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## Food Sovereignty in the United States: Supporting Local and Regional Food Systems

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FOOD SOVEREIGNTY IN THE UNITED STATES:  
SUPPORTING LOCAL AND REGIONAL FOOD SYSTEMS

*Allison Condra\**

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“[I]t is insufficient to consider only the structures that might guarantee the rights that constitute food sovereignty. It is also vital to consider the substantive policies, and politics, that go to make up food sovereignty.”<sup>1</sup>

“If we talk about food sovereignty, we talk about rights, and if we do that, we must talk about ways to ensure that those rights are met across a range of geographies, by everyone and in substantive and meaningful ways.”<sup>2</sup>

## I. INTRODUCTION

Today, perhaps more than ever, an increasing portion of U.S. society is paying attention to and asking questions about our food and agricultural system. We are recognizing the immense consequences of the agricultural “efficiencies” we valued and wrote into our policies in the seventies—for example, growing corn “fence row to fence row” and the ease of microwaved meals and prepackaged foods.<sup>3</sup> The increasingly global nature of our food system and its consequences are becoming more apparent. Food safety concerns—prompted by a growing number of foodborne illness outbreaks and the government’s response in the 2009 Food Safety Modernization Act—loom large and seem increasingly unpredictable.

One direct response to this increased awareness is a growing movement to support local food and smaller scale agriculture. This movement is not simply about “big is bad, small is good;” its motivations are broader, including: supporting local economies; concerns about food safety; reactions to the globalized food system; environmental concerns; supporting local community; issues of national security; prioritizing taste;

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1. Raj Patel, *What Does Food Sovereignty Look Like?*, FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY 186, 192–93 (Hannah Wittman, Annette Aurélie Desmarais, & Nettie Wiebe eds., 2010).

2. *Id.* at 195.

3. The rallying cries to plant “fence row to fence row” and demand to “get big or get out” are hallmarks of then Secretary of Agriculture Earl Butz’s tenure at the United States Department of Agriculture and have largely defined U.S. agricultural policy since. See Tom Philpott, *A Reflection on The Lasting Legacy of 1970s USDA Secretary Earl Butz*, GRIST.ORG, Feb. 8, 2008, <http://grist.org/article/the-butz-stops-here/>.

and, asserting one's right and freedom to grow food and eat how one chooses.

One of these movements is called "food sovereignty". Food sovereignty originated as a peasant movement in developing countries to aid citizens in regaining some control over the food system.<sup>4</sup> The movement has since spread around the world, finding support in developed, as well as more developing, nations.<sup>5</sup> The food sovereignty movement made its way to the United States and started showing up in national headlines in March of 2011.<sup>6</sup>

The food sovereignty movement takes a critical look at the current food system and how policies have disenfranchised citizens' ability to provide food for themselves and their communities. It envisions an alternative model for our food system; it redefines relationships within the food system, taking into consideration food safety, environmental concerns, the rights of women, and the role of government without the influence of corporations or international trade; it requires new laws and policies to support the system.

Food sovereignty demands that policy makers and the greater society find ways to support local and regional food systems. It prompts the question: how can government support local and regional agriculture with the smartest laws and regulations? The answer is, in part, to create scale appropriate regulations that address the range of food and agricultural operations that we have and those that will continue to develop.

This paper begins by introducing the current food and agricultural system and its major players. Section III defines food sovereignty and traces its development over the years. Section IV tells the story of the new food sovereignty movements in the United States and identifies some obstacles facing that movement. Section V discusses other ways state and federal governments can, and are, supporting local and regional agriculture.

## II. FOOD AND AGRICULTURE SYSTEM JURISDICTION

The current food and agriculture system is influenced by a number of players with varying areas of jurisdiction. The federal government—through Congress, the United States Department of Agriculture (USDA), and the Food and Drug Administration (FDA)—plays a major role in regulating the food and agriculture system. States (and their localities) play

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4. La Via Campesina, *What is La Via Campesina? The International Peasant's Voice*, Feb. 9, 2011, [http://viacampesina.org/en/index.php?option=com\\_content&view=category&layout=blog&id=27&Itemid=44](http://viacampesina.org/en/index.php?option=com_content&view=category&layout=blog&id=27&Itemid=44) [*hereinafter What is LVC*].

5. *See id.*

6. *See infra* § IV.

a role in regulating food and agriculture primarily through their police powers (regulating matters of health, safety, and morality). Although traditional constitutional commerce clause jurisprudence limits Congressional authority to matters of *interstate* commerce, there are some circumstances in which Congress can regulate activities that take place entirely within a state.<sup>7</sup> Lastly, the United States' obligations in international treaties and trade organization membership (particularly the World Trade Organization (WTO)) heavily influence the food and agriculture system in the United States. The following sections will discuss each entity's jurisdictional reach and how each one influences the food and agriculture system.

A. *Congress' Ability to Regulate "Local" Issues: Wickard v. Filburn*

Congress' power to regulate activities is limited, in part, by the commerce clause, which permits Congress to regulate commerce between the states, commerce with foreign nations, and commerce with the Indian tribes.<sup>8</sup> It appears from the language of the clause that Congress would not be permitted to regulate activities or behavior that occur entirely within a state (*intrastate* commerce). In 1942, however, a case about a farmer and the wheat quota of the Agricultural Adjustment Act of 1938 made its way to the Supreme Court and the Court held that Congress has the authority to pass laws that cover entirely local matters.<sup>9</sup> Although *Wickard* appears to remain good law in light of the Supreme Court's recent decision on the Patient Protection and Affordable Care Act, the Court's decision may have limited Congress' authority under the commerce clause.<sup>10</sup>

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7. U.S. CONST. art. I, § 8, cl. 3; *Wickard v. Filburn*, 317 U.S. 111 (1942).

8. U.S. CONST. art. I, § 8, cl. 3.

9. *Wickard*, 317 U.S. at 111. Since that time, over which matters and to what extent this Congressional authority extends has remained a controversial subject. In fact, *Wickard* remains an active part of Supreme Court jurisprudence. The most recent test may come in the Court's decision about the Obama administration's health care overhaul law. Adam Liptak, *At Heart of Health Law Clash, a 1942 Case of a Farmer's Wheat*, N.Y. TIMES, Mar. 20, 2012, at A1. The Court, over the years, has expanded and contracted Congressional authority under the commerce clause. Compare *United States v. Lopez*, 514 U.S. 549 (1995), *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (narrowing Congress' commerce power), with *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) and *Gonzalez v. Raich*, 545 U.S. 1 (2005) (broadening Congress' commerce power).

10. *Nat'l Fed'n of Indep. Bus. et al. v. Sebelius*, Nos. 11-393, 11-398, 11-400 (U.S. June 28, 2012).

### 1. *Homegrown Wheat*

In 1938, Congress passed the Agricultural Adjustment Act.<sup>11</sup> One purpose of the Act was to control the amount of wheat and other commodities in the stream of commerce in order to regulate price fluctuations.<sup>12</sup> An amendment to the Act set a wheat acreage allotment that limited the volume of wheat an individual farmer was permitted to grow.<sup>13</sup> Any wheat grown beyond that quota (“farm marketing excess”) was subject to a market penalty.<sup>14</sup> If a farmer exceeded his allotment and did not pay the penalty or surrender the excess to the Secretary of Agriculture, the farmer would not receive his “marketing card,” which was necessary if the farmer wanted to sell his allotted wheat.<sup>15</sup>

Mr. Roscoe Filburn was a small-scale farmer in Ohio and raised a small herd of dairy cattle and poultry and grew a small acreage of winter wheat.<sup>16</sup> In 1941, Filburn planted 23 acres of wheat, which amounted to 11.9 acres more than he was allowed under the Act.<sup>17</sup> The wheat Filburn planted was intended for a variety of end uses: some of it would be sold, some would be fed to the poultry and livestock on his farm (some of which would be sold), some would be used in making flour for his own family’s consumption, and the rest would be kept for reseeding the following year.<sup>18</sup> The extra acreage of wheat production triggered the Act’s penalty.<sup>19</sup> Because Filburn did not pay the penalty or surrender the excess, he was denied his marketing card.<sup>20</sup>

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11. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281–1393 (2006)).

12. 7 U.S.C. § 1282 (2006). “[T]o regulate interstate and foreign commerce in cotton, wheat, corn, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas . . .” *Id.*; *Wickard*, 317 U.S. at 115

13. 55 Stat. 203 (codified as amended at 7 U.S.C. § 1340 (2006)). In 1940, as per the amendment, the wheat acreage allotment was 11.1 acres. *Wickard*, 317 U.S. at 114–15.

14. *Wickard*, 317 U.S. at 114–15.

15. *Id.*; Jim Chen, *Filburn’s Legacy*, 52 EMORY L. J. 1719, 1735–36 (2003).

16. *Wickard*, 317 U.S. at 114. For more on Roscoe Filburn the man, see Jim Chen, *Filburn’s Legacy*, 52 EMORY L.J. 1719, 1733–34 (2003) (highlighting the fifth generation Ohio farmer’s strong sense of pride, recorded in a family biography: “I never worked for another man in my life.”).

17. *Wickard*, 317 U.S. at 114–15.

18. *Id.* at 114.

19. *Id.* at 114–15. The 11.9 extra acres yielded 239 bushels of wheat, and with a 49 cent per bushel penalty, Filburn was assessed a penalty totaling \$117.11. *Id.*

20. *Id.* at 115.

## 2. *The "Effects Test"*

Filburn challenged the authority of Congress to pass the Agricultural Adjustment Act, alleging a violation of the commerce clause because the Act extended federal regulation to production of a good intended only for on-farm consumption and not for interstate commerce.<sup>21</sup> The wholly local character of the activity being regulated, it was argued, resulted in a limited (or indirect), if any, effect on interstate commerce.<sup>22</sup>

In denying Filburn's claim, the Court rejected the earlier more formulaic test for finding commerce clause jurisdiction and embraced the "effects test."<sup>23</sup> The effects test holds that in order to decide whether an activity falls under Congress' commerce power, one must look at the *economic effect* of the activity on interstate commerce.<sup>24</sup> In this case, the production of wheat, even if solely for home consumption, has an effect on the interstate market for wheat.<sup>25</sup> The homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."<sup>26</sup> Additionally, the effects test looks at the impact of the local activity in the aggregate in order to determine impact on interstate commerce.<sup>27</sup> The Court wrote: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."<sup>28</sup>

## 3. *Wickard v. Filburn Today*

The Supreme Court's recent decision on the Patient Protection and Affordable Care Act articulated a limitation on Congress' authority under

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21. *Id.* at 113-14.

22. *Id.* at 119.

23. *Id.* at 120. "[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Id.*

24. *Id.* at 124. Chief Justice Harlan Stone had previously summarized the reach of the commerce power at that time: "[The commerce power] extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Id.* (citing *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110 (1924)).

25. *Id.* at 125-27.

26. *Id.* at 128.

27. *Id.* at 127-28.

28. *Id.* at 127-28.

the commerce clause.<sup>29</sup> One concern in the lead up to the decision was whether, or to what extent, *Wickard v. Filburn* would be limited or rejected. In his majority opinion, Chief Justice Roberts described *Wickard* as having set the high-water mark for Congressional reach into intrastate activity under the commerce clause.<sup>30</sup> Chief Justice Roberts noted that in the aggregate consumers' decisions not to purchase wheat on the open market and consumers' decisions not to purchase health insurance both impact the price of those goods and services.<sup>31</sup> Under *Wickard's* holding, Congress would be able to regulate those activities because of the substantial effect on interstate commerce due to the impact of aggregated activity.<sup>32</sup> The distinction between *Wickard* and the health insurance mandate, however, is that

[t]he farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.<sup>33</sup>

The Supreme Court's holding that the individual mandate cannot be upheld under the commerce clause focuses on fact that Congress was trying to regulate a consumer's *inaction*, or the consumer's failure to engage in commerce.<sup>34</sup> It appears that the Congress' authority to regulate activity under *Wickard* remains—Congress continues to have the authority to regulate entirely local matters if, in the aggregate, there is a substantial effect on interstate commerce, as long as there is an *activity* (and not an absence of action) that is being regulated.<sup>35</sup> Although the Supreme Court's

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29. *Nat'l Fed'n of Indep. Bus. et al. v. Sebelius*, Nos. 11–393, 11–398, 11–400, slip op. at 17–27 (U.S. June 28, 2012).

30. *Id.* at 21 (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

31. *Id.*

32. *Id.*

33. *Id.* at 22.

34. *Id.* at 20 (noting “[the individual mandate] instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”).

35. See *id.* at 17–27. The Court, at the time of its decision in *Wickard*, recognized a limit to Congress' power under the commerce clause. The Court held that “[e]ven today, when this power has been held to have great latitude, there is no decision of this



commerce clause jurisprudence has expanded and contracted throughout the years since *Wickard* was decided, Congress' authority under *Wickard* remains.<sup>36</sup>

### B. Federal Level

Congress, through the commerce clause, holds a significant amount of authority over the food and agriculture system.<sup>37</sup> Congress delegates most of its oversight of the food and agriculture system to two main federal agencies: USDA and FDA.

#### 1. United States Department of Agriculture

USDA is a large department within the executive branch with seventeen agencies and seventeen offices covering a wide range of issues, including animal health, biotechnology, education and research, energy, emergency preparedness and disaster response, the farm bill, food and nutrition, food safety, forestry, homeland security, marketing and trade, natural resources and environment, plant health, and rural and community development.<sup>38</sup> For purposes of this paper, USDA's authority over meat and poultry—slaughter and inspection rules, labeling, and food safety—is the most relevant.

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Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Wickard*, 317 U.S., at 120de.

36. See *Nat'l Fed'n*, at 17-27. Although it seems Congress' power to regulate activity under *Wickard* was not significantly affected by the Supreme Court's healthcare decision, it remains to be seen how this restriction of the commerce clause impacts Congress' actions in the future. See Nina Totenberg, *Health Care Decision Hinges on a Crucial Clause*, NPR.ORG June 11, 2012, <http://www.npr.org/2012/06/11/154583824/health-care-decision-hinges-on-a-crucial-clause>.

37. U.S. CONST. art. I, § 8, cl. 3.

38. USDA Topics, <http://www.usda.gov/wps/portal/usda/usdahome?navid=TOPICS> (last visited Oct. 29, 2012). The seventeen agencies are: Agricultural Marketing Service; Agricultural Research Service; Animal and Plant Health Inspection Service; Center for Nutrition Policy and Promotion; Economic Research Service; Farm Service Agency; Food and Nutrition Service; Food Safety and Inspection Service; Foreign Agricultural Service; Forest Service; Grain Inspection, Packers and Stockyards Administration; National Agricultural Library; National Agricultural Statistics Service; National Institute of Food and Agriculture; Natural Resources Conservation Service; Risk Management Agency; Rural Development. USDA Agencies and Offices, [http://www.usda.gov/wps/portal/usda/usdahome?navid=AGENCIES\\_OFFICES\\_C](http://www.usda.gov/wps/portal/usda/usdahome?navid=AGENCIES_OFFICES_C) (last visited Oct. 29, 2012).

Through the Food Safety and Inspection Service (FSIS), USDA is charged with “ensuring that the nation’s commercial supply of meat, poultry and egg products is safe, wholesome, and correctly labeled and packaged.”<sup>39</sup> Generally, under the three authorizing statutes, in order for meat, poultry, and egg products to be sold in interstate commerce an FSIS inspector must be on the premises of the slaughter facility and must inspect the products to ensure compliance with U.S. food safety standards.<sup>40</sup> The meat must be labeled as having passed USDA inspection.<sup>41</sup> FSIS is also the agency that promulgates rules about slaughter and inspection.<sup>42</sup> Those rules cover pre- and post-slaughter inspection,<sup>43</sup> labeling,<sup>44</sup> sanitation,<sup>45</sup> and hazard analysis and critical control point (HACCP) systems requirements,<sup>46</sup> among other things.

While states have the authority to promulgate laws and regulations that cover slaughter and inspection of meat, poultry, and egg products that will be distributed solely intrastate, Congress provided a way for the states and federal government to cooperate on these issues.<sup>47</sup> In order for states to receive the benefits from cooperation with the federal government—funding, advisory assistance, technical and laboratory assistance, and training—the state must create and implement a meat inspection program that is at least equal to the federal requirements.<sup>48</sup> This cooperation provision is important because it means that for many states, the federal requirements are (at least) the baseline for all meat inspection and slaughter in the state. Additionally, if the states cooperate with the federal government in this way, the federal government has a somewhat active role in the states’ activities.

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39. USDA, Food Safety and Inspection Service, About FSIS, [http://www.fsis.usda.gov/About\\_FSIS/index.asp](http://www.fsis.usda.gov/About_FSIS/index.asp) (last visited Oct. 29, 2012).

40. Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (2006); Poultry Products Inspection Act, 21 U.S.C. §§ 451–471 (2006); Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056 (2006).

41. *E.g.*, 21 U.S.C. § 607 (2006).

42. Food Safety and Inspection Service, Department of Agriculture, 9 C.F.R. §§ 300.1–.2 (2012).

43. Ante-Mortem Inspection, 9 C.F.R. §§ 309.1–309.18 (2012); Post-Mortem Inspection, 9 C.F.R. §§ 310.1–310.25 (2012).

44. Labeling, Marking Devices, and Containers, 9 C.F.R. §§ 317.1–317.400 (2012).

45. Sanitation, 9 C.F.R. §§ 416.1–416.17 (2012).

46. Hazard Analysis and Critical Control Point (HACCP) Systems, 9 C.F.R. §§ 417.1–417.8 (2012).

47. 21 U.S.C. § 661 (2006).

48. 21 U.S.C. § 661(a).

## 2. Food and Drug Administration

FDA is housed within the Department of Health and Human Services (HHS) and, like USDA, covers a wide range of topics.<sup>49</sup> The division of jurisdiction between USDA and FDA can seem a bit complicated, but basically breaks down this way: USDA has jurisdiction over meat and poultry, and FDA has jurisdiction over all other food items.<sup>50</sup>

Historically, the FDA focused on issues surrounding adulteration and misbranding, motivated by a desire for consumer protection and food safety.<sup>51</sup> With the passage of the Food Safety Modernization Act in 2009, FDA's authority over food safety issues expanded to include mandatory recall authority and some on-farm regulatory jurisdiction (i.e., in the form of produce safety standards).<sup>52</sup>

FDA's authority surrounding adulteration and misbranding comes in the form of regulations about standards of identity for ingredients, labeling, and packaging. Standards of identity set forth specific descriptions of what constitutes a particular food product, so that only those products that meet the requirements can use the name of the product.<sup>53</sup> FDA's regulations also

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49. In addition to food, FDA regulates drugs; medical devices; vaccines, blood and biologics; animal and veterinary issues; cosmetics; radiation-emitting products; and tobacco products. FDA, <http://www.fda.gov/> (last visited Nov. 11, 2012).

50. Food Safety – An Overview, The National Agricultural Law Center, <http://www.nationalaglawcenter.org/assets/overviews/foodsafety.html> (last visited Nov. 11, 2012). In terms of food products that contain meat, if the food product contains 3% or less meat, FDA retains jurisdiction. FDA Investigations Operations Manual (2012), Exhibit 3-1, available at <http://www.fda.gov/downloads/ICECI/Inspections/IOM/ucm127390.pdf>.

51. Food Labeling – An Overview, The National Agricultural Law Center, <http://www.nationalaglawcenter.org/assets/overviews/foodlabeling.html> (last visited Nov. 11, 2012). The FDA continues to regulate food ingredients and packaging, labeling and nutrition, and food safety concerns. FDA, <http://www.fda.gov/Food/default.htm> (last visited Nov. 3, 2012).

52. See 21 U.S.C. § 350h (2006) (standards for produce safety), 21 U.S.C. § 350i (2006) (mandatory recall authority). The New FDA Food Safety Modernization Act, FDA, <http://www.fda.gov/Food/FoodSafety/FSMA/default.htm> (last visited Nov. 3, 2012).

53. The Federal Food Drug and Cosmetic Act directs the Secretary of Health and Human Services, in order to “promote honesty and fair dealing in the interest of consumers, . . . [to] promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity.” 21 U.S.C. § 341 (2006). A food product that does not comply with the standard of identity and purports to be that food will be considered misbranded and a violation of the law. 21 U.S.C. § 343 (2006). The standards of identity are found at 21 C.F.R. pts. 131 – 169 (2012) (covering products such as milk and cream, cheese, frozen

require certain information to be included on the label of a food product: a statement of identity,<sup>54</sup> statement of net contents,<sup>55</sup> statement of origin,<sup>56</sup> statement of ingredients,<sup>57</sup> and nutrition labeling.<sup>58</sup> All food products sold must comply with these FDA rules.

Another area of FDA jurisdiction (and source of much controversy) surrounds the regulation of raw milk. Under FDA rules, it is illegal to sell raw milk interstate.<sup>59</sup> States, however, are permitted to decide whether to allow raw milk sales within the state's borders.<sup>60</sup> Each state promulgates the laws and regulations surrounding raw milk sales; for example, the state will decide what kind of inspection and licensing regime is required and where those raw milk sales may take place (at the retail level, on-farm, or through herd-shares).

### 3. *Concurrent Jurisdiction*

Although historically both FDA and USDA addressed food safety concerns, it was USDA that dealt mainly with food safety, particularly because of its jurisdiction over meat and poultry. After the passage of the Food Safety Modernization Act of 2009, FDA's jurisdiction over food safety concerns increased greatly.<sup>61</sup> The division of jurisdiction over food safety concerns—for facility inspections, on-farm inspections, traceability, and recalls, for example—is sometimes confusing, and it is not always clear where one agency's jurisdiction ends and the other's begins.<sup>62</sup> For

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desserts, canned fruits, fruit pies, vegetable juices, fish and shellfish, cacao products, margarine, and sweeteners and table syrups).

54. 21 C.F.R. § 101.3 (2012).

55. 21 C.F.R. § 101.105 (2012).

56. 21 C.F.R. § 101.5 (2012).

57. 21 C.F.R. § 101.4 (2012).

58. 21 C.F.R. §§ 101.9, 101.10, 101.12.

59. 21 C.F.R. § 1240.61(a) (2012). *See Farm-to-Consumer Legal Defense Fund v. Sebelius*, 734 F. Supp. 2d 668 (N.D. Iowa 2010) (plaintiffs challenging FDA's authority to ban interstate sale of raw milk); *see also Farm-to-Consumer Legal Defense Fund v. Sebelius*, 2012 WL 1079987 (N.D. Iowa 2012) (granting defendants' motion to dismiss and motion for summary judgment based on lack of subject matter jurisdiction and lack of standing of any plaintiff).

60. For a state-by-state illustration of raw milk laws, see Farm-to-Consumer Legal Defense Fund Map, [http://www.farmtoconsumer.org/raw\\_milk\\_map.htm](http://www.farmtoconsumer.org/raw_milk_map.htm) (last visited Nov. 11, 2012), and Real Raw Milk Facts State Laws and Regulations, <http://www.realrawmilkfacts.com/raw-milk-regulations> (last visited Nov. 11, 2012).

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

62. In order to streamline work and reduce confusion about jurisdiction, some have called for the establishment of one food safety agency. *See* Helena Bottemiller, *AEI Calls for Single Food Safety Agency, Better Foodborne Illness Surveillance*, FOOD

purposes of this paper, it is enough to note that FDA has a significant amount of authority over food safety through a number of avenues.

#### 4. *Federal Laws/Regulations and Small-Scale Producers*

Of the many laws and regulations that the food and agriculture industry is subject to, some entail more effort—financial, paperwork, personnel—and may impact smaller businesses more substantially than larger businesses. For example, as per the recent Food Safety Modernization Act, facilities are required to implement a hazard analysis and risk-based preventive control plan, which includes a large number of tasks, including: creation of a hazard analysis, implementation of preventive controls, monitoring, establishment of corrective action, verification, record keeping, creation of a written plan and documentation, and a requirement to reanalyze the plan.<sup>63</sup> For small businesses that lack sufficient staffing and/or funds to maintain these documents, compliance with the rules as written may cause the business to close or otherwise be affected negatively. Lawmakers need to keep the size differences in mind and create laws and regulations that achieve the goal of the legislation but also do not unintentionally cause these smaller-scale producers to go out of business.

Within the federal government's regulation of the food and agriculture system, however, there exist a number of exemptions and separate rules for small operations. For example, producers that slaughter less than 1,000 chickens a year and meet a couple other requirements are exempt from the poultry slaughter inspection rules.<sup>64</sup> Producers that sell eggs from a flock of 3,000 or less hens are exempt from the egg inspection rules.<sup>65</sup> Under the Federal Food, Drug, and Cosmetic Act, small businesses are exempt from or must comply with special requirements for nutrition

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SAFETY NEWS, Apr. 26, 2012, <http://www.foodsafetynews.com/2012/04/aei-calls-for-single-food-safety-agency-better-foodborne-illness-surveillance/>.

63. 21 U.S.C. § 350g (2006).

64. 21 U.S.C. §§ 464(c)(1), (4) (2006) (also exempting from the poultry inspection rules producers that slaughter poultry for their own personal use and those that perform custom slaughter). *But see* 21 U.S.C. § 623 (2006) (exempting from meat inspection only those producers who slaughter for personal use and those who do custom slaughter).

65. 21 U.S.C. § 1044(a)(7) (2006); 9 C.F.R. § 590.100 (2012); *see* Draft Guidance for Industry: Questions and Answers Regarding the Final Rule, Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, Sections III A-B, July 2011, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodSafety/ucm262206.htm#Question> (last visited Nov. 3, 2012).

labeling.<sup>66</sup> Most recently, in August 2012, under the USDA's new Cooperative Interstate Shipment Program, Ohio became the first state whose small-scale meat producers will be allowed to sell meat products from small state-inspected facilities across state lines.<sup>67</sup>

Additionally, the Food Safety Modernization Act (FSMA) contains provisions that incorporate size-specific considerations. For example, FSMA directs the FDA to consider the size of a business when promulgating regulations on the inspection of records.<sup>68</sup> FSMA amended the definition of "retail food establishment"—which is excluded from the food facility registration requirements—to include direct sales operations (farmers markets, roadside stands, CSAs, and any other direct sales operations the Secretary determines should be included).<sup>69</sup> The provisions regarding hazard analysis and risk-based preventive controls, mentioned above, contain modified requirements for small and very small business (defined by limited monetary value).<sup>70</sup> The standards for produce safety not only mandate flexibility for small businesses, but also exempt farms that sell through direct marketing (subjecting them to certain labeling requirements).<sup>71</sup>

While the federal government does not always take size and scale into account when writing laws or promulgating regulations, there are some in existence that provide a good launching point for the laws and regulations that will come.

### C. State Level

State jurisdiction over the food and agriculture system is derived mainly through the state's police powers. States (and the municipalities, as delegated) generally have authority over restaurant and food processing licensing and inspection; for example, rules about restaurant health

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66. 21 U.S.C. § 343(q)(5) (2006); 21 C.F.R. §§ 101.9(j)(1), (18) (2012); Small Business Nutrition Labeling Exemption Guidance, FDA, May 7, 2007, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm053857.htm>.

67. Helena Bottemiller, *Ohio First State to Gain Interstate Approval for Small, Local Meat Plants*, FOOD SAFETY NEWS, Aug. 10, 2012, [http://www.foodsafetynews.com/2012/08/ohio-first-state-to-gain-interstate-approval-for-small-local-meat-plants/?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=120810#.UCUfhURU0-8](http://www.foodsafetynews.com/2012/08/ohio-first-state-to-gain-interstate-approval-for-small-local-meat-plants/?utm_source=newsletter&utm_medium=email&utm_campaign=120810#.UCUfhURU0-8).

68. 21 U.S.C. § 350c(b) (2006).

69. 21 U.S.C. § 350d(c) (exempting retail food establishments from the registration requirements); 21 C.F.R. § 1.227(b)(11) (2012); Food Safety Modernization Act, Pub. L. No. 111-353, § 102(c), 124 Stat. 3885 (2009).

70. 21 U.S.C. § 350g(l).

71. 21 U.S.C. §§ 350h(b)(3), (f).

inspections, food handler licensing, food safety regulations (to a certain degree), and whether to allow intrastate sales of raw milk are all decided on a state or municipal level.

Additionally, as mentioned above, states share jurisdiction over some meat and poultry processing facilities when they act in partnership with the federal government.<sup>72</sup> While the federal government's rules on slaughter set the baseline, when a state acts in cooperation with the federal government the state is permitted to set higher standards and is the entity that enforces those rules.<sup>73</sup>

Lastly, as will be discussed later in this paper, states decide whether to pass "cottage food" laws that set different rules for home-made goods for sale within their borders.<sup>74</sup> Cottage food laws allow homemade goods to bypass, or be subject to different, regulations dealing with licensure and inspection.<sup>75</sup> Often these goods are deemed "non-potentially hazardous" and include items such as baked goods, granola, and jams (items that pose a lesser food safety risk).<sup>76</sup> Currently, there are forty-two states that have some sort of cottage food laws and there are several more that are working towards implementing similar legislation.<sup>77</sup>

#### D. *International Level*

International trade rules and commitments play a significant role in the United States' food and agriculture system. The United States' presence in the World Trade Organization (WTO) requires that the U.S. behave in a certain way toward international trade, with food and agricultural commodities being a sizeable portion of the international trade. The laws that Congress passes, such as the Farm Bill, must comply with WTO agreements, other international bilateral and multilateral treaties, and any free trade agreements into which the United States has entered.

The main provisions under WTO laws that the U.S. must comply with are the principles of non-discrimination: most favored nation and national treatment. The "most favored nation" principle declares that any benefit that a member country gives to any other country must be afforded to all

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72. 21 U.S.C. § 661 (2006).

73. *Id.*

74. *See infra* § V.B.

75. *See infra* § V.B.

76. *See infra* § V.B.

77. Harvard Food Law and Policy Clinic Publishes State Food Policy Toolkit, Harvard Food and Law Policy Clinic, <http://blogs.law.harvard.edu/foodpolicyinitiative/2012/12/03/harvard-food-law-and-policy-clinic-publishes-state-food-policy-toolkit/> (last visited January 4, 2013)

other WTO member countries for like products.<sup>78</sup> For example, if the United States sets its tariff rate for bananas as 10% for a country in Central America, it could not charge a 15% tariff rate to other WTO member countries that want to export bananas to the U.S. The United States is required to treat all member countries the same. The “national treatment” principle requires that member countries treat foreign products no less favorably than they treat their domestic products.<sup>79</sup> This principle is meant to prevent governments from instituting protectionist policies to the detriment of foreign trade partners.

The United States has run afoul of WTO agreements with some of its agricultural policies, namely cotton subsidies.<sup>80</sup> In 2005 and 2008, the United States cotton subsidy program was found to be a violation of WTO law.<sup>81</sup> The United States and Brazil entered into a settlement agreement over the U.S. cotton subsidy program, in which the U.S. agreed to pay \$147.3 million per year to Brazil until the next Farm Bill was passed or another mutually agreed upon solution was reached.<sup>82</sup> As illustrated here, international trade agreements are significant players in determining domestic food and agricultural policies.

### III. DEFINING FOOD SOVEREIGNTY

Food sovereignty has emerged as an alternative vision for food and agriculture systems around the world. Over the years, the definition of food sovereignty has developed and changed, due in part to its responsive character and to the increasing number of stakeholders that contribute new and differing values and goals. It is important to define food sovereignty for a number of reasons.

First, defining food sovereignty helps to clarify and accomplish the goals of the movement. The proponents of food sovereignty are seeking to implement a new food system that addresses the deficiencies of the current corporate food regime.<sup>83</sup> Without a solid understanding of the motivations

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78. General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 197-98.

79. General Agreement on Tariffs and Trade, art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 206.

80. SUSAN A. SCHNEIDER, *FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 77* (Carolina Academic Press 2011). Subsidies are generally suspect under WTO law, which is why direct payments were decoupled from production in the early 1990s. *Id.* at 67-68.

81. *Id.* at 77.

82. *Id.* at 77-78.

83. See Madeleine Fairbairn, *Framing Resistance: International Food Regimes & the Roots of Food Sovereignty*, FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE



and underlying goals, it will be difficult to craft solutions (here, through the use of scale appropriate regulations) that will accomplish those goals. Madeleine Fairbairn, in her essay *Framing Resistance: International Food Regimes & the Roots of Food Sovereignty*, writes: “The way that movements frame their ideas influences their likelihood of success as well as the very form taken by their struggle.”<sup>84</sup>

Second, defining food sovereignty helps distinguish what is *not* food sovereignty. For example, although the notion of food security is similar to food sovereignty, it is distinct in significant ways. The idea behind food sovereignty rejects the current corporate and international food regime, while the ideas of food security operate within and support the current system. Additionally, movements that may look like food sovereignty at first glance, such as the proposed legislation in Utah<sup>85</sup> and New Hampshire<sup>86</sup> 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.<sup>87</sup> Again, being able to distinguish what is and what is not food sovereignty aids in identifying and accomplishing the goals of food sovereignty.

### A. Food Sovereignty and its Development

#### 1. 1996 Definition

La Vía Campesina first introduced the concept of food sovereignty in 1996 at the World Food Summit.<sup>88</sup> At that time, discussions at the summit

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AND COMMUNITY 15, 27 (Hannah Wittman, Annette Aurélie Desmarais, & Nettie Wiebe eds., 2010). La Vía Campesina “propose[s] . . . an alternative that more faithfully relays the needs of small farmers and conjures the image of an alternative regime in which these needs might better be met.” *Id.*

84. *Id.* at 15.

85. S.B. 34, 59th Leg., Gen. Sess. (Utah 2012).

86. H.B. 1650, 77th Leg., Reg. Sess. (N.H. 2012).

87. Neither Utah nor New Hampshire ultimately passed these pieces of legislation, but the mere fact that these types of legislation were proposed reflects the atmosphere surrounding federal regulation of the food system. See Dan Flynn, *NH Food Freedom Bill Calls for Jailing Feds*, FOOD SAFETY NEWS, Jan. 25, 2012, <http://www.foodsafetynews.com/2012/01/nh-food-freedom-bill-calls-for-jailing-federal-officials/>; Dan Flynn, *NH May Drop Licensing in Name of Food Freedom*, FOOD SAFETY NEWS, Feb. 9, 2012, <http://www.foodsafetynews.com/2012/02/second-nh-law-drops-licensing-in-name-of-food-freedom/>; Dan Flynn, *Jail Time Proposed for Helping Federal Food Safety Officials*, FOOD SAFETY NEWS, Jan. 23, 2012, <http://www.foodsafetynews.com/2012/01/jail-time-proposed-for-helping-federal-food-safety-officials/>.

88. Hannah Wittman, Annette Desmarais & Nettie Wiebe, *The Origins & Potential of Food Sovereignty*, FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND

and at the World Trade Organization negotiations focused on food security.<sup>89</sup> Dan Glickman, former U.S. Secretary of Agriculture, said: “It was with food security in mind that the United States crafted its proposal for the next round of WTO negotiations . . . We want to give [developing countries and least developed countries] the ability to import the food they need to feed their people.”<sup>90</sup>

In anticipation of the focus on and in rejection of food security as a reason to liberalize trade, La Via Campesina defined food sovereignty as “the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity.”<sup>91</sup> The

COMMUNITY 1, 3 (Hannah Wittman, Annette Aurélie Desmarais, & Nettie Wiebe eds., 2010). La Via Campesina’s Position on Food Sovereignty that was presented at the World Food Summit was first conceived at a conference earlier in the year. *Id.* at 2. Peasant and farm leaders gathered in Tlaxcala, Mexico, for the Second International Conference of La Via Campesina in early 1996, where they discussed food sovereignty as a replacement for the notion of “food security.” *Id.* For these farmers, the pursuit of “food security” would ignore parts of the food production system that needed to be addressed. *Id.* Food security is defined as “a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” *Id.* at 3. The attendees at the conference rejected the idea of “food security” because it “invites an interpretation towards food related policies that emphasize maximizing food production and enhancing food access opportunities, without particular attention to how, where and by whom the food is produced.” *Id.*

89. *See id.* at 2-3. The focus on food security and the use of international trade to achieve food security had been gaining traction prior to the World Food Summit in 1996.

The World Bank continues to promote [a] neoliberal perspective on food security, which requires that countries “refrain from costly self-sufficiency policies and specialize in producing the commodities which are most profitable for them.” The free trade policies pursued by the WTO also played a prominent role in the neoliberalization of food security. As McMichael observes, “The shift in the ‘site’ of food security from the nation-state to the world market was engineered during the Uruguay Round (1986–1994)” of the WTO negotiations.

Fairbairn, *supra* note 83, at 25.

90. Steve Suppan, *Challenges for Food Sovereignty*, 32 FLETCHER F. WORLD AFF. 111 (2008) (quoting USDA, Press Release No. 0239.00, July 17, 2000, “Address by U.S. Secretary of Agriculture Dan Glickman to the United Nations Economic and Social Council”).

91. Patel, *supra* note 1, at 188. The longer definition is as follows: Long-term food security depends on those who produce food and care for the natural environment. As the stewards of food producing resources we hold the following principles as the necessary foundation for achieving food security False Food is a basic human right. This right can only be realized in a system where food sovereignty is guaranteed. *Food sovereignty is the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity.*

definition focused on the rights of nations to produce their *own* food on their *own* land and that food sovereignty was a necessary precondition to food security.<sup>92</sup>

## 2. 2002 Definition

In 2002, the definition took on a more expansive character, touching on subjects of domestic sustainable development, self-reliance, restricting dumping of commodities on domestic markets, and the importance of smart trade policies:

Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets; and to provide local fisheries-based communities the priority in managing the use of and the rights to aquatic resources. Food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of people to be safe, healthy and ecologically sustainable production.<sup>93</sup>

Raj Patel characterized the 2002 food sovereignty definition as “cautious,” noting that “[t]he diversity of opinions, positions, issues and politics bursts through the text.”<sup>94</sup>

## 3. 2007 Definition – the Nyéléni Declaration

In 2007, La Vía Campesina set forth the Nyéléni Declaration that defined food sovereignty as “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture system.”<sup>95</sup> This version of food sovereignty is even broader than the 2002 definition

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We have the right to produce our own food in our own territory. Food sovereignty is a precondition to genuine food security.

*Id.* (citations omitted) (emphasis added).

92. *Id.*

93. *Id.* at 189 (quoting Peoples Food Sovereignty Network 2002:1).

94. *Id.*

95. Nyéléni Declaration 2007, [www.nyeleni.org/spip.php?article290](http://www.nyeleni.org/spip.php?article290) (last visited Nov. 6, 2012).

and contains some potentially contradictory content.<sup>96</sup> The declaration states that food sovereignty “puts those who produce, distribute and consume food at the heart of the food systems and policies.”<sup>97</sup> As Patel notes, that definition includes everyone, including the inter- and transnational corporations that advocates of food sovereignty reject.<sup>98</sup> It is likely that the crafters of the Nyéléni Declaration intended that phrase to include only natural persons, rather than legal persons.<sup>99</sup> The Nyéléni Declaration challenges the world’s reliance on neo-liberalism and global capitalism.

### B. *Main Points*

Despite the broadening definition, there are a few main points that form common threads through the definitions of food sovereignty: the continued role for government; the importance of food safety; and the de-corporatization and de-commodification of the food system.

#### 1. *Role of Government*

Food sovereignty envisions a continued and central role of government in pursuit of its goals.<sup>100</sup> Proponents of food sovereignty are

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96. See Patel, *supra* note 1, at 190. A more complete definition is as follows: Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations. It defends the interests and inclusion of the next generation. It offers a strategy to resist and dismantle the current corporate trade and food regime, and directions for food, farming, pastoral and fisheries systems determined by local producers. Food sovereignty prioritizes local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal fishing, pastoralist-led grazing, and food production, distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just income to all peoples and the rights of consumers to control their food and nutrition. It ensures that the rights to use and manage our lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food. Food sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social classes and generations.

*Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. In fact, inherent in the definition of sovereignty is the presence of some form of governance. The definition of “sovereignty” is “supreme power esp. over a body

primarily seeking freedom from corporate control over food and agriculture, from government laws and regulations that are heavily influenced by corporate interests to the detriment of small and local agriculture, and from international trade laws that are designed by countries whose governments promote large, corporate agricultural interests.<sup>101</sup>

It is often the people, rather than the government, that are actually claiming the right to food sovereignty. La Vía Campesina is an organization made up of people—not governments—that are seeking to achieve food sovereignty.<sup>102</sup> However, governments play an important role in obtaining and protecting food sovereignty.<sup>103</sup> In fact, “[c]entral to the idea of rights is that a state is ultimately responsible for guaranteeing the rights within its territory, because it is sovereign over it.”<sup>104</sup> The interaction between individuals and government in the pursuit of food sovereignty is important because “food sovereignty advocates are concerned, at the end of the day, with democracy.”<sup>105</sup>

## 2. Food Safety

Improving food safety plays an important role in the food sovereignty movement. In a document entitled “Peoples’ Food Sovereignty – WTO Out of Agriculture,” La Vía Campesina demands that governments prioritize food safety measures.<sup>106</sup> The demands for better food safety include:

[C]ontrolling pests and disease, protecting against environmental pollution, prohibiting the use of antibiotics and hormones in aquacultures, and banning irradiation of food. Governments must establish food quality standards

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politic; freedom from external control: AUTONOMY.” MERRIAM-WEBSTER DICTIONARY 1129 (1996 ed.).

101. See generally Patel, *supra* note 1.

102. What is LVC, *supra* note 4. “La Vía Campesina is the international movement which brings together millions of peasants, small and medium-size farmers, landless people, women farmers, indigenous peoples, migrants and agricultural workers from around the world.” *Id.*

103. Patel, *supra* note 1, at 191-93.

104. *Id.* at 191.

105. *Id.* at 194. Patel writes that “[e]galitarianism . . . is not something that happens as a consequence of the politics of food sovereignty. It is a prerequisite to have the democratic conversation about food policy in the first place.” *Id.*

106. La Vía Campesina, *Peoples’ Food Sovereignty – WTO Out of Agriculture*, [http://viacampesina.org/en/index.php?option=com\\_content&view=article&id=416:peoples-food-sovereignty-wto-out-of-agriculture&catid=21:food-sovereignty-and-trade&Itemid=38](http://viacampesina.org/en/index.php?option=com_content&view=article&id=416:peoples-food-sovereignty-wto-out-of-agriculture&catid=21:food-sovereignty-and-trade&Itemid=38) (last visited Nov. 5, 2012).

that reflect the culture and values of its people and establish quality control measures to comply with environmental, social and health quality standards. Further, the declaration maintains that governments must “ensure that all food inspection functions are performed by appropriate and independent government bodies, and not by private corporations or contractors.”<sup>107</sup>

Again, governments play a primary role in promoting and achieving a stronger food safety system.

### 3. *De-Corporatization and De-Commodification of Food System*

The drive to de-corporatize and de-commodify the food system shows up in some manner in each definition of food sovereignty. In the 1996 definition, the focus on the “right to produce our *own* food in our *own* territory” and in-country capacity building suggests a decrease in international trade of food, thus reducing the role of corporations in the food system.<sup>108</sup> The 2002 definition speaks more clearly to trade and corporate control over food and agriculture. The definition of food sovereignty from 2002 mentions restricting the dumping of products in domestic markets but emphasizes that “food sovereignty does not negate trade, but rather, it promotes the formulation of trade policies and practices that serve the rights of people to safe, healthy and ecologically sustainable production.”<sup>109</sup>

In keeping with its somewhat contradictory character, the 2007 Nyéléni Declaration mentions trade and corporations in two places. The Declaration asserts that food sovereignty “offers a strategy to resist and dismantle the current corporate trade and food regime” as well as “promotes transparent trade that guarantees just income to all peoples and the rights of consumers to control their food and nutrition.”<sup>110</sup> Under this definition, the goal appears to be to improve trade (by increasing its transparency and commitment to justice), while reducing the corporate control of international trade. Despite the softening of its stance on international trade, food sovereignty is clear about reducing corporate control; and by advocating for smarter international trade, food sovereignty is seeking to de-commodify the food system.

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107. Alli Condra, Opinion, *Balancing the Scales: Food “Sovereignty” and Food Safety*, FOOD SAFETYNEWS, Dec. 19, 2011, <http://www.foodsafetynews.com/2011/12/balancing-the-scales-food-sovereignty-and-food-safety/>.

108. Patel, *supra* note 1, at 188.

109. *Id.* at 189 (quoting Peoples Food Sovereignty Network 2002:1).

110. *Id.* at 190.

## IV. "FOOD SOVEREIGNTY" MOVEMENTS IN THE UNITED STATES

Food sovereignty, as a named movement, is relatively new to the United States.<sup>111</sup> A cluster of towns in Maine passed so called "food sovereignty" ordinances starting in March 2011.<sup>112</sup> Most of the ordinances, though not all, are called "Local Food and Community Self-Governance Ordinances."<sup>113</sup> Over the past year, the local food ordinance movement has spread to other states and communities—spanning Massachusetts,<sup>114</sup> Vermont,<sup>115</sup> California,<sup>116</sup> and a couple more towns in Maine<sup>117</sup>—with

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111. See U.S. Food Sovereignty Alliance, About the Alliance, <http://www.usfoodsovereigntyalliance.org/about> (last visited Nov. 5, 2011).

112. *Maine Towns Try to Loosen Reins on Local Farms*, BANGOR DAILY NEWS, Mar. 18, 2011, <http://bangordailynews.com/2011/03/18/business/maine-towns-try-to-loosen-reins-on-local-farms/>; Maine Town Passes Landmark Local Food Ordinance, <http://localfoodlocalrules.org/2011/03/12/hello-world/> (last visited Nov. 11, 2012) (passed in the first town, Sedgwick, ME); David Bowden, *Passage of Local Food Ordinance Highlights Penobscot Town Meeting*, THE WEEKLY PACKET, Mar. 10, 2011, <http://weeklypacket.com/news/2011/mar/10/passage-local-food-ordinance-highlights-penobscot/> (passed in Penobscot, ME, failed in Brooksville, ME); 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/> (Blue Hill, ME); Trenton, ME, Passes Local Food and Self-Governance Ordinance, <http://afd-e-news.blogspot.com/2011/05/it-is-small-less-than-thousand-year.html> (May 24, 2011, 08:50 EST) (Trenton, ME).

113. Santa Cruz County passed a "Resolution Recognizing the Rights of Individuals to Grow and Consume their Own Food Products and to Enter into Contracts with Other Individuals to Board Animals for Food." Minutes Item 24.1, Proceedings of the Santa Cruz County Board of Supervisors, Volume 2011, Number 21 (Sept. 13, 2011) (passing Resolution 280-2011). The resolution has been called a "Food Freedom Resolution" as well as a "Food Rights Resolution." Santa Cruz County Passes a Food Freedom Resolution!, <http://localfoodfreedom-nevadacounty.org/blog/2011/09/santa-cruz-passes-right-to-grow-food-resolution/> (last visited Nov. 11, 2012).

114. David Gumpert, *Can a MO Judge Be Persuaded to Reverse Himself on Mastitis? Two More Towns Approve Food Sovereignty; A Poem from Amish Country*, THE COMPLETE PATIENT (May 5, 2011, 17:59 EST), <http://www.thecompletepatient.com/article/2011/may/22/can-mo-judge-be-persuaded-reverse-himself-mastitis-two-more-towns-approve-food/>; Simon Winchester, *Budget Impasse Over Soaring School Costs*, THE SANDISFIELD TIMES, June 2011, at 2, available at <http://sandisfieldtimes.org/Archive.htm>; Letter to the Editor, Brigitte Ruthman, *Letter from the Dairy Queen*, THE SANDISFIELD TIMES, July 2011, at 13, available at <http://sandisfieldtimes.org/Archive.htm>.

115. Second Vermont Town Passes Food Sovereignty Measure, Vermont Coalition for Food Sovereignty, <http://vermontfoodsovereignty.net/2011/05/second-vermont-town-passes-food-sovereignty-measure> (last visited Nov. 11, 2012).

116. Alli Condra, *Local Food Ordinance Proposed on West Coast*, FOOD SAFETY NEWS, Feb. 20, 2012, <http://www.foodsafetynews.com/2012/02/local-food-ordinance->

varying success. After the first town of Sedgwick, Maine, passed its local food ordinance, a blogger out of New England, David Gumpert, began calling the movement a “food sovereignty” movement.<sup>118</sup>

According to Bob St. Peter, the director of Food for Maine’s Future and one of the lead organizers based in Sedgwick, the push for the ordinance was in response to the Maine Department of Agriculture’s interpretation of its laws and rules that made it difficult to do on-farm poultry processing.<sup>119</sup> The farmers in the town, who were selling their poultry locally, wanted to slaughter their chickens in the open air, but the Maine Department of Agriculture wanted to require the butchering take place *inside*, citing food safety concerns.<sup>120</sup> The Maine Department of Agriculture suggested that more regulations were going to be tightened up like this because of the focus on food safety at the federal level.<sup>121</sup> As mentioned in an open letter to the governor of Maine and the state legislature, an increased crack down on raw milk dairies was a concern and likely was part of the motivation for the ordinance.<sup>122</sup> For these reasons,

takes-hold-on-west-coast/. The Board of Supervisors voted to study the issue further, but did not approve the ordinance. *Id.* See also David Gumpert, *Here’s a Surprise: Food Sovereignty May Be Coming to L.A. County; Rawsome Hearing Events*, THE COMPLETE PATIENT (Oct. 5, 2011, 15:54 EST), <http://www.thecompletepatient.com/article/2011/october/5/heres-surprise-food-sovereignty-may-be-coming-la-county-rawesome-hearing> (ordinance under review).

117. Clarke Canfield, *Towns Adopt Food Self-Governance Ordinances to Exempt Farmers from State, Federal Laws*, BANGOR DAILY NEWS, June 21, 2012, <http://bangordailynews.com/2012/06/21/business/towns-adopt-food-self-governance-ordinances-to-exempt-farmers-from-state-federal-laws/>. The two towns in Maine are the most recent additions to the local food ordinance list, passing their ordinances in mid-June 2012. *Id.*

118. Telephone Interview with Bob St. Peter, Director, Food for Maine’s Future (Feb. 3, 2012) [*hereinafter* St. Peter]. Bob St. Peter, director of Food For Maine’s Future and point person for much of the local food ordinance movement in Maine, emphasized that while they are pursuing food sovereignty by choosing a food and agriculture system that is right for their community, the term “food sovereignty” was placed on this movement by blogger David Gumpert, who is not directly involved in the movement in Maine. *Id.*; see also David Gumpert, *Here’s a Way to Eliminate the Regulators and Lawyers, and Build Community at the Same Time: Organize and Declare “Food Sovereignty,” Like Sedgwick, Maine*, THE COMPLETE PATIENT, <http://www.thecompletepatient.com/article/2011/march/7/heres-way-eliminate-regulators-and-lawyers-and-build-community-same-time> (Mar. 7, 2011, 17:40 EST).

119. St. Peter, *supra* note 119; see also YOU WANTED TO BE A FARMER (No Umbrella Media 2012), <http://nombrella.com/nublog/no-umbrella-tv/you-wanted-to-be-a-farmer-a-discussion-of-scale-video/> (last visited Nov. 5, 2012).

120. St. Peter, *supra* note 119.

121. *Id.*

122. Open Letter to Gov. Paul LePage & 125th Maine Legislature, <http://savingseeds.wordpress.com/2011/01/> (Jan. 10, 2011, 19:03 EST).



Bob St. Peter and the Food for Maine's Future group looked to their local governments to create some protection for local producers and found the ordinance, from their perspective, was the fastest and most direct way to accomplish their goal.<sup>123</sup>

The ordinances and resolutions center around the same basic idea—that local communities should be able to choose and maintain control over their own food and agriculture system—but as they have been considered and adopted or rejected, the ordinances and resolutions often take on their own character, reflecting the needs and desires of their originating communities.<sup>124</sup> Whether, or to what degree, these local food ordinances can be considered part of the food sovereignty movement will depend on a number of factors, including who is asking the question, who is answering the question, and how the community has re-written or re-formulated the language of the original ordinance.

#### A. *The Local Food and Community Self-Governance Ordinance*

At its most basic level, the Local Food and Community Self-Governance Ordinance exempts local producers from state and federal licensure and inspection, provided the transaction is between the producer and patron directly and is for the patron's home consumption.<sup>125</sup> The preamble of the ordinance provides some insight:

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.

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123. St. Peter, *supra* note 119.

124. *See infra* Part IV.B.

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

We have faith in our citizens' ability to educate themselves and make informed decisions. We hold that federal and state regulations impede local food production and constitute a usurpation of our citizens' right to foods of their choice. We support food that fundamentally respects human dignity and health, nourishes individuals and community, and sustains producers, processors and the environment. We are therefore duty bound under the Constitution of the State of Maine to protect and promote unimpeded access to local foods.<sup>126</sup>

The ordinance bases its authority on the Declaration of Independence, article I, section 2 of the Maine Constitution ("Power Inherent in People"), and the municipalities' police powers provision and a policy encouraging food-self sufficiency found in Maine's Revised Statutes.<sup>127</sup>

The exemption from state and federal licensure and inspection is the primary focus of the ordinance.<sup>128</sup> The exemption is limited to producers and processors of local foods (as defined by the ordinance) in two scenarios: (1) when the transaction is between the producer or processor and a patron for the patron's home consumption, or (2) when the products are prepared for, consumed, or sold at a community social event.<sup>129</sup> In addition to the licensure and inspection exemption, the ordinance asserts a right to access and produce food, a right to self-governance, and a right to enforce the ordinance.<sup>130</sup>

To implement these provisions, the ordinance states it is unlawful for the state or federal governments to adopt laws or regulations that interfere with the rights recognized in the ordinance.<sup>131</sup> Additionally, the ordinance specifically makes it unlawful for corporations to interfere with the rights recognized by the ordinance.<sup>132</sup> The ordinance provides a waiver of liability, titled "Patron Liability Protection", in which the patron *may* enter into a private agreement with the producer or processor to waive any liability for the consumption of the purchased local food.<sup>133</sup> The provision

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126. *Id.*

127. *Id.* Section 2 of the Maine Constitution states: "All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and inalienable right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it." ME. CONST. art. I, § 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

continues, “[p]roducers or processors of local foods *shall* be exempt from licensure and inspection requirements for that food *as long as* those agreements are in effect.”<sup>134</sup> The waiver of liability is not mandatory, but the second sentence of this provision suggests that if those waivers of liability are *not* in place, then the producer or processor would *not* be exempt from liability.

In the event any level government should take action against the ordinance—“any attempt to preempt, amend, alter or overturn”—the Town is directed to meet and explore options that would expand the local authority over these topics and would aid the citizens in protecting the rights they assert in the ordinance.<sup>135</sup> The ordinance gives express permission to the Town to partially or completely separate from the other units of government that are attempting to preempt, amend, alter, or overturn the ordinance.<sup>136</sup> Lastly, the ordinance contains a severability clause, but it is unclear what would remain if the main provision—exemption from state and federal licensure and inspection—were struck down.<sup>137</sup>

#### B. *Comparing the Maine Local Food Ordinance and the El Dorado County Local Food Ordinance*

One aspect of the food sovereignty movement is that it focuses on enacting a food and agriculture system that is appropriate for a particular community. The obstacles faced and addressed in one community may not be exactly the same as those faced in a different community. The Local Food and Community Self-Governance Ordinance passed in Sedgwick has been used as a template for other communities with some communities adding and changing provisions to fit their own situation.

In January 2012, the ordinance adopted in Sedgwick, Maine, was used as the basis for a proposed ordinance in El Dorado County, California.<sup>138</sup> The ordinance presented to the Board of Supervisors in El

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134. *Id.* (emphasis added).

135. *Id.*

136. *Id.*

137. *Id.*

138. El Dorado County, Cal., An Ordinance to Protect the Health and Integrity of the Local Food System in the County of El Dorado, California (proposed Jan. 24, 2012), <http://eldorado.legistar.com/LegislationDetail.aspx?ID=1045042&GUID=F86799EB-6E99-4798-9EE4-5AA35B1197D1&Options=ID|Text|&Search=local+food> [*hereinafter EDC Ordinance*]; Alli Condra, *Local Food Ordinance Proposed on West Coast*, FOOD SAFETY NEWS, Feb. 20, 2012, <http://www.foodsafetynews.com/2012/02/local-food-ordinance-takes-hold-on-west-coast/> (link to ordinance included in the article).

Dorado County differed from the one in Maine in a few significant ways.<sup>139</sup> While the primary issues in Maine were chicken slaughter and raw milk sales, the ordinance there was broadly worded. In El Dorado County, on the other hand, Pattie Chelseth, the farmer-citizen that proposed the ordinance, was very focused on raw milk and cow shares and the language of the ordinance clearly reflects that focus.<sup>140</sup> Ms. Chelseth had run a cow share operation in California and had received a cease and desist letter from the California Department of Food and Agriculture.<sup>141</sup> Ms. Chelseth and the California Department of Food and Agriculture differed in their interpretations as to whether cow shares were permitted under California regulations.<sup>142</sup> It was largely this interaction with the state government that prompted Ms. Chelseth to introduce her version of the local food ordinance.<sup>143</sup>

First, in the preamble, the El Dorado County ordinance (hereinafter EDC ordinance) includes two statements that focus on the importance of individual rights and responsibilities and of the naturalness of a self-regulating local food system.<sup>144</sup> The EDC ordinance cites two additional provisions for authority—the Fourth Amendment of the United States Constitution and a provision in the California Constitution that prohibits laws that impair contract obligations.<sup>145</sup>

In the statements of law section, the EDC ordinance begins with the “Right to Access and Produce Food,” as opposed to starting with the Licensure/Inspection Exemption, and lists five subparts to the right to access and produce food.<sup>146</sup> It is here that the EDC ordinance differs significantly from the Maine version and illustrates its focus on cow ownership issues and raw milk. In addition to the right to access and produce food, the EDC ordinance includes the right to own livestock “in whole or in part,” the right to contract for care and production, the right to the products of the livestock—“including dairy products,” the right to contract for specialty food items, and the right to participate in private food clubs.<sup>147</sup> Additionally, unlike the Maine version, the EDC ordinance places authority in the Sheriff of El Dorado County to enforce the ordinance and

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139. Condra, *supra* note 139.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *EDC Ordinance*, *supra* note 139. “The transparent and close relationship between patrons and their producers/processors naturally initiates a self-regulating system. . . . We recognize our individual rights and individual responsibilities.” *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

protect the rights of the citizens against any outside agency or corporation.<sup>148</sup>

Much of the EDC ordinance mirrors the Maine ordinance. However, the parts that differ illustrate how a community can take the basic themes of the ordinance and shape the rest to fit its own needs. The differences in the ordinances also illustrate the fine line between food sovereignty and a push for no or de-regulation. 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. Some people involved in the movement would say that they are not seeking to de-regulate the food system; they would hold that, in fact, the food sovereignty movement is seeking to regulate these transactions on an ultra-local level, without interference from the state or federal governments.

### *C. Legal Issues Facing the Local Food Ordinances*

The local food and community self-governance ordinances face a major legal obstacle: preemption—whether a municipality has the authority to pass an ordinance that exempts certain transactions from specific state and federal laws and regulations. The preemption issues facing these ordinances are two-fold. First, there is a preemption issue between the local government and the federal government with regard to laws and regulations about animal slaughter. Second, there is a preemption issue between the local government and the state with regard to raw milk licensing and inspection. Each state that has an ordinance such as this local food and community self-governance ordinance will face different preemption issues depending on how the state treats raw milk and how their slaughter rules are framed. Because of the variability in state laws, this discussion of preemption will focus on the broad issue of preemption and how it might impact these local ordinances.

The theory of preemption is based on the supremacy clause of the United States Constitution, which states that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>149</sup> Any laws passed by states under their traditional police power authority will not be preempted by federal law unless Congress clearly intends to do so.<sup>150</sup> The

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148. *Id.*

149. U.S. CONST. art. VI, cl. 2.

150. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

state versus local preemption issues are more complex—a municipality only has the authority granted to it by the state, and whether and to what degree that state follows Dillon’s Rule or home rule will dictate how the preemption analysis is done.<sup>151</sup>

There are three main types of preemption: express, conflict, and field.<sup>152</sup> Express preemption is found when Congress writes its intention to preempt state law into the language of the statute.<sup>153</sup> Conflict preemption occurs when Congress has not explicitly made their intention clear and the state law actually conflicts with the federal law.<sup>154</sup> Field preemption occurs when the federal statute is so broad as to “occupy the field”, leaving no room for state regulation.<sup>155</sup>

More commonly, the preemption issue arises when a state or municipality passes a law or ordinance that imposes additional or stricter standards. However, in the case of the local food and community self-governance ordinances, the issue is that the towns and counties are seeking to *exempt themselves from* regulation, not add more regulation. Some states have found that this kind of action by a municipality is also capable of being preempted by state law.<sup>156</sup> In a California case, the Ninth Circuit found conflict preemption exists “under California law when a local ordinance prohibits conduct that is expressly authorized by state statute or

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151. HARVARD FOOD LAW AND POLICY CLINIC, GOOD LAWS, GOOD FOOD: PUTTING LOCAL FOOD POLICY TO WORK FOR OUR COMMUNITIES 7–11 (2012). “Dillon’s Rule holds that local governments have only those powers that are expressly given to them by the state; . . . Home rule, on the other hand, is a broad grant of power from the state that allows municipalities to independently handle local matters without the need for special legislation by the state, as long as the municipal laws do not conflict with state laws.” *Id.* See, e.g., *California Grocers Assn. v. City of L.A.*, 127 Cal. Rptr. 3d 726, 731 (Cal. 2011) (“Local ordinances and regulations are subordinate to state law. Insofar as a local regulation conflicts with state law, it is preempted and invalid.”); *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 68 Cal. Rptr. 3d 882, 888 (Cal. Ct. App. 2007) (The California Constitution holds that “[u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law.”).

152. *Cipollone*, 505 U.S. at 516.

153. *Id.*

154. *Id.*

155. *Id.* Field preemption is found when “federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”” *Id.* (citing *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

156. E.g., *Hensler v. City of Davenport*, 790 N.W.2d 569 (Iowa 2010); *State v. Kirwin*, 203 P.3d. 1044 (Wash. 2009); *City of Las Cruces v. Rogers*, 215 P.3d. 728 (N.M. 2009).

*authorizes conduct that is expressly prohibited by state general law.*"<sup>157</sup> These local food and community self-governance ordinances authorize certain behavior to occur without the licensure and inspection that is required by state and federal law. In other words, it is unlawful under state and federal law to do certain actions without being licensed and inspected, and these ordinances authorize that conduct that is prohibited (operating without a license and inspection).

The individuals involved with the local food and community self-governance ordinance movement assert that the ordinance is creating the legal space to create scale appropriate regulations to reflect the kind of agriculture happening within their community and in other similar communities around the state.<sup>158</sup> Additionally, these towns consider the transactions described in the ordinance to be an exclusively municipal matter—all steps within the production cycle up through sale take place within the municipality—that should be regulated by the municipality itself.<sup>159</sup> At this point, it does not appear that there have been any replacement regulations for these transactions, only the ordinances that exempt the transactions from state and federal licensing and inspection.

The fact that the transactions covered by the ordinances are extra-local transactions means there may not be a preemption issue with federal law—because of the intrastate nature of the sales. However, state law regulates meat slaughter for intrastate sales as well as raw milk production and sales. It is more likely these ordinances will be found to violate state law if the state has laws and regulations about slaughter and raw milk. The increasing interest in local control over certain issues may play a part in influencing how much authority courts find municipalities have and how they can assert that authority.

## V. SUPPORTING FOOD SOVEREIGNTY

Food sovereignty recognizes the need to support the small and mid-scale farmers that are growing food for consumption within their community, including the broader community of consumers within their own state and country.<sup>160</sup> One way to accomplish this goal is through

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157. *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 943 (9th Cir. 2002) (emphasis added).

158. St. Peter, *supra* note 119.

159. *Id.*

160. "La Via Campesina observes that 'small farmers around the world, men and women . . . defend the right of countries to protect their domestic markets, to support sustainable family farmers, and to market food in the countries where it is produced.'" Philip McMichael, *Food Sovereignty in Movement: Addressing the Triple Crisis*, FOOD

scale-appropriate laws and regulations. The laws and regulations that govern larger operations may not be, and likely are not, best suited for smaller operations. Implementing scale specific regulations does not necessarily mean the smaller operations will be subject to less regulation, just that the rules will be reflective of the issues faced by a different sized operation. For example, some of the laws and regulations that govern animal slaughter for an operation slaughtering ten thousand chickens may not be appropriate for an operation that slaughters one hundred.

There are a number of ways governments can, and are attempting to, facilitate the strengthening of domestic producers who are serving the domestic market through scale-specific laws and regulations. First, at the federal level, the Local Farms, Food, and Jobs Act, introduced by Rep. Chellie Pingree of Maine addresses some of the issues faced by smaller scale farmers.<sup>161</sup> Second, a number of state governments are also taking action through consideration and passage of “cottage food laws.”<sup>162</sup> These efforts at the federal and state level address different areas of the food and agriculture system, but both work to support producers that are serving smaller, domestic markets, often limiting their sales to their local community.

#### A. *Federal Level: Local Farms, Food, and Jobs Act of 2011*

Introduced in November 2011, the Local Farms, Food, and Jobs Act of 2011 (hereinafter the Act) attempts to reduce some of the barriers faced by smaller scale producers.<sup>163</sup> In order to promote local and regional farm and food systems, the Act takes on four major tasks—“boost[ing] income and opportunities for farmers and ranchers; improv[ing] local and regional food system infrastructure; expand[ing] access to healthy foods for consumers; [and] enhanc[ing] agriculture research and extension.”<sup>164</sup> The Act seeks to accomplish these goals through a number of different areas: commodity programs and crop insurance, conservation, nutrition programs, credit concerns, rural development, research, horticulture and organic agriculture, poultry and livestock, and food safety issues.<sup>165</sup>

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SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY 168, 172 (Hannah Wittman, Annette Aurélie Desmarais, and Nettie Wiebe eds., 2010).

161. Local Farms, Food, and Jobs Act of 2011, H.R. 3286, 112th Cong. (1st Sess. 2011).

162. See The Cottage Food Law Campaign, The Sustainable Economies Law Center, <http://www.theselc.org/cottage-food-laws/> (last visited Nov. 3, 2012).

163. H.R. 3286.

164. H.R. 3286, Summary.

165. H.R. 3286.



The Act extends already existing federal programs to a growing category of producers that has encountered obstacles in accessing government support. The Secretary of Agriculture is directed to make and guarantee loans for producers of locally or regionally produced agricultural products; to expand the mission of the Farm Credit System to include supporting young, beginning, and small farmers and ranchers; and to study the needs of young, beginning, and small farmers and ranchers.<sup>166</sup> Additionally, a new title to the Federal Meat Inspection Act—"Very Small and Certain Small Establishments"—is added to provide technical assistance, education and training, and grants for small or very small meat and poultry processing establishments.<sup>167</sup> Some of the provisions of the Act were included in the latest House version of the Farm Bill, which has yet to be passed on the House floor, and therefore, it is uncertain whether these provisions will be included in the final bill.<sup>168</sup> This piece of legislation is an example of how the government can support local and regional agriculture, and in the process can promote food sovereignty within the U.S.

#### B. State Level: Cottage Food Laws

A growing number of states have enacted, or are considering enacting, so-called "cottage food laws" that permit the sale of certain non-hazardous foods produced from a home kitchen direct to consumers or to approved third parties, such as restaurants.<sup>169</sup> In September 2012, California became the most recent state to pass a cottage food bill.<sup>170</sup> In the author's statement associated with California's cottage food bill, California Assemblyman Mike Gatto (D – Los Angeles) notes that the growing national demand for "homemade" foods and products "reflects a wish to increase the availability of healthier and locally processed foods for our communities" to be provided by those same communities.<sup>171</sup>

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166. H.R. 3286, §§ 4001–4004.

167. H.R. 3286, §§ 8001–8002.

168. Press Release, House Agriculture Committee passes Farm Bill with Pingree's local food provisions (July 12, 2012), [http://pingree.house.gov/index.php?option=com\\_content&task=view&id=839&Itemid=24](http://pingree.house.gov/index.php?option=com_content&task=view&id=839&Itemid=24).

169. Alli Condra, *Cottage Food Bill Introduced in California*, FOOD SAFETY NEWS, Feb. 27, 2012, <http://www.foodsafetynews.com/2012/02/cottage-food-bill-introduced-in-california/>; Frequently Asked Questions about the California Homemade Food Act, The Sustainable Economies Law Center, <http://www.theselc.org/faq/> (last visited Oct. 29, 2012).

170. Assem. B. 1616, 2012 Leg. Sess. (Cal. 2012).

171. BILL ANALYSIS, SENATE COMMITTEE ON HEALTH, Assem. B. 1616, 2012 Leg. Sess., at 5 (Cal. 2012).

Assemblyman Gatto emphasizes the need for California to do everything in its power “to allow individuals to provide for their families and assist with our economic recovery, and home-based food production can allow micro-entrepreneurs to prosper during times of otherwise limited economic opportunity by meeting the desires of local consumers.”<sup>172</sup> In order to support these entrepreneurs and communities, cottage food laws attempt to reduce the regulatory and financial burdens that small and developing food enterprises face.

Although the cottage food laws differ in a variety of ways, there are a few basic commonalities. First, cottage food laws permit entrepreneurs to produce food in a home kitchen, rather than a certified commercial kitchen.<sup>173</sup> Second, the food produced is generally limited to non-potentially hazardous items, such as baked goods, jams, popcorn, dried fruit and nuts, candy, herb blends, and tea.<sup>174</sup> Third, in addition to standard label requirements—name and address of operation, name of product, ingredients, net weight or volume, allergen information—the food produced in cottage food operations must contain a label that indicates the product was made in a cottage food operation.<sup>175</sup> After these common points, the laws begin to diverge. Permitted sales may be limited to those sales that take place on-site, that are direct-to-consumer, and/or that are made to third-parties such as restaurants.<sup>176</sup> A state may or may not require

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172. *Id.*

173. *See e.g.*, ARK. CODE ANN. §§ 20-57-201(1)–(2) (2012) (defining “cottage food operation” as a “person who produces food items in the person’s home” and excluding other operations from the definition of “food service establishment”); IND. CODE § 16-42-5-29(b)(1) (2012); MICH. COMP. LAWS § 289.1105(h) (2012).

174. *See e.g.*, ARK. CODE ANN. § 20-57-201(1) (2012); IND. CODE § 16-42-5-29(b)(2) (2012); MICH. COMP. LAWS § 289.1105(i) (2012). *But see* UTAH CODE ANN. § 4-5-9.5(1)(c) (West 2012) (provides a list of potentially hazardous foods and provides exclusions to that definition, rather than a list of approved foods).

175. ALA. CODE § 420-3-22-.01(4)(a)(11)(i) (2012); FLA. STAT. ANN. § 500.80(3) (West 2012) (“Made in a cottage food operation that is not subject to Florida’s food safety regulations.”); MICH. COMP. LAWS §§ 289.4102(2)–(3) (2012) (“Made in a home kitchen that has not been inspected by the Michigan department of agriculture.”).

176. VA. CODE ANN. § 3.2-5130(A)(3) (West 2012) (limited to direct-to-consumer sales from private home or farmers market); UTAH ADMIN. CODE r.70-560-5(4) (2012) (regulations do not expressly limit sales, but only stipulate that “[a] copy of the registration shall be displayed at farmers markets, roadside stands and other places at which the operator sells food from a fixed structure that is permanently or temporary and which is owned, rented or leased by the operator of the cottage food production operation.”).

a permit for and/or an inspection of a cottage food operation.<sup>177</sup> Further, some states place a limit on annual gross sales.<sup>178</sup>

As highlighted by Assemblyman Gatto's bill author commentary, cottage food laws are intended to facilitate the growth and development of small businesses by reducing some of the obstacles these businesses face. Additionally, with the limitations on where and to whom the products may be sold, these cottage food laws are intended to support local communities and local economies. While there are likely not restrictions on where the ingredients may be sourced, the end product is local in character and is a way states and communities can support local and regional food systems.

## VI. CONCLUSION

Besides the local food and community self-governance ordinances popping up around the United States, the food sovereignty movement is also found at the U.S. Food Sovereignty Alliance.<sup>179</sup> The website indicates that the Alliance is made up of forty various organizations that have come together "to end poverty, rebuild local food economies, and assert democratic control over the food system" as well as "uphold the right to food as a basic human right and work to connect our local and national struggles to the international movement for food sovereignty."<sup>180</sup> To this end, the Alliance educates the public and hosts various actions (protests and celebrations) to further the food sovereignty movement.<sup>181</sup>

On an international level, the food sovereignty movement through La Vía Campesina appears to be similar to what the U.S. Food Sovereignty Alliance does. La Vía Campesina's website highlights various protests and

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177. In Alabama, because these kinds of operations are excluded from the definition of "food establishment" no permit or inspection is required. ALA. ADMIN. CODE r.420-3-22-.01(a)(11)(i), r.420-3-22-.08 (2012). In California's cottage food bill, a cottage food operation must be registered or have a permit. Assem. B. 1616, 2012 Leg. Sess. (Cal. 2012).

178. California's proposed cottage food bill limits the definition of "cottage food operation" to an "an enterprise that has not more than fifty thousand dollars (\$50,000) in gross annual sales." Assem. B. 1616, 2012 Leg. Sess. (Cal. 2012). Michigan's cottage food law limits gross annual sales to \$20,000. MICH. COMP. LAWS § 289.4102(5) (2012).

179. U.S. Food Sovereignty Alliance, <http://www.usfoodsovereigntyalliance.org/> (last visited Oct. 30, 2012).

180. Founding Document, U.S. Food Sovereignty Alliance, <http://www.usfoodsovereigntyalliance.org/> (follow "Founding Document" hyperlink under "About the Alliance") (last visited Oct. 30, 2012).

181. Actions and Events, U.S. Food Sovereignty Alliance, <http://www.usfoodsovereigntyalliance.org/upcoming-events> (last visited Oct. 30, 2012).

celebrations around different countries as well as publishes calls to action at various international development meetings (such as the United Nations Conference on Sustainable Development Rio+20).<sup>182</sup> La Vía Campesina seeks solidarity among its members to support the various movements in countries around the world, including meetings peasant groups may have with leaders, protests, and other educational efforts at conferences.<sup>183</sup>

A more specific example of international food sovereignty comes from Ecuador. In 2008, Ecuador became the first country to incorporate food sovereignty principles into its constitution.<sup>184</sup> The first mention of food sovereignty mandates that the “Ecuadorian State *shall* promote food sovereignty.”<sup>185</sup> The preamble to Article 281 states: “Food sovereignty is a strategic objective and an obligation of the State in order to ensure that persons, communities, peoples and nations achieve self-sufficiency with respect to healthy and culturally appropriate food on a permanent basis.”<sup>186</sup> The Article then lists fourteen tasks the Ecuadorian government will take responsibility for accomplishing, including adopting fiscal, tax, and tariff policies to protect domestic producers; promoting policies of redistribution of resources to benefit small farmers; and prioritizing the financing of small and medium-sized producers.<sup>187</sup> How these provisions are actually implemented and whether they would comply with international laws will influence whether Ecuador is able to accomplish its goal of promoting food sovereignty. Regardless of how the provisions are implemented, the addition of food sovereignty principles to the constitution makes a strong statement by the government to its people and the international community.

Although the United States has not embraced a constitutional amendment supporting food sovereignty, the various actions supporting local and regional food systems also make a strong statement. In the end, whether the various movements around the United States can be called “food sovereignty” may not be of much importance; the important point of this movement is that it seeks to offer a viable alternative to the way food and agriculture has been run for the past fifty years.

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182. Rio+20: Opening Statement of the Farmers Major Group, La Via Campesina (June 29, 2012), <http://viacampesina.org/en/index.php/actions-and-events-mainmenu-26/-climate-change-and-agrofuels-mainmenu-75/1269-rio-20-opening-statement-of-the-farmers-major-group>.

183. La Vía Campesina, [viacampesina.org/en](http://viacampesina.org/en) (last visited Oct. 30, 2012).

184. ECUADOR CONST. Title VI, ch. 3, art. 281, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last updated Jan. 31, 2011).

185. ECUADOR CONST. Title II, ch. 2, art. 13, (emphasis added). The term “food sovereignty” is mentioned a total of 10 times throughout the substance of the document. ECUADOR CONST.

186. ECUADOR CONST. Title VI, ch. 3, art. 281.

187. ECUADOR CONST. Title VI, ch. 3, art. 281, §§ 2, 4, 5.

Two major players in the food sovereignty movement write: “For us, food sovereignty is quite closely felt because it means the right of having food and agricultural policies evolving from our own political context and for our communities.”<sup>188</sup> Given the way our world is changing and the growing consensus that “business as usual” will not suffice, it is critical that our policy-makers find ways to support local and regional agriculture; scale-appropriate laws and regulations are a start.

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188. Itelvina Masioli & Paul Nicholson, *Seeing Like a Peasant: Voices from La Via Campesina*, FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE AND COMMUNITY 33, 34-35 (Hannah Wittman, Annette Aurélie Desmarais, and Nettie Wiebe eds., 2010).