a decision rule and cause constitutional harm is one reason not to adopt it. For example, one may
Even with such data, however, the Court has been unwilling to deem Figure 3.c allocations discriminatory. The primary case supporting the notion that Figure 3.c does not qualify as a discriminatory effect is one of the more difficult cases to understand on the DCC shelf: Exxon. In Exxon, the Court was faced with a Maryland statute that prohibited petroleum refiners and producers from owning retail gasoline stations. A discriminatory effect would seem to emerge from the facts because there were no insider producers or refiners of gasoline in Maryland. However, the Court rejected that argument. The Court looked to the retail market and found both insider and outsider owners of such stations. The burden imposed on producers and refiners hit primarily outsiders—95% of the excluded firms were outsiders that operated 98% of the stations affected. Those who were not affected were both insiders and outsiders. To the Court, the measure was not discriminatory. From a disproportionate-impact standpoint, the case is troubling. But it illustrates the Court’s refusal to find discrimination based upon disproportionate impacts.

Clover Leaf Creamery is another case that could involve a Figure 3.c allocation. The facts are discussed above, and the case seems to suggest that there are exceptions to Figure 2.a allocations. The Court was not entirely clear, however, on whether the burdened plastic resin producers were all outsiders. At one point, the Court states that “the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms,” but at another point states that the burdened group was “a predominately out-of-state industry.” If the latter is true, then Clover Leaf Creamery is like Exxon in its allocation and supports Figure 3.c. Again, discrimination did not ensue from the disproportionate impact.

prefer a decision rule that regards discriminatory allocations as only those that fall within Figures 1 and 2.a. But the possibility that states would be willing to move the allocation into Figure 2.b only to avoid a discrimination conclusion justifies treating Figure 2.b allocations as discriminatory, even if such laws in some instances cause no constitutional harm. Figure 3 allocations, however, do not present the same danger of subterfuge because in order to move the allocation to one that predominately favors insiders, the state will need to provide the benefit to outsiders and burden insiders. Perhaps a state is willing to do one or the other to avoid strict scrutiny, but it may not be willing to do both given the political costs involved. Of course, if the legislation does this explicitly, strict scrutiny probably should ensue. But if the legislation does this only effectively, then Pike would be more appropriate.

186. BITTGER, supra note 7, § 6.06[A], at 6–43.
188. In fact, the presence of insiders in Exxon is not altogether clear. The Court was quite focused on the lack of any impact on the movement of goods and it stated at one point in the opinion that, “there are no local producers or refiners.” Id. at 125–26 (majority opinion).
189. See supra text accompanying note 160–64.
In fact, the only modern case in which the Court has been willing to find a disproportionate impact discriminatory in effect is *Camps Newfound/Owatonna, Inc. v. Town of Harrison* ("Camps"). In that case the Court evaluated a Maine statute that provided a lower real-estate tax liability for non-profit entities serving primarily Maine residents. This, in turn, resulted in higher tuition rates for those consumers who patronized the non-qualifying camps. Because, by definition, such camps would predominately serve outsiders, the "burden of Maine's facially discriminatory tax scheme falls by design in a predictably disproportionate way on out-of-staters, [thus] the pernicious effect on interstate commerce is the same as in our cases involving taxes targeting out-of-staters alone." Predictability of this sort—what I call clear disproportionality—is lacking in many cases. Among consumers of camp services in *Camps*, Maine's tax system disproportionately impacted outsiders precisely because the tax benefit was explicitly given only to those camps serving a predominately insider clientele, while it was withheld from those camps serving a primarily outsider clientele. Nebraska's law is clearly distinguishable. There was no textual means of detecting a disproportionate allocation. And if data had been produced showing such a disparity, *Exxon* and *Clover Leaf Creamery* suggest that Figure 3.c, even if established, does not qualify as discriminatory.

*d. Post-Enactment Market Adjustments or "Structural" Regulation*

*Exxon* and *Clover Leaf Creamery* contain a further principle that is consistent with the notion of predictability and clear disproportionality, but which runs contrary to the notion that a substantiated Figure 3.c allocation is non-discriminatory. One key factor that weighed into the *Exxon* Court's analysis was the lack of any showing that outsiders would not take the place of the outsiders that the statute affected. As the Court stated in *Exxon*: "[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate [participant] to another." And the Court used the same logic in *Clover Leaf Creamery*. This suggests that the Court concluded no problematic dispar-

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192. *Id.* at 579–80. The Court's invocation of "design" also suggests that this case is more about discriminatory purpose than discriminatory effects. If that is the case, then it need not be synthesized with the cases dealing with discriminatory effects. It could also be an example of combining the types of discrimination utilized to trigger strict scrutiny. *See supra*, text accompanying note 49.
194. *Id.*
195. *Tribe*, supra note 7, at 1056; *see also*, *supra* text accompanying note 164 (explaining the longitudinal aspect of *Clover Leaf*); *see Brannon P. Denning & Rachel M.*
it existed (despite the existence of a disproportionate impact at the time of enactment) because outsiders might replace the particular outsider participants pushed out of the market. Indeed, that concern may be what made Exxon a case concerning a state law that regulated "the particular structure or methods of operation' of a market." In terms of Figure 3.c, this reasoning pushes the right boundary of the burden toward the center, indicating that the burden may be depicted by Figures 3.a or 3.b, over the long run.

Nebraska's law cannot be shielded by Exxon's concern for post-enactment market adjustments, even though it has some surface appeal. If one envisions Nebraska's measure as barring corporations from access to the markets at issue, then barring non-qualifying outsider (and insider) entities still leaves the market open for any individual or qualifying corporation to participate. Such individuals may be outsiders, and (depending upon how corporate outsider status is determined) so may the qualifying corporations. Taken in that light, Nebraska's active-engagement criteria (as well as its farm-residency requirement), did not predictably keep outsiders from the relevant market. Rather, the law identified entities that were ill-suited to Nebraska's view of the production agriculture, much like producers and refiners of oil in Exxon. More of those entities may be outsiders than insiders, but there was no assurance that outsiders would not acquire the land and production that was freed up by keeping the prohibited entities out of the markets.

One prominent example of an outsider gaining access after Nebraska's law was in place is Nebraska's largest landowner—Ted Turner. Mr. Turner acquired his interests after Nebraska's law was in place and was unable to satisfy its restrictions. As in Exxon and Clover Leaf Creamery, and unlike Camps Newfound/Owatonna, one could argue that there is no reason to think that outsider individuals like Mr. Turner will not gain access at the same level that they did before the regulation was put in place.

This sort of analysis, however, ignores the idea that the relevant burden was the inability to use the corporate farm, not market ac-


197. There would, of course, be other challenges available to strike down such regulation, such as due process and equal protection.

cess. Mr. Turner, for example, was burdened by Nebraska's measure, even though he was still able to gain access to the relevant markets. Thus, the presence of outsider individuals who would proceed without the corporate form should not affect the analysis, lest we forget the burden at issue.

In fact, if the burden in Exxon is framed slightly differently, the distinction between the restriction at issue there and corporate farming laws becomes clearer. In Exxon, the prohibition on producers and refiners could be reframed as burdening retail owners from the economic benefits of vertical integration—owning production and refining capacity. Taken in that light, the burden was placed on all retail owners regardless of their insider-outsider status. And there was no reason to think that this burden would continue to be felt in the long run by more outsiders than insiders who sought to engage in the retail gasoline business. With corporate-farming restrictions, the burden (denial of the use of the corporate form) is continually withheld from those individuals who do not perform the qualifying activities. As shown above, that may or may not constitute discrimination. But it surely means Nebraska's law could not take advantage of the longitudinal aspects of Exxon and Clover Leaf Creamery.

Time aside, however, Nebraska's active-engagement requirement continues to fall within the general notion that Figure 3 allocations are not discriminatory, absent a textual grounding for predictable disproportionate impact or (perhaps) data establishing a Figure 3.c allocation. Moreover, unlike in Exxon and Clover Leaf Creamery, there was no initial showing that the restriction disproportionately impacted outsiders relative to insiders. Thus, the market-adjustment principle is unnecessary.

199. A similar sort of logic impugns the argument that these laws should not be struck down because they are not really effective at keeping anyone out of the market. Thus, it should not be relevant that "in practical effect, the laws do not exclude outside investment in land, but rather make only one legal format for such investment illegal. Nor do they exclude agribusinesses from influence on farm operation, but only require such businesses to use more complex legal arrangements to achieve their objectives." Morrison, supra note 16, at 992. Rather, "the elimination of one legal format for such investment" and the requirement that some "use more complex legal arrangements" are themselves competitive disadvantages. Thus, even if these laws do not achieve their goals, as Morrison posits, that is unlikely to mean there is no discrimination.

200. This observation may also give so-called anti-big box ordinances vitality. That is, in the long run, there is little reason to think that a restriction on retail-store size will keep more outsiders from the market than insiders. See Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1011-12, 1014 (E.D.Cal. 2006) (reading Exxon in this manner).
e. Localism and Insider Burdens

For Nebraska's active-engagement requirement to fall within Figure 3 (which depicts non-discriminatory scenarios) and not Figure 2.a (which depicts a discriminatory scenario), it must burden insiders. There is a line of local processing cases that suggests the burden Nebraska's law imposed on some insiders was insignificant, but these cases are ultimately unconvincing.

Of particular relevance here are local restrictions imposed at the state level.201 Take, for example, a state law that uses local lines but, when considered en toto, covers the entire area of the state. The Court has found here that the effect on outsiders is exactly the same as if the state had used its political boundary: all outsiders are burdened, while no insiders are burdened.202 For example, in *Fort Gratiot*, the state prohibited the importation of waste into a county from beyond each county's borders. Thus, waste producers within each county benefitted from exclusive access to the county site, while all other insiders and outsiders were burdened. This would appear to put the measure within Figure 2.b. However, an alternative reading suggests that the out-of-county insiders are not really burdened under these circumstances because each insider who is denied access in another county is given exclusive access to the waste facility within their county. That is, a local benefit offsets any burden imposed on the insider producers.203 Outsider waste producers experience no such offsetting benefit. Thus, such cases can be said to fall within Figure 1:

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201. Localist laws imposed by local governments raise interesting questions about whether non-local, in-state participants are insiders or outsiders for purposes of the DCC inquiry. Process-based approaches to the DCC may do well to argue that that they are not. However, the matter is unclear. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); cf. United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984) (Privileges and Immunities case in which the process-based theory is not as strong); Tribe, supra note 7, at 1264 n.71 (questioning the Camden Court's "cavalier rejection of an analogy to the surrogate representation analysis so central to Commerce Clause jurisprudence"). In any event, locally imposed localist requirements are not relevant for present purposes because Nebraska's law was enacted at the state level. Thus, local political boundaries do not impact the analysis or the question of classifying insiders and outsiders.


203. Professor Williams helpfully presented some doctrinal rules for dealing with the problem of localism. His categorization goes much farther than required here, but his category of state imposed localist requirements provides the offsetting-benefit rationale. Williams, supra note 180, at 67.
This cancelling effect also helps implement the familiar principle that a state cannot be allowed to close its borders through its political subdivisions.\footnote{West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), is an example of the same sort of cancelling effect. There, a facially neutral dairy tax was used to fund subsidies to in-state dairies. The subsidy to insiders cancelled out the entirety of the tax burden imposed on insiders and, thus, the only group burdened consisted of outsiders. For a discussion of the linkage necessary to offset a tax burden in this context see, Dan T. Coenen & Walter Hellerstein, \textit{Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules}, 95 \textit{Mich. L. Rev.} 2167 (1997); Brannon P. Denning, \textit{The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]}, 29 \textit{Am. J.L. & Med.} 7 (2003).}

Even without the cancelling effect, \textit{Fort Gratoit} qualified as discriminatory under cases like \textit{Bacchus Imports}.\footnote{From a process standpoint, however, it explains why some burdens felt by insiders should not qualify as surrogates for outsider interests.} However, the basic idea of cancelling some insider benefits could make Nebraska's active-engagement requirement discriminatory by taking the allocation out of Figure 3 and placing it within Figure 2.a (where only a select group of outsiders are burdened). This occurred, for example, in one of the cases relied upon in \textit{Fort Gratoit—Brimmer v. Rebman}.\footnote{138 U.S. 78 (1891). \textit{Brimmer} was decided, of course, long before the Court's current doctrine. However, the Court uses the language of discrimination and the case has been cited and quoted in more modern cases like \textit{Fort Gratiot}. So it would be difficult to argue that \textit{Brimmer} was a non-discrimination case.} There, state law required that all meat slaughtered more than 100 miles from its place of sale must be inspected before it could be sold. With regard to those within the regulated state, some insiders were burdened by inspection when trying to sell in markets beyond 100 miles of their slaughtering locations. Similarly, some outsiders were bur-
dened by inspection when trying to sell in markets beyond 100 miles of their slaughtering location. But there were both insiders and outsiders within 100 miles of various places of sale within the state who were not burdened. Thus, the measure would seem to fall within Figure 3. However, each insider suffering a burden could rest assured that he had a competitive advantage within 100 miles of his slaughtering location. The same did not hold for outsiders beyond 100 miles of the state’s border. In the end, then, no meat seller within the State was burdened and all outsiders beyond 100 miles of the state were burdened. This set of facts does not fall within Figure 3, but rather within Figure 2.a, given the cancelling effect of the local benefit:

![Diagram showing local benefit and burden]

Nebraska’s active-engagement requirement poses a difficult problem of localism. State measures that impose local preferences can be seen as posing a burden only on outsiders even though insiders are nominally restricted. Unlike *Fort Gratoit*, Nebraska's active-engagement criteria cannot be taken as indirect state action through political subdivisions that basically closes trade at the state’s border. However, as in *Fort Gratoit* and *Brimmer v. Rebman*, there may be a cancelling effect that tends to diminish the burden placed on insiders.

Reconsider the hypothetical above. It would appear that the Colorado farmer and the Nebraska farmer experience the same burden with regard to the Banner County tract of land. However, the Nebraska farmer has better access than the Colorado farmer to land located closer to his operation because the Nebraska farmer can more easily perform the qualifying activities closer to home. So the burden on the Nebraska farmer (the insider) may be cancelled by the local benefit he is given with regard to land located closer to his operation. If that is the case, then the burden on insiders like the Nebraska
farmer falls out of the picture, and outsiders like the Colorado farmer are the only ones suffering a real burden with regard to owning and operating Nebraska farms. That could put active engagement within Figure 2.a.

There are two ways of distinguishing the *Fort Gratoit* and *Brimmer* lines of cases. First, in many of these cases, the discrimination at issue is in favor of local businesses providing some service that could be provided elsewhere.\(^\text{207}\) That sort of discrimination is not at issue with corporate-farming restrictions. One economic activity at issue is production. That production will take place within the state with or without the measure. Thus, it does not draw commerce to the state by imposing some requirement that outsiders use local service providers. Rather it requires only that local commercial activities be performed by qualifying individuals. Those activities, however, will be performed locally in any event. Thus, the local-processing cases appear distinguishable.

However, this argument is weak. Recall that the relevant activity is not just production. The purchase of land is also at issue. Insiders like the Nebraska farmer can rest assured that they will qualify to buy land somewhere close enough to them without having to compete with the Colorado farmer on the same terms. Thus, even though a possible distinction may arise between corporate-farming laws and the local-processing cases, the general notion of local favoritism at the state level counsels in favor of viewing the effects as falling within Figure 2.a.

The strongest argument for distinguishing the *Fort Gratoit* and *Brimmer* line of cases emerges from a closer look at the insiders who are burdened by these measures. Thus far, the discussion has focused on individuals, but it has remained somewhat narrow, with individuals like the Colorado farmer and the Nebraska farmer in mind. But the boxes depicted above contain everyone who would or could seek to own or operate Nebraska farms. While participants like the Nebraska farmer get a local benefit that offsets the burden otherwise imposed upon them, there are many other insiders in the market for farmland who will not become actively engaged, regardless of how close the land is to them and will not be able to utilize the corporate form.\(^\text{208}\) In *Brimmer* and *Fort Gratoit*\(^\text{209}\) there was simply no way of looking at the relevant participants in a manner other than meat sellers and


\(^{208.}\) Framed in terms of barring entity access to these markets, many insider entities will not be able to satisfy the qualifying criteria.

\(^{209.}\) Minnesota v. Barber, 136 U.S. 313 (1890) (striking down as discriminatory a state law requiring cattle to be inspected on the hoof in Minnesota before the
waste producers. The product or service at issue restricted the relevant class to those participants. However, with land, the relevant participants are not simply participants like the Colorado and Nebraska farmers. They include other insiders who would own Nebraska farms but would never fulfill the active-engagement requirement. And those participants continue to be burdened. This keeps the allocation within Figure 3, despite the presence of some nominally burdened insiders who experience a local offsetting benefit:

![Diagram](image)

### f. The Relevance of Costs

Thus far, the effect of Nebraska's law has been framed as burdening some participants' access to the relevant markets. A more exacting evaluation of Nebraska's law could, however, regard the burden of restricting participants' use of the corporate form as increasing the costs of doing business for some competitors. At times, the Court has indicated that laws increasing the participant's costs of doing business are problematic under the DCC doctrine. If discriminatory effects are based on the costs imposed on insiders and outsiders, rather than the proportion of insiders or outsiders affected, matters become a bit murkier.

Suppose, for example, outsider competitors have a 60% market share in some market. Each outsider experiences different costs in that market attributed to the regulation, but the total costs add up to $2200. Suppose also that insiders have the remaining 40% market share could be offered for sale), should also be included in this line of cases, given its appearance in *Fort Gratoit*.

share. Only a portion of them experience regulatory costs that add up to $1800. In terms of participants, the burden is discriminatory because it is placed on all outsiders, but only some insiders—Figure 2.b. The burden's financial impact would also appear to be felt more heavily by outsiders ($2200) than insiders ($1800). However, insiders are disproportionately burdened.

A proportionate impact would allocate the $4000 in total costs amongst the insiders and outsiders according to their share of the market. Thus, insiders and outsiders should shoulder $40 per percentage point of their share in the market. ($1600 for insiders, and $2400 for outsiders). On these facts, however, insiders are burdened relative to outsiders. Insiders should shoulder $1800 worth of the costs or $45 per percentage point of their market share, while outsiders should shoulder $2,000 worth of the costs or $36.67 per percentage point. Thus, upon closer examination, it would appear that increases in the cost of doing business may not be constitutionally problematic even when a look at participation numbers would reveal a problematic disparity.

In this hypothetical, the allocation initially falls within Figure 2.b. The circumstances under which this cost theory would make a seemingly predictable or clear set of discriminatory effects non-discriminatory are limited to this allocation. If all outsiders are burdened, and no insiders are, then discrimination follows (Figure 1). The cost approach does nothing to change this because there are no costs placed upon insiders that could be at issue. Similarly, if a select group of outsiders are burdened, then discrimination follows (Figure 2.a). The cost approach does nothing to change this, again, because there are no costs placed upon insiders that could be at issue. Similarly, a cost approach does not undermine the case for treating Figure 3 as non-discriminatory. If some insider participants (but not all) are burdened and some outsider participants (but not all) are burdened, then looking to the costs imposed may or may not reveal a problematic disparity, but data on costs would be necessary. Indeed, the cost approach bolsters the case for refraining from discriminatory effects conclusions within Figure 3.

211. There are, however, arguments for engaging in a more thorough cost-benefit analysis that would effectively eliminate most of the rules I've gleaned above. Professor Heinzerling has argued that benefits should be taken into account if the goal of the DCC doctrine is to eliminate discriminatory laws because of their inefficiency. Heinzerling, supra note 176, at 220. For instance, a cost-benefit analysis may reveal that the costs placed on outsiders are outweighed by the benefits they receive or the benefits accruing to others affected by the regulation. The Court has not, as of yet, been willing to engage in a thorough cost-benefit analysis in discrimination cases. Though, as I explain above, insider benefits are sometimes used to offset a putatively insider burden.

212. These inquiries would also transcend the confines of a facial attack.
So the pitfall is only with circumstances depicted in Figure 2.b. It arises where all outsiders are burdened along with some insiders, but a look at the costs imposed reveals that insiders are shouldering as much or more of the relevant burden than outsiders, proportionately speaking. This may mean that facial discriminatory-effects challenges should not be available in cases where some insiders are burdened along with all outsiders, at least when the claimed burden is an increase in the costs of doing business. In such cases, the question of discriminatory effect deserves more attention. This problem could also be alleviated in the doctrine by allowing the regulating state the ability to rebut a presumption of discrimination with data showing the relative burden on insiders is, in fact, greater than or equal to the burden placed on outsiders.

As applied to corporate-farming measures, the cost approach to burdens could lend itself to an argument that farm residency is not discriminatory despite its Figure 2.b allocation. That is, if the objection to disallowing the use of the corporate form to non-farm residents is that it increases the costs of doing business for those firms that cannot qualify, then one would have to evaluate what this costs non-qualifying insiders and outsiders. Such a cost allocation may reveal that insiders are burdened more than outsiders. This could, in turn, mean that there is no discriminatory effect. In order to figure this out, one would need to look at the relevant markets and calculate what proportion of buyers are insiders and outsiders. Then the costs imposed by prohibiting the use of the corporate form would need to be determined. That, at the least, would take the analysis far past the law's text. Alternatively, the state could be given the opportunity

213. The question of increased costs is also slippery because all state regulations have an impact on outsiders operating within a particular market. However, the point here is to isolate disparate increases in competitors costs caused by regulation and not attributable to other sources—e.g., distance and, perhaps, other states laws. See Earl M. Maltz, How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence, 50 GEO. WASH. L. REV. 47, 81-85 (1981-82) (arguing that burdens dependent upon conflicts between the regulating state’s law and the law of other states should not be burdens that the DCC doctrine recognizes). Distance is, of course, relevant to the costs of doing business in this sector, at least for producers using the land in their farming operations.

214. Active engagement, as explained above, does not fall within Figure 2.b. If anything, it falls within Figure 2.a or Figure 3, without addressing costs. Notably, however, if costs are the appropriate method of evaluating a restriction on the corporate form, the case for placing active engagement’s burdens in Figure 3 may be different because the offsetting benefits of local access would be calculated differently.

215. While this step would appear necessary with regard to participant approaches to discriminatory effects, such an appearance is inaccurate. So long as the distribution falls within Figures 1 or 2, and costs are not considered, then the actual proportions are not relevant because the resulting allocation will be disproportionate so long as there are outsiders and insiders in the relevant market.
to rebut a participant-derived discrimination conclusion with actual evidence of the costs imposed. However, the Court has not yet enunciated a state's ability to do so.\textsuperscript{216}

* * *

In sum,\textsuperscript{217} Nebraska’s farm-residency requirement produced a discriminatory effect with regard to access to the corporate form, assuming that the actual costs associated with such a restriction were irrelevant to the determination. The burdened class consisted of all non-residents and some (but not all) residents. That constitutes discrimination and triggers strict scrutiny. Those who could satisfy the active-engagement criteria were not, however, a select group of insiders. There were some insiders and some outsiders who did not meet the requirements. And the local benefits bestowed on some of the putatively burdened insiders did not offset the entire insider burden. The prospect of disproportionately burdening outsiders relative to insiders was a possibility, but that effect did not clearly emerge from the face of the legislation. It would appear, then, that \textit{Pike} was the more appropriate standard for judging whether Nebraska’s active engagement criteria passed muster or, at least, more data was required. In any event, despite the somewhat structural nature of this sort of regulation, the longitudinal look at market structure employed in cases like \textit{Exxon} does not help establish Nebraska’s law as non-discriminatory.

D. A Clear Error: The Livestock-Feeding Market

The land and production markets are somewhat complicated in terms of discriminatory effects. However, there is one additional mar-

\textsuperscript{216} One reason may be the formal distinction between “facial discrimination” and “discriminatory effects” and the sufficiency of each, on its own, to trigger strict scrutiny. A more precise distinction between explicit discrimination and discriminatory effects, with the latter claim arising in both facial and as-applied challenges, may lend itself to introducing this opportunity to the doctrine.

The Court, however, appears to be fairly hostile to using the actual effects of a measure to nullify an initial discrimination conclusion. For instance, in \textit{Oregon Waste Systems, Inc. v. Dept of Env't Quality}, 511 U.S. 93 (1994), the Court evaluated a state law that imposed a higher surcharge on outsider waste than insider waste when hauled to private disposal facilities within the state. The state argued that the facially discriminatory treatment was really not discriminatory at all because its additional surcharge was tied directly to the uncompensated costs to the government of disposing of non-residents’ (i.e., non-taxpayers’) waste. The Court rejected the argument.

\textsuperscript{217} The conclusions drawn here, of course, rest upon the assumptions and conclusions drawn above that necessitated an analysis of the allocation; specifically, that Nebraska’s corporate-farming measure burdened individual land buyers and producers by restricting their use of the corporate farm, and those participants’ insider-outsider statue has determined by their state residency.
ket within which Nebraska's law operated. The market for livestock feeding services was clearly put at issue by one of the plaintiffs in *Jones*—a feedlot. That feedlot performed a service for livestock owners—fattening cattle for sale. It claimed that Nebraska's law impacted its ability to offer its services to customers who used the corporate form to own livestock that it would feed, because owning livestock qualified as "engaging in farming or ranching" under Nebraska's law.218

As above, there are sellers and buyers in this market, creating two groups of competitors. The seller is the feedlot and the buyer is the cattle owner. The feeding-services seller in *Jones* claimed that Nebraska's law restricted the consumption of its services.219 That is, it claimed that Nebraska's law affected the buyers in this market and, thus, the seller by hindering its ability to serve those with economic interests beyond the state's borders. Thus, within the two groups of competitors in the feeding-services market, the burden fell on buyers who could not utilize the feedlot's services. As amongst sellers, no problematic distribution of burdens resulted. If anything, insider sellers were burdened by the restriction on whom they could sell to. Thus, the analytical focus needs to be on the buyers in this market. It is there that the discriminatory burdens arguably fall, given the general allocation the DCC doctrine cares about.220

218. *NEB. CONST.* art. XII, § 8(1) (defining farming or ranching). The mere ownership of livestock as a restricted activity poses one complication in this market. I deal with this prohibition on livestock ownership as a livestock-feeding problem because that is how the challenge arose. It could also be thought of as restricting who could own livestock physically located in Nebraska feedlots. Conceptualized as such, the restriction is no different than that imposed in the land market. Insider-outsider status is likely determined using the buyer's residency and the existence of discrimination turns on the correlation between state residency and farm residency or active engagement.

There was no restriction on outsiders' ability to buy cattle that would be shipped out of the state (i.e., there was no export ban), nor were insiders restricted from buying cattle that would be shipped into the state but unrestricted in their purchase of cattle already within the state (i.e., there was no import ban). Thus, the land market and the feeding-services market adequately cover how Nebraska's corporate-farming measure affected participants in these different aspects of the livestock market.

219. To the extent feeding service sellers claimed discrimination in terms of the ability to own or operate feeding-service facilities, the matter can be taken as affecting the market for agricultural land or as affecting the ability to produce the service. Such a claim is fully addressed within the other markets at issue.

220. One could object to the prospect of insider sellers asserting the rights of their buyers to make out a violation of the DCC doctrine. The DCC doctrine, however, allows sellers to raise constitutional claims on behalf of their buyers. See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (striking down state law as discriminatory against out-of-state milk producers, despite presence in litigation of only milk dealers); S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 591–92 (8th Cir. 2003) (using a particularly broad view of standing); Tribe, *supra* note 7, at
Among these buyers, the identification of insider-outsider status is easier because of the nature of the market. In the feeding market, for example with cattle, the animals often move. That point of origin can be used to determine insider-outsider status for the buyers at issue. Thus, if Nebraska's measure treated cattle coming from beyond the state's boundary differently than cattle originating within the state's boundary, then the measure would treat insiders and outsiders differently, with insider-outsider status determined by the originating location of the cattle being sent to the feeder.

Even with such a method of detecting insider-outsider status, however, there is no discrimination. Under the operational view of the farm, as above, no discrimination occurs because qualifying activities could occur anywhere. For instance, if a corporation had the requisite ownership structure and performed the qualifying activities in Kansas, it would be just as entitled to "engage in farming or ranching" in Nebraska (i.e., place the cattle it owns in Nebraska feedlots for feeding) as a Nebraska corporation that performed the required activities in Nebraska. In other words, Kansas' corporate cattle owners could buy the feeders' services on the same terms as Nebraska's corporate cattle owners. No discrimination would follow.

One plaintiff in Jones, however, argued that this was not the case. That feeder argued that outsider consumers were burdened in the market for cattle feeding services because insider consumers were the only ones who had access to the feedlot service while using a corporate form. Thus, the argument went, outsiders could not compete on the same terms as insiders in this market because only insiders could perform the qualifying activities.

The Jones court agreed with this plaintiff and concluded that out-of-state qualifying activities would not do the trick. But there is no logical or textual reason to conclude that an outsider operation would need to perform qualifying activities in Nebraska. An argument supporting this reasoning could be premised on the narrow interpretation of "the farm." That is, if Nebraska's law viewed the feedlot as a farm upon which qualifying activities would have to be performed, then insiders perhaps would have better access to the Nebraska feeders' services. But such an interpretation of Nebraska's law is nonsensical. Few would argue that Nebraska's law required cattle owners to reside on the Nebraska feedlot (the farm) that is feeding their cattle. And it would be just as unreasonable to strictly construe the active engagement requirements to require cattle owners who are having cattle fed in Nebraska feedlots to visit the feedlot, feed the cattle, and engage in the management of those cattle. After all, those activities are pre-

§ 6–6, at 1060 n. 4 (noting standing questions); Heinzerling, supra note 176, at 246–47, 264–67 (criticizing the Court's lax standing requirements).
cisely what the cattle owner hires the feedlot to do. Such a construc-
tion would markedly change the cattle-feeding industry and the
service it provides.

More importantly, the narrow interpretation of “the farm” proves
too much in this market. If “the farm” were construed narrowly as
applied to outsiders, it could not be construed in some other way for
their insider competitors. That is, if residency or active engagement
on the Kansas portion of the farming operation were insufficient, then
residency on a farming operation’s farmland in Nebraska would be
similarly insufficient to qualify the Nebraska corporate cattle owner to
have its cattle fed in a Nebraska feedlot. Under this interpretation,
Nebraska’s law would bar all corporate cattle-owners from buying
feeding services from Nebraska feedlots, insiders and outsiders alike.
No discrimination would follow.

The existence of cattle feeding operations in Nebraska feeding the
corporately owned cattle of others suggests the narrow interpretation
is wrong. At the very least, the narrow interpretation proves too much
in this market. Buyers of cattle feeding services can therefore be elim-
inated as a market in which discriminatory effects existed. Under any
construction of Nebraska’s law, no discrimination existed for purposes
of the DCC doctrine among buyers of feeding services.221

IV. CONCLUSION

The effort at critiquing the validity of Nebraska’s corporate farm-
ing measure under the DCC doctrine’s discriminatory effects rule is
difficult and the Jones court’s conclusion was more complex than it
appeared. As applied to feeding-service buyers, there was no cogniza-
ble discrimination. However, the effect of Nebraska’s law among land
buyers and producers may have been discriminatory. To qualify as
such, however, Nebraska’s law had to be interpreted narrowly with
regard to where the qualifying activities (residency and active engage-
ment) could occur and residency had to be invoked as the line that
separates insiders from outsiders. Even on those assumptions, a dis-
criminatory effect emerges only with regard to farm residency. Active
engagement remains sufficiently unclear in its impact under the
Court’s DCC case law to either require a Pike type of review or to re-
quire evidence of actual effects within the relevant markets.

221. Even if the court’s rejection of the operational view was unpersuasive in the cat-
tle feeding market, perhaps its narrow reading was correct for land buyers and
producers. This bifurcated reading of the term (broad for feedlot customers and
narrow for landowners and producers) would be difficult to anchor textually be-
cause Nebraska’s law contained no distinction between feeding services and pro-
duction or landownership in relation to the qualifying activities or the location of
such activities. This suggests, of course, that the narrow interpretation was in-
correct for all markets.
In reaching these conclusions, two primary doctrinal difficulties in the DCC case law have emerged to complicate the analysis. First, there is no clear rule with regard to who insiders and outsiders are. Second, there is a great deal of uncertainty associated with what sorts of allocations qualify as discriminatory for purposes of the DCC doctrine. A close look at the cases reveals some answers to the second uncertainty. In most instances, the Court is unwilling to find discriminatory effects where the impact is not clearly disproportionate. Two further nuances emerge, however. At times, offsetting local benefits can be used to nullify insider burdens, but this is insufficient to make out a case of discriminatory effects when a significant portion of insiders and outsiders remain burdened by a particular state law. The Court has also been concerned about the longitudinal aspects of state laws with respect to outsider entry. Neither of those nuances kill or save Nebraska’s corporate farming-measure.

In the end, then, states’ ability to pursue farmer-oriented policy is limited by the DCC doctrine. However, there is at least some room to argue that state’s may provide more favorable treatment for those individuals who are actively engaged in farming without meeting the high standards that must be met under the discrimination rules of the DCC doctrine. Matters are, of course, far from clear. But that, unfortunately, is the nature of the doctrine.