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Food Federalism: States, Local Governments, and the Fight for Food Sovereignty

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Recently, a number of states have sought to withdraw or restrain local power. In this Article, which is part of the "Re-Thinking State Relevance" symposium hosted by the Ohio State Law Journal, I write about a state taking the opposite approach, and attempting to affirmatively endow its local governments with additional powers. The state is Maine, and the context is control over local food production and sales. This Article begins by addressing the emergence of the sustainable local foods movement broadly, and reasons for the growth of this movement. It then focuses more pointedly on the food sovereignty movement, considering the ways that this movement has sought to put control into the hands of local people, and thus local governments. This Article then considers the power struggles between state and local governments, and the reason that even strong local governments might not be able to act as forcefully as they would like in areas such as food regulation. Finally, this Article addresses Maine's passage of a state law recognizing local food sovereignty, and the federalism concerns that this law raised. This Article seeks to present a roadmap for states that wish to play a more active role in advancing local food goals, or empowering local governments more broadly.

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* Edward S. Godfrey Professor of Law and Associate Dean for Research, University of Maine School of Law. Thanks to Margot Pollans and Anthony Moffa for feedback, to Daniel McCue for research assistance, and to the members of the *Ohio State Law Journal* for inviting me to present at this symposium.

I. INTRODUCTION

When I ask my first-year students what they know about environmental regulation, they often mention the famous federal environmental statutes—the Clean Air Act, the Clean Water Act, and the Endangered Species Act. While these classic federal statutes make up the bulk of a traditional environmental law curriculum, many scholars have expanded their conception of environmental law.[1] This expanded view includes actions taken at the state and local levels, as well as topics outside the traditional canon.[2]

The topic of this symposium is "Re-Thinking State Relevance." While a number of scholars focus their work on the interplay between state and federal governments when it comes to environmental law, my research focuses primarily on *local* governments and the ways they can aid in advancing environmentalist agendas and fighting climate change.[3]

Local governments have been working toward environmental goals on a number of fronts, especially through climate change mitigation and adaptation.[4] But in this Article, I want to address a topic that would likely be considered outside the traditional canon, but one that constitutes a growing and important part of environmental law: local and regional food systems.[5] More specifically,

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[1] *See generally* Jason J. Czarnezki & Sarah Schindler, *President Trump, the New Chicago School, & the Future of Environmental Law and Scholarship*, *in* PERSPECTIVES ON ENVIRONMENTAL LAW SCHOLARSHIP: ESSAYS ON PURPOSE, SHAPE AND DIRECTION (Ole Windahl Pederson ed., forthcoming 2019) (manuscript at 196) (on file with author) (describing the expanding nature of what scholars consider to fall within the category of "environmental law").

[2] *Id.*

[3] *See generally* Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471 (2012) (discussing how local governments have an economic incentive to repurpose big box stores and proposing four alternative uses: retail reuse, adaptive reuse, demolition and redevelopment, and demolition and regreening); Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 369 (2014) [hereinafter Schindler, *Unpermitted*] (discussing illegal local food actions as a catalyst for change); Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010) (discussing private rule creation).

[4] *See, e.g.*, John R. Nolon, *Zoning, Transportation, and Climate Change*, 8 ZONING L. & PRAC. REP. 1, 2 (2007); Emma L. Tompkins & Hallie Eakin, *Managing Private and Public Adaptation to Climate Change*, 22 GLOBAL ENVTL. CHANGE 3, 4 (2012); Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors that Harm the Environment*, 61 DUKE L.J. 1111, 1132–33 (2012).

[5] A number of environmental law scholars have been writing about food systems and food law in recent years, to the extent that a co-author and I have suggested that it is now part of an expanded definition of environmental law. *See* Czarnezki & Schindler, *supra* note 1 (manuscript at 196–97); *see also* Patricia E. Salkin & Amy Lavine, *Regional Foodsheds:*

a number of local governments have been adopting what are known as "food sovereignty" ordinances with a variety of goals, including improving their ability to produce and consume locally grown food.[6]

This Article will begin in Part II by addressing the emergence of the sustainable local foods movement and reasons for its growth. That part will specifically address how local food systems can advance environmental goals. Part III will turn to a focused discussion of the food sovereignty movement. It considers the way this movement seeks to put control in the hands of local people, and thus local governments, while Part IV addresses the motivations behind the adoption of local food sovereignty ordinances. Part V turns to the power struggles between state and local governments, and the reason that even strong local governments might not be able to act as forcefully as they would like in areas such as food regulation. In discussing the relationship between state and local governments, and the fact that local governments often lack power to take bold actions to advance environmental goals, this Part will suggest that this leaves a lot of room for states to step in and take actions to encourage and empower local governments. Part VI presents an example of a state doing just that: it addresses Maine's passage of a State law recognizing local food sovereignty and the federalism issues that this law raised. This Article concludes by addressing the way that states can play a more active role in advancing local food goals.

II. THE RELATIONSHIP BETWEEN LOCAL FOODS AND ENVIRONMENTALISM

This Article is part of the symposium panel dealing with environmental law. Thus, it begins by addressing the ways in which local foods are related to environmental law, environmentalism, and environmental goals.

The local foods movement has gained much traction and public visibility in recent years.[7] There are a number of reasons for the rise in interest in local foods, including "deeply held philosophical concerns about corporate influence over

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Are Our Local Zoning and Land Use Regulations Healthy?, 22 FORDHAM ENVTL. L. REV. 599, 600 (2011).

[6] *See* Alexis Baden-Mayer & Katherine Paul, *Can Food Sovereignty Laws Protect Local Farms from Annihilation?*, ORGANIC CONSUMERS ASS'N (Sept. 11, 2013), https://www.organicconsumers.org/news/can-food-sovereignty-laws-protect-local-farms-annihilation [https://perma.cc/T6U8-2RX2]; *see also* Town of Montville, Me., Montville Local Food Security Resolution (2011), *available at* https://www.sourcewatch.org/images/3/33/Montville_Local_Food_Resolution.pdf [https://perma.cc/HW28-JTAJ] (last visited Apr. 24, 2018); Letter from Neil Coonerty & Ellen Pirie to Bd. of Supervisors, Cty. of Santa Cruz (Sept. 6, 2011), https://foodfreedom.files.wordpress.com/2011/09/santa-cruz-right-to-grow-resolutn.pdf [https://perma.cc/R35Q-E2ZQ].

[7] *See* Oran B. Hesterman & Daniel Horan, *The Demand for 'Local' Food Is Growing—Here's Why Investors Should Pay Attention*, BUS. INSIDER (Apr. 25, 2007), https://www.businessinsider.com/the-demand-for-local-food-is-growing-2017-4 [https://perma.cc/R2GQ-KMFV].

the U.S. food supply and the environmental ramifications of our current centralized food system structure, to a simple preference for food varieties that have been bred for flavor rather than tolerance for long-distance shipping."[8] Indeed, much of the discussion surrounding the increased interest in local foods connects the idea to more sustainable agricultural practices, and a desire to move away from industrial agricultural production and the harms associated with it.[9] As I have written about previously, those harms fall into two broad categories: harm to the public health and harm to the environment.[10]

A. *Public Health Concerns Associated with Industrial Agriculture*

Industrial agricultural practices are tied to a number of public health concerns, including food insecurity, food deserts, and diet-related disease, all of which could also be thought of as environmental justice issues.[11] First, food insecurity is the idea that many people do not have access to sufficient amounts of affordable, healthy foods to feed their families.[12] Scholars have argued that food insecurity is tied to large-scale industrial food production due to factors such as reliance on oil products and the need for food to be imported from far-flung production locations.[13]

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[8] Debra Tropp & Malini Ram Moraghan, *Local Food Demand in the U.S.: Evolution of the Marketplace and Future Potential*, *in* HARVESTING OPPORTUNITY: THE POWER OF REGIONAL FOOD SYSTEM INVESTMENTS TO TRANSFORM COMMUNITIES 15, 27 (Andrew Dumont et al. eds., 2017).

[9] Of course, the two are not mutually exclusive. It is possible that there is a large monoculture-based industrial agriculture scale farm down the street from your house! However, most of the literature discussing local foods defines it as "alternative and oppositional" to industrial food systems. *See* Robert Feagan, *The Place of Food: Mapping Out the 'Local' in Local Food Systems*, 31 PROGRESS HUM. GEOGRAPHY 23, 24 (2007) (comparing "local food systems" movements, including alternative agro-food networks, community food security, civic agriculture, post-productivism, shortened food chains, and the "quality turn").

[10] Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 262–68 (2012) [hereinafter Schindler, *Backyard*] (discussing public health harms including food insecurity, food deserts, and obesity—and environmental harms—including the oil-intensive nature of industrial agriculture, monocropping, and animal welfare).

[11] *Id.*

[12] DARRIN NORDAHL, PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE xiii (2009) ("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."); *see also* FOOD & AGRIC. ORG. OF THE UNITED NATIONS, TRADE REFORMS AND FOOD SECURITY: CONCEPTUALIZING THE LINKAGES 29 (2003) (defining food security as the state where "all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life").

[13] Schindler, *Backyard*, *supra* note 10, at 234; ANNIE SHATTUCK & ERIC HOLT-GIMÉNEZ, WHY THE LUGAR-CASEY GLOBAL FOOD SAFETY ACT WILL FAIL TO CURB HUNGER 1, 3 (2009); AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND

Industrial agriculture might also be related to food deserts: areas that lack access to fresh, healthy foods and places that sell them.[14] This is in part because the zoning that is required for agricultural operations means that in many parts of the country farms are not close to urban areas, so there is a lack of proximity to produce.[15] Wealthier areas often have markets and grocery stores that have sufficient demand to ship in produce, but this is not necessarily the case in all communities.[16] Thus, if small-scale or urban farming were permitted closer to or within communities that are currently food deserts, the problems of proximity and distribution could be alleviated.[17]

Diet-related diseases, such as diabetes and heart disease, are another public health concern that has been linked to the consumption of industrially-produced, processed foods.[18] In contrast to all of this, local foods can help to foster and build social capital, a sense of community and identity, and provide avenues for people to meet their neighbors, or to share food that they have grown themselves.[19] This type of "civic agriculture" can help improve public health within a community.[20]

DEPRIVATION 7 (1981) (noting that hunger is not just related to insufficient amounts of food, but the systems for food distribution as well). *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 [https://perma.cc/5QP4-ELAQ] (arguing that the famous "1,500 miles" statistic is flawed).

[14] Schindler, *Backyard*, *supra* note 10, at 266.

[15] *See id.*

[16] *See id.* at 267.

[17] *See* JACOB E. GERSEN ET AL., *Nutrition*, *in* FOOD LAW: CASES AND MATERIALS 639, 666, 690–91 (2015) (describing food deserts). *But see* Deborah N. Archer & Tamara C. Belinfanti, *We Built It and They Did Not Come: Using New Governance Theory in the Fight for Food Justice in Low-Income Communities of Color*, 15 SEATTLE J. SOC. JUST. 307, 311 (2016) (suggesting "incorrect assumptions about the barriers to accessing healthy foods"). *See generally* SEN, *supra* note 13 (discussing the way that causes of hunger and malnutrition are related to poverty and food distribution issues).

[18] *See generally* JULIE GUTHMAN, WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM (2011) (analyzing how capitalism contributes to obesity and arguing that local, organic food can help solve the problem).

[19] Schindler, *Backyard*, *supra* note 10, at 281–82; Schindler, *Unpermitted*, *supra* note 3, at 371–72. *But see* Margot Pollans & Michael Roberts, *Setting the Table for Urban Agriculture*, 46 URB. LAW. 199, 224 (2014) (discussing potential benefits of urban agriculture and arguing that it is not inherently beneficial).

[20] *See, e.g.*, Margot J. Pollans, *Farming and Eating*, 13 J. FOOD L. & POL'Y 99, 100–01 (2017) (noting that one cost of the industrial food system is an obscuring of the shared interests between food producers and food consumers); Laura Saldivar-Tanaka & Marianne E. Krasny, *Culturing Community Development, Neighborhood Open Space, and Civic Agriculture: The Case of Latino Community Gardens in New York City*, 21 AGRIC. & HUM. VALUES 399 (2004) (discussing the role that community gardens play in community development and civic agriculture).

B. *Environmental Health Concerns Associated with Industrial Agriculture*

Even more relevant for purposes of this Article is that there are a number of harms to the environment that have been linked to industrial agricultural systems.[21] First, industrial agriculture is oil intensive, which contributes to greenhouse gas emissions.[22] Further, factory farms, where most animals that are killed for food live,[23] are associated with a host of environmental harms, including runoff that pollutes our waterways, and of course, harm to the animals themselves.[24] Finally, industrial farming is reliant upon monocultures.[25] It typically focuses on large-scale production of a single crop, which results in land that is over-cultivated and topsoil that is not protected.[26]

Some of these harms can be alleviated, at least incrementally, as people find ways to opt out of the industrial food system. This could involve the development of alternative distribution networks or alternative mechanisms of production. But it could also involve a move toward local food production and consumption, where people grow and raise their own food, or have access to food that is grown within their communities.[27]

Indeed, one of the strongest arguments that ties local food to environmental goals is that local food systems can help improve resiliency, which is an

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[21] *See, e.g.*, Margot Pollans, *Food Systems*, *in* CLIMATE CHANGE, PUBLIC HEALTH, AND THE LAW (Justin Gundlach & Michael Burger eds., forthcoming 2018) (manuscript at 31) (on file with author) ("Modern agricultural systems generate significant environmental degradation.").

[22] Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 600 (2010) (discussing animal waste with respect to Concentrated Animal Feed Operations ("CAFOs," also known as factory farms)).

[23] CAFOs "produce 'more than 99 percent of all farmed animals raised and slaughtered in the United States.'" Elizabeth Ann Overcash, *Unwarranted Discrepancies in the Advancement of Animal Law: The Growing Disparity in Protection Between Companion Animals and Agricultural Animals*, 90 N.C. L. REV. 837, 861 (2012) (quoting *Ending Factory Farming*, FARM FORWARD), http://www.farmforward.com/farming-forward/factory-farming (last visited Feb. 22, 2012).

[24] Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195, 1208 (2016); Angelo, *supra* note 22, at 607.

[25] *Industrial Agriculture: The Outdated, Unsustainable System that Dominates U.S. Food Production*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/our-work/food-agriculture/our-failing-food-system/industrial-agriculture#.W5aWCJNKgU0 [https://perma.cc/69EE-DGLA].

[26] Angelo, *supra* note 22, at 606.

[27] Schindler, *Unpermitted*, *supra* note 3, at 372 (noting that some of these harms might be partially alleviated as more people have access to local food); *see also* Mia Shirley, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 511, 518 (2013) ("Increased reliance on local, sustainable food sources can help reduce the environmental damage caused by the current U.S. food production system.").

important topic in recent environmental literature.[28] Resilience means the "capacity of a system to absorb disturbance and reorganize" while still retaining its same basic function.[29] The idea is that if there are a number of local or regional food systems in place, people will be less reliant on production from a single geographic area, or of a single monoculture crop.[30] Thus, in the event of a large-scale climate-related catastrophe, natural disaster, or chemical attack, it is likely that in some areas the availability and affordability of food would be impacted.[31] But, to the extent that many localities and regions have their own substantial food production and distribution systems in place, it is likely that food production in many other parts of the country would be unaffected. Thus, producers could work on distributing from those areas with robust local systems to the areas that were targeted by the disaster.

Given all of this, it is clear that there are a number of environmental benefits to moving away from large scale industrialized food systems and toward more localized ones. Because of this, and for other reasons as well, which will be addressed below, a number of local governments have begun to take steps toward strengthening their own local food systems.[32] One way that localities have attempted this is through the adoption of food sovereignty ordinances.[33]

III. FOOD SOVEREIGNTY

The term food sovereignty has international origins tied to a global peasant farmers' social movement.[34] In this original context, it was defined as "the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and [farmers'] right to define their own food and agriculture systems."[35] The central idea is that food sovereignty

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[28] *See, e.g.*, Schindler, *Backyard*, *supra* note 10, at 276.

[29] Brian Walker et al., *Resilience, Adaptability and Transformability in Social–Ecological Systems*, 9 ECOLOGY & SOC'Y 5, 6 (2004).

[30] *See id.*

[31] Pollans, *supra* note 21 (manuscript at 1) (suggesting that "[c]limate change may increase food-related public health concerns by damaging food production, undermining food quality, and impeding food access").

[32] *See infra* notes 34–36.

[33] *See* Blue Hill, Me., Local Food and Community Self-Governance Ordinance of 2011 (Apr. 1, 2011), *available at* http://farmtoconsumer.org/news_wp/wp-content/uploads /2013/05/BlueHill_LocalFoodOrd_2011.pdf [https://perma.cc/7SAZ-FJAA].

[34] *See* Madeleine Fairbairn, *Framing Transformation: The Counter-Hegemonic Potential of Food Sovereignty in the US Context*, 29 AGRIC. HUM. VALUES 217, 217 (2012) (describing the origins of food sovereignty tied to La Vía Campesina). *See generally* Hilda E. Kurtz, *Framing Multiple Food Sovereignties: Comparing the Nyéléni Declaration and the Local Food and Self-Governance Ordinance in Maine*, *in* FOOD SOVEREIGNTY IN INTERNATIONAL CONTEXT 163 (Amy Trauger ed., 2015) (discussing Maine's "Ordinance language with an eye to how particular clauses enact and/or adapt rights claims found in the 2007 Nyéléni Declaration of Food Sovereignty").

[35] *Declaration of Nyéléni*, NYELENI.ORG (Feb. 27, 2007), http://nyeleni.org/spip.php? article290 [https://perma.cc/M38Z-EGHU].

gives control over the way that food is produced, sold, and eaten within local communities to those local communities.[36] However, as the concept of food sovereignty has made its way to the United States, the term has taken on a bit of a libertarian bent, which I will further explain below; in this country, food sovereignty seems to manifest as a desire to avoid regulations that currently govern food production.[37]

In the U.S., food sovereignty ordinances have originated in local communities.[38] Maine, where I live, was one of the first states where a number of local towns adopted these ordinances.[39] The goal of the ordinances is to declare towns as "food sovereign," meaning that the town's own rules should govern with respect to food that is grown, raised, or produced, and sold for consumption within that town.[40]

These new food sovereignty designations are related to, but distinct from, other state and local attempts to limit the application of certain food safety laws to small-scale producers. For example, a number of communities have enacted "cottage food laws."[41] These laws tend to exempt home kitchens from certain regulations, or to allow certain products made in a home kitchen and sold locally and directly to consumers to be exempt from regulation.[42] In contrast to these cottage food laws, which focus on exemption of certain types of products, or products made in certain ways, food sovereignty ordinances have a bolder and more wide-ranging aim: they seek to declare their local right to regulate food, and perhaps even a right to food itself.[43]

In order to understand what local food sovereignty ordinances are trying to do, it is important to first have a basic understanding of the current regulatory

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[36] *See, e.g.*, Amy J. Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small*, 78 L. & CONTEMP. PROBS. 101, 131 (2015) ("[A] core principle of food sovereignty . . . [is] that small producers and consumers should make democratic decisions about food provisioning in particular social and geographical spaces.").

[37] *See, e.g.*, Stephen R. Miller, *A Coordinated Approach to Food Safety and Land Use Law at the Urban Fringe*, 41 AM. J.L. & MED. ETHICS 422, 435 (2015).

[38] *See* Julia Bayly, *Food Sovereignty Continues to Pick up Steam Around the State*, BANGOR DAILY NEWS (Mar. 10, 2018), http://bangordailynews.com/2018/03/10/homestead/food-sovereignty-continues-to-pick-up-steam-around-the-state/ [https://perma.cc/Q7NW-AA5L].

[39] *Id.*

[40] *Id. But see* Kurtz, *supra* note 34, at 165–67 (noting that some scholars have challenged the emphasis on localism in the U.S. food sovereignty movement).

[41] *See, e.g.*, Miller, *supra* note 37, at 431–32 (describing cottage food laws); *see also* Dan Flynn, *More Food Producers Exempt from FSMA Under Tester-Hagen*, FOOD SAFETY NEWS (Apr. 9, 2018), http://www.foodsafetynews.com/2018/04/more-food-producers-exempt-from-fsma-under-tester-hagen/#.WtX1yNPwbVo [https://perma.cc/S8CV-MEFY] (discussing Food Safety Modernization Act (FSMA) Tester-Hagan Amendment, which exempts small scale producers engaged in marketing).

[42] Miller, *supra* note 37, at 432 (noting that cottage food laws often exempt from regulation foods that are "not potentially hazardous").

[43] *See* Blue Hill, *supra* note 33.

scheme that governs agriculture, food production, and food safety in the U.S. The key for purposes of this Article is that our current food system is heavily controlled by federal agencies and regulations. The FDA controls most food safety and labeling issues, though the USDA also has jurisdiction over meat and poultry.[44] Further, states adopt their own regulations pursuant to and in compliance with those federal regulations. States must ensure that any state and local requirements are at least as strict as the federal rules.[45] A big reason for this regulation is to protect the public health; food-borne illness is a real concern and sickens many people every year (although, I would note, the numbers are small in comparison to diet-related diseases).[46]

In recent years, a small number of towns (and states) have begun to adopt statutes and ordinances addressing issues that could at least tangentially be tied to food sovereignty, or that relate to issues of who has control over the production and consumption of food.[47] The goal of these towns is effectively to declare themselves exempt from existing state and federal licensing and inspection procedures.

IV. WHY FOOD SOVEREIGNTY?: MOTIVATIONS BEHIND THE ORDINANCES

The motivations behind these U.S. food sovereignty ordinances are multifaceted. First, the ordinances are partially about democratic self-governance and self-determination.[48] Indeed, many of the ordinances adopted

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[44] Federal Meat Inspection Act (FMIA), 21 U.S.C. § 661 (2012); Poultry Products Inspection Act (PPIA), 21 U.S.C. § 454 (2012).

[45] Under an at least equal to cooperative agreement with the USDA Food Safety and Inspection Service (FSIS), States may operate their own Meat and Poultry Inspection programs if they meet and enforce requirements "at least equal to" those imposed under the Federal Meat Inspection Act, Poultry Products Inspection Act and Humane Methods of Slaughter Act of 1978. Letter from Alfred V. Almanza, Acting Deputy Under Sec'y, Office of Food Safety, Adm'r, Food Safety & Inspection Serv., to Walter E. Whitcomb, Comm'r, Me. Dep't of Agric., Conservation & Forestry (July 6, 2017), [hereinafter Letter from Almanza] https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/state-inspection-and-cooperative-agreements [https://perma.cc/P37L-WH7Y]; *see also* FMIA, 21 U.S.C. § 661(b); PPIA, 21 U.S.C. § 454(b).

[46] *See* Emily Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 4) (on file with author) (arguing that the U.S. overregulates when it comes to food safety); *see also* BAYLEN LINNEKIN, BITING THE HAND THAT FEEDS US 26 (2016) (arguing against new FDA regulations with small marginal benefits).

[47] *See, e.g.*, Pollans, *supra* note 21 (manuscript at 21) (noting that food sovereignty is concerned with "how and by whom food is produced").

[48] *See, e.g.*, Cohen, *supra* note 36, at 118 ("food sovereignty evokes populist and early social-era agrarian arguments about economic self-governance as its own political good").

in Maine use language about "assert[ing] our right to self-government" and recognizing "the authority to protect that right as belonging to the Town."[49]

These ordinances are also often about food choice, which many view as political, akin to a form of free speech or other fundamental right.[50] Indeed, food choice advocates have buoyed the idea of food sovereignty.[51] For example, "in challenging the FDA's mandate that milk sold in interstate commerce be pasteurized," the Farm-to-Consumer Legal Defense Fund suggested "that milk consumers have been deprived of fundamental privacy rights—including the right to protect one's own bodily health."[52]

There is also a sense that many involved with this local fight for "food sovereignty" would simply prefer that the government stay out of the way.[53] This idea ties into debates founded in civil-libertarianism, and arguments regarding local government overreach, the "nanny state," and public health paternalism.[54] Some local food activists believe that people should be able to engage in one-on-one exchanges with local farmers without governmental oversight or involvement.[55]

This libertarian-style argument also relates to another purpose of these ordinances, which is to further the ability of local residents to conduct business without unduly burdensome interference. Often, these attempts at food sovereignty are in response to feelings that people want to be able to cook and sell small amounts of food locally without going through expensive and time-consuming permitting and licensing processes.[56] Indeed, the origin of the food sovereignty discussion in Maine is often tied to small-scale chicken farmers in

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[49] *See, e.g.*, Blue Hill, *supra* note 33; *see also* Appleton, Me., Town of Appleton Local Food and Community Self-Governance Ordinance (June 13, 2012), *available at* http://appleton.maine.gov/vertical/sites/%7B5CBE9B20-93F0-4ECA-B07C-188D88398A31%7D/uploads/Food_Ordinance_2012.pdf [https://perma.cc/FYP8-9TU6] (relying on right of self-governance).

[50] *See* Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737, 746 (2013).

[51] *See id.*

[52] *Id.* at 743.

[53] At least one commentator has suggested that many local attempts at food sovereignty are in fact more accurately described as "anti-regulat[ory]." *See* Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL'Y 281, 296 (2012) [hereinafter Condra, *Food Sovereignty*] ("[M]ovements that may look like food sovereignty at first glance . . . that increased protection for locally made products and would have criminalized federal regulation of said local products, is less of a food sovereignty statement and more of an anti-regulation statement."). "Food sovereignty envisions a role for government in ensuring food safety and in developing its own food and agriculture system. In these local food ordinances, it is easy to assume, based on the language of the ordinance, that the goal is de- or no regulation of the food system at the level of producer direct to consumer transactions." *Id.* at 308.

[54] Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE, 16, 29 (2015).

[55] *See generally* Condra, *Food Sovereignty*, *supra* note 53 (discussing the local food sovereignty movement).

[56] *See* Schindler, *supra* note 54, at 30.

the state who "were faced with costs of more than $20,000 to build on-site slaughter facilities . . . or with hauling live chickens to one of just five USDA certified facilities in [the] 35,000 square mile state."[57] The goal of some food sovereignty advocates would be to allow backyard or on-farm slaughter and direct-to-consumer sale thereafter.[58]

Food sovereignty is also concerned with food safety, though perhaps in a way that is different from what our current food safety regulations focus upon. As it was originally formulated, food sovereignty involved demands that would "control pests and disease, protect against environmental pollution, prohibit the use of antibiotics and hormones in aquacultures, and ban irradiation of food."[59] Thus, the focus is on some of the food safety-related concerns that are specifically associated with larger scale, industrial agricultural productions, but which are typically less problematic in the context of small-scale food production.[60]

A final motivation for food sovereignty ordinances relates to the issue of scale.[61] Although many local farmers have small-scale operations, most of our federal and state food-related regulations were designed to govern and check abuses by large-scale food producers.[62] Here, I believe that it is useful to reference the "matching principle," which suggests that the size of government should not be larger than the size of the geographic area of the problem it is trying to solve.[63] Effectively, this means that we should match the level of government to the scope of the problem. Thus, because a concern like climate change is a global problem, we would ideally address it through international governmental coordination. In contrast, one could argue, the types of food local

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[57] Kurtz, *supra* note 34, at 170.

[58] *See* Condra, *Food Sovereignty*, *supra* note 53, at 303–04.

[59] Alli Condra, *Balancing the Scales: Food "Sovereignty" and Food Safety*, FOOD SAFETY NEWS (Dec. 19, 2011), http://www.foodsafetynews.com/2011/12/balancing-the-scales-food-sovereignty-and-food-safety/ [https://perma.cc/2TQT-K5GA].

[60] *See generally* Leib & Pollans, *supra* note 46 (discussing inherent risks associated with industrialization and the fact that U.S. approaches to food safety often ignore that risk); Margot J. Pollans, *Food Fascism* (unpublished manuscript) (on file with *The Ohio State Law Journal*) (arguing that there is a dichotomy between food safety law, which seeks safety via sterilization and homogenization, and food sovereignty laws, which seek safety via transparency and control).

[61] *See* Alli Condra, *Local Food and Community Self-Governance Ordinances*, AGRIC. MGT. COMMITTEE NEWSL. (Am. Bar Ass'n, Chi., Ill.), Aug. 2012, at 16, 17 ("[O]ne of the ultimate goals of the [food sovereignty] movement is to create scale-appropriate regulations of agriculture.").

[62] *See generally* STEPHEN BREYER, REGULATION AND ITS REFORM (1982) (detailing the existing regulatory system and related mismatches in scale, along with possible reforms); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 131 (2005) (analyzing jurisdictional mismatch in contemporary environmental law).

[63] Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996).

people can grow, sell, and eat within their community should be governed at the local level.[64] Michael Pollan expressed this argument in a popular New York Times piece, stating:

> Today the revival of local food economies is being hobbled by a tangle of regulations originally designed to check abuses by the very largest food producers. Farmers should be able to smoke a ham and sell it to their neighbors without making a huge investment in federally approved facilities. Food-safety regulations must be made sensitive to scale and marketplace, so that a small producer selling direct off the farm or at a farmers' market is not regulated as onerously as a multinational food manufacturer. This is not because local food won't ever have food-safety problems—it will—only that its problems will be less catastrophic and easier to manage because local food is inherently more traceable and accountable.[65]

Thus, there are clearly a large number of reasons that towns might want to adopt a food sovereignty ordinance, but legally, do they have a right to do so? The rest of this Article will address that question.

V. THE POWER STRUGGLE BETWEEN STATES AND LOCAL GOVERNMENTS

Because this symposium addresses the role of states, the following Part provides an example of a state's involvement in promoting local food sovereignty. However, in order to understand this dynamic, I will first briefly lay out some of the debate and discussion surrounding the relationship and interaction between state and local governments, as that relationship plays an outsized role in the attempts at food sovereignty.[66] Further, in order to

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[64] Of course, food safety concerns and the prevention of food-borne illness relate to public health broadly, which is a national concern, not just a local one. *See* Federal Meat Inspection Act (FMIA), 21 U.S.C. § 661 (2012); Poultry Products Inspection Act (PPIA), 21 U.S.C. § 454 (2012). *But see* MARY CHRISTINA WOOD ET AL., REFORM OF LOCAL LAND USE LAWS TO ALLOW MICROLIVESTOCK ON URBAN HOMESTEADS 9 (Univ. of Or. Envtl. & Nat. Res. Law Program Sustainable Land Use Project, 2010) ("[D]isease outbreaks in locally produced food systems are more isolated and therefore more contained.").

[65] Michael Pollan, *Farmer in Chief*, N.Y. TIMES MAG. (Oct. 9, 2008), http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?_r=1&pagewanted=all [https://perma.cc/BD8M-STA9] ("Perhaps the single greatest impediment to the return of livestock to the land and the revival of local, grass-based meat production is the disappearance of regional slaughter facilities. The big meat processors have been buying up local abattoirs only to close them down as they consolidate, and the U.S.D.A. does little to support the ones that remain.").

[66] *See* Miller, *supra* note 37, at 434; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1230–52 (1999).

understand the relationship between state and local governments, one must first understand the power of local governments themselves.[67]

The Black letter rule with respect to local government power comes from a case called *Hunter v. City of Pittsburgh*, which is that, at base, local governments are powerless.[68] They exist at the complete whim of the state, and they are thus a creature of and an agent of the state.[69] That said, a number of commentators and courts have found there to be an independent value of "localism."[70] This view is often tied to Toqueville's observations in Democracy in America.[71] He believed that in order to be effective, local governments must have both independence and power.[72] Although he recognized that this might result in a more inefficient system of government, he believed in the value of this type of strong local government.[73] Toqueville felt that this sort of model would encourage political participation, through which people could learn to be democratic citizens; and it would prevent despotism by uniting otherwise individualistic Americans.[74]

In addition to this theoretical value in localism, or perhaps in part because of it, some states began granting "home rule" power to some of their municipalities.[75] There are a few ways that this can manifest, but generally it

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[67] This Article examines a system that involves the interplay between two tiers of delegation: federal-state and state-local. Although this is not a topic that has been heavily written about in the legal literature, this Article builds upon some foundational work addressing federalism and localism. *See, e.g.*, Hills, *supra* note 66, at 1201 ("[E]xplor[ing] one aspect of this intrastate competition—the extent to which federal law can delegate federal powers to specific state or local institutions even against the will of the state legislature."); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 964–79 (2007) (addressing direct relations between federal and local governments); *see also* Dave Owen, *Cooperative Subfederalism*, U.C. HASTINGS RES. PAPER NO. 258 (manuscript at 10–14) (on file with author) https://ssrn.com/abstract=3071907 [https://perma.cc/BE57-B6AM] (addressing state-local delegations); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–33 (2010) (discussing federalism in the context not just of states, but cities and special purpose institutions); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) (noting that values of federalism may be better served by localities rather than states).

[68] Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

[69] *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 1, 8 (7th ed. 2008).

[70] *See, e.g.*, Davidson, *supra* note 67, at 961 (addressing direct relations between federal and local governments).

[71] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 61 (Lynn Hunt et al. eds., Elizabeth Trapnell Rawlings trans., Bedford/St. Martins 2009) (1835).

[72] *Id.* at 57.

[73] *Id.* at 57.

[74] *Id.* at 57–58.

[75] Richard Briffault, *Our Localism: Part I–The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) ("The home rule movement had two goals: to undo Dillon's Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.").

means that the local government has the power to regulate purely local areas of law.[76] These are areas that do not need to be handled uniformly and that will not result in significant external effects on other communities.[77] In some jurisdictions, if a local ordinance governs a *purely* local issue, the local government's rule can trump a state rule on the same topic.[78] In other home rule jurisdictions, the locality can only act if the state has not.[79] If the state decides to speak on an issue, and the state and local rules are in conflict, the state will win.[80] This is especially true if the local ordinance is less restrictive than the state standards.[81] Of course, there are often questions about whether something is a purely local issue, or if there are local and state rules on similar topics, whether they are in conflict or can co-exist.

As Stephen Miller noted, "[t]he food sovereignty movement is clearly structured to pit established principles of federalism and supremacy against local government's home rule powers."[82] Indeed, it is only if the local government's home rule powers control that a locality could declare itself exempt from state food regulations,[83] which is a goal of many food sovereignty activists.[84] However, the actions of local governments are often limited; as Professor Paul Diller recently noted, "the frequent preemption of city authority by Congress and especially state legislatures prohibits local governments from layering or reducing additional regulation when they see fit."[85] This is the classic problem that local government scholars and lawyers struggle with when trying to support local action.

Recently, there have been many examples of state legislatures seeking to remove power from local governments by taking preventative action to prohibit localities from enacting certain regulations.[86] These state actions sometimes manifest as express attempts to limit or remove home rule powers from localities.[87] For example, the Texas legislature enacted a law that would prevent

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[76] *Id.* at 10–11.

[77] Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1049–50 (2017).

[78] *Id.*

[79] *Id.* at 1048.

[80] *Id.*

[81] *Id.*

[82] Miller, *supra* note 37, at 434.

[83] Condra, *Food Sovereignty*, *supra* note 53, at 309–10.

[84] *See* Rich Hewitt, *Farmers Seek to Protect Locally Grown Foods*, BANGOR DAILY NEWS (Feb. 24, 2011), http://bangordailynews.com/2011/02/24/news/hancock/farmers-seek-to-protect-locally-grown-foods [https://perma.cc/UX46-RWGY]. *But see* Condra, *Food Sovereignty*, *supra* note 53, at 299 ("Food sovereignty envisions a continued and central role of government in pursuit of its goals.").

[85] Diller, *supra* note 77, at 1048.

[86] *See* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 J. FEDERALISM 403, 404 (2017).

[87] *Id.* at 405.

its municipalities from banning fracking,[88] and more recently other states have proposed the imposition of fines on local legislators, or their removal from office, if they attempt to adopt ordinances that govern certain subjects.[89] This trend toward removing power from municipalities would not bode well for food sovereignty ordinances.[90] However, at least one state has been actively working in opposition to this trend in the food sovereignty area. The following Part discusses that example.

VI. THE STATE OF MAINE AND FOOD SOVEREIGNTY

Maine has been described as a state whose local food systems and values are "deeply embedded in long-standing social and political norms."[91] Perhaps this is part of the reason that the state presents a unique and compelling recent example of a state's response to local food sovereignty ordinances.

In June 2011, the Maine state legislature passed a resolution stating, "the basis of human sustenance rests on the ability of all people to save seed and grow, process, consume and exchange food and farm products."[92] The resolution provided that the state would "oppose any federal statute, law or regulation that attempts to threaten our basic human right to save seed and grow, process, consume and exchange food and farm products within the State of Maine."[93] This was, in part, a response to concerns of Maine farmers who wanted to slaughter and process poultry in the open air on their farms, and who wanted to sell raw milk.[94]

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[88] *See* TEX. NAT. RES. CODE ANN. § 81.0523 (West 2015) ("The authority of a municipality or other political subdivision to regulate an oil and gas operation is expressly preempted.").

[89] Douglas Hanks & Elizabeth Koh, *Florida Mayors Can Be Fined $5,000 if They Enact Stricter Local Rules on Gun Control*, MIAMI HERALD (Feb. 19, 2018), https://www.miamiherald.com/news/local/community/miami-dade/article200997094.html [https://perma.cc/F2DH-HLWC]; *see also* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html [https://perma.cc/TF8R-BKXC].

[90] It is important to note, however, that state preemption is perhaps more common when local legislators are seeking to enact additional, or affirmative, regulation. Food sovereignty ordinances could be viewed as a form of deregulation, and thus perhaps they are not as threatening to some states. *See, e.g.*, Condra, *Food Sovereignty*, *supra* note 53, at 303–04 (discussing the libertarian characteristics of local food sovereignty ordinances); Pollans, *supra* note 60 (contrasting food sovereignty with food freedom).

[91] Kurtz, *supra* note 34, at 170.

[92] H.R.J. Res. 1176, 125th Leg., 1st Reg. Sess. (Me. 2011).

[93] *Id.*

[94] Condra, *Food Sovereignty*, *supra* note 53, at 303–04 (describing motivations behind Maine's food sovereignty movement).

These same concerns had also led a number of localities in the state to begin adopting food sovereignty ordinances.[95] These ordinances resemble one another, and were often based off of a model ordinance. An example reads,

> We, the People of the Town of Sedgwick, Hancock County, Maine, 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. As such, our right to a local food system requires us to assert our inherent right to self-government. We recognize the authority to protect that right as belonging to the Town of Sedgwick.[96]

When towns began adopting these food sovereignty ordinances, it was hard not to assume, from a legal perspective, that they would have no effect. Knowing what we know about federalism and preemption, legal scholars assumed that there was no merit in or point to these ordinances.[97] The ordinances could, of course, serve a powerful narrative function, with towns asserting their interest in self-governance,[98] but from a practical perspective, it seemed like a matter of time before the state or federal government would step in to put an end to the ordinances and any actions that resulted from them. Despite this legal perspective, many farmers took these local declarations of food sovereignty seriously, and began taking sovereign actions in response to them.[99]

Acting as if the food sovereignty ordinances were controlling led to at least one lawsuit. A Maine raw milk producer—Farmer Dan Brown—wound up in court.[100] The state of Maine (along with about twenty-four other states)[101] allows the sale of raw milk within the state, but it requires the farmers producing the milk to comply with state licensing and inspection procedures.[102] Some

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[95] Hewitt, *supra* note 84.

[96] Sedgwick, Me., Local Food and Community Self-Governance Ordinance (Mar. 5, 2011).

[97] Briffault, *supra* note 67, at 1335–44; *See* Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65:2 ME. L. REV. 790, 795 (2013).

[98] Even if ordinances are preempted, they may serve other functions, including showing an expression of dissent or dissatisfaction with the status quo. Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 635 (2015) ("Even many preempted statutes, however—such as those that declare federal law void—remain capable of fulfilling a similar expressive function."). They can also function as catalysts for lawsuits. *Id.* at 638.

[99] *See, e.g.*, Kevin Miller, *State Sues Blue Hill Farmer for Selling Unpasteurized Milk at Farmers' Markets*, BANGOR DAILY NEWS (Nov. 16, 2011), https://bangordailynews.com/2011/11/16/news/hancock/blue-hill-farmer-cited-for-violating-state-law/ [https://perma.cc/6P28-FGDD].

[100] *Id.*

[101] CTRS FOR DISEASE CONTROL & PREVENTION, SALE OF RAW MILK AND OUTBREAKS LINKED TO RAW MILK, BY STATE (2015).

[102] ME. REV. STAT. ANN. tit. 7, ch. 8-F §§ 2902-A–2902-B (2000).

farmers, including Farmer Brown, viewed the local food sovereignty ordinances in their towns as sufficient to exempt them from those state requirements.[103] Brown's case went to court.

As was aforementioned, many commentators and lawyers assumed that the court would find that the state licensing and inspection laws preempted the local food sovereignty ordinance.[104] Indeed, that was the holding at the Superior Court level.[105] However, on appeal, in 2014, Maine's Supreme Judicial Court used statutory construction to avoid the question and decided the farmer's case on other grounds.[106] Thus, the question about whether existing state law preempted these local ordinances remained.

As was addressed briefly above, many localities feel constrained by the threat of state or federal overrule,[107] and thus do not act as boldly as they otherwise might. In Maine, however, the localities did not let this concern stop them from passing their food sovereignty ordinances. And interestingly, instead of taking action to block those localities, the state Legislature decided to take action in an attempt to *further* the goals of these towns.

In late 2017, the Maine State Legislature decided that it wanted to take action to affirmatively support these food-sovereign towns, and farmers like Farmer Brown. Although in prior years, bills along these lines had been proposed, they never became law.[108] This year was different. The state legislature adopted a law—An Act To Recognize Local Control Regarding Food Systems—acknowledging that municipalities may, pursuant to their home rule powers, adopt food sovereignty ordinances, and that the state would recognize and observe these ordinances.[109] In doing so, the state adopted findings that local control of food systems would help ensure the preservation of small family farms, improve food security, promote self-reliance, enhance rural economic development, and enhance the environmental wealth of rural communities.[110]

This seems like a useful way that states can ensure their localities have the authority and power to act in furtherance of environmental goals, such as supporting local food systems. As I mentioned above, without such express authorization, even cities with home rule power are sometimes barred from

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[103] Miller, *supra* note 99.

[104] *See* Almy, *supra* note 97, at 805.

[105] State v. Brown, 95 A.3d 82, 91–92 (Me. 2014).

[106] *Id.* at 91 (holding that the municipal ordinance would be construed to avoid a preemption issue and that civil penalties could be imposed on the farmer for each act that constituted a violation of state licensing and labeling laws).

[107] Diller, *supra* note 77, at 1049 ("With the threat of state legislative, congressional, and presidential override . . . local governments are highly constrained in how they can implement their residents' preferred policies.").

[108] *See e.g.*, Kent Miller, *Maine Senate Rejects Proposed 'Right to Food' Constitutional Amendment*, PRESS HERALD (Mar. 23, 2016), https://www.pressherald.com/2016/03/23/maine-senate-votes-down-proposed-right-to-food-constitutional-amendment/ [https://perma.cc/HAZ3-HLKE].

[109] Maine Food Sovereignty Act, ME. STAT. tit. 7, ch. 8-F § 283 (2017).

[110] *Id.*

acting in areas that are already heavily regulated. However, if the state gives express authorization to a locality to regulate in a certain area, as the state of Maine did here, that lessens concerns about preemption or about the locality acting beyond the scope of its home rule authority.

Despite the novelty of the state's action here, there are a few concerns that must be addressed. First, there is still a pressing normative question about food safety, and whether it makes sense for localities to exempt themselves from state regulations. Further, perhaps the biggest problem is this: the state is not the final arbiter in the area of food safety and regulation. As was discussed earlier, there is a massive federal regulatory system, overseen by the USDA and FDA, with respect to food production.

This soon became apparent. A few weeks before the new law was set to take effect, the Governor of Maine received a letter from the USDA threatening to transfer control of meat and poultry from the state to federal inspectors, in light of the new state law.[111] The USDA did not believe that the state could ensure that state and local requirements would be at least as strict as the federal rules given that the state was basically agreeing to turn over control of food inspections and regulation to localities in some circumstances.[112] Although it is quite possible that the federal government would have lacked the capacity to follow through on its threat, the Governor and Legislature did not seem willing to take that risk.[113] Thus, the state legislature called an emergency session and amended its new law,[114] substantially weakening it by expressly stating that the state would: (a) continue to require state inspection and licensing (pursuant to federal law) for meat and poultry (which obviously means removing a lot of local discretion from the food sovereign towns);[115] and (b) limit local control

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[111] Letter from Almanza, *supra* note 45; *see also Food Sovereignty in Maine: Maine's 2017 Food Sovereignty Law Does Not Impact Farmers' Markets*, ME. FED'N FARMERS' MKTS., http://www.mainefarmersmarkets.org/food-sovereignty/ [https://perma.cc/5VTK-9A94] (last visited Apr. 24, 2018); Mary Pols, *Food Law Leaves Maine Meat Producers Squealing for a Fix*, PORTLAND PRESS HERALD (Oct. 19, 2017), https://www.pressherald.com/2017/10/18/maines-meat-and-poultry-producers-caught-in-the-middle-of-food-sovereignty-fight/ [https://perma.cc/3BVW-Z4R6].

[112] Letter from Almanza, *supra* note 45.

[113] There is a real possibility that some states might seek to achieve a goal through under-enforcement, assuming a lack of capacity to enforce federal law. *See* Eric Yoder, *Understaffing, Lack of Training at Agencies Hampering Agency Services to Public, Personnel Agency Says*, WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/02/08/understaffing-lack-of-training-at-agencies-hampering-agency-services-to-public-personnel-agency-says/?utm_term=.8834cdf38558 [https://perma.cc/YB65-QCS7].

[114] S.J. Res. 605, 128th Leg., 1st Spec. Sess. (Me. 2017).

[115] Maine Food Sovereignty Act, ME. STAT. tit. 7, ch. 8-F § 285 (2017) ("Notwithstanding any provision in this chapter to the contrary, the department shall implement and enforce all provisions of Title 22, chapter 562-A and the rules adopted thereunder that are necessary to ensure that the requirements of the State's meat and poultry products inspection and licensing program are at least equal to the applicable requirements

over other products to situations that involve face to face interactions at the site where the food was produced (thus, the law does not cover transactions at, for example, farmer's markets).[116]

VII. CONCLUSION

The bottom line is that there is work for states to do here, to enable and aid their localities in taking forward-looking steps toward improving the environment; however, they must be sure to remember that they are still subject to a number of federal provisions. It is somewhat surprising that the State of Maine failed to consider these issues before adopting its state statute. That said, there are certain areas where states have substantial control—in the food context, for example, states have more control over eggs and dairy than they do over meat and poultry.[117] Thus, in these areas of state control, states have more flexibility to expressly defer to local decision-making. Doing so removes questions about whether home rule power alone is strong enough to empower local governments, and gives local governments more confidence in their ability to take bold actions toward protecting the environment.

Further, to the extent more states join with Maine in passing laws such as these, it could serve a democratic function, signaling to the federal government that this is what its citizens want.[118] This could, perhaps, result in certain federal carve-outs, or a rethinking of the scale of regulation that is necessary and appropriate in the context of food safety and food systems.

For now, in food sovereign towns in Maine, a consumer can purchase directly from a farmer products like milk, cheese, pickles, and other canned foods that have not undergone any state inspection or licensing. This is all done with the state's explicit approval. Even a fix as small as this should enable more

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specified under applicable federal acts, as defined by the United States Department of Agriculture or other federal agencies, without exception.").

[116] *Id.* at § 282(1) (defining "direct producer-to-consumer transactions" as that phrase is used in the law); *id.* at § 286 ("An individual who grows, produces, processes or prepares food or food products for purposes other than direct producer-to-consumer transactions in a municipality that adopts or amends an ordinance pursuant to [this new law] shall grow, produce, process or prepare the food or food products in compliance with all applicable state and federal food safety laws, rules and regulations."); *see also id.* at § 283.

[117] Note that farmers with fewer than 1,000 chickens have reduced federal compliance requirements. *See* LYNN BLIVEN ET AL., NEW YORK STATE ON-FARM POULTRY SLAUGHTER GUIDELINES: FOOD SAFETY AND BEST MANAGEMENT PRACTICES FOR FARMERS PROCESSING LESS THAN 1000 BIRDS/YEAR (2012), http://smallfarms.cornell.edu/resources/guides/on-farm-poultry-slaughter-guidelines/ [https://perma.cc/LV9B-W8S9].

[118] Wyoming passed a similar Food Freedom Act. WYO. STAT. ANN. §§ 11-49-101 to -103 (2018). Colorado has also adopted a law. COLO. REV. STAT. § 25-4-1614 (2016).

small farmers, who could not afford to comply with state oversight and regulations, to produce and distribute local foods to their neighbors.[119]

[119] Further, if someone gets sick, perhaps the existence of strict liability tort, combined with the ease of being able to trace the source of the illness, will negate the need for grander and more comprehensive food safety regulations.