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# Foodshed Foundations: Law's Role in Shaping our Food System's Future

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## FOODSHED FOUNDATIONS: LAW'S ROLE IN SHAPING OUR FOOD SYSTEM'S FUTURE

*Margaret Sova McCabe\**

### INTRODUCTION

In 2008, Neil Hamilton observed, “[t]he reality is that American agriculture and our nation’s food system are undergirded by an architecture of laws and regulations designed to provide for efficient economic transactions and protect the health and safety of the people, food, animals, and natural resources involved in agriculture.”<sup>1</sup> This symposium Article analyzes how we can rethink the architecture of law based on a foodshed model to provide a greater role for local, state, and regional government in the American food system. In turn, greater roles for different levels of government may help America achieve greater efficiencies in domestic food safety, nutrition and related public health issues, sustainability, and international trade.

Americans need a greater voice in the food system. The foodshed model is a powerful vehicle that allows us to conceptualize change, allowing greater citizen participation and a more nuanced approach to food policy. The model also allows for greater nuance because it forces us to examine what is *happening* within the foodshed, whether we view that globally, regionally, or locally. A foodshed model requires us to examine our expectations of local agriculture and food production, as well as global trade. Obviously, these are sweeping topics, but the goal of this Article is much more modest: to frame

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\* Professor of Law, University of New Hampshire School of Law. My sincere thanks to the *Fordham Environmental Law Review* for hosting this Symposium. The students’ professionalism and passion for workable food systems provides great hope for our future. In addition, I thank Deans Susan Richey and John Orcutt for their support and encouragement, and Professors John Greabe, Sophie Sparrow, and Jordan Budd for their helpful discussions of the concepts in this paper.

1. Neil D. Hamilton, *Feeding the World’s Future: Agrarian Justice and the Rule of Law*, 13 DRAKE J. AGRIC. L. 545, 557 (2008).

food system reform within a foodshed model that considers the role of local, regional, national, and global government in food production and consumption.

This Article contains three sections. First, it provides an overview of the foodshed model's utility to food system reform. Second, it analyzes the various governmental structures that affect the food system, including the example of how the Food Safety Modernization Act illustrates those structures in the American food system. Finally, it presents a foodshed model that integrates local and state, regional, and national food system governance. The Article concludes by suggesting a feasibility study of this model, or similar ones, in the next Farm Bill.

### I. THE FOODSHED MODEL AND FOOD SYSTEM REFORM

If a food system<sup>2</sup> represents a democracy's success, how successful is America? Of course, some people might respond pithily, "define success." If we define success as affordable, abundant food and a stable agricultural sector, then America *is* a success. If we define success as affordable, abundant food sustainably produced and reflective of the population's nutritional needs beyond caloric intake, and inclusive of regional and cultural preferences, then America is likely a failure. Obesity, environmental degradation, and social justice cause us to question how we can achieve a better food system. The foodshed model provides us with a framework for this endeavor. This section provides a brief overview of the foodshed model and how it assists us in rethinking the American food system.

In 1929, W.P. Hedden authored *HOW GREAT CITIES ARE FED*.<sup>3</sup> Hedden's book grew out of a 1921 rail crisis that triggered an emergency study of New York City's food supply by its public agencies.<sup>4</sup> Chapter 2 is simply titled "Watersheds, Milksheds, and Foodsheds," and draws an analogy between the mountainous barriers of New York's watershed and the transportation costs that formed

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2. This Article uses the term "food system" to refer to the current American model of managing food production, consumption, and trade. The term "foodshed" is used to refer to a model of shaping food policy to reflect sustainable production and food security by examining principles that include moral economy, community, government, proximity, and nature. *See infra* pp. 4-7.

3. W.P. HEDDEN, *HOW GREAT CITIES ARE FED* 1 (1929).

4. *Id.* at 1.

barriers to the movement of food.<sup>5</sup> The book details the movement of lettuce from California,<sup>6</sup> potatoes from Maine,<sup>7</sup> lemons from Italy,<sup>8</sup> and butter from Denmark,<sup>9</sup> all in the context of how transportation and technology were changing New York's foodshed.<sup>10</sup> Simply put, Hedden described the emerging national and international agricultural economy. The depth to which Hedden's eighty year-old words ring true today is surprising: "The widening gap in physical distance between the point of production and the point of consumption has its counterpart in the attenuation of the contact and mutual understanding between producers and consumers."<sup>11</sup>

Hedden highlights how the technology of the day – refrigeration cars and trucking – dramatically changed food markets.<sup>12</sup> The effects of the emerging technology "brought distant sources of supply within the range of economic accessibility and permitted the city to draw upon those regions where quality is highest and costs are lowest."<sup>13</sup> However, at the time, the freight rates and transportation barriers continued to make urban retail food costs significantly higher than costs at the farm.<sup>14</sup> Therefore, the primary mission of Hedden's foodshed work was determining how New York City could promote a robust food trade that could lower consumer prices.

Hedden also discussed the pitfalls and merits of public control of the food supply.<sup>15</sup> Public control, of course, requires varying governmental roles, which Hedden identified. The roles Hedden identified are also consistent with modern practices. The roles include: 1) setting health standards, 2) setting commercial standards and discouraging fraud and food adulteration, 3) controlling

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5. *Id.* at 17 ("The barriers which deflect raindrops into one river basin rather than into another are natural land elevations, while the barriers which guide and control movements of foodstuffs are more often economic than physical.").

6. *See id.* at 23, 25.

7. *See id.* at 21, 24, 26.

8. *See id.* at 29-31.

9. *Id.* at 29.

10. *See generally id.* at 23-29.

11. *Id.* at xv.

12. *See id.* at xiii; *see generally id.* at 37-49 (discussing the revolutionary activities of the refrigerator car), 75-97 (discussing transportation and terminal handling of perishable food).

13. *Id.* at xiii-xiv.

14. *See, e.g., id.* at 145.

15. *See generally id.* at 252-85.

transportation and terminal charges, 4) engaging in some price controls while restraining price fixing, and 5) establishing infrastructure for food trade.<sup>16</sup> The dominant theme of Hedden's public control analysis was the shift from laissez-faire to "state supervision" of food.<sup>17</sup> Hedden highlighted the power of cities and states to influence the quality, price, and safety of the food supply, while also noting the federal government's commitment to food transportation and trade through the Interstate Commerce Commission, Federal Trade Commission, and the U.S. Department of Agriculture.<sup>18</sup> Even in 1929, Hedden concluded, "the responsibility of government is now a large one."<sup>19</sup> Imagine what Hedden might say about the government's role in today's food system!

Fast forward to permaculturalist Arthur Getz's 1991 article *Urban Foodsheds*.<sup>20</sup> Getz urged readers to ask "where is our food coming from, and how is it getting to us?"<sup>21</sup> Getz rightly emphasized that the total cost of moving food from one place to another – particularly around the globe – was (and is) not fully reflected in food prices.<sup>22</sup> This point is poignant in light of Hedden's focus on transportation costs' role in food pricing in the 1920s.<sup>23</sup> Of course, Getz forces us to ask why the costs of moving food are not reflected in food prices and what we should do about that.

Getz also detected a changing attitude about globalized food. Getz observed that "a new breed of farmers emerging that has urban roots and environmental values and that these farmers are doing well in the marketplace."<sup>24</sup> He relied on this observation as evidence of changing

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16. *Id.* at 254.

17. *See id.* at 252; *see generally* BEE WILSON, SWINDLED: THE DARK HISTORY OF FOOD FRAUD, FROM POISONED CANDY TO COUNTERFEIT COFFEE 152-12 (2008) (chronicling the emergence of American government involvement in regulating food).

18. *Id.* at 284.

19. *Id.* at 285.

20. Arthur Getz, *Urban Foodsheds*, 24 THE PERMACULTURE ACTIVIST 26 (1991).

21. *Id.* at 26.

22. *Id.*

23. *See generally* HEDDEN, *supra* note 3.

24. *See* Getz, *supra* note 20, at 26 (attributing the analysis to a 1989 article by Gene Logsdon, titled "The Future: More Farmers, Not Fewer"); *see also* John Reinhardt, 5 *Questions with Dr. Nevin Cohen: The Five Borough Farm Project, Food Systems in Academia, and More*, GROWN IN THE CITY BLOG (March 24,

attitudes about the food system.<sup>25</sup> Getz also found evidence of change in the growing number of metro farms that were tailoring output to the urban demand for “fresher, safer foods, more exotic crops, and even pressure to treat farm animals differently.”<sup>26</sup>

While Hedden and Getz’ work set out the basic contours of the foodshed model, Professor Jack Kloppenburg’s *Coming into the Foodshed*<sup>27</sup> provides five specific principles for exploring the foodshed possibilities within a region.<sup>28</sup> Like Hedden and Getz, Kloppenburg identifies distance between consumers and their food as problematic.<sup>29</sup> Consumers, according to Kloppenburg, are so far removed from the source of their food that they cannot possibly understand the consequences of their purchasing patterns.<sup>30</sup> Kloppenburg’s five principles serve as a useful tool in evaluating the values encoded in our current food system policies.

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2011), <http://growninthecity.com/2011/03/5-questions-with-dr-nevin-cohen-the-five-borough-farm-project-food-systems-in-academia-and-more/>

(The motivation for the [5 Borough Farm] project stems from the fact that while urban agriculture is booming, no one has a detailed understanding of all of these activities, or hard data or tools to evaluate the benefits of agriculture as an urban land use. Your previous question, on benefits and risks, is on the minds of most policymakers who intuitively believe that urban agriculture is good and want to support it, but need the metrics to argue for needed public policies and funding.)

25. Getz, *supra* note 20, at 26-27.

26. *Id.* at 27.

27. Jack Kloppenburg, Jr. et al., *Coming into the Foodshed*, 13 AGRIC. & HUM. VALUES 33 (1996).

28. *Id.* at 36-39. Compare *id.*, with Neil Hamilton, *Feeding our Future: Six Philosophical Issues Shaping Agriculture Law*, 72 NEB. L. REV. 210, 212 (1993) (providing another interesting set of considerations in food system reform). In this paper, I use the term “region” or “regional” to denote food system governance that transcends political boundaries, whether state or local.

29. Kloppenburg et al., *supra* note 27, at 34.

30. *Id.*

(The distance from which their food comes represents their separation from the knowledge of how and by whom what they consume is produced, processed and transported. If the production, processing, and transport of what they eat is destructive of the land and of human community – as it very often is – how can they understand the implications of their own participation in the global food system when those processes are located elsewhere and are so obscured from them? How can they act responsibly and effectively for change if they do not understand how the food system works and their own role within it?).

The first principle is moral economy.<sup>31</sup> Conceptually, this principle requires us to see food as more than a commodity.<sup>32</sup> Kloppenburg uses the term as shorthand “for the re-embedding of food production primarily within human needs rather than within the economists narrow . . . [ ]demand backed by ability to pay[ ].”<sup>33</sup> An excellent example of this principle is Joel Salatin’s Polyface Farm, the focus of much discussion in Michael Pollan’s *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS*.<sup>34</sup> The farm publicizes the moral economy principle in this way: “Mimicking natural patterns on a commercial domestic scale insures moral and ethical boundaries to human cleverness.”<sup>35</sup> The value of considering moral economy in our food system is that it reconnects us to the methods and people we rely upon to produce food.<sup>36</sup> In turn, this allows us to understand the consequences of our food purchasing and consumption patterns.

The next principle is the commensal community.<sup>37</sup> This principle emphasizes sustainable relationships “both between people (those who eat together) and between people and the land (obtaining food without damage).”<sup>38</sup> Community Supported Agriculture (“CSA”) is a prime example of the commensal community because CSAs connect the consumer directly to the source of the food.<sup>39</sup> Kloppenburg also notes that CSAs are farm-centric but the principle of commensal community is broader.<sup>40</sup> This point is critical because the commensal

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31. *Id.* at 36. See generally Thomas Clay Arnold, *Rethinking Moral Economy*, 95 THE AM. POL. SCI. R. 85 (2001) (discussing the evolution and utility of “moral economy” in understanding human behavior).

32. Kloppenburg et al., *supra* note 27, at 36 (“Adopting the perspective of the moral economy challenges us to view food as more than a commodity to be exchanged through a set of impersonal market relationships or a bundle of nutrients required to keep our bodies functioning.”).

33. *Id.*

34. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 125-129 (2006).

35. *Polyface Guiding Principles*, POLYFACE, INC., <http://www.polyfacefarms.com/principles.aspx> (last visited May. 14, 2011).

36. See generally Arnold, *supra* note 31, at 85.

37. Kloppenburg et al., *supra* note 27, at 37.

38. *Id.* (noting tangible evidence of the commensal community in Food Policy Councils). See generally Neil Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 DRAKE J. OF AGRIC. L. 408, 414 (2002) (discussing formation of Food Policy Councils).

39. Kloppenburg et al., *supra* note 27, at 37.

40. See *id.*

community principle is the one that urges us to consider racial, gender, and class issues in the food system.<sup>41</sup>

The third principle requires consideration of “self-protection, secession, and succession.”<sup>42</sup> The basic secession/succession principle is that a foodshed may require “a strategic preference for withdrawing from and/or creating alternatives to the dominant system rather than challenging it directly.”<sup>43</sup> This principle is perhaps the most troubling because it intimates that some view government as an ineffective partner in realizing a foodshed model.<sup>44</sup> This Article adopts the view that government is part of food system solutions, and that we should focus on creating alternatives in the food system, rather than withdrawing from it. However, the secession/succession principle requires us to consider how we should govern the food system. Therefore, we must determine the best role in the food system for the various levels of government involved (local, state, regional, federal) as well as the substance of the law and regulation they implement.

The fourth principle concerns proximity.<sup>45</sup> The underlying assumption is that commonalities in localities or regions form natural

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41. *Id.*

42. *Id.*

43. *Id.* at 38.

44. Kloppenburg is not alone in his sentiment. He specifically notes Wendell Berry and David Orr as the source of the secession idea. *Id.* Additionally, in an article that analyzes the “local food debate” one author notes a tension between locavores and sustainable agriculture and the role of government. See Jordan Kleinman, *Local Food and the Problem of Public Authority*, 50 E-TECH. & CULTURE 399, 401-02 (2009)

(The local-food debate also reveals much about the sustainable agriculture movement itself, particularly with respect to its ambivalence toward the state. Like many other movements shaped by the political culture of the 1960s, the sustainable agriculture movement has long regarded the federal government as both a destructive force, and under the right circumstances, a potential ally.);

see also Julie Guthman, *Commentary on Teaching Food: Why I Am Fed Up with Michael Pollan et al.*, 24 AGRIC. & HUMAN VALUES 261, 264 (2007) (“What is so painfully evident in [Pollan’s THE OMNIVORE’S DILEMMA] and in many other of the new food books, is how food politics has become a progenitor of neoliberal anti-politics that devolves regulatory responsibility to consumers’ via their dietary choices.”).

45. Kloppenburg et al., *supra* note 27, at 38.



foodsheds.<sup>46</sup> These can include “plant communities, soil types, ethnicities, cultural traditions, and culinary patterns.”<sup>47</sup> The idea is that a foodshed is embedded in a geographic region, and that this allows people to become more concerned with their immediate environment and how food production affects it.<sup>48</sup> The proximity principle also allows us to evaluate how trade – whether local, regional, national, or global – plays a role in our food system.<sup>49</sup> Additionally, considering food from the proximity perspective helps us address Getz’ concerns about transportation costs not being reflected in food prices.<sup>50</sup>

The last principle is “nature as measure.”<sup>51</sup> This principle urges people to respect the natural limitations of the foodshed and not override those limitations with technology.<sup>52</sup> As Hedden’s work illustrates, the technology of the day may have a profound effect on the food system.<sup>53</sup> Whether it is refrigeration or genetic modification, the “nature as measure” principle requires us to evaluate technology’s impact – a critical consideration in the twenty-first century as we face issues of sustainability and sustenance for an entire planet.<sup>54</sup>

To summarize, Hedden, Getz, and Kloppenburg’s work highlights the complex considerations at play in the foodshed model.<sup>55</sup> The dominant consideration in food system policy has always been economy and Hedden’s work best illustrates this.<sup>56</sup> However, Getz and Kloppenburg inject environmental, cultural, and ethical concerns as part of the foodshed model.<sup>57</sup> If we are to build a more sustainable

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46. *See id.* at 38.

47. *Id.*

48. *See id.* (“But though their precise boundaries will rarely be sharply defined, we insist that foodsheds are socially, economically, ethically, and physically embedded in particular places.”).

49. *Id.* at 40.

50. *See supra* note 22 and accompanying text.

51. *Id.* at 39.

52. *Id.*

53. HEDDEN, *supra* note 3, at 1-2 (summarizing how a rail service interruption would impact the New York food supply and noting the various types of transportation that would take the place of railcars).

54. *See Kleinman, supra* note 44, at 401-02; Kloppenburg, *supra* note 27, at 39.

55. *See supra* Part I.

56. *See generally supra* notes 3 – 20 and accompanying text.

57. *See Getz, supra* note 20; Kloppenburg et al., *supra* note 27. *But see* Susan Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL’Y REV., 935, 959

food system, these concerns are the most relevant considerations. However, before we envision a reformed food system, we need to consider the tools we have.<sup>58</sup> We can find these tools in government because as Hedden noted, government's responsibility in the food system is "large."<sup>59</sup>

## II. UNDERSTANDING THE "-ISMS": FEDERALISM, REGIONALISM, AND LOCALISM

### A. *The Global Foodshed*

The modern American food system is globalized *and* localized.<sup>60</sup> The food system is influenced by governmental structures as diverse as public international law and local land use policy.<sup>61</sup> This span of legal authority places certain limitations on what one government can or cannot do.<sup>62</sup> As a result, it is important to survey the various types of laws and constitutional provisions that influence how a foodshed model might operate under the law.<sup>63</sup>

Before discussing domestic concerns, we must acknowledge the role of globalization in the foodshed model. From consumer taste to trade policy, food is globalized. The World Trade Organization ("WTO") makes a fair globalized food system more possible.<sup>64</sup> It

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(2010) (noting there is no "forum for consideration of ethical issues in food" and suggesting a more holistic approach for the future).

58. See, e.g., Kleinman, *supra* note 44, at 416.

59. See HEDDEN, *supra* note 3, at 285; see also *supra* text accompanying notes 16-19.

60. See Kloppenburg et al., *supra* note 27, at 33 ("Food comes to most of us now through a global food system . . . [a]lternative producers, alternative consumers, and alternative small entrepreneurs are . . . finding common ground in municipal and community food councils."). This means that where Americans' food comes from ranges from local, such as eggs from a farm in the same town or city, or international, such as coconut milk from Thailand.

61. See generally *infra* notes 64-108 and accompanying text.

62. See *infra* notes 64-77 and accompanying text.

63. See *supra* notes 15-19 and accompanying text.

64. See Marrakesh Agreement Establishing the World Trade Organization art. 3, Apr. 15, 1994, 1867 U.N.T.S. 154. I use "fair" in this article to mean that there is a mechanism for objective dispute resolution. Whether the WTO has yielded fair results is a different topic; see also Carman G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 468 (2002) ("The WTO Agreement on

does so through global harmonization of food safety, food content, and food production with the Agreement on Sanitary and Phytosanitary (“SPS”) measures, which in turn relies on the Codex Alimentarius.<sup>65</sup> At their core, these harmonizing measures’ purpose is facilitating globalization.<sup>66</sup> For example, Codex Stan. 1-1985 standardizes food labels intended for international trade by requiring the name of the food and an ingredient list, as well as defining labeling terms.<sup>67</sup>

Globalization has a profound effect on the American food system’s engagement in international trade.<sup>68</sup> An example of this effect is illustrated by genetically engineered crops, which the European Union requires to be labeled and the U.S. and Canada do not.<sup>69</sup> As a result of the European labeling requirement, America and Canada challenged the requirement that genetically engineered foods be labeled as such before the WTO.<sup>70</sup> The European Union’s reservations about genetic engineering technology did not stop the technology’s global adoption.<sup>71</sup> However, the European labeling requirements show how barriers arise, even if they are anchored in safety concerns, and that adopting or rejecting advancing

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Agriculture has enabled developed countries to maintain trade-distorting subsidies and import restrictions and has failed to achieve its stated objective of ‘creating a fair and market-oriented trading system.’ ”).

65. Agreement on the Application Sanitary and Phytosanitary Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154 [hereinafter SPS]. *See generally* FOOD & AGRIC. ORG. (FAO) & WORLD HEALTH ORG. (WHO), CODEX ALIMENTARIUS STANDARDS, available at [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp).

66. *See* SPS, *supra* note 65.

67. CODEX ALIMENTARIUS STANDARDS: GENERAL STANDARD FOR THE LABELLING OF PREPACKAGED FOODS §§ 2.2-2.4 (1985), available at [http://www.codexalimentarius.net/download/standards/32/CXS\\_001e.pdf](http://www.codexalimentarius.net/download/standards/32/CXS_001e.pdf).

68. *See, e.g.*, Summary of Dispute Settlement by Panel, European Communities - Approval and Marketing of Biotech Products, WT/DS291 (Feb. 24, 2010), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds291\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm) (discussing the genetically engineered foods labeling action initiated by the U.S. and Canada against the European Union).

69. Linda Basilicato, *GMO-Free Foods*, EHOW HEALTH, [http://www.ehow.com/list\\_6152277\\_gmo\\_free-foods.html](http://www.ehow.com/list_6152277_gmo_free-foods.html) (last visited May 21, 2011). *See generally* Summary of Dispute Settlement by Panel, *supra* note 68.

70. *See* Summary of Dispute Settlement by Panel, *supra* note 68.

71. *See Global Distribution of Genetically Modified Crops*, CHARTSBIN.COM, <http://chartsbin.com/view/578> (last visited May 21, 2011).

technologies affecting the food supply has worldwide implications.<sup>72</sup> Furthermore, the label controversy illustrates that food trade issues will likely be resolved, in part, on the WTO's world stage.<sup>73</sup>

We must also acknowledge how globalized food trade and domestic policy can influence political stability around the globe. The "Arab Spring"<sup>74</sup> provides the most recent example of the interconnectedness of food pricing and food policy with political stability.<sup>75</sup> Though a complete analysis of global food policy is beyond the scope of this Article, the key point that readers should remember is that the American food system must account for the globalized food economy.<sup>76</sup>

When analyzing and reforming the American food system we simply cannot ignore or reject globalization. This is not a new concept. In fact, *Wickard v. Filburn*<sup>77</sup> has been analyzed as an international trade and diplomacy case even though it is most widely known as a seminal federalism case.<sup>78</sup> Globalization has influenced the American food system for decades and it is unlikely we can or will retreat from globalization.<sup>79</sup> Therefore, the foodshed model must

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72. See generally Summary of Dispute Settlement by Panel, *supra* note 68.

73. See *id.*

74. "Arab Spring" in this context refers to the revolutionary wave that swept Northern Africa and parts of the Middle East in early 2011. See Michael Slackman, *Bullets Stall Youthful Push for Arab Spring*, N.Y. TIMES, Mar. 18, 2011, at A1, available at [http://www.nytimes.com/2011/03/18/world/middleeast/18youth.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2011/03/18/world/middleeast/18youth.html?pagewanted=1&_r=1) (providing an overview of the nations involved and outcome of the unrest to date).

75. See, e.g., Marcus Samuelson, *The Politics of Food: How U.S. Farm Policy Impacts People Worldwide*, THE HUFFINGTON POST (Feb. 23, 2011, 02:37 PM), [http://www.huffingtonpost.com/marcus-samuelsson/global-poverty-and-food-i\\_b\\_827242.html.L](http://www.huffingtonpost.com/marcus-samuelsson/global-poverty-and-food-i_b_827242.html.L); UNITED PRESS INT'L, *Arab world faces more food crises*, UPI.COM (Mar. 11, 2011, 12:55 PM), [http://www.upi.com/Business\\_News/Energy-Resources/2011/03/11/Arab-world-faces-more-food-crises/UPI-14871299866146/](http://www.upi.com/Business_News/Energy-Resources/2011/03/11/Arab-world-faces-more-food-crises/UPI-14871299866146/).

76. See, e.g., Samuelson, *supra* note 75.

77. 317 U.S. 111 (1942) (analyzing the constitutionality of statutory provision imposing wheat marketing quota to farmers).

78. Jim Chen, *Filburn's Forgotten Footnote – of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 295 (1997) ("Though the story of agriculture and GATT lies outside this Article's scope, this glimpse suffices to show how *Filburn* might be more profitably studied as a prologue to the emergence of global economic federalism than as a postscript to the New Deal's transformation of American federalism.").

79. See *supra* notes 68-77 and accompanying text.

account for globalization, particularly because it is the goal of the WTO agreements and the Codex Alimentarius.<sup>80</sup>

### *B. The Foodshed and Federalism*

In simple terms, American federalism describes the relationship between the federal government and the states.<sup>81</sup> Understanding federalism's basic contours helps conceptualize how a foodshed model would work. The power allocation between federal and state government provided by the U.S. Constitution's Commerce Clause (and the dormant commerce clause),<sup>82</sup> Supremacy Clause,<sup>83</sup> Compact Clause,<sup>84</sup> and related powers such as preemption,<sup>85</sup> shape the food system.

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80. See *supra* text accompanying notes 60-67.

81. As with globalization, thoroughly explaining federalism and the commerce clause is beyond the scope of this paper. See Grant Nelson & Robert Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 96-101 (1999) (providing a basic discussion of federalism and the commerce clause).

82. U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). The dormant commerce clause also plays a prominent role in how the food system has evolved. See, e.g., *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (discussing milk dealers suit challenging Massachusetts milk pricing order as a violation of commerce clause).

83. U.S. CONST. art. VI.

84. U.S. CONST. art. I, § 10, cl.3

85. These constitutional powers often allow federal law to displace inconsistent state or local law. See 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES & STATUTORY CONSTRUCTION* § 36:9 (7th ed. 2010)

(Under the supremacy clause of the federal Constitution, federal law may preempt state law in several different ways. Congress may preempt state law by stating so in explicit language on the face of a statute. For example, if the statute contains an express preemptive clause, the plain wording of that clause necessarily contains the best evidence of a preemptive intention. Absent specific language, preemption can be implied through an interpretation of legislative intent, or where federal legislation is so comprehensive in a given area that no room remains for supplemental state legislation. The state law may be preempted to the extent that it is believed that such action is necessary to achieve important federal purposes. Preemption also takes place when the subject matter demands uniformity vital to national interest.).

The federal government is the primary influence on the American food system.<sup>86</sup> Evidence of federal domination is abundant. Examples include Farm Bills,<sup>87</sup> the Federal Food, Drug, and Cosmetics Act,<sup>88</sup> and feeding programs such as the National School Lunch Program (“NSLP”)<sup>89</sup> and the Supplemental Nutritional Assistance Program (“SNAP”).<sup>90</sup> Farmers and agricultural producers feel the federal government’s presence through agricultural policy in the form of subsidies,<sup>91</sup> crop insurance,<sup>92</sup> and marketing orders.<sup>93</sup> The focus of these legal tools is to promote economic efficiency in the food system.<sup>94</sup>

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86. *See infra* notes 87-100 and accompanying text.

87. *See* THE NAT’L CTR. FOR AGRIC. LAW & RESEARCH INFO., UNITED STATES FARM BILLS, THE NAT’L AGRIC. CTR. <http://www.nationalaglawcenter.org/farmbills> (last visited May 21, 2011), for a comprehensive resource on all Farm Bill legislation.

88. *See generally* 21 U.S.C. §§ 301-399(b) (2009).

89. *See* National School Lunch Program (NSLP), U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/cnd/lunch/> (last visited May 24, 2011); *see also* Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010) (authorizing funding for federal school meal and child nutrition programs); National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946) (providing assistance to the States in establishing, maintaining and operating expansion of school lunch programs).

90. *See* Supplemental Nutritional Assistance Program (SNAP), U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/snap/> (last visited May 24, 2011); *see also* Act of Sept. 21, 1959, Pub. L. No. 86-341, 73 Stat. 606 (1959) (extending Agricultural Trade Development and Assistance Act of 1954 and authorizing the Secretary of Agriculture to operate a food stamp system); Food, Conservation and Energy Act of 2008, Pub. L. No. 110-234, §§ 4001-4407, 122 Stat. 923, 1092-1142 (2008) (describing food programs such as Food Stamp Program/Supplemental Nutrition Assistance Program, Food Distribution Programs, Fruit and Vegetable Promotion, and Farmers’ Market and Community Food Promotion).

91. *See generally* Food, Conservation and Energy Act of 2008, Pub. L. No. 110-234, §§ 1001-1623, 122 Stat. 923, 936-1025 (2008) (commodity programs).

92. *See generally* Food, Conservation and Energy Act of 2008, Pub. L. No. 110-234, §§ 1001-1623, 122 Stat. 923, 1371-1427 (2008) (crop insurance and disaster assistance programs).

93. *See* Agricultural Marketing Act, 12 U.S.C.A. § 1141(a) (West 2011).

94. *See Farm and Commodity Policy: Background and Issues*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/Briefing/FarmPolicy/Background.htm> (last visited May 24, 2011).

Labor and safety regulations applicable to agricultural operations are also evidence of this federal influence.<sup>95</sup> Other federal influences on the food system include environmental regulation,<sup>96</sup> anti-trust law,<sup>97</sup> and tax policy.<sup>98</sup> Rooted in constitutional powers reserved to the federal government, these delicately balanced laws create abundance and stability in the food system.<sup>99</sup> This system also creates the luxury of wanting something different for the future because although many Americans are faced with food security concerns, many more live in a world of abundant food and can question whether the food they buy represents their sense of social justice.

State influences are no less important. They include food-related public health regulation,<sup>100</sup> tax law,<sup>101</sup> agricultural standards,<sup>102</sup> state

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95. See OSHA Occupational Safety and Health Standards for Agriculture, 29 C.F.R. § 1928 (1999).

96. See, e.g., Clean Air Act, 42 U.S.C. § 7401 (2009) (defining EPA's responsibilities for protecting and improving the nation's air quality and the ozone layer); Clean Water Act, 33 U.S.C. § 1251(2009) (governing water pollution in the United States); Plant Protection Act, 7 U.S.C. § 7701 (2010) (providing for the control of plant pests or noxious weeds to protect the agriculture, environment, and economy of the nation).

97. See, e.g., Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, 74 Fed. Reg. 165 (Dep't of Agric. Aug. 27, 2009) (notice).

98. See, e.g., IRS, PUBL'N 225, FARMER'S TAX GUIDE (2010), available at <http://www.irs.gov/publications/p225/index.html>.

99. See *supra* notes 81-85 and accompanying text.

100. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 1, § 2.3 (2010) (raw milk regulation); N.Y.C., N.Y. HEALTH CODE, tit. IV, art. 81, § 81.50 (2010) (local restaurant calorie disclosure requirements); N.Y.C., N.Y., Int. No. 530, A Local Law to Amend the Administrative Code of the City of New York, in Relation to Setting Nutrition Standards for Distributing Incentive Items Aimed at Children (Mar 29, 2011), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=862338&GUID=29A20994-0B39-49B3-8B17-D8CEB092071C&Options=ID|Text|&Search=530> (linking minimal nutritional standards to providing toys with fast food meals).

101. Examples include tax policy that makes agriculture use affordable. See, e.g., N.H. REV. STAT. ANN. § 79-A:1 (LexisNexis 2010)

(It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources.).

welfare programs,<sup>103</sup> environmental regulations,<sup>104</sup> and trade promotion.<sup>105</sup> Beyond state government lies local government. Its influences include: health ordinances,<sup>106</sup> levying local taxes,<sup>107</sup> and even regulation of ranch fences.<sup>108</sup>

Given the vast array of laws that regulate the food system, how can we envision a functional foodshed model? Federalism is relevant to the foodshed model because the foodshed's success will hinge on government coordination – whether that is through cooperation or agitation or somewhere in between.<sup>109</sup> “Cooperative federalism,” which is arguably effective with some environmental regulation, is the concept that integration of powers apportioned among the federal government and the states is the most effective way to achieve national objectives.<sup>110</sup> In contrast, “uncooperative federalism” is the notion that states can productively challenge federal authority by, for

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102. See, e.g., ME. REV. STAT. ANN. tit. 22, § 2512 (West 2011) (Maine Meat Inspection Program); 01-001 ME. CODE R. §§ 1-11 (LexisNexis 2011), available at <http://www.maine.gov/sos/cec/rules/01/chaps01.htm> (accompanying meat and poultry inspection and licensing regulations); VT. STAT. ANN. tit. 6, §§ 481-499 (2011), available at <http://www.vermontagriculture.com/documents/MapleLaws.pdf> (Vermont Maple Products Law); 20-011-002 VT. CODE R. §§ 1-7 (2011) (accompanying Maple Products regulation).

103. See NSLP, *supra* note 89 and SNAP, *supra* note 90, for examples of state participation in welfare programs.

104. See, e.g., TEX. WATER CODE ANN. § 26 (West 2005), available at <http://www.statutes.legis.state.tx.us/Docs/WA/htm/WA.26.htm> (water regulation).

105. See e.g., Melanie Warner, *McDonald's Fruit and Maple Oatmeal: Not Real Maple and Illegal in Vermont*, BNET (Jan. 13, 2011), <http://www.bnet.com/blog/food-industry/mcdonald-8217s-fruit-and-maple-oatmeal-not-real-maple-and-illegal-in-vermont/2261>.

106. See, e.g., Santa Clara County, Cal, Ordinance No. NS-300.820 (Apr. 27, 2010) (using public health regulation to force manufacturers to provide more nutritious “fast food” by providing minimum nutritional standards for “fast food”).

107. See *Local Option Taxes: States that Authorize Local Sales and Income Taxes Map*, NAT'L CONF. OF ST. LEGISLATORS, <http://www.ncsl.org/default.aspx?tabid=12632> (last visited May 27, 2011).

108. See, e.g., Sue Tone, *Ranchers Feel Left Out on Range in New Dewey-Humboldt Livestock Ordinance*, PRESCOTT VALLEY TRIB. (Sept. 1, 2010, 1:52 PM), <http://pvtrib.com/main.asp?SectionID=1&SubSectionID=761&ArticleID=52604>.

109. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1263 (2009).

110. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).



example, refusing to participate in a federal mandate.<sup>111</sup> Understanding the difference between cooperative and uncooperative federalism can help us understand how localism, regionalism, and federalism can be coordinated to maximize the potential of a foodshed model for food system reform. This difference is important because it forces us to ask what role we want local or state government to play in respect to federal food policy. For example, states can either participate in the federal school lunch program and work to improve it through cooperation, or states can opt-out and forge their own school lunch programs.

We should not view the federal government's domination of the current food system as a power grab from the states, but instead as a necessity to promote democracy around the world. Professor Chen's analysis of *Wickard v. Filburn*<sup>112</sup> as an international trade and diplomacy case illustrates this point.<sup>113</sup> Before the New Deal, politicians considered agriculture the province of the states.<sup>114</sup> After the New Deal, agriculture became the economic concern of the federal government, and it has remained so since 1937.<sup>115</sup> Before the Depression, no federal law existed that imposed a penalty on a farmer who saved crops for his own or local use rather than selling on the national or international market.<sup>116</sup> However, the economic downturn

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111. See Bulman-Pozen, *supra* note 109, at 1263; see also *id.* at 1265-70 (uncooperative federalism in theory); *id.* at 1271-74 (uncooperative federalism in practice). Healthcare reform likely provides the timeliest example of both cooperative and uncooperative federalism.

112. 317 U.S. 111 (1942).

113. See Chen, *supra* note 78, at 282-83.

114. *United States v. Lopez*, 514 U.S. 549, 591 (1995) (Thomas, J. concurring) (“[T]he supervision of agriculture and other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.” (quoting *The Federalist* No. 17, at 106 (Alexander Hamilton))).

115. In 1936, the Roosevelt Administration made its first effort to structure price supports for agricultural products with the Agricultural Adjustment Act, which was found unconstitutional. See *United States v. Butler*, 297 U.S. 1 (1936). However, in 1937, the Agricultural Adjustment Act of 1938 addressed the *Butler* court's concerns and remains effective today. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

116. See 317 U.S. at 115 (“The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.”).

and the needs of the national and international grain market ended the farmer's practice of crop saving to promote market stability.<sup>117</sup> As a result, the Commerce Clause (including the dormant, or negative, commerce clause) and the national and international market became paramount in agricultural policy.<sup>118</sup> Local farms, local markets, and local preferences ceded to the economic stability of "the unitary national market."<sup>119</sup> Moreover, that market served to position the U.S. as a global trading partner.<sup>120</sup>

*West Lynn Creamery v. Healy*<sup>121</sup> illustrates the traditional way in which federalism resolves state's attempts to preserve a segment of its economy and leads us to consider the role of localism and regionalism. In *West Lynn Creamery*, Massachusetts created a pricing order scheme that discriminated against interstate commerce.<sup>122</sup> Specifically, after the state's special commission found that the milk industry would be forced out of business in one year due to dairy price competition from other states, the Commissioner of Agriculture declared that the milk industry was in a state of emergency and issued a pricing order.<sup>123</sup> The order had two components. First, it required milk dealers to pay a monthly premium to the state.<sup>124</sup> Second, the state distributed the proceeds from the dealer's monthly premium proportionally to the state's producers based on their share of state's total raw milk production.<sup>125</sup>

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117. *See id.* at 115-16.

118. *See, e.g., West Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (discussing federal order setting minimum milk prices).

119. *Id.*

120. Jim Chen, *Filburn's Forgotten Footnote – of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 295 (1997) ("Filburn might be more profitably studied as a prologue to the emergency of global economic federalism . . .").

121. 512 U.S. 186 (1994).

122. *See id.* at 194 ("Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." (quoting *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935))).

123. *See id.* at 189.

124. *Id.* at 190. The premium payment calculation had two steps. The first step subtracted the monthly federal blend price from \$15 and divided by three. The second step multiplied the quantity from step one by the "dealer's Class I sales" in the state. *Id.* at 190-91.

125. *Id.* at 191.

The state court ruled that the scheme only incidentally burdened interstate commerce and that the “local benefits” outweighed any burden on commerce.<sup>126</sup> In reversing the state’s decision, the Supreme Court relied on the Commerce Clause, noting that the Commerce Clause gave Congress power to regulate the “prices paid to farmers for their products.”<sup>127</sup> In fact, this power was the source of the federal pricing order used to calculate the Massachusetts dealer’s premium.<sup>128</sup> Next, the Court emphasized that the negative (or dormant) Commerce Clause invalidated any measures designed to favor in-state economic interests.<sup>129</sup> Such measures are only valid if “the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>130</sup>

Massachusetts argued that the pricing order did not discriminate against interstate commerce.<sup>131</sup> First, Massachusetts argued that the subsidy was constitutional because the pricing order was designed to support local businesses.<sup>132</sup> Second, Massachusetts argued that the tax on out-of-state production was not discriminatory, and therefore constitutional.<sup>133</sup> As individual components, each part of the pricing order was constitutional; however, the Court disapproved of their combination.<sup>134</sup> In fact, the Court characterized the combination of a tax and subsidy as “a program more dangerous to interstate commerce than either part alone.”<sup>135</sup> The danger was in the fact that a key political constituency that would oppose the tax – dairy farmers – was mollified by the subsidy.<sup>136</sup>

*West Lynn* is instructive today, especially in a foodshed model that will likely rely on local or regional pricing schemes to ensure its success. Commerce Clause analysis is “not so rigid as to be

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126. *Id.* at 192.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 192-93 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

131. *Id.* at 198.

132. *See id.* at 198-99.

133. *Id.* at 198.

134. *Id.* at 199-200 (“More fundamentally, respondent errs in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts.”).

135. *Id.* at 200.

136. *Id.* at 200-01.

controlled by the form by which a State erects barriers” but rather requires “a sensitive case-by-case analysis of purposes and effects.”<sup>137</sup> Therefore, cases like *West Lynn* require us to consider two aspects of foodsheds. First, whether compelling arguments exist in support of regional or local pricing that favors local producers.<sup>138</sup> Those reasons might include preservation of farmland, environmental sustainability, promotion of employment in agriculture, and reduction in transportation use and costs.<sup>139</sup> Second, we must consider whether there are compelling arguments for congressional approval of a compact allowing regional management of a portion of the national food economy.<sup>140</sup>

Return for a moment to the fact that Massachusetts declared a state of emergency to preserve its dairy industry.<sup>141</sup> *West Lynn Creamery* found that attempting to save the milk industry was contrary to the national market’s need for free competition and found that all consumers “may look to the free competition from every producing area in the Nation to protect him from exploitation by any.”<sup>142</sup> This sentiment prompts the questioning of whether the loss of an agricultural sector puts all consumers in a worse position. Put another way: do consumers come out ahead if we re-envision a food system that relies first on local and regional production to meet consumer needs? An interstate compact that has the potential to draw on the strengths of local, state, and regional government is one possibly way to resolve the thorny issues presented by application of the Commerce Clause to the agricultural economy.

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137. *Id.* at 201.

138. *See supra* text accompanying note 130.

139. *See generally* U.S. DEP’T OF AGRIC., ECON. RES. REP. NO. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS AND ISSUES 42-50 (2010).

140. *See id.* at 203-04; *see also id.* at 206

(Let such an exception be admitted, and that all a state will have to do in times of stress . . . is to say that its farmers and merchants and workmen must be protected against competition from without . . . .To give entrance to that excuse would be to invite a speedy end of our national solidarity.);

Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1786 (2004) (“Although the Northeast Interstate Dairy Compact had been the subject of negotiations since at least 1988, Congress’s decision to ratify the compact in 1996 may be viewed as a response to the 1994 Supreme Court decision in *West Lynn Creamery* . . .”).

141. *See supra* notes 122-23 and accompanying text.

142. *Id.* at 207.

*C. Regionalism and Localism: Shared Power or Protectionism?*

Local food is popular.<sup>143</sup> In fact, the term ‘locavore’ has become part of the American lexicon.<sup>144</sup> Consumers “buy local” for several reasons, including: knowing the source of their food, believing that that they are reducing their carbon footprint, and supporting the local economy.<sup>145</sup> Given the interest in local food, it is logical to ask what the local food movement means for local and regional government.

Generally, localism is an integral part of American government.<sup>146</sup> Localism scholarship tends to focus on the scope and extent of local powers and how state law influences the exercise of those powers.<sup>147</sup> While localism is “a value deeply embedded in the American legal and political culture,”<sup>148</sup> scholars also criticize it for its ability to compound social and economic differences among communities.<sup>149</sup> Despite its shortcomings, localism is a helpful tool for organizing citizens within political boundaries and giving them tools of self-governance.<sup>150</sup> Common examples of local power are land use

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143. See U.S. DEP’T OF AGRIC., *supra* note 139, at iii (“Consumer demand for food that is locally produced, marketed, and consumed is generating increased interest in local food throughout the United States.”).

144. See MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/locavore> (last visited May 24, 2011) (defining “locavore” as “one who eats foods grown locally whenever possible” and dating first known use of the word to 2005).

145. U.S. DEP’T OF AGRIC., *supra* note 139, at 29.

146. Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

147. A full analysis of localism is beyond the scope of this article. See *id.* (providing an excellent starting point for understanding localism); see also Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter *Localism and Legal Theory*]; Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109-10 (1980).

148. Briffault, *supra* note 146, at 1-2 (“Localism reflects territorial economic and social inequalities and reinforces them with political power . . . . Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment.”).

149. See *id.* at 35-37, 42-43 (describing school funding reform and exclusionary zoning cases as examples of localism’s relative strength or weakness depending on the intervention of the courts and the courts’ requirements for local government to consider the impact of its use of power on other regions.)

150. See Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 373-74 (2002)

regulation such as zoning, local property taxation, and school funding.<sup>151</sup> Of course, zoning and other local ordinances already influence agriculture, so in a sense localism already affects the food system.

Regional governance may represent an opportunity to leverage local government and private sector resources to benefit the population within in an area that is not confined neatly to local or state boundaries. In fact, in the last decade, legal scholars have debated regional government's viability for use in land use planning and have addressed planning issues created by the suburban and urban divide.<sup>152</sup> However, a regional foodshed compact may bring a

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(Localism tends to sacrifice inclusion for the possibilities of citizenship. This "boundary problem" of local government law can be stated as follows: The creation of a place for meaningful self-government (in space and in politics) for those inside the (metaphorical and sometimes literal) gates always affects (and often injures) those who are outside the gates. The boundary problem in local government law thus is the problem of pluralism.).

151. See Briffault, *supra* note 146, at 2-3, 57, 101.

152. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000) (providing a helpful discussion on the relationship between localism and regionalism). Briffault discusses that the key challenge to the success of regional governance structures as:

The real challenge for regionalism as we enter the twenty-first century, then, is not the theoretical arguments for localism. Those, as I have suggested, actually tend to cut in favor of regionalism and not against it in our metropolitan areas. Rather, the fate of regionalism will turn on whether regionalists will be able to persuade people that their interests are sufficiently tied in with those of the residents or other communities within the region. The political and legal movement from localism to regionalism will occur only when people believe that they are part of a region as well as part of a locality, and that their interests will be advanced by supplementing local governance with regional policies and political structures that give effect to those interests and promote the well-being of the region as a whole and of all the localities within it.

*Id.* at 29-30. *But see* Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 266 (2009) (concluding that regional governance, at least in land use regulation is unworkable because "the truth is—no matter what scholars say—localities feel that their autonomy is threatened by regional governments, and individual landowners are just as wary. The practical barriers to regionalism render a regional approach unviable").

new perspective to the American food system: not local, not global, but somewhere in between.

The Interstate Oil and Gas Compact Commission (“IOGCC”) is an example of longstanding cooperation among states with oil and gas reserves.<sup>153</sup> Formed in 1935, the IOGCC’s mission is to promote “the conservation and efficient recovery of domestic oil and natural gas resources while protecting health, safety and the environment.”<sup>154</sup> The IOGCC has thirty member states and is actively involved in national energy policy.<sup>155</sup> The IOGCC’s ability to bridge geographical gaps and political divides in energy policy illustrates the value of compacts.<sup>156</sup> However, coordinating and bridging gaps can be difficult – especially if political interests supersede the purpose for taking a regional approach.

Therefore, it is critical to ask what portion of the local food movement is political, and what can be attributed to other motivations such as safety, or physical or geographic proximity.<sup>157</sup> To the extent that local food is a political movement, a foodshed model must account for and coordinate the positive and negative aspects of localism.<sup>158</sup> The positives include a greater voice for citizens in the food system. This voice comes through involvement in local government such as food policy councils or local land use boards.<sup>159</sup> The negatives include localism that becomes defensive and ignores the consequences of local action, such as is evident when

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153. See *Our History*, INTERSTATE OIL & GAS COMPACT COMM’N, <http://www.iogcc.state.ok.us/history> (last visited May 24, 2011).

154. See *Vision, Mission, Values*, INTERSTATE OIL & GAS COMPACT COMM’N, <http://www.iogcc.state.ok.us/vision-mission-values> (last visited May 24, 2011).

155. See *Member States*, INTERSTATE OIL & GAS COMPACT COMM’N, <http://www.iogcc.state.ok.us/member-states> (last visited May 24, 2011); *About Us*, INTERSTATE OIL & GAS COMPACT COMM’N, <http://www.iogcc.state.ok.us/about-us> (last visited May 24, 2011); see also 42 U.S.C. § 15907 (2009); see also *Bath Petroleum Storage, Inc. v. Mkt. Hub Partners, L.P.*, 129 F. Supp. 2d 578, 595 (W.D.N.Y. 2000), *aff’d*, 229 F.3d 1135 (2d Cir. 2000) (illustrating that IOGCC provided industry standards).

156. See *About Us*, *supra* note 155.

157. See e.g., Michael Winter, *Embeddedness, The New Food Economy, and Defensive Localism*, 19 J. RURAL STUD. 23, 23 (2003) (reporting that purchasing patterns in five areas in the United Kingdom showed local food was more important than organic, possibly illustrating “a defensive politics of localism rather than a strong turn to quality based around organic and ecological production”).

158. See *supra* notes 146-51 and accompanying text.

159. Hamilton, *supra* note 38, at 444.

exclusionary zoning practices are used.<sup>160</sup> On balance, localism is an essential piece of a fully functional food system.<sup>161</sup> Additionally, regionalism can be utilized to diminish concerns that are more parochial and to help people realize the broader impact of policy choices.<sup>162</sup>

To summarize, the American food system is globalized, but this does not preclude a regional foodshed model, supported by local and state government. The WTO represents international trade policy, from which all sectors of American agriculture presumably benefit through lowered trade barriers, and dispute resolution processes.<sup>163</sup> Federal laws such as the Farm Bill set national agricultural policy, while the Food, Drug, and Cosmetics Act sets national food safety standards.<sup>164</sup> Meanwhile, the states play an important role in the food system through state agricultural marketing standards, safety standards, support of agricultural trade such as farmer's markets, and through local land use policy.<sup>165</sup> Given this broad government structure, the question is: where can a regional or local foodshed fit?<sup>166</sup> The recent passage of the Food Safety Modernization Act<sup>167</sup> provides a clue.

*D. "Isms" in Action: The Food Safety Modernization Act*

On January 4, 2011, the FDA Food Safety Modernization Act ("FSMA") became law.<sup>168</sup> Responding to recent food system crises, including foodborne illness outbreaks in produce and peanut butter,

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160. See Briffault, *supra* note 146, at 112-13.

161. See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 631 (2001) ("[T]here are roles that both state constitutional law and local government law can usefully play in protecting local interests in the processes of intrastate lawmaking.").

162. See *supra* note 152 and accompanying text.

163. See *The Agriculture Agreement: New Rules and Commitments*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/agric\\_e/agric\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/agric_e.htm) (last visited May 27, 2011).

164. See *supra* notes 87-88 and accompanying text.

165. See *supra* notes 100-09 and accompanying text.

166. This question assumes that government should play a formal role in a regional foodshed model. In my view, this is the correct assumption because government, and the laws it enacts, reflects accepted societal norms.

167. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011).

168. *Id.*



the new law seeks to drastically improve food safety.<sup>169</sup> The law uses tools such as food facility registration,<sup>170</sup> hazard analysis and risk-based performance controls,<sup>171</sup> science-based standards for safe production and handling of certain fruits and vegetables (the produce standards),<sup>172</sup> and mandatory recall authority.<sup>173</sup> This new law makes great strides towards ensuring a safer food system through the exercise of federal powers. Its provisions also confirm that the American food system is both globalized and localized by including specific provisions for both improved import safety and by refusing to apply a “one-size-fits all” regulatory scheme applicable to small farms.<sup>174</sup> Therefore, the FSMA may indicate that regional foodsheds are a viable and useful modernizing tool.

First, the FSMA was controversial.<sup>175</sup> The controversy centered on the original “one-size fits all” approach that would have swept mega farms and small farms alike into the regulatory fold.<sup>176</sup> Senators Jon Tester (D-MT) and Kay Hagan (D-NC) offered an amendment that exempted most small farms from the new, rigorous safety regulations that the Food and Drug Administration (“FDA”) will issue in coming years.<sup>177</sup> Some industries, including meat and produce growers, urged rejection of the Tester-Hagan amendment stating: “We believe an

169. See 156 CONG. REC. S10810 (daily ed. Dec. 20, 2010) (statement of Sen. Klobuchar); Gardiner Harris & William Neuman, *Senate Passes Sweeping Law on Food Safety*, N.Y. TIMES, Dec. 1, 2010, at A1, available at <http://www.nytimes.com/2010/12/01/health/policy/01food.html>.

170. FDA Food Safety Modernization Act §102.

171. *Id.* § 103.

172. *Id.* § 105.

173. *Id.* § 206.

174. *Id.* §§ 105, 301-309.

175. See, e.g., *The Food Safety Modernization Act and Local Food*, LOCAL FOOD CONNECTION (Jan. 5, 2011 3:42 PM), <http://www.localfoodsconnection.org/2011/01/05/the-food-safety-modernization-act-and-local-food/>.

176. *Id.*

177. Helena Bottemiller, *Tester Amendment Picks Up Cosponsor*, FOOD SAFETY NEWS (May 3, 2010), <http://www.foodsafetynews.com/2010/05/tester-amendment-picks-up-cosponsor/>

(Senator Jon Tester (D-MT) has picked up a key supporter for his amendments intended to ease the impact of the pending food safety legislation on small farms. Senator Kay Hagan (D-NC) announced late last week she will cosponsor Tester’s amendments to ‘protect small, local food producers from unnecessary and burdensome regulations that could harm their businesses.’).

operation's size, the growing practices used, or its proximity to customers does not determine whether the food offered is safe."<sup>178</sup> On the other hand, the National Sustainable Agriculture Coalition ("NASC") urged its members to lobby for the Tester-Hagan amendment.<sup>179</sup> In its suggested message to elected representatives, the NASC urged members to state "we need a food safety bill that cracks down on corporate bad actors without erecting new barriers to more local and regional food sourcing. Size and practice appropriate food safety regulation for small and mid-sized farms and processors is vital to economic recovery, public health, and nutritional wellbeing."<sup>180</sup>

In the end, the FSMA passed with the Tester-Hagan amendment and other provisions that preserved space for small farms and regional food systems to operate without extensive federal regulation.<sup>181</sup> The FSMA includes special provisions for direct sales from farms and community supported agriculture programs,<sup>182</sup> exempts operations with sales less \$500,000 from complying with certain provisions,<sup>183</sup> and provides grants to state and local governments for food safety training.<sup>184</sup> Additionally, the FDA released the following statement characterizing the role of all levels of government:

The legislation recognizes the importance of strengthening existing collaboration among all food safety agencies – Federal, state, local, territorial, tribal, and foreign – to achieve our public health goals.

It also recognizes the importance of building the capacity of state, local, territorial and tribal food safety programs. Among other provisions, it directs the Secretary to improve training of state, local, territorial and tribal food safety officials and authorizes grants for

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178. Letter from American Feed Industry Association, et al., to Tom Harkin, Chairman, and Michael B. Enzi, Ranking Member, Health, Educ., Labor and Pensions (PELP) Comm. (Nov. 15, 2010) (on file with author).

179. *Id.*

180. *Food Safety Action Alert*, NAT'L SUSTAINABLE AGRIC. COAL. (NASC) (Nov. 10, 2010), <http://sustainableagriculture.net/blog/food-safety-action-alert-2/>.

181. *See supra* notes 168-72 and accompanying text.

182. FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 102(c), 124 Stat. 3885, 3889 (2011).

183. *Id.* § 103(k)-(l).

184. *Id.* § 209.

training, conducting inspections, building capacity of labs and food safety programs, and other food safety activities.<sup>185</sup>

At the same time, the FSMA has extensive provisions aimed at the globalized aspect of the food supply.<sup>186</sup> The FSMA shows an American intent to influence the safety of the global foodshed through programs for food safety capacity building with foreign governments<sup>187</sup> and requiring import certification.<sup>188</sup> The FSMA devotes an entire title to “improving the safety of imported food”<sup>189</sup> and focuses resources on foreign food inspection.<sup>190</sup> The FSMA also contains specific provisions to harmonize its terms with WTO agreements.<sup>191</sup> Taken together, the FSMA’s import provisions illustrate the reality that the food system is global, and a key domestic policy aim is to improve import’s food safety so that Americans are willing participants in that global food system.

In summary, the FSMA represents a major step in reforming America’s food system. The new law shows room for global and localized approaches to the food system. Specifically, it is significant that the FSMA did not envelope small and local food facilities into a one-size fits all regulatory system, and signaling that the regional-local foodshed has a space of its own.<sup>192</sup> The next question is how that space may be governed and coordinated with the federal aspects of the food system.

### III. ENVISIONING A FOODSHED MODEL

This section describes the contours of governmental influences on the foodshed and returns to Kloppenburg’s five principles.<sup>193</sup>

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185. *Food Safety Legislation Key Facts*, FDA, <http://www.fda.gov/Food/FoodSafety/FSMA/ucm237934.htm> (last visited May 29, 2011).

186. *See id.* §301-309.

187. *Id.* §305.

188. *Id.* §303.

189. *Id.* §301-309.

190. *Id.* § 201.

191. *Id.* § 404 (“Nothing in this Act (or an amendment made by this Act) shall be construed in a manner inconsistent with the agreement establishing the World Trade Organization or any other treaty or international agreement to which the United States is a party.”).

192. *See supra* notes 175-81 and accompanying text.

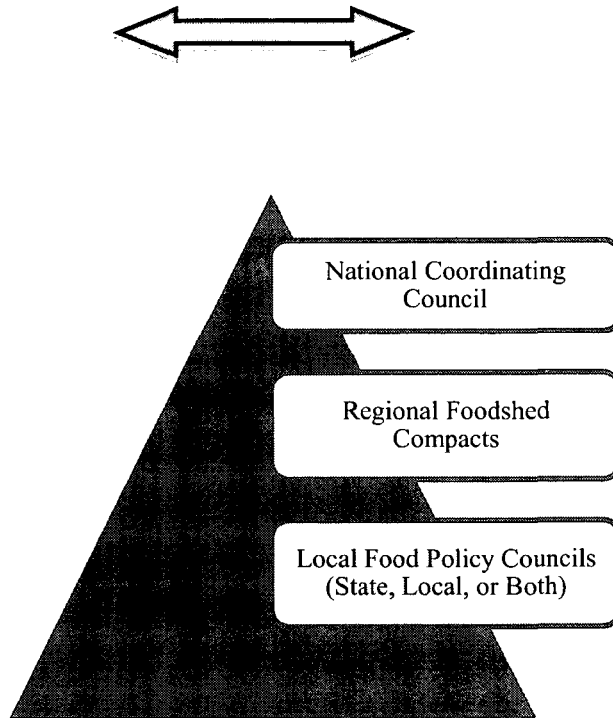
193. *See supra* note 28 and accompanying text.

Kloppenbergs five principles are: moral economy, commensal community, succession/secession, proximity, and nature as measure.<sup>194</sup> This section highlights concepts foundational to forming a foodshed model, rather than try to engage in an exhaustive analysis of how the “isms” support or impede food system reforms.

This section invites readers to imagine how a foodshed might help us realize a sustainable, efficient, and healthful food system. Below is a visual model of a holistic foodshed, divided into three levels. These levels represent different governments with different powers. The model attempts to maximize the opportunities for vertical and horizontal governing of the American food system (to the extent that we agree it should be governed). The model imagines a system where local food production could be balanced with global trade needs. This Article does not address whether this is a politically viable model, but instead discusses the reasons that this model might maximize the strengths of different levels of government to create a coherent system.

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194. *See supra* note 28-54 and accompanying text.

*Graphic 1.1 Integrated Foodshed Model**International Trade**A. State and Local Food Policy Councils*

At the base of the model are local food policy councils.<sup>195</sup> Some states would likely benefit from having both local and state food policy councils, while other states may only need a state policy council. For example, a state with a homogenous land mass and general acceptance of a state agricultural policy may not need local policy councils.<sup>196</sup> In contrast, a state with prominent urban-rural

195. See STATE & LOCAL FOOD POLICY COUNCIL, <http://www.statefoodpolicy.org/> (last visited May 29, 2011), for a full exploration of policy councils' use and structure. See also *San Francisco Food*, SFGOV.ORG, <http://www.sfgov3.org/index.aspx?page=753> (last visited May 29, 2011).

196. See generally *Questions Most Frequently Asked About Food Policy Councils*, STATE & LOCAL FOOD POLICY COUNCIL, <http://www.statefoodpolicy.org/>

divides and/or diverse agricultural sectors may benefit from local and state councils.<sup>197</sup> A local council's purpose is to coordinate local population food needs and provide a forum to discuss how to do this.<sup>198</sup>

Using local or state food policy councils as the foundation of a foodshed model may maximize the role of moral economy, commensal community, and nature as measure. First, because the consumer is more likely to connect with the producer in a local food system, commodification is less of a concern.<sup>199</sup> Consumers and producers will likely have richer communication about food production and preferences when they know each other. These conversations will in turn support the commensal community.<sup>200</sup> That community, as Kloppenburg envisions it, should be inclusive and accept a wide range of views and preferences.<sup>201</sup> The views and preferences within the community will also promote discussions about nature as measure.<sup>202</sup> For example, does a community accept chemical fertilizers or genetically engineered crops? What are food manufacturers' roles within the local foodshed? In summary, local food policy councils are a structured place for citizens to discuss and create a local food system that meets the needs of the commensal community.

The tools used by local food policy councils include working with zoning or building code officials to ease burdens on agricultural production or to shape land use policy with public health considerations.<sup>203</sup> Beyond land use, food policy councils might work with local welfare offices to plan local food production that addresses

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(last visited May 29, 2011) (discussing that Policy Councils structure should reflect the unique needs, political culture and climate of a given area).

197. *Id.*

198. *See, e.g., San Francisco Food, supra* note 195.

199. *See* Kloppenburg et al., *supra* note 27, at 36.

200. *Id.* at 37.

201. *Id.*

202. *See supra* note 51-54 and accompanying text.

203. *See* JULIE SAMIA MAIR ET AL., CTR. FOR LAW & THE PUB.'S HEALTH AT JOHNS HOPKINS AND GEORGETOWN UNIVS., THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 1-2 (2005), available at <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf>.

the population's food security needs.<sup>204</sup> Local food policy councils might also take the lead in organizing CSAs, farmers markets, and educational presentations supported by State Cooperative Extension programs.<sup>205</sup> Ideally, the local food policy council is a resource for people in the community to communicate what they want and need from local producers, and is an incubator for new ideas about producing sustainable food.

As noted above, some areas will need only to coordinate at the state level.<sup>206</sup> Such state council might include not only representatives from local food policy councils, but also the state agriculture commissioner, public health officials, economic development experts, state land use planners, and environmental regulators.<sup>207</sup> The state food policy council is also a place where state government can leverage resources with private interests to support not only local agriculture, but also economic development that supports food and agriculture trade regionally and nationally.<sup>208</sup>

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204. See *Free and Affordable Food*, SFGOV.ORG, <http://www.sfgov3.org/index.aspx?page=756#programs> (last visited May 29, 2011).

205. *National Institute of Food and Agriculture*, U.S. DEP'T OF AGRIC., <http://www.csrees.usda.gov/Extension/> (last visited May 29, 2011)

(The Cooperative Extension System is a nationwide, non-credit educational network. Each U.S. state and territory has a state office at its land-grant university and a network of local or regional offices. These offices are staffed by one or more experts who provide useful, practical, and research-based information to agricultural producers, small business owners, youth, consumers, and others in rural areas and communities of all sizes.)

206. See *supra* note 196 and accompanying text.

207. See, e.g., *State Food Policy Councils Authorized by State Government*, N. AM. FOOD POLICY COUNCIL, [www.foodsecurity.org/FPC/ListofStates2.doc](http://www.foodsecurity.org/FPC/ListofStates2.doc) (last visited May 29, 2011) ("Created in 1997 by the State Legislature, the Connecticut Food Policy Council works to promote the development of a food policy for the State of Connecticut and the coordination of state agencies that affect food security. Food Policy refers to government actions that influence the availability, affordability, quality and safety of our food supply. Food Policy addresses such concerns as: farmland preservation, urban agriculture, emergency food supply, transportation, markets for locally-grown food, food education, child nutrition and urban supermarkets."); see also FARMLAND PRES. PROGRAM, CONN. DEP'T OF AGRIC., ANNUAL REPORT SUMMARY (2007), [http://www.ct.gov/doag/lib/doag/farmland\\_preservation\\_/2007\\_annual\\_report\\_summary\\_mod.pdf](http://www.ct.gov/doag/lib/doag/farmland_preservation_/2007_annual_report_summary_mod.pdf).

208. See ALA. FOOD POLICY COUNCIL, DOCUMENTS, <http://alaskafoodpolicy.blogspot.com/p/documents.html> (last visited May 29,

Examples of state food policy council actions are designing statewide programs for the use of EBT cards usable at farmer's markets,<sup>209</sup> proposing state-private partnerships for cooperative, commercial kitchens that allow small producers access to the tools to process foods,<sup>210</sup> or providing loan guarantees to promote food production infrastructure such as mobile slaughter units.<sup>211</sup> Council members could propose or amend state laws in ways that promote food markets and safety. Finally, state food policy councils also support long-term sustainability planning including environmental and land use issues.<sup>212</sup>

### *B. Regional Foodshed Compacts*

As with watersheds, foodsheds may not neatly adhere to pre-existing political boundaries.<sup>213</sup> Instead, foodsheds may be unified by geography, culture, and transportation systems.<sup>214</sup> One way to overcome concerns that local or state food policy councils might promote parochial views and move towards protective measures contrary to a unitary market and harmful to globalization is to seek congressional approval of a regional compact.<sup>215</sup> More importantly, a regional foodshed compact allows local and state governments to leverage resources within a proximate region – whether through

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2011), for an example of a policy council with broad ranging initiatives in social justice, supply chain analysis, and food security.

209. See, e.g., *Food Stamps and EBT at Farmer's Markets*, WASH. STATE FARMER'S MKT. ASSOC., <http://www.wafarmersmarkets.com/resources/foodstamps-market.html> (last visited May 29, 2011).

210. See, e.g., *Frequently Asked Questions*, OKLA. FOOD POLICY COUNCIL, <http://www.kerrcenter.com/ofpc/faq.htm> (last visited May 29, 2011) (noting one purpose of the council is “[t]o improve the economic status of Oklahomans involved in the food system by creating new opportunities, increasing profitability and ensuring that food dollars stay close to home through local processing, enhanced distribution, direct marketing, diversification of products, and distribution of information regarding presently under-utilized opportunities”).

211. See, e.g., *Mobile Slaughter Units*, GOOD FOOD FOR ALL: LOCAL FOOD & AGRIC. RES. FOR THE GREATER CHI. FOODSHED, [http://freshtaste.typepad.com/my\\_weblog/mobile-slaughter-units/](http://freshtaste.typepad.com/my_weblog/mobile-slaughter-units/) (last visited May 29, 2011).

212. See Hamilton, *supra* note 38, at 418-19, 452-53.

213. See *supra* notes 5, 46 and accompanying text.

214. See Kloppenburg et al., *supra* note 27, at 38.

215. Cf. U.S. CONST. art 1, § 10.



pooled economic resources, data sharing, or other policymaking coordination.<sup>216</sup>

Regional foodshed compact membership could include representatives from state/local food policy councils, agriculture and food industry, and planning experts.<sup>217</sup> This mixture of expertise might, for example, generate more efficient and effective ways to address regional food security, food defense, and to manage agriculture production for national and international markets. Further, it allows the best ideas generated in local or state councils to rise to the regional, and possibly national, level.

Placing regional foodshed compacts between local/state food policy councils and the federal government provides a new way of thinking about proximity, secession/succession, and nature as measure.<sup>218</sup> First, the local food movement illustrates that “local” is relative. Local depends not simply on distance, but also transportation systems and geographical features.<sup>219</sup> Therefore, a solely local food system allows people to ignore how their behavior might affect proximate, but not immediate, communities. Regional planning has been beneficial for transportation planning,<sup>220</sup> energy use,<sup>221</sup> as well as in the dairy industry.<sup>222</sup>

Although the Northeast Interstate Dairy Compact is now defunct,<sup>223</sup> its purpose echoes Kloppenburg’s hopes for certain values within a foodshed because it expressed concern for preserving the dairy farmers’ way of life and farms.<sup>224</sup> The Compact’s primary purpose was to preserve the regional dairy industry through price

216. See discussion *supra* p. 17-18 (IOGCC); *Purpose of the Compact*, NE DAIRY COMPACT COMM’N., <http://www.dairycompact.org/purpose.htm> (last visited May 29, 2011); see also *supra* note 207 and accompanying text.

217. See *supra* note 207 and accompanying text.

218. See *supra* notes 42-54 and accompanying text.

219. See *supra* notes 4-10, 46-49 and accompanying text.

220. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-77, STATEWIDE TRANSPORTATION PLANNING: OPPORTUNITIES EXIST TO TRANSITION TO PERFORMANCE-BASED PLANNING & FEDERAL OVERSIGHT (2010) (discussing possibilities in transportation planning to incorporate rural and regional outcomes).

221. See discussion *supra* p. 17-18 (IOGCC).

222. See Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7256 (2000).

223. 7 U.S.C. § 7256(3).

224. See *Purpose of the Compact*, *supra* note 216.

controls.<sup>225</sup> The dairy industry's cultural and economic significance in the northeast warranted such a compact.<sup>226</sup> Similarly, the foodshed model has similar characteristics: it can reflect a region's economic, environmental, and social needs and preferences.

A regional compact also buffers inclinations to not participate in a regional, national, or international food system. As previously noted, some advocate secession from a globalized food economy as a way to achieve a sustainable food system.<sup>227</sup> However, the better approach is succession. A regional food compact could promote succession by replacing the current federally dominated system, with a governance system that provides a systematic way for localities and regions to communicate with federal policy makers.<sup>228</sup> In this way, the foodshed model forces the federal government to acknowledge the impact of its policies on regional, state, and local food systems.

### *C. National Coordinating Council*

This article advocates placing a national coordinating council at the top of the foodshed model. This council's task would be to unify federal food policy horizontally across agencies and vertically through the regional compacts and local food policy councils. Some commentators have called for adopting a food-centric approach to American food regulation (rather than the bifurcated agriculture or health and safety approaches that we currently see with the USDA and FDA).<sup>229</sup> A national coordinating council could achieve a food-

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225. NE. DAIRY COMPACT COMM'N, <http://www.dairycompact.org> (last visited May 29, 2011) ("The participating states concluded that their ability to control the price that dairy farmers in the region receive for their product is essential to the public interest.").

226. *Purpose of the Compact*, *supra* note 216.

227. *See supra* notes 42-44 and accompanying text.

228. *See* Kloppenburg et al., *supra* note 27, at 34, 38.

229. *See, e.g.*, Nicholas D. Kristof, *Obama's 'Secretary of Food'?*, N.Y. TIMES, Dec. 11, 2008, at A35, available at <http://www.nytimes.com/2008/12/11/opinion/11kristof.html> ("A Department of Agriculture made sense 100 years ago when 35 percent of Americans engaged in farming. But today, fewer than 2 percent are farmers. In contrast, 100 percent of Americans eat."); Michael Pollan, *Farmer in Chief*, N.Y. TIMES MAGAZINE, Oct. 12, 2008, <http://michaelpollan.com/articles-archive/farmer-in-chief/> (suggesting a number of reforms to American food policy that will require coordination of regional, state, and local resources).

centric approach without dismantling the USDA and/or FDA.<sup>230</sup> The council could take up an agenda concerned with environmental sustainability, public health including nutrition and food safety, and international trade policy.

A national food policy council would be guided by some version of Kloppenburg's five foodshed principles, though the principles would likely have more traditional economic components and accept globalization.<sup>231</sup> This council would evaluate federal policy, whether it is farm subsidies or food safety, to determine the effects on local, regional, and global food systems. Though this is a large task, with well-informed members from local/state food policy councils, regional compacts, and federal agency experts, it would be well equipped to manage the American food system more responsibly than the current structure.

#### *D. Conclusion: From Words to Action*

How do we move from the current model of setting agricultural policy through federal omnibus legislation and waging political battles over food safety and nutrition to a foodshed model? This Article proposes studying whether a regional foodshed compact could coordinate local, state, and federal government, economic policy, agricultural resources, environmental protection, food transportation, nutritional needs, and cultural preferences. A study with such broad ranging concerns is a big task, but offers a starting point toward systematic reform.

This article suggests that the next Farm Bill is the regional foodshed's first opportunity to cause succession in the modern American food system. The Farm Bill is a logical place to propose incorporating the idea into agriculture policy. First, a feasibility study could determine the strengths and weaknesses of a regional system, and assess the opportunities and threats of a compact.<sup>232</sup> A study could inventory regional resources in the following ways:

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230. The President's Food Safety Working Group could be considered a prototype of such a coordinating council. *See* PRESIDENT'S FOOD SAFETY WORKING GRP., <http://www.foodsafetyworkinggroup.gov/> (last visited May 29, 2011).

231. *See supra* notes 27-57 and accompanying text.

232. I am not suggesting new data collection. The study would be based on current data held by the USDA's National Agricultural Statistics Service, which

### 1. Regional Infrastructure

- Agricultural land and current land use patterns;
- Agricultural production, including types of crops grown and capable of growing, including fisheries, where applicable.
- Number and type of food processing facilities (processing for wholesale or retail, slaughtering);
- Transportation, including rail, highway, and seaport access;
- Food defense plans.

### 2. Regional Economy

- Land tax structures;
- Land use regulation methods;
- Marketing standards and laws across agricultural sectors;
- Availability of capital and banking infrastructure related to agriculture;
- Number and type of food purchasing outlets (wholesale, retail, direct from farm, including Farmer's Markets and CSAs) including food deserts.

### 3. Regional Food Culture

- Health of population, including obesity, and related diseases, rates;
- Food security statistics including participation rates in WIC, SNAP, and NSLP;
- Unique attributes of regional food products, such as prevalence of Farm to School programs, Farmer's Markets, CSAs, and marketing initiatives;
- Agricultural worker profiles, including age, gender, and experience;
- Socio-economic profile of the population, including rural-suburban-urban divide.

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also conducts the Agriculture Census. See *National Agricultural Statistics Service*, U.S. DEP'T OF AGRIC., <http://www.nass.usda.gov/> (last visited May 29, 2011).

Much of this information exists in the National Agricultural Census,<sup>233</sup> National Agriculture Statistics Service,<sup>234</sup> the U.S. Census,<sup>235</sup> and other state and local resources. Studying the data with a foodshed rubric might help us make real progress in the twenty-first century. This progress is not only overdue, but also essential to our health and security. Readers should consider the foodshed model a foundation for realizing a sustainable, healthful, and just future for American food.

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233. See *The Census of Agriculture*, U. S. DEP'T OF AGRIC., <http://www.agcensus.usda.gov/> (last visited May 29, 2011).

234. See *supra* note 232.

235. See U.S. CENSUS BUREAU, <http://www.census.gov/> (last visited May 29, 2011).