

Maine Law Review

Volume 65 | Number 2

Article 23

January 2013

State v. Brown: A Test for Local Food Ordinances

Ryan Almy

Follow this and additional works at: <http://digitalcommons.mainelaw.maine.edu/mlr>



Part of the [Agriculture Law Commons](#), and the [Food and Drug Law Commons](#)

Recommended Citation

Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65 Me. L. Rev. 789 (2013).

Available at: <http://digitalcommons.mainelaw.maine.edu/mlr/vol65/iss2/23>

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

STATE V. BROWN: A TEST FOR LOCAL FOOD ORDINANCES

Ryan Almy

- I. SPROCKET
- II. HEATING UP
- III. “FOOD SOVEREIGNTY”: FINDING VALIDITY OF LOCAL FOOD ORDINANCES THROUGH “HOME RULE” PROVISIONS
- IV. PROTECTING PUBLIC HEALTH AND SAFETY
- V. ANALYSIS: FOOD RIGHTS VS. CONSUMER PROTECTION
- VI. CONCLUSION

STATE V. BROWN: A TEST FOR LOCAL FOOD ORDINANCES

Ryan Almy*

I. SPROCKET

For many of us, adding a little milk to our morning coffee is likely one of the more insignificant tasks of the day. For Dan Brown of Blue Hill, Maine, that splash of dairy in his coffee mug is the result of his personal labor and constant, meticulous attention paid to the health and well-being of a single 1,000-pound mammal.¹ Besides fresh raw milk, what does Brown gain from his efforts? He knows the exact source of the milk he puts in his coffee, as well as the butter his daughter spreads on her toast: Sprocket, Brown's sole dairy cow.² However, Sprocket has garnered Brown some unwanted attention recently, earning her a new moniker: "Troublemaker."³

Whatever dairy Sprocket produces that does not end up in the Brown family's coffee or cereal, Dan Brown offers for sale directly from his farm, Gravelwood Farm, or at local farmers' markets in the towns of Blue Hill and nearby Ellsworth.⁴ These sales, "which net Brown roughly \$8,"⁵ gained the attention of the Maine Department of Agriculture ("the Department").⁶

The Department, noting that Brown was not properly licensed as either a milk distributor or food establishment, advised him that he was not in compliance with state law and demanded that he cease the sale of all food products until he complied with licensing requirements, or otherwise face legal action.⁷ Furthermore, having previously taken samples from Brown's raw whole milk, butter, and cottage cheese, the Department claimed that his dairy products "failed to meet established standards for quality and safety," and that Brown was "exposing consumers to serious health risks."⁸ Despite these demands and threats of legal action, Brown continued to sell his food products without a Department

* J.D. Candidate, 2014, University of Maine School of Law. I would like to thank Professor Sarah Schindler and the Maine Law Review editors and staff for their invaluable contributions and dedication to this Note. Many thanks to Isabel Ekman for being my brainstorming partner. Finally, thanks to those who facilitate meaningful conversations about our food supply.

1. Kevin Miller, *Maine's Case Against a Blue Hill Farmer and His Cow Gains National Attention*, BANGOR DAILY NEWS, Dec. 27, 2011, <http://bangordailynews.com/2011/12/27/news/hancock/maines-case-against-a-blue-hill-farmer-and-his-cow-gains-national-attention>.

2. *Id.*

3. *Id.*

4. *Id.*; see also Pl.'s Compl. ¶¶ 18-19, State v. Brown, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., filed Nov. 3, 2011).

5. Miller, *supra* note 1. "Altogether, Sprocket produces about a gallon and a half of milk per day," sale of which gains Brown roughly \$8. *Id.* Brown offers other food products for sale at his farm stand and at farmers' markets, including jams, jellies, maple syrup, and canned vegetables. Pl.'s Opp'n to Def.'s Comb. Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J. 2, *Brown*, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., filed Nov. 3, 2011).

6. See Pl.'s Compl., *supra* note 4, ¶¶ 18-25.

7. See Pl.'s Ex. E, *Brown*, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., filed Nov. 3, 2011).

8. *Id.*

2013]

STATE V. BROWN

791

license recognizing him as an authorized distributor or food establishment.⁹

On November 3, 2011, the State of Maine filed suit against Dan Brown in Hancock County Superior Court “seeking injunctive relief and civil penalties for violations arising out of the unlicensed distribution and sale of milk and food products . . .”¹⁰ Subsequently, both parties moved for summary judgment, with Brown claiming that Maine’s “home rule” provisions, combined with the recently passed Local Food Ordinance in Blue Hill,¹¹ exempt him from state licensing requirements.¹²

The suit against Dan Brown has gained the attention of raw milk advocates, pro-family farm interest groups, bloggers, and “locavores” across the nation.¹³ Gary Cox, general counsel for the Farm-to-Consumer Legal Defense Fund,¹⁴ and a familiar face in litigation involving “food sovereignty” and small family farms, has signed on to defend Brown in the matter.¹⁵ While gaining significant national attention as fuel to the fiery food choice debate, the “Farmer Brown” case came to a rather anticlimactic end when the Hancock County Superior Court granted summary judgment in favor of the State and issued an injunction against Brown, enjoining him from selling raw milk or otherwise operating a food establishment unlicensed.¹⁶ A hearing regarding civil penalties is pending as this Note goes to press.¹⁷

The Superior Court found summary judgment in favor of the State appropriate as “Brown readily concedes that he has sold and continues to sell milk . . . without a license,” and such unlicensed conduct could not be deemed permissible as a

9. Pl.’s Compl., *supra* note 4, ¶ 22-25.

10. *Id.* at ¶ 1. The complaint alleges three counts, one of which—Count II, regarding labeling requirements—is not within the scope of this Note.

11. Blue Hill, Me., Local Food and Community Self-Governance Ordinance of 2011 (Apr. 1, 2011) [hereinafter Blue Hill Local Food Ordinance]. *See also* Rich Hewitt, *Blue Hill Voters Approve Self-Governance Ordinance, \$1.7 Million Budget*, BANGOR DAILY NEWS, Apr. 3, 2011, <http://bangordailynews.com/2011/04/03/news/hancock/blue-hill-voters-approve-self-governance-ordinance-1-7-million-budget>.

12. Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J. 12, *Brown*, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., filed Nov. 3, 2011). Brown cited additional grounds for summary judgment that are outside the scope of this Note. He claims substantial compliance with labeling requirements, and claims that the State should be estopped from arguing that he needs a license to sell raw milk due to his reliance upon the State’s practice of not requiring dairy farmers who do not advertise or solicit sales to obtain a license. *Id.* at 4-6. Brown claims that only under a recent re-interpretation of the laws pertaining to the state’s dairy program are such small farmers required to obtain a license. *Id.* at 6-7.

13. *See, e.g.*, David Gumpert, *Maine Farmer’s Food Sovereignty Suit Appears Headed for Court Test, as Raw Milk Safety Rears its Head*, THE COMPLETE PATIENT (Apr. 18, 2012, 7:24p.m.), <http://www.thecompletepatient.com/article/2012/april/19/mainefarmers-food-sovereignty-suit-appears-headed-court-test-raw-milk-safety>; *We Are All Farmer Brown! Defend Community Food Sovereignty in Maine!*, FAMILY FARM DEFENDERS, (Nov. 14, 2011), <http://familyfarmers.org/?p=542>.

14. *See Board of Directors*, FARM-TO-CONSUMER LEGAL DEFENSE FUND, <http://www.farmtoconsumer.org/board.html> (last visited Mar. 11, 2013).

15. *See* David Gumpert, *Maine Food Sovereignty Prosecutors: If Private Food Sales are Allowed, Why, There’ll Be . . . There’ll Be . . . There’ll Be . . .*, THE COMPLETE PATIENT (Aug. 9, 2012, 3:26 PM), <http://thecompletepatient.com/article/2012/august/9/mainefood-sovereignty-prosecutors-if-private-food-sales-are-allowed-why>.

16. *State v. Brown*, ELLSC-CV-11-70 at 9 (Me. Super. Ct., Han. Cty., Apr. 27, 2013) (Murray, J.).

17. *Id.*

matter of law.¹⁸ The court relied on –an interpretation of state legislative intent that that dairy products should be subject to stricter regulation than other food items to dislodge Brown’s arguments based in Blue Hill’s Local Food Ordinance and Maine’s home rule provision. In so doing, the court has functionally precluded a municipality from exempting individuals from milk licensing requirements.¹⁹ The court found such apparent legislative intent in the fact that Maine’s food establishment regulations already anticipate an exception for farm stand or farmers’ markets sales, and expressly exclude the sale of milk from such relaxed standards.²⁰ Thus, the court reasoned, reading the Local Food Ordinance as permitting Brown’s unlicensed sale of milk would render the ordinance implicitly preempted as it would clearly frustrate the purpose of existing state law.²¹ Further, the court cited the home rule “axiom” that “a municipality may only add to the requirements of the statute,” and may not loosen such requirements absent express authority to do so.²²

Interestingly, the Superior Court stopped short of striking down the Blue Hill Ordinance entirely, by adopting a reading of the ordinance that, in conformity with Maine’s existing regulatory scheme, offers exceptions for farm stand and farmers’ markets sales while retaining a ban against unlicensed dairy product sales.

This Note will explore the background of the *Brown* case, address the arguments on each side of the dispute, and explore the potential ramifications of the Superior Court’s decision. Part II will set the stage for the “food rights versus consumer protection” debate that is at the heart of *Brown*. Part III will explore Maine’s constitutional and statutory scheme through which municipalities find the authority to enact local rules and address the stated purposes of the Local Food Ordinance. Part IV will explore Maine’s regulation of food and agriculture, and the State’s purpose in standardizing the production and sale of food. Part V will propose an alternate analysis of the issues in *Brown*, and argue that the Hancock County Superior Court could have recognized the validity of the Blue Hill Local Food Ordinance on grounds that agricultural policy should not be driven purely by the state’s definition of “safe” food, but also by concerns for the vitality of small-scale local food producers and rural economies, as anticipated by Maine’s agricultural regulatory scheme. Part VI will conclude by arguing that, despite the Superior Court’s ruling, *Brown* will potentially speak volumes as to the role of agriculture in Maine and what we value about it, and thus demands a full hearing on the merits.

II. HEATING UP

The debate over raw milk is playing out across the nation through courtroom litigation and family farm raids.²³ For example, in October 2009, Eric Wagoner was en route back to Georgia from South Carolina with 110 gallons of raw or

18. *Id.* at 3.

19. *Id.* at 8-9.

20. *Id.*

21. *Id.*

22. *Id.* at 9.

23. See generally DAVID E. GUMPERT, THE RAW MILK REVOLUTION: BEHIND AMERICA’S EMERGING BATTLE OVER FOOD RIGHTS xxi, 1-16 (2009).

unpasteurized milk that had been ordered by his “virtual farmers’ market” customers.²⁴ Upon reaching the Georgia border, Wagoner’s truck was stopped, searched, and seized by Georgian officials.²⁵ The dairy contraband was embargoed and eventually destroyed, apparently by order of the FDA.²⁶ Though the service is based in Georgia, where the sale of raw milk products is illegal, Wagoner’s virtual farmers’ market offered its members raw milk produced by various dairies located in neighboring South Carolina, where the sale of raw milk is legal.²⁷

The Farm-to-Consumer Legal Defense Fund, a non-profit organization “dedicated to protecting and promoting sustainable, environmentally sound farming practices and direct farm-to-consumer transactions” by defending “the right of farmers to directly provide, and for consumers to directly obtain, unprocessed and processed farm foods,”²⁸ brought suit against the FDA and the Department of Health and Human Services on behalf of Wagoner, as well as other buyers and sellers of raw milk.²⁹ It claimed that FDA regulations requiring milk to be pasteurized and banning unpasteurized milk from interstate commerce infringes upon consumers’ fundamental right to “produce, obtain, and consume the foods of choice for themselves and their families . . .”³⁰ The government responded that “there is no ‘deeply rooted’ historical tradition of unfettered access to foods of all kinds,” and denied the existence of a fundamental right to personal bodily and physical health that includes the right to choose which foods to obtain and consume.³¹ Citing the public health concerns posed by raw milk, the FDA argued that regulations upon raw milk are reasonable measures in furtherance of safeguarding the national food supply.³²

The FDA requires pasteurization³³ before milk is fit for human consumption—indeed, milk must be pasteurized before it is properly recognized as “milk.”³⁴ Raw milk proponents, on the other hand, counter that milk is a safe, nutrient-rich

24. Farm-to-Consumer Legal Def. Fund v. Sebelius, 734 F. Supp. 2d 668, 676 (N.D. Iowa 2010).

25. *Id.*

26. *Id.* at 676, 689.

27. *Id.* at 676

28. *Id.* at 677.

29. Other plaintiffs included individuals who reside in states that have banned the sale of raw milk, purchase raw milk for their personal consumption in states where the sale of raw milk is allowed, then transport the raw milk to their home state for consumption, and a South Carolina farmer who produces and sells raw milk, some of which is purchased by people living in states in which the sale of raw milk is prohibited. *Id.* at 675.

30. *Id.* at 678.

31. Br. in Supp. of United States’ Mot. to Dismiss Pl.’s Am. Compl. at 26, *Sebelius*, 734 F. Supp. 2d 668 (No. 5:10-cv-04018-MWB).

32. *Id.* at 7-8, 27-29.

33. Pasteurization is a process where milk is heated to a specific temperature for a set period of time, thereby killing harmful bacteria that are known to cause diseases such as listeriosis, typhoid fever, tuberculosis, diphtheria, and brucellosis. FDA, THE DANGERS OF RAW MILK: UNPASTEURIZED MILK CAN POSE A SERIOUS HEALTH RISK 1 (August 2012), available at <http://www.fda.gov/Food/ResourcesForYou/consumers/ucm079516.htm>.

34. 21 C.F.R. § 131.110(a) (2012) (defining “milk” as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows” that “shall have been pasteurized or ultra-pasteurized”).

beverage in its unadulterated, raw form.³⁵ They argue that raw milk contains higher levels of essential vitamins, minerals, and healthy bacteria than pasteurized milk,³⁶ and provides plentiful health benefits, including increased resistance to allergies and asthma.³⁷

However, battles over raw milk may only be symptomatic of the underlying war that is intensifying in the United States.³⁸ At the heart of the raw milk debate is the individual's asserted right to choose which foods to eat and feed his or her family, "even if in some cases it means assuming some minimal risk of becoming ill," and the inevitably adverse interest of the State to define and regulate which foods are proper for human consumption in the name of public safety.³⁹ This is the debate over what has been called food choice, or "food sovereignty."⁴⁰ As consumers are increasingly demanding locally produced foods⁴¹ and more of a connection with their food and its origins,⁴² safety regulations that arguably limit the consumer's ability to obtain food products of their choice are seen by some as tantamount to restrictions upon the exercise of a fundamental right.⁴³

Providing the latest food choice battleground is the "Local Food Ordinance," which has been passed by municipalities in Vermont,⁴⁴ Massachusetts,⁴⁵ California,⁴⁶ and Maine.⁴⁷ These local ordinances assert that "citizens possess the

35. See A Campaign for Real Milk, The Weston A. Price Fund., *A Campaign For Real Milk Brochure* (Jan. 1, 2000), <http://www.realmilk.com/brochures/real-milk-brochure>.

36. *See id.*

37. Georg Loss et al., *The Protective Effect of Farm Milk Consumption on Childhood Asthma and Atopy: The GABRIELA Study*, 128 J. ALLERGY CLINICAL IMMUNOLOGY 766, 769 (2011).

38. *See GUMPERT, supra* note 23, at xxvi-xxix.

39. *See id.* at xxvii. *See also Sebelius*, 734 F. Supp. 2d. at 677-78; Br. in Supp. of United States' Mot. to Dismiss Pl.'s Am. Compl., *supra* note 31, at 26.

40. *See GUMPERT, supra* note 23, at xxvii (quoting Pete Kennedy of the Farm-to-Consumer Legal Defense Fund); *What Is Food Sovereignty?*, FAMILY FARM DEFENDERS, http://familyfarmers.org/?page_id=230 (last visited Oct. 12, 2012).

41. *See generally* Dawn Thilmany McFadden, What Is Driving Consumer Demand for Local Foods? (Feb. 2012), (*available at* <http://www.slideserve.com/sancha/what-is-driving-consumer-demand-for-local-foods-dawn-thilmany-mcfadden-colorado-state-university>).

42. *See Marne Coit, Jumping On the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 49-50 (2008).

43. *See Kammi L. Rencher, Note, Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418 (2012); JOEL SALATIN, EVERYTHING I WANT TO DO IS ILLEGAL: WAR STORIES FROM THE LOCAL FOOD FRONT 3-10 (2007) (questioning the rationale behind strict regulation on a number of agricultural activities).

44. *See Jessica, Second Vermont Town Passes Food Sovereignty Measure*, VT. COAL. FOR FOOD SOVEREIGNTY (May 17, 2011), <http://vermontfoodsovereignty.net/2011/05/second-vermont-town-passes-food-sovereignty-measure>.

45. *See Clarke Canfield, Food Sovereignty Ordinances: Towns Loosen Reins On Direct-To-Consumer Food Producers*, HUFFINGTON POST (June 22, 2012, 3:10 AM), http://www.huffingtonpost.com/2012/06/22/food-sovereignty-ordinances_n_1618270.html.

46. *See Rady Ananda, Santa Cruz Adopts Food Freedom Resolution Supporting Private Herd Shares*, THEPEOPLESVOICE.ORG (Sept. 22, 2011, 8:20 PM), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2011/09/22/santa-cruz-adopts-food-freedom-resolution>.

47. *Third Maine Town Passes Landmark Local Food Ordinance: Effort Gaining Attention Nationwide*, FARM-TO-CONSUMER LEGAL DEFENSE FUND (Apr. 4, 2011), <http://www.farmtoconsumer.org/Third-Maine-Town-Passes-Landmark-Local-Food-Ordinance.htm>.

2013]

STATE V. BROWN

795

right to produce, process, sell, purchase, and consume local foods of their choosing,”⁴⁸ and thereby purport to exempt local food producers and processors from state license and inspection requirements, “provided that the transaction is only between the producer or processor and a patron when the food is sold for home consumption.”⁴⁹ Furthermore, the ordinance rejects as unlawful any state or federal interference with the rights asserted.⁵⁰

The validity of the Local Food Ordinance is now under fire in the wake of the *Brown* decision.⁵¹ Facing sanctions from the Maine Department of Agriculture for selling unpasteurized milk without a license, Blue Hill farmer Dan Brown sought safe harbor under the town’s ordinance.⁵² Significantly, though it involves the sale of raw milk, the *Brown* case is not about the controversial dairy product. This is, however, a case that goes to the heart of the food sovereignty debate. It is a case about residents of a small, rural Maine town asserting the right to obtain food from their local farmers and neighbors unimpeded by state and federal regulation. This is also a case about the State’s legitimate interest in regulating the sale of milk—pasteurized or unpasteurized—and other food products through licensing and inspection, as a reasonable means of ensuring public health and safety. As a potential “test case” for the legitimacy of local food ordinances in general, the ultimate disposition and persuasiveness of *Brown* could have a profound impact on the food sovereignty movement in Maine, and nationwide.⁵³

III. “FOOD SOVEREIGNTY”: FINDING VALIDITY OF LOCAL FOOD ORDINANCES THROUGH “HOME RULE” PROVISIONS

Maine’s State constitution affords “[t]he inhabitants of any municipality . . . the power to alter and amend their charters on all [local matters].”⁵⁴ Thus, Maine is a “home rule” state, and grants its municipalities a plenary power to exercise, by ordinance or otherwise, any constitutionally granted power or function not expressly or implicitly denied by the Legislature.⁵⁵ Thus, so long as not expressly or implicitly prohibited from doing so, a municipality is “free to act to promote the well-being of its citizens.”⁵⁶

48. LOCAL FOOD AND COMMUNITY SELF-GOVERNANCE ORDINANCE OF 2011 § 5.2 (2011), available at <http://savingseeds.files.wordpress.com/2011/03/localfoodlocalrules-ordinance-template.pdf> [hereinafter Model Local Food Ordinance].

49. *Id.* § 5.1.

50. *Id.* § 6.1.

51. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 11-18.

52. Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 12, at 12.

53. Press Release, Internal Dept. of AG Emails Raise Questions about Motivation in Farmer Brown Case: Lawsuit Against Dan Brown and Gravelwood Farm a “Test Case” (Apr. 4, 2012), http://www.sourcewatch.org/images/f/f7/Food_for_Maine's_Future_Press_Release.pdf

54. Me. Const. art. VIII, pt. 2, § 1.

55. 30-A M.R.S.A. § 3001 (2011).

56. School Comm. v. Town of York, 626 A.2d 935, 938 n. 8 (Me. 1993) (citing the Report of the Joint Standing Committee on Local and County Government on the Revision of Title 30 11 (Dec. 1986)).

In 2011, the towns of Sedgwick,⁵⁷ Penobscot,⁵⁸ and Blue Hill, Maine,⁵⁹ each passed substantially similar versions of the Local Food and Self Governance Ordinance, purporting to exempt local food producers who sell directly to consumers from state and federal licensing and inspection requirements.⁶⁰ The towns' stated purpose in enacting the ordinance includes facilitating residents' unimpeded access to local foods through farmers' markets and direct farm-to-consumer sales, and enhancing the local economy by promoting the production and purchase of local food products.⁶¹ The model ordinance's preamble reads:

We the People of [the municipality] have the right to produce, process, sell, purchase and consume local foods thus promoting self-reliance, the preservation of family farms, and local food traditions. We recognize that family farms, sustainable agricultural practices, and food processing by individuals, families and non-corporate entities offers stability to our rural way of life by enhancing the economic, environmental, and social wealth of our community We hold that federal and state regulations impede local food production and constitute a usurpation of our citizens' right to food of their choice.⁶²

Given this language, it appears that these ordinances reflect fears within Maine's farming communities that recent reinterpretations of state agriculture regulations, and possibly the FDA Food Safety Modernization Act,⁶³ are tailored toward facilitating large-scale food production at the expense of the family farm and traditional agricultural values.⁶⁴ The industrial food model fails to differentiate between family farms and factories, and imposes the same requirements on both.⁶⁵ Indeed, food sanitation laws seem to inherently require a producer to purchase expensive equipment.⁶⁶ For large-scale agribusinesses like Tyson and Pilgrim's Pride, these costs are a drop in the bucket.⁶⁷ For small-scale producers like Dan

57. Sedgwick, Me., Local Food and Community Self-Governance Ordinance of 2011 (Mar. 5, 2011), available at <http://www.sedgwickmaine.org/images/stories/local-food-ordinance.pdf>. [hereinafter Sedgwick Local Food Ordinance]

58. See Jennifer Kongs, *Local Food Sovereignty Ordinance Passed in Maine Community*, MOTHER EARTH NEWS (Apr. 12, 2011, 10:06 AM), <http://www.motherearthnews.com/happy-homesteader/maine-local-food-sovereignty-zb0z11zkon.aspx#axzz2JrrZkFAz>.

59. Blue Hill Local Food Ordinance, *supra* note 11.

60. Jay Field, *More Maine Towns Join "Food Sovereignty" Movement*, ME. PUB. BROAD. NETWORK (Apr. 18, 2011), <http://www.mpbn.net/News/MPBNNNews/tabid/1159/ctl/ViewItem/mid/3762/ItemId/16037/Default.aspx>. As of the writing of this note, the number of Maine towns that have passed local food sovereignty ordinances has grown to eight. See Avery Yale Kamila, *2 More Maine Towns Pass Local Food Ordinances*, PORTLAND PRESS HERALD (June 14, 2012, 9:55 A.M.), <http://www.pressherald.com/blogs/mainmealacarte/159039265.html>.

61. See, e.g., Model Local Food Ordinance, *supra* note 48, § 3; Sedgwick Local Food Ordinance, *supra* note 57, § 2; Blue Hill Local Food Ordinance, *supra* note 11, at § 3.

62. Model Local Food Ordinance, *supra* note 48, § 3.

63. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885(codified as amended in scattered sections of 21 U.S.C.).

64. See Alli Condra, *Local Food and Community Self-Governance Ordinance*, A.B.A. AGRIC. MGMT. COMM. NEWSLETTER (A.B.A./Smart Growth & Green Bldgs. Comm. & Agric. Mgmt. Comm.), Aug. 2012, at 17.

65. See WENDELL BERRY, BRINGING IT TO THE TABLE 37 (2009).

66. See *id.* at 83.

67. See SALATIN, *supra* note 43, at 23.

Brown, however, they are absolutely prohibitive.⁶⁸ This inequity in food regulation has prompted at least one of those at the forefront of the food sovereignty movement to call the modern “doctrine of sanitation” the “greatest destroyer” of the small farm and small economies.⁶⁹

In addition to Maine’s home rule provision outlined in the State constitution, the ordinance finds statutory authority by which Maine “grants municipalities all powers necessary to protect the health, safety, and welfare of [its residents].”⁷⁰ It also cites Maine’s statutory policy “to encourage food self-sufficiency for the State.”⁷¹ Thus, finding a cohesive purpose between the municipal ordinance and the State’s defined goals in regulating Maine’s food and agriculture, proponents maintain that this regulatory scheme inherently leaves room for the town’s Local Food Ordinance.⁷² Brown argues that the ordinance in fact facilitates the purposes of agricultural regulation by supporting the state and local economy, improving food quality and the health of Maine’s citizens, and ensuring the vitality of rural values and family farms.⁷³ For those waving the banner of food choice rights, it is exactly these types of food sovereignty proclamations that foster the true purposes of food and agriculture.

IV. PROTECTING PUBLIC HEALTH AND SAFETY

Federal public health agencies have long warned of the dangers of raw milk consumption,⁷⁴ and the FDA requires adequate pasteurization of all milk entering into interstate commerce.⁷⁵ While the federal Grade “A” Pasteurized Milk Ordinance (PMO) sets the national standard for milk sanitation by defining acceptable practices in production, inspection, processing, and packaging,⁷⁶ intrastate sale or consumption of raw milk is a matter left to the states.⁷⁷ Perhaps unsurprisingly, a correlation has been suggested between state leniency toward raw milk and the occurrence of outbreaks and illnesses commonly attributable to raw milk and adulterated foods.⁷⁸

Significantly, in the *Brown* case, the State and the Department of Agriculture maintains that they do not seek to restrict Brown’s ability to sell raw milk.⁷⁹ In

68. See BERRY, *supra* note 65, at 83-84.

69. *Id.* at 83.

70. Blue Hill Local Food Ordinance, *supra* note 11, § 4.

71. *Id.*

72. See Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 12, at 15.

73. *Id.*

74. See generally *Raw Milk Misconceptions and the Danger of Raw Milk Consumption*, FDA, <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ConsumerInformationAboutMilkSafety/ucm247991.htm> (last updated Nov. 1, 2011).

75. Milk and Cream, 38 Fed. Reg. 27924, 27924 (FDA Oct. 10, 1973).

76. DEP’T HEALTH & HUMAN SERVS., PUB. HEALTH SERV. & FDA, GRADE “A” PASTEURIZED MILK ORDINANCE iii (2009 Rev.).

77. *Food Safety and Raw Milk*, FDA, (Nov. 1, 2011), <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm277854.htm>.

78. See Adam J. Langer et al., *Nonpasteurized Dairy Products, Disease Outbreaks, and State Laws—United States, 1993-2006*, 18 EMERGING INFECTIOUS DISEASES 385, 388 (2012).

79. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 5.

fact, Maine is one of twenty-five states that allow either the retail or farm-direct sale of raw milk from licensed food establishments.⁸⁰ Rather, the State's concern in this matter is in protecting the public health and welfare by ensuring that all milk sold to consumers—pasteurized or not—has been produced under safe, sanitary conditions, and is unadulterated and fit for consumption.⁸¹ The State ensures these safety measures within the food supply by way of Department licensing and inspection requirements, with which each food establishment must comply.⁸²

The State argues that allowing producers to sell milk and other food items completely unchecked would usurp the State's compelling interest—indeed, the State's *responsibility*—in protecting the health and welfare of its citizens.⁸³ Such a hands-off approach to regulating the food supply would provide no assurance of sanitation in the production process, and would therefore pose serious public health consequences, including increased risks of food-borne bacterial, parasitic, and viral illnesses.⁸⁴ The Department licensing and inspection requirements provide reasonable regulatory oversight to ensure that the food that ends up on our plates has been produced, processed, packaged, and labeled in a safe, sanitary manner.⁸⁵

The Blue Hill Ordinance, the State contends, is in direct conflict with the State's purpose in ensuring an unadulterated food supply in Maine.⁸⁶ By purporting to provide complete exemption from State agricultural regulations, and thereby allowing farmers who sell directly to consumers to bypass licensing and inspection requirements, the ordinance effectively frustrates the “efficient accomplishment” of a defined legislative purpose.⁸⁷ The Department, under direction of the Legislature, established standards for inspection, licensing, labeling, and sanitation of milk products, in conformance with the standards set by the PMO.⁸⁸ Thus, the State maintains, it is the express intent of the Legislature that the sale of milk and other food products are regulated in a manner consistent with FDA standards, thereby ensuring the reasonably unadulterated nature of Maine's food supply through licensing, inspection, and enforcement of sanitation and safety measures.⁸⁹ The State argues that by providing an exception to reasonable safety standards that does not exist in the state's regulatory scheme, the Blue Hill Local Food Ordinance is implicitly preempted.⁹⁰

Furthermore, the State emphasizes that Department licensing requirements are not overly burdensome, and that the simple, affordable steps to obtain a license are

80. See *Raw Milk Nation: State-by-State Review of Raw Milk Laws*, FARM-TO-CONSUMER LEGAL DEFENSE FUND (May 17, 2010), http://www.farmtoconsumer.org/raw_milk_map.htm.

81. Pl.'s Opp'n to Def.'s Comb. Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J., *supra* note 5, at 4-5.

82. 22 M.R.S.A. § 2167 (2004 & Supp. 2012).

83. Pl.'s Opp'n to Def.'s Comb. Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J., *supra* note 5, at 4-5.

84. *Id.*

85. *Id.* at 5.

86. *Id.* at 14.

87. *Id.* at 11-12.

88. *Id.* at 12.

89. *Id.* at 13.

90. *Id.* at 17.

accessible even for the small-scale farmer.⁹¹ Once licensed, a local food producer⁹² is free to sell his products directly to consumers, provided sanitation and handling standards are maintained.⁹³ In conformance with its stated purpose of protecting the family farm and rural values, the Department maintains it has a history of working cooperatively with producers to bring them into compliance with the law,⁹⁴ and indeed offered such assistance to Brown prior to commencing legal action.⁹⁵ Any hardships posed by the simple licensing procedure, the State continues, are certainly outweighed by public health concerns.⁹⁶

V. ANALYSIS: FOOD RIGHTS VS. CONSUMER PROTECTION

The Farmer Brown case raises some fascinating questions about the limits of local rule, the nature of agricultural legislative intent, and the merits of the “public safety” argument in opposition to municipal self-governance.

There is a clear trend toward consumer’s demanding food localization and a relationship with the source of their food.⁹⁷ There seems to be a growing sentiment that large-scale agribusiness and factory farms⁹⁸ are simply not a sustainable, nor healthy model for global food supply.⁹⁹ While few would argue that supporting local communities and agriculture is not worthwhile public policy, food safety is undoubtedly of tremendous policy concern.¹⁰⁰ At its worst, a completely unregulated food supply could leave consumers at the whim of unchecked corruption and contribute to disease outbreaks of overwhelming proportion. Then again, some argue that these are the exact crisis conditions imposed upon us by regulatory preference for large agribusiness.¹⁰¹

The central issue¹⁰² in *Brown* comes down to whether the Local Food Ordinance in Blue Hill is preempted by Maine law and Department regulations. The Maine Supreme Judicial Court, sitting as the Law Court, has provided a

91. *See Id.* at 5 n.1.

92. Local food distributors include “milk distributors,” *see* 7 M.R.S.A. § 2901-C(1) (2002), or “food establishment[s],” *see* 22 M.R.S.A. §§ 2152(4-A), 2167 (2004 & Supp. 2012).

93. *See* Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 5. However, the comprehensive sanitation and safety requirements imposed upon a licensed producer are cited as insurmountable barriers for small, family farm operations in the form of exorbitant capital expenditures on sophisticated machinery. *See* SALATIN, *supra* note 43, at 23; *see also* Isolde Raftery, *Young Farmers Find Huge Obstacles to Getting Started*, N.Y. TIMES, Nov. 12, 2011, http://www.nytimes.com/2011/11/13/us/young-farmers-face-huge-obstacles-to-getting-started.html?_r=3& (explaining that the cost of land and machinery, and limited access to capital, keeps many from taking up small farming operations).

94. *See* Pl.’s Statement of Add. Mat. Facts in Opp’n to Def.’s Mot. Summ. J. 3, *Brown*, ELLSC-CV-11-70 (Me. Super. Ct., Han. Cty., filed Nov. 3, 2011).

95. *See* Pl.’s Ex. E, *supra* note 7.

96. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 5.

97. *See* Coit, *supra* note 42, at 49-50.

98. *See* JONATHAN SAFRAN FOER, EATING ANIMALS 59 (2009) (suggesting that the term will no longer be in use as there will no longer be family farms to which to compare).

99. *See id.* at 148.

100. *See* Condra, *supra* note 64, at 17.

101. *See generally* FOER, *supra* note 98, at 135-43.

102. *Brown* also involves issues of estoppel and substantial compliance, which are outside the scope of this Note.

framework for interpreting the interplay between state law and municipal ordinances in light of Maine's home rule provisions.¹⁰³ The Law Court recognizes that local authority is "necessary for the welfare of the municipalities and their inhabitants," and has affirmed that Maine's home rule provisions establish a "rebuttable presumption that [municipal ordinances] are valid."¹⁰⁴ Accordingly, only where the Legislature has expressly denied localities the power of self-governance over regulatory subject matter, or has clearly intended to exclusively occupy the field to the exclusion of the municipality's home rule authority, will a local ordinance be invalid.¹⁰⁵ Because there seems to be no explicit statutory denial of municipalities' authority to regulate local agriculture, the preemption question turns upon whether the Legislature in fact intended to exclusively regulate agriculture to the implicit exclusion of local power.¹⁰⁶ Therefore, if the Blue Hill Ordinance frustrates the purpose of agricultural regulation,¹⁰⁷ it would not be a valid assertion of local authority in this context.¹⁰⁸

So, as a preliminary question: does the food sovereignty ordinance circumvent regulations designed to conform all intrastate food production and supply to state sanitation and safety standards? The answer is likely "yes." The State has an undeniable interest in "the preservation of public peace, health and safety,"¹⁰⁹ and in establishing reasonable measures to minimize the risk of consumer deception and widespread disease. As a reasonable means toward these ends, the clear purpose of Maine law is to regulate the production and sale of food products "in a manner consistent with inspection and examination, licensing, permitting, testing, labeling and sanitation standards set by the [FDA]."¹¹⁰ The ordinance attempts to provide local food producers an unambiguous loophole to these requirements, and thus frustrates that purpose.

However, the preemption analysis does not end there. After all, what is the purpose of agriculture and food regulation? Is it just conformity with state safety standards? Or is that a simplification of the issue?

Maine recognizes that safety is in fact not the sole concern in agricultural regulation, as exemplified in its stated intent under Title 7 of the Maine Revised Statutes, the title concerning agriculture and animals:

[A]griculture . . . [contributes] substantially to the state's overall economy, [is] essential to the maintenance and strengthening of rural life and values and necessary to the preservation of the health, safety and welfare of all of the people of this State.

103. See *Cent. Me. Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990); *School Comm.*, 626 A.2d 935 (Me. 1993).

104. *Cent. Me. Power*, 571 A.2d at 1193.

105. *School Comm.*, 626 A.2d at 939.

106. *See id.*

107. See *E. Perry Iron & Metal Co. v. City of Portland*, 2008 ME 10, ¶ 15, 941 A.2d 457, 462 (citing *Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 27, 760 A.2d 257, 263-64)

108. Condra, *supra* note 64, at 17.

109. Pl.'s Opp'n to Def.'s Comb. Mot. Summ. J. & Opp'n to Pl.'s Mot. Summ. J., *supra* note 5, at 13.

110. *Id.*

2013]

STATE V. BROWN

801

The survival of the family farm is of special concern to the people of the State, and the ability of the family farm to prosper, while producing an abundance of high quality food and fiber, deserves a place of high priority in the determination of public policy.¹¹¹

In a very real sense, agricultural regulations define the state's view as to what constitutes an ideal food system. The manner in which we regulate our food supply has a direct impact on the role of agriculture in shaping our communities, our values, and our relationship to food. As the Legislature has acknowledged, agriculture itself, and the role of the small, family farm should be a significant consideration in Maine's food law and policy.¹¹²

Indeed, *Brown* is not a case about the legality of raw milk, despite the Superior Court's emphasis on the State's apparent intent to subject dairy to more exacting standards. But it *is* a case that has significant implications for food choice. Modern food regulation, and its prohibitive effect upon the small-scale producer, directly impacts the consumer's "opportunity for qualitative choice."¹¹³ The Local Food Ordinance is an assertion by rural Mainers that the option to buy food from their neighbors, thereby boosting the local economy and sustaining local family farms, is fundamental to their welfare and way of life.¹¹⁴ It is an assertion that the way we have been doing things is not working; that existing food regulation and the ideal role of agriculture and food are at odds with one another.¹¹⁵ The failure of the industrial food model to differentiate between the family farm and the factory farm necessitates the former's opting out of that model.

Thus, the Superior Court could have properly found that the purpose of agricultural regulation is not simply for the food supply—including dairy products—to conform to state guidelines for sanitation and safety, but also to preserve the traditional role of agriculture in rural communities, sustain the family farm, and boost local economies. In so finding, the court may determine that, despite the loophole it provides to state licensing and inspection requirements, the ordinance does not frustrate the purposes for agricultural regulation because agricultural public policy goals should not yield to state-defined safety standards. Rather, both sound public policy and legislative intent dictate that proper agricultural regulation should promote these values harmoniously. Arguably, there has been a tilt toward sacrificing public policy goals in the name of consumer protection.¹¹⁶ The Local Food Ordinance represents a locality's attempt to reassert the established policy goals of agricultural regulation by exempting the family farm and direct farm-to-consumer sales from the industrial food model.

But, are public safety concerns nonetheless paramount to agricultural public policy and concerns for the valuable role of small-scale food systems? Are the two inevitably at odds?

111. 7 M.R.S.A. § 1-A (2002 & Supp. 2012).

112. *See id.*

113. *See BERRY, supra* note 65, at 35.

114. *See Model Local Food Ordinance, supra* note 48, § 3.

115. *See id.*

116. *See BERRY, supra* note 65, at 84-85. *See generally GUMPERT, supra* note 23, at xxvi-xxix (describing the conflict that exists between private food choice and government concerns for consumer protection).

The State maintains that, absent any Department oversight, Brown would be free to sell his food products completely unchecked, with no assurance that the food was fit for consumption.¹¹⁷ The ordinance, however, does provide for some level of accountability.¹¹⁸ One of the philosophical tenets of the food choice movement is that it encourages an individual to see where his or her food comes from, and then judge the quality and safety of the product.¹¹⁹ This “free market” check upon local food producers may seem naïve but, whether stamped with FDA approval or not, any time we make a purchase decision on food, we take a risk.¹²⁰ It is the right of choice itself that is held as a fundamental liberty—the ability to determine for one’s self the quality, safety, and integrity of the food he or she consumes, rather than complete reliance upon state-approved sustenance. Agricultural policy that encourages consumers to literally *see* where their food comes from, and witness the health of the animals and the cleanliness of the facilities, undoubtedly has some merit. This is particularly true as it becomes increasingly difficult to ignore the arguments by some that modern agricultural practices are endangering us far more than they are keeping us safe.¹²¹ Public safety is undoubtedly a substantial state concern, but the soundness of policies that commission the expanding role of factory farms and Concentrated Animal Feeding Operations¹²² in our food supply—where even “Best Management Practices”¹²³ facilitate alarming rates of food-borne illnesses,¹²⁴ promote the growth of devastating “superbugs” like MRSA, H1N1 and H5N1,¹²⁵ and constitute the leading contributor to greenhouse gasses¹²⁶—must be questioned.¹²⁷ Proactive measures taken by federal and state agriculture departments in the name of public protection seem to only exacerbate the dangers lurking in our food supply.¹²⁸ It comes as little surprise, then, that an increasing number of “health and medical authorities are questioning whether the ever-widening use of sanitation techniques, including pasteurization, irradiation, [and] the overuse of antibiotics . . . could be

117. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 14.

118. *See, e.g.*, Model Local Food Ordinance, *supra* note 48, § 6.2. Blue Hill, however, has not, as of the writing of this Note, proposed any alternative local regulations to ensure residents’ safety. *See Condra*, *supra* note 64. The Superior Court is unlikely to recognize the “free market” safety-check discussed in this Note as a viable alternative to safety regulation, and is therefore unlikely to uphold the ordinance on these grounds alone. *See id.*

119. *See* Model Local Food Ordinance, *supra* note 48, § 3.

120. *See* GUMPERT, *supra* note 23, at xxvii-xxviii. *See generally* SARAH A. LISTER & GEOFFREY S. BECKER, CONG. RESEARCH SERV., R40916, FOOD SAFETY: FOODBORNE ILLNESSES AND SELECTED RECALLS OF FDA-REGULATED FOODS (2010) (describing several methods and means of monitoring foodborne illness, as well as the rates and impacts of foodborne illness in the United States); *Foodborne Outbreak Online Database (FOOD)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/foodborneoutbreaks> (last visited Oct. 14, 2012) (supplying a web-based search tool for tracking national information on foodborne illnesses and disease outbreaks).

121. *See generally* FOER, *supra* note 98, at 135-43.

122. *See id.* at 50.

123. SALATIN, *supra* note 43, at 173.

124. *See* FOER, *supra* note 98, at 139.

125. *See id.* at 139-43; GUMPERT, *supra* note 23, at xxviii.

126. *See id.* at 58.

127. *See* BERRY, *supra* note 65, at 84-85.

128. *See id.* at 85; GUMPERT, *supra* note 23, at xxviii.

2013]

STATE V. BROWN

803

eliminating beneficial bacteria that not only keep pathogens at bay but also boost the nutritional value of foods.”¹²⁹

Of course, at issue in *Brown* was not the soundness of existing food regulation, but whether existing food regulation fairly anticipates municipal authority over local food commerce. Significantly, Blue Hill’s Local Food Ordinance asserts that local food systems promote the availability of foods that are safer, healthier, and more nourishing than those produced by large-scale operations.¹³⁰ In this respect, the ordinance shares and advances the State’s goals to provide quality nutrition in furtherance of the public health and welfare.¹³¹ Accordingly, the ordinance does not frustrate, but rather furthers the purpose of the State’s food regulations. Perhaps then, the court’s finding that the Legislature intends to promote public safety by way of dairy regulation to the implicit exclusion of localities ignores the notion of *safety*, in its purest sense, as well as the intended purpose of home rule provisions: to ensure the welfare of municipalities and their inhabitants.¹³²

The mere fact that the ordinance provides for an undeniably divergent, more liberal means of achieving the purposes of agricultural regulation does not preclude an argument against preemption,¹³³ nor does the State’s argument that Department licensing and inspection requirements are not unreasonable or overly burdensome.¹³⁴ Even if this latter argument is accepted as meritorious, it misses the point. The question is not whether State licensing requirements are overly burdensome upon the small farmer, but whether the Legislature fairly anticipates a municipality allowing its farmers to sell food products without following such procedures. The question in *Brown*, then, is not whether the existing regulatory scheme is fully consistent with and facilitates the intended purposes of agriculture, but whether the *ordinance* achieves these goals.

Maine’s home rule legislation apparently grants broad local authority.¹³⁵ Given this broad grant of municipal power over local issues, Maine courts should

129. GÜMPERT, *supra* note 23, at xxviii.

130. See Model Local Food Ordinance, *supra* note 48, § 3.

131. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 5.

132. See 30-A M.R.S.A. § 2109 (2011) (stating that the statute outlining Maine’s home rule, “being necessary for the welfare of the municipalities and their inhabitants” is to be construed “liberally”).

133. See *School Comm.*, 626 A.2d at 941 (quoting Report of the Joint Standing Committee on Local and County Government on the Revision of Title 30 8 (Dec. 1986) (“The mere fact that there is a state law, or even a multitude of state laws on a subject is by itself irrelevant; the key is whether the Legislature intended to exclusively occupy the field and thereby deny a municipality’s home rule authority to act in the same area.”).

134. Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 5. See also Alli Condra, *Maine’s Local Food Ordinances Tested*, Nov. 21, 2011, FOOD SAFETY NEWS, <http://www.foodsafetynews.com/2011/11/maines-local-food-ordinances-tested>.

135. See 30-A M.R.S.A. §§ 3001(1)-(3), which reads:

1. Liberal construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality’s home rule authority.
3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

narrowly interpret the current standard of implied preemption¹³⁶—the question of whether the local rule frustrates a purpose of state law—and find no such preemption when the municipal rule aims at the same general purpose as the State’s statutory scheme, or otherwise provides for the satisfaction of any affirmative obligations upon the municipality itself.¹³⁷

In *Brown*, there is no indication that Blue Hill’s Local Food Ordinance is at odds with the general purposes of Maine’s agriculture regulation, as discussed in this section. The Ordinance explicitly aims to ensure the vitality of the family farm, increase access to quality nutrition in furtherance of the public health and welfare, and strengthen the local and state economies.¹³⁸ Furthermore, there seems to be nothing in the record to suggest that Blue Hill has not met any statutory duties imposed upon it in enacting a local agricultural ordinance. Blue Hill is specifically authorized to enact local ordinances related to agriculture, provided that it submit the proposed ordinance to the Department for its review on whether the ordinance meets the Department’s “best management practices.”¹³⁹ Significantly, this review process “does not affect municipal authority to enact ordinances.”¹⁴⁰

In light of the foregoing analysis, the Superior Court could have upheld the validity of the Blue Hill’s Local Food Ordinance to the extent necessary to allow the municipality to determine which agricultural practices promote the welfare and safety of its residents and foster the sustainability of its local agricultural practices and economy. The family farm and the direct farm-to-consumer relationship is a segment of our food system worth preserving. To the extent that a municipality finds existing state or federal food regulations restrictive of small-scale local food production and direct farm-to-consumer sales, that municipality should be allowed to exempt its local farmers from such regulation. Food and agriculture, with their tangible and unique roles in local economies and rural values, seem to be precise areas of governance contemplated by home rule provisions as within the purview of local rule. A municipal rule regarding direct farm-to-consumer transactions that are purely local in nature does not frustrate the State’s ability to regulate those producers otherwise falling under the “food establishment” or “milk producer” umbrella. Thus, a holding that the Local Food Ordinance is not implicitly preempted by agricultural legislation would have both preserved the integrity of home rule authority and promoted the intended purposes of agricultural legislation.

136. See Shane Wright, Case Note, *Smith v. Town of Pittston: Municipal Home Rule’s Narrow Escape from the Morass of Implicit Preemption*, 57 ME. L. REV. 613, 639 (2005).

137. See *id.* at 636.

138. See Model Local Food Ordinance, *supra* note 48, § 3.

139. 7 M.R.S.A. § 155 (Supp. 2012). Although both parties to the *Brown* litigation appear to agree that Blue Hill is statutorily authorized to enact local agricultural ordinances, they appear to disagree on whether the Department has merely an advisory role regarding an ordinance’s conformity with the Department’s best management practices under 7 M.R.S.A. § 155, or whether a local ordinance will be implicitly preempted upon the Department’s determination that best management practices are restricted or prohibited by the ordinance. Compare Pl.’s Opp’n to Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 5, at 14 n.6, with Def.’s Comb. Mot. Summ. J. & Opp’n to Pl.’s Mot. Summ. J., *supra* note 12, at 14-15. The plain language of the statute, and the significance of home rule authority, seems to support the former interpretation.

140. 7 M.R.S.A. § 155.

2013]

STATE V. BROWN

805

VI. CONCLUSION

Brown presents a fairly minute matter in the grand scheme of food law and policy. It is a case about a single town in rural Maine that wishes to allow its small farmers to sell directly to consumers. But, at the risk of exaggerating the potential ramifications of the *Brown* decision and order, this case could prove to offer an important glimpse into the legal and policy reasoning that shapes Maine's agricultural model. While the Superior Court did not expressly strike down the Blue Hill Ordinance, the ruling does put Maine farmers operating under local food ordinances on uncertain legal ground. Further, from a policy perspective, the ultimate disposition of *Brown* may reflect the true driving forces of food regulation, and firmly define the role of agriculture in Maine's values and culture. The court may very well have determined that striking a reasonable balance between freedom of food choice and consumer protection was impossible, and the side with which the court aligned likely turned upon the extent to which the multiple purposes of agriculture took precedence. Perhaps, by focusing on the apparent legislative intent for heightened restrictions regarding dairy products, the Superior Court did not give proper weight to the significant role of food and agriculture in rural farming communities and local economies. Or perhaps the court simply decided that public health and safety would be compromised without comprehensive regulatory oversight.

In any case, given the facts before the court, and the express statutory language, summary judgment in favor of the State was appropriate. However, had the court incorporated into its analysis the broader context of Maine's agricultural regulation and the purposes for such regulation, it *could* have found Brown's conduct shielded by home rule. At the very least, the Superior Court's ruling signals that there is significant work to be done at the legislative level regarding Maine's food system.