Agriculture's New Environmental Battleground: The Preemption of County Livestock Regulations

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AGRICULTURE'S NEW ENVIRONMENTAL BATTLEGROUND: THE PREEMPTION OF COUNTY LIVESTOCK REGULATIONS

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I. INTRODUCTION

The modernization of the United States' agricultural industry has transformed once bucolic family farms into multi-national agricultural corporations.[1] Where traditional farms passing from generation to generation inspired little controversy, the siting of modern livestock confinement operations has spawned local conflicts mirroring the Not In My Back Yard ("NIMBY") battles of the nuclear power industry.[2] Within this war between agricultural industrialists and traditionalists, a new battlefront is burgeoning–the county government regulation of animal agriculture.

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1. *See generally* Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 DRAKE L. REV. 289 (1997) (describing the industrialization of agriculture and its public policy consequences).

2. *See, e.g.*, Gary L. Benjamin, *Industrialization in Hog Production: Implications for Midwest Agriculture*, ECON. PERSPECTIVES, Jan. 11, 1997, at 2, 10 (describing opposition to large livestock farms as driven by "strong NIMBY (Not In My Back Yard) sentiments"); Art Hovey, *Opposition of Neighbors Keeps Pork Plant Out*, LINCOLN JOURNAL STAR, July 20, 1997, at A1. Mike Hoffschneider, a neighbor who opposed a planned hog operation, typifies the NIMBY attitude facing new livestock confinement operations:

> It's one thing to be in a community all your life and to have been in the livestock business. And as time goes on, children come along and you gradually expand. It's another thing to come out of a community where you're already established in the hog business and to come into another.

Id.

Environmental regulation of agriculture has been almost the sole province of the state and federal governments.[3] Many states even prohibit counties from zoning agricultural lands.[4] The political heat generated by the siting of new livestock facilities, however, has county officials looking to assert local authority as a means of diffusing the tension in rural communities.[5] County governments are claiming police power authority to regulate air and water quality surrounding livestock operations.[6] These new local ordinances are often at odds with a web of federal and state regulations leaving family farmers and corporations alike entangled in a morass of conflicting laws.[7]

The imposition of county regulations into the existing regulatory scheme raises the question whether the local[8] ordinances are preempted by state law.[9] Extensive state and federal laws governing agriculture often do not expressly preempt county authority.[10] Thus, determining whether a local ordinance has been preempted requires courts to divine the legislature's intent and balance it against a county's home rule authority.[11] Within the agricultural arena, however, the pattern

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3. *See, e.g.*, Phillip Weinberg, *Federal-State Relationships, in* 4 ENVTL. LAW & PRACTICE GUIDE: STATE AND FEDERAL LAW § 41.01[3] (Michael B. Gerrard ed., 1992) [hereinafter *Federal-State Relationships*] (stating "the Clean Water Act envisages a system of state controls subject to EPA supervision"); 2 JOHN H. DAVIDSON ET AL, AGRICULTURAL LAW §§ 8.21-8.23 (1981) (defining the state's role in Clean Water Act implementation and enforcement).

4. *See, e.g.*, 55 ILL. COMP. STAT. 5/5-12001 (West Supp. 2000) (stating that zoning powers should not be exercised in a manner imposing regulations or requiring permits "with respect to land used for agricultural purposes, which includes the growing of farm crops . . . animal and poultry husbandry . . . when such agricultural purposes constitute the principal activity on the land"). *See also* IOWA CODE § 335.2 (1999) (declaring a similar prohibition against agricultural zoning); KAN. STAT. ANN. § 19-2908 (1995); MO. ANN. STAT. § 64.620 (West 1998).

5. *See* Len Wells, *Hog Confinement Facilities Under Building Moratorium*, EVANSVILLE COURIER, Sept. 21, 1997, at A10. "Tired of waiting for state officials to enact more stringent rules, the Wayne County Board has imposed a 60-day moratorium on all construction at large hog confinement operations." *Id. See also* Jim Smiley, *Taylor County Tightens Feedlot Rules*, OMAHA WORLD-HERALD, July 18, 1997, at 13SF, *available in* LEXIS, Newspaper Stories, Combined Papers (quoting livestock opponent Sydney Vogel as he explained that the local rules are needed "because the state has shown that it is unable to enforce its own laws").

6. *See, e.g.*, Jerry Perkins, *Livestock Ordinances Go On Trial*, DES MOINES REGISTER, Jan. 31, 1997, at 10S (noting Humboldt County's claim that ordinances regulating the livestock industry were passed under the county's police power).

7. *See infra* Part V.

8. The term "local" is used in this article to refer primarily to county governments, even though the term also encompasses municipal governments.

9. *See infra* Part IV. Preemption, as applied in this article, is defined as occurring "where [a] legislature has adopted [a] scheme for regulation of [a] given subject, [then] local legislative control over such phases of [the] subject as are covered by state regulation ceases." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990).

10. See *infra* Part II.B.

11. *See infra* Part III.C.

of state regulation denotes a clear intent on the part of various legislatures to occupy the field of agricultural regulation.[12]

James Madison worried that strong factions in local governments would trample the interests of the minority.[13] This Article argues that, when it comes to local government regulation of new livestock operations, Madison's fears are being realized. County regulations grounded in economic protectionism and parochialism erect barriers that will limit the business opportunities for new or young farmers. This Article first examines some of the changes in the modern livestock industry which have spawned this controversy.[14] Then, an overview of existing state and federal regulations is contrasted with the new county ordinances.[15] Next, this Article reviews the foundations of county home rule authority and the preemption doctrine.[16] Finally, a case study is presented that sets the stage for recommendations and conclusions about the role of counties in regulating modern agriculture.[17]

II. SETTING THE BATTLEFIELD

The battle surrounding county livestock ordinances must be evaluated and understood within the context of the changes taking place in agriculture. New farms have brought new problems to rural communities, some perceived and others real.[18] Further, the change in the composition of rural communities[19] is exacerbating age-old problems regarding farm consolidation and concentration—more farmers are moving off the farm leaving fewer farmers with larger farms.[20]

Within this cauldron of change, a new debate is beginning to rage over local regulation of livestock operations and whether such regulations are preempted by existing state and federal environmental laws.[21] A full exploration of this preemption question requires a certain level of background regarding present federal and state

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12. *See infra* Part V.

13. *See* THE FEDERALIST NO. 10 (James Madison) (as cited in GERALD E. FRUG, LOCAL GOVERNMENT LAW xxxi (2d ed.1994)).

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. *See infra* Parts III. IV.

17. *See infra* Part V.

18. *See infra* Part II.A.

19. *See* Economic Research Service, U.S. Dep't of Agric., *Farm Population Decline of 1980's Follows Long-Term Trend,* FARMLINE, Aug. 1992, at 8, 8 [hereinafter *Farm Population Decline*] (noting that the number of non-farm residents of rural communities grew 12.6% during the 1980s while the farm population dropped 24.1%).

20. *See* Economic Research Service, U.S. Dep't of Agric., *Fewer Owners Hold More U.S. Farmland,* FARMLINE, July 1992, at 14, 14 [hereinafter *Fewer Owners Hold More U.S. Farmland*] (quoting U.S.D.A. economist Gene Wunderlich, "U.S. farmland is held by fewer owners now than at any other time in this century").

21. *See infra* Part IV.

livestock environmental regulations. It also requires a look back at the long history of county zoning battles over agriculture.[22]

A. *Agriculture's Changing Face*

Changes in the agricultural industry have brought the increased food production necessary to meet growing consumer demand.[23] Farmers today have become more efficient so that fewer farmers are able to feed more people.[24] These changes, however, have not come without a price. The modernization of agriculture has claimed thousands of jobs during the past decade as farmers have quit or retired due to marginal price returns.[25] Coupled with a change in the make-up of rural communities,[26] the result has been growing tension along rural-urban lines.[27] Non-farm neighbors, increasingly dissatisfied with state inaction, have thrown the debate in the lap of county supervisors or commissioners.[28]

1. *New Farms, New Problems*

In 1950, the typical farm operation had 215 acres and sold thirty-one hogs and eleven head of cattle.[29] By 1974, these numbers had changed to 440 acres, approximately forty-eight cattle, and approximately 177 hogs.[30] According to the 1992 Census of Agriculture, a modern farm operation has 491 acres, ninety cattle,

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22. *See infra* Part II.B.3.

23. *See Backgrounder–Agriculture & Food Production* (visited Dec. 4, 2000) <http://ificinfo.health.org/backgrnd/bkgr12.htm>.

24. *See id.*

25. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 CENSUS OF AGRICULTURE vol. 1, pt. 51, at 8 tbl.1 (1994) [hereinafter 1992 AG CENSUS] (showing the number of farms dropped from 2.24 million in 1982 to 1.92 million in 1992). *See also Farm Population Decline*, *supra* note 19, at 8-9; *Fewer Owners Hold More U.S. Farmland*, *supra* note 20, at 14-16.

26. *See* Kenneth Pins, *U.S.Population Trend: Going Rural*, DES MOINES REGISTER, June 1, 1997, at 1A (mentioning some of the demographic changes in rural communities).

27. *See* Amy L. Miller, *Lawsuit Spurs Farmers to Seek Right to Farm*, BALTIMORE SUN, Mar. 5, 1993, at 3B (noting that two $250,000 nuisance suits were filed against a dairy farmer for dust kicked up by tractors and milk trucks). *See also Clash Over 'Rural Environment'*, CHRISTIAN SCIENCE MONITOR, Oct. 23, 1990, at 8, 8 (mentioning how an "Illinois farmer was even arrested for operating his tractor at night - because nonfarm neighbors object[ed] to [his] farming activities").

28. *See* Jamie C. Ruff, *Proposed Hog Farm Irks Neighbors*, RICHMOND TIMES-DISPATCH, July 27, 1997, at C3 (stating the Pittsylvania County Board of Supervisors "adopted a resolution asking G.I.S. [a proposed hog operation] not to locate in the county"); Wells, *supra* note 5, at A10 (neighboring residents force Wayne County, Illinois Board of Supervisors to impose a sixty day moratorium).

29. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1950 CENSUS OF AGRICULTURE 10, 369 (1952) [hereinafter 1950 AG CENSUS] (citing 1949 data on livestock sales and the percent of farms reporting).

30. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1978 CENSUS OF AGRICULTURE vol. 1, pt. 51, at IX tbl.20, tbl.21 (1980) [hereinafter 1978 AG CENSUS].

and 300 hogs.[31] The increase in farm size has come with a corresponding reduction in the number of farmers[32] and a new set of public policy challenges.

While the size of the average crop farm increased 11.6% over the past two decades,[33] the growing concentration of the livestock industry[34] has garnered the most attention.[35] The growth of large, multi-national farm corporations like Murphy Family Farms, National Farms, and Cargill[36] has drawn the attention of farm advocates,[37] environmentalists,[38] and policymakers.[39] Criticisms of these operations have included complaints that these large corporations interfere with a small producer's market access,[40] that these operations have a negative impact upon a community's economic and social structure,[41] and that these enterprises are not

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31. *See* 1992 AG CENSUS, *supra* note 25, vol. 1, pt. 51 at app. C-7 tbl.A (1992) (listing historical characteristics highlights, total number of pork and cattle operations, and total inventory).

32. The 1950 census listed 5,382,162 farms. *See* 1950 AG CENSUS, *supra* note 29, at 10. By 1974, farm numbers had dropped to 2,314,013. *See* 1978 AG CENSUS, *supra* note 30, vol. 1, pt. 51 at tbl.1. The 1992 Census of Agriculture cites only 1,925,300 farms. *See* 1992 AG CENSUS, *supra* note 25, vol. 1, pt. 51 at app. C-7 tbl.A.

33. The relatively small increase in the size of farms does not give a complete picture. The USDA's Economic Research Service noted that by 1988, owners of 1,000 plus acres, representing only 4% of all farm landowners, held 47% of all U.S. farmland. *See Fewer Owners Hold More U.S. Farmland*, *supra* note 20, at 14.

34. The degree of concentration is evident in the 1992 Census of Agriculture. In 1992, 126,965 producers (66% of all producers) with an inventory of fewer than 200 head accounted for 10% of the total swine inventory. *See* 1992 AG CENSUS, *supra* note 25, vol. 1, pt. 51 at 32 tbl.31. On the opposite end of the spectrum, 11,869 farms with an inventory of 1,000 hogs or more (6% of all producers) held 50% of the inventory. *See id.* By comparison, in 1987 large producers made up only 3.9% of the producers and accounted for only 40% of the inventory. *Id. See also Beef QA Programs Cause Large Producers To Change Practices*, FOOD CHEMICAL NEWS, Jan. 23, 1995, at 45, 45 (citing a 1995 U.S. Department of Agriculture survey which found large capacity feedlots accounted for only 4% of all feedlots, but 83.3% of the feedlot cattle population).

35. *See, e.g.*, George Anthan, *Giant Ag Firms Spark Concerns*, DES MOINES REGISTER, Feb. 2, 1997, at 4G (articulating U.S. Secretary of Agriculture Dan Glickman's concerns that small farmers are being pushed out of business by increased concentration and vertical integration of the food industry).

36. *See generally* Betsy Freese, *Pork Powerhouses 1996*, SUCCESSFUL FARMING, Oct. 1996, at 27, 28 (listing Murphy and Cargill within the nation's top seven largest pork operations).

37. *See, e.g.*, *Rural Opposition to Hog Farms Grows*, N.Y. TIMES, Sept. 22, 1997, at A18 (quoting Nancy Thompson of the Center for Rural Affairs explaining local opposition to large livestock farms).

38. *See, e.g.*, Traci Carl, *Family Farmers, Environmentals on Common Ground*, THE PANTAGRAPH (Bloomington, Ill.), Dec. 3, 1996, at C3.

39. *See, e.g.*, Brian Williams, *Bills Take Aim at Impact of Massive Farms*, COLUMBUS DISPATCH, Aug. 29, 1997, at 2H (noting that Ohio state senator Dick Schafrath was proposing legislation to study the impact of large farms on traditional family farms).

40. *See* Rick Barrett, *The New Face of Hog Farms*, WIS. STATE JOURNAL, May 18, 1997, at 1E (voicing claims by Bill Wenzel, of the Wisconsin Rural Development Center that "factory farms" have "eradicate[d] family farms by denying them access to markets").

41. *See* Margaret Krome, Editorial, *Town in Hog-Wrestling Contest*, WIS. STATE JOURNAL, May 29, 1997, at 14A (referencing a 1994 University of Missouri study which claimed large operations caused a net loss of jobs in rural communities).

environmentally sustainable.[42] For some rural neighbors, both farmers and non-farmers alike, these arguments are secondary concerns that take a back seat to the odor generated by large livestock farms.[43] In response to these complaints, most opponents are calling for moratoriums or bans on the development of new large livestock operations.[44]

Those supporting continued growth in the livestock industry generally focus on the local economic gain generated by these new operations.[45] There is also recognition that these operations contribute to the national agricultural economy.[46] With regard to the environmental concerns raised, many large livestock producers contend they do more to protect the environment than most small farmers.[47] Some

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42. *See* Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 848-50 (1996) (detailing some of the environmental consequences from specific corporate farming operations).

43. *See, e.g.*, Bob Williams, *Boss Hog's New Frontier*, THE NEWS & OBSERVER (Raleigh, N.C.), Aug. 3, 1997, at A1 (voicing complaints about the environmental effects and odor associated with large pork operations).

44. *See, e.g.*, Rick Callahan, *Ban on Building 'Hog Factories' Demanded Foes Cite Odor, Runoff's Effect on Water Supply*, THE COURIER-JOURNAL (Louisville, Ky.), Oct. 10, 1996, at 1A, *available in* 1996 WL 6365218 (describing the Hoosier Environmental Council's call for a one-year moratorium on "factory farms" in Indiana).

45. *See* David A. Lieb, *High-Tech Hog Farm Sends These Little Piggies to Market: Premium Standard Farms, the Nation's Fourth-Biggest Pork Producer, Has Brought Jobs and Prosperity to Princeton, Mo.*, ORLANDO SENTINEL, Sept. 15, 1996, at H1 (noting that Premium Standard Farms brought 1,700 jobs and a $35 million payroll to an economically depressed three county area in northern Missouri). *See also* Williams, *supra* note 43 (quoting Milford, Utah mayor Mary Wiseman's praise of a new 2.5 million head joint venture of the nation's largest pork producers: "They rescued this town . . . . Five years ago we looked like a ghost town. Now we've got more people here. We've got more shops on Main Street. Our tax balance is better. What more can you ask?").

46. *See, e.g.*, Benjamin, *supra* note 2, at 2-3 (explaining that the U.S.'s shift from a net importer to a net exporter of pork in 1995, and improved efficiency within the industry, have fueled the growth of large pork operations).

47. *See* Lisa Cloat, *What's the Big Stink? Balancing Act as Livestock Farmers and Opponents Square Off, Consumers Land in the Middle of Debate Over Large-Scale Animal Operations*, JOURNAL STAR (Peoria, Ill.), Sept. 28, 1997, at B1. Kay Stinson, a spokeswoman for Murphy Family Farms defended that company's environmental management by saying, "the bottom line is we're a good operator . . . . We've done a lot above and beyond what the states require." *Id.* The article also noted that "[a] check with regulatory agencies in North Carolina, Iowa and Missouri revealed that Murphy Family Farms has never been fined for operations in those states." *Id. See also* Richard F. Prim, *Minnesota's Anti-Corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt To Empower Minnesota Livestock Farmers*, 18 HAMLINE L. REV. 431, 456-57 (1995). "One could also argue that large concentrations of animals in the newest, most technologically advanced, and most closely regulated operations, could be potentially better for the environment then lots of small operations that are not as closely regulated and have antiquated manure handling systems." *Id.* A review of regulatory actions against livestock producers concluded that "size doesn't matter." *See* NATIONAL PORK PRODUCERS COUNCIL, A REVIEW OF STATE ENVIRONMENTAL REGULATORY ENFORCEMENT ACTIONS 12-13 (1996) [hereinafter REVIEW OF STATE ACTIONS]. One of the report's conclusions was that "if animal waste management systems are properly designed and maintained, the trend toward concentrated feeding operations does not invariably pose a threat to the environment." *Id.* at 13.

local lawmakers and farm leaders, while not proponents of the large operations, have also argued against new regulations for fear that the rules imposed on large livestock operations may have unintended harmful consequences for family farmers.[48] The challenge facing proponents, however, is multiplied by another changing characteristic of rural America the population trend to rural communities.[49]

2. *The Changing Makeup of Rural Communities*

The change in the size and structure of farm operations is not the only transformation taking place in rural communities. For most of our nation's history, the population trend was away from rural areas and toward urban communities.[50] Today, the trend is slowing, and in some areas, more people are actually moving into rural communities than are moving out.[51] The new structure of the rural economy has driven changes in agriculture's production structure.[52] In turn, these shifts have changed the composition of farming communities–farmers no longer make up the majority in most rural communities.[53] This new rural-urban mix intensifies the potential conflict between farm operations and their non-farm neighbors.[54]

3. *Playing Political Hot Potato*

The change in farm structure and the change in the composition of rural communities have thrust the hot potato of livestock production into the laps of county supervisors.[55] Rural residents, complaining about state inaction,[56] are

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48. *See* Ron Warfield, Editorial, *Small Livestock Farms Can't Afford to Comply with Restrictive State Regulations*, PEORIA JOURNAL STAR, Sept. 6, 1997, at A4. Ron Warfield was the Illinois Farm Bureau President in 1997. *See id.* "[W]e must avoid overly restrictive, prohibitively expensive requirements which only mega-farms can afford–regulations that have the unintended consequence of shutting down small- and medium-sized operations." *Id.*

49. *See infra* Part II.A.2.

50. *See* Pins, *supra* note 26.

51. *See id.* (stating that 75% of the 2,304 non-metro counties grew during the 1990s).

52. *See generally* Beverly A. Cigler, *The Special Problems of Rural County Governments, in* COUNTY GOVERNMENTS IN AN ERA OF CHANGE 94 (David Berman, ed. 1993) (citing intense competition brought on by the emerging global economy and a shift in the role of natural resources—from serving as raw materials to serving as amenities—as two factors influencing rural communities).

53. *See* WILLIS GOUDY, RURAL/URBAN TRANSITIONS IN IOWA 47-49 (1996) (noting that the non-farm rural population living in the country outside of city limits is greater than the farm population).

54. *See generally, e.g.*, Weida v. Ferry, 493 A.2d 824 (R.I. 1985) (urban residents sue neighboring dairy farmer). *See also* James Malone, *Hog-Farm Shooting Followed Problems*, COURIER-JOURNAL (Louisville, Ky.), Aug. 21, 1997, at 1B, *available in* LEXIS, Newspaper Stories, Combined Papers (detailing the confrontation between a hog farm manager and local opponents which ended in a shooting).

55. *See* Ruff, *supra* note 28 (stating the Pittsylvania County Board of Supervisors "adopted a resolution asking G.I.S. [a proposed hog operation] not to locate in the county"); Wells, *supra* note 5, at A10 (neighboring residents force Wayne County, Illinois Board of Supervisors to impose a sixty day moratorium); Julie Anderson, *Holt County Keeps Limits on Hog Lots: Board Deadlocks on Repealing Its Ban*, OMAHA WORLD-HERALD, Sept. 20, 1997, at 37, *available in* LEXIS, Newspaper Stories,

increasingly petitioning county supervisors in an effort to keep new livestock operations out of their communities.[57] In turn, elected county officials have grown frustrated with state governments because of a perceived lack of state action with respect to livestock operations.[58] The result has been a series of actions taken by counties across the country to address local concerns regarding large livestock operations.[59]

While the county actions may have placated some local residents, many others have been critical. After a state district court decision upholding one set of local livestock ordinances,[60] Iowa Governor Terry Branstad argued the ruling represented over-regulation and "could close down the expansion of our livestock industry . . . . We could see the rapid demise of family-farm producers."[61] North Carolina Governor Jim Hunt decried the need for strong state action claiming, "people are going to get protection one way or another . . . we don't need to have 100 different approaches in 100 different counties."[62] Farmers have also sued county

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Combined Papers (citing the defeat of a resolution overturning Holt County, Nebraska's moratorium on large livestock operations because "emotions have been running high").

56. *See* Jay P. Wagner, *Hog Lot Complaint Rules are Denied*, DES MOINES REGISTER, May 22, 1996, at 8 (citing complaint by hog-farm opponent that "of the 371 complaints made to the DNR about livestock in 1995, only 13 resulted in enforcement action").

57. *See, e.g.*, *Tecumseh-Area Residents Reject Pigs as Their Potential Neighbors*, OMAHA WORLD-HERALD, May 23, 1991, at 16, *available in* 1991 WL 4118161 (noting 130 residents signed a petition asking the Johnson County Nebraska Commissioners to ban a proposed 500-700 sow hog unit); Jay P. Wagner, *Farmers Raise Stink Over Proposed Farrowing Unit*, DES MOINES REGISTER, Feb. 18, 1996, at 8B (stating that 200 people signed a petition asking the Shelby County, Iowa supervisors to block a proposed hog facility); Timothy B. Wheeler, *Md. Rejects Proposal to Raise 3,000 Hogs in Shore Warehouse*, BALTIMORE SUN, Apr. 8, 1997, at 2B (noting farmer's decision not to appeal state's rejection because "area residents and elected officials opposed him").

58. *See* Jerry Perkins, *County Officials 'Never Dreamed' of Livestock Ruckus*, DES MOINES REGISTER, Apr. 22, 1997, at 9S. "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." *Id.* (quoting Humboldt County, Iowa supervisor Harlan Hansen). *See also Wayne County Targets Hog Farms*, ST. LOUIS POST-DISPATCH, Sept. 18, 1997, at 2. Wayne County Board Vice Chairman Richard Vaughan announced: "We've been waiting too long on the state to pick up the ball and carry it . . . . My experience in dealing with the state is they are going to be way too late and too short . . . I don't think the regulations are going to be stringent enough." *Id.*

59. *See, e.g.*, *Wayne County Targets Hog Farms, supra* note 58; Jerry Perkins, *Davis Supervisors Approve New Rules for Hog Confinement*, DES MOINES REGISTER, Sept. 16, 1997, at 9S; Jamie C. Ruff, *Brunswick Restricts Hog Farms*, RICHMOND TIMES-DISPATCH, Sept. 13, 1997, at B1.

60. *See* Goodell v. Humboldt County, No. 16311 (Iowa District Court for Humboldt County, filed Apr. 2, 1997).

61. David Yepsen, *Branstad: Livestock Industry in Peril*, DES MOINES REGISTER, Apr. 16, 1997, at 1A.

62. Emery P. Dalesio, *Hunt Says Counties Will Act Against Hogs if Legislature Won't*, ASSOCIATED PRESS POLITICAL SERVICE, June 6, 1996, *available in* 1996 WL 5387101. Hunt's comment was made following action by the North Carolina House of Representatives Agriculture Committee, which had watered down recommendations generated by the Governor's Blue Ribbon Livestock Task Force. *See id.* Fourteen months later, North Carolina legislative leaders reached an agreement granting

boards claiming that the counties do not have the authority to pass local livestock ordinances.[63] Given the current climate in rural communities, it is likely this battle over state versus local control will only intensify.[64]

B. *Regulating the Modern Livestock Industry*

The propriety of county regulation is a question which must be examined within the context of existing federal and state regulations. In most cases, federal environmental laws are enforced by state regulatory agencies, which have been delegated the authority by the EPA to enforce federal environmental laws.[65] Additionally, states may impose more stringent conditions than those imposed by federal law or may regulate practices not covered by federal law.[66] The cry by local officials, then, that counties must act because large livestock units are unregulated, represents a misunderstanding of the current regulatory structure.

The existing combination of the federal environmental laws,[67] state laws,[68] and state enforcement[69] presents a livestock producer with a panoply of regulations, particularly regarding water quality. And while livestock operations may avoid most regulations of the federal Clean Air Act through de minimus exceptions,[70] state laws[71] and common law nuisance[72] do impose air quality restrictions on livestock

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counties authority to zone large livestock operations. *See also* 1997 N.C. Sess. Laws 458; *Riding Herd on Hogs*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 26, 1997, at A8 (discussing the new legislative agreement on livestock regulation).

63. *See generally* Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25 (Minn. Ct. App. 1997) (dismissing livestock producers' challenge to county ordinances); Tony Hall, *New Chatham Farm Rules Prompt Lawsuit*, NEWS & RECORD (Greensboro, N.C.), May 15, 1997, at B2A (describing the Chatham County Agribusiness Council's attempts to overturn the Chatham County Ordinance); Jerry Perkins, *Pork Faces Two Battles This Week*, DES MOINES REGISTER, Jan. 26, 1997, at 1G (describing livestock producers' suits against Humboldt County, Iowa officials).

64. *See* Jerry Perkins, *Today, One County; Tomorrow, All 99?*, DES MOINES REGISTER, May 11, 1997, at 1G (noting that 15 counties are studying ordinances similar to those passed in Humboldt County, Iowa).

65. *See* State Program Requirements, 61 Fed. Reg. 65,047 (1996) (approving Oklahoma's application to administer the federal Clean Water Act's permit program and listing 43 states that have been delegated such authority by EPA).

66. *See id.*; *Federal–State Relationships*, *supra* note 3, § 41.02[2].

67. *See, e.g.*, 33 U.S.C. §§ 1251-1387 (1994) (the Federal Water Pollution Control Act).

68. *See, e.g.*, 510 ILL. COMP. STAT. ANN. 77/1-77/999 (West Supp. 2000); IND. CODE ANN. §§ 13-18-10-1 to 13-18-10-6 (Michie 2000); IOWA CODE §§ 455B.201-.204, 455B.161-.165 (1999); MO. ANN. STAT. §§ 640.700-.758 (West 2000); N.C. GEN. STAT. §§ 143-215.10A-215.10G (1999).

69. *See generally* REVIEW OF STATE ACTIONS, *supra* note 47 (ascertaining the magnitude of state actions).

70. *See* J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 305 (2000).

71. *See, e.g.*, MINN. STAT. ANN. § 116.0713 (West 1997) (enforcing limits on hydrogen sulfide emitted from livestock operations).

72. *See generally* Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996) (imposing $45,000 in damages on a livestock farm upon a finding of nuisance).

producers. Within this context, it is also important to review the historical efforts of counties and other local governments to regulate agricultural practices.[73] Most of these efforts have been struck down in the past,[74] but the new generation of county ordinances present a new set of legal challenges.[75]

1. *The Federal Regulatory Structure: Absent Regulators or Intended Effect?*

Through the 1972 federal Water Pollution Control Act ("CWA" or "the Act"),[76] large livestock producers are subject to more stringent environmental standards than most other industries.[77] This conclusion is drawn from the effect the CWA has on the design and operation of livestock farms, even though most farms may not presently have a CWA permit.[78]

The CWA[79] prohibits the "discharge of any pollutant" [80] into our nation's waters[81] from any point source[82] unless done in compliance with the Act.[83]

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73. *See infra* notes 86-93 and accompanying text.

74. *See, e.g.*, Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996) (overturning a county's decision denying an agricultural zoning exemption to a proposed hog confinement operation); Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995) (declaring a proposed livestock operation was statutorily exempt from county zoning ordinances).

75. *See infra* note 94.

76. *See* 33 U.S.C. §§ 1251-1387(1994).

77. *Compare* Oliver A. Houck, *Clean Water Act and Related Programs*, *in* ALI-ABA COURSE OF STUDY: ENVIRONMENTAL LAW, 241, 262-65 (1997) [hereinafter Houck] (outlining the permissible discharge limits for various industries in several North Central states and giving an example of acceptable toxic pollutant discharge levels from a hypothetical paper mill), *with* 40 C.F.R. § 412.12(a) (2000) (permitting "no discharge of process waste water" from any concentrated animal feeding operation).

78. *See, e.g.*, *Government Accounting Office: Animal Waste Is Major Factor Causing Nonpoint Water Pollution*, vol. 33 no. 35 AIR/WATER POLLUTION REPORT'S ENV'T WK., Aug. 25, 1995, *available in* 1995 WL 2404242 (hereinafter *GAO: Animal Waste)* (quoting U.S. Environmental Protection Agency (EPA) figures that only 1,987 permits have been issued for livestock and poultry point-source discharges). Comparatively, the 1992 Census of Agriculture lists 4000 hog farms with more than 2000 head and 8000 cattle operations with more than 1000 head, all of which *could* be subjected to regulation under the Act even though these farms do not presently maintain an NPDES Permit. *See* 1992 AG CENSUS vol. 1 pt 51, *supra* note 25, at 32 tbl.31, 28 tbl.24.

79. 33 U.S.C. §§ 1251-1387 (1994).

80. *Id.* § 1311(a). A discharge is defined as the "addition of any pollutant to navigable waters from any point source . . . ." *Id.* § 1362(12)(A).

81. Navigable waters, as used in section 1311 is defined to include "the waters of the United States." *Id.* § 1362(7). The phrase "waters of the United States" is then further defined in 40 C.F.R. § 122.2 (2000). Finally, courts have determined that this phrase should be interpreted broadly to expand the jurisdiction of the Clean Water Act to include groundwater and inland lakes. *See, e.g.*, Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1320 (S.D. Iowa 1997) (holding that discharges to groundwater which may later pollute surface water are a violation of the federal Clean Water Act). Accordingly, livestock operation discharges to groundwater could ostensibly be regulated under the federal Clean Water Act.

82. *See* 33 U.S.C. § 1362(14) (1994). A point source is defined as, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit,

Compliance with the Act requires the point source operator to obtain a National Pollutant Discharge Elimination System Permit ("NPDES Permit")[84] which sets forth the applicable industry effluent limitations.[85]

Livestock farms, specifically those defined under the Act as concentrated animal feeding operations ("CAFO"),[86] are required to meet the livestock industry's effluent standard[87]–with one important caveat. The livestock industry's effluent standard states that "there shall be no discharge of process waste water pollutants to navigable waters."[88] The standard requires that all operations are constructed and maintained to prevent any discharges of wastewater from the operation.[89] The Environmental Protection Agency's ("EPA") CAFO definition, however, provides that "no animal feeding operation is a concentrated animal feeding operation . . . if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm[90] event."[91] The logic of the Clean Water Act is circular: under the livestock effluent standard, every livestock operation must be constructed so as not to discharge waste into the waters of the U.S.[92] Then, once constructed, every farm should qualify for the no-discharge exemption

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well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft from which pollutants are or may be discharged." *Id.* (emphasis added).

83. *See id.* § 1311(a).

84. *See id.* § 1342.

85. *See Id.* § 1362(11) (defining effluent limitation as "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . .").

86. A CAFO is an animal feeding operation with more than 1000 animal units. *See* 40 C.F.R. § 122 app. B (2000) (setting forth the size requirements for a CAFO and defining other criteria which make an animal feeding operation subject to the Act). An animal unit is defined as

> a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

Id. Thus, 1,000 animal units equals 2,500 head of hogs, 1,000 cattle, or 500 horses. *See id.*

87. *See* 40 C.F.R. § 412.12 (2000).

88. *Id.* § 412.12(a).

89. *See id.*

90. A 25 year, 24 hour storm is defined in as "a rainfall event with a probable recurrence interval of once in . . . twenty-five years. . . as defined by the National Weather Service in Technical Paper Number 40, 'Rainfall Frequency Atlas of the United States,' May 1961, and subsequent amendments, or equivalent regional or state rainfall probability information developed therefrom." 40 C.F.R. § 412.11(e) (2000). The Rainfall Frequency Atlas defines a 25 year, 24-hour storm event for specific geographic locations by projecting the greatest number of inches of rainfall likely to occur in any 24-hour period no more than once in 25 years. *See* U.S. DEP'T OF COMMERCE, WEATHER BUREAU, TECHNICAL PAPER NO. 40: RAINFALL FREQUENCY ATLAS OF THE UNITED STATES 1-7, 101 (1961).

91. 40 C.F.R. § 122 app. B (2000).

92. *See id.* § 412.12.

contained within the regulations[93]–meaning that, technically, no livestock operation would be required to obtain an NPDES Permit.[94] Thus, while there may only be a small number of operations with an approved NPDES Permit,[95] the CWA has had its intended effect by forcing the design and management of livestock operations in accordance with its requirements. Accordingly, those issuing the siren call for new local regulations on large operations overlook that these farms are already subject to one of our nation's most stringent industrial effluent standards.[96] The comprehensive and stringent standards of the federal CWA's livestock provisions lay the foundation for a claim that local ordinances are preempted by the existing state and federal regulatory scheme.[97]

2. *States as Law-Makers and Enforcers*

State governments are the focal point of regulation for the livestock industry. Under the CWA, states are delegated the authority by the EPA to enforce the requirements of the Act.[98] Although state enforcement is sometimes inconsistent, state enforcement authority is exercised regularly against livestock producers.[99]

Most states, however, do not rely solely on the federal CWA authority. In addition to the EPA approved NPDES program, many states have passed state legislation directly targeting livestock environmental concerns.[100] These state laws

93. *See id.* § 122 app. B.

94. *But cf.* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114 (2nd Cir. 1994) (holding that animal feeding lot operation was in itself a point source under the CWA and was not exempt from a NPDES permit); Carr v. Alta Verde Indus., Inc. 931 F.2d 1055 (5th Cir. 1991) (holding farmers liable under the CWA after accidental discharges because the farms did not have the required NPDES permits). The Environmental Protection Agency, however, is working on new guidance for the NPDES program that would increase the pressure on livestock operations to secure an NPDES permit or its state equivalent. *See generally Pfiesteria and Its Impact on Fishing: Testimony before the Subcomm. on Fisheries, Conservation, Wildlife and Oceans* (October 9, 1997) (testimony of Robert Perciasepe) (describing EPA's plans for modifying existing livestock NPDES regulations).

95. *See GAO: Animal Waste*, *supra* note 78.

96. *Compare* Houck, *supra* note 77, at 262-65 (outlining the permissible discharge limits for various industries in several north central states and giving an example of acceptable toxic pollutant discharge levels from a hypothetical paper mill), *with* 40 C.F.R. § 412.12(a) (2000) (permitting "no discharge of process waste water" from any concentrated animal feeding operation).

97. *See infra* Part V.

98. *See* 33 U.S.C. § 1342(b) (1994) (listing the requirements for EPA approval of state programs). *See also* State Program Requirements; Approval of Application by Oklahoma to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 61 Fed. Reg. 65,047 (1996) (including a chart listing the 43 EPA approved states and the date each was delegated Clean Water Act enforcement authority).

99. *See generally* REVIEW OF STATE ACTIONS, *supra* note 47, at 5-13 (listing and describing 160 enforcement actions taken against livestock producers in fifteen states between 1992 and 1994).

100. *See, e.g.*, Illinois Livestock Management Facilities Act, 510 ILL. COMP. STAT. 77/1-77/999 (West Supp. 2000) (chapter discusses livestock management facilities); IND. CODE §§ 13-18-10-1 to 13-18-10-6 (2000) (chapter concerns confined feeding control); IOWA CODE §§ 455B.201-.204,

allow a state to tailor its environmental enforcement toward issues of specific concern within the state.[101] The comprehensive nature of these state statutes, when viewed through the prism of the preemption doctrine, should preclude further local regulations of livestock operations.[102]

3. *Counties Enter the Fray*

The battle between state and county governments over the regulation of agriculture is not a new issue, but the nature of the battle has changed. Many states specifically exempt agricultural operations from any county zoning requirements.[103] Nonetheless, counties have consistently sought to narrow the agricultural exemption by declaring certain agricultural practices as "commercial" or "non-agricultural uses."[104] Initially, counties found some support for a narrow interpretation of these statutes.[105] However, the judicial tide soon turned, striking down most county attempts to declare agricultural facilities as commercial.[106]

The litigation to enforce county zoning requirements on agriculture has generally been instigated by local governments attempting to prohibit the

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455B.161-.165 (1999) (Supp. 2000) (setting forth water and air quality requirements for animal feeding operations, respectively); MO. ANN. STAT. §§ 640.700-.758 (2000); N.C. GEN. STAT. §§ 143-215.10A - 10G (1999).

101. *See, e.g.*, S.D. CODIFIED LAWS § 34A-2-27 (Michie 1999) (imposing a fee on concentrated animal feeding operations which will be dedicated toward defraying inspection costs); TEX. [water] CODE ANN. § 26.048 (West 2000) (prohibiting concentrated animal feeding operations from discharging into playa lakes which are not considered "waters of the U.S." for purposes of the Clean Water Act).

102. *See generally* Goodell v. Humboldt County, 575 N.W.2d 486, 489 (Iowa 1998) (determining that county ordinances regulating livestock operations were preempted by state law).

103. *See, e.g.*, 55 ILL. COMP. STAT. 5/5-12001 (West Supp. 2000) (stating that zoning powers should not be exercised in a manner imposing regulations or requiring permits "with respect to land used for agricultural purposes, which includes the growing of farm crops . . . animal and poultry husbandry . . . when such agricultural purposes constitute the principle activities on the land"); *See also* IOWA CODE § 335.2 (1999) (declaring similar prohibition against agricultural zoning); KAN. STAT. ANN. § 19-2908 (1995); MO. ANN. STAT. § 64.620 (West 1998).

104. *See generally* Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996) (rejecting a county's claim that a proposed livestock operation was not an agricultural use); Steven B. Long, *Annotation, Construction and Application of Terms "Agricultural," "Farm," "Farming," or the Like, in Zoning Regulations*, 38 A.L.R. 5th 357 (1996) (identifying cases interpreting whether a particular activity was or was not held to be farming or agriculture under county zone regulations).

105. *See generally* Farmegg Products, Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971) (finding that proposed poultry operation holding 80,000 chickens did not have an "agricultural purpose"); Lincoln v. Murphy, 49 N.E.2d 453 (Mass. 1943) (finding an operation producing 2100 hogs was a "piggery" and not a farm).

106. *See, e.g.*, Platte River Env't Conserv. Org. v. National Hog Farms, Inc., 804 P.2d 290, 292-93 (Colo. Ct. App. 1990) (holding that contiguous land holdings constitute only one "lot" for purposes of determining number of animals permitted to raise); Lake v. Cushman, 353 N.E.2d 399, 404-405 (Ill. App. Ct. 1976) (finding a poultry operation on a 3.9 acre lot was an agricultural use exempt from county zoning under Illinois state law); Helmke v. Board of Adjustment, 418 N.W.2d 346 (Iowa 1988) (holding that a grain elevator was an exempt agricultural use).

development of a new agricultural facility.[107] This pattern of attempted exclusion represents a continuing effort on the part of counties to exclude certain agricultural operations.[108] Unfortunately, although these efforts to "zone-out" certain agricultural operations are directed at the mega-farms,[109] the impact of the local ordinance also falls upon small family farmers who are seeking to expand their operations.[110] Nonetheless, as county efforts to "zone out" agricultural operations have failed,[111] counties have turned toward a new source of authority to justify the regulation of agriculture.

The new generation of county regulations claim the county's police power–the power to regulate for the "health, safety and welfare of the public"[112]–as a source of authority.[113] The move is a thinly-disguised effort to circumvent the zoning prohibitions which have thwarted county attempts to regulate agriculture in the past.[114] Whether this is a valid exercise of county authority is a question likely to be answered first in the courts,[115] and then in the legislatures.[116]

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107. *See, e.g.*, *Kuehl*, 555 N.W.2d at 686 (Iowa 1996) (overturning county's decision that proposed hog farm was not a permissible use under the county zoning ordinances); Board of Supervisors v. ValAd Co., 504 N.W.2d 267 (Minn. Ct. App. 1993) (finding that proposed township regulation to prohibit construction of a pork facility was invalid).

108. *See, e.g.*, Tim Meidroth, *County Wants to Regulate Hog Farms*, JOURNAL STAR (Peoria, Ill.), Oct. 9, 1996, at A9 (stating that County Board member Eldon Polhemus wanted legislation to allow local bodies to regulate mega-farms "that would exceed normal community farming procedures").

109. *See, e.g.*, Theresa Grimaldi Olsen, *F.A.R.M. Group Holds Rally to Protest Mega-Hog Farms*, JOURNAL STAR (Peoria, Ill.), Nov. 3, 1996, at B12. McLean County Board candidate Bill Emmett said, "we are trying to protect the American farm . . . . They [large corporate farms] will put farmers out of business."

110. *See* Richard Meryhew, *Feedlots, Restrictions Raising a Stink in Rice County*, STAR TRIBUNE (Minneapolis, Minn.), Oct. 29, 1996, at 1B, *available in* LEXIS, Newspaper Stories, Combined Papers (voicing Rice County Commissioner Milt Plaisance's complaint that the Rice County Feedlot Ordinance would prevent a father and son operation from expanding).

111. *See, e.g.*, *Platte River Env't Conserv. Org.*, 804 P.2d at 292-93 (holding that contiguous land holdings constitute only one "lot" for purposes of animals permitted to raise); *Cushman*, 353 N.E.2d at 404-05 (finding of poultry operation on a 3.9 acre lot was an agricultural use exempt from county zoning under Illinois state law); *Helmke*, 418 N.W.2d at 346 (holding that a grain elevator was an exempt agricultural use); *Kuehl*, 555 N.W.2d at 689 (overturning county's decision that hog farm was not a permissible use under the county zoning ordinances); *ValAd Co.*, 504 N.W.2d at 267 (finding that proposed township regulation to prohibit construction of a pork facility was invalid).

112. *See, e.g.*, IOWA CODE § 331.301 (1999) (providing a statutory grant of home rule authority by allowing a county to "exercise any power and perform any function it deems appropriate to . . . preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents"). *See also* ILL. CONST. art VII, § 6 (granting Illinois counties home rule); MO. CONST. art. VI, § 18(a)-(c) (granting home rule authority); WIS. STAT. ANN. § 59.03 (West 2000) (granting administrative home rule).

113. *See, e.g.*, Perkins, *supra* note 6, at 10 (claiming Humboldt County livestock ordinances were enacted under the county's police powers); *Sauk County Eyes Ordinance*, WIS. STATE JOURNAL, Aug. 29, 1997, at 8B (detailing a proposed county ordinance which would require that "the (livestock) operation must not negatively impact the public's health, safety or general welfare").

114. *See, e.g.*, Jerry Perkins, *Humboldt Livestock Ordinances Delayed*, DES MOINES REGISTER, June 14, 1997, at 12S (noting that, although Iowa law prohibits zoning of agriculture, district court

III. FROM DILLON'S ASHES: THE RISE OF HOME RULE AUTHORITY

A county's claim to police powers is derived from a state's grant of home rule authority.[117] That grant of authority, however, came after a long history of limitations on county government authority that were developed, in part, by Iowa Supreme Court Justice John F. Dillon.[118] Accordingly, county authority today must be analyzed through the prism of the county's relationship to the state, the breadth of the home rule authority legislation, and the legacy of Judge Dillon.

A. *Counties as Creatures of the State*

A constitutional grant of home rule does not alter the dual system of government established by the United States Constitution.

> [A]ll sovereign authority 'within the geographical limits of the United States' resides either with 'the Government of the United States, or [with] the States of the Union. There exist [sic] within the broad domain of sovereignty but these two. There may be cities, counties, and other[s] . . . but they are all derived from, or exist in, subordination to one or the other of these.[119]

Even after a grant of home rule authority, counties remain creatures of the state, ostensibly "to prevent the minority from being at the disposal of the majority" within a local government.[120] Grants of county home rule authority serve two purposes: first, the grant of authority sets the limits of what a county may do; [121] second, a grant of home rule immunity defines when a state may not intrude upon local action.[122] States impose limits on county home rule authority in a number of ways. For example, Iowa's home rule authority prohibits counties from taking action that is

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Judge Kurt Wilke had found the Humboldt County ordinances were derived from the county's police power).

115. *See id.* (reporting pending suit of Humboldt County livestock producers challenging county ordinances).

116. *See* Rick Barrett, *Legislation Limits Counties on Pollution*, WIS. STATE JOURNAL, Aug. 29, 1997, at 8B (noting proposal before the Wisconsin Legislature would "prohibit counties from adopting water pollution standards tougher than state standards without permission from the state").

117. *See* IOWA CODE § 331.301 (1999) (providing a statutory grant of home rule authority by allowing a county to "exercise any power and perform any function it deems appropriate to . . . preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents"). *See also* ILL. CONST. art VII, § 6; MO. CONST. art. VI, § 18(a)-(c); WIS. STAT. ANN. § 59.03 (West 2000).

118. *See infra* Part III.B.

119. Community Communication Co. v. Boulder, 455 U.S. 40, 53-54 (1982) (quoting United States v. Kagama, 118 U.S. 375, 379 (1886)).

120. Stetson v. Kempton, 13 Mass. 272, 284 (1816).

121. *See* IOWA CONST. art. III, § 39(a) (limiting county home rule authority to "local affairs and government").

122. *See, e.g.*, New Orleans v. Board of Comm'rs, 640 So.2d 237, 242 (La. 1994) (finding that home rule immunity insulated a local governments action from state intervention).

inconsistent with state law.[123] Wisconsin's grant of home rule authority requires that the state justify its intrusion into local affairs: home rule is "subject . . . to any enactment of the legislature which is of statewide concern and which uniformly affects every county."[124] Indiana delineates a specific list of actions the county is prohibited from undertaking, even with home rule authority.[125] While the language may differ, the commonality of the limitations is consistent–each of these grants preserves state supremacy over local regulations. The provisions are an important element in preserving the hierarchy of counties as creatures of the state, not independent sovereign authorities.[126]

B. *Judge Dillon's Rule*

In 1917, county governments were described by one commentator as the "'dark continent' of American political structures," prone to corrupt and incompetent management.[127] Other charges leveled against early county governments were that these governments were "plagued by inefficiency, corruption, and lack of citizen respect and involvement."[128] It is from this historical perspective, and from early English law, that Dillon's Rule was derived.[129]

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123. *See* IOWA CONST. art. III, § 39(a); IOWA CODE § 331.301 (1999). Iowa's constitution states that local action may not be "inconsistent" with state law. The Iowa Code's statutory grant, however, provides that to be inconsistent with state law, a county action must be "irreconcilable" with the governing state provisions. *See* IOWA CODE § 331.301 (1999). The intent of this change between the Constitutional language and the statutory provision is unknown. However, one definition of "irreconcilable" is "impossible to make consistent." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1144 (1981) (the definition of "inconsistent" lists "irreconcilable" as a synonym; the distinction may be moot).

124. WIS. STAT. ANN. § 59.03 (West 2000).

125. *See generally* IND. CODE ANN. § 36-1-3-8 (Michie 1993 & Supp. 2000) (including, within a list of twelve specifically prohibited acts, a prohibition against "regulat[ing] conduct that is regulated by a state agency, except as expressly granted by statute").

126. *See* IOWA ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, NEW DIRECTIONS FOR COUNTY GOVERNMENT 12 (1985). "Unlike municipalities which are essentially autonomous, counties are still considered to some extent an 'agent of the state' . . . . Currently, counties provide services to their respective electorates independent of State functions and *over which the State has little interest.*" *Id.* (emphasis added). Given the active participation of most states in formulating agricultural and environmental policy, counties should be hardpressed to prove a claim that local livestock ordinances are justified on the grounds that the "state has little interest" in the subject.

127. *Id.* at 4 (quoting H.S. GILBERTSON, THE DARK CONTINENT (1917)).

128. David R. Berman & Katheryn A. Lehman, *Counties, Change and Reform: An Overview, in* COUNTY GOVERNMENTS IN AN ERA OF CHANGE xi (David R. Berman, ed., 1993) (noting that Gilbertson's work conveyed this image of counties).

129. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1111 (1980) ("Most troubling of all to Dillon, cities were not managed by those 'best fitted by their intelligence, business experience, capacity and moral character.' Their management was 'too often both unwise and extravagant.'") (emphasis omitted). *See also* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL, STATUTORY, AND

Judge Dillon's early opinions focused on the county or municipal government as a creature of the state:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control . . . We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.[130]

Dillon's Rule grew from these early cases:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by courts against the corporation, and the power is denied.[131]

Dillon's Rule is usually cited as a rule of strict construction based upon the premise that local governments are creatures of the state government that created them,[132] as a result, "any fair, reasonable doubt concerning the existence of [local] power is resolved by the courts against the corporation and the power is denied."[133] One other interpretation of Dillon, however, is that it is not so much a strict construction favoring state authority as it is a call to arms to protect individual rights.[134]

JUDICIAL CLARIFICATION 31-32 (Oct. 1993) [hereinafter USAICR, LOCAL GOVERNMENT AUTONOMY] (outlining the English history derivation of Dillon's Rule).

130. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868) (emphasis omitted).

131. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448-50 (5th ed. 1911).

132. *See* EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 10.18.10-10.25 (3d rev. ed. 1988).

133. Browning-Ferris Indus. v. Dance, 671 S.W.2d 801, 808 (Mo. Ct. App. 1984) (citing Lancaster v. County of Atchison, 180 S.W.2d 706, 708 (Mo. 1944) (en banc)). *See also* Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234, 238 (Mo. 1997) (applying Dillon's Rule in determining that a township may not prohibit the construction of a livestock facility).

134. *See* USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 32-33 (claiming that under Judge Dillon's opinions, a local government's actions should be strictly construed when "out of the range of those normally or customarily devolved upon localities, or . . . infringes on the liberty or property interests of individuals").

Following passage of state constitutional and statutory home rule amendments, some commentators contend that Dillon's Rule has been vanquished.[135] However, an analysis of Iowa's municipal home rule amendment by the State Legislative Service Bureau noted that "in many states which have a constitutional home rule provision, Dillon's Rule is used by the courts to interpret the scope of the home rule powers."[136]

C. *Home Rule Authority*

Home rule is formally defined as a state constitutional provision or legislative action that provides a city or county government with a greater measure of self-government.[137] Within this definition, self-government has two components: (1) the power of the local government to manage its "local" affairs; and (2) the freedom or immunity of the local government from excessive state intervention.[138] States grant home rule authority to cities and counties either through an amendment to the state constitution, a specific home rule statute, or both.[139] The genesis of local home rule amendments and statutes generally had three principle foundations.[140] First, state codes were filled with minute detail regarding the constant needs of local government.[141] Second, local governments faced a lag between the time that a call for action arose and the time when the legislature provided the local government with the needed authority to act.[142] And third, the focus of state legislatures on municipal duties distracted it from matters of general state importance.[143] These problems spurred legislatures and citizens alike to pursue modernization of local government through grants of home rule authority.[144]

By 1993, a total of thirty-seven states had provided for county home rule authority.[145] The success of the movement, however, has been mixed.[146] While the

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135. *See, e.g.*, Richard Briffault, *Our Localism: Part I–The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) (stating that the home rule movement had a goal of undoing Dillon's Rule by granting local governments broad authority).

136. IOWA LEGISLATIVE SERV. BUREAU, BRIEF ANALYSIS OF THE HOME RULE AMENDMENT OF IOWA 2 (1966) [hereinafter HOME RULE AMENDMENT]. *See also* HARRY R. SMITH, HOME RULE FOR IOWA? 4 (1962) (offering the same proposition).

137. *See* BLACK'S LAW DICTIONARY 733 (6th ed. 1990).

138. *See* Michele Timmons et al., *County Home Rule Comes to Minnesota*, 19 WM. MITCHELL L. REV. 811, 816 (1993) (defining home rule and listing the two components).

139. *See* USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 1 (identifying the two means for granting home rule authority).

140. *See* SMITH, *supra* note 136, at 15.

141. *See id.*

142. *See id.*

143. *See id. See also* Lawerence L. Martin, *American County Government: An Historical Perspective, in* COUNTY GOVERNMENTS IN AN ERA OF CHANGE 11 (David Berman ed., 1993) (referencing both the lag time issue and the encumbrance of the state legislature).

144. *See id.* at 12.

145. *See* USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 1.

reforms have been successful at addressing the foundational concerns,[147] judicial battles over the definition of "local affairs"[148] and questions over preemption continue to plague state courts.[149]

IV. THE LEGAL ISSUE: PREEMPTING LOCAL ORDINANCES

The final piece in putting this puzzle together is setting forth the elements of the preemption doctrine—the legal issue separating state versus county control of agriculture. The preemption doctrine has two tenets: express preemption[150] or implied preemption.[151] Express preemption invalidates local ordinances when the state or federal government has passed specific legislation that reserves an area of law unto itself.[152] Implied preemption may be created in two ways. One way is through conflict[153]—when a local ordinance "prohibits an act permitted by a statute, or permits an act prohibited by a statute."[154] The other way is by regulating so extensively as to occupy the field of regulation.[155] Although the judicial tide usually

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146. *See generally* Michael Monroe Kellogg Sebree, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155 (1989) (detailing the successes and challenges of home rule authority).

147. *See* SMITH, *supra* note 136, at 15. *See also* Martin, *supra* note 143, at 11 (listing the principal reasons behind passage of home rule authority).

148. *See, e.g.*, Water Quality Ass'n v. County of Santa Barbara, 52 Cal. Rptr. 2d 184, 190-91 (Cal. Ct. App. 1996) (finding implied preemption of county water softener regulations because the state had "partially covered [the subject matter] by general law couched in such terms as to indicate clearly a paramount state concern [that] will not tolerate further or additional local action").

149. *See, e.g.*, Goodell v. Humboldt County, No. 16311 (Iowa District Court for Humboldt County, filed Apr. 2, 1997) (addressing whether local livestock environmental ordinances were preempted by state law).

150. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1 (4th ed. 1991) (stating that "where Congress acts pursuant to a plenary power, it may specifically prohibit parallel state legislation").

151. *See id.* § 9.4. "Congress' intention [to preempt state law] may be clear from the pervasiveness of the federal scheme, the need for uniformity, or the danger of conflict between the enforcement of state laws and the administration of federal programs." *Id.* (citations omitted).

152. *See* ANR Pipeline Co. v. Iowa State Comm. Comm'n, 828 F.2d 465, 468 (8th Cir. 1987) (finding that the prohibition in the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1672(a)(1), which stated that "no State agency may adopt or continue in force any such standards applicable to interstate transmission facilities . . . ." preempted state safety laws governing pipelines).

153. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6.24 (1978) (defining "actual conflict" as when "federal and state enactments are directly contradictory on their face. . . . [C]ompliance with both is a literal impossibility").

154. City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983). *See also* Gravert v. Nebergall, 539 N.W.2d 184, 189 (Iowa 1995) (stating that "the power of home rule thus must always yield to a state statute with which it conflicts").

155. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633-34 (1973). "Federal control [of airline regulation] is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Id. See also*

flows against the state in proving preemption of local regulations,[156] the statutory provisions relating to agriculture, and the livestock industry in particular,[157] provide grounds to argue that local ordinances violate all three of the preemption doctrine's tenets.

V. IOWA'S CASESTUDY: THE RISE AND FALL OF THE HUMBOLDT COUNTY ORDINANCES

The issue of county versus state control of livestock environmental regulation is boiling all over the country, but Iowa, the nation's leading pork producing state,[158] has been at the center of a legal battle over the preemption of county regulations. At the center of the controversy was a series of regulations adopted by the Humboldt County, Iowa Board of Supervisors that imposed new controls upon livestock operations within the county.[159] The Iowa Supreme Court determined that the county's ordinances were preempted by Iowa's laws regulating livestock operations.[160] Because the county's ordinances and the court's decision are precedents for action in many other states across the country,[161] a closer examination is warranted.

A. *The History of the Humboldt County Case*

The advent of the Humboldt County Ordinances probably dates back at least to the early 1970s, when Humboldt County imposed zoning restrictions on a proposed poultry operation.[162] The county's effort to regulate the poultry facility under the county's zoning ordinances predicted the later attempts to control large-scale farm operations. Through most of the 1970s and 1980s, sharp drops in the number of livestock operations in Humboldt County minimized the political conflict

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Goodell v. Humboldt County, 575 N.W.2d 486, 501-02 (Iowa 1998) (describing the two branches of preemption).

156. *See, e.g.*, TRIBE, *supra* note 153, § 6-26.

> But federal occupation of a field will not be lightly inferred: 'The principle to be derived from [the Supreme Court's] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of some persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'

Id. (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).

157. *See* IOWA CODE §§ 161C.6, 331.304A, 335.2, 455B.134, 455B.161-.165; 455B.173, 455B.201-.204 (1999).

158. *See* Benjamin, *supra* note 2, at 3.

159. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NOS. 22, 23, 24, 25 (1996).

160. *See Goodell*, 575 N.W.2d at 508.

161. *See* Doug Wood, *Update on Nation Wide Effort to Enact Ordinances* (visited Sept. 19, 2000) <http://www.salamander.com/~manyhogs/wood.html> (stating that five counties in Kentucky have adopted ordinances modeled after Humboldt County's).

162. *See* Farmegg Products, Inc., v. Humboldt County, 190 N.W.2d 454, 456 (Iowa 1971).

surrounding livestock farming.[163] The 1990s brought changes to the pork industry that increased the political tension.[164] Although beef industry numbers continued to fall,[165] the number of pork farms with sales of more than 1,000 head rose from 52 in 1982 to 68 in 1992.[166] More dramatically, the number of hogs produced in the county jumped from 182,114 in 1987 to 218,792 in 1992, despite the continued overall trend of fewer pork producers.[167] With the advent of these larger farms, the county began to seek new ways to limit the construction of new livestock facilities.[168] The result was a series of four ordinances aimed at regulating livestock facility construction, manure application, financial assurance, and odors.[169]

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163. The 1978 census data shows Humboldt County with 242 cattle operations and 342 pork farms. *See* 1978 AG CENSUS, vol. 1, pt. 51, *supra* note 30, at tbl.11, tbl.12. By 1992, those numbers had dropped to 123 and 186, respectively. *See* 1992 AG CENSUS, *supra* note 25, vol. 1, pt. 51 at 444. Between 1978 and 1987, the county's production of hogs dropped from 105,649 head to 95,334; cattle production fell from 30,984 to 19,778. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 IOWA CENSUS OF AGRIC., vol. 1, pt. 15 (Iowa) at tbl.11, tbl.12 (1984); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 IOWA CENSUS OF AGRIC., vol. 1, pt. 15 (Iowa) at tbl.1 (1989) [hereinafter 1987 AG CENSUS].

164. *See* 1992 AG CENSUS, *supra* note 25, vol. 1, pt. 15 at 462 tbl.15.

165. *See id.* at 453 tbl.14. The number of cattle produced in Humboldt County dropped to 13,754 in 1992. *See id.*

166. *See id.* at 462 tbl.15

167. *See id.*

168. *See* Jay Wagner, *County Eyes Livestock Ordinance*, DES MOINES REGISTER, Sept. 26, 1995, at 8S.

169. The attorney defending the Humboldt County ordinances against two suits by various local producers describes the ordinances this way:

> Ordinance 22: encourages meaningful community participation by requiring facilities to provide general information concerning their operations . . . . Once all requested information has been submitted, the County *shall* issue a Notice of Construction or Operation . . . .
>
> Ordinance 23: . . . provides environmental protection to County residents by requiring all facilities to demonstrate financial assurance prior to construction or operation of a regulated facility . . . . The estimated cost shall include the cost of clean-up of above-ground facilities and the cost of remediation to off-site facilities . . . .
>
> Ordinance 24: . . . prohibits the land application of manure that results in contamination of County groundwater . . . .Ordinance 24 requires a facility to provide County officials with information regarding the identity of land where animal waste will be applied, and water samples of all identified agricultural drainage wells (ADW's) and sinkholes . . . . The permit may only be suspended upon a finding that land application of animal waste has resulted in the contamination of an ADW or sinkhole once it has been issued.
>
> Ordinance 25: . . . prohibits off-site emission of hydrogen sulfide in excess of acceptable ambient levels. The facility shall cease operations once the ambient level has been exceeded until it complies with County air standards.

Brief for Appellees at 5-7, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790).

After the county passed the first ordinance, a local livestock producer, Lloyd Goodell, filed a declaratory action seeking to invalidate the ordinance.[170] Lloyd Goodell's suit was joined three months later by the Humboldt County Livestock Producers, an organization formed principally to contest the new ordinances.[171] A district court hearing was held January 30, 1997, on the parties' cross-motions for summary judgment.[172] The court ruled that three of the ordinances, Ordinances 22, 23, and 24, were "valid exercises of the county's home rule authority."[173] The district court did find that the county's air quality ordinance, Ordinance 25, was not enforceable.[174] The court held that article one of Ordinance 25, which imposed minimum distances between livestock facilities and neighboring residences, was a zoning ordinance which conflicted with the state's prohibition against agricultural zoning found in Iowa Code section 335.2.[175] The court upheld article two of Ordinance 25, but concluded that it was not enforceable until the county had received permission from the Iowa Department of Natural Resources ("DNR"), as required by Iowa Code section 455B.145, to enforce a local air quality program.[176] The Goodells and the Livestock Producers[177] appealed the adverse rulings on Ordinances 22, 23, and 24 to the Iowa Supreme Court.[178]

B. *The Iowa Supreme Court's Opinion: A Divided State, A Divided Court*

In a divided opinion,[179] the Iowa Supreme Court invalidated the Humboldt County ordinances, holding that all four ordinances were preempted because the

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170. *See* Final Brief for the Appellant at 4, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790) (presenting the chronology of the case).

171. *See id.* The Goodells' suit and the Livestock Producers' suit were consolidated for action on November 22, 1996. *See id.*

172. *See id.* at 5.

173. Goodell v. Humboldt County, 575 N.W.2d 486, 491 (Iowa 1998) (discussing the district court's decision).

174. *See id.*

175. *See id.*

176. *See id.*

177. This article will hereinafter refer collectively to the Goodells and the Humboldt County Livestock Producers as either "plaintiffs" or "livestock producers."

178. *See Goodell*, 575 N.W.2d at 491. Most all of the state's major agricultural organizations later joined in the action as amicus curiae parties. *See* Amicus Curiae Brief, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790) (listing Agribusiness Association of Iowa, Iowa Cattlemen's Association, Iowa Corn Grower's Association, Iowa Dairy Products Association, Iowa Farm Bureau Federation, Iowa Institute for Cooperatives, Iowa Pork Producers Association, Iowa Poultry Association, Iowa Soybean Association, and Iowa Turkey Federation as amicus curiae parties).

179. *See* Frank Santiago, *Local Control vs. Uniform Regulations*, DES MOINES REGISTER, Mar. 6, 1998, at 4A (Justice Ternus wrote the majority opinion, Justices Carter and Neuman concurred specially, Justice Harris dissented in part, and Justice Snell dissented from the majority opinion. Justice McGiverin excused himself because of public statements he had made regarding the livestock issue and Justice Larson recused himself because of his opposition to a livestock facility being constructed near his home.).

ordinances were irreconcilable with existing state laws.[180] The court's opinion begins with a review of the preemption doctrine juxtaposed against Iowa's county home rule authority.[181] After a disclaimer stating that the court's role was not to address the wisdom of the ordinances or the merits of state versus local control, the court proceeded to examine the plaintiffs' claims of express and implied preemption.[182]

The plaintiffs had claimed that the Humboldt County ordinances were zoning ordinances expressly preempted by Iowa Code section 335.2, which prohibits county zoning of agriculture.[183] The county asserted that the ordinances were passed under the county's home rule authority granted by Iowa Code section 331.[184] The court examined several definitions of zoning to determine whether the ordinances should be classified as zoning or as an exercise of police power.[185] The court's conclusion on the issue of express preemption rested on the principle that zoning usually regulates according to specific geographical districts.[186] Because the Humboldt ordinances applied on a countywide basis, the court held that the ordinances were not zoning, and thus were not expressly prohibited by Iowa Code section 335.2.[187]

Next, the court determined that the state laws governing livestock operations were not so pervasive as to occupy the field of regulation.[188] Iowa case law had established that "a clear expression of legislative intent to preempt regulation of a field by local authorities, or a clear expression of the legislature's desire to have uniform regulations statewide" was the standard that must be met before a court could preempt a local ordinance.[189] Examining the facts of the case, the court specifically found no clear expression of legislative intent either precluding home rule authority or dictating the need for state uniformity.[190] Absent such an expression of legislative intent, the court determined that the ordinances were not preempted under this tenet of the implied preemption doctrine.[191]

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180. *See Goodell*, 575 N.W.2d at 508. The breadth of the decision and the import of this case make it suitable for a lengthy comment fully exploring the court's application of the preemption doctrine and county home rule. Because this Article is intended to provide a national overview of this issue, however, this section will provide only a brief summary of the court's major holdings.

181. *See id.* at 489.

182. *See id.* at 494.

183. *See* Brief for the Appellant at 22, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790).

184. *See* Brief for Appellees at 20, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790).

185. *See Goodell*, 575 N.W.2d at 496-97 (citing 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 1.02[1], at 1-6 (1991); 6 ZONING AND LAND USE CONTROLS § 40.01[1][b], at 40-5).

186. *See id.* at 497.

187. *See id.* at 497.

188. *See id.* at 500.

189. *Id.* at 499-500.

190. *See id.* at 500.

191. *See id.*

Finally, the court reached the last tenet of the implied preemption doctrine, whether the local ordinances were inconsistent with state law.[192] It was under this analysis that the court held the ordinances to be an invalid exercise of county home rule authority, striking down all the ordinances as being in irreconcilable conflict with state law.[193] The court's first step was to dispatch with the conflict that exists between the Iowa constitution's mandate that local laws cannot be "inconsistent with the laws of the general assembly,"[194] and Iowa Code section 331.301(6) which provides "that a local government may 'set standards and requirements which are higher or more stringent than those imposed by state law.'"[195] Rather than fighting the battle out within these boundaries, the court very simply redrew the battle lines:

> Although it is possible to reconcile the statute allowing counties to set higher standards with the prohibition against inconsistent local laws, any distinction between these two principles is not determinative here. As we show in the following discussion, the Humboldt County ordinances do far more than merely set more stringent standards to regulate confinement operations. These ordinances revise the state regulatory scheme and, by doing so, become irreconcilable with state law.[196]

With this predilection established, the court proceeded to examine each ordinance in relation to the corresponding state statutory provisions.

1. *Ordinance 22*

Ordinance 22 fell because of conflicts with Iowa Code sections 455B.110 and 455B.173.[197] Section 455B.110 proscribes Iowa DNR enforcement against a livestock operation unless the agency has secured permission from the Iowa Environmental Protection Commission ("EPC").[198] The court found that, because the county could bring a civil action against a livestock producer without first getting the approval of the EPC, Ordinance 22 was in direct conflict with this statute.[199] Section 455B.173 grants authority to the state EPC to establish a livestock-permitting program.[200] Because it would be possible for a producer to have an approved state permit but still be denied approval by the county, the court concluded that the

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192. *See id.*
193. *See id.* at 500-08.
194. IOWA CONST. art. III, § 39A.
195. *Goodell*, 575 N.W.2d at 501.
196. *Id.* at 501-02.
197. *See id.* 502-03.
198. *See* IOWA CODE § 455B.110(3) (1999). *See also Goodell*, 575 N.W.2d at 502 (describing the purpose of section 455B.110).
199. *See Goodell*, 575 N.W.2d at 502.
200. *See* IOWA CODE § 455B.173(13) (1999).

county's prohibition of what the state allowed was a direct and irreconcilable conflict.[201]

2. *Ordinance 23*

Perhaps the most contentious of the Humboldt ordinances was Ordinance 23, which required that producers post an assurance bond with the county to cover the cost of any potential pollution.[202] Economic estimates projected the ordinance would increase production costs six dollars per head.[203] The plaintiffs contended that the ordinance conflicted with Iowa Code chapter 204, which establishes a state manure indemnity fund.[204] Rather than finding the ordinance preempted by the state financial assurance requirement, the court reasoned that because failure to comply with Ordinance 23 would prevent a producer from operating, the ordinance was invalid for the same reason as Ordinance 22.[205]

3. *Ordinance 24*

Ordinance 24, prohibiting the application of manure near drainage wells or sinkholes, was overturned because of a conflict with Iowa Code section 455B.172(5).[206] The county claimed that Iowa Code section 455E.10(2) specifically authorized the county to impose groundwater protection policies.[207] The Iowa Supreme Court found, however, that the exclusive grant of authority provided to the Iowa DNR by Iowa Code section 455B.172(5) trumped any conflict with section 455E.10(2).[208] The broad holding in this section proclaimed that "any home rule authority of the county to control the land application of manure from confinement operations has been preempted by the state."[209]

4. *Ordinance 25*

The Humboldt County air quality ordinance, Ordinance 25, prescribed specific limits on hydrogen sulfide emissions from livestock operations.[210] Farms with ambient emissions that violated the county's standard would have to shut down

201. *See Goodell*, 575 N.W.2d at 503.
202. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 23, § V (1996).
203. *See* Amicus Curiae Brief at 20, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790) (referencing the economic analysis of the ordinance).
204. *See Goodell*, 575 N.W.2d at 504.
205. *See id.*
206. *See id.* at 505.
207. *See* Brief for Appellees at 39, Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998) (No. 97-790).
208. *See Goodell*, 575 N.W.2d at 505.
209. *Id.* at 504.
210. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 25, § IV (1996).

until air quality limits were achieved.[211] The district court had basically eviscerated Ordinance 25 by striking article one and requiring the county to seek state approval for article two of the ordinance. Nonetheless, the plaintiffs challenged the ordinance as being in conflict with the livestock nuisance protection provisions found in Iowa Code section 657.11.[212] The provisions in that section provide that a livestock facility is not a nuisance unless it violates state law or unless it "'unreasonably and continuously interferes' with the comfortable enjoyment of life or property, *and* that any injury 'is proximately caused by the *negligent* operation' of the facility."[213] The court accepted the plaintiffs' position, emphatically stating that Ordinance 25 was not "merely setting a more stringent standard . . . [but was] a frontal assault on section 657.11."[214] The court found the nuisance protections provided by section 657.11 prevented any county regulation of odors produced by livestock operations.[215] Implicit within the court's holding is the idea that if the county regulation of odor is prohibited any attempted regulations governing the constituent components of that odor (such as hydrogen sulfide) must also be prohibited.

5. *Concurrence and Dissent*

Lost within the majority opinion's detail regarding the substance of the ordinances is the effect of this decision on the relative expansion and contraction of home rule authority versus the viability of the preemption doctrine.[216] The concurring[217] and dissenting[218] opinions bring these issues squarely into the spotlight. For example, Justice Carter's concurring opinion minimized the need for express preemption statements by the legislature, and instead insisted that disharmony between state and local provisions should be the standard for implied preemption.[219] The dissenting opinions decry the court turning its back on Iowa home rule and resurrecting Dillon's Rule.[220]

> Whether the Dillon rule has been excavated from the grave or preemption has re-emerged under the new name of inconsistency, or inconsistency has swallowed the law permitting higher and more stringent standards, the majority has drained the vitality from home rule. Little is left to local

211. *See id.* § V(2).
212. *See Goodell*, 575 N.W.2d at 505.
213. *Id.* (characterizing section 657.11) (emphasis in original). *See also* Iowa Code § 657.11 (1999).
214. *Goodell*, 575 N.W.2d at 507.
215. *See id.*
216. *See id.* at 489-508.
217. *See id.* at 508-09 (Carter, J., specially concurring).
218. *See id.* at 509-517 (Harris, J., Snell, J., dissenting).
219. *See id.* at 508-09 (Carter, J., specially concurring).
220. *See id.* at 509, 511 (Harris, J., Snell, J., dissenting).

> government that could withstand the avarice of an inconsistency meaning so pervasive.[221]

The dissent's final wish was that if the legislature believed the Humboldt Ordinances were preempted, then "an express preemption statement of unambiguous language would determine the issue."[222] In the aftermath of the court's decision, the dissent's wish came true.

C. *The Epilogue as a Prologue: Iowa's New Livestock Law*

Shortly before the Iowa Supreme Court released its opinion, the leaders of the Iowa Legislature announced their intent to preempt county regulation of livestock operations.[223] On April 13, 1998 House File 2494 passed the Iowa House on a 59-40 vote.[224] The compromise legislation incorporated a narrower Senate provision that only preempted county regulation of livestock operations, and not broader agricultural activities as the House originally desired.[225] The principal purpose of the legislation is found in section nine of the Act, which amends chapter 300 of the Iowa Code, the County Home Rule Authority provisions.[226] The Act created code section 331.304A,[227] which specifically precludes a county from "adopt[ing] or enforc[ing] 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."[228] At the same time, the law grants counties a greater role in the state's permitting, investigation, and enforcement processes.[229] Finally, the bill expands the requirement that livestock producers have nutrient management plans, widens separation distances between livestock farms and the state's waterbodies, and requires that all commercial manure applicators be properly trained and certified.[230]

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221. *Id.* at 517 (Snell, J., dissenting).

222. *Id.* at 517 (Snell J., dissenting).

223. *See* Jonathan Roos, *House Pushes Livestock Bill Ahead*, DES MOINES REGISTER, Feb. 18, 1998, at 4A (describing Iowa House Republican leaders' plans to move ahead with legislation preempting county authority).

224. Jonathan Roos, *Hog Lot Measure Heads to Governor*, DES MOINES REGISTER, Apr. 14, 1998, at 1A.

225. *See* Jonathan Roos, *Lawmakers Near Agreement on State Livestock Regulations*, DES MOINES REGISTER, Apr. 10, 1998, at 4M.

226. *See* H.F. 2494 § 9, 77th Leg., 2d Sess. (Iowa 1998).

227. *See* IOWA CODE § 331.304A (1999).

228. H.F. 2494 § 9, 77th Leg., 2d Sess. (Iowa 1998).

229. *See id* § 26.

230. *See, e.g., id.* (adding new permit requirements under a new Iowa Code Section 455B.200); *id.* § 33 (requiring manure applicator certification under new Iowa Code Section 455B.203A); *id.* § 35 (amending Iowa Code Section 455B.204 to increase the separation distance between livestock operations and waters of the state). *See also* Roos, *supra* note 224, at 1A (listing the same features of the bill).

Whatever the true merits of the bill, in either de-escalating the present tension between the Home Rule Loyalists and the neo-Dillionites, or in protecting the environment, its effects may never be known. As the political crescendo continues to rise,[231] the opportunity for reasoned and informed debate on the appropriate role for state and county governments will increasingly become a victim of thirty-second attack ads aired by proponents, opponents, and political candidates of every stripe.[232] The next part of this Article, while presenting arguments championing state control, will hopefully provide some reason and rationale for those policymakers across the country who continue to be confronted with this Rubic's Cube of business, environment, and local control.

VI. WHO CONTROLS THE FUTURE? MAKING THE CASE FOR STATE CONTROL

The extensive background and the Iowa casestudy demonstrates the complexity in determining whether state or local laws will regulate agriculture, or at least certain types of agricultural operations. Past all the political hyperbole, the question remains–who should be responsible for regulating modern livestock operations? The case for state control can be made through a broad range of legal,[233] economic,[234] and public policy[235] arguments. This Article concludes with a call for clarity. Judicial decisions should uphold state interests when, as Judge Dillon said, local government actions are "out of the range of those normally or customarily devolved upon localities, . . . or [the action] infringes on the liberty or property interests of individuals. . . ."[236] With or without judicial decisions on the validity of local ordinances, state legislatures should expressly preempt the police power regulation of livestock operations for the same reason the legislature formerly exempted those operations from zoning–the state's continuing interest in a viable agricultural sector.

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231. Most major votes on the Iowa legislation were nearly along straight party lines–Republicans voting in favor of strong state regulations, Democrats voting for greater local control. *See* Jonathan Roos, *Legislators Vote to Tighten State's Grip on Hog Rules*, DES MOINES REGISTER, Mar. 13, 1998, at 1M (quoting State Rep. Deo Koenigs as declaring, "we're saying to the people of Iowa that 'Pigs are more important than people'"). The article notes that the bill's opponents came to a rally at the statehouse wearing gas masks and dusk masks as a means of protesting the legislation. *See id.*

232. *Compare* Jerry Perkins, *Ag Foundation Ad's Funding Under Scrutiny*, DES MOINES REGISTER, Mar. 5, 1998, at 10S (discussing television ads aired by the Ag Value Growth Foundation which show 99 referees working a basketball game as an analogy to 99 different county regulations), *with* Jerry Perkins, *Livestock Ads Will Promote Local Control*, DES MOINES REGISTER, Mar. 10, 1998, at 10S (discussing advertisements aired by industry opponents).

233. *See infra* Part V.A.

234. *See infra* Part V.B.

235. *See infra* Part V.C.

236. USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 32-33.

A. *The State's Legal Case*

Although the legal case for state control will vary from one state to the next, two legal challenges should be common. The first legal issue is whether the breadth of the state's grant of home rule power permits the type of action taken by the county.[237] The second question is whether county action is preempted either by express statements, impliedly through a direct and irreconcilable conflict, or by the state's demonstrated intent to occupy the particular subject's field of regulation.[238] Both the home rule argument and the preemption argument support state, rather than local, control. Although the legal analysis should start with a review of the scope of the home rule grant, this Article will address the preemption question first.

1. *The Preemption of County Livestock Environmental Regulations*

County ordinances attempting to regulate agriculture may be preempted in three different manners.[239] First, county regulations may be in conflict with state law if those regulations prohibit a producer from operating, even after the farmer has met the environmental tests imposed by the state.[240] Second, the state's express provisions relating to agricultural production[241] demonstrate a state legislature's clear intent to prevent even minimal county interference with agricultural production.[242] These express state provisions against local zoning of agriculture should also serve as analogs in determining whether police power regulations to promote the general welfare are any more acceptable within a state's statutory scheme as police power regulations that zone agricultural operations. And third, the extensive nature of some state regulatory programs governing agriculture impliedly preempt local regulation by thoroughly occupying the field of regulation.[243] Within each of these contexts, determining whether local ordinances are preempted will depend upon the construction of each state's laws. Some shared principles between various state laws, however, provides sufficient fodder for analysis.

a. *Which Way To Turn: Farmers Facing Conflicting Regulations*

If a livestock producer has received all required environmental permits from the state, a county regulatory scheme prohibiting that livestock operator from

237. *See supra* Part III.C.
238. *See supra* Part IV.
239. *See id.*
240. *See supra* Part V.A.1.a.
241. *See supra* note 4.
242. *See supra* Part V.A.1.b.
243. *See supra* Part V.A.1.c (providing examples of how the extensive nature of most state regulatory scheme governing agriculture, specifically livestock production, impliedly preempt county regulation by occupying the field of agricultural regulation).

constructing his or her operations is in direct conflict with the state law.[244] The Humboldt County, Iowa ordinances serve as a good example of local ordinances that conflict with state law.[245] Humboldt Ordinance 22 requires a producer to receive county approval prior to construction or expansion of a livestock facility.[246] An operator is required to file specific information with the county before county approval will be granted.[247] While an information requirement on its face may seem innocuous, the provision can be used to force substantive changes in the management of the operation. For example, if the development of a livestock odor control plan is not a prerequisite to state permit approval, but the county requires that such a plan be submitted before county approval will be granted, the county has forced substantive, economic changes in the management of the operation, merely by requiring that information about such a plan be submitted. In this instance, because the producer would be allowed to operate under a state permit, but prohibited from doing so by the county, this is a clear conflict of local and state regulations.

b. *The Express Preemption of County Agricultural Regulations*

Agriculture plays a major role in the economies of many midwestern states where the local regulation of livestock is at issue.[248] Rather than imposing a strict regulatory regime upon the agricultural industry, many state programs have been designed to help ensure both environmental protection and economic productivity.[249]

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244. *See* USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 1. *See generally* Sebree, *supra* note 146 (detailing the successes and challenges of home rule authority).

245. *See* Goodell v. Humboldt County, 575 N.W.2d 486, 489-91 (Iowa 1998).

246. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 22, §§ 1, 8 (1996).

247. *See id.* §§ I, VIII.

248. *See generally* 1992 AG CENSUS, supra note 25 (showing total agricultural sales for all fifty states). Agricultural sales in Iowa reached $10 billion in 1992, with pork sales making up one-fourth of that total. *See id.* vol. 1 pt. 15 (Iowa) at 1, 7 fig.6. Iowa cattle sales contributed $2.2 billion. *See id.* at 7 fig.6. Illinois sales for 1992 reached $7.3 billion with pork contributing $986 million and cattle adding $725 million. *See id.* vol. 1 pt. 13 (Ill.) at 1, 7 fig.6. In both states, sales declined between 1982 and 1992. *See id.* at 8 tbl.1, vol. 1 pt. 15 (Iowa) at 8 tbl.1. During this same time period, North Carolina's total agricultural sales increased from $3.5 billion to $4.8 billion. *See id.* vol. 1 pt. 33 (N.C.) at 8 tbl.1. In 1992, cattle contributed $158 million to the North Carolina economy while pork sales contributed $900 million. *See id.* at 7 fig.6. Arkansas, Indiana, and Michigan all increased pork sales during this period, while Kansas, Missouri, and Wisconsin ended with a substantial decreases in pork sales. *See id.* vol. 1 pt. 4 (Ark.) at 10 tbl.2, vol. 1 pt. 14 (Ind.) at 10 tbl.2, vol. 1 pt. 22 (Mich.) at 10 tbl.2, vol. 1 pt. 16 (Kan) at 10 tbl.2, vol. 1 pt. 25 (Mo.) at 10 tbl.2, vol. 1 pt. 49 (Wis.) at 8 tbl.1.

249. *See, e.g.*, 510 ILL. COMP. STAT. ANN. 77/40 (West Supp. 2000) (establishing state-funded environmental research programs to address odor and water quality issues related to livestock production); *id.* at 77/45 (granting a tax abatement to livestock producers for the purchase of environmental equipment); IOWA CODE § 161C.6 (1999) (setting up an organic nutrient management fund to help livestock farmers improve manure management); N.C. GEN. STAT. § 143-215.10A (1999) (providing "it is the intention of the State to promote a cooperative and coordinated approach to animal waste management among the agencies of the State with a primary emphasis on technical assistance to farmers"); 1995 Ky. Rev. Stat. & R. Serv. 224.71-120 (Banks-Baldwin) (providing for technical assistance to help livestock producers meet state water quality plans).

The goal in many states has been to promote technological improvement and efficiency within the agricultural industry.[250] This state interest, however, has been generally ignored by local governmental officials who oppose new livestock facilities.[251]

Passage of a specific agricultural purposes exemption within the state zoning enabling statute was an effort by many states to protect the state's vital interest in a strong agricultural industry.[252] And although counties have consistently tried to narrow the breadth of this exemption, recent court decisions continue to support a broad interpretation of exempt agricultural activities.[253] The state agricultural exemptions represent an express statement on the part of various state legislatures to preempt county regulation of agriculture.[254]

A state's express preemption of agricultural zoning should be controlling when viewing other county attempts to regulate the agricultural industry. The power to zone is one of the police powers conferred upon local governments, indistinguishable in authority from the police power to regulate health, safety, and welfare.[255] When a county claims it is regulating under its police powers, and not under its zoning authority to protect the general welfare, the county is splitting hairs simply for the purpose of evading state prohibitions against regulating agriculture. Such an ordinance should not be allowed to stand against express state policies and statutes that prohibit local application of other police power regulations.

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250. *See, e.g.*, IOWA CONST. art. IX, 2d, § 3 (encouraging "by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement"); 510 ILL. COMP. STAT. ANN. 77/40 (West Supp. 2000) (state livestock research fund).

251. *See* Hall, *supra* note 63 (farmers complaining that the Chatham County ordinance was stricter than state laws); Meryhew, *supra* note 110 (Rice County commissioner supported an ordinance restriction corporate farm growth); Smiley, *supra* note 5 (Taylor County officials approved ordinances regulating large livestock production); Wells, *supra* note 5 (Wayne County Board imposed a sixty day moratorium on construction of new hog facilities); Wheeler, *supra* note 57 (Kent County local officials considered zoning restrictions on large livestock options).

252. *See* 55 ILL. COMP. STAT. ANN. 5/5-12001 (West Supp. 2000) (stating that [zoning powers] should not be exercised in a manner imposing regulations or requiring permits "with respect to land used for agricultural purposes, which includes the growing of farm crops . . . animal and poultry husbandry . . . when such agricultural purposes constitute the principal activity on the land . . . ."). *See also* IOWA CODE § 335.2 (1999) (declaring a similar prohibition against agricultural zoning); KAN. STAT. ANN. § 19-2908 (1995); MO. ANN. STAT. § 64.620 (West 1998).

253. *See generally* Platte River Env't Conserv. Org. v. National Hog Farms, Inc., 804 P. 2d 290, 292-93 (Colo. Ct. App. 1990) (holding that contiguous land holdings contribute only one "lot" for purposes of determining number of animals permitted to raise); Lake v. Cushman, 353 N.E. 2d 399, 404-405 (Ill. App. Ct. 1976) (finding a poultry operation on a 3.9 acre lot was an agricultural use exempt from county zoning under Illinois state law and listing cases delineating a broad agricultural purpose exemption); Helmke v. Board of Adjustment, 418 N.W. 2d 346 (Iowa 1988) (holding that a grain elevator was an exempt agricultural use); Farmegg Products, Inc. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971) (finding that proposed poultry operation holding 80,000 chickens did not have an "agricultural purpose"); Lincoln v. Murphy, 49 N.E.2d 453 (Mass. 1943) (finding an operation producing hogs was a "piggery" and not a farm).

254. *See supra* note 252.

255. *See* 1 DILLON, *supra* note 131, § 301, at 553-55.

c. *The State's Intent: Implied Preemption Through Occupation of the Field*

The implied preemption doctrine is an even more likely method for overturning local livestock regulations.[256] Many states have responded to constituent concerns regarding livestock operations,[257] yet the state law changes have failed to satisfy county critics.[258] For example, Iowa's 1995 legislation commonly known as House File 519[259] required that new operations be set back a certain distance from neighboring structures.[260] The bill also established a manure indemnity fund[261] and required manure management plans.[262] The comprehensive nature of the Iowa legislation supports a judicial conclusion that the legislation occupies the field of environmental regulation pertaining to agriculture, which precludes county regulatory efforts.[263]

Further evidence of the legislature's intent to preempt local regulation is found in the Iowa Senate's rejection of an amendment that would have provided counties the authority to adopt regulations more stringent than those of the state DNR.[264] The Iowa Supreme Court has held that the "striking of a provision before enactment of a statute is an indication the statute should not be construed to include it."[265] Although the failure of one amendment is not singularly controlling, it does represent further evidence of the legislature's express and implied intent to prevent or exclude county regulation of agricultural operations.

The challenge facing any court hearing preemption arguments is that it must draw a line in the sand as to when state regulation is merely extensive, versus when it occupies the field. Such a line is not easily drawn.[266] Justice Jackson's review of federal airline regulation, however, provides a good analogy.[267] Most states regulate

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256. *See* SMITH, *supra* note 136, at 15. *See also* MARTIN, *supra* note 143, at 11-12; USACIR, LOCAL GOVERNMENT AUTONOMY, *supra* note 129, at 1.

257. *See* Livestock Facilities Management Act, 510 ILL. COMP. STAT. 77/1-77/999 (West Supp. 2000); 1995 Iowa Acts 195; 1997 N.C. Sess. Laws 458 (H.B. 515) Slip Copy.

258. *See* Roger Larson, Opinion, *What's Next for Iowa Hog Legislation?*, DES MOINES REGISTER, May 18, 1997, at 6 (quoting a complaint by a member of Iowa Citizens for Community Improvement that House File 519 doesn't protect the environment or "slow the growth of factory farms"). *See also* Perkins, *supra* note 64, at 5G (quoting Humboldt County supervisor Harlan Hansen that House File 519 "does not work in Humboldt County").

259. *See* 1995 Iowa Acts 195.

260. *See* IOWA CODE § 455B.173(13) (1999).

261. *See id.* § 204.

262. *See id.* §§ 455B.201-.204

263. *See, e.g.*, Goodell v. Humboldt County, 575 N.W.2d 486, 500 (Iowa 1998). *See also* IOWA CONST. art. III, § 39A; IOWA CODE § 331.301 (1999).

264. *See* IOWA CODE § 455.1 (1999) (not including proposed amendment 455B.167); S. 3528, 76th. Gen. Assembly 2 (Iowa 1995).

265. Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 374 (Iowa 1977).

266. *See* Water Quality Ass'n v. County of Santa Barbara, 52 Cal. Rptr.2d 184, 190-93 (Cal. Ct. App. 1996) (articulating the challenge of establishing preemption by occupation of the field).

267. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633-34 (1973) (finding the federal government's pervasive regulatory system occupied the field of airline regulation).

the location and construction of livestock manure storage facilities,[268] the level of manure within those facilities,[269] and the application of that manure to cropland.[270] There is no aspect of livestock manure management that is left completely unregulated—the question is simply one of degree.[271] Accordingly, when the state has made provisions to regulate all basic elements of an enterprise, and the county's challenge is simply one of degree, a court should invalidate the local ordinance by finding that the state has occupied the field of regulation.

B. *Finding the Efficient Level of Regulation*

Economics versus the environment is a familiar refrain within the ongoing battle over the regulation of agriculture. Instead of looking at the issue of local livestock regulation in such an either/or fashion, a better perspective is to determine whether the additional environmental investment yields a corresponding environmental gain.[272] Economists reviewing Humboldt County Ordinance 23, the financial assurance ordinance,[273] estimated the Ordinance would annually cost

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268. *See, e.g.*, 510 ILL. COMP. STAT. 77/35 (West Supp. 2000) (imposing setback distances for livestock facilities and management activities); IOWA CODE § 455B.134(3)(f) (1999) (establishing separation distances between livestock lagoons and neighboring residences or institutions); IOWA CODE §§ 455B.162-.165 (1999) (imposing separation distances on all new operations built after May 31, 1995); MO. REV. STAT. § 640.710(2) (1997) (requiring buffer distances between a livestock operation and any public building or occupied residence); OKLA. STAT. ANN. tit. 2 §§ 9-210-210.1 (West 1997) (providing Right to Farm protections to producers who comply with applicable setback distances); S.C. CODE ANN. §§ 47-20-20 to -50 (Law. Co-op. 1996) (setting forth the setback and waiver requirements for large swine facilities).

269. For example, in North Carolina, the following violations require immediate notification of the state environmental department:

> (1) Any direct discharge of animal waste into the waters of the State.
> (2) Any deterioration or leak in a lagoon system that poses an immediate threat to the environment.
> (3) Failure to maintain adequate storage capacity in a lagoon that poses an immediate threat to public health or the environment.
> (4) Overspraying animal waste either in excess of the limits set out in the animal waste management plan or where runoff enters waters of the State.
> (5) Any discharge that bypasses a lagoon system.

N.C. GEN. STAT. § 143-215.10E (1999).

270. *See* IOWA CODE §§ 455B.201-.203 (1997).

271. Prior to passage of the Humboldt County ordinances, the Iowa Attorney General had ruled that the comprehensive and highly pervasive nature of the state's regulatory scheme preempted county livestock regulations. *See* Op. Iowa Att'y Gen. 96-1-2, at 5-7 (Jan. 30, 1996).

272. *See* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 34 (1996) (discussing how to allocate environmental regulatory authority so as to "achieve the optimal . . . level of pollution without imposing unnecessary costs on productive economic activity").

273. *See* Goodell v. Humboldt County, 575 N.W.2d 486, 490 (Iowa 1998) (describing Ordinance 23).

producers six dollars per head.[274] Comparatively, Iowa State University estimated that in 1996, the least efficient producers made a $6.32 per head profit, whereas average producers gained $17.95 per head.[275] The fact that the least marginal producers merely broke even is not that dramatic, until you consider that these same producers have averaged a three dollar per head loss the past ten years, and 1996 was the first year this group had made a profit since 1990.[276] For these producers, the imposition of local regulations, similar to the Humboldt County ordinances, would be the death knell for their swine enterprises.

Determining whether forcing these producers out of the industry generates a comparable environmental gain can be evaluated by comparing the local ordinances to what state law already prescribes. Iowa law already requires livestock producers to secure a permit–similar to that required by Humboldt County Ordinance 22.[277] The state also requires certain producers to contribute to a manure storage indemnity fund, which serves the same purpose as the financial assurance bonds required by Humboldt County Ordinance 23.[278] The state also requires manure management plans that protect against manure runoff entering agricultural drainage wells,[279] a key requirement of Humboldt County Ordinance 24,[280] and prescribe air quality measures for livestock operations,[281] the stated purpose of Humboldt County Ordinance 25.[282] The duplication between these state provisions and the county ordinances not only makes a strong preemption case, it demonstrates that there will be minimal environmental gain for the significant cost extracted from local producers.

C. *The Political and Social Restraints on Local Government Action*

Judge Dillon argued that unless a local government had express authority, any actions that contravened state policy goals were invalid.[283] While Dillon's idea that a local government needs express authority may have been laid to rest with the passage of home rule authority, the idea that a state's policy should trump a local ordinance is still a viable part of the conflict doctrine.[284] In addition to the legal and

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274. *See* John Lawerence et al., *Economic Impact of Livestock Bonding Requirement*, IOWA PORK PRODUCERS, June 1997, at 8, 8.

275. *See* NAT'L PORK PRODUCERS COUNCIL, PORK FACTS 2000/2001 24 (2000).

276. *See id.*

277. *See* IOWA CODE § 455B.173(13) (1999); IOWA ADMIN. CODE r. 567–65.6 (1999) (granting authority to the state EPC to require permits and setting forth the criteria for receiving a state permit).

278. *See* IOWA CODE ch. 204 (1999) (establishing Iowa's manure storage indemnity fund which was created to pay for the clean-up of any livestock manure spills).

279. *See id.* § 159.27.

280. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 24, § IV (1996).

281. *See* IOWA CODE §§ 455B.161-.165 (1999).

282. *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 25, § I (1996).

283. *See* DILLON, MUNICIPAL CORPORATIONS, *supra* note 131, § 92, at 144-45; § 237, at 448-50.

284. *See supra* III.C, IV.

economic arguments against local control, two policy reasons remain: (1) the prohibition against economic protectionism;[285] and (2) the perverse impact of local regulations on the small livestock producers the regulations are intended to help.[286]

1. *County Environmental Regulations: The Trojan Horse for Economic Protectionism*

In general, state policies have supported continued growth and technological efficiency in agriculture.[287] Many county regulations, on the other hand, are raw economic protectionism masquerading as environmental laws. State policy should not tolerate such a ruse. The change in our agricultural production system has been dramatic; a change made even more poignant by the loss of family farmers.[288] Passing new environmental laws, however, will not stem this tide of change. If anything, it may exacerbate it. The excessive costs imposed by the Humboldt County financial assurance ordinance would effectively prohibit the expansion of any family operation that would breach the Humboldt County cap.[289]

2. *The Perversity of Local Laws*

Lost within the issue of big versus small livestock operations is one of the "paradoxes of the regulatory state."[290] In his renowned article on regulation, Professor Cass Sunstein offered as a paradox the idea that "redistributive regulation harms those at the bottom of the socioeconomic ladder."[291] Part of the siren call for local regulation is that corporate farms are driving small farms out of business.[292] Some of the people arguing against expansive local control, however, recognize that environmental regulations aimed at corporate farms may have perverse, negative consequences for family farmers.[293] Large, well-capitalized farm operations have a greater ability to finance new technologies and employ innovative environmental management systems.[294] The paradox of aiming for big farmers and hitting family

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285. *See infra* VI.C.1.
286. *See infra* VI.C.2.
287. *See supra* note 250.
288. *See supra* Part II.A.1.
289. *See infra* Part VI.C.2.
290. Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 407 (1990).
291. *Id.* at 421-22.
292. *See* Barrett, *supra* note 40 (citing complaints that large farms drive small farms out of business).
293. *See, e.g.*, Warfield, *supra* note 48 (arguing that small farmers cannot comply with restrictive state laws).
294. *See generally* Amy Purvis & Joe Outlaw, *What We Know About Technological Innovation to Achieve Environmental Compliance: Policy Issues for an Industrializing Animal Agriculture Sector*, 77 AM. J. AGRIC. ECON. 1237, 1238 (1995) (concluding that access to capital,

farmers is not limited by geography—the problem can occur with both state or local regulations.

The final element to this debate, which demonstrates that the "perversity paradox" is more likely to occur with local (rather than state) regulation is the inconsistencies with county regulations in establishing what constitutes a large farm.[295] A cynical joke within the debate over large and small farmers is that a big farmer can be defined as someone who has one hog more than his neighbor. Unfortunately, proponents of local livestock regulations seem to have adopted this definition as a standard. The federal definition for a large farm, known in CWA parlance as a concentrated animal feeding operation, sets 1,000 animal units as the level at which a farm is classified as an industrial source.[296] The federal law provides a consistent framework that has provided certainty to both farmers and regulators for over 25 years.[297] In contrast, county regulations have set the regulated farm size all over the board.[298] The consequence of this disparity is that the lines between who qualifies as a corporate farmer and who qualifies as a family farmer are blurred.[299] For large corporate farms that can choose to locate anywhere in this country or another country, an individual county's ordinances pose no dilemma.[300] Family farmers who have built their home and livelihood within a particular county, however, may be prevented from expanding by draconian county regulations.

3. *The Precedent for State Control*

Iowa has established a pattern of granting local control within very defined limits.[301] For example, the state's air quality program allows for local units of

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innovation, and economies of scale allow large livestock farms greater opportunity for complying with environmental regulations).

295. *Compare Wayne County Targets Hog Farms*, *supra* note 59, *with* Meidroth, *supra* note 108.

296. *See* 40 C.F.R. §§ 122.23, 122 app. B (2000) (defining a CAFO). *See also supra* Part II.B.1.

297. *See* 33 U.S.C. §§ 1251-1387 (1994) (the federal Water Pollution Control Act); 42 U.S.C. §§ 7401-7671 (1994) (the federal Clean Air Act); 40 C.F.R. §§ 122.23, 122 app. B (2000).

298. *See, e.g.*, *Wayne County Targets Hog Farms*, *supra* note 59 (regulating "large operations" with more than 1250 hogs); Meidroth, *supra* note 108 (defining a large farm as "anything that would exceed normal community farming procedure").

299. *See, e.g.*, Kristi O'Brien, *Hog Farmer Persuades Few at Board Meet*, REGISTER-MAIL (Galesburg Ill.), June 19, 1997, at A1 (reporting a debate involving large hog farms at county board meeting). At the meeting, Kevin Main, a local hog farmer, stated,

> I am a family operation. We went out and borrowed $2 million in 1993 to construct two hog facilities. That's a lot of money . . . . Some see us as greedy, some see us as rich. My bank would tell you different. If hard work and the extreme desire to be successful is viewed as greed, I'm guilty.

Id.

300. *See* BUTLER & MACEY, *supra* note 271, at 35.

301. *See, e.g.*, IOWA CODE § 455B.145 (1999) (setting forth the criteria a local government must meet before the state will certify a local air quality control program).

government to enforce the state's air quality provisions, but only after the local government has certified that it has established a comprehensive program capable of enforcing all state requirements.[302] The structure of this provision ensures enforcement of all state and federal rules, eliminates duplicative regulation, consolidates enforcement, and provides the regulated industry with a clear understanding of what is required.[303] By contrast, Humboldt County Ordinance 25,[304] the county's air quality ordinance, would have left enforcement of most clean air standards in the hands of the state, would have created two separate enforcement mechanisms, and would have confused farmers regarding how the state and county regulations would be applied.[305] A county district court reviewing the ordinance held the county could not enforce the measure until the county had met the requirements of Iowa Code section 455B.145.[306] The Humboldt ordinances regulating water quality were not struck down because no comparable language existed in the state water quality codes.[307]

Iowa's air quality provisions provide lessons for both courts and legislatures. Courts should note that county control over environmental regulations governing air quality is strictly limited and narrowly defined.[308] Although similar limitations are not expressed within the state's water quality provisions,[309] the approach within the air quality section may still serve as a precedent for defining the level of environmental control the legislature wanted to cede to local governments. Second, legislatures could use this approach in providing an option for local control, with one caveat. Iowa's current air quality laws prohibit the state from imposing emissions standards which exceed "the standards or limitations . . . of the federal Clean Air Act."[310] Because many county ordinances are exclusionary in nature,[311] a similar state restriction would be an important part of a joint state-local program.

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302. *See id.*

303. *See id.*

304. *See* Goodell v. Humboldt County, 575 N.W.2d 486, 505-07 (Iowa 1998) (describing the Humboldt County ordinances).

305. For example, Iowa's law governing the location of new livestock facilities requires varying separation distances between the animal feeding structure and a neighboring residence or institution. *See* IOWA CODE § 455B.162 (1999). A farmer attempting to comply with the state setback provision may construct an operation near a property line farthest from surrounding neighbors. *See id.* The Humboldt County air quality ordinance, however, allowed an air quality measurement to be taken "off-site." *See* HUMBOLDT COUNTY, IOWA, ORDINANCE NO. 25 (1996). Since the county ordinance punishes "off-site" emissions, locating a facility according to state law may increase the chances of violating the county standard. *See id.*

306. *See* Goodell v. Humboldt County, No. 16311, at 16 (Iowa District Court for Humboldt County, filed Apr. 2, 1997).

307. *See id.* at 15.

308. *See* IOWA CODE § 455B.145 (1999).

309. *See id.* at §§ 455B.171-.192.

310. IOWA CODE § 455B.133(4) (1999).

311. *See, e.g.*, Olsen, *supra* note 109 (referencing county official's desires to keep out large corporate farms).

D. *The Need for Clarity*

> [In a] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person . . . [a] common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies . . . have ever been found incompatible with personal security or the rights of property . . . .[312]

Madison's fear of a common passion overriding reason within a local government has certainly come to fruition in the debate surrounding large livestock operations. The challenge now is to find reasoned solutions to the real problems which the livestock industry must address. Meeting this challenge will be left to both courts and legislatures.

1. *Judicial Construction of Home Rule Authority*

When it comes to the debate regarding state versus local control of livestock operations, the apple of home rule has fallen far from the tree. Home rule was originally passed because of the burden that managing local affairs imposed upon a state government.[313] Today, the problems with home rule center around the encroachment of local authority into areas of traditional state dominion.[314] Based upon these historical roots of home rule authority, a narrow construction of the authority is warranted.[315]

Terrance Sandalow, a leading commentator on local government and a champion of home rule authority, recognized that the potential authority of local governments was so broad that it could create a labyrinth within which individual rights might get lost.[316] Sandalow proposed that an active court should invoke a suspensive veto of local government actions that threaten "fundamental community values or established state policies."[317] A judicial veto of a municipal or county act conflicting with state policies would put the issue back into the hands of the

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312. THE FEDERALIST NO. 10 (James Madison) (as cited in GERALD FRUG, LOCAL GOVERNMENT LAW xxxi (2d ed. 1994)).

313. *See* SMITH, *supra* note 136, at 14 (listing the three principle reasons for granting home rule authority).

314. *See* 55 ILL. COMP. STAT. 5/5-12001 (West Supp. 2000). *See also* IOWA CODE § 335.2 (1999); KAN. STAT. ANN. § 19-2908 (1995); MO. ANN. STAT. § 64.620 (West 1998) (defining environmental regulations as primarily a state function and providing examples of state and local conflicts regarding the scope of the home rule authority).

315. *See* HOME RULE AMENDMENT, *supra* note 136, at 2 (1966) (suggesting that Dillon's rule may be used in states with home rule authority to interpret the scope of the home rule powers).

316. *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for Courts*, 48 MINN. L. REV. 643, 717 (1964).

317. *Id.*

legislators, where the extent of the county's authority could be explicitly defined.[318] Boiled down, the question becomes, who must seek the approval of the legislature? A local government implementing a new and restrictive standard that threatens future business opportunities, or the landholder seeking to effectuate individual property rights against an egalitarian majority?

2. *State Legislative Options*

With or without judicial action, this question is likely to continue to haunt legislators for the next several years. Our federal system ensures that each state is likely to handle the questions presented in its own unique manner.[319] Express preemption of county authority will prevent the development of a patchwork quilt system of environmental controls.[320] Express preemption will also ensure that the rapid proliferation of county regulations does not undermine state policies supporting a strong and progressive agriculture.[321] The most important point for state legislators to remember, however, is that decisive state action is critical.

3. *A Closing Irony*

There is a rich, regional, irony to this debate over state versus local environmental regulations. Environmentalists and federal authorities are bemoaning the stridency of the western states' wise use movement.[322] The movement has been sparked by county officials who have taken blatant actions in disregard of environmental controls on federal lands within their individual counties.[323] Legal commentators have criticized these local government officials and prescribed federal

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318. *See id.* at 689.

319. *Compare* 1997 N.C. Laws Sess. Laws 458 (imposing a two-year moratorium on construction of new swine operations, and expressly granting counties authority to zone agricultural operations), *with* Barrett, *supra* note 116 (describing proposed environmental legislation in Wisconsin which would impose statewide water quality standards, while restricting the "patchwork quilt" of county regulations).

320. *See* Jim Smiley, *Branstad: State Must Control Hog-Lot Rules*, OMAHA WORLD-HERALD, Apr. 24, 1997, at 17SF, *available in* LEXIS, Newspaper Stories, Combined Papers (stating that former Iowa Governor Terry Branstad feared that if counties could set their own regulations, the result could be conflicting rules across the state).

321. *See supra* Part VI.A.1.b.

322. *See* Ted Williams, *Defense of the Realm: Is the Endangered Species Act Really Working?*, SIERRA, Jan. 11, 1996, at 34 (complaining that the growth of the wise use or "county supremacy" movement threaten the future of the Endangered Species Act).

323. *See* Kevin Keating, *Idaho High Court Halts 'Wise Use' Movement*, SPOKESMAN REVIEW (Spokane, Wash.), Mar. 19, 1996, at A1 (explaining how the Idaho Supreme Court struck down a county ordinance which had claimed ownership of state and federal lands); Brad Knickerbocker, *Sagebrush Rebels Take on Uncle Sam*, CHRISTIAN SCIENCE MONITOR, Jan. 3, 1996, at 1 (describing how a Nye County Commissioner had bulldozed open a federal Forest Service road after the county had passed a resolution declaring home rule authority over federal lands).

preemption of county actions.[324] From an environmental standpoint, it might be easy to favor county regulatory actions while condemning the wise use movement. It is important to remember, however, that the issues and arguments regarding governmental structure and control will apply the same in both cases.

VII. CONCLUSION

Livestock operations have generated a storm of controversy that is unlikely to be quelled in the near future. The changing structure of agriculture, the shift to a global economy, and the changing composition of our rural communities have all contributed to an intense and emotional debate over the future of agriculture. As states have worked to find a balance between promoting agriculture and protecting the environment, counties have become increasingly strident in their efforts to impose local controls on agriculture.

Counties are claiming police power authority to impose new environmental regulations on agriculture. Unfortunately, many of these regulations are merely Trojan Horses designed to exclude operations rather than protect the environment. Accordingly, narrow construction of home rule authority and preemptory challenges should be constructed as a bulwark against expansive county environmental regulation. Ultimately, however, state legislatures must directly confront the questions regarding the appropriate level of local control. Narrow constraints of county authority or joint county-state enforcement may be two possible solutions for state legislatures seeking alternatives.

The agricultural industry and state legislatures must effectively address the environmental challenges facing the livestock industry. At the same time, those individuals calling for more local regulation must realize that changes in environmental management and environmental quality do not occur overnight. In the meantime, policymakers will find themselves in a no-man's land between those individuals calling for strong local regulations and those individuals trying to preserve a strong local economy and the freedom to farm.

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324. *See generally* Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417 (1997) (arguing that the county supremacy movement is a threat to federalism).

> The County Supremacy movement is the newest, and most dangerous, chapter in the American states' rights movement. . . . The theoretical construct of this perspective, that "local is better" in avoiding the tyranny of centralization, began benignly enough . . . . The current reincarnation of states' rights activism on the western range has become even more dangerous and irrational. Ostensibly advocating increased local input in land management decisions, the movement's misleading rhetoric and virulent anti-federalism only heightens the contemporary atmosphere of insurrection.

Id. at 486. *See also* Elizabeth M. Osenbaugh & Nancy K. Stoner, *The County Supremacy Movement*, 28 URB. LAW. 497 (1996) (discussing federal preemption of county wise use ordinances predicated under home rule).