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# Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game?

by

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# JURISDICTIONAL BOUNDARIES: WHO SHOULD MAKE THE RULES OF THE REGULATORY GAME?

*Charles W. Abdalla* and John C. Becker***

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## I. INTRODUCTION

The concept of jurisdictional boundary is relevant at several levels in analyzing issues resulting from the industrialization of agriculture. Currently, many external effects occur beyond the boundary of firms engaged in animal production and are not considered by firm decision-makers and reflected in market prices. For political decisions, jurisdictional boundaries define the group whose voice stands the best chance of being heard in the process of specifying rights and granting entitlement.

This Article focuses attention primarily on the relationship between formation of rules for natural resources use, especially costs external to firms, and industrialization of the livestock production system and how industrialization is affecting these rules. An overview of federal policy precedes a discussion of legal considerations employed to resolve disputes when more than one level of government acts to address a problem. An analysis of jurisdictional boundary issues as observed in five states follows this discussion. The Article concludes by proposing an answer to the initial question posed in the title.

### A. *Federal Policies for Managing Animal Waste*

An individual's or firm's opportunity set is defined by the interaction of many interrelated federal, state and local institutional rules. At the federal level, these rules are broad, including basic rights and responsibilities derived from the Constitution and common law that frame the scope of issues open for decision at the state and local levels. This institutional context also includes specific laws, such as the federal Clean Water Act,[1] which defines the rules for large confined animal feeding operations.

Under the federal Clean Water Act, permits for discharging waste into surface water are required only for confined animal feeding operations with more

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

than 1000 animal unit equivalents.[2] In 1995, forty states had taken over this program. However, implementation of the permitting process has varied greatly across the country. As of April 1995, out of an estimated 6600 feedlots with greater than 1000 animal units, 1987 had discharge permits.[3] Moreover, even though the current federal approach to addressing environmental problems attributable to animal agriculture is in theory a sensible decentralized effort, this program's implementation has been limited in scope.[4]

The Clean Water Act has been slated for reauthorization for five years, but Congress has not yet acted. Local disputes between neighbors and farmers settled in court cases, such as *Concerned Area Residents for the Environment (C.A.R.E.) v. Southview Farm*,[5] have expanded the possibility that confined feeding operations using land application may be in violation of the Clean Water Act.[6] Federal Coastal Zone Management Act regulations,[7] passed in 1991, mandate control of point and nonpoint water pollution, including pollution from animal facilities.[8] This program sets land-based criteria for manure utilization rather than discharge limits. In many coastal areas, concerns about phosphorus are more important than nitrogen. Federal goals have been set and guidance on management measures has been established, but states are responsible for implementing these procedures.

## II. JURISDICTIONAL BOUNDARY SELECTION

The issues associated with selection of boundaries when making political decisions about the external impacts of animal production are addressed in this section. The focus is on how the choice of state versus local institutions is made and how that decision affects those whose preferences count. The conceptual issues

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2. *See* 40 C.F.R. § 122.23 (1997). Concentrated animal feeding operations are defined as a livestock feedlot or facility (1) where animals have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and (2) where crops, vegetation, forage growth, or post-harvest residues are not present in the lot of facility during the normal growing season and one of three animal unit limits is met. *See id.*

3. U.S. GOV'T ACCOUNTING OFFICE REPORT, ANIMAL AGRICULTURE: INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 2 (GAO/RCED-95-200, 1995).

4. *See* Katherine R. Smith & Peter J. Kuch, *What We Know About Opportunities for Intergovernmental Institutional Innovation: Policy Issues for an Industrializing Animal Agricultural Sector*, 77 AM. J. AGRIC. ECON. 1244, 1248-49 (1995).

5. *See* Concerned Area Residents for the Environment (C.A.R.E.) v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995).

6. *See* Kristen E. Mollnow, Note, *Concerned Area Residents for the Environment v. Southview Farm: Just What is a Concentrated Animal Feeding Operation Under the Clean Water Act?*, 60 ALB. L. REV. 239, 259-60 (1996) (stating that the scope of CAFO regulation has been expanded in *Southview Farm*).

7. *See* 16 U.S.C. §§ 1451-1464 (1994).

8. *See* 16 U.S.C. § 1455b(g) (1994).

inherent in jurisdictional boundary selection are reviewed before examining the legal relationships existing between levels of government along with the rules that are employed to deal with situations which concern more than one level of government acts. Following this discussion, a review of decisions in five states on these issues will be examined.

### A. *Criteria for Jurisdictional Boundary Choice*

An individual's ability to have public policies enacted that are consistent with his or her preferences depends on the tastes and beliefs of fellow citizens and the relative amount of influence that the individual has with the decision makers. The definition of the decision-making group depends on where the individual lives and how political boundaries are drawn. A selected overview of the criteria for selection is presented.[9]

#### 1. *Responsiveness*

Conventional wisdom suggests that local governments are closer to and are therefore more in tune with local conditions and citizen preferences. Thus, local government is more likely to provide the mix and level of output that satisfies local citizens. This follows from the maxim that the best government is the one closest to the people.[10] However, depending on how particular boundaries are drawn one can be a member of a majority or minority on a particular issue.[11]

#### 2. *Homogeneity of Citizen Preferences*

If people in an area have similar preferences, larger jurisdictions can provide uniform outputs. If tastes differ, division into smaller jurisdictions may allow preferences to be better satisfied. Homogenous governmental units may form if people have the opportunity to "vote with their feet" by moving to units that have

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9. For more detailed discussion of these criteria, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); ALBERT BRETON, THE ECONOMY THEORY OF REPRESENTATIVE GOVERNMENT (1974); RONALD J. OAKERSON, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS (ACIR) (Report A-109, 1987) THE ORGANIZATION OF LOCAL PUBLIC ECONOMICS (1987); A. ALLAN SCHMID, PROPERTY, POWER AND PUBLIC CHOICE (2d ed. 1987); Robert L. Bish, *Federalism: A Market Economics Perspective, in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 351 (James D. Gwartney & Richard E. Wagner eds., 1988); WALLACE E. OATES, FISCAL FEDERALISM (1972).

10. *See generally* ALBERT BRETON, THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT (1974) (discussing benefits of the representative form of government).

11. *See generally* A. ALLAN SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE (2d ed. 1987) (discussing the interaction of political models and the public).

the public goods or services they desire most.[12] A related approach emphasizes the role of competition among local jurisdictions to help reveal preferences. The mobility of citizens is believed to discipline governmental taxing, spending, and rule-making and allow discovery of new institutional arrangements.[13]

3. *Interdependencies: External Effects and Coordination Issues*

Actions of governments are interdependent leading to effects that occur beyond jurisdictional borders and resulting in coordination problems. Such effects prompt recommendations to redraw jurisdictional boundaries to encompass the spillovers so these costs will be considered by decision-makers. Similarly, actions by individual jurisdictions may result in overall outcomes that are not in the interest of a group of jurisdictions. A remedy for this problem is to involve higher-level authorities to coordinate actions through collaborative action, allowing the group to avoid costs or capture benefits.

4. *Economies of Scale*

Economies of scale in provision of certain goods or services suggests that larger jurisdictions allow realization of these advantages better than smaller jurisdictional units. However, if the distinction between provision and production of services is recognized,[14] a government unit can obtain the benefits of producing goods with scale economies, such as the centralized waste treatment, without having to produce the service. These units can act as governance structures to arrange for the good or service itself without actually engaging in production of it.

5. *Uniformity and Stability*

Uniformity or stability in the output of certain goods or services of government may be desirable to promote economic activity or to reduce uncertainty or costs. The lack of uniformity caused by excessive differences in outputs of local units may increase costs for firms whose activities span these boundaries. Similarly, it may be argued that uniformity is needed for equity reasons, especially

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12. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-19 (1956).

13. *See* Mark Vihanto, *Competition Between Governments as a Discovery Procedure*, 47 J. INSTITUTIONAL & THEORETICAL ECON. 411, 411-36 (1992) (discussing Austrian economic theory concerning competition between local government).

14. *See generally* RONALD J. OAKERSON, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS (ACIR), THE ORGANIZATION OF LOCAL PUBLIC ECONOMICS (Report A-109, 1987).

to create a "level playing field" for competition among firms or to assure that everyone receives a certain minimum level of a public good or service.

### 6. *Favorable Political Rules (or Power and Influence)*

An individual's or group's ability to influence a decision may be greater at one governmental level than another. This may be due to differences in the ways that preferences are aggregated. Examples include differences in the specific rules for representation of different interests, agenda setting, and policy implementation. In some cases, it may be advantageous for an interest group to shift a decision to another level in order to protect its position or create opportunities. It has been suggested that efforts to raise responsibilities to higher authority levels are actually efforts to limit the advantages of one region or industry over another.[15]

## III. Resolving Disputes When Two Units of Government Act

### A. *In General*

Within the American system of government, power is divided not only horizontally among the Executive, Legislative, and Judicial branches of government, but it is also divided vertically between the United States and the sovereign states, and between the sovereign states and local governments within each state.[16] Within a system that allows for several approaches and perspectives on a problem, the various positions favoring or opposing one level of government involvement in an issue have already been identified. The central question becomes, what happens when more than one unit of government wants to address the same problem?

In attempting an answer to this question, several concepts are involved. The first concept involves the sources of governmental power that each unit can apply to a particular problem and the nature of the interaction with other levels of governmental power. The second concept recognizes that on some issues one level of government has greater authority than another. For example, "the supremacy clause of the Constitution[17] mandates that on some issues federal law overrides,

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15. *See generally* B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 Econ. Inquiry 551 (1985) (explaining how special interest groups may affect environmental policies by region).

16. *See* Celia Campbell-Mohn, Environmental Law, From Resources to Recovery 91 (1993).

17. U.S. Const. art. VI, cl.2. "This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." *Id.*

i.e., preempts, any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires."[18] A third concept of an absolute or complete level of authority to address an issue is called a plenary power. In the exercise of such complete authority, Congress, or a state, may specifically prohibit parallel legislation from a lower level of government and occupy the entire field of regulation.[19]

### B. *Constitutional Grants of Authority*

The federal government's power derives from grants of authority found in the Constitution. In environmental law, the grant of authority to regulate interstate commerce[20] gives the federal government sweeping power to control commercial activities and practices whose impacts are felt beyond the borders of the state in which the activities physically take place. The ability of the federal government to address the issue is based on the interstate aspect of the activity, but the state in which the activity takes place, and more specifically, the local community bearing the direct impact of the activity also has an interest in protecting its perceived concerns in the situation.

In *Garcia v. San Antonio Metropolitan Transit Authority,*[21] the U.S. Supreme Court reviewed the reach of federal power over state and local governments and recognized that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power"[22] as had been true under

18. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.1 (2d ed. 1992) (citing S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 763 (11th Cir. 1991)).

19. *See id.*

20. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

21. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

22. *Id.* at 552. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court held that Congressional action based on constitutional Commerce Clause authority could not be applied against state and local government entities where the impact of the application would be to displace the state's ability to carry out traditional governmental functions. Congress had no authority under the Commerce Clause "to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government decisions are to be made." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). In *Garcia*, the Court summarized the following four conditions which must exist for immunity to apply: (1) states must be regulated as states by Congress; (2) the law must address issues that are "indisputably 'attribute[s] of state sovereignty;'" (3) complying with the law must impair the ability of states "to structure integral operations in areas of traditional governmental functions;" and (4) the relationship between the interests "must not be such that 'the nature of the federal interest . . . justifies

earlier law. In later decisions, such as *Gregory v. Ashcroft*,[23] the Court modified its position in *Garcia* somewhat by reaffirming adherence to a line of cases which held that courts should not interpret federal legislation in a manner that would interfere with essential state or local government functions unless Congress has plainly stated its intention to do so in the statute itself.[24] Justice O'Connor, writing for the majority in *Gregory*, noted that the *Garcia* decision was built on the concept that the primary protection for state and local government interests was the congressional process and that the Court could not be sure that the state and local government interest had been considered in that process unless Congress clearly stated its intention to regulate these governments in a law that would impair their autonomy.[25]

In distinguishing a state's authority to legislate a solution to a problem from the federal government's authority, it is important to note that the state's authority is independent of federal authority.[26] In the field of environmental regulation, states addressed environmental issues for years before the advent of federal involvement.

In general, state authority to pass legislation in response to an environmental problem is based on the state's police power; that is the inherent authority of a sovereign to protect the health, safety and welfare of its citizens. Although such power exists at the state level, there is no federal police power, as this authority has been reserved to the states.[27] In addition to police power authority, states may be delegated authority from the federal government to address particular problems, or to implement particular programs that comply with federal guidelines.[28]

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state submission." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (citing Hodel v. Virginia Surface Mining & Reclaimation Ass'n, 452 U.S. 264, 287-88 n.29 (1981) (quoting National League of Cities v. Usery, 426 U.S. 833, 845, 852, 854 (1976)).

23. Gregory v. Ashcroft, 501 U.S. 452 (1991).

24. *See id.* at 460-61 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

25. *See Gregory*, 501 U.S. at 464.

26. *See* CELIA CAMPBELL-MOHN, ENVIRONMENTAL LAW, FROM RESOURCES TO RECOVERY 92 (1993).

27. *See* U.S. CONST. amend. X (stating "[t]he Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

28. In the field of environmental law, there are many examples of what is described as the federal-state partnership that allows the federal government to design programs and delegate enforcement responsibility to the states. States can request and obtain primacy over particular programs that will give them more direct involvement and control over implementation and enforcement of specific programs. This partnership concept plays an important part in the Clean Air Act, 42 U.S.C. § 7401 (1994), the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1994),

Within states, local government units also have authority that enables them to protect the public health, safety and welfare of their constituents. As units of government, some of their authority is inherent, in other respects it is derivative. The local government authority is derivative in that to exist the municipal unit must comply with organizational rules established by a state. In many instances, the state's granting of a charter defines the boundaries of the unit and classifies it under state laws[29] that provide detailed descriptions of the power and authority local governments can exercise. In contrast to local government's derivative authority, state government authority is plenary and full or complete in its own right.

In resolving the question of what happens when more than one unit of government acts to address a particular problem, the answer often reflects a practical assessment of the problem rather than a strict view of the unit's authority to act. For example, if the problem is caused by an entity operating on a national or international level, then a national response may be appropriate. If, however, the problem is dispersed more widely across the spectrum, then specific local approaches to specific local problems may be more practical.[30] In cases where a higher level of government chooses to act, one assessment that must be made is what impact the action will have on lower levels of government that may also seek to address the situation with their own political power. Three choices are available to the higher level of government in this situation. First, it can choose to completely exclude all involvement by lower levels. Second, it can condition the involvement of lower levels in some way that allows both levels to have meaningful opportunities to deal with the situation. Third, it can simply allow lower levels to take whatever action they please.

### C. *Preemption*

Four general questions arise when two levels of government address a matter of concern.[31] First, does each government entity have authority to act? Second, is each entity acting within the sphere of its competence? Third, can both entities act and their efforts be allowed to stand as a result? Fourth, if the acts are

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and the Solid Waste Disposal Act as amended by the Resource Conservation Recovery Act, 42 U.S.C. § 6901 (1994).

29. For example, Pennsylvania Statutes codifies general state law providing for detailed descriptions of authority for county governments, various classes of cities, boroughs, and first and second class townships. Within the state, there are more than 2500 separate units of government. 53 PA. CONS. STAT. ANN. §§ 101, 45201, 55101, 65101 (West Supp. 1997).

30. *See* CELIA CAMPBELL-MOHN, ENVIRONMENTAL LAW, FROM RESOURCES TO RECOVERY 92 (1993).

31. *See* DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW IN A NUTSHELL 44 (3d ed. 1990).

inconsistent, how will it be determined whether one action is given predominance over the other action?

When the dispute involves state action that alleged to interfere with federal action, a three-pronged test is applied to resolve the question of whether a state regulatory scheme facilitates or impedes the purposes and objectives of the federal statute.[32] In this test, courts consider the following three questions: (1) How pervasive is the federal regulatory scheme? (2) Is federal occupation of the field necessary for national uniformity? (3) Is there a danger of conflict between state laws and administration of the federal program? The conflict can manifest itself in the form of either state or local regulation. For example, in *Wisconsin Public Intervenor v. Mortier*[33] the issue confronted was whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[34] preempted the authority of the town of Casey, Wisconsin to pass an ordinance regulating the use of pesticides within the town.[35] The town government adopted the law on grounds that it was necessary to manage and control the activities to protect public health, safety, and welfare of the community.[36] The ordinance required applicators to obtain a permit by applying for it at least sixty days in advance of the desired use date.[37] Ralph Mortier applied for a permit but was denied.[38] Following the denial, Mortier appealed the denial on grounds that FIFRA and state law preempted the local community's authority to regulate the application of pesticides.[39] Section 136v of FIFRA provides:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.[40]

In its review of this language, the Wisconsin Supreme Court found the provision indicated Congressional intent to preempt local regulation of pesticide

32. 2 ROTUNDA & NOWAK, *supra* note 18, at 73 (citing Haines v. Deviates 312 U.S. 52 (1941) and Pennsylvania v. Haines 350 U.S. 497 (1956), *reh'g denied* 351 U.S. 934 (1956)).
33. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).
34. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1997).
35. *See Mortier*, 501 U.S. at 600.
36. *See id.* at 602-03.
37. *See id.* at 603.
38. *See id.*
39. *See id.*
40. 7 U.S.C. § 136v(a), (b) (1994).

usage.[41] However in its analysis, the Supreme Court of the United States concluded that neither the language of the section nor the use of the term "states," without referring to local governments, justified inferring that Congress expressly intended to preempt local authority to regulate pesticide usage in ways other than those set forth in the section.[42] Congressional silence on the scope of regulatory coverage cannot suffice to establish a clear and manifest purpose needed to preempt local authority.[43] The Court found that a more appropriate reading of section 136v is that the allocation of regulatory authority be left to the absolute discretion of the states themselves, thereby allowing each state to decide if local communities ought to have authority to regulate pesticide use in their community.[44]

Because preemption can also exist in the absence of an express statement of legislative intent to preempt, the circumstances and situations in which intent can be implied are often considered. In *Mortier*, the Supreme Court concluded that FIFRA's regulatory scheme was not so pervasive as to make reasonable the inference that Congress left no room for the states to supplement its provisions.[45] Although the local ordinance's permit requirement has no parallel in FIFRA, the local ordinance does not address product registration and labeling, which are specifically addressed in FIFRA.[46]

The third inquiry asks whether one regulatory scheme is so inconsistent with the other that compliance with both is a physical impossibility. As described above, FIFRA section 136v(a) offers states the authority to regulate the sale and use of pesticides, but only if state regulation does not permit any sale or use that is

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41. The Wisconsin Supreme Court found that the use of the term "state" in section 136v was significant, as it is a defined term for FIFRA purposes, carrying the meaning of one of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or the Trust Territories. *See* Mortier v. Casey, 452 N.W.2d 555, 557-58 (Wis. 1990).

42. *See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 606-07 (1991).

43. *See id.* at 607.

44. *See id.* An interesting, but eventually unpersuasive, aspect of this case involves FIFRA's legislative history. Before the U.S. Supreme Court, Mortier argued that the legislative history of FIFRA provides evidence of Congressional intent to preempt local government authority. In its review of the history, the Court noted that although the Senate Agriculture's version of the FIFRA bill did not prohibit local governments from regulating pesticide, the committee's report stated explicitly that local governments could not regulate pesticides in any manner. The legislative history also includes a report from the Senate Commerce Committee that offered an amendment to the FIFRA bill to authorize local regulation, but the amendment was not rejected. On the basis of its review of the legislative history, the Supreme Court concluded that the principal committees responsible for passage of FIFRA disagreed whether the act preempted pesticide regulation by political subdivisions. In its view, the legislative history fell short of establishing preemption as the clear and manifest purpose in enacting section 136v. *See id.* at 597-99.

45. *See id.* at 606.

46. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1997).

prohibited by FIFRA.[47] Under section 136v(b), states may take other regulatory steps, but may not adopt labeling or packaging requirements that are in addition to or different from those adopted by FIFRA.[48] Under such language, compliance with FIFRA provisions and other regulations is contemplated.

### D. *Interpreting the Authority Level of Local Governments*

Whenever a unit of government acts, it must have authority to do so. In defining the amount of this authority held by local government units, an oft quoted statement of municipal government's legislative authority is "Dillon's Rule"[49] which states that "municipal corporations have and can exercise only those powers expressly granted to it, those necessarily or fairly implied therefrom, and those that are essential and indispensable to their corporate status."[50] Other courts have recognized "municipal corporations [as] political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them" by a state exercising its absolute discretion to decide what power and authority a municipal corporation shall have.[51] The state may modify or withdraw all or any part of such powers, conditionally or unconditionally, with or without the consent of the citizens.[52] In all respects state government is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. [53]

Within these statements are found clear references to the derivative nature of local government authority. The question then turns on an interpretation of the express grant of authority that local government units have been given. Is the grant clear and unequivocal, or is it sweeping and general, leading to ambiguity and confusion?[54] The rise of home rule authority for local governments provides a good example of how a grant of authority is interpreted. Home rule authority that

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47. *See* 7 U.S.C. § 136v(a) (1994).

48. *See* 7 U.S.C. § 136v(b) (1994).

49. Taken from the opinion of Chief Justice J.F. Dillon of the Iowa Supreme Court and his opinions, such as *Clinton v. Cedar Rapids*, 24 Iowa 455, 480 (1868).

50. DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW IN A NUTSHELL 18 (3d ed. 1990).

51. Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).

52. *See id.* at 178-79.

53. *See id.* at 179.

54. A particularly good example of the problem of how to interpret legislative intention is section 1717 of Pennsylvania Nutrient Management Act, 3 PA. CONS. STAT. ANN. §§ 1701-1718 (West 1995). *See discussion infra* Part IV.A.1. Based on the legislature's statement, what did it intend regarding the authority of local governments to regulate manure management activities arising from animal production facilities? Based on the language noted, at least two, if not three, differing interpretations can be given. *See infra* note 64.

creates local autonomy serves as a significant limitation on state legislative authority by assigning full authority to manage specific issues to the home rule community.[55] In general, home rule authority is based on either constitutional or statutory grants of authority to government units. Under either form of grant a second question is whether the grant is of specific authority or a sweeping statement of generic government authority.[56] In evaluating an express grant of authority, opportunities may arise for recognizing implied grants of authority.[57]

When both state and local governments act to address a particular problem, can both actions be enforced? If not, which action should be considered to dominate the other? In examining cases of conflict between state and local governments, federal courts have not given federal constitutional protection to local governments against incursions by their state under equal protection or due process rights guaranteed by the federal Constitution.[58]

The first consideration in deciding whether state and local action can coexist is whether the competing actions are consistent with each other. In general, ordinances enacted in non-home rule local communities that are inconsistent with state legislative action will be held invalid.[59] In determining if the acts are consistent, inquiry is focused on whether the local action is merely an additional or complimentary regulation that aids and furthers the purpose or objective of the state law.[60] Could a person observe the requirements of both laws?

A second consideration is that, despite being consistent, local ordinances may nonetheless be preempted by state legislation in which the subject has been so completely covered by the state enactment that it becomes exclusively a matter of state concern.[61]

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55. *See* DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW IN A NUTSHELL 37 (3d ed. 1990).

56. *See id.* at 19. Home rule provisions may give local governments autonomy to "make and enforce all laws and regulations in respect to municipal affairs." *Id.* at 38.

57. *See id.* at 25. For example, does the grant of local authority to regulate parking include the authority to prohibit it completely?

58. *See id.* at 45.

59. *See id.* at 53.

60. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586, *cert. granted*, 503 U.S. 935 (1992).

61. *See* DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW IN A NUTSHELL 54 (3d ed. 1990).

## IV. Jurisdictional Boundaries Issues and Their Implications

### A. *Policy Responses to an Industrializing Animal Agriculture*

Even though a policy framework exists at the federal level, it is lacking at the state and local level where much governmental activity to address externalities from animal agriculture is occurring. There are significant differences among geographic areas and among states in environmental regulations and the ways in which costs are measured. Within states, various criteria, as discussed in section II.A, have been used by interest groups to argue for the most appropriate jurisdiction for decision making.

#### 1. *Pennsylvania*

Concern about water quality in the state and in Chesapeake Bay, as well as residents' fears about nuisance odors from swine expansion in some regions, motivated passage in 1993 of the Pennsylvania "Nutrient Management Act."[62] The Act requires all farms with more than two animal equivalent units per acre of crop land or acre of land suitable for application of animal manure[63] to implement a management plan certified by a nutrient management specialist. A key section of the law addresses preemption of local laws affecting nutrient management on farms.[64] Prior to 1993, numerous individual townships in southeast and south

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62. 3 PA. CONS. STAT. ANN. §§ 1701-1718 (West 1995).

63. An animal equivalent unit is defined as "one thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individuals comprising the unit." 3 PA. CONS. STAT. ANN. § 1703 (West 1995).

64. Section 1717 of the Act reads as follows:

> This Act and its provisions are of statewide concern and occupy the whole field of regulation regarding nutrient management to the exclusion of all local regulations. Upon adoption of the regulations authorized by section 4 (section 1704), no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this act if the municipal ordinance or regulation is in conflict with this act and the regulations promulgated thereunder. Nothing in this act shall prevent a political subdivision or home rule municipality from adopting or enforcing ordinances or regulations which are consistent with and no more stringent than the requirements of this act and the regulations promulgated under this act, provided, however, that no penalty shall be assessed under any local ordinance or regulation for any violation for which a penalty has been assessed under this act.

3 PA. CONS. STAT. ANN. § 1717 (West 1995).

central Pennsylvania developed ordinances to address manure odor and land application problems caused by rapid expansion of animal production facilities. The state's major agricultural organizations sought the local preemption provision primarily because of concerns about non-uniformity of various local ordinances. The lack of municipal technical capacity to develop and enforce such laws was another key argument for local preemption. Rules to implement the law were finalized in early 1997 and took effect in October 1997. Until the law went into effect, municipalities retained authority to regulate animal nutrients, but such activity slowed substantially after the law's passage.

2. *Iowa*

In 1995, Iowa enacted a series of provisions applicable to animal feeding operations[65] that created many new requirements for poultry and livestock producers and provided additional defenses against nuisance lawsuits.[66] Important components of the law include the following: separation distances between buildings, lagoons and manure storage structures, and nearby residences;[67] state construction permits for certain facilities,[68] and an indemnity fund generated from permit fees;[69] manure management plans and habitual violator penalties;[70] and manure disposal requirements.[71] The state's natural resources agency developed rules to implement the Animal Feeding Operations Act that became effective in March 1996.[72] The law impacts a complaining party's ability to resort to the courts to resolve an animal-based nuisance dispute by expressly providing that a person who obtains all required permits is entitled to a rebuttable presumption that the animal feeding operation is not a public or private nuisance under either Iowa's statutory or common law.[73] A person who is not required to obtain a permit under the law is likewise entitled to the rebuttable presumption.[74] The presumption can be overcome, but evidence must be clear and convincing that the animal feeding operation unreasonably and continuously interfered with the complaining party's use and enjoyment of their own property or their life *and* that the injury is

65. 1995 Iowa Acts 195.
66. *See* IOWA CODE § 657.11 (1997).
67. *See* IOWA CODE § 455B.162 (1997).
68. *See* IOWA CODE § 455B.162-.165 (1997).
69. *See* IOWA CODE § 204.1-.7 (1997).
70. *See* IOWA CODE § 657.11(4) (1997).
71. *See* IOWA CODE § 159.27 (1997).
72. 1995 Iowa Acts 195.
73. *See* IOWA CODE § 657.11(2) (1997).
74. *See id.*

proximately caused by negligent operation of the animal feeding operation.[75] Persons who bring suits to challenge such operations as nuisances and are unsuccessful in overcoming the rebuttable presumption can be liable for all legal costs and expenses of the suit if the court determines the claim to be frivolous.[76]

Recent administrative and judicial decisions in Iowa provide mixed signals about counties' abilities to regulate confined livestock operations in the face of state regulation. In 1996, the state's Attorney General responded to a request from a county that wished to create ordinances regulating the location, construction and waste disposal methods of swine facilities.[77] The question presented was whether the animal feeding operations legislation would preempt the county's authority under the home rule authority granted to it by the state constitution.[78] The Iowa Attorney General concluded that by enacting the Animal Feeding Operations Act the legislature reserved regulation of both large and small confined feeding operations to the state, thereby precluding the possibility of local regulation.[79]

County level attempts to regulate large swine facilities through their zoning authority were thwarted by the Iowa Supreme Court decision in *Kuehl v. Cass County*,[80] which held that a proposed hog confinement facility for 2000 hogs to be located on a five acre tract adjacent to crop land currently rented by one of two facility owner/operators was primarily adapted for use for agricultural purposes and thus was exempt from county zoning regulations under Iowa laws providing for such exemption.[81] The five acre tract was separated from any tract of land that the applicants used for agricultural purposes.[82] Under prevailing Iowa law, county zoning authority was limited by a provision which stated that no ordinance adopted under its authority could apply to land, farm houses, farm barns, farm outbuildings, or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes.[83] The court held that although the tract on which the proposed activity was to be conducted was not then being used by the applicants for agricultural activities, the hog confinement structures that the applicants proposed were primarily adapted for agricultural use by reason of their nature and therefore within the terms of the exemption from zoning authority.[84] The court contradicted an earlier landmark case that left open the possibility that

75. *See* IOWA CODE § 657.11(3) (1997).
76. *See* IOWA CODE § 657.11(7) (1997).
77. Iowa Op. Att'y Gen. 96-1-2, at 1.
78. Iowa Op. Att'y Gen. 96-1-2, at 1, 2.
79. *See* Iowa Op. Att'y Gen. 96-1-2 at 7 (1996).
80. Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996).
81. *See id.* at 689.
82. *See id.* at 688.
83. *See* IOWA CODE § 335.2 (1997).
84. *See* Kuehl v. Cass County, 555 N.W.2d 686, 689 (Iowa 1996).

"commercial" farms were not subject to the agricultural exemption from local zoning.[85] In *Kuehl*, the court held that a 2000 head unit proposed on five acres was an agricultural activity.[86] Many commentators have concluded that *Kuehl* broadened the definition of a farm to include the rearing and management of livestock irrespective of feed supply or the owner's other farming activities.[87]

A 1997 decision by an Iowa district court involving agricultural zoning ordinances in Humboldt County increased uncertainty about state and local governments' powers to regulate animal agriculture.[88] In this decision, the district court validated three of four ordinances that were challenged by a coalition of agricultural organizations.[89] These ordinances were based on a county's authority to protect public health, specifically the environment and groundwater, not its zoning authority.[90] The ordinances required county approval for construction of new livestock facilities, regulated manure application, and required financial assurance for possible clean-up in case of abandonment.[91] Those opposed to the local controls, including the state's Governor, feel that the local rules duplicate state law and will result in the proliferation of different approaches to local zoning for animal and perhaps crop agriculture.[92] Proposals were introduced to address the local control issue, but the state legislature adjourned in mid-1997 without taking action. The decision on *Humboldt County* was appealed to the Iowa Supreme Court and in March 1998 that court concluded that the county's ordinances were invalid.[93] The court agreed with the district court that the ordinances in question were not zoning regulations and were not preempted by state

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85. Farmegg Products, Inc. v. Humboldt County, 190 N.W.2d 454, 457-60 (Iowa 1971). This case involved a proposal by an agribusiness firm to establish a confinement facility to raise 40,000 chicks on a four acre tract. The Iowa Supreme Court concluded:

> [T]he question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.

*Id.* at 458. (citing Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 760-61 (1949)).

86. *Kuehl*, 555 N.W.2d at 687.

87. *See* Steve Marbery, *Hog Industry Insider*, FEEDSTUFFS, Dec. 16, 1996, at 26.

88. *See* Goodell v. Humboldt County, No. 97-790, 1998 WL 92658 (Iowa 1998).

89. *See id.* at *3.

90. *See* David Yepsen, *Lawmakers Spurred to Action*, DES MOINES REG., Apr. 17, 1997, at 4M.

91. See Goodell v. Humboldt County, 1998 WL 92658, at *2; David Yepsen, *Lawmakers Spurred to Action*, DES MOINES REG., Apr. 17, 1997, at 4M.

92. *See* Joe Vansickle, *States Go to War Over the Environment*, NAT'L HOG FARMER, May 15, 1997, at 17-18.

93. *See* Goodell v. Humboldt County, No. 97-790, 1998 WL 92658 (Iowa 1998); Steve Marbery, *Iowa's Top Court Rejects County Livestock Ordinances*, FEEDSTUFFS, Mar. 9, 1998, at 3.

law.[94] The supreme court's decision turned on the fact that the Humboldt County rules were inconsistent with state environmental rules and nuisance statutes.[95]

### 3. *North Carolina*

Under North Carolina law, county zoning regulations may not affect "bona fide" farms.[96] In response to county enactment of an ordinance that created a definition of such a farm, a state law was passed in 1991 specifically to include livestock facilities within the definition. This legislation was initiated by the North Carolina Farm Bureau.[97] The nation's largest manure spill to date—twenty-five million gallons from a waste lagoon at a large hog facility in eastern North Carolina in June 1995—provided impetus for strengthening the state's regulatory programs and resulted in legislation in mid-1996.[98] The law addresses animal operations and includes the requirement to obtain a permit to construct and operate an animal waste management system for an animal operation.[99] Waste management systems must meet a system design requirement that prevents pollution to the waters of the state, except "as may result because of rainfall from a storm event more severe than a 25-year, 24-hour storm."[100] Animal waste management plans must meet detailed requirements and are required of all animal operations.[101] Annual inspections of all animal operations by state authorities are mandated,[102] and animal waste management plans are also required, including an operations review conducted by a technical specialist at least once each year.[103]

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94. *See* Goodell v. Humboldt County, No. 97-790, 1998 WL 92658 (Iowa 1998); Steve Marbery, *Iowa's Top Court Rejects County Livestock Ordinances*, FEEDSTUFFS, Mar. 9, 1998, at 3.

95. *See* Goodell v. Humboldt County, No. 97-790, 1998 WL 92658 (Iowa 1998); Steve Marbery, *Iowa's Top Court Rejects County Livestock Ordinances*, FEEDSTUFFS, Mar. 9, 1998, at 3.

96. *See* N.C. GEN. STAT. § 153A-340 (1996). "These regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulations. Bona fide farm purposes include the production and activities relating to or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market." *Id.*

97. *See* Pat Stith & Joby Warrick, *For Murphy, Government and Business Were a Good Mix*, RALEIGH NEWS & OBSERVER, Feb. 22, 1995, at A1.

98. *See* N.C. GEN. STAT. § 143-215.10A (1996).

99. *See* N.C. GEN. STAT. § 143-215.10C(a) (1996).

100. N.C. GEN. STAT. § 143-215.10C(b) (1996).

101. *See* N.C. GEN. STAT. § 143-215.10C(e) (1996). An animal operation is defined as an agricultural farming activity involving 250 or more swine, 100 or more confined cattle, 75 or more horses, 1000 or more sheep, or 30,000 or more confined poultry with a liquid animal waste management system. Public livestock markets or sales are excluded from this definition. *See* N.C. GEN. STAT. § 143-215.10B (1996).

102. *See* N.C. GEN. STAT. § 143-215.10D(b) (1996).

103. *See* N.C. GEN. STAT. § 143-215.10D(b) (1996).

Despite the state-level prohibition against zoning regulation of bona fide farms, counties have not backed away from attempting to regulate hog farming. Five counties have used their powers under state statutes allowing them to adopt stringent statutes to protect public health.[104] Exercising such authority, counties have enacted a variety of controls as follows: setback requirements from waterways, neighbors, and public buildings; closure plans in event the facility ceases to operate; and specific design and construction requirements and continuous monitoring requirements.[105] More recently, county commissioners in North Carolina cited substantial threats to public health and safety as justification for issuing orders halting further expansion of large livestock operations.[106] Several legal challenges to local action of this type have resulted.[107]

In August 1997, the North Carolina Legislature enacted a broad clean water bill that included stringent new provisions to address the contentious environmental and nuisance issues resulting from the state's booming hog industry.[108] The bill removed the zoning exemption on bona fide farms by authorizing county governments to regulate hog farms and other agricultural facilities if the size of the operation exceeds specified limits (600,000 pounds liveweight capacity or about 4000 head finishing hogs).[109] In addition, the law included a two-year state-wide ban (beginning March 1, 1997) on construction of new or expanded operations that have more than 250 head of animals.[110] State-approved operations that use innovative (non-lagoon) waste handling technologies are exempt from the moratorium.[111]

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104. *See* Shannon Buggs, *Local Health Boards Make Own Farm Rules*, RALEIGH NEWS & OBSERVER, May 2, 1996, at A1.

105. *See id.*

106. *See id.* Citing the need to develop more information about the potential problems that could arise from establishing large animal facilities, county officials issued a moratorium and established a committee comprised of environmentalists and agricultural producers to examine the issues and make recommendations for addressing the situation. In Craven County, North Carolina, existing livestock producers were not affected by the moratorium. *See id.*

107. *See Counties Using Public Health Rules to Control Hog Farms Locally*, RALEIGH NEWS & OBSERVER, May 26, 1996, at B12.

108. *See* N.C. GEN. STAT. § 113-145.1-.8 (1997); Steve Marbery, *North Carolina Gets Hog Law*, FEEDSTUFFS, Sept. 1, 1997 at 1.

109. *See* N.C. GEN. STAT. § 113-145.1-.8 (1997); Steve Marbery, *North Carolina Gets Hog Law*, FEEDSTUFFS, Sept. 1, 1997 at 1.

110. *See* N.C. GEN. STAT. § 113-145.1-.8 (1997); Steve Marbery, *North Carolina Gets Hog Law*, FEEDSTUFFS, Sept. 1, 1997 at 23.

111. *See* Steve Marbery, *North Carolina Gets Hog Law*, FEEDSTUFFS, Sept. 1, 1997, at 1.

4. *South Carolina*

In 1996, South Carolina passed one of the nation's toughest comprehensive confined swine feeding operation laws.[112] Under the new law, large producers[113] are subject to specific requirements, including the need to obtain a periodically renewable permit.[114] Smaller operations must comply with regulations to be developed by the state's environmental and health agency. These "separate and distinct" regulations will consider many of the same factors that the large producer regulations address, but they will also address the impact that the regulations have on the environment and agribusiness.[115] The following elements of the law affect large producers: setbacks of manure lagoons from nearby properties owned by others, private drinking water wells, and water bodies;[116] standards for animal waste lagoons;[117] application rates of manure on farmland based on the waste's impact on the environment, animals, and people living in the environment;[118] annual inspections of animal feeding operations and monitoring wells;[119] and record-keeping[120] and training of facility operators.[121] In addition, the new law provides for public notice to construct or expand an animal feeding operation, including provisions for public hearings and for receipt of public review and comments on such proposals.[122]

An interesting aspect of this bill's history is that it originated as an effort by the major state agricultural organizations to establish state-wide uniform guidelines for animal waste management and to preempt counties from enacting laws in this

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112. *See* S.C. CODE ANN. § 47-20-10 (Law. Co-op. Supp. 1997).

113. *See* S.C. CODE ANN. § 47-20-40 (Law. Co-op. Supp. 1997). In addition to limiting the application of its terms solely to hog raising operations, the threshold for dividing large farms from small farms is 420,000 pounds of animal capacity (roughly 3000 head of finish hogs, 1100 sow farrowing units and 300 sow farrow to finish operations). *See* Steve Marbery, *Hog Industry Insider*, FEEDSTUFFS, June 24, 1996, at 29. Regulations to implement these thresholds and other aspects of the law were being debated in early 1997. *See* Standards for the Permitting of Agricultural Animal Operations, ___ S.C. Reg. ___ (1997) (to be codified at S.C. Reg. 61-43) (proposed Feb. 2, 1997).

114. *See* S.C. CODE ANN. § 47-20-150 (Law. Co-op. Supp. 1997).

115. *See* S.C. CODE ANN. § 47-20-165(D)(2) (Law. Co-op. Supp. 1997).

116. *See* S.C. CODE ANN. § 47-20-40 (Law. Co-op. Supp. 1997). As the mass of animals at the facility increases and the environmental significance of the waters involved increases, the setback requirements also increase. In general, the smallest setback is 500 feet and the largest is one-half mile. *See* S.C. CODE ANN. § 47-20-20 (Law. Co-op. Supp. 1997).

117. *See* S.C. CODE ANN. § 47-20-60 (Law. Co-op. Supp. 1997).

118. *See* S.C. CODE ANN. § 47-20-40 (Law. Co-op. Supp. 1997). Seventeen factors are considered in setting application rates.

119. *See* S.C. CODE ANN. §§ 47-20-100 to 110 (Law. Co-op. Supp. 1997).

120. *See* S.C. CODE ANN. § 47-20-110(C) (Law. Co-op. Supp. 1997).

121. *See* S.C. CODE ANN. § 47-20-130(A) (Law. Co-op. Supp. 1997).

122. *See* S.C. CODE ANN. § 47-20-140 (Law. Co-op. Supp. 1997).

area. The effort proved unsuccessful, however, as local governments rallied to oppose limits on their authority.[123] Local official concern about preemption of local authority coupled with an awareness on the part of other interest groups of the environmental and nuisance impacts associated with the rapid growth of large hog facilities in North Carolina combined to shift the outcome away from the preemption goal of the bill's initial drafters.[124]

#### 5. *Kansas*

Recent developments in Kansas illustrate how concerns about corporate farming, environmental quality, and nuisance issues interact, and how the outcome depends on the boundary chosen. In Kansas, only family farm corporations, authorized farm corporations, limited liability agricultural companies, limited agricultural partnerships, family trusts, authorized trusts, or testamentary trusts may directly or indirectly own, acquire, or otherwise obtain or lease agricultural land in the state.[125] In the early 1990s, several Kansas counties desired to expand their animal industries and felt they were prevented from doing so by the state's corporate farming laws.[126] In 1994, this law was amended to allow counties to permit corporate farming, if they could win the support of a majority of registered voters via a referendum.[127] Twenty-three counties subsequently approved corporate farming.[128] Due to a complex array of concerns related to environmental, nuisance, and corporate farming issues, several counties recently reversed their policies, creating controversy and uncertainty.[129] Several large hog corporations had made significant investments in the state and claimed these reversals constitute a "taking."[130] The Kansas Attorney General has ruled that counties have the legal authority to make such changes in the public interest, based on the "home rule" defense.[131] However, the Attorney General's office is not the final arbitrator.[132] Legal uncertainties remain to be settled in another jurisdictional unit, the courts.

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123. *See* Telephone Interview with Larry McKenzie, Director, Governmental and Commodity Activities, South Carolina Farm Bureau (Sept. 16, 1996).

124. *See id.*

125. *See* KAN. STAT. ANN. § 17-5904 (Supp. 1996).

126. *See* Roger McEowen & James B. Wadley, 1 KAN. AGRIC. L. UPDATE 3-4 (Nov. 1994) (supplementing SAM BROWNBACK, KANSAS AGRICULTURAL LAW (2d ed. Lone Tree Pub. Co. 1994)).

127. *See* KAN. STAT. ANN. §§ 17-5907 to 5908 (1995).

128. Steve Marbery, *Hog Industry Insider*, FEEDSTUFFS, Mar. 25, 1996, at 24.

129. *See id.*

130. *See id.*

131. *See* 96 Kan. Op. Att'y Gen. 21 (1996).

132. *See* Roger McEowen & James B. Wadley, 2 KAN. AGRIC. L. UPDATE 4 (Mar. 1996) (supplementing SAM BROWNBACK, KANSAS AGRICULTURAL LAW (2d ed. Lone Tree Pub. Co. 1994)).

Perception of what is to be defined as a taking varies among jurisdictions, with courts making judgments and imposing preferences about rights on legislative jurisdictions. In this case, changing the rules by creating a loss in the value of an investment in a hog operation could conceivably be judged as a taking requiring compensation. At the same time, the loss of value in neighboring land due to odor is less likely to be judged a taking by a distant court than by local voters who judge the odor and property value declines to be an unacceptable cost. Also, it is certain that the impact on land values resulting from laws allowing large hog operations will not be taken from the benefiting land owner and given to those imposed upon by the odor. As argued above, perception of rights is highly selective.

## V. IMPLICATIONS OF RECENT DEVELOPMENTS

Several observations may be made about the interests that appear to be served by institutions at different jurisdictional levels. These themes are discussed along with supporting evidence from states. The observations are preliminary and await confirmation in future research as they are based on the interactions between interest groups in states that are in the first several years of interaction over animal agricultural pollution issues. As the process of policy development changes over time with participants learning about the implications of different arguments and positions, the observations and ensuing conclusions need to be updated.

### A. *Bundling of Concerns and Selectively Expressing Them*

Academics often talk about the "water quality" issue or the "odor" issue. In practical application, however, such distinctions are blurred. In areas for which no rules exist to deal with new or newly perceived consequences from industrialized animal agriculture, there are important implications for preference articulation. In many cases, nuisance issues, such as odor, exist in a loose, highly subjective legal framework that defines what a nuisance is and the factors that are taken into account in making this determination. People concerned get frustrated and attempt to register their preferences by whatever means of interest group politics that are open to them. Often one issue is attached to another issue that already is recognized as legitimate, such as protecting water quality.[133] Interest group politics and selective perception of rights may result in preferences being worked out in unexpected jurisdictions. In some instances, odor may be the real

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133. *See* Neil D. Hamilton, *Trends in Environmental Regulation of Agriculture*, *in* INCREASING UNDERSTANDING OF PUBLIC PROBLEMS AND POLICIES 108, 108 (Farm Foundation ed. 1996); Charles W. Abdalla & Timothy W. Kelsey, *Breaking the Impasse: Helping Communities Cope with Change at the Rural-Urban Interface*, 51 J. SOIL & WATER CONSERVATION 462, 463 (1996).

local issue but the preferences for protection from odor of livestock enterprises may be expressed by support for more stringent state water quality rules. Recent developments in Kansas provide an example of bundling of corporate farming concerns.

### B. *Organized Interest Groups Have Reasons to Prefer State Level Regulatory Authority Over Local*

In three of the states reviewed, organized agricultural interests supported state involvement and preemption of local laws regulating animal agriculture. The problem with local regulations was the lack of uniformity or a "level playing field" due to the potential for proliferation of many local ordinances. When proliferation of different laws occur, the costs for firms with activities that span across the local jurisdictional lines increase. Given the sizable investment needed for modern large-scale animal facilities, the stability and predictability of regulations affecting costs are critical to investors. State-level regulation is more predictable than the independent actions of many local units. In addition, local governments, because of their inability to achieve economies of scale, may have less technical capacity to develop or implement effective regulations.

Agricultural and other interests may also prefer state decision-making because they are able to more effectively influence legislation and implementation of laws affecting animal agriculture as compared to local government units. There is evidence that this occurred in North Carolina[134] and Pennsylvania in the 1990s. This last observation is consistent with arguments of Libecap[135] and Pashigian[136] regarding industries that seek protection from competition and other forces of change supporting regulatory authority at the higher level. The economics of political influence clearly leads to a general preference for state level regulatory authority by organized interest groups. Monitoring and lobbying at the state level is much less expensive than providing these services at hundreds of local governmental units.

Food industry, agri-business, and related economic development groups are likely to have a general preference for a state-wide uniform approach to regulating animal agriculture for the same reasons just discussed for organized agricultural

134. *See* Pat Stith & Joby Warrick, *For Murphy, Government and Business Were a Good Mix*, RALEIGH NEWS & OBSERVER, Feb. 22, 1995, at A1.

135. For a discussion of this dynamic, see Gary D. Libecap, The New Institutional Economics and Rural Development in the United States (Sept. 1996) (unpublished manuscript, on file with the *Drake Journal of Agricultural Law*). This paper was prepared for New Institutional Economics and Growth Workshop, in Kansas City, KS.

136. *See* B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985).

interests. Uniformity and predictability of regulatory costs are important in promoting investments in large scale animal enterprises that are perceived to contribute to the growth of regional and state economies. The economic benefits of expanded animal production are likely to provide broad-based benefits to a regional economy, whereas the potential costs are more likely to fall on people in the individual jurisdictions where facilities are located. Is this result fair? If one concludes it is not fair, what can be done to make it more equitable?

In addition, state-level environmental groups and the agencies they seek to influence may have reasons to favor state approaches that provide more control and predictability in meeting state-wide goals. They may wish to "rationalize" the disparate efforts of local governments and also be skeptical of the technical capabilities of local government representatives and personnel. State-level environmental groups generally favored local preemption in deliberations over Pennsylvania's Nutrient Management Act in 1993.[137] In discussions this year in North Carolina, some environmental and other state-level organized interests argued for more local control.[138] This could be a reflection of participants learning about outcomes or change in the perceptions of the issues or policy options over time.

### C. *Unorganized Residents Have Reasons for Preferring Local Regulatory Authority*

Nearby residents and those closest to the problems of animal agriculture tend to want rules from the government unit that is closest to them. Such groups may believe that local governments are more responsive to their interests, more knowledgeable about local situations, or perhaps can act more quickly to address problems. In the past, rural residents may have been more unified in their attitudes about agriculture, regarding it as a sometimes polluting activity but one that contributed to the rural economy and provided open space benefits. However, large scale animal agriculture is changing these perceptions and attitudes. Nearby residents affected by potential water degradation or nuisance odors have quite different perceptions of the benefits and costs from large scale animal facilities than the general population.[139] Consequently, they often oppose such operations. In such efforts, citizens are likely to feel that local governments are more responsive to their pleas than bureaucrats located in offices far from their homes and communities who may be influenced by other factors or feel other pressures.

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137. *See* 3 PA. CONS. STAT. ANN. §§ 1701-1718 (West 1995).

138. *See* Pat Stith & Joby Warrick, *For Murphy, Government and Business Were a Good Mix*, RALEIGH NEWS & OBSERVER, Feb. 22, 1995, at A1.

139. *See* Erica Voogt, *Pork Pollution and Pig Farming: The Truth About Corporate Hog Production in Kansas*, 5 KAN. J.L. & PUB. POL'Y 219 (1996).

### D. *The Institutional Learning Process*

Participants in the policy process learn from their own experiences on an issue within a state and from the experiences of other states. As noted earlier, the attitudes and actions concerning preferences for local control of organized environmental interests in some states may change as they learn about the outcomes associated with different policy approaches. In other words, they may "play the political game" differently after they receive feedback from the process. The political economies of the different states are interdependent. Cross-state institutional learning can take different forms.[140] South Carolina, for example, observed pollution and other problems from hog waste occurring to its north and decided against local preemption in passing stronger environmental rules for large swine enterprises in 1996.[141] Only three years earlier, there was little opposition from local governments in Pennsylvania to a nutrient management bill that contained a local preemption provision.[142] One difference between these two time periods is expanded public awareness of environmental and nuisance problems from large hog operations resulting from major manure spills in 1995 in North Carolina and the Midwest.[143] Also, a state moratorium on hog expansions in Missouri in 1996 may have affected the North Carolina legislature's decisions to enact tougher regulations than it otherwise would have.[144]

Interestingly, North Carolina, the fastest growing swine production state, appears to be moving toward allowing greater involvement of neighbors and local officials in regulatory decisions. In contrast, the institutional rules in Iowa, a state with a dominant industry position that has recently been challenged, has significantly limited opportunities for local input in such decisions.[145] This may be due to a different balancing of the economic benefits and environmental and nuisance costs for each state depending upon its phase in the life cycle of industry growth.

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140. The learning can go in a direction to weaken environmental regulations as well. For example, in another economic and political climate, development interests may lobby for regulations providing competitive advantage, thereby leading to the "race to the bottom."

141. *See* Steve Marbery, *Hog Industry Insider,* FEEDSTUFFS, June 24, 1996, at 28, 29.

142. *See* 3 PA. CONS. STAT. ANN. §§ 1701-1718 (West 1995).

143. *See* Ronald Smothers, *Spill Puts A Spotlight on a Powerful Industry: Hog Farm's Waste Kills Crops and Fish,* N.Y. TIMES, June 30, 1995, at A10.

144. *See* Steve Marbery, *Hog Industry Insider,* FEEDSTUFFS, June 24, 1996, at 28.

145. *See* Goodell v. Humboldt County, No. 97-790, 1998 WL 92658 (Iowa 1998); Steve Marbery, *Iowa's Top Court Rejects County Livestock Ordinances,* FEEDSTUFFS, Mar. 9, 1998, at 3.

## VI. WHO SHOULD MAKE THE RULES OF THE REGULATORY GAME?

From the outset of this discussion the approach has been to describe the various legal, economic, and practical factors that favor one unit of government taking the initiative to address a particular problem with tools it has in its arsenal of authorized responses. Although the discussion is descriptive of what motivates groups to favor one solution over another, the discussion fails to reach the question of which level of government should address the problem. Public support of state level regulation of an activity to the exclusion of local regulation will only be successful when it can muster enough political power to achieve the desired outcome. As the events in Iowa and North Carolina demonstrate, individuals who live in a local community near controversial activities, which the community perceives to be a threat to its well being, will tenaciously oppose and challenge these activities despite the best efforts of organized groups to prevent it. Whether the challenge is based on constitutional divisions of power between levels of government or the subjective analysis of how actions of one level of government affect the power and ability of another level of government, opposition can be expected. In North Carolina, this opposition may lead to a legislated "cooling off" period, which does not solve any problems but allows tempers to cool. The South Carolina experience typifies the often unpredictable nature of political solutions to thorny problems. What started out as an attempt to adopt state laws that preempt counties from enacting measures to deal with confined animal feeding operations resulted in a measure that provides for considerable regulation of the activity and significant local involvement in the process. It can hardly be said that the initial proponents of statewide regulation achieved what they set out to do when they turned to the political process for a solution.

Despite the fact that political solutions to thorny problems can be unpredictable and may not achieve the most efficient resolution, the political process is still firmly entrenched as an important part of our governmental system. Resorting to it has the positive result of allowing all enfranchised members of the affected communities to participate in the process at the ballot box or a public hearing. Democratic principles do not guarantee citizens that they will favor all decisions that elected or appointed officials make. The principles do guarantee an opportunity to participate in the decision making process and have a voice in the outcome.

The arguments presented for or against a particular jurisdictional level involvement are not intended to lead toward the conclusion that a particular level of jurisdictional boundary is best equipped to deal with rural-urban interface issues. Instead it is hoped that the identification and discussion of the criteria will lead toward more productive debate about the options for governmental decisions about such issues. The level of government that should act to establish the regulatory

rules in any given situation is the level that has the political support to do so. Failing to obtain the support before acting will destine those efforts to continual challenge and opposition.