State Preemption of Local Control Over Intensive Livestock Operations

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Summary

Attempts to regulate intensive livestock operations at the local level have met stiff resistance from state legislatures. Local governments, frustrated by the hands-off approach of federal and state law, have tried to pass local ordinances that address potential detrimental impacts to the water, air, and quality of life from factory farms in their communities. Yet, increasingly, state legislatures have blocked these efforts. States preempt local control in three main ways: by setting statewide standards for agricultural operations that cannot be exceeded by local law; by prohibiting local zoning and often local health ordinances for agricultural operations; and by broadening Right to Farm laws to supersede local ordinances. In the absence of additional regulation or enforcement of existing regulation, those who are most affected by industrial agriculture are left with no way to address perceived harms.

The nature of agriculture has changed, yet the way we regulate its environmental and public health effects has not. Many contemporary livestock operations are now industrial in nature and can have significant environmental and health impacts on the communities in which they are located. But even as the scale, intensity, and impacts of agriculture have grown, environmental law has continued to take a hands-off approach. Federal environmental laws largely exempt agricultural activities, as does most state law. In fact, at the state level, agriculture is not just unregulated, it tends to be actively protected in a way that no other industry is.[1] In the absence of federal and state regulation, the only remaining governmental option is local laws. But many state legislatures have actively worked to take that option away.

States have routinely delegated decisions about zoning, siting, construction, permit issuance, enforcement and inspections, environmental control, and health to local governments. Even where regulatory authority has been retained at the state level, states have historically allowed local governments to enact rules that are more stringent than state rules.[2] However, in recent years, when local governments around the country have attempted to exercise their authority to regulate intensive livestock operations, a number of state legislatures have intervened to take such control away. This state preemption is occurring even in states that grant local governments broad "home rule" powers.

This Article explores how many localities have attempted to regulate industrial livestock operations and what state legislatures have done to undermine these local efforts, effectively taking away local residents' democratic right to control what is happening in their communities. The Article surveys some of the increasingly well-documented environmental and health impacts of intensive livestock operations, the origins and desirability of local governing authority, and the various ways that local control[3] is being stifled by state legislatures. A concluding appendix contains detailed state-specific examples that support the contention that the agriculture industry is granted extraordinary protections, despite its environmental impacts. Whatever merit there may have been historically to exempting the agricultural sector from basic environmental protections no longer squares with the reality of industrial livestock production in 2014—especially when it comes to the needs of directly affected communities and citizens.

1. Every state has a "Right to Farm" Act, but no state has, for example, a "Right to Smelt" Act.
2. *See, e.g.*, Iowa Code §331.301(6) (2013).
3. As used in this Article, "local control" refers to the ability of local governments to regulate proposed or existing intensive livestock operations located in their communities.

I. Intensive Livestock Operations and Their Impacts on Local Communities

Many contemporary livestock operations are no longer bucolic farms, but rather industrial-scale operations with huge concentrations of animals. Since 1978, the number of pigs, chickens, cows, and cattle raised for meat and dairy has almost tripled, but the number of farms on which they are raised has decreased by almost one-half.[4] In 2012, the 3,006 largest hog and pig operations averaged almost 15,000 animals each.[5]

Of the approximately 1.2 million[6] farms with livestock and poultry in the United States, the U.S. Environmental Protection Agency (EPA) estimates that 450,000[7] are animal feeding operations (AFOs),[8] where livestock and poultry are confined, reared, and fed. Of these AFOs, an estimated 18,622[9] are concentrated animal feeding operations (CAFOs),[10] which confine large numbers of animals and meet certain pollutant discharge criteria. The number of large operations has been increasing in recent years, as livestock raising has become more concentrated in fewer, larger operations. The U.S. Department of Agriculture (USDA) estimates that from 1982 to 1997, the total number of livestock operations decreased by 24% and total operations with confined livestock similarly fell by 27%.[11] At the same time, the number of animals raised at large feedlots increased by 88%, and the number of large feedlots/CAFOs increased by 51%.[12]

Intensive livestock operations are blamed for a broad range of environmental, public health, social, and animal welfare harms.[13] For example, the systematic feeding of maintenance doses of antibiotics to promote faster animal growth and prevent infections that tend to occur under intensive confinement conditions is implicated in the development of antibiotic-resistant bacteria that are transferred from animals to humans, posing significant risks for human health.[14] The extremely close quarters in which animals are housed inhibits their ability to express natural behaviors, or often even turn around.[15]

A number of harms, discussed further below, are disproportionately borne by those living nearby. The mostly rural communities in which intensive livestock operations are located can endure water contaminated by nitrogen and pathogens, higher rates of respiratory and other diseases, depressed property values, and a reduced quality of life as residents are forced to curtail normal daily activities because of poor air quality.[16] These impacts to the air and water quality, the health of workers, and the quality of life of community residents are the primary targets of local attempts to regulate intensive livestock operations.

4. U.S. Dep't of Agric. (USDA), Nat'l Agric. Statistics Serv., *2012 Census of Agriculture—United States Data*, tbl. 1. Historical Highlights: 2012 and Earlier Census Years, *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf. In 1978, 3,164,399,774 pigs, dairy cows, beef cattle, and broiler hens were raised on 1,743,315 farms. In 2012, 8,567,430,404 such animals were raised on 888,185 farms. Data on the number of laying hens is not available for censuses prior to 2007, so these animals are not included in the comparison.
5. USDA Nat'l Agric. Statistics Serv., *2012 Census of Agriculture—United States Data*, tbl. 19. Hogs and Pigs—Inventory: 2012 and 2007, *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_017_019.pdf. In 2007, 3,006 farms had 5,000 or more hogs and pigs, and these farms reported an inventory of 44,719,035 animals.
6. USDA, Nat'l Agric. Statistics Serv., *2012 Census of Agriculture—United States Data*, tbl. 1. Historical Highlights: 2012 and Earlier Census Years, *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.
7. *National Pollutant Discharge Elimination System (NPDES), Animal Feeding Operations, Frequently Asked Questions*, U.S. EPA, http://cfpub.epa.gov/npdes/faqs.cfm?program_id=7 (last visited Apr. 26, 2014).
8. EPA defines an AFO as an agricultural operation where animals are raised and kept confined for 45 days or more in a 12-month period, and where feed is brought to the animals rather than the animals grazing or foraging. U.S. EPA, *National Pollutant Discharge Elimination System (NPDES), Animal Feeding Operations, Overview*, http://cfpub.epa.gov/npdes/home.cfm?program_id=7 (last visited Apr. 26, 2014).
9. U.S. EPA, *NPDES CAFO Rule Implementation Status—National Summary, Endyear 2012*, completed 12/31/12 (as reported by EPA Regions), *available at* http://www.epa.gov/npdes/pubs/afo_tracksum_endyear2012.pdf.
10. An AFO is characterized as a CAFO by EPA based on the number of animals at the facility, whether the facility has a man-made ditch or pipe that carries manure or wastewater to surface water or the animals come into contact with surface water that passes through the area where they are confined, or if the facility has been designated as a CAFO by the permitting authority as a significant contributor of pollutants. *See* 40 C.F.R. Part 122.23.
11. USDA, Natural Resources Conservation Service, *Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States*, Publication No. nps00-579, 17 (Dec. 2000), *available at* http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/?cid=nrcs143_014126.
12. *Id.* at 18.
13. *See, e.g.*, Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America* (April 2008); David Osterberg, MS, & David Wallinga, MD, *Addressing Externalities From Swine Production to Reduce Public Health and Environmental Impacts*, 94 Am. J. Pub. Health 1703 (2004); U.S. Government Accountability Office (GAO), *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality From Pollutants of Concern*, GAO-08-944, 23-26 (Sept. 2008), reviewing 15 studies completed since 2002 that "directly link pollutants from animal waste to human health or environmental impacts," *available at* http://www.gao.gov/new.items/d08944.pdf.
14. National Research Council, *Antibiotic Resistance: Implications for Global Health and Novel Intervention Strategies: Workshop Summary*, The National Academies Press (2010), *available at* http://www.nap.edu/openbook.php?record_id=12925&page=1.
15. Pew Commission on Industrial Farm Animal Production, *Technical Report: The Welfare of Animals in Concentrated Animal Feeding Operations*, *41 (July 2008), *available at* http://www.ncifap.org/_images/212-7_PCIFAP_AmlWlBng_FINAL_REVISED_7-14-08.pdf.
16. Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, National Association of Local Boards of Health, 8 (2010). *See also* Steve Wing et al., *Air Pollution and Odor in Communities Near Industrial Swine Operations*, 116 (10) Envtl. Health Persp. 1362 (Oct. 2008).

A. *Water Quality Impacts*

Intensive livestock operations can pose special problems for water quality because of the large volume of waste they generate and the concentrated nature of their potential discharges. In the preindustrial days of farming, animals and crops were raised on the same farm and waste from the animals served to fertilize the crops. While many operations still do land apply, the volume of waste produced may exceed the soil's absorptive capacity.[17] USDA estimates that around 500 million tons of manure are produced annually by intensive livestock and poultry operations.[18] This is more than three times the EPA estimate of the amount of human sanitary waste produced annually in the United States.[19] However, human waste must be treated before it is released into the environment, unlike the significantly larger amount of animal waste produced each year.[20]

Animal waste from intensive livestock operation is typically stored onsite in a "manure lagoon," but these lagoons can leak or overflow during heavy rains, releasing contaminants such as nitrogen and phosphorus, organic matter, sediments, pathogens, heavy metals, hormones, antibiotics, and ammonia into surface or groundwater. Contaminants from animal wastes can also enter the environment from runoff following an application of waste to farm fields, or atmospheric deposition followed by dry or wet fallout.[21] Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, fish advisories, algal blooms and oxygen-depleted "dead zones," contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.[22]

B. *Air Quality Impacts*

In addition to polluting ground and surface water, intensive livestock operations can adversely affect air quality. Air emissions from intensive livestock operations can include coarse and fine particulates, bioaerosols, endotoxins, hydrogen sulfide, ammonia, volatile organic compounds, odoriferous microbial organic compounds, and greenhouse gases.[23] Many of these emissions are implicated in acute and chronic respiratory diseases including sinusitis, chronic bronchitis, inflamed mucous membranes of the nose, irritation of the nose and throat, headaches, and muscle aches and pains.[24] A 2002 study by the Environmental Health Sciences Research Center at the University of Iowa concluded that, based on national data, "CAFO air emissions may constitute a public health hazard."[25]

An estimated 25% of CAFO workers suffer from such respiratory diseases,[26] and other studies have found that these workers experience a progressive decline in lung function over years.[27] Workers experience respiratory symptoms from ammonia at exposure levels that are as little as one-half of the recommended maximum.[28] Endotoxin is thought to be responsible for many of the respiratory problems of CAFO workers because of its highly inflammatory properties.[29] And in addition to documentation of severe injury and even death from acute exposures to high levels of hydrogen sulfide,[30] a number of studies have shown adverse health effects from exposure to even brief, low concentrations.[31]

The health effects of these emissions can extend beyond just the workers and can affect the nearby community. In several studies, neighbors of intensive hog operations reported a higher incidence of specific diseases compared with control groups.[32] Proximity to intensive livestock operation can also have psychological effects: in a North Carolina study, residents near swine facilities reported higher

17. U.S. GAO, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality From Pollutants of Concern*, GAO-08-944, 18-23 (Sept. 2008).
18. U.S. EPA, *Compliance and Enforcement National Priority: Concentrated Animal Feeding Operations (CAFOs)*, *1, *available at* http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2008prioritycwacafo.pdf.
19. U.S. EPA, *Compliance and Enforcement National Priority: Concentrated Animal Feeding Operations (CAFOs)*, *1 (updated 12/11/09).
20. Hribar, *supra* note 16, at 2.
21. Viney P. Aneja et al., *Agricultural Ammonia Emissions and Ammonium Concentrations Associated With Aerosols and Precipitation in the Southeast United States*, 108 J. Geophysical Res. 4152 (2003).
22. Union of Concerned Scientists, *The Hidden Cost of CAFOs, Issue Briefing*, 4-5 (Sept. 2008). *See also* Jan L. Flora et al., *Hog CAFOs and Sustainability: The Impact on Local Development and Water Quality in Iowa*, 17-18 (Oct. 2007), *available at* http://www.iowapolicyproject.org/2007docs/071018-cafos.pdf.
23. *See* Peter S. Thorne, *Air Quality Issues*, *in* Iowa Concentrated Animal Feeding Operations Air Quality Study: Final Report 35 (Envtl. Health Sci. Ctr., Univ. of Iowa, 2002); *see also* Marc Schenker et al., *Respiratory Health Hazards in Agriculture*, 158 Am. J. Respiratory & Critical Care Med. S1 (1998), *available at* http://www.thoracic.org/statements/resources/eoh/agriculture1-79.pdf.
24. *Executive Summary*, *in* Iowa Concentrated Animal Feeding Operations Air Quality Study: Final Report 5, 5-6 (Envtl. Health Sci. Ctr., Univ. of Iowa, 2002).
25. *Id.* at 7.
26. Based on more than 70 published papers addressing adverse health effects of workers in swine confinement operations. Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 (2) Envtl. Health Persp. 317, 318 (Feb. 2007).
27. Kendall M. Thu, *Public Health Concerns for Neighbors of Large-Scale Swine Production Operations* 8 (2) J. Agric. Safety & Health 175, 177 (2001). *See also* Susan Schiffman et al., *Symptomatic Effects of Exposure to Diluted Air Sampled From a Swine Confinement Atmosphere on Healthy Human Subjects*, 113 (5) Envtl. Health Persp. 567 (2005).
28. Katie G. McElroy, *Environmental Health Effects of Concentrated Animal Feeding Operations: Implications for Nurses*, 34 (4) Nursing Admin. Q. 311, 313 (2010) (citing Susanna Von Essen & Kelley J. Donham, *Illness and Injury in Animal Confinement Workers*, 14 (2) Occupational Med. 337 (1999)).
29. *Id.*
30. Schiffman et al., *supra* note 27, at 567; *see also* Centers for Disease Control and Prevention, *Fatalities Attributed to Entering Manure Waste Pits—Minnesota, 1992*, 269 (24) J. Am. Med. Ass'n 3098, 3102 (1993), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00020468.htm.
31. James A. Merchant et al., *Human Health Effects*, *in* Iowa Concentrated Animal Feeding Operations Air Quality Study: Final Report 147, 148-49 (Envtl. Health Sci. Ctr., Univ. of Iowa, 2002).
32. *See* Steve Wing & Susanne Wolf, *Intensive Livestock Operations, Health, and Quality of Life Among Eastern North Carolina Residents*, 108 (3) Envtl. Health Persp. 233-38 (2000); Donham et al., *supra* note 26, at 317; Kendall M. Thu et al., *A Control Study of the Physical and Mental Health of Residents Living Near a Large-Scale Swine Operation*, 3 (1) J. Agric. Safety & Health, 13 (1997).

levels of tension, anger, fatigue, confusion, and depression when odors from neighboring facilities were strongest.[33]

C. Community Impacts

Less often discussed, but just as important as the physical and psychological health impacts of intensive livestock operations, are the economic and social impact to rural communities. In five decades of social science research on the effects of industrialized farming on communities, researchers have found higher income inequality, lower community employment, decreases in property values, detrimental impacts to the "social fabric" of the community, and loss of local autonomy.[34]

Intensive livestock operations are often promoted as enhancing the local economy through capital investment, increased employment, and expanded tax revenue that will permit increased funding for schools and infrastructure.[35] Further, it is argued that the effects of using local materials, feed, and livestock will ripple throughout the local economy.[36] But critics argue that few CAFO jobs go to local residents, and that salaries are barely above minimum wage.[37] They argue that the influx of new residents employed by CAFOs strains existing public services, like schools and roads, and the relatively low wages these workers receive increases the demand for social services.[38] Additionally, it is argued that local communities see little benefit from increased sales at local businesses because large farms tend to procure their inputs, including building materials, equipment, feed, and animals, from outside the community where they can get better prices and a wider selection.[39] A Michigan study found that small hog farms spend almost 50% more at local businesses than large farms do, primarily because the larger farms buy feed in bulk from sources outside of the community.[40] And the odors and potential exposure to toxins are believed to deter new nonagricultural businesses, further hampering economic growth.[41]

Other studies show a decrease in property values in communities near intensive livestock operations. One study estimated an average loss of about $2.68 million in value for the land within three miles of each CAFO in Missouri.[42] Extrapolating this data to an assumed 9,900 CAFOs in the United States, the Union of Concerned Scientists estimates that property values near U.S. CAFOs have fallen a total of about $26 billion.[43]

Perhaps the least tangible, but by no means the least detrimental, impact is the decrease in "social capital" that these communities experience. Residents of rural communities near intensive livestock operations report a decreased quality of life because of a need to change their daily activities due to intensive odors. Residents report that they keep windows closed, avoid sitting in the yard or on the porch and socializing with friends, dry their clothes indoors, minimize outdoor exercise and walks, do not put up Christmas lights, and do not garden or mow their lawn.[44] Some even report difficulty sleeping.[45] Many rural residents comment that it is difficult to plan social activities, like barbecues, because they never know if the air will be tolerable for guests.[46]

The noxious odors and stress of having an intensive livestock operation for a neighbor can result in an increase in psychological distress and a decrease in perceived personal control.[47] Studies done using mood scales have shown frequent mood changes, increased depression and anxiety, feelings of post traumatic stress disorder, anger, and fatigue in people who live near CAFOs, as compared with people who do not.[48] Declining property values, controversy within communities over the necessity of CAFOs, and an overall decreased perceived quality of life add to the stress experienced by CAFO neighbors.[49]

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33. Susan Schiffman et al., *The Effect of Environmental Odors Emanating From Commercial Swine Operations on the Mood of Nearby Residents*, 37 (4) Brain Res. Bull. 369 (1995).
34. Curtis W. Stofferahn, *Industrialized Farming and Its Relationship to Community Well-Being: An Update of a 2000 Report by Linda Lobao*, Prepared for the State of North Dakota, Office of the Attorney General, 30-32, *available at* http://www.und.edu/org/ndrural/Lobao%20&%20Stofferahn.pdf.
35. Brief for Iowa Farm Bureau Fed'n, Iowa Cattlemen's Assoc. et al., as Amici Curiae Supporting Plaintiffs-Appellees, Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257; 2004 Iowa Sup. LEXIS 274 (Iowa 2004) (No. 82 / 03-0552) at *1.
36. Hribar, *supra* note 16.
37. Jack L. Runyan, *Almost Half of Hired Farmworkers 25 Years or Older Earn Poverty-Level Wages*, 11 Rural Conditions & Trends 47 (1999): Farmworkers associated with CAFOs earn about 58% as much as all wage and salary workers; *see also* John Ikerd, *Confronting CAFOs Through Local Control*, http://web.missouri.edu/~ikerdj/papers/Idaho%20CAFOs%20--%20Local%20Control.htm (last visited Apr. 26, 2014).
38. Ikerd, *supra* note 37.
39. Stofferahn, *supra* note 34, at 28 (quoting Mark Drabenstott & Tim R. Smith, *The Changing Economy of the Rural Heartland in Economic Forces Shaping the Rural Heartland*, Kansas City: Federal Reserve Bank (1996)); *see also* Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 (2) Envtl. Health Persp. 317, 317 (Feb. 2007), and John W. Chism & Richard A. Levins, *Farm Spending and Local Selling: How Do They Match Up?*, 676 Minn. Agric. Econ. 1 (1994): Farms with a gross income of $100,000 made nearly 95% of their expenditures locally, while farms with gross incomes in excess of $900,000 spent less than 20% locally.
40. Jan L. Flore et al., *Social and Community Impacts*, *in* Iowa Concentrated Animal Feeding Operations Air Quality Study: Final Report 147, 148-49 (Envtl. Health Sci. Ctr., Univ. of Iowa, 2002).
41. E. Paul Durrenberger & Kendall M. Thu, *The Expansion of Large Scale Hog Farming in Iowa: The Application of Goldschmidt's Findings Fifty Years Later*, 55 Hum. Org. 409 (1996).
42. Doug Gurian-Sherman, Union of Concerned Scientists, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations*, 61 (Apr. 2008) (citing Hamed Mubarak et al., *The Impacts of Animal Feeding Operations on Rural Land Values*, Report R-99-02, College of Agriculture, Univ. of Missouri-Columbia (May 1999)).
43. Union of Concerned Scientists, *supra* note 22, at 5.
44. Steve Wing et al., *Air Pollution and Odor in Communities Near Industrial Swine Operations*, 116 (10) Envtl. Health Persp. 1362, 1365 (Oct. 2008).
45. *Id.*
46. Jan L. Flora et al., *Social and Community Impacts*, *in* Iowa Concentrated Animal Feeding Operations Air Quality Study: Final Report 147, 150 (Envtl. Health Sci. Ctr., Univ. of Iowa, 2002).
47. Susan Bullers, *Environmental Stressors, Perceived Control, and Health: The Case of Residents Near Largescale Hog Farms in Eastern North Carolina*, 33 (1) Hum. Ecology 1 (Feb. 2005).
48. McElroy, *supra* note 28, at 315 (citing Thu, *supra* note 27, and Donham et al., *supra* note 26).
49. *Id.* (citing Donham et al., *supra* note 26).

II. Limited Federal and State Regulatory Tools

Despite the multitude of detrimental effects that can be experienced by rural communities, tools to regulate intensive livestock operations are limited. Under the federal Clean Water Act (CWA),[50] certain large-scale intensive livestock operations are considered "point sources," and must obtain a permit under the national pollutant discharge elimination system (NPDES) provisions of the Act. However, this only includes AFOS above a threshold number of animals, and attempts to regulate even these large operations have been thwarted by judicial determinations that narrowly interpret the statutory language.[51] Of the estimated 18,622 CAFOs in the United States, only 35% have received such permits.[52]

The CWA allows the NPDES permit program to be administered by states; 45 states have elected to do so.[53] These state programs vary widely in effectiveness, and several state programs have come under fire in recent years. In 2011, EPA's Office of Inspector General issued a report faulting the Georgia Environmental Protection Division and EPA Region 4 for "significant deficiencies" in the management and oversight of CAFOs, concluding that "there is a significant risk that Georgia's CAFO program is failing to protect water quality."[54] Advocacy groups have filed "de-delegation" petitions to have NPDES programs in Illinois, Iowa, and Vermont placed under federal control because of alleged failures to regulate CAFOs. Following an investigation and report issued by EPA in 2010, the Illinois EPA entered into an agreement identifying specific actions that it would take to comply with CWA requirements for authorized state NPDES programs.[55] This workplan was replaced in February 2013.[56] By the end of 2012, only 33 of the estimate 500 CAFOs in Illinois had received permits.[57] In Iowa, it took almost six years from the filing of the de-delegation petition for the Iowa Department of Natural Resources to finally sign a proposed workplan.[58]

EPA recognizes that much more needs to be done to regulate CAFOs and has identified "Preventing Animal Waste From Contaminating Surface and Ground Water" as a National Enforcement Initiative beginning in 2008 and most recently continuing into fiscal years 2014-2016. These initiatives are set every three years and are intended to focus civil and criminal enforcement resources and expertise on serious pollution problems affecting communities.[59] In addition, in July 2013, EPA issued a Criminal Enforcement Alert, intended to "increase public awareness of the consequences of knowing or negligent CWA violations by animal confinement operations."[60] But it is difficult to see how this alert will lead to increased enforcement in the absence of additional enforcement resources or data collection—in July 2012, the Agency abandoned plans to develop a reporting rule that would have allowed the Agency to collect important basic operating information about CAFOs.[61] In August 2013, five nonprofit organizations sued EPA over its decision to withdraw this proposed rule.[62]

Like water contamination, air emissions from intensive livestock operations are essentially unregulated because there are no federally mandated air quality monitoring programs for CAFOs in the United States, and only a small number of states have instituted their own monitoring.[63] Under the terms of a 2005 settlement with the agriculture industry, EPA granted facilities a waiver from Clean Air Act (CAA)[64] enforcement actions if they participated in a study of their emissions.[65] Through this voluntary monitoring of emissions at hog, dairy, and broiler operations in a number of states, EPA hopes to develop emissions-estimating methodologies that could be used to assess and regulate facilities.[66] Unwilling to wait for this potentially protracted process, in August 2013, a number of Iowa residents who live, work, or have children who attend school near an intensive hog operation filed a citizen suit, claiming that EPA has a nondiscretionary duty to list hydrogen sulfide and ammonia from AFOs as criteria pollutants, and to list AFOs as point sources under the CAA.[67]

One potential federal regulatory tool is the Emergency Planning and Community Right-to-Know Act (EPCRA),[68] under which facilities must report releases of certain chemicals and "hazardous substances" above certain thresholds.[69] In July 2012, the Humane Society of the United States (HSUS) filed a Notice of Intent to bring citizen

50. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
51. *See* National Pork Producers Council v. EPA, 635 F.3d 738, 41 ELR 20115 (5th Cir. 2011).
52. *NPDES CAFO Rule Implementation Status*, *supra* note 9.
53. *Id.*
54. U.S. EPA, Office of Inspector General, Evaluation Report, *Region 4 Should Strengthen Oversight of Georgia's Concentrated Animal Feeding Operation Program*, Report No. 11-P-0274, *3 (June 23, 2011).
55. U.S. EPA, *Illinois Program Work Plan Agreement Between Illinois EPA and Region 5* (entered into 02/24/11), *available at* http://www.epa.gov/region5/illinoisworkplan/.
56. U.S. EPA, *Illinois Program Work Plan for 2013 Agreement Between Illinois Environmental Protection Agency and Region 5* (entered into 02/04/13), *available at* http://www.epa.gov/region5/illinoisworkplan/.
57. *NPDES CAFO Rule Implementation Status*, *supra* note 9.
58. *Final Work Plan Agreement Between Iowa Department of Natural Resources (IDNR) and EPA Region 7*, *available at* http://www.epa.gov/region7/water/pdf/ia-workplan-cafo.pdf.
59. U.S. EPA, *National Enforcement Initiatives*, http://www.epa.gov/compliance/data/planning/initiatives/index.html (last visited Apr. 26, 2014).
60. U.S. EPA, Criminal Enforcement Alert, *EPA Targets Clean Water Act Crimes—Illegal Pollution by Animal Confinement Operations Punished by Fines and Incarceration*, EPA 310 N 13 013 (July 2013), *available at* http://www2.epa.gov/sites/production/files/documents/cr-cafo-06-13.pdf.
61. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 77 Fed. Reg. 42679 (July 20, 2012).
62. Environmental Integrity Project et al. v. U.S. EPA, No. 1:13-cv-1306 (D.D.C. Aug. 28, 2013).
63. Thorne, *supra* note 23, at 35.
64. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
65. Inside EPA, *Seeking to Permit CAFOs, EPA Urged to Quickly Fix Emissions Methods* (July 6, 2012).
66. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005).
67. Complaint, Zook et al. v. EPA et al., No. 1:13-cv-01315-RJL (D.D.C. Aug. 29, 2013).
68. 42 U.S.C. §§11001-11050, ELR Stat. EPCRA §§301-330.
69. *Emergency Planning and Notification*, 40 C.F.R. §355 (2011). *See also* 42 U.S.C. §11004; 40 C.F.R. §302.4; 40 C.F.R. §355, app. A.

suits against 51 pig confinement operations in Iowa, North Carolina, and Oklahoma for "unreported releases of the hazardous pollutant ammonia."[70] HSUS alleges that these producers violated EPCRA by failing to report releases of ammonia that exceeded the threshold of 100 pounds of ammonia within a 24-hour period.[71]

In general, federal environmental regulation of agriculture has been described by one observer as a vast "anti-law," brought about by a "nearly unbroken" series of congressional decisions to exclude farms and farming from the burdens of federal environmental law.[72] And, for the most part, states have followed suit.[73] In many cases, even where a state may have its own laws governing livestock operations, county officials perceive an unwillingness to enforce these laws.[74] Thus, county supervisors conclude that they have little choice but to try to regulate intensive livestock operations at the local level.[75]

III. Origins of Local Regulatory Power

A lack of federal and state regulatory tools, or simply a lack of enforcement of existing authorities, has led many local governments to turn to using their own authority to regulate intensive livestock operations. However, since local governments draw their regulatory power from their respective state, this legal avenue has proven complicated. The U.S. Constitution reserves the basic right of states to make laws governing the "safety, health, welfare, and morals" of their inhabitants. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."[76] Local governments are not contemplated in the Constitution, and thus it is up to the states to create local governments and delegate power to them.

States delegate their police powers to local governments in two ways. First, the state can grant specific authorities to local governments through enabling legislation. The basis for this authority is often cited as Dillon's Rule, and it allows municipalities to exercise only the limited powers specifically granted by the state, the powers necessary to carry out the specifically granted powers, and the powers indispensable to the declared purposes of the municipality.[77] Zoning is an example of a police power that is granted to local governments through specific state enabling legislation.[78]

Beginning in the early 1900s, some states adopted a new form of legislation known as "home rule," which is essentially the converse of Dillon's Rule. Where Dillon's Rule limits local government power to specific allocations, Home Rule allows local governments broad power to adopt ordinances without state intervention, as long as they do not contravene state statutes and constitutions.[79] The home rule doctrine is founded upon the idea that local government best reflects the desires and preferences of citizens on issues affecting their daily lives.[80] All but six states provide for some form of home rule authority.[81]

A grant of home rule authority is operationalized through a state constitutional provision or a legislative action. For example, in 1976, Iowa amended its constitution to allow for county home rule authority.[82] The Iowa Legislature describes a county's powers broadly and permits a county to "exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents."[83] South Carolina amended its constitution in 1973 to permit home rule, and the legislature codified this authority in the 1975 "Home Rule Act."[84] The South Carolina Supreme Court interpreted that state's home rule amendment as "effectively abolish[ing] Dillon's Rule . . . ."[85] and suggested this was warranted because "different local governments have different problems that require different solutions."[86]

While courts construe the authority granted to local governments under home rule to be broader than that granted under Dillon's Rule, home rule authority is not unlimited.[87] Even in states such as Iowa and South Caro-

70. The Humane Society of the United States, *The HSUS Serves Notices of Intent to Sue More Than 50 Pig Confinement Facilities for Toxic Air Pollution* (July 11, 2012), http://www.humanesociety.org/news/press_releases/2012/07/hsus_intent_to_sue_pig_confinement_facilities_071112.html (last visited Apr. 26, 2014).
71. *Id.*
72. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 Ecology L.Q. 263, 267 (2000).
73. *Id.*
74. Christopher A. Novak, *Agriculture's New Environmental Battleground: The Preemption of County Livestock Regulations*, 5 Drake J. Agric. L. 429, 437 (2000).
75. When Humboldt County, Iowa, supervisor Harlan Hansen was asked why the county passed its ordinances, he reportedly stated: "The fault lies with the Iowa Legislature for inadequately protecting the public from possible pollution by large livestock operations . . . We had to pass the ordinances because of the inadequacies of current legislation regulating the livestock industry." Jerry Perkins, *County Officials "Never Dreamed" of Livestock Ruckus*, Des Moines Reg., Apr. 22, 1997, at 9S.
76. U.S. Const. amend. X; Brown v. Maryland, 25 U.S. 419, 443 (1827); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).
77. *Municipal Corporation*, West's Encyclopedia of American Law (2005), http://www.encyclopedia.com/doc/1G2-3437703005.html (last visited Apr. 26, 2014); Dillon's Rule is derived from *Clinton v. Cedar Rapids*, 24 Iowa 455 (1868), and was adopted by the U.S. Supreme Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).
78. Wendy K. Walker, *Whole Hog: The Preemption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 Val. U. L. Rev. 461, 467 (2001).
79. *Id.* at 477.
80. Dale Krane et al., Home Rule in America: A Fifty State Handbook 1 (CQ Press 2001).
81. *Municipal Home Rule in the 50 States*, Community Environmental Legal Defense Fund, http://celdf.org/home-rule-in-the-states (last visited Apr. 26, 2014).
82. Jennifer K. Bower, *Hogs and Their Keepers: Rethinking Local Power on the Iowa Countryside*, 4 Great Plains Nat. Resources J. 261, 269 (2000).
83. Iowa Code §331.301(1) (2013).
84. S.C. Const. Ann. art. VIII; Act No. 283 of 1975.
85. Hospitality Ass'n of South Carolina v. County of Charleston, 320 S.C. 219, 225, 464 S.E.2d 113, 117 (S.C. 1995).
86. *Id.* at 120.
87. *See, e.g.*, *Hospitality Ass'n of South Carolina*, 320 S.C. 219. Under Dillon's Rule, South Carolina courts had been required to "construe the powers of local governments strictly and narrowly," but the Home Rule amendment to the constitution mandated a liberal construction of the powers and duties of local government, including all such powers which might be fairly implied and "not prohibited by the Constitution." 320 S.C. at 225, n.4.

lina, which grant home rule authority, courts have upheld state preemption of local laws regarding agriculture. In general, such preemption has been permitted because, even under home rule authority, local ordinances may not be "inconsistent" with state law.[88] Courts have ruled that any local law that imposes additional conditions beyond those required under state law is "inconsistent" because it prohibits something that would have been allowed under state law.[89] The Iowa Supreme Court ruled that even where home rule authority is granted in the state constitution, state legislative preemption is constitutional because it is within the state's superior authority to take back power from local governments.[90] Thus, even in states that grant home rule authority, local power to regulate agriculture can be constrained as if the state followed Dillon's Rule.

IV. The Battle Over Local Control

The battle over local control of intensive livestock operations pits those who believe the state should regulate all agriculture against those local governments and citizens who believe that they are in the best position to know what is appropriate in their community. Proponents of state preemption argue that local governments unfairly discriminate against livestock operations[91] and that the expansion of agriculture is necessary to spur economic development, create jobs, and create new income streams and tax revenues.[92] State preemption of local action is claimed to be justified by "the need to prevent dual regulation which would result in uncertainty and confusion,"[93] and by the recognition that "some matters, by their very nature, inherently require uniform and consistent treatment at the state level and are inappropriate subjects for local regulation."[94] The South Carolina Legislature went so far as to argue that preemption was necessary "in the interest of homeland security and in order to secure the availability, quality and safety of food produced in South Carolina."[95] Others have argued that preemption is necessary because states are the only political entities with sufficient resources to evaluate potential environmental and health risks.[96]

Advocates of local control argue that federal and state laws, by necessity, can establish only minimum, not maximum, levels of health and environmental protection because risks vary among localities due to differences in topography and climate and in soils and water resources.[97] They argue that state legislatures are not responding quickly enough to address the serious public health threats posed by these intensive operations, and local elected officials who necessarily live in the same place as their constituents have a greater awareness and understanding of local concerns.[98]

Surveys show that citizens believe that intensive livestock operations *should* be regulated at the local level. A 1979 survey of citizen attitudes toward zoning in 20 northern Wisconsin counties found that 83% of respondents favored local, instead of state, control of zoning for agricultural lands.[99] A survey conducted in 1995 by Iowa Citizens for Community Improvement found that 83% of respondents believed that county officials should have the power to use zoning laws to regulate the building of large-scale confinement operations.[100] And a January 2003 survey indicated that 64% of Iowans want more of a voice in how livestock operations are sited in their counties.[101] Yet, when citizens and local governments have tried to exercise this preference and regulate intensive livestock operations at the local level, state governments have intervened to preempt or curtail these efforts.

V. State Preemption of Local Control

States preempt or curtail local government control of intensive livestock operations in three main ways, each of which is discussed in more detail below. First, states preempt local control by outlining statewide standards for agricultural operations that cannot be exceeded by local law.[102] If a livestock operation meets these (often lax) standards, a local government can neither deny it an operating permit, nor impose additional conditions in any permit. Second, states preempt local control by prohibiting local zoning, and often local health ordinances[103] for agricultural operations. Finally, every state has a "Right to Farm" law that limits private and public nuisance claims against farms, and in recent years, many of these laws have been broadened to prohibit nuisance claims against even industrial-scale oper-

88. *See, e.g.*, Iowa Const. art. III, §39A.
89. *See, e.g.*, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998).
90. Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257, 265 (Iowa 2004).
91. *See, e.g.*, *Comments of Senator Jubelirer*, Legislative Journal-Senate, 633 (Pa. July 4, 2005).
92. *See, e.g.*, Dave Swenson & Liesl Eathington, *Agriculture and Agriculture Related Manufacturing Economic Impacts in Iowa*, Department of Economics, Iowa State Univ. (Feb. 2013); Brief for Iowa Farm Bureau Fed'n, Iowa Cattlemen's Assoc. et al., as Amici Curiae Supporting Plaintiffs-Appellees, Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257; 2004 Iowa Sup. LEXIS 274 (Iowa 2004) (No. 82/03-0552).
93. Worth Cnty. Friends of Agric., 688 N.W.2d at 262 (citing Mo. Pac. R.R. v. Bd. of County Comm'rs, 231 Kan. 225, 643 P.2d 188, 192 (Kan. 1982)).
94. *Id.* (quoting 56 Am. Jur. 2d *Municipal Corporations* §329, at 368 (2000)).
95. S.C. Code Ann. §46-45-10 (2012).
96. Brief for Iowa Farm Bureau Fed'n, Iowa Cattlemen's Assoc. et al., as Amici Curiae Supporting Plaintiffs-Appellees, Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257; 2004 Iowa Sup. LEXIS 274 (Iowa 2004) (No. 82/03-0552) at *1.
97. Ikerd, *supra* note 37.
98. Brief for Sierra Club, Iowa Farmers Union et al., as Amici Curiae Supporting Defendants-Appellants, Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257; 2004 Iowa Sup. LEXIS 274 (Iowa 2004) (No. 82/03-0552) at **12-14.
99. Jack R. Huddleston & Thomas M. Krauskopf, *Further Evidence Concerning Local Control of Land Use*, 56 Land Econ. 471, 471 (1980).
100. Morris Smith, Letter to the Editor. The Daily Rep. (Spencer, Iowa), May 14, 1996, at 4.
101. Perry Beeman, *Iowans: Put New Hog Lots on Hold*, Des Moines Reg., Feb. 5, 2003, at 1B.
102. *See, e.g.*, Iowa Code §459.305 (2013); Wis. Stat. §93.90 (2012).
103. In one state, Missouri, the right of local governments to regulate based on health ordinances has been upheld.

ations and to explicitly preempt local ordinances governing nuisance actions.[104]

A. *Creation of Statewide Standards That Cannot Be Exceeded*

States preempt local control by outlining statewide standards for agricultural operations that cannot be exceeded by local law. If a livestock operation meets these standards, a local government must grant it an operating permit without imposing any additional conditions. For example, Wisconsin's Livestock Facility Siting Law tasks the Wisconsin Department of Agriculture, Trade, and Consumer Protection with creating state standards for new or expanding livestock operations that have more than 500 animal units. As discussed in the Appendix, a 2012 Wisconsin Supreme Court decision found that a local government could not deny a permit for an operation that met the state standards, and could not impose additional restrictions on the grant of a permit for an operation that met the state standards.[105]

Similarly, Iowa has adopted a "Master Matrix," a 44-question scoring system that assesses water, air, and community impacts of a proposed operation.[106] An overall score determines if a permit is granted for a particular operation. Counties must "opt in" to the Matrix system in order to have any input at all into the permit process, but the ultimate authority to issue a permit rests with the Iowa Department of Natural Resources.[107] Iowa's Master Matrix is discussed in more detail in the Appendix.

B. *Preemption of Local Zoning Ordinances*

In many states, agriculture receives preferential treatment in zoning, or is exempted from zoning altogether. For over one century, courts have upheld local governments' right to zone land to restrict uses deemed to be detrimental to the general welfare, morals, health, and safety of community residents. Zoning power has been used to ban the sale or manufacture of alcohol in certain areas,[108] to outlaw the manufacture of oleomargarine,[109] to cease operation of a brickyard when city limits spread to incorporate it,[110] to prohibit industrial development in certain areas,[111] to ban nude dancing,[112] and to limit the location of "adult" businesses.[113] Yet, despite this historically broad authority to zone for a wide range of social ills, many states expressly exempt agriculture from local zoning control.[114] For example, Arizona prohibits local regulation of land used for "general agricultural purposes."[115] Iowa prohibits counties from zoning land used for "agricultural purposes,"[116] and the Iowa Supreme Court has ruled that intensive livestock operations are "agriculture" for purposes of the zoning exemption.[117] Missouri prohibits the regulation of "farm buildings or farm structures," and courts have found that anything related to farming, including finishing buildings and sewage lagoons, are "farm structures."[118]

Michigan amended its Right to Farm Act in 1999 to prohibit any local regulation that "conflicts" with the Act, and courts have interpreted this to mean that any local ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct permitted by the Act.[119] Idaho amended its Act to void any local zoning ordinance that forces the closure of any agricultural operation operated in accordance with "generally recognized agricultural practices."[120]

C. *Preemption of Local Health Ordinances*

As efforts to control intensive livestock operations based on zoning have failed, many counties have turned to regulating for the "health, safety and welfare of the public."[121] These attempts have had mixed results.

As discussed further in the Appendix, the Iowa Supreme Court ruled that a state provision that prohibited county "regulation" of livestock operations was broad enough to prohibit local health ordinances.[122] Humboldt County passed a series of ordinances that imposed additional requirements for financial assurance, groundwater protection, and toxic air emissions beyond what was required by state law. Because Iowa's home rule statute prohibits local ordinances that are "inconsistent" with state law, the Court found that the Humboldt ordinances were preempted because they would "prohibit what the state law permits."[123]

In contrast, courts have upheld Missouri counties' attempts to enact health regulations. This power is statutorily granted: Mo. Rev. Stat. Chapter 192.300 permits county commissions and county health center boards to "make and promulgate ordinances or regulations as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county. . . ."[124] In *Borron v. Farrenkopf*,[125] the Missouri Court of Appeals upheld a Linn County

104. *See, e.g.*, Ark. Code Ann. §§2-4-101 to 2-4-108; Colo. Rev. Stat. §§35-3.5-101 to 35-3.5-103; Ga. Code Ann. §41-1-7; S.C. Code Ann. §46-45-60.
105. Adams v. State Livestock Facilities Siting Review Bd., 2012 WI 85, slip op. at 23-25 (Wis. July 11, 2012).
106. Iowa Code §459.305 (2013).
107. Iowa Code §459.304(3) (2013).
108. Mugler v. Kansas, 123 U.S. 623 (1887).
109. Powell v. Pennsylvania, 127 U.S. 678 (1888).
110. Hadacheck v. Sebastian, 239 U.S. 394 (1915).
111. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
112. Barnes v. Glen Theatre, 501 U.S. 560 (1991).
113. City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).
114. Novak, *supra* note 74, at 442.
115. Ariz. Rev. Stat. §11.811(A)(6).
116. Iowa Code §335.2. *See also* 55 Ill. Comp. Stat. 5/5-12001; Kan. Stat. Ann. §19-2908.
117. *See* Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995); Kuehl v. Cass County, Iowa, 555 N.W.2d 686 (Iowa 1996).
118. Mo. Rev. Stat. ch. 65.677.
119. Charter Township of Shelby v. Papesh, 704 N.W.2d 92, 103 (Mich. Ct. App., 2005).
120. Idaho Code §22-4504.
121. Novak, *supra* note 74, at 443.
122. Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257 (Iowa 2004).
123. Goodell v. Humboldt County, 575 N.W.2d 486, 501 (Iowa 1998).
124. Mo. Rev. Stat. 192.300.
125. Borron v. Farrenkopf, 5 S.W.3d 618, 622 (M. Ct. App. 1999).

ordinance that established minimum building and setback requirements for AFOs, finding that it was not a zoning ordinance, but was indeed a health ordinance because its purpose was to "regulate for health concerns rather than for a uniform development of real estate." However, Missouri's authority to regulate based on health has come under steady attack in the legislature. Most recently, language was added to a bill regarding political subdivisions that would have exempted agricultural operations from Chapter 192.300.[126] The bill was defeated by the Missouri House of Representatives in May 2012. For a fuller analysis of these "health" ordinances and legislative attempts at preemption, see the Appendix.

Pennsylvania has adopted an unusual model of state preemption in that it prohibits "unauthorized local ordinances" generally, and allows farmers to challenge such ordinances by requesting that the Attorney General intervene to bring action against the municipality.[127] Pennsylvania Act 38, or the "Agricultural, Communities, and Rural Environment Act" (ACRE) is discussed at more length in the Appendix. Between July 2005 and July 2013, farmers brought 97 complaints under the Act.[128]

D. Preemption Through Right to Farm Acts

All 50 states limit private and public nuisance liability against farming operations through Right to Farm Acts.[129] Right to Farm Acts were originally intended to offer nuisance immunity to established operations that only become "nuisances" due to changes in land use in nearby areas.[130] A number of states' Acts still explicitly conform to this original goal.[131] Many Acts only protect farming operations that operate reasonably or non-negligently, and within "sound" or "best" agricultural practices as defined by a state Commission or panel.[132] Other Acts protect operators that employ methods or practices that are "commonly or reasonably associated with agricultural production."[133]

However, over time, many Right to Farm Acts have been amended to have a much broader reach and to explicitly preempt local ordinances governing nuisance actions, and even to preempt zoning ordinances.[134] For example, Idaho amended its Act to void any local ordinance that declares an agricultural facility operated in accordance with "generally recognized agricultural practices" to be a nuisance.[135] The Idaho Act goes further and voids any "zoning" ordinance that would force the closure of any agricultural operation, agricultural facility, or expansion that is operated in accordance with generally recognized agricultural practices.[136] Michigan's Right to Farm Act was amended to preempt local ordinances that conflict with the state Act or with "generally accepted agricultural and management practices" developed under the Act, and courts have interpreted this to preempt zoning ordinances. Similarly, South Carolina amended its Right to Farm Act to void all local ordinances governing an agricultural facility or operation that are not identical to state law and regulations, except for ordinances governing new swine or new slaughterhouse operations.[137] For an analysis of how the state was able to reconcile such a sweeping state law with its grant of home rule authority to local governments, see the Appendix.

Only a handful of states explicitly permit local control of agriculture in their Right to Farm Acts. For example, Vermont's Right to Farm Act states that "[n]othing in this section shall be construed to limit the authority of state or local boards of health to abate nuisances affecting the public health."[138]

E. Are Intensive Livestock Operations "Agriculture?"

Because Right to Farm Acts and zoning restrictions only pertain to "agriculture," some localities have challenged the inclusion of intensive livestock operations within the scope of the definition of the word "agriculture." They argue that the enormous change in scale and concentration of livestock operations since most Right to Farm Acts were first passed so fundamentally alters their impacts that such operations should no longer be considered "agriculture." In 1978, an average livestock operation had an inventory of 130 pigs, 33 dairy cows, or 96,467 broiler hens.[139] By 2012, the average number of pigs had increased more than eightfold, the average number of dairy cows had more than quadrupled, and the number of broiler hens had almost tripled.[140] Additionally, the number of farms owned by corporate interests, rather than individuals or families, more than doubled.[141] The largest 2.8% of livestock operations now produce more than 63% of the animals, dairy, and eggs sold in the United States.[142]

126. H. Comm. Substitute for S. Comm. Substitute S.B. 692, 96th Gen. Assemb. 2nd Reg. Sess., *67 (Mo. 2012).
127. 3 Pa. Cons. Stat. §§311-318, P.L. 112, No. 38, H.B. 1646, 2005-2006 Reg. Sess. (Pa. 2005).
128. Kathleen G. Kane, *Eighth Annual Report of the Attorney General to the General Assembly Pursuant to Section 318 of Act 38 of 2005 "ACRE" Agriculture, Communities and Rural Environment* at *3 (2013).
129. Elizabeth R. Rumley, *States' Right-to-Farm Statutes*, The National Agricultural Law Center, http://nationalaglawcenter.org/state-compilations/right-to-farm/ (last visited Apr. 26, 2014).
130. *Id.*
131. *See, e.g.*, Del. Code. Ann. tit. 3, §1401, Neb. Rev. Stat. §2-4403.
132. *See, e.g.*, Me. Rev. Stat. Ann. tit. 7, §153, Mich. Comp. Laws §286.472(d).
133. *See, e.g.*, Colo. Rev. Stat. §35-3.5-102.
134. Va. Code Ann. §3.2-302(C). *See also* Ala. Code §6-5-127(c), Ark. Code Ann. §2-4-105, Ky. Rev. Stat. Ann. §413.072(7).
135. Idaho Code §22-4504 (2012).
136. *Id.*
137. S.C. Code Ann. §46-45-60 (2012).
138. Vt. Stat. Ann. tit. 12, §5753.
139. USDA, Nat'l Agric. Statistics Serv., *2007 Census of Agriculture—United States Data*, tbl. 1. Historical Highlights: 2007 and Earlier Census Years, *available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf.
140. USDA, Nat'l Agric. Statistics Serv., *2012 Census of Agriculture—United States Data*, tbl. 1. Historical Highlights: 2012 and Earlier Census Years, *available at* http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_001_001.pdf. In 2012, the average livestock operation had an inventory of 1,044 pigs, 144 dairy cows, and 256,967 broilers.
141. *Id.* In 1978, 50,231 farms were owned by corporate interests. In 2012, this number was 106,716.
142. USDA, Nat'l Agric. Statistics Serv., *2012 Census of Agriculture—United States Data,* tbl. 44. Farms by Concentration of Market Value of Agricultural Products Sold: 2012, *available at* http://www.agcensus.usda.gov/Pub-

For the most part, challenges that intensive livestock operations are commercial or industrial, and not "agricultural," have proven unsuccessful. In *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*,[143] the Missouri Supreme Court upheld a lower court's grant of summary judgment in favor of Premium Standard Farms, finding that the company's proposed hog finishing buildings and sewage lagoons were exempt from Lincoln County's zoning ordinance because they were "structures" "incident to the raising of livestock, which is farming." In *Thompson v. Hancock County*, the Iowa Supreme Court found that a proposed confinement hog operation was not a "feedlot" subject to county zoning control because the pigs would be raised in an enclosed structure, not an open area.[144] The Court further stated that the proposed operation fell under the zoning exemption for "agricultural purposes" because the facilities were part of the "evolving agricultural functions" associated with a particular farming operation.[145]

In contrast, the South Dakota Supreme Court, in *Cordell v. Codington County*,[146] held that a hog production facility was both a commercial and agricultural operation for purposes of local zoning. This decision has less significance than it might because South Dakota does not exempt agricultural uses in its grant of zoning powers to its municipalities—the issue before the Court was not whether the operation was exempt from zoning because it was agricultural, but whether local setback requirements for commercial operations applied to the facility.[147]

In at least two instances, discussed in more detail in the Appendix, the state legislature has intervened to explicitly include intensive livestock operations in the definition of agriculture. In 2011, Idaho amended its Right to Farm Act to extend the activities that are protected by the Act.[148] Protected agricultural activities now include any "agricultural facility" such as "any land, building, structure, ditch, drain, pond, impoundment, appurtenance, machinery or equipment" or any expansion of such operations, and enlarges the definition of "agricultural operation" to include preparing land for agricultural production, applying pesticides or herbicides, any construction, expansion, use, maintenance and repair of an agricultural facility, and any "noise, odors, dust, fumes, light and other conditions associated with an agricultural operation or an agricultural facility."[149]

After an Arizona court found that a 3,000-cow pen-feeding operation should be regulated like a commercial feedlot, and not like "general agriculture" for the purposes of zoning, the Arizona Legislature passed a bill that explicitly included this type of operation under the definition of "general agriculture."[150] Arizona law permits local zoning for "canneries, fertilizer plants, refineries, commercial feed lots, meat packing plants, tallow works, and other like businesses," but exempts land used for "general agricultural purpose."[151] The court found that the intensive dairy operation was "like" a feedlot and not "agricultural," leading the Arizona Legislature to amend the statute to provide that dairy operations, including areas designated for the "raising of replacement heifers or bulls owned by the same dairy operation" are "general agriculture" and are not included in the type of facilities that require zoning approval.[152] The Arizona case study in the Appendix discusses the court's reasoning, and the legislature's reaction, in more detail.

F. Other Methods of State Preemption

Other methods of state preemption of local control of livestock operations warrant a brief mention here, but are not discussed in more detail in the Appendix. In 2009, a number of states passed legislation that expressly preempts any local laws regarding animal welfare standards. Oklahoma Statute §2-2-4c prohibits local governments from passing or enforcing any "order, ordinance, or regulation concerning the care and handling of livestock within its jurisdiction that is more restrictive than rules promulgated by the Oklahoma Department of Agriculture, Food, and Forestry."[153] Section 2-1-6 of Georgia's Official Annotated Code prohibits any "local ordinance, rule, regulation, or resolution regulating crop management or animal husbandry practices involved in the production of agricultural or farm products on any private property."[154] South Carolina's Code §47-4-160 prohibits local governments from passing "ordinances, orders, or other regulations concerning the care and handling of livestock and poultry" except new swine and new slaughterhouse operations.[155]

Other state legislatures have moved to limit damages and award court costs in nuisance suits brought and lost against agricultural operations. Such costs are usually awarded at the discretion of the court, and are typically only assessed if the court finds that the action was frivolous or brought maliciously. Such legislative proposals are not examples of state interference with local municipal control, but they warrant a mention here because similar proposals are pending, or even in effect, in many

lications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_044_044.pdf. In 2012, 27,678 farms out of 984,957 accounted for $112 billion of the $177 billion in sales of cattle, cows, milk from cows, hogs, pigs, poultry, and eggs.

143. Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234, 238 (Mo. 1997).
144. Thompson v. Hancock County, 539 N.W.2d 181, 184 (Iowa 1995).
145. *Id.* at 183.
146. Thomas R. Head III, *Local Regulation of Animal Feeding Operations: Concerns Limits, and Options for Southeastern States*, 6 Envtl. Law. 503, 574 (1999-2000) (citing Cordell v. Codington County, 526 N.W.2d 115, 118 (S.D. 1994)).
147. *Id.*
148. Idaho Sess. Laws 2011, ch. 229, and codified at Idaho Code §§22-4501 et seq.
149. Idaho Code §22-4502.
150. S.B. 1411, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
151. Ariz. Rev. Stat. §11.811(A)(6); Ariz. Rev. Stat. §11-812(A)(2).
152. S.B. 1411, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
153. 2 Okla. St. §2-4c (Laws 2009, ch. 180 (HB 2151).
154. O.C.G.A. §2-1-6 (H.B. 529, 2009-2010 Reg. Sess. (Ga. 2009)).
155. S.C. Code Ann. §47-4-160 (S. 453, 2009-2010 Gen. Assemb., 118th Sess. (S.C. 2009)). The South Carolina Legislature overrode a veto by then-Governor Mark Sandford.

states and because they are examples of state legislatures' attempts to discourage local citizen challenges to intensive livestock operations.[156]

Most recently, two states have moved to protect farming operations by amending their state constitutions. In 2012, North Dakota amended its constitution to provide absolute protection to farmers to engage in "modern" farming, ranching, and livestock production practices, and to prohibit *any* law that would abridge that right.[157] Indiana is considering a constitutional amendment that would allow only the General Assembly to enact laws governing the agricultural or commercial production of meat, fish, poultry, or dairy products.[158] The proposed amendment was approved by the General Assembly in 2011 and, if approved by a second consecutive General Assembly, will be sent to Indiana voters for ratification.[159]

VI. Conclusion

The nature of agriculture has changed dramatically since the first industry-protective Right to Farm Acts were passed, but the way we regulate its environmental consequences has not. The environmental and health impacts of what are often industrial-scale operations disproportionately affect the neighbors and communities where these operations are located, yet these very residents and communities have little say in how such facilities are regulated. By setting statewide standards for agricultural operations and then prohibiting any local deviation or enhancement, by explicitly exempting agricultural operations from local zoning control, and by prohibiting local health ordinances only when they pertain to agricultural operations, state legislatures are stripping the power of citizens to address very real harms. This would be less problematic if there were an avenue at the state or federal level to address these harms, but in the absence of additional regulation or enforcement of existing regulation, those people most affected by industrial agricultural operations are left with no redress.

Appendix: Case Studies

Following are examples of various state approaches to preemption of local control with respect to intensive livestock operations. This is not intended to be a comprehensive survey of state barriers to local control.

Arizona

In Arizona, the legislature reacted to a judicial determination that intensive dairy operations should be regulated like commercial feedlots, and not excluded from regulation as "general agriculture," by passing a bill that explicitly included these types of operations under the definition of "general agriculture."[160]

In *County of Cochise v. Faria*,[161] the Farias owned a dairy farm on land that was zoned "heavy industry." In 2006, they began operations across the street (on land zoned "residential" for four-acre lots), adding a 3,000-cow pen-feeding operation.[162] Prompted by neighbor complaints about flies, odor, and potential groundwater contamination, the county zoning inspector told the Farias that they would have to have the property rezoned to heavy industrial or obtain a special-use permit.[163] The Farias applied for a special-use permit, but the county denied it.

The Farias appealed to the Cochise County Board of Supervisors and contended that they did not need a special-use permit because the feeding operation fell within the definition of "general agricultural purpose" and thus was exempt from regulation under Ariz. Rev. Stat. §11-830(A)(2) (now §11-812(A)(2)).[164] The County argued that the Farias' feeding operation was not "agriculture," but was a "commercial feed lot," explicitly subject to regulation under Arizona Rev. Stat. §11-821.01 (now §11-811(A)(6)).[165] Arizona law requires local zoning for "canneries, fertilizer plants, refineries, commercial feed lots, meat packing plants, tallow works, and other like businesses."[166]

In July 2009, the appeals court upheld the finding by the trial court that the Farias' pen-feeding operation constituted a "like business" under the zoning statute and could be regulated by Cochise County "like" a commercial feedlot. The court noted that if the legislature believed commercial feedlots and "like" businesses fell within the

156. *See, e.g.*, Wis. Stat. §823.08(4)(b); Mo. Rev. Stat. §537.295(5); 740 Ill. Comp. Stat. 70/4.5; S.D. Codified Laws §21-10-25.6; H.B. 1091, 2012 Leg., 2d Reg. Sess. (Ind. 2012); H. 0166, 61st Leg., 1st Reg. Sess. (Idaho 2011). Missouri limits compensatory damages that can be awarded to a claimant to the fair market value of the property affected. The Missouri and South Dakota statutes, and the Indiana proposal, takes the discretion to award costs away from the court only if the nuisance action was "frivolous," or "initiated maliciously, or groundless." In Illinois, and as proposed in Idaho, a prevailing farm operator is awarded costs in all circumstances.

157. N.D. Const. art. XI, §29.

158. Indiana SJ 7, 2013 First Regular Session; status at http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2013&session=1&request=getBill&docno=0007&doctype=SJR#latest_info (last visited Apr. 26, 2014).

159. Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, Bloomberg Businessweek (Jan. 9, 2014), http://www.businessweek.com/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield (last visited May 5, 2014).

160. S.B. 1411, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

161. County of Cochise v. Faria, Court of Appeals of Arizona, Div. 2, Dept. A, No. 2 CA-CV 2008-0146, at ¶ 2 (June 16, 2009).

162. *Id.*

163. Carol Broeder, *Cochise County Sues Faria Dairy Over Its Pen Feeding Operation*, Douglas Dispatch (Ariz.), Sept. 8, 2007, *available at* http://www.douglasdispatch.com/articles/2007/09/08/news/news4.txt.

164. *County of Cochise*, at ¶ 3. Section 11-812(A)(2) states: "Nothing contained in any ordinance authorized by this chapter shall: Prevent, restrict or otherwise regulate the use or occupation of land or improvements for . . . general agricultural purposes, if the tract concerned is five or more contiguous commercial acres."

165. *Id.* at ¶ 1. Section 11-§11-811(A)(6) states: "The county planning and zoning commission shall designate and zone appropriate areas of reasonable size in which there may be established with reasonable permanency canneries, fertilizer plants, refineries, commercial feed lots, meat packing plants, tallow works, and other like businesses."

166. Ariz. Rev. Stat. §11.811(A)(6).

category of general agricultural purposes, it would not have then explicitly provided protection to such businesses under the zoning statute, by making sure they have a "zone" within which to operate.[167]

Within eight months of the Court's decision, the Arizona Legislature was considering a bill that explicitly included all aspects of dairy farming in the "general agricultural purpose" exemption.[168] SB 1411 was signed into law on May 11, 2010, and provides that dairy operations, including areas designated for the "raising of replacement heifers or bulls owned by the same dairy operation" are "general agriculture" and are not included in the type of facilities that require zoning approval.[169]

Idaho

Idaho is another example of a state with a very broad definition of agriculture, as protected by its Right to Farm Act. Idaho's Right to Farm Act prohibits the adoption of any local ordinance or resolution that declares any agricultural operation operated in accordance with generally recognized agricultural practices to be a nuisance and prohibits the adoption of any zoning ordinance that forces the closure of any such agricultural operation.[170] This provision was part of amendments made in 2011 that also expanded the activities that are protected by the Act as "agricultural."[171] As amended, Idaho Code §22-4502 now defines agricultural activities covered by the Act to include any "agricultural facility" such as "any land, building, structure, ditch, drain, pond, impoundment, appurtenance, machinery or equipment" or any expansion of such operations, and enlarges the definition of "agricultural operation" to include preparing land for agricultural production, applying pesticides or herbicides, any construction, expansion, use, maintenance and repair of an agricultural facility, and any "noise, odors, dust, fumes, light and other conditions associated with an agricultural operation or an agricultural facility."[172]

The amended Act further provides that any local ordinance that declares any agricultural operation, agricultural facility or expansion thereof that is operated in accordance with "generally recognized agricultural practices" to be a nuisance, or that requires abatement as a nuisance or forces the closure of any such agricultural operation or agricultural facility "shall be void and shall have no force or effect."[173] "Generally recognized agricultural practices" is not defined by the Act.

Another bill that would have automatically awarded court costs, expenses, and attorneys fees to an owner or operator of an agricultural operation or an agricultural facility that prevailed in a nuisance action died in committee.[174]

Iowa

An assessment of the state of law in Iowa provides additional insights into what constitutes agriculture. Since 1947, Iowa law has prohibited counties from zoning land used for "agricultural purposes."[175] However, it was not clear that intensive livestock operations were included in the definition of agriculture until two court challenges in 1995 and 1996.

David and Holly Thompson had farmed grain and raised hogs for over 20 years when they proposed an expansion to accommodate contract growing of 4,500 "feeder" pigs in five hog confinement buildings.[176] Hancock County claimed that the proposed operation did not fall under the agricultural exemption to zoning. The Iowa Supreme Court disagreed. Although Iowa law permits zoning of a "feedlot,"[177] the Court in *Thompson v. Hancock County*[178] found that the proposed operation was not a feedlot because the Thompsons would be raising pigs in an enclosed structure, not an open area. Further, the Court found that the proposed operation fell under the exemption for "agricultural purposes" because the facilities were part of the "evolving agricultural functions" associated with a particular farming operation.[179] The court defined "agriculture" very broadly, as "the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock."[180]

This definition of "agriculture" was reinforced in 1996 in *Kuehl v. Cass County, Iowa*.[181] Another proposed hog confinement facility, this time in Cass County, claimed it was exempt from county zoning regulations. The Supreme Court again agreed. The Court referred to the statutory language, which provided that no zoning ordinance applies to "land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used." Applying the broad definition of "agriculture" from earlier cases, the Court found that "the structures proposed to be erected . . . are primarily adapted for agricultural use by reason of the nature of the structures."[182]

Following this decision, many Iowa counties stopped trying to regulate agriculture using zoning laws and instead tried to regulate for "health and safety" based on home rule

167. *County of Cochise*, at ¶ 12.
168. S.B. 1411, 49th Leg., 2nd Reg. Sess. (Ariz. 2010) was introduced on Feb. 2, 2010.
169. *Id.*
170. Idaho Code §22-4504 (2012).
171. The amendments discussed in this section were originally introduced as H.B. 166, but were later split into two bills, H.B. 210 and H.B. 211. H.B. 210 was signed into law as Idaho Sess. Law 2011, Chapter 229, and codified at Idaho Code §§22-4501 et seq. H.B. 211 died in committee.
172. Idaho Code §22-4502 (2012).
173. Idaho Code §22-4504 (2012).
174. H.B. 211, 61st Leg., 1st Reg. Sess. (Idaho 2011).
175. Iowa Code §335.2 (2103).
176. Thompson v. Hancock County, 539 N.W.2d 181, 182 (Iowa 1995).
177. Iowa Code §172D.4 (2013).
178. *Thompson*, 539 N.W.2d at 184.
179. *Thompson*, 539 N.W.2d at 183.
180. *Id.* (quoting Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d 454, 457-58 (Iowa 1971)).
181. Kuehl v. Cass County, Iowa, 555 N.W.2d 686 (Iowa 1996); Iowa Code §335.2
182. *Kuehl,* 555 N.W.2d, 688-89.

authority.[183] In 1996, Humboldt County responded to an increasing number of hog containment operations springing up in the county by passing a series of ordinances that applied to large livestock confinement feeding facilities.[184] The ordinances imposed additional permit, financial assurance, groundwater protection, and toxic air emissions requirements beyond what was required by state law.[185]

Shortly after they were enacted, the ordinances were the subject of a court challenge by the Humboldt County Livestock Producers and three residents of Humboldt County who planned to construct hog confinement facilities that would be affected."[186] The case wound its way to the Iowa Supreme Court. At issue before the Supreme Court was whether the four ordinances were preempted by a 1995 law, House File 519, which was designed in part to "promote the expansion of animal agriculture . . . by protecting persons engaged in the care and feeding of animals."[187] H.F. 519 laid out the minimum distances a new or expanding AFO must be away from a neighboring residence, business, school, church, or public use area, and set forth other requirements for operators, such as the development of a manure management plan. If an operator complied with the requirements of the Act and was granted a permit by the state, the Act granted the operator a rebuttable presumption that an AFO is not a public or private nuisance under the Act or under principles of common law.[188] Although H.F. 519 was silent on preemption of local power, it was perceived by many as "stripping all zoning authority regarding industrial animal confinements from local elected officials and opening the floodgates for factory hog farms. . . ."[189]

In *Goodell v. Humboldt County*,[190] the farmer plaintiffs argued that the comprehensive nature of H.F. 519 indicated that the legislature intended to preempt local government from regulating in this area. In contrast, the County claimed that such ordinances were permissible under the grant of home rule authority provided for in the state constitution. Iowa's home rule authority is contained in Article III §39A, which states that counties have the power "to determine their local affairs and government," but only to the extent such power and authority is "not inconsistent with the laws of the general assembly."[191] The County further relied on a provision in the Iowa Code that states: "A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise."[192]

In 1998, the Iowa Supreme Court found that, although the provisions of H.F. 519 did not expressly preempt a number of ordinances adopted by Humboldt County under its home rule authority, the ordinances were "inconsistent" with state law and were therefore preempted.[193] In its analysis, the court recognized that when a state law merely sets a standard, a local law that sets a higher standard would not be inconsistent with or conflict with that state law.[194] However, where a state has conditioned pursuit of an activity upon compliance with certain requirements, local government attempts to add to those requirements would conflict with state law because the "local law would in effect prohibit what the state law permits."[195] In this instance, the court found that Humboldt County's ordinances conflicted with state law, as opposed to being just more stringent, and therefore were preempted by state law.[196]

Shortly before the *Goodell* decision was released, the Iowa Legislature took additional steps to expressly preempt local livestock ordinances.[197] In 1998, H.F. 2494 added code §331.304A, which specifically precludes a county from adopting or enforcing county legislation regulating "a condition or activity occurring on land used for the production, care, feeding, or housing of animals unless the regulation of the production, care, feeding, or housing of animals is expressly authorized by state law."[198]

A test of this provision came in 2001, when Worth County passed a "Rural Health and Family Farm Protection Ordinance." The ordinance set concentration limits for odorous or toxic air contaminants, established a complaint-driven monitoring system, required livestock operations to meet indoor air quality standards and test employees for diseases that may compromise pulmonary function, and required the installation of underground water monitoring wells.[199] A month after the ordinance passed, a collection of agricultural groups filed suit.

The district court found that the Worth County ordinance was void and unenforceable because state law expressly preempted its subject matter.[200] The County appealed to the Supreme Court, which affirmed the lower court decision.[201] The court stated that when the Worth County ordinance was "stripped of its health label," it was "clearly exposed" as an attempt to regulate livestock operations contrary to state law.[202] The court further found the state law constitutional, because the state's home rule

183. Novak, *supra* note 74, at 443.
184. *Id.* at 450. The number of hogs produced in Humboldt County increased from 182,114 in 1987 to 218,792 in 1992, despite a reduction in the number of pork producers.
185. Goodell v. Humboldt County, 575 N.W.2d 486, 489-90 (Iowa 1998).
186. *Id.* at 491.
187. H.F. 519, 76th Gen. Assemb. (Iowa 1995), at 30-34 to 31-1, codified at Iowa Code §657.11.
188. H.F. 519, 76th Gen. Assemb. (Iowa 1995).
189. Dave Murphy, Food Democracy Now!, *Iowa Governor 2010: Who Will Be the Worst Environmental Governor of the 21st Century?*, Huffington Post, Oct. 29, 2010, http://www.huffingtonpost.com/dave-murphy/election-2010-in-iowa-for_b_774530.html (last visited Apr. 26, 2014).
190. *Goodell*, 575 N.W.2d at 493.
191. *Id.* at 492.
192. Iowa Code §331.301(6) (2013).
193. *Goodell*, 575 N.W.2d 486.
194. *Id.* at 501.
195. *Id.*
196. *Id.* at 507-8. For a deeper analysis of this case, see Head, *supra* note 146.
197. Novak, *supra* note 74, at 456.
198. Iowa Code §331.304A (2013).
199. Worth County Rural Health and Family Farm Protection Ordinance, WCO 06-01.
200. Worth Cnty. Friends of Agric. et al. v. Worth Cnty. Iowa et al., 688 N.W.2d 257, 261 (Iowa 2004).
201. *Id.* at 259.
202. *Id.* at 264.

amendment permits the legislature to exercise its superior power to take power back from counties.[203]

Iowa has now adopted new statewide standards for AFOs known as the Master Matrix.[204] The Matrix is a 44-question scoring system with point allocations in the categories of water, air, and community impacts. Applicants must obtain a minimum overall score of 440 out of 880 possible points, with at least 53.38 "air" points, 67.75 "water" points, and 101.13 "community impacts" points in order to obtain a permit.[205] A county must adopt the Matrix each year in order to be able to challenge a construction permit granted under it.[206] In 2014, all but 11 Iowa counties had adopted the Matrix.[207] Although counties are allowed to have some input to the permitting process, the ultimate authority to issue a permit for a livestock operation rests with the Iowa Department of Natural Resources.[208] Critics contend that the scoring system is so lax that the Matrix has yet to be used to deny a single permit.[209] Still, the Master Matrix is currently "the only tool counties have at their disposal to provide any input."[210] As now-Governor Terry Branstad stated while campaigning in 2010, "[l]ocal control is something that won't ever happen in Iowa."[211]

Michigan

Michigan's Right to Farm Act prohibits any local regulation that "conflicts" with the Act, and courts have interpreted this to mean that any local ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the Act. Michigan's original Right to Farm Act, passed in 1981, provided farmers some protection from nuisance suits, but allowed local land use control through zoning.[212] As recently as the 1995 amendments to the Act, farmers that conformed to "generally accepted agricultural and management practices" (GAAMPs) as determined by the Michigan Commission of Agriculture were immune from nuisance suits; however, they were not immune from citations for violations of local ordinances if the standards set out in the ordinance differed from those set out in the GAAMPs.[213]

In response to a growing number of conflicts over concentrated animal feedlots, the Michigan Legislature amended the Right to Farm Act in 1999 to preempt local control, including the power to zone for agriculture.[214] One of the apparent impetuses for the 1999 amendments is the case of *Travis v. Preston*.[215] In 1996, the Preston brothers opened a 4,000-head hog facility and were quickly sued by neighbors who claimed that the operation violated a township ordinance prohibiting "obnoxious" glare, dust, odors, fumes, and smoke from leaving property lines.[216] The trial court awarded the plaintiffs $58,000 in damages and, on appeal, the case was remanded. The case reportedly cost the Prestons $100,000 to defend and this high cost is cited as an example of the "negative impact on agriculture from local ordinances" that led to the 1999 amendments.[217]

Like the 1981 Right to Farm Act, the 1999 Act provides that a farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation conforms to GAAMPs according to policy determined by the Michigan Commission of Agriculture.[218] New to the 1999 Act, however, was the provision that

> it is the express legislative intent that this act pre-empt any local ordinance, regulation or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or GAAMPs developed under this act.[219]

However, a local unit of government may propose an ordinance that sets "standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government." Such ordinances require the approval of the Commission of Agriculture after review by the Departments of Agriculture, Environmental Quality, and Community Health.[220]

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203. *Id.* at 265.
204. Iowa Code §459.305 (2013), added by Senate File 2293 (2002 Iowa Acts, ch. 1137), effective Mar. 1, 2003.
205. Iowa Department of Natural Resources, *Master Matrix Document*, *available at* http://www.iowadnr.gov/Environment/LandStewardship/AnimalFeedingOperations/Confinements/ConstructionRequirements/Permitted/MasterMatrix.aspx.
206. Iowa Code §459.304(3) (2013).
207. Iowa Dept. of Natural Resources, *Status of Construction Evaluation Resolutions by County* (Feb. 3, 2014), *available at* http://www.iowadnr.gov/Portals/idnr/uploads/afo/files/CER_2014.pdf.
208. Iowans Down Wind, *About The Master Matrix Process in Iowa*, http://iowansdownwind.com/wp_archive/wp_1/matrix_process.html (last visited Apr. 26, 2014).
209. Christine Schrum, *Hog Confinement Health Risks*, The Iowa Source, Aug. 2005, http://www.iowasource.com/health/CAFO_airqu_0805.html (last visited Apr. 26, 2014).
210. Iowans Down Wind, *supra* note 208.
211. Jason Hancock, *Branstad: Local Control Will Never Happen*, The Iowa Indep., Oct. 12, 2010, http://iowaindependent.com/44729/branstad-local-control-will-never-happen (last visited Apr. 29, 2014). Terry Branstad was governor of Iowa from 1983 and 1999 and was largely credited with the passage of H.F. 519. Sensing a "need for change," Branstad again ran for governor and won in the 2010 election. *See About the Governor*, Office of the Governor of Iowa, https://governor.iowa.gov/about/ (last visited Apr. 26, 2014).
212. Mich. Comp. Laws §286.473a (repealed 1999).
213. Patricia E. Norris & Gary D. Taylor, *Michigan's Right to Farm Act and New Generally Accepted Agricultural and Management Practices: Public Act 261 of 1999 (SB 205)* 3, Michigan State Univ. Extension Land Use Series (Dec. 1999).
214. Public Act 261 of 1999 (SB 205); Walker, *supra* note 78, at 476.
215. Travis v. Preston, 247 Mich. App. 190 (2001).
216. *Id.* at 192-93.
217. Walker, *supra* note 78, at 479-80.
218. Mich. Comp. Laws §286.473 (2013).
219. Mich. Comp. Laws §286.474(6) (2013).
220. Elizabeth Moore et al., Michigan State Univ. Extension, *Public Policy Analysis—Right to Farm Amendments, Public Act 261 of 1999 (SB 205)* (Feb. 2000), *available at* http://www.msue.msu.edu/objects/content_revision/download.cfm/revision_id.346416/workspace_id.213590/Right%20to%20Farm%20Amendments,%20Public%20Act%20261%20of%201999%20(SB%20205).url/.

Although some believe that local officials may adopt ordinances that address standards unrelated to those addressed by the GAAMPs,[221] two appeals court decisions call this into question. In *Charter Township of Shelby v. Papesh*,[222] the township passed an ordinance that restricted a "farm" to a minimum of three acres. Because the Papesh's farm was just over one acre, the township argued that it was not a "farm" and thus not protected by Michigan's Right to Farm Act (RTFA). The appeals court found against the township, stating, ". . . the RTFA no longer allows township zoning ordinances to preclude farming activity that would otherwise be protected by the RTFA. Rather, any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA."[223] Because no GAAMP limited farming to property consisting of more than three acres, the ordinance "conflicts" with the RTFA in that it allows the township to preclude a protected farm operation by limiting the size of a farm."[224] In 2006, the Court reiterated this position in the case of *Papadelis v. City of Troy*.[225] A white paper prepared by the Michigan State University Extension states: "The *Papesh* and *Papadelis* decisions have the effect of not only conferring nuisance immunity on certain farm operations but also exempting them from local zoning regulations."[226]

Equally problematic for those who advocate for local control is the method of statutory interpretation used by the court. Section 286.473(3)(1) of the Right to Farm Act states that a farm shall not be found to be a nuisance if it conforms to GAAMPs. Section 286.473(3)(2) states that a farm shall not be found to be a nuisance due to a change in the land use or occupancy of land within one mile. In its analysis, the *Shelby* court read the two clauses as operating independently. The Michigan Association of Planning argues that this interpretation gives farm operations the right to move into even residential areas and qualify for nuisance protection as long as the operation conforms to GAAMPs.[227]

A more recent challenge to the preemption provisions of the Right to Farm Act came from an unexpected source—the city of Detroit. As part of its urban revitalization efforts and as a way to provide residents with better access to fresh foods, Detroit has become a leader in urban gardening and is even the subject of a short film, *Urban Roots*.[228] However, the growth in the number of farms has prompted the Detroit City Planning Commission to begin to develop local ordinances for farming within city limits—ordinances that could be preempted by the state Right to Farm Act.[229] Citing concern that current law would permit someone to raise "pigs right next door to somebody trying to raise a normal family," a state senator announced that he would propose legislation to exempt cities of a certain size from Michigan's Right to Farm Act.[230] Although it does not appear that such legislation was ever introduced, Michigan's Department of Agriculture and Rural Development amended the GAAMPS in January 2012 to exempt cities with a population of 100,000 or more "in which a zoning ordinance has been enacted to allow for agriculture."[231] In March 2013, Detroit's City Council passed such an ordinance, although animal agriculture within the city limits is expressly prohibited.[232]

Missouri

Similar to other states in this Appendix, Missouri has adopted an expansive definition of what constitutes agriculture, but in contrast to other states, Missouri still permits counties to enact "health" ordinances governing intensive livestock operations.

Missouri grants broad zoning powers to counties and townships. However, Chapter 65.677 prohibits the regulation or the requirement of permits "with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures."[233] Attempts by Missouri counties and townships to use their "zoning" authority to regulate intensive livestock operations have been struck down by courts as improper regulation of "farm structures."

In *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*,[234] the Missouri Supreme Court upheld a lower court's grant of summary judgment in favor of Premium Standard Farms, finding that Premium's hog farm was exempt from Lincoln Township's zoning ordinance. Lincoln's ordinance required minimum setbacks from adja-

221. Norris & Taylor, *supra* note 213, at 8. "If, for example, a local jurisdiction seeks to protect surface water resources by establishing setbacks for structures from all lakes and streams (not just those serving as public drinking water sources), it should be within its rights to do so because GAAMPs do not address the issue."
222. Charter Township of Shelby v. Papesh, 704 N.W.2d 92, 96 (Mich. Ct. App., 2005).
223. *Id.* at 103.
224. *Id.* at 102.
225. Papadelis v. City of Troy, unpublished (Mich. Ct. App. 2006).
226. Dr. Patricia Norris & Dr. Gary Taylor, Michigan State Univ. Extension, *Land Use Planning and the Right to Farm Act*, *available at* http://www.animalagteam.msu.edu/uploads/files/20/Tech%20Bullitin%20Land%20Use.pdf.
227. Michigan Association of Planning, *Right to Farm Act, Policy Platform* (adopted Feb. 19, 2010), *available at* http://www.planningmi.org/downloads/rtfa_board_adopted_policy_feb_19_2010.pdf.
228. Eric Steinman, *Detroit: The Center of Urban Farming*, Care 2 (Apr. 23, 2012), http://www.care2.com/greenliving/detroit-the-center-of-urban-farming.html#ixzz1wehim4Yj (last visited Apr. 26, 2014).
229. Eric T. Campbell, *Keep Farming Laws Local,* The Mich. Citizen, Feb. 26, 2012.
230. Jonathan Oosting, *State Senator Looks to Amend Michigan Right to Farm Act, Let Detroit Regulate Urban Farming*, Michigan Live, Nov. 29, 2011, http://www.mlive.com/news/detroit/index.ssf/2011/11/state_legislator_looks_to_amen.html (last visited Apr. 26, 2014).
231. Michigan Department of Agriculture and Rural Development, *Generally Accepted Agricultural and Management Practices for Site Selection and Odor Control for New and Expanding Livestock Production Facilities* (Jan. 2012), http://www.michigan.gov/documents/mdard/2012_FINAL_SITE_SELECTION_GAAMP_378548_7.pdf.
232. Kathryn Lynch Underwood, *City of Detroit Urban Agriculture Ordinance-Abridged*, Apr. 2013, *available at* http://www.detroitmi.gov/Portals/0/docs/legislative/cpc/pdf/Urban%20Ag%20Ordinance%20Abridged_Apr2013.pdf.
233. Mo. Rev. Stat. ch. 65.677.
234. Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234, 240 (Mo. 1997).

cent residences for sewage lagoons and livestock feedlots.[235] The court found that Lincoln Township lacked the statutory authority to promulgate the regulation because the "erection, maintenance, repair, alteration or extension of farm buildings or farm structures" was exempt from local zoning.[236] The court concluded that the finishing buildings and sewage lagoons were "structures" "incident to the raising of livestock, which is farming," and thus exempt from local regulation under Chapter 65.677.[237]

Ten years later, Richland Township Zoning Board adopted regulations that required livestock sewage lagoon systems and livestock feedlots to maintain a minimum setback distance from adjacent residences.[238] Richland Township brought an action against a swine feeding operation for violations of the ordinance. The Missouri Court of Appeals followed the precedent set by *Premium Standard* and upheld the trial court's finding that the ordinances were invalid because the township lacked the authority to regulate "farm structures."[239] The Missouri Supreme Court refused to hear an appeal.[240]

Missouri also allows the regulation of animal operations through local "health" ordinances. Chapter 192.300 permits county commissions and county health center boards to "make and promulgate ordinances or regulations as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county. . . ."[241]

Courts have historically viewed "health" ordinances more favorably than zoning ordinances. In *Borron v. Farrenkopf*,[242] the Missouri Court of Appeals upheld a "health" ordinance passed by Linn County. The Linn ordinance stated that it relied on authority granted in Chapter 192.300 and required large AFOs to meet minimum building and setback requirements and to avoid degradation of soil, water, and air from the waste generated in such operations. The court upheld the ordinance, finding that it was not a zoning ordinance, but was indeed a health ordinance because its purpose was to "regulate for health concerns rather than for a uniform development of real estate."[243] The provisions in the ordinance regarding building locations and setback provisions were to protect nearby water and ground, as well as the air, and thus were "rationally related to the purpose of public health enhancement and disease prevention."[244]

An estimated 18 Missouri counties have adopted "health" ordinances for AFOs, despite repeated attempts to pass state legislation to prevent such ordinances.[245] In 2007, legislators defeated Senate Bill 364, which would have amended Missouri's Right to Farm Act to prohibit any local health ordinances that apply to agricultural operations.[246] Most recently, in May 2012, language was added to a bill regarding political subdivisions that would have amended Chapter 192.300 to provide that "no public health order, ordinance, rule, or regulation promulgated by a county health board under this section shall apply to any agricultural operation and its appurtenances."[247] The bill was defeated by the Missouri House.

Pennsylvania

Pennsylvania has adopted an unusual model of state preemption in that it prohibits "unauthorized local ordinances" generally, and allows farmers to challenge such ordinances by requesting that the Attorney General intervene to bring action against the municipality. Pennsylvania Act 38, or the Agricultural, Communities and Rural Environment Act (ACRE), prohibits the adoption of local ordinances that would ban or restrict a "normal agricultural operation" unless the local government unit has express or implied authority under state law or is not prohibited or preempted under state law from adopting the ordinance.[248] A "normal agricultural operation" is defined in Pennsylvania's Right to Farm Act as "the activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities."[249] The Act also expressly prohibits local ordinances on odor management and nutrient management unless "consistent with and no more stringent than" the regulations or guidelines promulgated under the Act.[250]

Detractors of ACRE claimed that the Act is "nothing less than a state assault on citizens' right to democracy at the local level," and that "[c]hallenges to local ordinances should follow the established procedure for any law and be appealed to the proper higher court, not an elected official beholden to campaign contributors."[251] Supporters alleged that the real goal of local ordinances was to force farmers out of business so that their land could be sold to developers and generate increased tax revenue for the municipality,[252]

235. *Id.* at 236.
236. *Id.* at 238.
237. *Id.*
238. Board of Directors of Richland Township v. Kenoma, LLC, No. SD 29080, 3 (Mo. Ct. App. 2009).
239. *Id.* at 10.
240. *Minutes of June 30, 2009*, Action SC90110, Supreme Court of Missouri, http://www.courts.mo.gov/sup/index.nsf/9f4cd5a463e4c22386256ac4004a490f/5f5d61f8f9af0c2b862575e5005933ea?OpenDocument (last visited Apr. 26, 2014).
241. Mo. Rev. Stat. 192.300.
242. Borron v. Farrenkopf, 5 S.W.3d 618, 619-20 (M. Ct. App. 1999).
243. *Id.* at 622.
244. *Id.*
245. *Resources for Nutrient Management Planners, Missouri County and Township Restrictions on AFOs*, University of Missouri Extension, http://nmplanner.missouri.edu/regulations/mocountyrules/ (Apr. 26, 2014).
246. S.B. 364, 94th Leg. (Mo. 2007).
247. H. Comm. Substitute for S. Comm. Substitute S.B. 692, 96th Gen. Assemb. 2nd Reg. Sess., *67 (Mo. 2012).
248. Pub. L. No. 112, No. 38, H.B. 1646, §312, 2005-2006 Reg. Sess. (Pa. 2005).
249. 3 Pa. Cons. Stat. §952.
250. H.B. 1646, §519, 2005-2006 Reg. Sess. (Pa. 2005).
251. Tom DiStefano, *Pennsylvania ACRE Bill Passes: Legislature Gives State Officials Power to Override Local Democracy*, Clarion News, July 2005.
252. Comments of Representative Benninghoff, Legislative Journal-House, 1669 (June 30, 2005) and Comments of Senator Waugh, Legislative Journal-Sen-

and stated that the Act was necessary to keep local municipalities from "reject[ing] anything, anywhere, for any reason, at any time."[253] An often-cited example of the burden to farmers from local ordinances is a case in Granville Township where a dairy farmer sought to construct a hog finishing facility.[254] At the urging of neighbors, the township enacted an ordinance requiring that any manure storage be set back at least 1,500 feet from any property line, public road, or water source.[255] The dairy farmer filed suit and ultimately obtained a court order invalidating the ordinance, but it reportedly cost him $80,000 in attorneys fees to pursue the litigation.[256]

ACRE is cited as a "more cost effective method of settling conflicts between farmers and local government units."[257] Rather than litigating in a court, farmers who believe they are harmed by a local ordinance can request that the Attorney General intervene to bring action against the municipality. Between July 2005 and July 2013, the Pennsylvania Attorney General received 97 requests and determined that action was warranted in 41 cases. Of these 41, 28 municipalities agreed to amend their ordinances to avoid suit.[258] One still-pending action concerns a proposed 60,000 chicken egg-laying facility located less than one mile-and-a-half from the historic Gettysburg battlefield. Prompted in part by concerns about the impact of potential odors on tourism, Cumberland Township passed an ordinance that prohibited concentrated animal operations in districts zoned for agricultural uses.[259] The owner of the proposed facility challenged the ordinance under ACRE and the Attorney General intervened, to the dismay of local residents. "They have completely taken away our rights to local control," said Maria Payan, organizer of a local citizens group.[260]

South Carolina

South Carolina is another example of a state whose Right to Farm Act has been expanded to explicitly curtail local control of agriculture. In 2006, the South Carolina Legislature passed S. 1205/Act 290, which provided that, with certain exceptions, "local ordinances in conflict with state law or regulations governing an agricultural facility or operation, are null and void."[261] With the exception of ordinances governing new swine operations and new slaughterhouse operations, any local ordinance that regulates the licensing or operation of an agricultural facility must be identical to state law and regulations, and any operation that is in compliance with state law is automatically deemed to be in compliance with local law.[262] However, the Act also added a provision retaining any right a county may have to determine whether an agricultural use is a permitted use under the county's land use and zoning authority.[263]

These changes to the law were of sufficient concern to lawmakers that they sought an opinion from the state Attorney General. In a letter to Rep. William D. Witherspoon, chair of the Agriculture, Natural Resources and Environmental Affairs Committee, the Attorney General weighed in on the constitutionality of an amendment to §46-45-10, which stated:

> With the exception of new swine operations and new slaughterhouse operations, in the interest of homeland security and in order to secure the availability, quality, and safety of food produced in South Carolina, it is the intent of the General Assembly that state law and the regulations of the Department of Health and Environmental Control pre-empt the entire field of and constitute a complete and integrated regulatory plan for agricultural facilities and agricultural operations as defined in Section 46-45-20, thereby precluding a county from passing an ordinance that is not identical to the state provisions.[264]

The lawmakers specifically sought guidance on whether this provision was "valid and not violative" of the home rule provisions added to the South Carolina Constitution in 1973.[265]

Attorney General Henry McMaster found that the bill would not be violative of home rule. The 1975 Home Rule Act grants power to counties to enact regulations, resolutions, and ordinances, but only to the extent they are "not inconsistent with the Constitution and general law of this State."[266] Further, the home rule provision of the state constitution permits the legislature to enact "general laws," including those that preempt the power and authority of counties.[267] The Attorney General found that this bill was a form of "general law" because it applied facially to all counties, and that the legislature's goal of protecting "the interest of homeland security and . . . the availability, quality and safety of food produced in South Carolina . . ." clearly

ate, 632 (Pa. July 4, 2005).

253. Comments of Senator Jubelirer, Legislative Journal-Senate, 633 (Pa. July 4, 2005).

254. Ross H. Pifer, *The Agriculture, Communities and Rural Environment Act: Protecting Pennsylvania's Agricultural Operations From Unlawful Municipal Regulation*, originally published at 15 Drake J. Agric. L. 109, updated to reflect the state of the law as of May 6, 2010, *available at* http://law.psu.edu/academics/research_centers/agricultural_law_center; 34 Pa. Bull. 371, *Governor's Notice of Veto of House Bill 1222* (Dec. 2003), Pa Bull., http://www.pabulletin.com/secure/data/vol34/34-3/83.html (last visited Apr. 26, 2014).

255. 34 Pa. Bull. 372 (Pa. Jan. 17, 2004).

256. Pifer, *supra* note 254, at *10.

257. Stephen L. Weber Jr., *Understanding Pennsylvania Act 38*, The Agricultural Law Resource and Reference Center, Penn State Law (Aug. 2005).

258. Kane, *supra* note 128, at *3.

259. Kane, *supra* note 128, at *15.

260. Amy Stansbury, *For Animal-Feeding Operations, Details Matter*, The Evening Sun (Hanover, Pa.), Sept. 1, 2012, http://www.eveningsun.com/ci_21451953/animal-feeding-operations-details-matter# (last visited Apr. 29, 2014).

261. S. 1205, 116th Sess. (S.C. 2006).

262. S.C. Code Ann. §46-45-60(A).

263. S.C. Code Ann. §46-45-60(B).

264. S.C. Code Ann. §46-45-10(5).

265. Letter from Henry McMaster, Attorney General, South Carolina, to the Honorable William D. Witherspoon (May 15, 2007), *available at* www.scag.gov/wp-content/uploads/2011/03/06may15-Witherspoon.pdf.

266. S.C. Code Ann. §4-9-25.

267. Letter from Henry McMaster, *supra* note 265 (citing S.C. Const. art. VIII, §7 and Town of Hilton Head v. Morris, 484 S.E.2d 104 (S.C. 1997)).

warranted statewide uniformity, and thus preemption of local law.[268]

Wisconsin

Wisconsin is an example of a state that has adopted statewide standards for new or expanding large livestock operations. In 2012, the Wisconsin Supreme Court ruled that local governments have no authority to grant permits in a manner "inconsistent" with the standards.

In 2004, the Wisconsin Legislature passed Act 235, the "Livestock Facility Siting Law."[269] The law purports to provide "uniform regulation of livestock facilities" by creating a "framework of statutes and administrative rules to define appropriate local regulations regarding the siting and expansion of livestock facilities."[270] The Act directs the Wisconsin Department of Agriculture, Trade, and Consumer Protection to create state standards for new or expanding livestock operations that have more than 500 animal units.[271] Such standards are found in ATCP 51 of the Wisconsin Administrative Code (ATCP 51).[272] The Act also created a Livestock Facility Siting Review Board to hear appeals concerning local permit decisions.[273]

If a local government chooses to require a permit to site livestock operations covered by the Act, it must use the statewide standards contained in Chapter ATCP 51 to evaluate permit applications, and must approve applications that meet those requirements.[274] Local governments may apply *less* stringent setback requirements, but can only apply more stringent siting standards if the increased standard is based on "reasonable and scientifically defensible findings of fact" that show that the standard is necessary to protect public health or safety.[275] Once a livestock facility receives local approval, the approval runs with the land.[276]

Since its passage, the Act and the standards contained in ATCP 51 have been a source of conflict between the state and some local governments, which perceive that the siting law serves largely to block challenges by local communities to factory farms.[277] One lawsuit that resulted from challenges to the Act, *John Adams v. Wisconsin*,[278] worked its way up to the Wisconsin Supreme Court.

In *John Adams*, Larson Acres dairy applied to the town of Magnolia for approval of an expansion to its dairy operation to permit it to grow from about 1,600 cows on one site to 4,100 on two sites.[279] The town approved the expansion but set certain conditions, such as allowing the town to conduct monthly water quality tests on the land.[280] Larson appealed to the Livestock Facility Siting Review Board who told the town to issue a permit without any conditions. Adams and seven other of Larson's neighbors, along with the town of Magnolia, sued the state and the farm. The circuit court sided with the town and vacated the Board's decision, but an appeals court later reversed the circuit court decision.[281]

The Supreme Court of Wisconsin issued a ruling in 2012 upholding the appeals court decision and finding that the town impermissibly "stepped over" the limitations set by the state legislature.[282] The court noted that livestock facility siting is an "issue of statewide concern," but it also "clearly affects local concerns, and has been traditionally regulated at the local level."[283] In evaluating an issue like this that is not clearly state or local, but is a "mixed bag" of statewide and local concern, local governments may only adopt ordinances that complement rather than conflict with the state legislation.[284] Applying a four-factor *Anchor* test, the court found that state law expressly preempted the conditions imposed by the town of Magnolia because they were an attempt "to exercise power expressly withdrawn by the plain language of the Siting Law."[285] Specifically, the Siting Law says that local governments may not disapprove a livestock facility siting permit unless one of eight narrow exceptions applies.[286] Furthermore, the Law expressly withdraws local governments' power to impose certain conditions when they approve such permits—local governments have no authority to grant permits in a manner "inconsistent with the Siting Law."[287] Therefore, the court found that "any attempt by the Town to regulate the livestock facility siting process outside the parameters set by the Siting Law is preempted."[288]

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268. Letter from Henry McMaster, *supra* note 265.
269. 2003 Wis. Act 235/2003 Assemb. Bill 868, codified at Wis. Stat. §§15.135(1), 93.90, and 165.25(4).
270. *Wisconsin Legislative Council Act Memo, 2003 Wisconsin Act 235* (Apr. 2004), *available at* http://docs.legis.wisconsin.gov/document/lcactmemos/2003/REG/AB868.pdf.
271. Wis. Stat. §93.90 (2012).
272. Wis. Admin. Code ATCP §51.
273. Wis. Stat. §15.135 (2012); *see also Wisconsin Legislative Council Act Memo*, *supra* note 270.
274. Jordan K. Lamb, *Wisconsin's New Livestock Facility Siting Rule*, 80 (2) Wis. Law. (Feb. 2007), http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=80&Issue=2&ArticleID=1414 (last visited Apr. 26, 2014).
275. *Id.*
276. *Id.*
277. Ron Seely, *In Deciding Where Farms Go, Communities Find They May Have to Battle the State*, Wisc. St. J. (Mar. 2010), http://host.madison.com/wsj/special-section/factory_farms/the_factory_next_door/article_884cbae8-2257-11df-8486-001cc4c03286.html (last visited Apr. 26, 2014).
278. Shannon Linderoth, *Supremes Hear Oral Arguments on Wisconsin's Livestock Siting Law*, Dairy Herd Mgmt., Sept. 2011, http://www.dairyherd.com/dairy-news/Supremes-hear-oral-arguments-on-Wisconsins-livestock-siting-law-129426173.html (last visited Apr. 26, 2014).
279. Dinesh Ramde, Associated Press, *Residents: Wis. Law Favors Big Farms*, The Daily Rep., Sept. 2011, http://dailyreporter.com/2011/09/28/residents-wis-law-favors-big-farms/ (last visited Apr. 26, 2014).
280. *Id.*
281. Adams v. State Livestock Facilities, 787 N.W.2d 941 (Wis. Ct. App. 2010).
282. Adams v. State Livestock Facilities Siting Review Bd., 820 N.W.2d 404, 407 (Wis. 2012).
283. *Id.* at 413.
284. *Id.* at 414.
285. *Id.*
286. *Id.* at 415.
287. *Id.* at 417.
288. *Id.*