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Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores

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**OF BACKYARD CHICKENS AND FRONT YARD GARDENS: THE CONFLICT BETWEEN
LOCAL GOVERNMENTS AND LOCAVORES**

Sarah B. Schindler*

ABSTRACT

Locavores aim to source their food locally. Many locavores are also concerned more broadly with living sustainably and decreasing reliance on industrial agriculture. As more people have joined the locavore movement, including many who reside in urban and suburban areas, conflict has emerged between the locavores' desires to use their private property to produce food—for personal use and for sale—and municipal zoning ordinances that seek to separate agriculture from residential uses.

In this Article, I consider the evolution of this conflict and its implications for our systems of land use, local government, and environmental law. Specifically, I investigate the police power rationales for the existence of ordinances that disallow urban homesteading in urban and suburban communities. I then demonstrate that public health, civic virtue, and free market principles can be used to justify the passage of ordinances that would expressly permit these behaviors. Central to this analysis is a discussion of the problems caused by industrial agriculture and the lack of access to locally produced foods—food insecurity, food deserts, obesity tied to processed foods, monoculture-induced environmental catastrophes, harm to animals, and greenhouse gas emissions—all of which could be alleviated, at least in part, through urban agriculture. In recognition of these changing conceptions of harm, some local governments have begun to pass ordinances expressly allowing gardens, chickens, and the sale of produce in residential areas. I conclude by considering what this movement toward loosening restrictions on the use of private property says more broadly about the decline of Euclidean zoning controls and the future of land use law.

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I. Introduction

In the quiet Chicago suburb of Oak Park, Illinois, Julie Bass was brazenly breaking the law. An inspection of the crime scene would reveal no assault rifles or illicit drugs, but rather a shovel, raised planting beds, and some seeds. Ms. Bass faced 93 days of jail time for planting a vegetable garden in her front yard, and for refusing to comply with the City's demand to remove it.¹

Ms. Bass's situation is not unique. Throughout the country, antiquated land use ordinances restrict homeowners and renters from undertaking practices such as raising chickens for eggs, planting gardens in front of their homes, or selling produce they have grown.² These forbidden practices fall into a broader category of activities and movements with many names and variations: urban homesteading,³ locavorism,⁴ relocalization,⁵ urban agriculture,⁶ recession gardening,⁷ food sovereignty,⁸ and regional

¹ Bass received a code enforcement ticket, followed by a misdemeanor charge. *Internet Buzz: Concept of Jail Time for Growing a Vegetable Garden*, MY FOX DETROIT, July 14, 2011, http://www.myfoxdetroit.com/dpp/news/local/why-cant-i-grow-a-vegetable-garden-in-my-front-yard_20110712_dk. The City did not believe her garden was "suitable live plant material," which was the only permissible use of a front yard other than for grass or shrubs. OAK PARK, MICH. CODE § 1716(A)(5) (2012) ("All unpaved portions of the site shall be planted with grass ground cover, shrubbery, or other suitable live plant material.").

² See generally Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002) [hereinafter Salkin, *From Euclid to Growing Smart*] ("Almost a century later, local governments are finding themselves limited by zoning schemes authorized by state statutes that were enacted prior to television, computers, sports utility vehicles and massive investments in the built-up infrastructure."); Angie Basiouny, *Backyard bounty ruffles some feathers: Suburban chickens create a quandary in [New Castle County]*, THE NEWS JOURNAL, Sept. 23, 2009 ("dozens of local governments nationwide [are] dealing with the intersection of lifestyle and land use as a recession-fueled interest in urban farming collides with strict laws originally drafted to keep neighborhoods clean and tidy.").

³ Mary Wood, et al., *Promoting the Urban Homestead: Reform of Local Land Use Laws to Allow Microlivestock on Residential Lots*, 37 ECOLOGY L. CURRENTS 68, 69 (2010) (urban homesteading is the "effect of transforming the urban or suburban yard into a food-producing lot.").

⁴ *Top Twelve Reasons to Eat Locally*, LOCAVORES, <http://www.locavores.com/how/why.php> (last visited Jan. 22, 2012) (Locavores choose to source their food locally.).

⁵ Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807, 859 (2002) ("Relocalization . . . stresses the primacy of local initiatives to combat the adverse effects of globalization.").

⁶ Katherine H. Brown & Anne Carter, *Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe*, CMTY. FOOD SEC. COAL. N. AM. URBAN

foodsheds.⁹ The reasons for these restrictive ordinances vary. Some have been in place since Euclidean¹⁰ zoning and land use ordinances were first created, with a purpose of separating and isolating residential uses from agricultural uses. In other jurisdictions, these practices fall as the incidental victims of neighborhood uniformity and aesthetic demands for neat and tidy front lawns.¹¹ Bans related to farm animals within city limits often stem from nuisance-related concerns about noise and odor.¹²

However, as greater numbers of individuals become interested in sustainable lifestyles, the allure of urban homesteading is growing. Many people want to feed themselves and their families without burning oil by driving to the grocery store, or spending money on food that required large amounts of fossil fuels during production and

AGRIC. COMM., 1 (Oct. 2003), www.foodsecurity.org/PrimerCFSCUAC.pdf (“Urban agriculture . . . is the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities.”).

⁷ ‘Recession gardens’ sprouting up, WASH. TIMES, Mar. 17, 2009, <http://www.washingtontimes.com/news/2009/mar/17/recession-gardens-sprouting-up> (Recession gardening means “cultivating vegetables in [] backyards to squeeze every penny out of [] food budgets.”).

⁸ Deirdre Fulton, *Free our food: Small farmers demand independence from agrobusiness industry rules*, PORTLAND PHOENIX, May 4, 2011, <http://portland.the phoenix.com/news/120146-free-our-food/> (the “‘food sovereignty’ movement [is] aimed at restoring the direct relationship between food producers and consumers, while reducing government interference in local food systems.”).

⁹ Patricia Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 FORDHAM ENVTL. L. REV. 599, 600 (2011) (regional foodsheds are “geographic areas in reasonably close proximity to where an urban community receives agricultural commodities.”).

¹⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding constitutionality of comprehensive zoning); see *infra* note 97 (describing Euclidean zoning).

¹¹ These requirements might be imposed by zoning ordinances, but are also often found in private restrictive covenants, termed Covenants, Conditions, and Restrictions (CC&Rs), which control numerous neighborhoods that are governed by private Homeowner’s Associations. See generally Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. (forthcoming 2012). CC&Rs’ role in the urban agriculture debate is addressed *infra*, Part V(a). See also LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 485 (1961) (discussing “hygienic superiority” of the lawn).

¹² See, e.g., MARY WOOD ET AL., *REFORM OF LOCAL LAND USE LAWS TO ALLOW MICROLIVESTOCK ON URBAN HOMESTEADS* 13 (Mar. 1, 2010), available at <https://www.law.uoregon.edu/assets/facultydocs/mwood/microlivestock.pdf> (“Cities have generally prohibited microlivestock because they are considered ‘farm animals.’ An individual who wanted such an animal would have to buy a farm. That notion, however, runs counter to the growing interest of citizens in making full use of their privately owned property to provide for healthy food and family self-sufficiency.”).

transportation.¹³ This is a key tenet of the locavore¹⁴ movement: eat food—preferably organic—that is grown close to where one lives and is in season. Locavores’ goals include reducing their carbon footprint by reducing their reliance on industrial agriculture and oil-based food production, supporting their local economy, avoiding genetically modified foods (GMOs), reducing ingestion of residual fertilizers and pesticides, saving money, supporting fair treatment of farm laborers and humane treatment of farm animals, and teaching others about food origins.¹⁵ These goals are lofty, but there is historical evidence that individual actions can have a global impact. During World War II, people grew “victory gardens” that produced 40 percent of the produce consumed in the U.S.¹⁶

Many urban agriculture bans stem from early zoning ordinances that took hold in urban and suburban areas. Localities used their police powers, acting in the interest of the public health, safety, welfare and morals, to zone agricultural uses out of residential areas. Although bans on urban agricultural practices are still common, many municipalities are looking for ways to encourage better health and increase “green”

¹³ See *infra* Part IV(a)(ii)(1); but cf. *infra* note 228.

¹⁴ Locavore was chosen as the Oxford University Press word of the year in 2007. *Oxford Word of the Year: Locavore*, OXFORD UNIVERSITY PRESS BLOG, <http://blog.oup.com/2007/11/locavore/> (last visited Jan. 16, 2012).

¹⁵ See, e.g., Marion Burros, *Preserving Fossil Fuels and Nearby Farmland by Eating Locally*, N.Y. TIMES, Apr. 25, 2007, <http://www.nytimes.com/2007/04/25/dining/25loca.html> (describing selecting foods that are in season and grown close to residences, and reducing reliance on industrial agriculture); *Guidelines for Eating Well*, LOCAVORES, <http://www.locavores.com/how/> (last visited Jan. 22, 2012) (advising to eat local and organic produce when possible); *Top Twelve Reason to Eat Locally*, *supra* note 4 (listing reasons to eat locally, including: reducing one’s carbon footprint, supporting local economies, avoiding GMOs, and reducing ingestion of chemicals); John Cloud, *Eating Better than Organic*, TIME, Mar. 2, 2007, <http://www.time.com/time/magazine/article/0,9171,1595245-1,00.html> (discussing virtues of eating close to home, reducing the number of food miles consumed, reducing exposure to pesticides, and learning about where food comes from); U.S. DEP’T OF AGRIC., ECON. RES. REP. NO. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS AND ISSUES, 3 (2010), www.ers.usda.gov/Publications/ERR97/ERR97.pdf (articulating reasons for locavorism, including reducing reliance on industrial agriculture, supporting local economies, avoiding pesticides, supporting fair farm labor practices and animal welfare, and learning about roots of food); *‘Recession gardens’ sprouting up*, *supra* note 7 (observing that gardens save money).

¹⁶ Greening Food Deserts, H.R. 4971, 111th Congress § 2(a)(20) (2010); AMY BENTLEY, EATING FOR VICTORY 117 (1998); DARRIN NORDAHL, PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE 136 (2009).

economic development.¹⁷ Now, as conceptions of harm are changing, localities can use those same police powers that originally justified bans on urban agriculture to instead justify more permissive uses of residential property for agricultural purposes to further broader public health and welfare goals. To those ends, some localities have recently put in place ordinances that proactively address and govern urban agriculture practices.¹⁸

Importantly, the elimination or loosening of bans on urban agriculture exemplifies a broader trend in land use law: in pursuit of sustainable development, some local governments are beginning to move away from restrictive zoning ordinances. This trend is visible in the implementation of smart growth and new urbanist policies, form-based codes,¹⁹ and the rise of mixed-use zoning ordinances. Furthermore, the movement toward permissive municipal views of urban agriculture illustrates a perennial issue in land use policy: how to allocate control over land use between municipal governments and private property owners.²⁰ Urban agriculture presents an example of some governments and citizens agreeing that, at least with respect to certain agricultural uses, and as long as certain prescriptive controls remain in place, private landowners should be able to use their property free from the constraints of severe public regulation. As Robert Ellickson and Vicki Been point out:

¹⁷ Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, ZONING PRACTICE (Mar. 2010) (“As sustainability has moved up the municipal agenda, cities have begun to take an interest in urban agriculture as a way to promote health, to support economic and community development, and to improve the urban environment.”).

¹⁸ See generally Mukherji & Morales, *supra* note 17. “[C]ities from Austin, Texas, to Little Rock, Ark., to Miami, New York City and Seattle have all recently changed land-use laws to permit urban agriculture. . . . The Charlottesville, Va., Goat Justice League persuaded city officials there to overturn a 30-plus year-old law banning goatkeeping. The law evidently was passed after a rogue goat wreaked havoc in the city.” Arin Greenwood, *Got Your Goat*, ABA JOURNAL 12 (June 2011).

¹⁹ Form-based codes are zoning codes that are more concerned with a building’s form and structure than its use. Patricia E. Salkin, *Symposium: Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787, 833 (2007) [hereinafter Salkin, *Squaring the Circle on Sprawl*].

²⁰ See ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES & MATERIALS* 31 (3d ed. 2005).

Few observers approach this issue free of ideological baggage. Stalwarts of public regulation regard government as an essential check on the environmental damage that self-interested landowners might cause if left alone . . . Stalwarts of markets, by contrast, regard public regulation as a coercive system that commonly makes urban outcomes worse, not better.²¹

In many land use cases, supporters of fewer regulations are supporters of market forces. However, in the case of urban agriculture, it is often progressive and otherwise typically pro-regulatory forces—the locavore liberals—who have championed many of the ordinances that loosen restrictions. Thus, the parties to the urban agriculture debate do not easily map onto the traditional political pro-regulation/anti-regulation divide.

This Article focuses on individual homeowners and renters. It examines their desire to use private land in a way that supports sustainable urban agriculture and locavore policies, and the existence of land use ordinances that govern those behaviors. Although there has been a limited scholarly discussion suggesting government involvement in the promotion of sustainable urban agriculture,²² much of that discussion focuses on the use of surplus and underused public land and government aid in the creation of community gardens;²³ in other words, government as a source of land or money, rather than as a regulator. Legal scholars and the press are just beginning to pay attention to the more current issues raised in this Article.²⁴ Further, this Article sheds

²¹ *Id.*

²² See, e.g., Kathryn A. Peters, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 205 (2010) (“[I]t is imperative that the government, at federal, state, and local levels, establish policies that promote sustainable urban agriculture to ensure access to an adequate food supply produced with minimal impact on the environment.”).

²³ *Id.*; NORDAHL, *supra* note 16; Neil D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 359 (1997).

²⁴ For example, students at the University of Oregon School of Law recently authored a white paper urging reform of local land use ordinances to permit urban and suburban homeowners to keep “microlivestock”—“chickens, ducks, turkeys, geese, quail, rabbits, pygmy goats, [or] bees—on their property for food production purposes.” MARY WOOD ET AL., *supra* note 12, at 2 (“Because current code provisions tend to restrict these activities, however, cities responsive to their community’s growing interest in urban homesteading must revise their city codes to allow microlivestock on residential lots.”). See also Salkin &

light on an area that is fundamentally misperceived by the community at large, local officials, and even some scholars²⁵ who erroneously believe that people can freely use their private property for urban agricultural purposes without fear.

As issues surrounding sustainability and urban agriculture are becoming more important to many citizens, and current conceptions of what is harmful to a community are beginning to change, now is the time for municipalities to review their comprehensive plans and ordinances to create a united scheme addressing urban homesteading and the locavore lifestyle.²⁶ This Article is the first to comprehensively describe existing prohibitions on such uses, consider the justifications for overturning existing bans, propose an approach that municipalities can take in actively addressing the intersection between private property, urban agriculture and locavorism in their communities, and situate this trend within the changing landscape of zoning more generally.²⁷

In Part II, the Article provides examples of existing bans on urban agriculture, including bans on front yard gardens, the sale of produce, and chickens. Part III presents reasons that local governments initially enacted these bans pursuant to their police powers. These justifications include traditional methods of zoning, the promotion of public health and avoidance of nuisance, aesthetics, property values, and exclusion. This

Lavine, *supra* note 9; Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (2011).

²⁵ See, e.g., Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 THE URBAN LAWYER 237 (2010) [hereinafter LaCroix, *Urban Agriculture*] (“As a practical matter, gardening is permissible in any zoning district; a homeowner does not need zoning permission, for example, in order to raise vegetables.”) This is plainly not universally true. See *infra* Part II.

²⁶ In the past, “[h]ow local government policies affect[ed] and [were] affected by the food system [was] unclear. Consequently, we [did] not know enough to help us plan more comprehensively for the urban food system to enhance community food security.” Kameshwari Pothukuchi & Jerome L. Kaufman, *Placing the Food System on the Urban Agenda: The Role of Municipal Institutions in Food Systems Planning*, 16 J. AGRIC. & HUMAN VALUES 213, 218 (1999). Today, municipalities are doing just that.

²⁷ There has not yet been much successful planning of food systems at the urban or municipal level. See *id.* (“As urban and regional planners, we are struck by the piecemeal approach to planning for the food system at the urban level. We think the urban food system needs to be looked at more comprehensively . . . particularly through the assistance of the local planning agency.”).

Part also briefly describes the historical role of farming in the context of land use, and the prior legal regimes that were used to resolve conflicting uses of land. It demonstrates that, though there were valid historical reasons for the enactment of bans, those reasons no longer apply to most current communities.

Part IV provides justifications for reversal of these anachronistic bans and for municipal encouragement of urban homesteading practices. These include police powers, the pursuit of civic virtue, and free market and efficiency reasons. This Part also critiques these bans via a discussion of the harms of industrial agriculture and the benefits of urban agriculture and locavorism, giving municipalities factual data and normative analysis to back up a decision to support an urban agriculture scheme.

Part V looks forward. It presents concrete solutions that municipalities can adopt to implement an urban agriculture program that allows citizens to use their land more productively. The Part concludes by addressing changing conceptions of harm, and the broader implications that a loosening of restrictions on urban agriculture may have for land use law and the future of Euclidean zoning.

II. Urban Agriculture Bans

a. Existing Bans on Vegetable Gardens and Produce

Municipalities use a variety of approaches to ban urban homesteading practices in their communities. These generally include: (a) ordinances that prohibit the growth of vegetables or fruit in certain zones; (b) ordinances that only allow expressly permitted uses, and that do not mention vegetable gardening; (c) ordinances that prohibit gardens in certain locations, such as the front yard, side yard, or median strip; and (d) ordinances that prohibit or limit the sale of produce.

i. Prohibiting Growth in Certain Zones

One common ban prohibits a person from growing vegetables in certain zones, either entirely, or without a discretionary permit. For example, the Los Angeles Municipal Code was amended in 1960 to prohibit the growth of crops in residential zoning districts, and to prohibit on-site sale of produce.²⁸ However, if urban gardeners wanted to grow and then sell their produce off-site, such as at farmers' markets, they could pay \$15,000 to apply for a conditional use permit ("CUP").²⁹ Although this ordinance was subsequently revised,³⁰ on-site sales of produce from gardening are still prohibited.³¹

ii. Only Allowing Expressly Permitted Uses

In other jurisdictions, very strict zoning ordinances only permit specific uses that are expressly described in the ordinance. Thus, if the ordinance does not expressly mention vegetable gardening, a person could be cited, fined, or eventually prosecuted for

²⁸ Prior to that time, farming had been allowed within certain zones of the city. *Truck Gardening Ordinance Categorical Exemption Narrative*, in L.A. City Attorney, Rep. No. R10-0128 (2010) ("Prior to 1946, farming was allowed in the R1 zone with certain limitations. In 1946, permitted uses were expanded to include truck gardening. After 1960, farming was no longer allowed, but truck gardening remained an allowable use. . . ." Thus, the Los Angeles Municipal Code "is self-contradictory in that it permits truck gardening without permitting the growth of virtually all produce."); *see also* Sharon Cohoon, *Legalizing Urban Farming in LA -- The Food Flower Freedom Act*, SUNSET, Oct. 21, 2009, <http://freshdirt.sunset.com/2009/10/legalizing-urban-farming-in-la-the-food-flowers-freedom-act.html>.

²⁹ Raquel Maria Dillon, *Urban Gardeners Versus Zoning Laws*, THE CHRISTIAN SCIENCE MONITOR, Feb. 16, 2010, <http://www.csmonitor.com/The-Culture/Gardening/2010/0216/Urban-gardeners-versus-zoning-laws>.

³⁰ In advocating for revisions, supporters argued that allowing for growth of local foods and their sale at local farmers' markets—without requiring an expensive discretionary permit—was inherently tied to the city's goals of greening the city, improving nutrition, and building community and a sense of place. *The Food Flowers Freedom Act Needs Your Help*, URBAN FARMING ADVOCATES, Oct. 9, 2009, http://urbanfarmingadvocates.org/posted_by_ufa/the-food-flowers-freedom-act-needs-your-help/. Now, individuals can grow produce to use on-site or to be sold off-site, without a permit. *See generally* Los Angeles, Cal. Ordinance 181188 (June 8, 2010); *see, e.g.*, LOS ANGELES MUNICIPAL CODE § 12.07(A)(6) (truck gardening is a permitted use in suburban residential district).

³¹ LOS ANGELES MUNICIPAL CODE § 12.05(A)(16)(a)(19) (2010).

growing vegetables in that zone.³² This recently happened to a gardener in Dekalb County, Georgia.³³ The Dekalb County Code contains a general prohibition that states, “no use of any land, building, structure or property shall be permitted unless expressly and specifically authorized in the district within which said use is located”³⁴ Pursuant to that provision, the County cited the gardener for growing vegetables on his parcel, which was zoned R-85—a residential zone in which the Code does not list growing vegetables (on any scale) as an allowable use.³⁵

iii. Prohibiting Front Yard Gardens

Another common ban forbids growing vegetables in a front yard.³⁶ Vegetable gardens are often viewed as an affront to the “idealized”³⁷ lawn that, in the United States, comprises approximately 18 million acres of land surrounding homes.³⁸ A front lawn is the embodiment of “a visible statement” that a person makes to her neighbors and the broader community.³⁹ This statement is often one that suggests uniformity, conformity, neatness and normalcy.⁴⁰

³² See, e.g., *County Sues Farmer, Cites Too Many Crops*, WSBTV, Sept. 13, 2010, <http://www.wsbtv.com/news/news/county-sues-farmer-cites-too-many-crops/nFBrd/>; DEKALB COUNTY CODE § 27-6.

³³ *County Sues Farmer, Cites Too Many Crops*, *supra* note 32 (Miller was cited for “growing too many crops for the zoning”).

³⁴ DEKALB COUNTY CODE § 27-6.

³⁵ See *id.* §§ 27-163, 27-164. Miller subsequently obtained a rezoning of his property to R-200 (a single-family residential district), which expressly allows vegetable growing as a permitted use. *Id.* § 27-63.

³⁶ See, e.g., BEDFORD, OHIO, CODIFIED ORDINANCES § 1341.19 (1997) (“No vegetable gardens shall extend beyond the front line of the house.”).

³⁷ See Loren B. Byrne, *Of Looks, Laws and Lawns: How Human Aesthetic Preferences Influence Landscape Management, Public Policies and Urban Ecosystems*, in EMERGING ISSUES ALONG URBAN-RURAL INTERFACES: LINKING SCIENCE AND SOCIETY CONFERENCE PROCEEDINGS 42-46, *passim* (D. Laband, ed. 2005); see also Asmara M. Tekle, *Lawns and the New Watershed Law*, 95 MARQUETTE L. REV. 213, 214 (2011) (describing the “idyllic” lawn).

³⁸ See Cristina Milesi, et al., *Mapping and Modeling the Biogeochemical Cycling of Turf Grasses in the United States*, 36 ENVTL. MGMT. no. 3, at 432 (2005) (“it appears that turf grasses would represent the single largest irrigated ‘crop’ in the United States, occupying a total area three times larger than the surface of irrigated corn.”).

³⁹ James Charles Smith, *The Law of Yards*, 33 ECOLOGY L.Q. 203, 211 (2006); cf. Tekle, *supra* note 37, at

The press recently took interest in a front yard ordinance (“FYO”) in effect in Sacramento, California. The ordinance, originally adopted in 1941, banned overgrown plants by stating that front yards “shall be landscaped, irrigated and maintained with primarily low groundcover or turf.”⁴¹ Community members supportive of urban homesteading organized and convinced the city to revise the ordinance, which now permits front yards to contain landscapes including annuals, perennials, shrubs and trees.⁴² The new ordinance still requires that the growth be “mowed, trimmed, and/or maintained as often as necessary to prevent overgrowth and blight.”⁴³ Thus, aesthetics and the prevention of blight—which could lead to a nuisance—are of concern to the town in determining what belongs in a front yard.⁴⁴ The revised ordinance is more prescriptive

213 (stating that there are currently “forty million acres of national front lawn” in the U.S.).

⁴⁰ See Byrne, *supra* note 37, at 46 (Houses set back from the street with front lawns “were meant to foster a sense of community and gave the front lawn stature as the symbol of a landowner’s contribution to keeping the community looking neat and orderly.”).

⁴¹ SACRAMENTO, CAL. CODE § 17.68.010 A.1 (2009); see also Cheyenne Cary, *Front yard ordinance allows DIY food*, SACRAMENTO PRESS, July 17, 2009, http://www.sacramentopress.com/headline/10830/Front_yard_ordinance_allows_DIY_food (“The main concern of the old FYO was preventing overgrowth of plants, whether food or otherwise. It didn’t explicitly forbid food plants, but didn’t list them as legal either, whereas perennial grasses and decorative plants were listed as legal groundcover.”).

⁴² SACRAMENTO, CAL. CODE § 17.68.010A.1.b (2009).

⁴³ *Id.*; *Did you know... Growing Vegetables in Your Front Yard is Against the Law?*, SACRAMENTO CITIZENS FOR SUSTAINABLE LANDSCAPES, www.organicsacramento.org/documents/fyg_DIDYOUKNOW.pdf.

⁴⁴ Anti-weed ordinances are common and have been in existence for years. See, e.g., *City of St. Louis v. Galt*, 77 S.W. 876 (Mo. 1903) (weeds four to five feet tall, including sunflowers, were included under the anti-weed ordinance enacted in 1900); *People v. McKendrick*, 468 N.W.2d 903 (Mich. Ct. App. 1991) (“noxious vegetation” ordinance defined weeds as “all weeds, grass, brush, wildings, second growth, rank vegetation or other vegetation that is not growing in its proper place, having a greater height than seven (7) inches or spread of more than seven (7) inches.”).

than proscriptive,⁴⁵ and a step toward a more permissive approach to locavore practices in urban areas.⁴⁶

Another FYO that made headlines is located in Northbrook, Illinois. The Northbrook Code prohibits residents from growing anything in the front yard except “shade trees, ornamental trees, evergreen trees, shrubs, flowering plants, ground cover plants, and other native or ornamental grasses and plants.”⁴⁷ A Northbrook woman lacked sufficient sun in her backyard to grow vegetables, so she instead put a garden in her front yard.⁴⁸ A neighbor complained and the planning department asked her to remove the garden.⁴⁹ Several months later, the Northbrook Village Board declared that front yard gardens are permitted under the existing Code, but set out guidelines for residents to follow in order to “promote properly maintained gardens, [and] not allow areas to fall into disrepair.”⁵⁰

iv. Prohibiting or Limiting the Sale of Produce

Finally, some communities allow residents to grow vegetables on their property, but ban the sale of produce for commercial gain in residential areas.⁵¹ For example, in Detroit, Michigan, which has begun a broad urban homesteading program, the zoning

⁴⁵ Proscriptive codes “restrict the kinds of development that can take place. [For example,] [t]hey specify minimum sizes of lots; the types of developments allowed in particular zones; the amount of parking required; and the width of standard streets.” Andres Duany & Emily Talen, *New Urbanism And Smart Growth: Making The Good Easy: The Smart Code Alternative*, 29 *FORDHAM URB. L.J.* 1445, 1452 (2002). In contrast, “[p]roscriptive codes are designed to encourage a certain type and quality of development.” *Id.*

⁴⁶ The ordinance is not fully permissive, as it limits garden space to 30 percent of the front yard and height to four feet. SACRAMENTO, CAL. CODE § 17.68.010A.1.c (2009). Thus, certain climbing vegetables or tall plants might be prohibited in front yards.

⁴⁷ NORTHBROOK, ILL. ZONING CODE § 9-107B(3) (2012).

⁴⁸ Megan Graydon, *This Year’s Harvest Could Be Last for Resident’s Garden*, TRIBLOCAL, Aug. 23, 2010, <http://triblocal.com/northbrook/2010/08/23/this-years-harvest-could-be-last-for-residents-garden/>.

⁴⁹ *Id.*

⁵⁰ Jeff Dana, *Front-yard gardens OK, but there are guidelines to follow*, TRIBLOCAL, Feb. 9, 2011, <http://triblocal.com/northbrook/2011/02/09/front-yard-gardens-ok-but-there-are-guidelines-to-follow/>.

⁵¹ The Los Angeles ordinance, *supra* note 30 and accompanying text, is an example of this type of ban as well.

code prohibits an individual from selling home-grown vegetables on-site.⁵² This is problematic for those who see urban agriculture as an opportunity for transformation in the area of municipal green economic development. Commentators believe that it is important for members of a community to have the opportunity—both legally and financially—to be able to grow and sell food to others in the community.⁵³ The hope is that this will create both a physical space and a sense of place that encourages individuals to enhance their gardening skills, and perhaps create broader “food enterprises” in the community, which could result in the sale of healthier food to more members of the community.⁵⁴ If an individual has a garden that is productive enough to feed him or herself, and wants to make money by selling surplus harvest to others, these bans stifle this form of green sector economic growth.⁵⁵

In a twist on these ordinances, in some jurisdictions individuals are only allowed to sell the produce they grow if they obtain a CUP from the municipality, which is discretionary and often expensive. For example, a group of urban gardeners in San Francisco was required to apply for an expensive CUP, which, depending upon the length of the permit queue at the Planning Department could take up to six months to receive, in order to sell their produce.⁵⁶ Similarly, an urban homesteader and author in Oakland,

⁵² Dillon, *supra* note 29; DETROIT, MICH. ZONING CODE § 61-12-391 (2005). *See also* COLUMBIA, MO. CODE § 29-6(b) (2011).

⁵³ *See* Sajid Farooq, *Oakland Sprouting New Farming Laws*, NBC BAY AREA, July 22, 2011, <http://www.nbcbayarea.com/news/local/Oakland-Looking-to-Update-Urban-Farming-Laws-125974063.html>.

⁵⁴ *Id.* (quoting Aaron Lehmer, campaigns director for Bay Localize).

⁵⁵ *But see* Emily Farris, *Kansas City Farming for Cash*, URBAN FARM ONLINE, June 22, 2010, <http://www.urbanfarmonline.com/urban-farm-news/2010/06/22/kansas-city-urban-farming.aspx> (discussing neighbors’ nuisance concerns with permitting onsite sales of produce in residential areas).

⁵⁶ Zusha Elinson, *Urban Farming for Cash Gains a Toehold in San Francisco*, N.Y. TIMES, Aug. 13, 2010, <http://www.nytimes.com/2010/08/13/us/13bcfarm.html>. The application itself is also daunting. *See Application Packet for Conditional Use Authorization*, SAN FRANCISCO PLANNING DEP’T, <http://www.sf-planning.org/Modules/ShowDocument.aspx?documentid=481> (last visited Feb. 7, 2012).

California was recently cited for selling food without a CUP.⁵⁷ Many small farmers lack sufficient funds to go through such a process, especially since there is a risk that the permit might not be granted, or will only be granted if the applicant complies with expensive mitigation measures; thus discretionary permits often serve as a barrier to entry.⁵⁸ Because each jurisdiction adopts its own zoning ordinance, few urban agriculture bans are identical; however, the themes discussed in this section are common.

b. Existing Bans on Backyard Chickens

Perhaps more well known than bans on vegetable growing and selling are bans or limitations on raising urban and suburban chickens, which have received much attention in the popular press.⁵⁹ The typical story is that one or more citizens want to raise chickens for eggs (or perhaps, already raise chickens for eggs), but local zoning ordinances prohibit keeping farm animals within city limits. These citizens organize, rally, and are sometimes successful in overturning the existing ordinance.

Urban chicken regulations have existed for many years, in some cases preceding zoning ordinances. For example, in 1877, the New York Sanitary Code was revised to state:

⁵⁷ City officials were alerted to Novella Carpenter's activities by animal advocates who disapproved of her selling rabbit potpies. Chip Johnson, *Novella Carpenter Could Use a Hand, Oakland*, SF GATE, Apr. 5, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/05/BAFG1IPTFT.DTL>. Oakland now has an interim measure in place while it undertakes a comprehensive examination of its urban agriculture policies. See *Urban Agriculture Citywide Update*, CITY OF OAKLAND, CAL. PLANNING & ZONING, <http://www2.oaklandnet.com/Government/o/CEDA/o/PlanningZoning/OAK029859> (last visited Jan. 28, 2012); OAKLAND, CAL. ZONING CODE § 17.35.01(L7) (2011) ("Crop and Animal Raising is only permitted upon the granting of a Conditional Use Permit").

⁵⁸ Elinson, *supra* note 56. The San Francisco gardeners successfully challenged the ordinance requiring a CUP, with the city acknowledging that CUPs are "a bit of a barrier." *Id.* The challengers wrote a letter to the Zoning Administrator after learning of the CUP and encouraged others to write. Subsequently, the Mayor's office introduced an ordinance, which was passed. See *A Letter to the SF Planning Commission*, LITTLE CITY GARDENS, May 12, 2010, <http://www.littlecitygardens.com/page/6/>; see also *Success!*, LITTLE CITY GARDENS, Feb. 18, 2011, <http://www.littlecitygardens.com/page/4/>; *Let's clarify SF zoning code!*, LITTLE CITY GARDENS, May 10, 2010, <http://www.littlecitygardens.com/page/7/>.

⁵⁹ *Infra* notes 66 - 67.

[N]o live chickens, geese, ducks, or other fowls shall be brought into, or kept, or held, or offered for sale, or killed in any yard, area, cellar, coop, building, premises or part thereof, or on any sidewalk or other place within the built-up portion of the City of New York . . . without a special permit in writing.⁶⁰

In New Jersey in 1943, a woman was charged with violations of the building code for having constructed a chicken coop in her backyard.⁶¹

Backyard chicken bans are now common, and there is a burgeoning literature dedicated to their existence and efforts to overturn them. For example, in a recent article Professor Salkin summarizes regulations related to permitting chickens in residential areas,⁶² while two others describe the externalities that result from citizen objection to the overturning of chicken bans as an example of what they term the “clucking theorem.”⁶³

Like prohibitions on produce growth, bans on backyard chickens exist in many forms. Some communities ban farm animals or poultry from residential areas.⁶⁴ Some only permit a limited number of chickens, or permit hens but ban roosters due to noise concerns.⁶⁵ Others require setbacks that effectively prohibit construction of any accessory structures, such as chicken coops, particularly on smaller lots.⁶⁶ Homeowners frequently

⁶⁰ N.Y.C. SANITARY CODE § 197 (1877) (cited in Orbach & Sjoberg, *supra* note 24, at 19).

⁶¹ *Women Fight Curb on Chicken Raising*, N.Y. TIMES, Jan. 1, 1943, at 18 (“Then the borough fathers stepped in, informed Mrs. McLeod she was violating the building code, enacted in 1824, and a 1927 zoning ordinance forbidding the erection of ‘accessory’ buildings on premises without a permit.”).

⁶² Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 ZONING AND PLANNING LAW REPORT (Mar. 2011) [hereinafter Salkin, *Feeding the Locavores*].

⁶³ Orbach & Sjoberg, *supra* note 24, at 6.

⁶⁴ *See, e.g.*, AURORA, COLO. CODE OF ORDINANCES §§ 14-1 & 146-1203 (no livestock, which includes chickens, permitted within the city except in agricultural zones); WHEATON, ILL. CODE OF ORDINANCES §§ 14-1 & 14-99 (1999) (it is unlawful to keep livestock within city limits, where livestock includes chickens, unless chickens are for a 4-H project).

⁶⁵ *See, e.g.*, STAMFORD, CONN., CODE § 111-6 (2010) (“[n]o person shall keep any rooster in such location that the crowing thereof shall be annoying to any person occupying premises in the vicinity”); ANN ARBOR, MICH., CODE tit. IX, ch. 107, § 9:42(3)(b) & (d) (2011) (permitting up to four chickens, but prohibiting roosters); PORTLAND, ME., CODE § 5-402(a) & (b) (2009) (allowing up to six female chickens per lot); SEATTLE, WASH., CODE § 23.42.052(C)(2) (2010) (allowing up to eight fowl per lot, but banning roosters).

⁶⁶ *See, e.g.*, ALEXANDRIA, VA., CODE § 5-7-2 (1963) (fowl cannot be kept two hundred feet from any residence); BATON ROUGE, LA., CODE § 14:224(c)(1)(b) (1993) (requiring coops to be ten feet from the nearest property line and fifty feet from the nearest residence); NAPLES, FLA., ZONING CODE § 58-52(5)

run afoul of laws requiring a certain lot size in order to house chickens. For example, a Linthicum, Maryland woman had five egg-laying chickens in her backyard for over two years until a neighbor complained of smells and rats.⁶⁷ Because her yard was less than the acre required to keep chickens, and her coop encroached on the 50-foot setback, the County required her to dispose of her chickens.⁶⁸

Although these bans are common, citizen outcry or interest in promoting sustainable practices has led some city councils to alter their rules. Municipalities large and small are beginning to revise these ordinances to allow for the keeping of at least a few backyard chickens.⁶⁹ That said, a number of localities that have considered overturning existing bans have opted not to.⁷⁰ The reasons for this will be discussed *infra* in Part III.

III. Justifications for Bans on Urban Agriculture

Although this Article asserts that bans on urban agriculture are generally anachronistic, understanding why they are out of date requires an understanding of the reasons that they were enacted in the first instance. Those reasons are numerous and diverse, and there are legitimate bases, pursuant to a municipality's police powers, for

(2011) (enclosures must be thirty feet from any lot line and one hundred feet from neighboring residences). *See also* Salkin & Lavine, *supra* note 9, at 621-2 (setbacks “bar chickens from particularly dense neighborhoods, prevent residents from keeping large flocks, and ensure that chickens have enough space to live comfortably. However, if such requirements are too restrictive, they may create obstacles to chicken raising in neighborhoods otherwise suited for that use.”).

⁶⁷ Tim Pratt, *County: Linthicum chickens must go: Coop on property doesn't meet county setback requirements*, MD GAZETTE, Oct. 8, 2011, <http://www.mdgazette.com/content/county-linthicum-chickens-must-go>.

⁶⁸ *Id.*; *see also* Corey de Vera, *Willard family told to get rid of chickens: Willard aldermen open to changing ordinance*, NEWS-LEADER, July 16, 2011, <http://www.news-leader.com/article/20110716/NEWS01/107160348/Willard-family-told-get-rid-chickens> (lot too small).

⁶⁹ *See* MARY WOOD ET AL., *supra* note 12, at 48.

⁷⁰ *See, e.g.*, Orbach & Sjoberg, *supra* note 24, at 35-6 (discussing Iowa City, Iowa, where “the 2009 campaign to legalize urban fowl failed . . . articulating concern that students may move and leave behind their chicken pets;” Franklinton, Louisiana, whose Mayor said “[y]ou can’t raise animals or livestock in the city;” and Durango, Colorado, where the city worried that “chickens would threaten its modern image.”).

enacting and upholding these bans. This Part will describe and evaluate some of these justifications.

a. Traditional Ideals Underpinning Euclidean Zoning

Although locavorism is now a commonplace idea, there is a sense that many land use laws are “stuck in another era,” when farming in residential areas was viewed as a harm to be avoided.⁷¹ To understand why these outdated laws were enacted, and why they still exist today, it is necessary to begin with a brief bit of history. Prior to the modernization of refrigeration and food preservation, communities relied on subsistence farming to feed themselves in ways that were both local and seasonal. Indeed, nearly all early residents of the Thirteen Colonies were subsistence farmers.⁷² The federal government encouraged private ownership for farming through land disposal policies,⁷³ implementing Thomas Jefferson’s professed desire for a nation of “yeoman farmers” who were self-sufficient and eschewed the need for substantial governmental regulation.⁷⁴

⁷¹ Elinson, *supra* note 56.

⁷² *See, e.g.*, BRUCE C. DANIELS, *THE CONNECTICUT TOWN: GROWTH AND DEVELOPMENT, 1635-1790*, at 140-41 (1979). The evolution of land in the United States is tied to the evolution of farms. Native Americans grew the country’s first subsistence gardens. JOHN T. SCHLEBECKER, *WHEREBY WE THRIVE: A HISTORY OF AMERICAN FARMING 1607-1972*, at 25 (1975). Later, colonists engaged in subsistence farming, but only after the Virginia governor ordered them to “plant a corn patch or face starvation” in 1609 due to unreliable food shipments from abroad. *Id.* at 36 (“Neither the settlers nor the capitalists expected commercial farming to become established. The promoters expected their colonists to become self-sufficient in food, but . . . their main efforts would be to obtain commodities for trade in Europe.”).

⁷³ SCHLEBECKER, *supra* note 72, at 57-65 (discussing the Homestead Act of 1862). The purpose of land distribution policies “was to []distribute [land] to farmers, and the number of farmers and farms was to grow as rapidly as possible.” *Id.* at 68.

⁷⁴ *See, e.g.*, THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA: QUERY XIX: MANUFACTURES (1782)*, reprinted in THOMAS JEFFERSON: *SELECTED WRITINGS* 52 (Harvey C. Mansfield, Jr. ed., 1979); Stanley N. Katz, *Thomas Jefferson and the Right to Private Property in Revolutionary America*, 19 *J. L. & ECON.* 467, 470-74, 480-81 (1976); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161, 2178 (2001) (“Jefferson disdained large-scale commerce and its effects on character; he envisioned a nation of self-sufficient yeoman farmers participating in public life to deliberate about the common good, but he was generally skeptical of all exercises of government power.”); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. ON REG.* 91, 124 (2011) (“Jefferson was convinced that the yeoman’s economic self-reliance assured his freedom and political autonomy. Hence, increasing the number of American yeomen strengthened the national capacity for self-determination. Accordingly, old

Over time, small, individually-owned farms were sold and combined, resulting in a transition to larger farms.⁷⁵ At the same time, technological advancements in farm equipment made larger farms practically and economically feasible, as well as necessary to stay competitive.⁷⁶ As a result of improved technologies, farmers were able to farm larger acreages, obtain higher crop yields, and reduce their work force.⁷⁷

While farms were expanding, individuals were moving closer together: by 1920, a majority of Americans lived in cities or suburbs.⁷⁸ Large manufacturing plants often located next to temporary housing, making cities unsanitary and crowded.⁷⁹ As urban areas expanded to meet the demand for business and residences, there was a clash between agricultural and residential uses.⁸⁰ Urban areas squeezed out gardens to make

conservatives and old progressives both viewed the proliferation of small landholding as a bulwark of democracy.”); James Phillips, *American Agrarianism's Answers to the Nation's (In)securities*, 9 CONN. PUB. INT. L.J. 343, *passim* (2010) (discussing Jefferson's yeoman farmer ideal); WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 11 (1985) [hereinafter FISCHER, *ECON. OF ZONING LAWS*] (suggesting that federal “land policy was [] deliberately designed to fulfill the Jeffersonian ideal of independent yeoman farmers”).

⁷⁵ Morgan L. Holcomb, *Book Review: Our Agriculture Policy Dilemma: The Omnivore's Dilemma: A Natural History of Four Meals*, by Michael Pollan (2006), 8 MINN. J. L. SCI. & TECH. 249, 257 (2007). In 1910, the average farm was 138.13 acres. SCHLEBECKER, *supra* note 72, at 207. In 1950 the average farm was 215.49 acres. *Id.* Today, the average farm is 443 acres. Holcomb, *supra* note 75, at 257.

⁷⁶ Alfonso Morales & Gregg Kettles, *Healthy Food Outside: Farmers' Markets, Taco Trucks, and Sidewalk Fruit Vendors*, 26 J. CONTEMP. HEALTH L. POL'Y 20, 30 (2009) (Discussing advances in technology, including “changes in agricultural production, refrigeration technology, and intermodal transportation” in the 1930s).

⁷⁷ SCHLEBECKER, *supra* note 72, at 30, 145. For example, “[p]rior to mechanization, it took three hours and forty minutes for a farmer to harvest one bushel of wheat; by the 1880s the farmer's grandson needed only ten minutes to produce the same bushel.” *From Manpower to Horsepower: Technological Change in the Nineteenth Century*, IOWA STATE UNIV. CENTER FOR AGRIC. HISTORY RURAL STUDIES, <http://www.history.iastate.edu/agprimer/Page23.html> (last visited Aug. 29, 2011).

⁷⁸ DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 16 (1999); Shoked, *supra* note 74, 128 (“By the end of the 1920s, nearly a third of the metropolitan population lived outside the central city.”).

⁷⁹ MUMFORD, *supra* note 11, at 431-4; *see also* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 157 (2006) (“Plagued by adult crime, juvenile gangs, and inadequate law enforcement, Denver was a rough and dirty city in the late nineteenth century. Heatless tent slums rife with disease sprawled on the banks of the Platte River, into which raw sewage drained until the mid-1880s. Citizens raised chickens and dairy cows on their urban property . . .”).

⁸⁰ “[F]ewer urban dwellers ha[d] any farm background, they [were] less tolerant of the smells, noise, dust and other inconveniences that result from farm operations.” H. W. Hannah, *Farming in the Face of Progress*, 16 FRANCHISE L.J. 8, 9 (1997). *See, e.g.*, *Twigg v. County of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994) (testimony that “agricultural use was incompatible with residential development to the extent that

room for the more profitable uses,⁸¹ and took over farmland, which resulted in the elimination of some farms and the pushing of others further from the city center.⁸² This change in land use patterns meant that food had to travel further to reach city-dwellers.⁸³ However, because larger farms could produce more food, more quickly, and because supermarkets were available and sold many products,⁸⁴ individuals were relieved of pressure to produce their own. As a result, residential landscapes changed as yards replaced gardens.⁸⁵

Neighbors and courts discovered that the traditional common law tools that had been used to constrain land use—nuisance and restrictive covenants—were no longer effectively protecting the new suburban “utopia”⁸⁶ and the sanctity of its homes, most of which were inhabited by the middle- and upper-classes.⁸⁷ Nuisance law, a judicial land use control, provided a cause of action for the substantial interference with the use and

mail boxes and garbage cans along the roadways might hinder the movement of farm machinery, or children playing in the area might damage terraces and downspouts”).

⁸¹ MUMFORD, *supra* note 11, at 428, 434 (The demand for “pecuniary exploitation . . . reduced the rear garden to a backyard for drying clothes [as residences were built] back to back” and as people paved “[t]he court between the buildings . . . prohibit[ing] even the most pinched garden.”).

⁸² *See, e.g.*, Hannah, *supra* note 80, at 9; Tamara Mullen, Note, *The McMansion: Architecture’s Role in Facilitation Urban Sprawl and Farmland Loss*, 12 DRAKE J. AGRIC. L. 255, 257-9 (2007); Thomas Benton Bare III, *Recharacterizing the Debate: A Critique of Environmental Democracy and an Alternative Approach to the Urban Sprawl Dilemma*, 21 VA. ENVTL. L.J. 455, 455-6 (2003). This pattern of development continues today. Mullen, *supra* note 82, at 256 (“[L]and masses the size of Delaware are paved over every year to make way for expanding hypersprawl.”).

⁸³ Pothukuchi & Kaufman, *supra* note 26, at 215 (“As local farms disappeared, food simply came from more distant places, and from farms that were more intensively cultivated by increasingly corporate players.”).

⁸⁴ Between 1934 and 1938 the amount of available frozen foods increased from 10 million pounds to 250 million pounds. SCHLEBECKER, *supra* note 72, at 231. The modern supermarket originated in the 1920s. *Id.* at 232. By 1969, supermarkets accounted for 52.4 percent of the food retailing business. *Id.* at 293; MARION NESTLE, *WHAT TO EAT* 17 (2006).

⁸⁵ KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 54 (1985) (providing a history of suburban development in America, and stating, “[b]etween 1825 and 1875, middle-class Americans adopted a less utilitarian expectation about residential space. They no longer needed herbs and vegetables from gardens, and . . . a smooth lawn replaced the rough meadow cut by scythe or sheep.”).

⁸⁶ MUMFORD, *supra* note 11, at 428, 486.

⁸⁷ *Id.* at 493 & 495 (“the suburb . . . tended to remain a one-class community, with just a sufficient fringe of tradesmen and servants to keep it going—the latter often condemned to use the central metropolis as their dormitory.”).

enjoyment of one's land that resulted from activities of another that were negligent, reckless and unintentional, or intentional and unreasonable.⁸⁸ In the land use context, individuals typically brought nuisance suits for intentional actions.⁸⁹ Courts used different tests to determine what actions were unreasonable.⁹⁰ Nuisance suits are still used today, but the consensus is that they are more successful when used to control small, localized harms;⁹¹ the conflict between agriculture and residential uses proved to need a larger-scale solution. From a private, contractual law perspective, individuals also bound themselves to use or not use their land in certain ways via real covenants that ran with the land.⁹² These covenants are still quite common today in the form of CC&Rs (covenants, conditions and restrictions), which are recorded documents that control the use of property in many residential subdivisions.⁹³

⁸⁸ JESSE DUKEMINIER, ET AL., PROPERTY 641-2 (6th ed. 2006).

⁸⁹ *Id.* at 642-3. For an action to be intentional, the actor needed only realize that his action was likely to cause the result—he did not need to act for the purpose of causing it. *Id.* at 642.

⁹⁰ Some courts determined that if a harm passed a given threshold, it was unreasonable. *See Jost v. Dairyland Power Coop.*, 172 N.W.2d 647 (Wis. 1969). Others applied a utilitarian test to determine whether the gravity of the harm outweighed the benefit of the actor's conduct. The Restatement adopts this view. RESTATEMENT (SECOND) OF TORTS § 826(1) (1979).

⁹¹ *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973) [hereinafter Ellickson, *Alternatives to Zoning*] (“Many land use activities now constrained by zoning ordinances raise only localized threats [as opposed to pervasive threats] that would be better handled through private nuisance remedies . . .”); DUKEMINIER, ET AL., *supra* note 88, at 665 (“nuisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems”); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 775-6 (quoting 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 2.1, at 33 (1986)) (“As a remedy particularly well-suited for ‘localized’ problems, it has ‘contributed consistently to the just resolution of neighborhood environmental conflict.’”). Indeed, “[n]uisance law has largely been superseded by zoning and other police power controls.” FISCHER, ECON. OF ZONING LAWS, *supra* note 74, at 27 (attributing this trend to “the lack of prospective control, the high cost of litigation, and the tendency to use the extreme remedy of the injunction rather than award damages”).

⁹² DUKEMINIER, ET AL., *supra* note 88, at 740 (6th ed. 2006).

⁹³ *See, e.g.*, *Covenants, Conditions and Restrictions*, CAMERON PARK, CAL. COMMUNITY SERV. DIST., <http://cameronpark.org/ccrs.html> (last visited Jan. 17, 2012); *Declaration of Covenants, Conditions and Restrictions for Alary Farm Subdivision*, ALARY FARM, N.M., www.alaryfarm.com/alacovee.pdf; *Covenants, Conditions, and Restrictions Applicable to Vineyard Estates*, EIPERT-NICELY DEVELOPMENT, LLC, www.vineyardestatesberrea.com/.../Recorded%20New_Restrictions.pdf.

Although these common law controls were sufficient for a time, as technology advanced, industrial uses grew louder, noisier and dirtier; automobiles developed; cities grew more crowded; and people began to spread out, states and municipalities began to consider regulatory approaches to controlling land use.⁹⁴ States adopted zoning enabling acts that empowered localities to implement land use regulations “for the purpose of promoting health, safety, morals or the general welfare of the community.”⁹⁵ Pursuant to this authority, municipalities began to enact zoning ordinances⁹⁶ to regulate aspects of city life, such as the height and bulk of buildings, the size of yards, and most importantly, the use of buildings and land.⁹⁷ Further, as more states moved toward “home rule”⁹⁸ through state constitutional amendments and statutes, their municipalities were freed from strict adherence to the provisions of the enabling acts.⁹⁹

As zoning flourished, some questioned its constitutionality. In 1926, The United States Supreme Court considered the question in *Village of Euclid, Ohio v. Ambler Realty Co.*, and determined that comprehensive zoning was constitutional.¹⁰⁰ The divide between urban and suburban, and rural and agricultural lands as we know them today

⁹⁴ STANISLAW J. MAKIESLSKI, *POLITICS OF ZONING: NEW YORK 1916-1960* (1966).

⁹⁵ U.S. DEP’T OF COMMERCE, *STANDARD STATE ZONING ENABLING ACT* (1926), *reprinted in* 5 KENNETH H. YOUNG, *ANDERSON’S AMERICAN LAW OF ZONING* § 32.01 (4th ed. & Supp. 2004).

⁹⁶ New York City is often credited with creating one of the first comprehensive zoning ordinances. *See* MAKIESLSKI, *supra* note 94. During the early 1900s, New York developers constructed skyscrapers that cut off the light and air that residential neighbors desired. At the same time, fancy retail stores on 5th Avenue disliked the influx of immigrants who worked at the new garment factories in their neighborhoods. Thus, a coalition of forces banded together to petition for a comprehensive regulatory scheme to control who and what could be located where. *Id.* *See also* Basiouny, *supra* note 2.

⁹⁷ Many early ordinances included a zone that allowed little more than single-family residential homes; even apartments were prohibited from these zones. *See, e.g., Village of Euclid*, 272 U.S. at 380 (ordinance categorizing land uses into a hierarchy of zones, where the most restrictive permitted only “single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening,” and forbid two-family dwellings, apartments, municipal buildings, and commercial and industrial uses).

⁹⁸ Home rule municipalities have broad, general powers. ELLICKSON & BEEN, *supra* note 20, at 29.

⁹⁹ *See, e.g., White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App. 1974) (determining that a home-rule city was able to zone more broadly than the text of the enabling act would suggest).

¹⁰⁰ *Village of Euclid*, 272 U.S. 365.

traces its origin to the type of zoning that the *Euclid* Court upheld, known as Euclidean Zoning.¹⁰¹ The idea behind Euclidean Zoning is that different uses that are thought to be incompatible should be kept separate from one another.¹⁰² This was especially true for industrial uses, which were to be separated from residential uses for fear that they would likely cause nuisances if they were located nearby. Specifically, the Court viewed single-family homes as the highest and best use of property,¹⁰³ and thus those structures were to be separated from every other use.¹⁰⁴ Under the aegis of promoting health, safety, welfare and morals of the community, municipalities zoned out the less civilized, potentially nuisance-causing uses, including agriculture.¹⁰⁵ This line of reasoning explains why both gardening and keeping farm animals are prohibited in many localities that hew to traditional Euclidean zoning.¹⁰⁶

In addition to validating zoning, *Euclid* arguably also ushered in a new conception of property rights; in exchange for the security that one's neighborhood environment (and thus, property value) would be preserved, one gave up much of the freedom to use and

¹⁰¹ "In 1840 suburbs had not yet developed into a recognizable entity, distinct from either the city or the farm." JACKSON, *supra* note 85, at 45.

¹⁰² See Shoked, *supra* note 74, at 95, 99 (2011) (describing property ownership in "post-Euclid America" as signifying "security rather than freedom" and property rights as protecting "tranquil security" rather than "dynamic development").

¹⁰³ *Village of Euclid*, 272 U.S. at 394 (referring to apartments as "mere parasites").

¹⁰⁴ See Salkin, *From Euclid to Growing Smart*, *supra* note 2, at 110 ("[Z]oning was viewed as a means to an end - the end being to separate incompatible land uses because there was an inherent conflict between uses that were not identical (e.g., residential, agricultural, business and commercial). . . . the historical use of zoning [was] merely a tool to separate what had been viewed as incompatible land uses.").

¹⁰⁵ *Village of Euclid*, 272 U.S. at 394 (describing apartments as "parasites"); see also Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls to Reduce Automobile Emissions*, 2 SUSTAINABILITY 1742, 1745 (2010) ("[Euclid] thus enshrined the low-density, single-family house, protected from alien, lower land uses such as apartments, as the highest form of civilized land-use.").

¹⁰⁶ Once a municipality was zoned and "the impurities of agriculture [were] removed, a new settlement was born, one that commanded cleaner landscaping: well manicured, sterile varieties of trees, shrubs, and ground covers." NORDAHL, *supra* note 16, at 3.

develop her property.¹⁰⁷ Thus, *Euclid* not only impacted a home's surroundings—by establishing what could and could not be developed next to the home—but it also modified the sticks in the homeowner's bundle of rights by reigning in much of the flexibility that homeowner previously had to use her land as she pleased.¹⁰⁸

The values, ideas, and assumptions that are embodied in Euclidean zoning ordinances are founded in traditional concepts of the police powers: protection of children, upper- and middle-class families,¹⁰⁹ property values, the sanctity and quiet of the suburbs, and a very specific sense of place. In 1974, the Supreme Court famously explained in *Village of Belle Terre v. Boraas* that:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹¹⁰

Thus, restrictions developed not just due to the perception that agricultural uses caused specific harms, but also because of a cultural sense that agricultural (and industrial) use was not socially appropriate in the vicinity of homes and families. These values still serve as a justification for many bans that prohibit urban agriculture in residential areas.

Often, municipalities that ban front yard gardens and backyard chickens seek to appeal to a certain type of potential resident—one who seeks a community that embodies

¹⁰⁷ Shoked, *supra* note 74, at 99-100 (2011). *But cf.* Keith H. Hirokawa, *Property Pieces in Compensation Statutes: Law's Eulogy for Oregon's Measure 37*, 38 ENV. L. 1111, 1144 (2008) (noting that "it is arguable that these changes [in the right to use property due to zoning] did not affect the substance or character of the property right: zoning did not alter the basis for the nuisance limitation on the property right The only change of substance was in the manner and forum in which the determination was made.").

¹⁰⁸ Conversely, zoning also created value by restraining neighbor A's ability to impact neighbor B's property.

¹⁰⁹ *Village of Euclid*, 272 U.S. 365.

¹¹⁰ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

Euclidean ideals of family and traditional values.¹¹¹ The idea that different localities are designed for, and thus appeal to, different types of people ties into the theory set forth by Charles Tiebout in his seminal article, *A Pure Theory of Local Expenditures*.¹¹² There, Tiebout views people not as residents or members of local governments-cum-democratic polities, but rather as “consumer-voters” who express their preferences by seeking out municipalities that provide the public goods and services that appeal most to them. Thus, it makes sense that different communities would have different rules and provide different services so as to appeal to and attract different “consumers.” And, some communities will likely continue to hold to traditional Euclidean values so as to attract residents who hold those values.

b. Promoting Public Health and Avoiding Nuisances

Another reason that municipalities enact bans on urban agriculture is the protection of public health and the prevention of nuisance claims, pursuant to their police powers.¹¹³ States are presumed to have inherent, plenary authority to regulate, subject to the limits of the federal constitution and the states’ constitutions. Traditionally, local governments are viewed as creatures of the state, and derive their powers from the

¹¹¹ See generally DAVID TRACEY, *URBAN AGRICULTURE: IDEAS AND DESIGNS FOR THE NEW FOOD REVOLUTION* (2011).

¹¹² See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹¹³ See, e.g., HELGA OLKOWSKI ET. AL., *THE INTEGRAL URBAN HOUSE: SELF RELIANT LIVING IN THE CITY* 252 (2008) (“Most municipal ordinances restricting livestock were made to protect urbanites from the smell, noise, flies, and general nuisance-causing behavior associated with farm animals in the city . . .”); *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 608 (Ark. 1998) (noting that “Oak Grove is legislating under its police power when it states that its purpose is to protect the residents of the town from the deleterious effects of commercial broiler activities, to protect against offensive or noxious odors, and to protect the order, peace, comfort, convenience, safety, general welfare, health and prevent injury from offensive or unhealthy matters.”); *Becker v. Arnfeld*, 466 P.2d 479, 480 (1970) (finding that “the clear intent expressed in the covenants as a whole is to create a desirable, pleasant residential area”).

state.¹¹⁴ This is consistent with Dillon’s rule, which suggests that all local power must be expressly granted.¹¹⁵ However, most states now allow home rule by municipalities, which empowers local governments to regulate without seeking express authorization from the state.¹¹⁶ Localities generally have the power to pass regulations and act in the interest of public health, safety, and welfare unless the state expressly retains that power.¹¹⁷ These police powers have been interpreted broadly;¹¹⁸ a court recognizing the breadth of the power to regulate observed that “[t]he promotion of the general welfare does not rigidly limit governmental authority to a policy that would ‘scorn the rose and leave the cabbage triumphant.’”¹¹⁹ (However, it could!).¹²⁰ Although many municipalities do not think of

¹¹⁴ *Hunter v. City of Pittsburg*, 207 U.S. 161, 178 (1907) (localities are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them”).

¹¹⁵ Localities “possess[] and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; [and] third, those essential to the accomplishment of the declared objects and purposes of the corporation.” 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 449-50 (5th ed. 1911). *See, e.g., TransDulles Center, Inc. v. USX Corp.*, 976 F.2d 219, 224 (4th Cir. 1992) (same). All states have adopted enabling legislation that expressly grants zoning powers to municipalities. *See ELLICKSON & BEEN, supra* note 20, at 29.

¹¹⁶ *See DALE KRANE, ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 14 (2001).

¹¹⁷ *See, e.g., Hodge, supra* note 163, at 130 (“Primary responsibility for protecting the public’s health, however, is held by the states (and local governments via delegated state authority).”); Anthony J. Samson, *A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials*, 2008 MICH. ST. L. REV. 879, 886 (2008) (“Absent expressed or implied powers to regulate a particular activity, home rule municipalities may rely on their police powers to safeguard and promote public health, safety, morals, and general welfare.”); Catherine J. LaCroix, *SEPA’s, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 CASE W. RES. L. REV. 1289, 1295 (2008) (“[L]ocal governments have land use regulatory power and power to adopt local environmental regulations, both through state legislation authorizing zoning, comprehensive planning, or other regulation, and through home rule power.”).

¹¹⁸ They “justify virtually any exercise of [] local government to preserve, protect, or promote the public’s health that does not infringe upon constitutionally-protected individual or community rights.” *Hodge, supra* note 117, at 130. *See also Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The concept of the public welfare is broad and inclusive.”); Judith A. Stoll, *Home Rule and the Sherman Act After Boulder: Cities Between A Rock and A Hard Place*, 49 BROOK. L. REV. 259, 299 n. 191 (1983) (The term is “broad enough to encompass all the powers by which local government is authorized to protect public welfare. . . . [and] may be applied to regulate activities which may or may not be ‘integral’ or ‘governmental’ insofar as those activities affect public health and safety.”).

¹¹⁹ *Buhler v. Stone*, 533 P.2d 292, 294 (Utah 1975) General welfare considerations include “the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and [preservation of] the beauty as well as the usefulness of the environment.”).

¹²⁰ While a municipality could adopt a policy banning flowers and requiring vegetables, it would be subject to the limits of democracy: voters would likely make this result impossible or impermanent.

food as an urban or local issue,¹²¹ localities are in a fine position to regulate many food issues,¹²² and may do so pursuant to their police powers.

Further, as discussed earlier, private nuisance law protects an individual from substantial interference with the use and enjoyment of her property when another is acting intentionally and unreasonably.¹²³ Thus, a locality might not want to allow intensive urban gardening due to fears that the fresh, and subsequently rotting, fruit and vegetables will attract pests. A compost pile, for example, if located too close to a neighbor's home, may smell and attract flies or rats.¹²⁴

Locavores who wish to raise chickens are harmed by bans that prevent them from doing so. However, that harm must be balanced against the harm that their neighbors

¹²¹ “When people think of urban policy, [] food issues are hardly given a second thought.” Pothukuchi & Kaufman, *supra* note 26, at 216-17. Perhaps this is because most U.S. food policy is dictated at the federal level. *See, e.g.*, Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong. (2008). *See also* David Burnett, Note, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic*, 14 VA. J. SOC. POL’Y & L. 357, 373 (2007) (“Congress influences the food that Americans eat with food subsidies, food-safety laws, nutritional standards, and regulations governing the ingredients, packaging, marketing, and sale of food intended for public consumption.”); *see generally* U.S. DEP’T OF AGRIC., ECON. RES. REP. NO. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS AND ISSUES 35-39 (2010), www.ers.usda.gov/Publications/ERR97/ERR97.pdf; A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD DRUG L.J. 405 (2009); Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 FOOD DRUG L.J. 371 (2002).

¹²² Food policy has dramatic impacts on localities, as it affects “the local economy, the environment, public health, and quality of neighborhoods.” Pothukuchi & Kaufman, *supra* note 26, at 216-17 (emphasis omitted); *see also* NORDAHL, *supra* note 16, at 53 (“Programs, policies, funding strategies, and maintenance regimens of any urban agriculture endeavor will be difficult to implement and sustain if the largest land-owner in the city [the municipal government] is indifferent.”). However, some commentators assert that the state should play a key role in food policy. *See, e.g.*, Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 403, 407 (finding that “states occupy a central and critical role in ensuring the right to food”); Salkin & Lavine, *supra* note 9, at 599 (quoting KIMBERLY HODGSON, ET AL., AM. PLANNING ASS’N, PLANNING ADVISORY SERVICE NO. 563, URBAN AGRICULTURE: GROWING HEALTHY, SUSTAINABLE PLACES 12 (2011)) (“[M]eaningful change in regional food system policies is likely to start with state and local governments [because] community based food systems have the potential to ‘simultaneously address issues of food security, public health, social justice, and ecological health in local communities and regions’”).

¹²³ *Supra* notes 89, 90 and accompanying text.

¹²⁴ *Composting*, ACE HARDWARE, <http://www.acehardware.com/info/index.jsp?categoryId=1283900> (last visited Feb. 9, 2012) (“Some people have concerns about compost heaps fearing they will attract insects, rodents and other pests as well as produce undesirable odors. Most of these worries are unfounded, especially with a properly maintained pile.”).

would suffer as a result of the locavores' chickens, including potential health concerns and loud noise.¹²⁵ Many chicken ordinances allow a limited number of hens within city limits, but ban even a single rooster due to the noise they create at sunrise each morning.¹²⁶ Localities may also ban roosters because they can be used in cockfighting, which is illegal in every state, yet is still a problem faced by local law enforcement officers.¹²⁷

Even bans on female chickens are often founded in nuisance reasoning, as chickens can attract pests and predators, and may smell if they are not cleaned up after regularly.¹²⁸ Courts that have considered chicken bans that are founded on harm prevention, noxious use, or nuisance rationales have found those bans to be constitutional, as not interfering with any fundamental rights.¹²⁹

There are also some legitimate environmental and health concerns associated with urban agriculture. If a city does not ban fertilizers or insecticides, those products can

¹²⁵ Orbach & Sjoberg, *supra* note 24 (discussing externalities surrounding backyard chicken debates).

¹²⁶ See MARY WOOD ET AL., *supra* note 12, at 45 (discussing noise-based rooster bans). However, at least one court found that the morning crowing of a rooster was “a symbol of ‘good cheer and happiness.’” Salkin, *Feeding the Locavores*, *supra* note 62, at 4 (quoting *Myer v. Minard*, 21 So.2d 72, 72 (La. Ct. App. 2d. Cir. 1945)).

¹²⁷ See, e.g., *Cockfighting Raid Results in 145 Arrests*, WRAL, Jan. 22, 2007, <http://www.wral.com/news/local/story/1175339/>; Alexis Shaw, *Drug Raid Leads to Cockfighting Ring Discovery*, NBC LOS ANGELES, Oct. 14, 2011, <http://www.nbclosangeles.com/news/local/Drug-Raid-Leads-to-Cockfighting--131816783.html>; Howard Portnoy, *Leader of FL cockfighting ring pleads guilty; faces jail time*, EXAMINER, Oct. 21, 2011, <http://www.examiner.com/pet-news-in-national/leader-of-fl-cockfighting-ring-pleads-guilty-faces-jail-time>.

¹²⁸ See, e.g., HOMEWOOD, ALA. CODE OF ORDINANCES § 4-8 (2011) (“It shall be unlawful for any person to keep, harbor, or possess any chicken, . . . except . . . [u]nder circumstances where no noise, odor, or pollution violation or nuisance is occasioned thereby.”) (cited by Salkin, *Feeding the Locavores*, *supra* note 62, at 4).

¹²⁹ See, e.g., *City of St. Paul v. Nelson*, 404 N.W.2d 890, 891-92 (Minn. Ct. App. 1987) (upholding constitutionality of ordinance prohibiting keeping of chickens that cause a nuisance, and finding that “numerous complaints of a rooster’s frequent crowing at inconvenient hours demonstrate a nuisance.”); *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 608 (Ark. 1998) (holding that the “town of Oak Grove acted within its lawful discretion in prohibiting the keeping of swine or fowl for commercial purposes within the town limits”); *cf.* *City of Springdale v. Chandler*, 257 S.W.2d 934, 935 (Ark. 1953) (“It might be arbitrary to prevent the keeping of a few hens at a place where it would not be arbitrary or unjust to prevent the keeping of thousands of chickens.”).

make their way into the local water supply.¹³⁰ Similarly, if not properly disposed of, animal waste can also be a source of water pollution, and can result in E-coli in municipal water supplies.¹³¹ In some urban areas, the soil is contaminated with lead or other substances that would make it an unhealthy base in which to plant edible foods.¹³² Finally, sometimes maintenance and safety justify bans, especially of fruit-bearing trees that overhang public ways. The concern is that the nuts or fruit will fall, the ground will become slippery and dirty, causing accidents, and pests will be attracted to the smell.¹³³

¹³⁰ William K. Reilly, *The Future of Environmental Law*, 6 YALE J. ON REG. 351, 353 (1989) (“There are literally millions of small, decentralized sources of pollution along the coast itself and millions more located well inland. Lawn fertilizers and backyard garden insecticides used in Brattleboro, Vermont end up contributing pollution to Long Island Sound.”). Pesticide loading in residential areas is often higher per acre than loading from agricultural areas. Jim Criswell, et al., *Pesticides in Residential Areas—Protecting the Environment*, OKLA. STATE UNIV. DIV. OF AGRIC. SCI. & NATURAL RES., 1, <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-2341/EPP-7461web.pdf> (“In residential areas, chemicals are applied to smaller areas, but applications may be heavier and more frequent [than in agricultural areas].”).

¹³¹ John E. Mogk, et al., *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 WAYNE L. REV. 1521, 1538 (2010) (“[U]ntreated manure can be carried away by rainwater into feedlots, pastures and water sources for human or animal consumption.”).

¹³² For example, in Portland, Maine, industrial uses, gasoline, and lead paint resulted in lead filtering into much of the soil in the downtown residential area, requiring those who wish to plant edible foods to use raised beds. John Richardson, *Dirt alert: Test for lead, vegetable gardeners*, PORTLAND PRESS HERALD, Mar. 12, 2010, http://www.pressherald.com/archive/dirt-alert-test-for-lead-vegetable-gardeners_2009-03-13.html. Other urban areas are built on the sites of former industrial plants and struggle with lead contamination. Mogk, et al., *supra* note 131, at 1535-1538 (areas of Detroit, New York, Baltimore, Boston, Chicago, Los Angeles, Minneapolis and Philadelphia have high levels of lead due to former industrial uses).

¹³³ “[M]any municipalities have . . . bans on planting of fruit and nut trees on public streets, and sometimes local zoning prohibits small agricultural practices downtown. However, the justifications of maintenance and aesthetics for not allowing food-bearing plants in public spaces may be misconceptions” Jason J. Czarnecki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 274 (2011). Despite its extensive urban agriculture planning, Seattle bans fruit trees in the public right of way. *Growing Food in Planting Strips*, SEATTLE PUBLIC UTILITIES, http://www.seattle.gov/util/Services/Yard/Natural_Lawn_Garden_Care/GrowingFoodintheCity/PlantingStrips/ (last visited Jan. 18, 2012).

c. Aesthetic, Economic, and Exclusionary Justifications

Some urban agriculture bans are in place for aesthetic reasons.¹³⁴ Indeed, localities can regulate to prohibit vegetable gardens and chickens on purely aesthetic grounds, as aesthetics fall within a municipality's police power.¹³⁵ Many communities and residents prefer multiple, uniform, neat front yards to overgrown, messy vegetable gardens and chicken coops, and feel that gardens and chickens are out of place in their upper- or upper-middle-class communities.¹³⁶

Beyond pure aesthetics, studies suggest that the appearance of homes in a neighborhood impacts property values in that neighborhood.¹³⁷ Thus, though the bans might be couched in aesthetics,¹³⁸ perhaps the underlying reason for excluding gardens and chickens is that communities do not want their property values negatively

¹³⁴ Kate A. Voigt, Note, *Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture*, 38 B.C. ENVTL. AFF. L. REV. 537, 565 (2011) (aesthetics are one reason for opposition to urban agriculture); NORDAHL, *supra* note 16, at 91 (“[t]he biggest objections to planting food-bearing plants in public spaces have always been, and will likely continue to be, maintenance and aesthetics.”); *But see* Mogk, et al., *supra* note 131, at 1567 (urban agriculture can enhance aesthetics in blighted cities); Alexandra Dapolito Dunn, *Siting Green Infrastructure: Legal And Policy Solutions To Alleviate Urban Poverty And Promote Healthy Communities*, 37 B.C. ENVTL. AFF. L. REV. 41, 47 (2010) (“Green infrastructure also benefits the urban poor by enhancing the aesthetic appeal of communities with trees and vegetation.”).

¹³⁵ *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“The values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . .”).

¹³⁶ *Supra* notes 37 - 41 and accompanying text. *See* Byrne, *supra* note 37, at 42-46, *passim*; *see also* Tekle, *supra* note 37, at 214 (describing the “idyllic” lawn).

¹³⁷ *See, e.g.*, Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, in *THE CULTURAL MEANING OF URBAN SPACE* 139, 140 (Robert Rotenberg & Gary McDonogh eds., 1993) (noting that vacant properties lower the value of nearby homes, even if those homes are in good condition); Vicki Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 243 (2008) (noting that community gardens positively impact the sales prices of nearby properties and that “gardens have the greatest impact in the most disadvantaged neighborhoods”).

¹³⁸ If these bans were not in place, aesthetics could not be the sole basis of lawsuits by neighbors seeking removal of front yard gardens or chickens; the “aesthetic nuisance doctrine” protects people from suing for a nuisance on purely aesthetic grounds. Smith, *supra* note 40, at 215 (“[T]here are certain activities that are privileged and not subject to nuisance balancing. One such range of activities is embraced by the doctrine of aesthetic nuisance. . . . [T]he actor has immunity if an aesthetically offended observer brings an action for nuisance.”).

impacted.¹³⁹ Professor William Fischel’s “homevoter hypothesis” supports this contention; he suggests that homeowners make self-interested decisions about local politics and regulation, the goal of which is to preserve one’s home’s value.¹⁴⁰ Zoning ordinances are thus often used as exclusionary devices.¹⁴¹ Exclusion is typically demonstrated through large-lot zoning—for example, an ordinance might require lots to be at least one acre and house only a single-family home—which effectively closes the market to those who cannot afford a large parcel of land, or the cost to heat a large house. However, exclusionary justifications might also exist for urban agriculture bans.¹⁴² Although it is now fashionable in some circles to keep chickens in the backyard or plant a large vegetable garden in the front, these practices were historically identified with low-income families and recent immigrants.¹⁴³ These were perhaps also the people who needed to grow their own food for subsistence, as they were unable to afford to purchase it, unlike their wealthier counterparts who shopped at the grocery store. Thus, by banning chickens, or the growing of produce, in residential areas, the local legislatures and their constituents could ensure that the types of people who would need to engage in those behaviors would be kept out. At the same time, this also would have the benefit of preserving property values and maintaining a neat, uniform aesthetic.

¹³⁹ See, e.g., Salkin, *Feeding the Locavores*, *supra* note 62, at 1 (“People who criticize efforts to allow chickens in neighborhoods worry that property values will plummet, that chickens will create foul odors and noise, and that they will attract coyotes, foxes, and other pests.”).

¹⁴⁰ WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 4-5 (2001) *reprinted in* ELLICKSON & BEEN, *supra* note 20, at 46-7 [hereinafter FISCHEL, HOMEVOTER].

¹⁴¹ ELLICKSON & BEEN, *supra* note 20, at 768-71.

¹⁴² See, e.g., STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 190 (2011) (“[f]rom the beginning, zoning was as much about excluding undesirable people as about excluding undesirable uses of land”); Elizabeth Ryan, *Signal Mountain suburbanite lobbies council for right to raise chickens*, TIMES FRESS PRESS, Jan 10, 2009, <http://timesfreepress.com/news/2009/jan/10/signal-mountain-suburbanite-lobbies-council-right/> (city council revised zoning code pursuant to complaints that “Hispanic immigrants [were] keeping chickens, rabbits and other animals in their backyards”).

¹⁴³ See GILDA L. OCHOA, *BECOMING NEIGHBORS IN A MEXICAN AMERICAN COMMUNITY: POWER, CONFLICT, AND SOLIDARITY* 114 (2004).

d. Inertia and Neighbor Complaints

Political inertia is one of the least justifiable explanations for bans on urban agriculture, but also one of the easiest to explain. Because many of these bans date back decades,¹⁴⁴ few residents have even considered the possibility of an urban or suburban landscape featuring farm animals and produce. Further, inertia is evident in the low enforcement priority that these violations receive. In many instances, although code enforcement officers have the authority to issue citations, they rarely do so unless there is a complaint from a neighbor.¹⁴⁵ Local newspaper articles are rife with examples of this very situation.¹⁴⁶ For example, a Delaware woman who had chickens for over three years and regularly shared their eggs with her neighbors only learned of the illegality when a neighbor reported her rooster's loud crowing.¹⁴⁷ Similarly, in Sacramento, a woman was cited when a neighbor reported her to code enforcement for planting tomatoes and a fruit tree on her front lawn.¹⁴⁸

There are two ways to interpret this anecdotal data. The first is that code enforcement officers, though concerned about violations, are too busy to patrol neighborhoods.¹⁴⁹ Therefore, they rely on neighbors to enforce the provisions for them.

¹⁴⁴ See, e.g., ARKADDELPHIA, ARK., MUNICIPAL CODE § 4-4 (1949) (“[i]t shall be unlawful for any person to keep or to allow to run at large within the city any chickens, ducks, geese, turkeys, or any other kind of domestic fowl”); DENVER, CO., CITY CODE §§ 9-91-93 (1950) (backyard chickens prohibited without a permit); FRANKLINTON, LA., ORD. No. 626 (1970) (it is “unlawful for any person to keep any cattle, horses, mules, hogs, sheep, goats or other livestock” in town).

¹⁴⁵ See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169, 186, 207 (1968) (theorizing that the amount of damage caused by the offense “determines the amount and type of resources and punishment used to enforce a piece of legislation.” Offenses that “do more damage” are more likely to be discovered and punished.).

¹⁴⁶ A Google search for “neighbors cry fowl” brings up numerous articles describing neighbors complaining about chickens, ducks, and even peacocks in their neighborhoods.

¹⁴⁷ Basiouny, *supra* note 2.

¹⁴⁸ City authorities “then notified Baumann that she would have to pull up the plants or face a \$750 fine.” Cary, *supra* note 41.

¹⁴⁹ See MARY WOOD ET AL., *supra* note 12, at 4 (describing this approach as “a ‘living code,’ a complaint-driven system”).

The other interpretation is that code enforcement officers, and city officials generally, have other priorities, but because the bans exist, they must react in response to a valid complaint. This second approach suggests that the laws are outdated, and are ripe for revision.¹⁵⁰ Both of these interpretations are different from the concept of desuetude in criminal law, which suggests that if a law has not been enforced for a long enough period of time, it no longer has any effect.¹⁵¹ Here, the laws are still being enforced, but typically only when their violation is expressly brought to the attention of the code compliance division by a disgruntled neighbor. This raises a problem: if a person lives in a community that bans chickens or front yard gardens, but it is known that those ordinances are not enforced, and most people who have chickens or gardens have never had a problem, there is little incentive to change those ordinances.¹⁵² This is another likely reason that these bans still exist in many places.¹⁵³

IV. Justifications for Removal of Proscriptive Urban Agriculture Bans and Replacement with Prescriptive or Permissive Urban Agriculture Policies

There is validity behind some of the reasons that municipalities have instituted, and have kept in place, bans on urban agriculture and urban homesteading. However, those bans are grounded in an insufficiently nuanced view of the range of modern

¹⁵⁰ See MARY WOOD ET AL., *supra* note 12, at 51 (observing that “[i]t is widely known that many people keeping chickens in Eugene [Oregon] are in violation of the limits, indicating a regulatory change is necessary”); Mukherji & Morales, *supra* note 17, at 2 (“Frequently, these policy barriers are unintentional.”).

¹⁵¹ BLACK’S LAW DICTIONARY 513 (9th Ed.); Richard E. Myers, *Responding to the Time-based Failures of the Criminal Law through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1347 (2008) (“[T]he current widespread disobedience of a statute does not make it desuetudinal. Instead, a longstanding government policy of non-enforcement drives desuetude.”).

¹⁵² See Andrew E. Taslitz, *Exclusion and Other Remedies: Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 311 (2010).

¹⁵³ Some municipalities also likely keep bans in place because they fear that expressly allowing urban agriculture is passing a new law to appeal to small group of people who want to undertake a specific activity, which sets a bad precedent and might open the floodgates to similar requests. See Basiouny, *supra* note 2 (noting city council concern about setting a precedent for exceptions).

agricultural practices and an outdated set of property and land use law theories. Further, the values that undergirded those restrictive ordinances are beginning to change as communities look to the future and enact policies for sustainable development.

On judicial review, revisions to a zoning ordinance are often viewed as legislative actions taken by the local elected legislative body,¹⁵⁴ and will be upheld if they are “fairly debatable.”¹⁵⁵ If they are unreasonable, or arbitrary and capricious, the court will substitute its judgment for that of the local officials.¹⁵⁶ This section provides justifications showing that any decision to allow permissive urban agricultural ordinances would have substantial support, and thus would be upheld under this standard.¹⁵⁷

First, by removing bans and adopting policies that support urban agricultural practices, municipalities are acting in furtherance of their police powers, and in the interest of the health, safety, and welfare of their citizens. Second, allowing urban agriculture can foster ideals of civic virtue and democratic self-governance. And finally, in deciding to support urban homesteading within municipal boundaries, localities should find support in and be bolstered by the law and economics and property rights literature, which suggests that allowing free and open use of an individual’s private property

¹⁵⁴ *Fasano v. Board of County Comm’rs*, 507 P.2d 23, 26 (1973) (“Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority . . .”).

¹⁵⁵ *Village of Euclid*, 272 U.S. 365; *Ferris v. City of Alhambra*, 189 Cal. App. 2d 517, 524-5 (Dist. Ct. App. 1961) (“[i]f the matter is debatable, if reasonable minds may differ upon the question of whether the zoning is required by or consistent with the public welfare, the courts may not interfere.”).

¹⁵⁶ *Fasano*, 507 P.2d at 26.

¹⁵⁷ It is important to understand a locality’s legal basis for its actions; for example, localities that currently have no urban agricultural ordinances on the books but wish to expressly allow these practices would need authority to do so, and that authority could be found in their police powers. *Supra* notes 114 - 122 and accompanying text. However, localities that currently ban agriculture in residential areas may make those regulations less intrusive; authority is not necessary for this sort of deregulation.

promotes more efficient use of that property. This is especially true when the property is being used to produce food that may then be sold back into the local economy.

a. Urban Agriculture as a Local Government’s Tool to Further Public Health, Safety and Welfare While Combating Industrial Agriculture’s Harms

Traditionally, municipalities enacted urban agriculture bans in furtherance of public health and welfare.¹⁵⁸ However, conceptions of harm are beginning to change; now, modern views of health and welfare allow homeowners and renters to use their property for some agricultural purposes.¹⁵⁹ As will be discussed in the following subsection, food that is grown at home is typically healthier than food produced by the industrial agricultural system.¹⁶⁰ Further, allowing urban homesteading also supports the general welfare because a local economy’s health is tied to its food system.¹⁶¹

By allowing residents to use their private property to produce a portion of their food, and to sell their surplus locally, local governments can incrementally reduce reliance on industrially-produced food and in the aggregate avoid related harms.¹⁶² Harms that result from industrial agricultural processes can roughly be divided into two groups: those that impact public health, and those that impact the health of the environment.

¹⁵⁸ *Supra* Part III(b).

¹⁵⁹ Just as municipalities “provide clean drinking water, [and] protection from crime and catastrophe,” they should also be taking steps to ensure that their residents are able to use their property for urban farming. NORDAHL, *supra* note 16, at 89.

¹⁶⁰ Casey Adams, *Why Locally-Grown Food is Healthier*, YAHOO! VOICES, Mar. 31, 2010, <http://voices.yahoo.com/why-locally-grown-food-healthier-5743172.html>.

¹⁶¹ Pothukuchi & Kaufman, *supra* note 26, at 214.

¹⁶² *See, e.g., supra* note 16 and accompanying text (noting that “victory gardens” accounted for up to 40 percent of domestically consumed produce during World War II).

i. Public Health

Pursuant to its police powers, a municipality has the right, and some might argue a duty, to act in the interest of the public health.¹⁶³ Further, municipalities are already intimately involved in a number of food policy issues, including “nutrition education, food stamps, WIC, food health and safety regulation, and school breakfast and lunch programs.”¹⁶⁴ Thus, it is logical that local governments should get involved in the emerging local foods trend, and adopt local policies and regulations to ensure that their residents are able to use their property for urban homesteading purposes without fear of fines or prosecution. Although such policies would leave urban agriculture as a purely voluntary endeavor, it would have a positive impact on local public health for a number of reasons.

1. Food Insecurity

The industrial agricultural system contributes to food insecurity¹⁶⁵ in this country, which will likely become a greater problem as the world’s population increases, and as oil reserves continue to be depleted. This problem could be alleviated if more households grew their own produce or raised chickens for eggs. Thus, local governments should do

¹⁶³ See, e.g., *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 603 (Ark. 1998) (recognizing “the city’s plenary duty to exercise its police power in the interest of the public health and safety of its inhabitants.”); *But Cf.* James G. Hodge, Jr., *An Enhanced Approach to Distinguishing Public Health Practice and Human Subjects Research*, 33 J.L. MED. & ETHICS 125, 130 (2005) (noting that “the federal and most state constitutions do not create any affirmative duty for government to act in the interests of communal health”); *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 195-96 (1989) (“(N)othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”); Joan Comporet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus A Defendant’s Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165, 1234 (2002) (“Under its parens patriae powers, [government] also has a duty to care for its citizens.”).

¹⁶⁴ Pothukuchi & Kaufman, *supra* note 26, at 218.

¹⁶⁵ Food insecure individuals are those “who do not have ‘nutritionally adequate’ and ‘safe food’ available to them and individuals who do not have the ability to acquire these acceptable foods.” Christina Fox, *Teach A Man: Proactively Battling Food Insecurity by Increasing Access to Local Foods*, 4 J. FOOD L. & POL’Y 243, 245 (2008).

what they can to ensure that their citizens have the ability to access or grow enough food to feed their families.¹⁶⁶

The industrial agricultural food production system on which most Americans rely¹⁶⁷ is intimately tied to, and unable to be separated from, oil.¹⁶⁸ Petroleum is used to produce and apply fertilizer, to operate farm equipment, and of course, to move food from farm to plate,¹⁶⁹ as most food sold in the United States is not grown in the community where it is consumed.¹⁷⁰ It may be imported from abroad, or from across the country, but it relies on transportation, which relies on oil.¹⁷¹ The most often cited studies demonstrate that most fresh food and produce travels anywhere from 130 to 2000 miles before it is eaten; the most common figure cited is 1500 miles.¹⁷² Because of the dramatic increase in the price of petroleum, overreliance on oil is dangerous. As the price of oil

¹⁶⁶ Food insecurity, like hunger, is a public health problem, and thus is within the purview of the locality's police powers. *See, e.g.,* Mariana Chilton & Jenny Rabinowich, *Ending Childhood Hunger in America*, 37 A.B.A. J. HUM. RTS. 14 (Winter 2010) ("food insecurity . . . is also a serious public health problem. Food insecurity among children is associated with fair and poor child health, with high hospitalization rates, and with truncated social, emotional, and cognitive development. . . . among teenagers, it is associated with suicidal ideation and depression.").

¹⁶⁷ "[N]inety-eight percent of the food supply in the United States is produced by agribusinesses running industrial farms that employ mechanically and chemically intensive farming methods for the maximization of profit." Peters, *supra* note 22, at 207 (citing Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America's 2007 Farm Bill*, 31 ENVIRONS ENVTL L & POL'Y J. 1, 4 (2007)).

¹⁶⁸ NORDAHL, *supra* note 16, at xiii ("Until communities figure out how to provide for themselves, instead of relying on a handful of petrophilic agribusinesses in remote locations in our country and abroad, our satiety will be tenuous.").

¹⁶⁹ Peters, *supra* note 22, at 230 (contrasting local, sustainably grown agriculture, which is not similarly dependent upon oil).

¹⁷⁰ "Virtually all communities in the United States depend heavily upon imported food, produced far away in climates and soils non-native to the particular locality." Mary Wood, et al., *supra* note 3, at 70 (citing THOMAS A. LYSON, CIVIC AGRICULTURE: RECONNECTING FARM, FOOD AND COMMUNITY 4 (2004)).

¹⁷¹ Because of our industrial agricultural system, we produce a large amount of certain crops, but small amounts of others, which leads us to import those crops from other countries. *See* William S. Eubanks II, *A Rotten System*, 28 STAN. ENVTL. L.J. 213, 237 (2009).

¹⁷² Mary Wood, et al., *supra* note 3, at 71 (citing NATIONAL SUSTAINABILITY AGRICULTURE INFORMATION SERVICE, FOOD MILES: BACKGROUND AND MARKETING (2010)); MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 137 (2006); *But see* Jane Black, *What's In a Number: How the press got the idea that food travels 1,500 miles from farm to plate*, SLATE, Sept. 17, 2008, http://www.slate.com/articles/life/food/2008/09/whats_in_a_number.html (arguing that food miles traveled may be more or less than 1,500 miles depending on the food and the location within the U.S.).

rises, the price of food may also rise, which would lessen the ability of poorer Americans to purchase what they need.¹⁷³

Further, as the population rises, there will be an increasing demand for food production, which may lead to more intensive farming methods and increased use of genetically modified crops to produce larger products in shorter amounts of time.¹⁷⁴ Support for urban homesteading can address some of this increased demand, as it has previously in this country. Historically, food was not produced in cities.¹⁷⁵ However, this changed during World War I, the Great Depression, and World War II, when “victory gardens” became a common feature of urban and suburban residences.¹⁷⁶ Viewed as an act of patriotism so that food could be freed up for shipment overseas, over 20 million individuals grew produce.¹⁷⁷

The existence of those gardens served as an important food security tool¹⁷⁸ because farms in rural areas were not producing enough food to supply domestic homes and also ship food abroad.¹⁷⁹ To ensure success, the government instituted an education and information campaign¹⁸⁰ providing information about planting techniques and

¹⁷³ *Supra* note 168.

¹⁷⁴ The harms that result from industrial agriculture processes such as this are discussed *infra*, Part IV(a)(ii).

¹⁷⁵ Pothukuchi & Kaufman, *supra* note 26, at 215. (“‘A city is a human settlement whose inhabitants cannot produce, within the city limits, all of the food that they need for keeping them alive’ []. ‘Urban’ thus came to be defined in early twentieth century texts as non-agricultural, thereby conceptually distancing food as an urban issue.”) (citing ARNOLD J. TOYNBEE, *CITIES ON THE MOVE*, 8 (1970)).

¹⁷⁶ Mukherji & Morales, *supra* note 17, at 2.

¹⁷⁷ Greening Food Deserts, H.R. 4971, 111th Congress, § 2(a)(20) (2010); BENTLEY, *supra* note 16, at 117; NORDAHL, *supra* note 16, at 136.

¹⁷⁸ Mukherji & Morales, *supra* note 17, at 2.

¹⁷⁹ NORDAHL, *supra* note 16, at 17 (“The agriculture and gardening efforts during [] periods of crisis were initiated to help secure our food supply, and the government looked to urban means of food production to supplement the rural farms that were unable to keep up with domestic demand.”).

¹⁸⁰ Endres & Endres, *supra* note 121, at 417 (describing a “massive public information campaign that appealed to American patriotism to ‘put all idle land to work’ . . . [and] programs that educated Americans how to grow and process food.”); *see also* NORDAHL, *supra* note 16, at 118. The program was coordinated between federal, state, and local entities. *See Victory Gardens to Bloom in the U.S.*, N.Y. TIMES, Jan. 12, 1942, at 19.

nutrition, while state universities provided radio broadcasts discussing how to garden.¹⁸¹ Therefore, urban agriculture is “a return to the past American tradition,”¹⁸² and should not be viewed as implausible or unexpected.

Local governments can look to the success of victory gardens during those former times of food insecurity, and apply similar educational techniques to urban farming today.¹⁸³ In communities that allow urban agriculture, an individual only needs a small plot of land and a small amount of money to set up a garden, or purchase or construct a suitable chicken coop.¹⁸⁴ Seeds and seedlings can often be obtained from neighbors, and chickens can be adopted from shelters. After that, access to food is readily available, thus alleviating some insecurity.¹⁸⁵

2. Food Deserts

¹⁸¹ NORDAHL, *supra* note 16, at 118; Endres & Endres, *supra* note 121, at 418, n. 124 (“[T]he University of Illinois [] Extension Service provided a weekly seasonal broadcast on victory gardening”). Similar educational techniques could be used today if localities decided to encourage urban agriculture.

¹⁸² MARY WOOD ET AL., *supra* note 12, at 19 (noting that during WWII, the “government appealed to homeowners nationally to raise their own chickens for food security”). There were, however, food rations at that time for foods that were in short supply. Endres & Endres, *supra* note 121, at 415-6. Further, it is unknown whether high levels of productivity would be sustained outside of wartime.

¹⁸³ Others have suggested that local governments have a role to play in supporting urban agriculture as a means of food security. *See, e.g.*, Peters, *supra* note 22, at 205 (“In the face of environmental, economic, and social equity challenges, it is imperative that the government . . . establish policies that promote sustainable urban agriculture to ensure access to an adequate food supply produced with minimal impact on the environment.”).

¹⁸⁴ One problem is that many of the most food-insecure in the U.S. do not own their own homes; perhaps they rent or live in public housing. Thus, their ability to use their land for urban agricultural purposes might be limited by rental agreements. Further, if they live in high-density, inner-city housing, there is often little to no outdoor space on which to conduct many of these activities. However, there have been tales of individuals growing vegetables in window boxes and keeping chickens inside apartments. *See, e.g.*, Clare Trapasso, *Chickens born and bred in one-bedroom apartment as part of couple’s local food routine*, MY DAILY NEWS, Oct. 2, 2011, http://articles.nydailynews.com/2011-10-02/local/30247953_1_chicken-keeping-local-food-eggs. Further, though it is beyond the scope of this Article, community gardens can serve some goals for individuals who lack the space or funds to start their own urban agricultural endeavor. *See, e.g.*, *Garden Program*, NEW YORK CITY HOUSING AUTHORITY, <http://www.nyc.gov/html/nycha/html/community/garden.shtml> (last visited Feb. 11, 2012).

¹⁸⁵ Of course, in certain climates, little can be grown during the winter months, and egg production in older hens may slow down.

Closely tied to the problem of food insecurity is that of food deserts.¹⁸⁶ Industrial agriculture combined with restrictive zoning results in a highly concentrated system of food production that is geographically removed from urban areas. Before zoning, a person could walk down the street to a farm stand or neighborhood produce market. This is no longer true in many urban and suburban neighborhoods,¹⁸⁷ and even in some rural areas.¹⁸⁸ Thus, even if an individual has the money or desire to purchase whole, healthy foods, she may not have access to those items. Many areas lack farmers' markets, produce stands, and even grocery stores.¹⁸⁹ Instead, people in these communities buy their food at fast food restaurants, convenience stores and gas stations. And even if there is a grocery store in a low-income area, research shows that it likely has a smaller and poorer quality selection of produce than a similar store in a wealthier neighborhood.¹⁹⁰

There is a role for governments to play in alleviating the problem of food deserts, and some states have been investing in programs to do so. For example, a Philadelphia non-profit has used state funding to create stores in underserved communities that can

¹⁸⁶ Sarah B. Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 COLO. L. REV. (forthcoming 2012) (discussing food deserts); Avi Brisman, *Food Justice as Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 8-11 (2009).

¹⁸⁷ Michael Correll, *Getting Fat on Government Cheese: The Connection Between Social Welfare Participation, Gender, and Obesity in America*, 18 DUKE J. GENDER L. & POL'Y 45, 59-60 (2010).

¹⁸⁸ Salkin & Lavine, *supra* note 9, at 609; Avi Brisman, *It Takes Green To Be Green: Environmental Elitism, "Ritual Displays," And Conspicuous Non-Consumption*, 85 N. DAK. L. REV. 329, 360 n. 207 (2009).

¹⁸⁹ See generally Correll, *supra* note 187; Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935 (2010). See also *Your Food Environment Atlas*, U.S. DEP'T AGRIC., <http://maps.ers.usda.gov/FoodAtlas/foodenv5.aspx> (last visited Feb. 11, 2012).

¹⁹⁰ Dunn, *supra* note 134, at 52-53 (citing Mark Vallianatos et al., *Transportation and Food: The Importance of Access*, URBAN & ENVTL. POL'Y INST. 2 (2002), http://departments.oxy.edu/uepi/cfj/publications/transportation_and_food.pdf); see also *Moving To Opportunity for Fair Housing Demonstration Program: Final Impacts Evaluation*, U.S. DEP'T HOUS. & URBAN DEV. XII (Oct. 14, 2011), http://www.huduser.org/publications/pdf/MTOFHD_fullreport.pdf (moving from a low- to a higher-income community decreases risk of diabetes and obesity).

provide low cost, healthy food.¹⁹¹ Municipalities have also been attempting a variety of techniques to eliminate food deserts, including support for community gardens.¹⁹² A locality's support for and promotion of voluntary urban homesteading is another way to alleviate the food desert problem.¹⁹³ Because of existing ordinances, many people who live in food deserts are unable to grow their own food in quantities sufficient to feed their families. A locality adopting a policy promoting urban agriculture could include an educational component to aid low-income families in planting and harvesting an urban garden, or to teach school-age children about urban gardening. If these individuals are able to grow their own food, they can save money that would otherwise be spent buying processed foods from a convenience store, and gain the added bonus of contributing to a healthier diet.¹⁹⁴ Further, if they produce more than they can consume, they can sell the

¹⁹¹ MARK WINNE, CLOSING THE FOOD GAP: RESETTling THE TABLE IN THE LAND OF PLENTY 187 (2008) (noting that these stores “will [] pay off in new property taxes and jobs for those communities”).

¹⁹² See, e.g., Salkin & Lavine, *supra* note 9, at 613 (Chicago “set[] a goal of eliminating food deserts by 2040 . . . [by] support[ing] programs for farmers markets, farm carts and stands, fresh food delivery trucks, food cooperatives, direct sales from community gardens, and other alternative retail options.”); see also Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 195-6 (2008) (Pennsylvania enacted the Fresh Food Financing Initiative in 2004 to “encourage[] public and private funding for supermarket development across that state” and New Mexico created a task force to foster ““a state-financed revolving loan fund that helps cash strapped store owners in rural areas purchase produce coolers or even loading docks.””); Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 44-5 (2010) (The “2008 Farm Bill expanded the USDA Fresh Fruit and Vegetable Snack Program in Schools, which may help reduce participants’ purchases at corner stores after school.”); Anupama Prasad, et al., *Recent Developments in Environmental Law*, 24 TUL. ENVTL. L.J. 423, 444 (2011) (Walmart’s Health Food Initiative aims to eradicate food deserts by constructing new stores in underserved areas).

¹⁹³ LaCroix, *Urban Agriculture*, *supra* note 25, at 236 (“the city’s goals in fostering urban gardens are two-fold: gardening is by itself a productive use of land, and [] the city is concerned about inner city ‘food deserts’”).

¹⁹⁴ Brisman, *supra* note 186, at 42 (arguing that “eliminating food deserts and working towards food justice has the potential for positive public health outcomes and, in the process, to possibly prevent and reduce crime”).

surplus at a local market or to a neighbor, thus supplementing their income, contributing to community cohesiveness, and helping to alleviate the food insecurity of others.¹⁹⁵

3. Obesity, Processed Foods, and the Role of the State

The industrial food complex has resulted in food insecurity and food deserts, both of which are partially to blame for a trifecta of major American health problems: obesity, Type II diabetes, and heart disease.¹⁹⁶ Industrial food is often processed, packaged food. Moreover, because U.S. agriculture policy currently rewards the overproduction of corn, much excess corn is turned into high fructose corn syrup, which is included in a large number of processed foods, and has been shown to play a factor in both diabetes and obesity.¹⁹⁷ Many people would rather spend less for more calories. This is why fast food—high in calories but low in nutrition—is so popular.¹⁹⁸ It is often easier, cheaper, and less time-consuming to buy packaged peanut-butter that is loaded with sugar and oils than it is to grind fresh peanuts, or to buy a hamburger and fries than to cook a meal that entails washing, chopping and cooking vegetables and grains.¹⁹⁹ It is naïve to believe that

¹⁹⁵ Mukherji & Morales, *supra* note 17, at 2 (“The produce is sold to neighborhood residents who might not otherwise have access to inexpensive fresh produce.”).

¹⁹⁶ Morales & Kettles, *supra* note 76, at 30 (citing *The Burden of Chronic Diseases and Their Risk Factors: National and State Perspectives*, Ctr. Disease Control, at 29 & 44 (2004)) (“[T]wo interrelated factors dominate the food/health integument: diminished access to healthy food and the rise of industrial food. Taken together, the two are believed to produce serious health problems, such as obesity and Type II diabetes.”). *See also supra* note 190.

¹⁹⁷ Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in A Changing Global Environment*, 17 GEO. MASON L. REV. 593, 612 (2010); George A. Bray, et al., *Consumption of High-Fructose Corn Syrup in Beverages May Play a Role in the Epidemic of Obesity*, 79 AM. J. CLINICAL NUTRITION 537, 537 (2004).

¹⁹⁸ Andrea Jezovit, *Cheap Twix: Junk food offers more calories for your cash*, GRIST, Aug. 8, 2011, <http://grist.org/food/2011-08-08-cheap-twix-more-calories-for-your-cash-in-the-junk-food-aisle/> (citing Adam Drewnowski’s research, finding that one “dollar could purchase 1,200 calories of cookies or potato chips, but only 250 calories of carrots.”).

¹⁹⁹ *See generally* NORDAHL, *supra* note 16, at 35 (“obesity is the result of food insecurity here in America. . . it is the abundance of cheap calories derived from processed and fast food vis-à-vis the inaccessibility of fresh, wholesome, nutrient-dense foods at an affordable price that is responsible for the poor health of this nation’s citizens”).

local governments will change these habits overnight by adopting a policy that allows and supports urban agriculture. However, such a policy could provide an alternative source of healthy food that could combat obesity;²⁰⁰ foods produced in a residential backyard—vegetables, fruits, and eggs—are healthier than processed foods that are easily purchased.²⁰¹

Some municipal governments have begun taking steps to alleviate the obesity epidemic in their communities. Many of these ordinances focus not on urban agriculture, but on the regulation of fast food restaurants and their menus. For example, Los Angeles recently enacted a moratorium on the construction of new fast food restaurants.²⁰² The stated justifications in support of the moratorium were that the formula retail structures are designed in a way that does not mesh with the neighborhood character, have too much signage and parking, and have a negative aesthetic impact.²⁰³ The subtext of the ordinance’s enactment was that fast-food restaurants cause health problems, and health-related concerns are a valid exercise of the city’s police power.²⁰⁴ Similarly, after expressly finding that “the presence of industrially-produced trans fat in foods prepared

²⁰⁰ For example, funding that currently goes to programs, *supra* note 191, could be redirected toward teaching people to grown their own food. It is questionable whether pro-urban agriculture policies will make a difference in the areas where industrial-food-related public health maladies are occurring; are low-income people in food insecure areas the ones who want urban gardens? Regardless, if they are permitted to have them, and if energy is invested in educating these communities about the positive health impacts from urban agriculture, change is possible. Further, some of these bans do exist in neighborhoods with problems discussed in this section. For example, Novella Carpenter authored a book about “urban homesteading in an impoverished area of Oakland, California,” and she herself has been the target of repressive city policies aimed at curbing urban agriculture. MARY WOOD ET AL., *supra* note 12, at 17 (discussing NOVELLA CARPENTER, *FARM CITY: THE EDUCATION OF AN URBAN FARMER* (2009)). So, although these neighborhoods are not necessarily at the forefront of the locavore movement, they could benefit from policies that support the movement.

²⁰¹ Michael Pollen, *Unhappy Meals*, NEW YORK TIMES, Jan. 28, 2007, <http://michaelpollan.com/articles-archive/unhappy-meals/>.

²⁰² L.A., Cal., Ordinance 180103 (July 29, 2008).

²⁰³ *Id.*

²⁰⁴ Eloisa C. Rodriguez-Dod, *It’s Not a Small World After All: Regulating Obesity Globally*, 79 MISS. L.J. 697 (2010) (discussing ordinances that prohibit fast food restaurants); Allyson C. Spacht, Note, *The Zoning Diet: Using Restrictive Zoning to Shrink American Waistlines*, 85 NOTRE DAME L. REV. 391 (2009).

in food shops poses a threat to the public health,” Cleveland adopted an ordinance that banned the use of industrially manufactured trans-fat-laden foods in certain shops, and required labeling and documentation of that information.²⁰⁵

Although local governments have the potential to advance public health through food policy, they should consider the role that their states play before adopting legislation in this area. In some states, food policy is very much a state issue,²⁰⁶ and there are emerging preemption concerns. For example, in New York, a state law pertaining to multiple dwelling units prohibits the keeping of rabbits, goats or chickens unless a local government regulation expressly allows it.²⁰⁷ South Carolina passed a law stating that “[a]ll local laws and ordinances related to the regulation of and the enforcement of the care and handling of livestock and poultry in this State are preempted and superseded.”²⁰⁸ It appears that such a law might prohibit backyard chicken ordinances that regulated the size and location of chicken coops, or the treatment of the chickens themselves. In Georgia, a proposed bill would have preempted local ordinances addressing agriculture,²⁰⁹ and prohibited the sale of homegrown vegetables or animal products.²¹⁰

²⁰⁵ Cleveland, Ohio, Ordinance 474-11 (Apr. 25, 2011). This ordinance is threatened by the subsequent adoption of a state preemption statute. H.B. 153, 129th Gen. Assemb., Reg. Sess. § 3717.53, .54 (Ohio 2011).

²⁰⁶ Of course, the federal farm bill sets food policy at a national level. Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong. (2008). For a summary of problems with the current subsidized industrial agriculture system and the Farm Bill, see William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10493 (2009) (“By encouraging large-scale, monoculture megafarms, a subsidized industrial agricultural system leads to severe environmental consequences such as water pollution from fertilizer and pesticide runoff, soil erosion, and effects on wildlife and biodiversity, such as fragmented habitats and species decline.”); Peters, *supra* note 22, at 208 (discussing “large, monocultural farms heavily reliant on chemical pesticides and fertilizers, mechanization, and irrigation”).

²⁰⁷ N.Y. MULT. DWELL. LAW § 12(2).

²⁰⁸ Elizabeth R. Springsteen, *A Proposal to Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L. 437, 457-58 (2009); S.C. CODE ANN. § 47-4-160 (2009).

²⁰⁹ Notably, the purpose of this bill was to prohibit localities from banning or requiring permits in order to grow or raise crops, chickens, rabbits or goats on private property, subject to certain lot size restrictions. H.B. 842, Gen. Assemb., Reg. Sess. (Ga. 2010).

Municipalities should also be aware that some states have passed new preemption laws that curb the ability of a municipality to regulate obesity. These laws typically preclude local regulation of restaurant menus, meal contents, and labeling.²¹¹ Thus, a locality that plans to justify its urban agriculture plan as a form of regulation in furtherance of public health and food choice should first determine whether its state has adopted such a law, and if so, how broad it is.²¹²

For example, the Ohio legislature recently passed a law saying that a municipality cannot require a restaurant to provide health information about its menu items, nor can it pass local ordinances that address “food-based health disparities.”²¹³ A 2010 Tennessee state statute prohibits localities from enacting ordinances or rules “pertaining to the provision of food nutritional information” or regulating menus in any other way.²¹⁴ In Arizona, the legislature recently enacted a statute prohibiting localities from regulating the use of “consumer incentives”—things like toys, games, coupons, or prizes—associated with a meal, such as those that come with Happy Meals.²¹⁵ The Arizona law was enacted in response to ordinances, like that passed in Santa Clara, California, whose

²¹⁰ *Id.* On Mar. 11, 2010, the “House Committee [f]avorably [r]eported.” *HB 842 – Agriculture; preempt certain local ordinances; protect right to grow food crops; provisions*, GEORGIA GENERAL ASSEMBLY, http://www1.legis.ga.gov/legis/2009_10/sum/hb842.htm (last visited Feb. 23, 2012).

²¹¹ *See, e.g.*, FLA. STAT. § 509.032(7)(a) (“The regulation of public lodging establishments and public food service establishments, including . . . matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state”); ALA. CODE § 20-1-10(a) (2011) (“The subject matter of the regulation of nutrition labeling of food that is a menu item in restaurants, retail food establishments, and vending machines is reserved to the Legislature and may be regulated only by an act of the Legislature of statewide application enacted after June 9, 2011); GA. CODE ANN. § 26-2-373 (“no county board of health or political subdivision of this state shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments”).

²¹² If a preemption law does exist, perhaps the best justification for urban agriculture programs is based in civic virtue or efficiency (discussed *infra* Part IV(c)).

²¹³ *See* H.B. 153, 129th Gen. Assemb., Reg. Sess. § 3717.53, .54 (Ohio 2011); Stephanie Strom, *Local Laws Fighting Fat Under Siege*, N.Y. TIMES, June 30, 2011, <http://www.nytimes.com/2011/07/01/business/01obese.html>.

²¹⁴ TENN. CODE ANN. § 68-14-303(3) (2010); *see also* UTAH CODE ANN. § 10-8-44.5(1) (“A municipality may not regulate the dissemination of nutritional information or the content required to be placed on a menu, menu board, or food tag by a restaurant, eating establishment, or other food facility.”).

²¹⁵ ARIZ. REV. STAT. ANN. § 44-1380 (2011).

purpose is “to improve the health of children and adolescents in the County by setting healthy nutritional standards for children’s meals accompanied by toys or other incentive items.”²¹⁶

These state-level preemption laws are problematic because they may discourage cities from adopting wide-ranging urban agriculture policies and regulations. However, localities would have a strong argument that they should not apply to urban agriculture ordinances. If an overriding goal of the state statutes is to protect restaurants from having to comply with a patchwork or “crazy quilt” of local regulations,²¹⁷ that goal would not be affected by individuals raising chickens or vegetables in their yards. If such an argument is unsuccessful, and if states continue to prohibit localities from enacting regulations that might serve to reduce the obesity epidemic that plagues so many communities in this country, we run the risk of stifling a possible path to change.

While some commentators have set forth proposals for change at the federal level,²¹⁸ federal farm subsidies are deeply entrenched, and thus far no change is forthcoming (although Congress recently renounced support for ethanol corn

²¹⁶ SANTA CLARA CNTY., CAL., CODE §§ A18-350 - A18-355 (2011).

²¹⁷ *Utah may ban regulation of nutritional info*, IFT, Feb. 27 2009, <http://www.ift.org/Food-Technology/Daily-News/2009/February/27/Utah-may-ban-regulation-of-nutritional-info.aspx> (Senator who sponsored bill said menu labeling rules “should apply statewide, if at all”). See also Strom, *supra* note 213 (National Restaurant Association believed it was in “the best interests of the consumer to have one uniform standard.”); *Town of Mt. Pleasant, Racine County v. City of Racine, Racine County*, 127 N.W.2d 757, 760 (Wis. 1964).

²¹⁸ Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong. (2008). See, e.g., Margaret Sova McCabe, *Foodshed Foundations: Law’s Role In Shaping Our Food System’s Future*, 22 FORDHAM ENVTL. L. REV. 563, 575 (2011) (observing that “[e]vidence of federal domination is abundant” and advocating for implementation of a “regional foodshed compact”); Adam Benforado, et al., *Broken Scales: Obesity And Justice In America*, 53 EMORY L.J. 1645, 1793 (2004) (criticizing “[t]he availability of cheap corn [and how it] has reshaped the entire universe of the food industry, as well as the universe of food in our society,” particularly with regard to obesity); Sarah Harwood, Note, *United States Farm Bill - An Antiquated Policy?*, 88 U. DET. MERCY L. REV. 377 (2010) (discussing harms created by subsidies); Angelo, *supra* note 197, at 645-46 (suggesting a “complete rethinking of commodity subsidy programs”).

subsidies).²¹⁹ And while state-level policies can guide local governments in their consideration of urban agriculture policies, they may not be as successful as the policies put in place by local governments themselves. Real change can happen—and is happening—at the local level.²²⁰

4. Food Safety

It is impossible to talk about industrial food and public health without briefly mentioning food safety. Although experts debate whether small and/or urban farms really produce safer food than large industrial agriculture does, the main argument is that the purchaser knows the farmer, so if there is a problem, it is easily traceable and will not have national impacts like some of the recent E-coli outbreaks.²²¹ Further, some pathogens are caused by animal feces that get into water that is then used for crop irrigation; this is less likely in urban centers and suburbs, which typically contain fewer animals, and where crops are often watered with potable municipal water.²²² Finally, research has demonstrated that chickens that are raised in stressful environments, such as those found on factory farms, are more likely to produce eggs containing harmful

²¹⁹ *Congress ends era of ethanol subsidies*, NPR, Jan. 3, 2012, <http://www.npr.org/2012/01/03/144605485/congress-ends-era-of-ethanol-subsidies> (“Congress let the formerly sacred subsidies expire after more than 30 years and about \$20 billion.”).

²²⁰ NORDAHL, *supra* note 16, at 126 (“Centralized policies, regardless of their reform aims, tend to be of a one-size-fits-all mold. Such a policy regarding food would likely erase the unique traditions and customs of our celebrated ethnic diversity expressed through food and cuisine . . .”).

²²¹ MARY WOOD ET AL., *supra* note 12, at 9 (“disease outbreaks in locally produced food systems are more isolated and therefore more contained”); How to Protect Yourself from Food Poisoning, ABC News, July 17, 2011, <http://abcnews.go.com/Health/Wellness/protect-food-poisoning/story?id=14022017#.TznHQsrBwfo> (“It’s hard to find the exact source of a food-borne illness because it typically takes two to three days for the first symptoms of an infection to appear. . . . ‘Moreover, contamination might not be from a specific farm or food, but from a point of distribution.’”).

²²² NORDAHL, *supra* note 16, at 28. *Compare What to Do with Urban Chicken Poop?*, URBAN CHICKENS, Feb. 5, 2009, <http://www.urbanchickens.net/2009/02/what-to-do-with-urban-chicken-poop.html> (discussing concerns of phosphorous run-off into water supplies from chicken feces) *with Benefits of Urban Chickens*, URBAN CHICKENS, <http://urbanchickens.org/benefits-urban-chickens> (discussing benefits that the high nitrogen content of chicken feces has on compost).

bacteria, such as salmonella.²²³ Thus, some suggest that backyard chickens are less likely to produce harmful eggs.²²⁴

ii. Environmental Harm

While the public health problems that industrial agriculture visits upon communities are serious, the environmental harms are just as noxious. And just as many of the public health problems addressed above can be alleviated through a shift in focus from national, industrial agriculture to local, urban homesteading, many of the environmental harms that result from industrial agriculture can be dramatically reduced through a renewed focus on, and governmental support for, urban agriculture. The city of San Francisco has recognized this by setting forth a goal of “[r]educ[ing] the environmental impacts associated with food production, distribution, consumption, and disposal by increasing our reliance on regional and sustainable food resources.”²²⁵ Other municipalities should follow suit.

1. Food Miles Traveled and Climate Change

A common rallying cry of the locavore movement relates to “food miles traveled,” or FMT. Processed food typically has to be shipped long distances to reach its

²²³ *An HSUS Report: Food Safety and Cage Egg Production*, THE HUMANE SOC’Y OF THE U.S., www.humanesociety.org/assets/.../farm/report_food_safety_eggs.pdf.

²²⁴ *Id.* at 5 (finding “no Salmonella in eggs from either [barren caged birds or cage-free hens] or a trend towards higher infection rates in eggs from caged hens compared to barn-raised birds”); *infra* note 253. *But see* James McWilliams, *Backyard Chickens: A Trend Coming Home to Roost?*, FREAKONOMICS, July 27, 2011, <http://www.freakonomics.com/2011/07/27/backyard-hens-a-trend-coming-home-to-roost/> (“To the best of my knowledge . . . nobody has calculated comparative rates of infection between backyard and industrialized birds.”).

²²⁵ *The Final Recommendations of the San Francisco Urban-Rural Roundtable*, ROOTS OF CHANGE, 8 (May 15, 2009), http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy_reports/FinalURRRecommendations0709.pdf [hereinafter *Final Recommendations*].

destination.²²⁶ Thus, locavores put a great deal of stock in how far food must travel, typically on oil-burning trucks that drive thousands of miles on asphalt highways, but more frequently now on ships and planes as well. Some locavores will only eat food grown within 100 miles of their homes.²²⁷ There are a number of reasons for this: the food will be fresh and can be eaten soon after harvest; it will be in season; and because it will have traveled only a short distance, it will have a light carbon footprint.

However, some recent studies are refuting the carbon footprint element of the FMT calculation as too simplistic.²²⁸ Specifically, FMT fails to take into account the energy used in producing the food—the phase in which some argue the most greenhouse gases are released—and only considers the energy used in transporting it.²²⁹ Rather, perhaps the most efficient use of resources, and the smallest use of energy, is to grow food where it grows best—for example, do not heat a greenhouse to grow tomatoes in Maine in the middle of winter—and worry less about transportation costs.²³⁰

²²⁶ Czarnezki, *supra* note 133, at 271 (discussing the “the negative environmental impact of food packaging and shipping”).

²²⁷ See, e.g., Burros, *supra* note 15.

²²⁸ See generally JAMES E. MCWILLIAMS, *JUST FOOD: WHERE LOCAVORES GET IT WRONG AND HOW WE CAN TRULY EAT RESPONSIBLY* (2010); Christopher L. Weber & H. Scott Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 ENVTL. SCIENCE & TECH. 3508 (2008).

²²⁹ See Caroline Saunders et. al., *Food Miles – Comparative Energy/Emissions Performance of New Zealand’s Agriculture Industry*, Research Report No. 285, 93 (July 2006), www.lincoln.ac.nz/documents/2328_rr285_s13389.pdf (calling the FMT calculation “spurious”); Vasile Stanescu, “Green” Eggs and Ham? *The Myth of Sustainable Meat and the Danger of the Local*, 3 JOURNAL FOR CRITICAL ANIMAL STUDIES 9 (2010) (describing the “false pastoral narrative” associated with locavorism); Weber & Matthews, *supra* note 228 (cited by Stanescu, *supra* note 229, at 12-3).

²³⁰ See Stephen Budiansky, *Math Lessons for Locavores*, OP-ED, N.Y. TIMES, Aug. 19, 2010, <http://www.nytimes.com/2010/08/20/opinion/20budiansky.html> (“The best way to make the most of these [] resources of land, favorable climates and human labor is to grow lettuce, oranges, wheat, peppers, bananas, whatever, in the places where they grow best and with the most efficient technologies—and then pay the relatively tiny energy cost to get them to market, as we do with every other commodity in the economy.”) Further, Professor Glaeser’s recent op-ed cautions that urban agriculture could result in lower density, which actually means more greenhouse gas emissions. Edward L. Glaeser, *The Locavore’s Dilemma: Urban farms do more harm than good to the environment*, BOSTON GLOBE, June 16, 2011, http://articles.boston.com/2011-06-16/bostonglobe/29666344_1_greenhouse-gas-carbon-emissions-local-food (“Urban farms mean less people per acre which in turn means longer drives and more gasoline

Even if one were to accept that FMT is a false indicator of environmental health or greenhouse gas contributions,²³¹ individuals who grow their own produce and harvest their own eggs still contribute less to climate change than those who purchase those same products at a grocery store.²³² For example, chickens that roam in a backyard consume bugs, weeds and slugs, reducing “the need for [petro-chemical-based] commercial slug bait, pesticides, and herbicides,” and the pollution associated therewith.²³³ Chickens also consume food scraps, which reduces the amount of food waste thrown away. In contrast, many processed foods are also packaged foods. This means that the packaging must be created, which takes energy,²³⁴ and once the food is used, the packaging must be disposed of or recycled, both of which fall on the city.²³⁵ So, adopting a policy that promotes urban agriculture should have an overall positive impact on a community’s carbon footprint.²³⁶

2. Monocultures

consumption.”). Because population is increasing and global hunger is a real problem, all these environmental issues should be considered together.

²³¹ *Supra* notes 228 - 230.

²³² See *The Issues: Fossil Fuel and Energy Use*, SUSTAINABLE TABLE, <http://www.sustainabletable.org/issues/energy/> (last visited Feb. 27, 2012). Further, gas is saved by not having to drive to the grocery store as frequently. John Reinhardt, *Will a Spike in Gas Prices Pique Interest in Urban Gardens?*, SUSTAINABLE CITIES COLLECTIVE, Mar. 29, 2011, <http://sustainablecitiescollective.com/growninthecity/23018/will-spike-gas-prices-pique-interest-urban-gardens>.

²³³ MARY WOOD ET AL., *supra* note 12, at 20.

²³⁴ Andrew Martin, *If It’s Fresh and Local, Is It Always Greener?*, N.Y. TIMES, Dec. 9, 2007, <http://www.nytimes.com/2007/12/09/business/yourmoney/09feed.html> (citing research of Tom Tomich, Director of the University of California Sustainable Agriculture Research and Education Program, and noting that locavores should also consider how food is packaged, grown, and processed).

²³⁵ Mary Wood, et al., *supra* note 3, at 71.

²³⁶ See, e.g., *Davis Climate Action & Adaptation Plan*, CITY OF DAVIS, <http://cityofdavis.org/cdd/sustainability/DCAAP/ClimateActionPlan.cfm> (last visited Feb. 13, 2012) (Davis plan “is designed to place the community on a path to achieve [] greenhouse gas emission reduction targets”); *HowLowCanAVLGo?: Raise the Bar. Lower the Carbon*, ASHVILLE NCV, <http://www.ashevilenc.gov/Departments/Sustainability.aspx> (last visited Feb. 13, 2012) (“City Council passed a resolution committing to reduce the municipal carbon footprint 80% by the year 2050 and requiring a strategic plan to lead this effort.”).

Scientists and commentators are beginning to recognize the environmental harms and potential catastrophe that monocropping,²³⁷ a common agribusiness practice, may cause.²³⁸ Two scholars succinctly explain why a small, diversified, urban food system is better for the environment than the current industrial system:

The typical mono-cropping, coupled with reliance on fossil fuels and long range transportation networks, create a complicated and inflexible system that lacks resiliency. . . . A complex system, on the other hand, consisting of multiple local/regional food systems is more resilient, as redundancies and adaptive institutions may compensate for the failure of one ‘gear’ in the system.²³⁹

Permitting residents to use their property for small-scale agriculture contributes to this safer, more complex system. Moreover, because many urban homesteaders practice organic gardening techniques, eschewing chemical fertilizers, and often plant heirloom seeds, the biodiversity of the crops they are growing is preserved.

3. Water Runoff and Pesticides

Intensive industrial agriculture uses a lot of water, which can carry chemical fertilizers and pesticides into waterways, contributing to pollution.²⁴⁰ Indeed, a number of cities have recognized the harms pesticides impose on city waterways, and have thus

²³⁷ “Industrial monocultural farming focuses on large-scale production of a single crop; as a result, land is overcultivated, crops are not rotated, and cover crops that protect topsoil between growing seasons are not employed.” Peters, *supra* note 22, at 210.

²³⁸ See generally Matthew Rich, *The Debate Over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 CASE W. RES. L. REV. 889 (2004); Harwood, *supra* note 218; Angelo, *supra* note 197, at 606 (noting that the “shift from perennial rotation of crops to large single crop monocultures, such as most corn fields, has led to erosion of topsoil”); Helena Norberg-Hodge, *Global Monoculture: The Worldwide Destruction of Diversity*, in FATAL HARVEST: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 13. “Industrial farming techniques such as over-tilling, a lack of crop rotation, inorganic fertilizers, pesticides, and monoculture mines the soil of its natural nutrients, destroys soil biota and its habitat, and increases erosion.” Czarnezki, *supra* note 133, at 263-4.

²³⁹ Endres & Endres, *supra* note 121, at 406-07.

²⁴⁰ Angelo, *supra* note 197, at 606 (noting that “more than two billion tons of sediment enter the nation’s waterways each year. . . [which] can clog streams and fill in shallow areas in water bodies, thereby reducing habitat and light availability to submersed plants.”).

banned their application on city-owned and maintained properties.²⁴¹ Further, monocropping results in large swaths of simultaneously and uniformly farmed land, which increases the likelihood of runoff traveling “from one bare field [] across many.”²⁴² In contrast, small urban garden plots and chicken coops often require less water than a standard lawn, thus reducing the municipal water supply burden.²⁴³ Further, because fewer petrochemicals are used on urban garden plots, the likelihood of tainted water reaching waterways is reduced.²⁴⁴

Lawns, which are often treated with chemicals, are another key contributor to urban and especially suburban water pollution, negatively impacting water quality due to stormwater and irrigation runoff.²⁴⁵ Despite these problems, lawns are the number one irrigated crop in the United States, and watering them consumes vast amounts of potable municipal water.²⁴⁶ Some localities have taken action against these practices. Las Vegas has limited the planting of new yards,²⁴⁷ while other cities require a property owner to

²⁴¹ See, e.g., Arcata, Cal., Ordinance 1300 (Mar. 31, 2000) (finding that “[t]he migration of pesticides into the City’s watercourses, water bodies and wetlands poses a severe threat to the health of the environment” and banning “pesticides on or in any city owned, operated or maintained property”); Fairfax, Cal., Ordinance 686 (Mar. 2, 2001) (banning pesticide use by the town on “parks, open space parcels and public rights of way and buildings owned and maintained by the Town”); San Francisco, Cal. Code §§ 302-304 (calling for a phased reduction in pesticide use); Albany, N.Y., Ordinance 34.5.11(MC) (June 6, 2011) (same).

²⁴² Johan Boardman, et al, *Socio-economic Factors in Soil Erosion and Conservation*, 6 ENVTL. SCIENCE & POL’Y 3 (2003).

²⁴³ “Growing a plot of vegetables can actually reduce a front yard’s water consumption and benefit the community in drier times.” Cary, *supra* note 41.

²⁴⁴ However, cities should carefully regulate disposal of animal feces, as this type of pollutant is “more likely to reach surface waters in urban areas” than rural. Dave Owen, *Urbanization, Water Quality, And The Regulated Landscape*, 82 COLORADO L. REV. 431 (2011).

²⁴⁵ *Did you know... Growing Vegetables in Your Front Yard is Against the Law?*, *supra* note 43. Pesticide loadings from suburban and urban areas are often higher than agricultural areas. For example, in New York City, pesticide use for lawn care exceeds use for agricultural activities. *New York City*, ENVTL. ADVOCATES, http://www.envadvocates.org/public_html/Pest/Toxic_Treadmill/nyc.html (last visited Feb. 14, 2012).

²⁴⁶ *Did you know... Growing Vegetables in Your Front Yard is Against the Law?*, *supra* note 43.

²⁴⁷ LAS VEGAS, NEV., MUNICIPAL CODE §§ 14.11.140 (2003) (prohibiting new turf in non-residential areas and common areas of single and multi-family residential areas) & 14.11.150 (2003) (prohibiting new turf in residential front yards).

notify her neighbors if she plans to use pesticides.²⁴⁸ Localities could go further: by allowing or encouraging residents to replace their lawns with native plantings or edible crops, many of these harms could be reduced, thereby contributing to sustainability goals.

4. Animal Welfare

Finally, the meat-industrial complex results in dramatic harm to animals, and in turn to the humans who consume them and their products.²⁴⁹ While a discussion of the abuse and suffering that takes place in factory farms is beyond the scope of this Article, a few points should be made. First, many people who raise backyard chickens for eggs interact with these traditional “food” animals on a personal level, often viewing them as pets.²⁵⁰ These interactions could lead to changed perceptions, and perhaps treatment, of traditional “food” animals.

Further, there is a well-documented link between animal abuse and violence towards humans.²⁵¹ By integrating people with non-human animals through urban

²⁴⁸ See, e.g., Fairfax, Cal., Ordinance 686 (Mar. 2, 2001) (requiring 48 hours notice of pesticide application on private property to neighbors); 17 N.Y. CITY ADMIN. CODE §§ 1101 – 1104 (same).

²⁴⁹ For a discussion of the harms associated with factory farming, see A. Christine Green, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799 (2008) (criticizing corporate organic factory farms); Ani B. Satz, *Animals As Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, And Property*, 16 ANIMAL L. 65 (2009) (discussing cruelty of factory farms).

²⁵⁰ Adrian Higgins, *Hot Chicks: Backyard Chicken Keeping is Catching on, Legal or Not*, WASH. POST, May 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301051.html> (“Chickens are America’s cool new pet.”) (quoting Dave Belanger, publisher of the magazine *Backyard Poultry*); Keith Goetzman, *Are Backyard Chickens Pets or Food?*, UTNE READER, Dec. 17, 2010, <http://www.utne.com/Wild-Green/Are-Backyard-Chickens-Pets-or-Food.aspx> (“People want to get closer to their food, but often that means getting closer to eggs, but not to meat—few want to eat an animal they know by name.”) (quoting KASSANDRA GRIFFIN, MEATPAPER).

²⁵¹ Sharon L. Nelson, *The Connection Between Animal Abuse And Family Violence: A Selected Annotated Bibliography*, 17 ANIMAL L. 369 (2011); Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 22 (1998); Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14 J. INTERPERSONAL VIOLENCE 963 (1999); FRANK R. ASCIONE, THE ABUSE OF ANIMALS AND HUMAN INTERPERSONAL VIOLENCE: MAKING THE CONNECTION, IN CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION (Frank R. Ascione & Phil Arkow eds. 1999).

homesteading, the former might develop a greater respect for the latter, and thus be less likely to harm them, and in turn, other humans. From an animal welfare perspective,²⁵² non-human animals also benefit from urban homesteading as compared to life in a concentrated animal feeding operation (CAFO); backyard animals typically have more room, and are able to exhibit more natural behavior patterns.²⁵³ Indeed, if a city decides to allow chickens, the ordinance could expressly state how much space they must be given and how they must be treated.²⁵⁴

Finally, there are a number of environmental benefits to housing certain animals on an urban farm. On pre-industrial farms, farmers fed their chickens kitchen scraps, used them to manage weeds, and used their on-site animals' waste to fertilize crops. Now, one of the biggest problems with CAFOs is environmental pollution and water contamination caused by excessive amounts of animal waste.²⁵⁵ Although animal waste in urban and suburban areas would need to be managed so as to avoid water pollution problems, the scale is much smaller than that on a CAFO, and thus the harms would be reduced.

b. Civic Virtue: Strengthening Community and Private Property Interests

²⁵² Gary L. Francione, *Animal Rights And Animal Welfare*, 48 RUTGERS L. REV. 397, 397-8 (1996) (animal welfare “assumes the legitimacy of treating animals instrumentally as means to human ends as long as certain ‘safeguards’ are employed,” while animal rights “‘demand[s]’ the end of institutionalized animal exploitation”).

²⁵³ *An HSUS Report*, *supra* note 223.

²⁵⁴ *See, e.g.*, KNOXVILLE, TENN., CODE pt. 112, ch. 5, art. IV, § 5-107(f)(3) (2010) (requiring two square feet per hen in the henhouse and six in the fenced enclosure); CHEROKEE, GA., ZONING CODE § 7.7-24(a)(1)(iv) & (v) (2011) (requiring two square feet per hen in the coop and ten in the fenced enclosure); ANN ARBOR, MICH., CODE tit. IX, ch. 107, § 9:42(3)(k) (2011) (“All enclosures . . . shall be so constructed or repaired as to prevent rats, mice, or other rodents from being harbored underneath [or]within”); PORTLAND, ME., CODE § 5-402(a) & (b)(1) (2009) (“chicken pen must provide adequate sun and shade and must be impermeable to rodents, wild birds, and predators”). *See generally* Salkin, *Feeding the Locavores*, *supra* note 62, at 5-7.

²⁵⁵ Angelo, *supra* note 197, at 606-7 (discussing animal waste at CAFOs).

Another reason that localities should allow urban agriculture within their boundaries is that it may further principles of civic virtue, which is an important role of local government. Civic virtue, like civic republicanism, focuses on cultivating behaviors and traits in individuals that contribute to the strength of the community as a whole,²⁵⁶ including self-sufficiency, philanthropy, and reciprocity.²⁵⁷ Thus, one role of municipalities is to foster civic virtue by legislating in the interest of the community at large.²⁵⁸

Urban agriculture presents a provocative lens through which to examine civic virtue. A local government that allows unlimited forms of urban homesteading—10-foot tall bean poles in the front yard, chickens wandering about the property—is aiding the individual landowner who desires to use her property in this manner. To that individual, the government’s decision to be permissive allows for her self-reliance and furthers her right to use her private property as she wishes. Some might view this as counter to principles of civic virtue; Professor Epstein pointed out that:

²⁵⁶ Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 134 (1995) (discussing civic republicanism’s “emphasis on communities rather than individuals”); Carlton Morse, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 819 (2007) (“the foundation of republican politics is ‘civic virtue,’ not individual self-interest. Civic virtue is a transcendent public good determined through deliberation between political actors willing to suspend individual interest and instead derive their motivation from, and legislate according to, a consensus view of the public good.”). See generally Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1720 (1988) (discussing civic republicanism and civic virtue in the context of associations).

²⁵⁷ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000) (reciprocity as a civic virtue); James Madison, *Republican Distribution of Citizens*, NATIONAL GAZETTE, Mar. 5, 1792 (“The class of citizens who provide . . . their own food . . . may be viewed as the most truly independent and happy. They . . . are the best basis of public liberty, and the strongest bulwark of public safety.”).

²⁵⁸ Many commentators discuss the benefits of democratic self-governance, and the belief that democracy is key to local control. Tocqueville believed that participation builds political skills, and protects against tyranny. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 62-70 (J.P. Mayer ed. & George Lawrence trans., 1969) (1966) (“townships and other participatory groups were little schools of citizenship where people could form clear ideas about their rights and duties, while acquiring habits of deliberation and mutual accommodation”). Gerald Frug believes that people who can govern themselves are happier, but they will only participate if their participation will have an impact. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048, 1077 (1996) (“The role that cities ought to play in American society . . . and [which] should inform the meaning of[] land-use policy - is community building.”).

It is often said that a theory that stresses the importance of private property . . . ignores the role of civic virtue—devotion to public service, protection of the weak, advancement of the arts, participation in public life—which is central to understanding the highest aspirations of political life.²⁵⁹

However, at least with respect to urban agriculture, by developing strength in the individual's use of private property, a municipality can also foster civic virtue and a robust sense of place in the community, which in turn furthers the ideals of democratic self-governance.

The community benefits from the individual's action because urban agriculture results in a number of positive externalities that flow to, and help to build, the broader community. If there is surplus produce, its sale at farm stands and farmer's markets can build community,²⁶⁰ or it can be donated to neighbors in need or food banks, furthering philanthropy and reciprocity.²⁶¹ Urban agriculture also opens a dialogue between neighbors that often results in shared meals and traded foods,²⁶² reinforcing a sense of belonging and reducing atomization.²⁶³ Though individual traits are strengthened through urban agriculture, individuals are not isolated, and are instead engaged with their

²⁵⁹ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 344 (1985).

²⁶⁰ "Municipal policies can help community gardeners make money by allowing them to sell excess produce." *Promoting Urban Agriculture: Zoning*, SUSTAINABLE CITIES INSTITUTE, http://www.sustainablecitiesinstitute.org/view/page.basic/report/feature.report/Report_Zoning_Urb_Ag (last visited Feb. 14, 2012). If residents are permitted to sell excess produce or eggs to their neighbors or to local markets, the taxes from those sales could remit to the local government. Cities could also sell their own value-added goods from produce grown on municipally-owned property. UC Davis does this: it bottles and sells olive oil from the olive trees on its campus. NORDAHL, *supra* note 16, at 98 (noting that the process "turn[s] maintenance crews into moneymakers by exploiting the demand for locally produced food").

²⁶¹ PUTNAM, *supra* note 257, at 19 (reciprocity as a civic virtue).

²⁶² "'Urban agriculture [. . .] is an essential part of any program to make [] cities more livable, and to improve the lives of city dwellers.'" NORDAHL, *supra* note 16, at 141; *see also Supra* Part IV(a); *Edible Backyards: Residential Land Use for Food Production in Toronto*, CITY FARMER NEWS, Mar. 10, 2008, <http://www.cityfarmer.info/2008/03/10/edible-backyards-residential-land-use-for-food-production-in-toronto/> ("Special foods are part of our culture, and eating together can bring people closer to each other."); COOKING, EATING, THINKING: TRANSFORMATIVE PHILOSOPHIES OF FOOD (Deane W. Curtin & Lisa M. Heldke, eds. 1992).

²⁶³ PUTNAM, *supra* note 257, at 287 (discussing the erosion of social capital and civic engagement).

community.²⁶⁴ Commentators have noted that more public forms of urban agriculture, such as community gardens, are “helping to attain broad civic aims, such as . . . boosting civic pride and building community; reducing crime; strengthening our connection to place. . . .”²⁶⁵ If municipalities revise their zoning codes to encourage productive landscapes, and there is sufficient citizen desire and education to follow through, that analysis should be transferable to urban produce on private property as well, as neighbors engage in an exchange of information and food.

c. Support for the Free Market: Efficiency, Property Values, and Nuisance Protection

Localities can also find support for overturning urban agriculture bans in libertarian property ideals, which here coincide with environmental and civic virtue justifications. Many libertarian and law and economics scholars argue that land can be used more efficiently when there are fewer restrictions upon it.²⁶⁶ For example, Professor Epstein suggested that “[z]oning stands in stark contrast to a system of private property,

²⁶⁴ *Id.* at 19 (“[S]ocial capital is closely related to what some have called ‘civic virtue.’ The difference is that ‘social capital’ calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.”).

²⁶⁵ NORDAHL, *supra* note 16, at 7 (analysis and studies focusing on community gardens and planting on publicly-owned open space); Peters, *supra* note 22, at 210 (“Transforming vacant lots into thriving urban gardens brings people together, giving them a common goal of beautifying their neighborhoods while producing healthy food. . . . The beautification of once vacant lots and the increased sense of community make urban neighborhoods safer and more attractive places to live, which, in turn, revitalizes urban neighborhoods.”).

²⁶⁶ See, e.g., Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 588 (citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993)) (describing Ellickson’s argument that when small and medium land use activities (including tomato gardens), which only impact the individual landowner or a small group of neighbors, predominate, “individual private property ownership is the most efficient arrangement”); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986) (“The usual economic approach to property law suggests that productive efficiency will be enhanced when private property is the norm, but government intervenes in recognized instances of market failure.”). *But see* Michael H. Schill, *Deconcentrating The Inner City Poor*, 67 CHI.-KENT L. REV. 795, 816 (1991) (“The bulk of evidence on suburban land use regulation supports the conclusion that as currently practiced restrictive zoning is inefficient. Nevertheless, this observation does not mean that eliminating all restrictive land use regulation would be more efficient than the status quo.”).

which allows a single owner (within the confines of the nuisance limitation) to decide how to use his plot of land. Where property rights are enforced, owners can make choices on efficient land use without having to overcome the conundrums of collective choice.”²⁶⁷ Thus, assuming a world with no restrictions (and no transaction costs), people will use their private property in the most efficient way possible.²⁶⁸ Further, land that is unburdened by regulations and is able to be used efficiently theoretically corresponds to an increase in property values.²⁶⁹ Therefore, municipalities should benefit financially from liberalizing bans that encourage inefficient use of land.²⁷⁰ Further, if homeowners believe that attracting and retaining locavores will improve their property values, Fischel’s homevoter hypothesis suggests that they will encourage their local representatives to vote in favor of permissive urban agriculture policies.²⁷¹

The removal of inefficient bans does not mean that there will be no protection for aggrieved neighbors who disapprove of excessive agricultural uses; standard nuisance law protections would remain in place even if these bans were lifted.²⁷² Further, even if a

²⁶⁷ EPSTEIN, *supra* note 259, at 265.

²⁶⁸ See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) in ELLICKSON & BEEN, *supra* note 20, at 768-71 (“Coase argues that, in a world of costless market transaction, there would be no externalities because any outsiders affected by a land use activity would bring home those effects by, for example, offering to pay the land user to alter the activity.”).

²⁶⁹ William K. Jaeger, *The Effects of Land-use Regulations on Property Values*, 36 ENVTL. L. 105, 118 (2006) (“If the landowner is acting to maximize the value of her land, then removing a binding constraint would presumably raise the value of the land.”).

²⁷⁰ WILLIAM A. FISCHEL, DO GROWTH CONTROLS MATTER? A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION 36, 53 (1990) (“conventional suburban zoning is inefficiently restrictive”).

²⁷¹ FISCHEL, HOMEVOTER, *supra* note 140, at 4-5 (homeowners “tend to choose those policies that preserve or increase the value of their homes”). Although empirical analysis about the impact of urban agriculture ordinances on home prices would be useful, a municipality need not have foolproof evidence before enacting an “innovative solution”—they “must be given a ‘reasonable opportunity to experiment with solutions’” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)) (Kennedy, J., concurring) (stating that “a city must have latitude to experiment, at least at the outset, and [] very little evidence is required”).

²⁷² EPSTEIN, *supra* note 259, at 265; Smith, *supra* note 39, at 215 (“A strong view of private property empowers the landowner to do what she wishes with her yard. Yet the right to use one’s real property as desired . . . was never conceived as absolute. . . . [T]he law of nuisance has imposed a significant set of

prescriptive ordinance expressly allows gardens or chickens, those activities can still constitute an abatable nuisance under certain circumstances;²⁷³ some municipal codes expressly state as much.²⁷⁴ Of course, many people successfully keep chickens within residential areas without causing a nuisance.²⁷⁵

Some may wonder whether nuisance law will afford sufficient protection; zoning developed, in part, because nuisance suits were not effectively addressing large-scale harms.²⁷⁶ However, Ellickson suggests that small, localized land use issues, such as those that might arise if one neighbor's chickens are disturbing another neighbor, might be better addressed "through private nuisance remedies supplemented by covenants and good manners."²⁷⁷ He continues:

restrictions on land use."). *See also* 2 A.L.R.3d 965 (Originally published in 1965) ("The ground of attack . . . usually involved the contention that the keeping of chickens or other fowl by the defendant unreasonably interfered with the complainant's enjoyment of adjoining property because the fowl caused noise, dust and litter, or odors or pests. Whether the conditions complained of in fact existed to such a degree as to amount to a nuisance . . . has turned upon the evidence produced in the particular cases.").

²⁷³ *See, e.g.,* *Erwin v. Alvarez*, 752 So. 2d 1261, 1262 (Fla. Dist. Ct. App. 2000) (trial court erred in finding that appellees' chickens constituted a nuisance, but that the appellees would not be in contempt so long as they limited the number of chickens to the number allowed by the county ordinance); *Biddix v. Henderson Furniture Indus., Inc.*, 331 S.E.2d 717 (N.C. Ct. App. 1985) (compliance with a permit does not make a party immune from common law nuisance claims); *Union Oil Co. of Cal. v. Heinsohn*, 43 F.3d 500 (10th Cir. 1994) (same); *Valley Poultry Farms, Inc. v. Preece*, 406 S.W.2d 413, 416 (Ky. 1966) ("The keeping of poultry has been a source of much litigation . . . and it has frequently been recognized that the keeping of chickens is not a nuisance per se but may become a nuisance because of the circumstances or manner in which the business is operated."); *Vaszil v. Molnar*, 33 A.2d 743, 744 (NJ. Ch. 1943) ("The raising and maintenance of chickens ought not to be unjustifiably discouraged. . . . Perhaps at some future time, the science of breeding will produce the silent rooster and the quiet hen in company with the voiceless cat, the odorless pig and the flealess dog. Meanwhile, chickens will continue to be chickens, and if in the present cause it eventuates that the maintenance of poultry at the location selected is pursued in such conditions and circumstances as to injuriously affect the comfort of residents of ordinary sensitiveness in the vicinity, this court will not hesitate to enjoin its continuance."); Catherine LaCroix, *Urban Green Uses: The New Renewal*, 63 PLANNING & ENVTL. L. 3, 8 (2011).

²⁷⁴ *See, e.g.,* LOS ANGELES MUNICIPAL CODE § 12.03 (allowing birds as an accessory use but stating that "if the [city] determines that the keeping of birds or the keeping of a particular number of birds at a particular location constitutes a nuisance or a health or safety hazard, then the keeping of birds under those circumstance shall not be an accessory use."); TOPEKA, KAN. ZONING CODE § 18-291 ("It shall be unlawful for any person to keep or maintain any domestic fowl upon any private premises in the city (when such keeping is lawful under other ordinances of the city) . . . on any premises in a manner or condition constituting a public nuisance.").

²⁷⁵ OLKOWSKI ET. AL., *supra* note 113, at 252.

²⁷⁶ *Supra* note III(b) and accompanying text.

²⁷⁷ Ellickson, *Alternatives to Zoning*, *supra* note 91, at 762.

The system of private nuisance law . . . avoids the allocative inefficiencies threatened by mandatory regulations or injunctions. It relies upon a decentralized policing system that is triggered more efficiently than a centralized system, and it can easily be used to internalize existing nuisances, not merely future ones.²⁷⁸

Thus, the common law of nuisance can control localized harms in a free market system while also promoting efficient use of private property.

By allowing backyard chickens and front yard gardens, municipalities are not completely eliminating regulatory control, but rather changing the party who holds the “entitlement.”²⁷⁹ According to the framework created by Professors Calabresi and Melamed, a governing body must first establish who has the entitlement, then determine the remedy that should be given to the party with the entitlement.²⁸⁰ Where chickens and front yard gardens are banned, the entitlement belongs to the neighbor without chickens or a garden who is entitled to the peace and quiet of a neighborhood without the harms, or negative externalities, that urban agriculture can cause.²⁸¹ Once a municipality adopts a permissive urban agriculture ordinance, it places the initial entitlement with the gardener or chicken-raiser.

²⁷⁸ *Id.*

²⁷⁹ Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Perhaps the time is ripe to revise allocation of entitlements precisely because underlying values are changing. “Like Coase, Calabresi and Melamed proposed that the initial allocation of entitlements would be efficient in the sense that it would minimize future transactions among parties.” Orbach & Sjoberg, *supra* note 24, at 25 (citing Calabresi & Melamed, *supra* note 279 at 1093-94).

²⁸⁰ Calabresi & Melamed, *supra* note 279. See also Orbach & Sjoberg, *supra* note 24 (discussing backyard chicken ordinances in the context of the Calabresi-Melamed framework).

²⁸¹ Orbach & Sjoberg, *supra* note 24, at 14 (“Using the Coasean framework, neighbor disputes over backyard chickens illustrate the reciprocal nature of certain externalities. On the one hand, a legal rule that prevents fowl lovers from keeping poultry on their premises entails harm to households that could benefit from chicken ownership. . . . They articulate a wide range of economic, environmental, gastronomic, health, social, and emotional matters that call for the exercise of their property rights to raise chickens in their backyards. . . . On the other hand, a legal rule that permits fowl may impose discomfort and other injuries on the chicken owners’ neighbors [who] consider backyard hens and roosters to be sources of unacceptable levels of noise, smell, and health risks.”).

Urban homesteaders are thus protected by a property rule to the extent that they can engage in urban agriculture practices, so long as they comply with any health and safety, or nuisance-avoiding provisions of the ordinance. Again, if they fail to comply with those provisions—if their chickens are too noisy, or if their garden attracts pests—then the neighbor can bring a nuisance suit.²⁸² Thus, determining the allocation of entitlements has a real, important impact on how resources are allocated.²⁸³

By allocating the entitlement, either to urban homesteaders or to neighbors who do not wish to engage in urban agriculture, the city is making a value judgment about who should bear the costs of bringing action. One concern with relying on nuisance instead of zoning is the high cost associated with abatement.²⁸⁴ If litigation is required to abate the nuisance, that remedy is beyond many neighbors' means. However, if a locality were to adopt a permissive urban agriculture ordinance, it could also put in place a public administrative system to handle neighborhood disputes related to nuisance, which Ellickson suggests would be helpful for “specialized and repetitive issues. A single adjudicative authority with exclusive jurisdiction over these cases could resolve them with greater facility and consistency than courts of general jurisdiction.”²⁸⁵ Thus, localities could eliminate bans, which would increase efficiency and promote the free

²⁸² Consider what the outcome of the nuisance suit might be. Would the use have to cease? Or would the locavore pay a fine to the neighbor? Most ordinances do not address the answer. Because chickens are being kept pursuant to an ordinance, it is unlikely that a neighbor could obtain a total injunction. However, fines might be levied upon a chicken owner who did not follow provisions in the ordinance related to health, safety or noise. Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 802 (1986) (noting that there is now “a general presumption against unconditional injunctive relief for prevailing plaintiffs. Plaintiffs generally would be limited to recovering damages, with injunctive relief being available only when the defendant’s conduct was egregious or when it threatened the safety or personal liberty of the plaintiff.”) (citing Ellickson, *Alternatives to Zoning*, *supra* note 91, and Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977)).

²⁸³ Lewin, *supra* note 288, at 794 (“[A]s suggested by the Coase Theorem, in the real world in which transaction costs are not zero, the assignment of entitlements has an impact on resource allocation.”).

²⁸⁴ Ellickson, *Alternatives to Zoning*, *supra* note 91, at 762.

²⁸⁵ *Id.*

market and property rights, while at the same time ensuring that the availability of nuisance protection was within the means of neighborhood residents.

V. Moving Forward: Potential Solutions and Broader Implications

This Part will propose steps that municipalities can take as they move toward more permissive views of urban agriculture, including specific approaches to permitting those uses.²⁸⁶ This Part will also discuss what the lifting of urban agriculture bans suggests about the future of land use law.

a. Zoning, Comprehensive Plans, and Covenants

The most straightforward approach that a municipality could take in pursuit of more locavore-friendly practices would be to revise its comprehensive plan and zoning code to eliminate any provisions that expressly ban urban agriculture, or that make it more difficult for an individual to use her property for agriculture. There are generally two different approaches for the treatment of a land use issue like urban agriculture: it can be treated as a use or a district.²⁸⁷

If it is to be treated as a district, the municipality should begin by examining its land use plan.²⁸⁸ If there is an existing designation for general agriculture, the

²⁸⁶ There exists a thin legal academic literature on urban agriculture ordinances, and specifically the structure of ordinances addressing backyard chickens. See Orbach & Sjoberg, *supra* note 24, at 16-7; Mukherji & Morales, *supra* note 17, at *passim* (addressing different zoning approaches that can be used to allow urban agriculture); Salkin, *Feeding the Locavores*, *supra* note 62, at 4-7 (discussing different approaches to backyard chicken ordinances). Because these articles do an admirable job of compiling many of the existing urban agriculture ordinances, I will not repeat that task here.

²⁸⁷ Mukherji & Morales, *supra* note 17, at 4 (proposing these two approaches for the treatment of urban agriculture).

²⁸⁸ For example, San Francisco's mayor directed the Planning Department to "integrate policies and implementing actions to support San Francisco's food policy goals into elements of" the General Plan. *Executive Directive 09-03 Healthy and Sustainable Food for San Francisco*, CITY OF SAN FRANCISCO, 4 (July 9, 2009), http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy_reports/MayorNewsomExecutiveDirectiveonHealthYustainableFood.pdf.

municipality should consider whether it makes sense to use that land use category, or to create a new, separate category for urban agriculture, which could be applied as an overlay district within the residential, commercial, and/or industrial areas of the city.²⁸⁹ If the municipality prefers to treat urban agriculture as a use, which this author believes will typically make more sense, it should first ensure that the comprehensive plan will allow such a use, and then create a new use designation for urban agriculture practices. The category should expressly allow uses such as front yard gardens, backyard chickens, sale of produce or value-added products, and any other agricultural uses that the municipality believes are important to its residents.

This could then be added as a use that is permitted either as of right or conditionally in various existing zoning districts. In order to be truly permissive, localities should allow urban agriculture as a principal or accessory as of right use, and not require any type of permit.²⁹⁰ A municipality may still impose certain requirements on uses that are permitted as of right, such as a limit on the number of chickens or size or location of the garden,²⁹¹ or a requirement that the urban homesteaders pay a small fee before conducting these activities on their property if the activity will exceed a certain size.²⁹²

²⁸⁹ For example, “Boston [] has the Olmsted Green Smart Growth Overlay Zone, where there is a use category for ‘food production uses, including a farm, garden, food production center . . .’ permitted in the mixed use part of the zone.” Mukherji & Morales, *supra* note 17, at 6.

²⁹⁰ See, e.g., Mary Wood, et al., *supra* note 3, at 76 (suggesting that permits are unnecessary because neighbors can rely on nuisance suits, and “a permit system would strain local government resources and potentially discourage homeowners from keeping microlivestock”).

²⁹¹ See, e.g., MOBILE, ALA., CODE § 7-103(d) (1965) (requiring coops to be twenty feet from property line); CHEROKEE, GA., ZONING CODE § 7.7-24(a)(1)(iv) (2011) (coops must be twenty-five feet from property line); NAPLES, FLA., ZONING CODE § 58-52(5) (2011) (thirty feet). See generally Salkin, *Feeding the Locavores*, *supra* note 62, at 5-7.

²⁹² See Seattle, Wash., Ordinance 123378 (2010).

The municipality might instead choose to require a CUP for urban agriculture, although this would be moving away from truly permissive use.²⁹³ If the locality has concerns about soil safety, one condition of permit approval could be to require an environmental assessment to ensure that the soil would be suitable for gardening.²⁹⁴ Or, a jurisdiction might allow urban agricultural activities that can be shown not to create “significant objectionable influences in residential areas.”²⁹⁵ Though CUPs provide a locality with more control over the use, they also typically involve even greater barriers to entry than as of right permits, as they are typically quite expensive.²⁹⁶ Localities should therefore consider their underlying goals for urban agriculture before instituting such conditional requirements. If their primary purpose is to aid low-income families, to address food insecurity, or to enable those in food deserts to harvest their own food, certain requirements might inhibit those ends, especially in neighborhoods that lack large lots.²⁹⁷

Once a municipality has determined which approach it will use, it should also look into the existence of relevant private covenants in its jurisdiction. A very large

²⁹³ Mukherji & Morales, *supra* note 17, at 5. (“[C]ities may want to foster intensive urban agriculture through permissive uses, but to prevent nuisance they may want to limit the extent of those uses – either by making the use conditional or by confining it to specific districts.”).

²⁹⁴ A model community garden ordinance imposes a similar requirement: “Site users must provide a Phase I Environmental Site Assessment (ESA). Any historical sources of contamination identified in the ESA must be tested to determine type and level of contamination; appropriate remediation procedures must be undertaken to ensure that soil is suitable for gardening.” *Establishing Land Use Protections for Community Gardens*, PUB. HEALTH L. & POL’Y, 12 (June 2010).

²⁹⁵ NEW YORK CITY, N.Y., ZONING RESOLUTIONS § 22-14 (Use Group 4).

²⁹⁶ See, e.g., *Planning Application Filing Fee Schedule*, CITY OF SAN JOSE, CAL., 3 (Aug. 15, 2011), www.sanjoseca.gov/planning/pdf/11-12_Fee_Schedule.pdf (\$2,250); *Application for Conditional Use Permit*, RICHMOND, VA., 4, <http://www.richmondgov.com/planninganddevelopmentreview/forms/ConditionalUsePermit.pdf> (\$1,100); *Conditional Use Permit Submittal Requirements*, LOUISVILLE METRO PLANNING & DESIGN SERV., www.louisvilleky.gov/NR/rdonlyres/A7F4FC3D.../CUPJune07.pdf (\$775).

²⁹⁷ A 150-foot setback “effectively limits backyard chicken raising to single-family homes on large lots.” Salkin, *Feeding the Locavores*, *supra* note 62, at 6.

number of suburban homes in the U.S. are subject to CC&Rs,²⁹⁸ which are designed to ensure a level of consistency and expectations.²⁹⁹ Even if the zoning ordinance would permit backyard chickens or front yard gardens, the restrictive covenants often prohibit such uses.

When a zoning ordinance is in conflict with a private covenant, the more restrictive typically prevails,³⁰⁰ which in this instance would be the covenant barring chickens or gardens. However, if a covenant is deemed to be against public policy, it may be struck down.³⁰¹ As localities and states place more emphasis on sustainable policy, such a finding is possible. For example, restrictions that prohibit solar energy devices have been deemed void in California via statute because “it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto.”³⁰² Similar findings could be made to void covenants that prevent urban agriculture in residential areas.³⁰³ This would likely not result in a violation of the Contract Clause,³⁰⁴ which only permits the government to substantially impair existing private contracts if (i) there is “a significant and legitimate public purpose behind the regulation . . . [,] such as the remedying of a broad and general social or economic

²⁹⁸ *Supra* note 93. In 2011, approximately 25.1 million homes were governed by associations. *Industry Data: National Statistics*, CMTY. ASS’N INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Feb. 18, 2012).

²⁹⁹ CC&Rs may regulate house color, awning patterns, or the length of the front lawn. *See* ELLICKSON & BEEN, *supra* note 20, at 596 (discussing CC&Rs governing design).

³⁰⁰ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. c (2000); *Inabinet v. Booe*, 202 S.E.2d 463 (1974).

³⁰¹ “The test of whether a contractual provision violates public policy is ‘whether the contract as made has a ‘tendency to evil,’ to be against the public good, or to be injurious to the public.’” *Thayer v. Thompson*, 677 P.2d 787 (Wash. 1984) (quoting *Golberg v. Sanglier*, 616 P.2d 1239 (Wash. 1980)).

³⁰² CAL. CIV. CODE § 714 (1990); J. Wiley, Note, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning*, 67 CAL. L. REV. 350 (1979).

³⁰³ *Supra* Part III.

³⁰⁴ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

problem,”³⁰⁵ and if (ii) “the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’”³⁰⁶ Here, the state or locality would have a strong argument that the purpose of the regulation would be to remedy the broad social issues that are associated with industrial agriculture, and that can be improved by permissive urban agriculture policies.

b. Sustainability Plans and Goals

A number of U.S. municipalities have recently begun to regulate in furtherance of the public health and safety through adoption of new “climate protection” or “sustainability” plans.³⁰⁷ These plans may be standalone documents, or included as goals or provisions in an existing comprehensive plan establishing sustainability as an important pursuit of new regulations and development.³⁰⁸ Many municipal governments have created special departments responsible for administering their sustainability plans.³⁰⁹ Some commentators have suggested that this is part of an “emerging

³⁰⁵ *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-412 (1983).

³⁰⁶ *Id.* at 412 (quoting *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 22 (1977)).

³⁰⁷ *See, e.g., The Baltimore Sustainability Plan*, BALT. COMM’N ON SUSTAINABILITY (Feb. 2009), <http://www.baltimorecity.gov/Government/AgenciesDepartments/Planning/OfficeofSustainability.aspx> (last visited Sept. 2, 2011) [hereinafter *Balt. Sustainability Plan*]; *Climate Protection Plan*, KAN. CITY, MO. OFFICE OF ENVTL. QUALITY (July 2008), <http://www.kcmo.org/CKCMO/Depts/CityManagersOffice/OfficeofEnvironmentalQuality/OfficeofEnvironmentalQuality/index.htm> (last visited Sept. 2, 2011) [hereinafter *Climate Prot. Plan*]. *See also* Peters, *supra* note 22, at 206 (“Establishing a sustainable urban agricultural system would reduce the environmental degradation that is caused by modern agricultural practices, reduce the financial strain on government resources by increasing urban productivity and enabling urbanites to grow a local food supply, and reduce socioeconomic disparities by providing less-advantaged populations in urban areas with access to an adequate supply of fresh, nutritious food.”).

³⁰⁸ In Kansas City, the City Manager must answer the question, “[h]ow will this contribute to a sustainable Kansas City?” on the fact sheet for all ordinances and resolutions. Kan. City, Mo., Resolution 080246 (2008).

³⁰⁹ *See, e.g., Environment Department*, CITY AND COUNTY OF S.F., <http://www6.sfgov.org/index.aspx?page=109> (last visited Sept. 2, 2011); *Department Environment*, CITY OF CHI., <http://www.cityofchicago.org/city/en/depts/doe.html> (last visited Sept. 2, 2011). *See also Environmental & Energy Services*, CITY OF BOS., <http://www.cityofboston.gov/environmentalandenergy/>

international environmental norm” that there is a duty among developed nations to alleviate contributions to climate change.³¹⁰

While many of these sustainability plans address issues such as transportation, green building, and high-density development, a next step is to include local food production.³¹¹ Urban agriculture can substantially contribute to “green” goals that many localities are actively trying to further;³¹² indeed, some cities have begun to include foodshed analysis and local food policies in their comprehensive or sustainability plans.³¹³ For example, the Baltimore Sustainability Plan recognizes the “growing movement to utilize urban land for agriculture as a means of providing fresh food to communities” and finds that such an approach “would reduce fuel use and greenhouse gas emissions”³¹⁴ One goal of the plan is to “[e]stablish Baltimore as a leader in

(last visited Sept. 2, 2011); *Office of Sustainability and Environment*, SEATTLE, <http://www.seattle.gov/environment/> (last visited Sept. 2, 2011); *Office of Sustainability*, CITY OF CLEVELAND, OHIO, <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/PublicUtilities/Sustainability> (last visited Sept. 2, 2011); *So What is Sustainability?*, BALT. OFFICE OF SUSTAINABILITY, <http://www.baltimoresustainability.org/> (last visited Sept. 2, 2011); *Mayor’s Office of Sustainability*, CITY OF ATLANTA ONLINE, <http://www.atlantaga.gov/mayor/sustainability.aspx> (last visited Sept. 2, 2011); *Sustainable Sacramento*, CITY OF SACRAMENTO DEP’T OF GEN. SERV., <http://www.cityofsacramento.org/generalservices/sustainability/> (last visited Sept. 2, 2011); and *Office of Environmental Quality*, CITY OF KAN. CITY, MO., <http://www.kcmo.org/CKCMO/Depts/CityManagersOffice/OfficeofEnvironmentalQuality/index.htm> (last visited Sept. 2, 2011).

³¹⁰ Medina & Tarlock, *supra* note 105, at 1743, 1756 (“[C]omprehensive land-use planning may be the better, more comprehensive tool for reducing greenhouse gas emissions.”).

³¹¹ NORDAHL, *supra* note 16, at 107 (“If a city is truly interested in ‘going green,’ as many are, food has to be considered an integral part of sustainability.”). Cleveland recently adopted an ordinance offering a “bid incentive to local producers, local-food purchasers, and sustainable businesses who apply for a City contract.” Cleveland, Ohio, Ordinance 1660-A-09 (Mar. 29, 2010). *See also* Morales & Kettles, *supra* note 76, at 38 (“Pressure for sustainable and livable cities, and demands from food policy advocates, is compelling cities to reorganize right of ways and zoning [related to food trucks and farmers’ markets].”).

³¹² For example, people who grow their own food seasonally will take fewer car trips to the local supermarket. Those supermarkets can thus reduce the amount of food on their shelves, which will contribute to a decrease in emissions both from food transport and production. *Supra* Part IV(a)(ii)(1); *but cf. supra* notes 228 - 230 and accompanying text.

³¹³ Salkin & Lavine, *supra* note 9, at 600.

³¹⁴ *Balt. Sustainability Plan*, *supra* note 307, at 70.

sustainable, local food systems,”³¹⁵ in pursuit of which the city has devised a number of strategies, including the development of an urban agriculture plan, altering zoning to allow for production and sale of urban agricultural products, and increasing the percentage of agricultural land in the city.³¹⁶ Kansas City, Missouri’s Climate Protection Plan sets a goal of 10,000 vegetable gardens, and promotes residential neighborhood food production through methods that reduce greenhouse gas emissions and sequester carbon.³¹⁷ And Chicago’s “Eat Local Live Healthy” plan includes increased food production in neighborhoods and increased knowledge of urban farming and composting as goals.³¹⁸ Many other cities are following suit.³¹⁹ Thus, a number of local governments have recognized that creating urban agriculture policies and plans can assist them in furthering broader sustainability goals.

c. Broader Implications: The Fall of Euclidean Zoning?

As sustainability has become more important to many citizens and municipalities, there has been a concomitant recognition that perhaps Euclidean zoning cannot sufficiently address modern challenges and sustainable development goals.³²⁰ The move

³¹⁵ *Id.* at 74.

³¹⁶ *Id.* (Strategies A & D).

³¹⁷ *Climate Prot. Plan*, *supra* note 307, at 24 (Appendix A); *Id.* at 14 (Appendix B) (recommending similar advice to this Article, including revision of local ordinances “to explicitly allow tall garden plants, front yard gardens, and cover crops,” and elimination of codes “that are barriers to produce stands/farmers markets in neighborhoods”).

³¹⁸ *Chicago: Eat Local Live Healthy*, CITY OF CHI. HOUS. & ECON. DEV., 16 (June 2007), http://www.cityofchicago.org/content/dam/city/depts/zlup/Sustainable_Development/Publications/Eat_Local_Live_Healthy_Brochure/Eat_Local_Live_Healthy.pdf (identifying “food issues that, if restructured locally, could improve food quality, lower its cost and increase its availability for consumers”).

³¹⁹ For example, Oakland is undertaking a comprehensive urban agriculture update to implement policies in the Open Space and Conservation Element of its General and Climate Action Plans. *Urban Agriculture Citywide Update*, PLANNING & ZONING, <http://www2.oaklandnet.com/Government/o/CEDA/o/PlanningZoning/OAK029859> (last visited Feb. 18, 2012). San Francisco’s goals include supporting urban agriculture through modification of zoning ordinances, horticulture education, and incentivizing ownership of some small livestock. *Final Recommendations*, *supra* note 225, at 8.

³²⁰ Salkin, *Squaring the Circle on Sprawl*, *supra* note 19, at 788.

toward permissive views of urban agriculture is a reversal of the key premise of early zoning ordinances: that single-family homes had to be protected from agriculture. Change inheres in the adoption of urban agriculture policies, new urbanism, smart growth and form-based codes,³²¹ including in how neighbors interact in a system of fewer regulations. This section sketches the broader implications of this movement.

Challenges to traditional Euclidean zoning have been asserted for many years,³²² though its critics have become more vocal and powerful in recent times.³²³ Further, zoning laws themselves have changed over time. Professor Joseph Sax links the change in laws to changes in views about what we need to protect: “Many things considered harmful today were once legal and commonplace. If views about what is harmful cannot change to reflect contemporary conditions and values, property owners may be afforded stability but property is rendered dysfunctional to society.”³²⁴ The opposite is also true; maintaining bans on urban agriculture might render property and expectations stable,³²⁵ but the emerging view is that urban agriculture is a beneficial and acceptable use in a residential area. Unless zoning laws change to reflect contemporary views of health, safety, and community values, property ownership becomes dysfunctional. Thus, a

³²¹ There is an emerging but thin scholarly literature discussing form-based codes. *See generally* Lolita Buckner Inniss, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?*, 11 U. PA. J.L. & SOC. CHANGE 75 (2008); Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 396 (2008); CHAD EMERSON, *THE SMARTCODE SOLUTION TO SPRAWL* (2007).

³²² Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 784-85 (2003) (“Practitioners and academics became aware of the failures of traditional zoning as early as the 1940s, while zoning was still in its infancy.”).

³²³ *See generally* ANDRES DUANY, ET AL. *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2001).

³²⁴ Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context*, 1995 DET. C.L. REV. 17, 31 (1995) (quoting Joe Sax, uncited source).

³²⁵ Consider the reliance interests of neighbors living in areas with bans who do not want to use their property for urban agricultural purposes. They likely purchased homes with expectations, including the existence of the ban. If the locality then liberalizes the law, they might argue that a taking has occurred, or at least that the new, permissive ordinances constitute a change that harms them in their use and enjoyment of their property based on their reasonable expectations.

movement toward more beneficial property uses protects the utility of property in a changing society.³²⁶

The removal of urban agriculture bans is a form of regulatory minimalism—a movement away from centralized legal authority and toward deregulation. Some theorists assert that law is not always necessary for people to coordinate their behaviors and use of land. Economist Charles Lindblom suggests that “people can coordinate with each other without anyone’s coordinating them, without a dominant common purpose and without rules that fully prescribe their relations to each other.”³²⁷ Ellickson’s study of ranchers in Shasta County would support this line of reasoning: neighbors who live in an area that adopts a permissive urban agriculture ordinance will find ways to coordinate with each other—through informal social norms and good manners—without the need for regulation.³²⁸ However, there is some suggestion that those norms are only persuasive means of coordinating groups of neighbors when people live in small, close-knit communities.³²⁹ So, while mutual adjustment may work successfully in some suburban neighborhoods where turnover in homeownership is low, in larger, dense urban areas, informal coordination might not be sufficient to resolve all disputes.³³⁰

³²⁶ See Salkin, *From Euclid to Growing Smart*, *supra* note 2, at 147-48 (discussing the “transformation of American land use law from an arcane technique designed to separate different types of uses, to a recognition that land use law, policy and practice have evolved into a much more dynamic network of locally adopted laws and regulations designed to . . . promote sound environmental protection goals”).

³²⁷ CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 3-5 (1965) (describing “mutual adjustment”).

³²⁸ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) [hereinafter *ELICKSON, ORDER WITHOUT LAW*] (studying informal norms governing boundary fences); *see also* Ellickson, *Alternatives to Zoning*, *supra* note 91, at 685 (discussing norms and manners).

³²⁹ ELICKSON, *ORDER WITHOUT LAW*, *supra* note 328. *See also* ELICKSON & BEEN, *supra* note 20, at 39 (suggesting that “the more closely-knit a group of residents and landowners, the more likely they are to succeed in exercising informal social controls to settle land use disputes at the micro level” and that “[a]s the number of neighbors affected by a conflict grows . . . bottom-up cooperation becomes more difficult”).

³³⁰ If manners are not sufficient, Ellickson notes that government can aid resolution of problems while still maintaining a decentralized approach to the distribution of property rights; it does this by enforcing covenants and nuisance protections. Ellickson, *Alternatives to Zoning*, *supra* note 91, at 686.

Although some communities still hold to traditional Euclidean values to attract residents who hold those same values, traditional conceptions of morality are slowly beginning to change in some parts of the country.³³¹ Though zoning is communitarian, the concern for protection of only a certain segment of the community through zoning (e.g., upper-middle-class single-family homeowners) is being replaced by a concern for the broader community.³³² These changes are embodied in the emergence of the sustainable development ideal that underscores many new comprehensive plans,³³³ and through a change in norms, as localities begin to prioritize the benefits of urban agriculture over the perceived harms. Although prescriptive noise ordinances may govern the extent to which a barking dog can go on before neighbors have a right to complain, those ordinances rarely limit a homeowner from keeping a dog. This is because the norm favors dog ownership in residential areas. As more localities realize the benefits that flow

³³¹ See *supra* Part III(a).

³³² This is not only true in the United States. For example, the Countryside and Rights of Way Act provides for a “right to roam” over certain privately-owned but natural land in England and Wales for the purpose of “improv[ing] public health[,] reduc[ing] social divisions” and establishing a degree of “social equity.” JESSE DUKEMINIER, ET AL., PROPERTY 812 (7th ed. 2006) (quoting KEVIN GRAY & SUSAN GRAY, ELEMENTS OF LAND LAW 1372 (5th ed. 2009)). See also *Atl. Coast Line R.R. Co. v. City of Goldsboro*, N.C., 232 U.S. 548, 559 (1914) (regulation under the police power must be “designed to promote the health, comfort, safety, or welfare of the community”); Carole Necolet Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 CONN. L. REV. 7, 16-7 (2003) (“It is well established that government may regulate, by exercise of its police power, in a way that burdens the individual’s use and enjoyment of his private property. . . . Notwithstanding the essential nature of the police power to government, the United States Supreme Court maintains that limitations exist on a sovereign’s ability to regulate the uses to which private citizens may put their property.”).

³³³ *Supra* Part IV(b); see, e.g., *City of Seattle Comprehensive Plan: Toward a Sustainable Seattle*, DEP’T OF PLANNING & DEV., http://www.seattle.gov/DPD/Planning/Seattle_s_Comprehensive_Plan/ComprehensivePlan/default.asp (“Sustainable cities use resources efficiently and effectively. They reuse and recycle. . . . They use existing local resources where they can. They minimize exportation of environmental risk. They provide physical and economic security, and they distribute these and other benefits evenly.”); *Kansas City, Mo. Comprehensive Plan: Forging Our Comprehensive Urban Strategy*, CITY PLANNING & DEV., <http://www.kcmo.org/CKCMO/Depts/CityPlanningandDevelopment/AdoptedPlans/FOCUS/index.htm> (“Kansas City shapes and guarantees its future by examining first and foremost the impact of every decision on future generations.”).

from urban agriculture, perhaps those norms too will change. The hen itself may someday be welcomed into the neighborhood, so long as its clucking and odors are managed.

VI. Conclusion

Everything old is new again,³³⁴ and so it is with land use. In the days before zoning ordinances, mixed-use communities developed to accommodate the needs of a public that walked to work and to the market. Many of those community members grew their own produce or raised chickens out of necessity. Although Euclidean zoning stepped in to separate conflicting uses nearly one hundred years ago, many communities are pursuing a return to a mix of uses amidst recognition that Euclidean zoning was a direct cause of sprawl and unsustainable development in the United States.³³⁵ This Article has demonstrated that, although there are some valid reasons for banning urban agricultural uses, those justifications are often antiquated and outweighed by more current conceptions of beneficial and harmful uses of land. As views about what actions are appropriate in a residential area change, local governments should revise their ordinances to reflect current conceptions of harm. The potential for a large-scale downward shift in demand for industrial agriculture is possible as more municipalities begin to overturn their urban agriculture bans. Although a single locavore growing tomatoes and collecting her pet chickens' eggs might not greatly contribute to a sustainable future, multiple locavores, across multiple jurisdictions, undertaking those same actions, certainly will. Zoning and land use laws are flexible enough to change to

³³⁴ See PORTLANDIA, DREAM OF THE 1890S, <http://www.ifc.com/portlandia/videos/portlandia-dream-of-the-1890s> (suggesting that pickling, raising chickens, and curing one's own meats, which were popular in the late 1800s, have returned to the forefront of popular culture).

³³⁵ Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 ENVTL. L. REPORTER 11001 (Aug. 2001) ("Euclidean zoning has resulted in cities that expand outward rapidly due to their inability to combine land uses and grow vertically").

reflect contemporary values; however, local governments must be willing to take steps toward making that change.