

## As Montville, Maine Goes, So Goes Wolcott, Vermont? A Primer on the Local Regulation of Genetically Modified Crops

*“As Maine goes, so goes Vermont.”*<sup>1</sup>

*“We are . . . imposing a moratorium on the growing of GM crops in Montville and demanding that our legislators pass laws to protect our rights as consumers and farmers.”*<sup>2</sup>

### I. INTRODUCTION

On March 29th, 2008, the residents of Montville, Maine voted to ban the cultivation of genetically modified organisms (GMOs) within the town’s borders.<sup>3</sup> They did so because, among other things, the town’s residents were concerned about the potential for genetic contamination from farms growing genetically modified crops (GM crops).<sup>4</sup> In enacting its ordinance, Montville became the first local government outside of California to ban the cultivation of GM crops.<sup>5</sup>

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1. See *MAINE: As the Nation Goes*, TIME, Sept. 23, 1957 (crediting Democratic Strategist Jim Farley with coining phrase after Roosevelt swept 46 states in 1936). The only two holdouts: Maine and Vermont. *Id.* The expression had previously been “As Maine Goes, So Goes the Nation.” *Id.*

2. See Press Release, Kai George, et al., Montville, ME Passes Binding GMO Moratorium Ordinance in Historic Vote! (Mar. 29, 2008), <http://nwrage.org/index.php?name=News&file=article&sid=2131> (quoting town resident and ordinance supporter, Kai George).

3. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (banning “production” of GM crops). Genetically modified organisms, also known as genetically engineered, or transgenic organisms, are those that have had their genetic makeup altered artificially. See CECIE STARR & RALPH TAGGART, BIOLOGY: THE UNITY AND DIVERSITY OF LIFE 253 (11th ed. 2005). Some activists disparagingly refer to GM crops as “Franken-food”—an allusion to Mary Shelley’s *Frankenstein*—the tale of a scientist who went afoul of the bounds of science by piecing together and reanimating a being later to become known as the Frankenstein monster. See William Safire, *The Way We Live Now: 8-13-00: On Language; Franken-*, N.Y. TIMES, Aug. 13, 2000 (crediting term “Franken-food” to Boston College English Professor, Paul Lewis).

4. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (explaining motivation behind ban as protecting native flora and garden varieties). The ordinance states that the purpose of the ban on GM crops was to “protect Montville’s native plants and trees from cross-contamination by genetically modified plants and to protect garden varieties bred using traditional plant propagation methods from genetically engineered or genetically modified organisms,” as well as to “protect the health of Montville’s inhabitants by ensuring they are confident of the integrity of the plants they grow and eat; and to defend the economy of the farmers, gardeners, and foresters in the Town of Montville.” *Id.*

5. See Tux Turkel, *In Montville, Unengineered Seeds of Rebellion*, PORTLAND PRESS HERALD, Apr. 13, 2008 (explaining ordinance and motivation behind it); see also THE CENTER FOR FOOD SAFETY, GENETICALLY ENGINEERED CROPS AND FOODS: REGIONAL REGULATION AND PROHIBITION 10-11 (June 2006), [http://www.centerforfoodsafety.org/pubs/Regional\\_Regs\\_Chart\\_6-2006.pdf](http://www.centerforfoodsafety.org/pubs/Regional_Regs_Chart_6-2006.pdf) (listing transgenic crop restrictions

Opponents of GM crops include organic farmers, environmentalists, and anti-corporate activists.<sup>6</sup> They cite a litany of concerns about GM crops, including cross-pollination of conventional crop varieties; adverse health effects, if consumed by humans, such as allergic reactions; and unknown environmental effects.<sup>7</sup> Producers of genetically modified crop seed refute these claims, arguing that GM crops are just as safe as non-genetically modified varieties.<sup>7</sup> They also counter that GM crops offer advantages over conventional varieties, including increased yields, lower carbon emissions resulting from production, and other beneficial environmental effects.<sup>8</sup> Genetically modified crop opponents argue that the federal government has failed to provide proper oversight on the development, testing, and cultivation of GM crops.<sup>9</sup> They also assert that local regulation of GM crops is needed to

throughout world, including local ordinances).

6. See, e.g., Greenpeace International, *Say No To Genetic Engineering*, <http://www.greenpeace.org/international/campaigns/genetic-engineering> (stating environmental organization's opposition to transgenics); Maine Organic Farmers and Gardeners Association, *MOFGA Position Statement on Genetically Engineered Organisms*, <http://mofga.org/Default.aspx?tabid=439> (asserting opposition to GM crops) [hereinafter *MOFGA Position Statement*]; Public Citizen, WTO and Genetically Modified Organisms (GMOs), <http://www.citizen.org/trade/wto/agriculture/gmo/> (indicating corporate watchdog organization's skepticism towards GM crops).

7. See, e.g., CALIFORNIANS FOR GE-FREE AGRICULTURE, GENETIC ENGINEERING AND CALIFORNIA AGRICULTURE, [http://www.calgefree.org/GeneralFactSheetSmall\\_000.pdf](http://www.calgefree.org/GeneralFactSheetSmall_000.pdf) (listing food allergies and novel toxins as threats posed by GM crops); FRIENDS OF THE EARTH, WHO BENEFITS FROM GM CROPS: THE RISE IN PESTICIDE USE, [http://www.foe.co.uk/resource/briefings/who\\_benefits.pdf](http://www.foe.co.uk/resource/briefings/who_benefits.pdf) (listing environmental and socioeconomic concerns as reasons for organization's opposition to GM crops); *MOFGA Position Statement*, *supra* note 6 (citing unknown environmental and health risks among reasons for opposition to GM crops). The unintentional swapping of genes from GM crop strains to conventional strains is known as "gene flow" and can have a homogenizing affect on formerly distinct strains of crops. See Eliana Fontes, *A Healthy Mix: Strategies For GM and Non-GM Crop Coexistence*, SCIENCE AND DEVELOPMENT NETWORK, <http://www.scidev.net/en/policy-briefs/a-healthy-mix-strategies-for-gm-and-non-gm-crop-co.html> (explaining gene flow phenomenon and associated risks). ALSO OF CONCERN IS GENE FLOW TWIXT WILD SPECIES AND RELATED CROP SPECIES, AS THIS HAS POTENTIAL TO ENHANCE THE FITNESS OF THE RESULTANT WILD SPECIES, MAKING IT MORE DIFFICULT TO ERADICATE, OR ABLE TO OUT-COMPETE ITS NICHE COMPETITORS, POTENTIALLY RESULTING IN A LOSS OF BIODIVERSITY. SEE STEVEN HILL, *REGULATING THE RULES OF GENE FLOW*, IN *Gene Flow from GM Plants* 221 (GUY M. POPPY & MICHAEL J. WILKINSON EDS., 2005) (DISCUSSING RISKS ASSOCIATED WITH GENE FLOW). A single genetic strain producing all of the world's food is more susceptible to pests, bacteria, and viruses. See *Toxic Pollen From Widely Planted, Genetically Modified Corn Can Kill Monarch Butterflies*, *Cornell Study Shows*, SCIENCE DAILY, May 21, 1999, <http://www.sciencedaily.com/releases/1999/05/990521054837.htm> (claiming GM corn resulted in harm to butterflies). But see Mark K. Sears et al., *Impact of Bt Corn Pollen on Monarch Butterfly Populations: A Risk Assessment*, 98 PROC. NAT'L ACAD. SCI. U.S. 11937 (2001) (asserting no harm to butterflies found).

7. See Croplife International, Safety, <http://www.croplife.org/> (click "Safety" on menu bar) (last visited Nov. 11, 2009) (asserting GM crops are safe and explaining transgenic crop safety track record).

8. See Croplife International, Benefits of Plant Biotechnology, <http://www.croplife.org/> (click "Benefits of Plant Biotechnology" on left menu bar) (last visited Nov. 11, 2009) (listing benefits of transgenic crop use). It should be noted, however, that all of these purported benefits accrue largely, if not entirely, to the primary selling point of most GM crops—their resistance to insects require less pesticides. PG ECONOMICS LIMITED, *BIOTECH CROPS: THE REAL IMPACTS 1996-2006 – YIELDS* (2008), [http://www.pgeconomics.co.uk/pdf/GM\\_crop\\_yield\\_arial.pdf](http://www.pgeconomics.co.uk/pdf/GM_crop_yield_arial.pdf) (crediting PIP containing GM crops with reduced environmental impacts including lower carbon foot-print).

9. See The Center for Food Safety, Genetically Engineered Foods, <http://truefoodnow.org/campaigns/>

protect the environment and public health.<sup>10</sup>

In response, these food activists have sought to use the police power afforded to local governments to regulate GM crops.<sup>11</sup> As of April 2009, only nine local governments across the entire nation have enacted mandatory prohibitions on GM crops.<sup>12</sup> California, Maine, and Vermont represent hotbeds of local opposition to GM crops, whether in the form of mandatory prohibitions, or in the form of non-binding resolutions.<sup>13</sup> Although only a few communities, concentrated in a few states, have acted with respect to this issue, evidence exists of a growing movement on the local level against GM crops.<sup>14</sup>

This local angst toward GM crops is not without restraint, however, as the power of local governments to enact law is limited.<sup>15</sup> Federal law and, to a

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genetically-engineered-foods/ (last visited May 19, 2010) (arguing Congress has failed to properly regulate GMOs); Britt Bailey, *States Introduce Numerous Bills to Regulate Genetically Modified Foods*, ENVIRONMENTAL COMMONS, <http://environmentalcommons.org/gmo-regulation-2007.html> (describing local regulations as response to federal inaction).

10. See, e.g., ARCATA, CAL., CODE tit. 5, ch. 10.5 (2004) (citing health and environmental concerns as part of motivation for prohibition on GMOs); MENDOCINO COUNTY, CAL., CODE ch. 10A.15 (2004) (citing environmental harm as part of justification for prohibition on genetically modified organisms); Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (citing health and environment concerns as justification for banning "production" of GM crops).

11. See Organic Consumers Organization, Save BioDemocracy: Monsanto Laws, <http://www.organicconsumers.org/ge-free.cfm#mlaws> (last visited Apr. 13, 2010) (expressing support for local regulations and concern over and opposition to preemptive state laws); see also Bailey, *supra* note 9 (describing local regulations as response to federal inaction).

12. See THE CENTER FOR FOOD SAFETY, *supra* note 5 (listing bans on GM crops throughout world as of 2006). As of 2008, at least nine local governments, aside from Montville, Maine, have passed mandatory prohibitions on GM crops: Trinity, Marin, Santa Cruz, and Lake Counties, Arcata and Point Arena Cities in California; and Hawaii County, Hawaii. See POINT ARENA, CAL., MUNICIPAL CODE, ch. 8.25 (2008); SANTA CRUZ, CAL., MUNICIPAL CODE, ch. 6.10 (2006) (banning cultivation of GM crops); SANTA CRUZ COUNTY, CAL., CODE, ch. 7.31 (2006); TRINITY COUNTY, CAL., CODE, ch. 8.25 (2004); MARIN COUNTY, CAL., CODE, ch. 6.92 (2004); MENDOCINO COUNTY, CAL., CODE, ch. 10A.15 (2004); ARCATA, CAL., MUNICIPAL CODE, ch. 10.5 § 5920-5960 (2004); HAWAII COUNTY, HAW. CODE, ch. 14.90 (2008) (banning cultivation of transgenic coffee and taro root). Eighty-three towns in Vermont have also passed non-binding resolutions against GM crops. See GE Free Vermont, Town Meeting Resolution Updates - 4 More Towns Say NO to GMOs!, [http://gefreevt.org/index.php?name=town\\_to\\_town](http://gefreevt.org/index.php?name=town_to_town) (last visited May 19, 2010) (listing Vermont towns having passed resolutions against GM crops). The Maine towns of Brooklin and Liberty have also passed nonbinding resolutions declaring themselves "GE-free zones." See *Montville Passes Ordinance to Ban Genetically Engineered Crops*, BOSTON GLOBE, Mar. 31, 2008, [http://www.boston.com/news/local/main/articles/2008/03/31/montville\\_passes\\_ordinance\\_to\\_ban\\_genetically\\_engineered\\_crops/](http://www.boston.com/news/local/main/articles/2008/03/31/montville_passes_ordinance_to_ban_genetically_engineered_crops/) (explaining Brooklin and Liberty nonbinding transgenic prohibitions).

13. See THE CENTER FOR FOOD SAFETY, *supra* note 5 (listing all U.S. local prohibitions on GM crops). Nevertheless, Vermont towns have passed nonbinding resolutions in opposition, rather than outright prohibitions like those passed by Montville, Maine, and a number of local governments in California. *Id.*

14. See generally ENVIRONMENTAL COMMONS, SECURING LOCAL CONTROL OF OUR FOOD & ENVIRONMENT: HOW TO FIGHT PREEMPTIVE LEGISLATION IN YOUR STATE (2007), <http://environmentalcommons.org/local-control-toolkit.pdf> (describing state preemptive legislation and how to prevent preemption of local ordinances); PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, FACTSHEET: STATE LEGISLATIVE ACTIVITY RELATED TO AGRICULTURAL BIOTECHNOLOGY IN 2005-2006 (2007), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food\\_and\\_Biotechnology/PIFB\\_State\\_Legislature\\_2005-2006Session.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Food_and_Biotechnology/PIFB_State_Legislature_2005-2006Session.pdf) (tracking state legislation addressing GM crops).

15. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (describing multiple

greater extent, state law restrain the legislative powers of local governments.<sup>16</sup> Limitations imposed by state law explain, in part, why local governments in Vermont have pursued non-binding resolutions against GMOs, while Montville, in the neighboring state of Maine, has enacted mandatory prohibitions on GMOs.<sup>17</sup> Beginning with federal law, the first type of restraint on local action is preemption.<sup>18</sup> Federal preemption has a variety of forms, but at its essence, it means that an ordinance may not contradict federal law either explicitly or implicitly.<sup>19</sup> The second form of federal restraint on local authority is the Dormant Commerce Clause, which essentially bars states from discriminating against interstate commerce.<sup>20</sup> But the powers of the federal government are not the only limitations on local authority.<sup>21</sup> Even if an ordinance survives the rigors of federalism, it must also fall within the powers granted by the state in which it is incorporated.<sup>22</sup> Like federal preemption, states can also preempt local governments from acting.<sup>23</sup> At least one commentator has described state preemption as the “primary threat” to ordinances.<sup>24</sup> In fact, many states have passed laws that preempt local regulation of GM crops.<sup>25</sup>

Using Montville’s ordinance for illustrative purposes, this Note will focus on the threats that state law poses to local governments that seek to regulate GM crops.<sup>26</sup> As background, the Note will begin with a summary of the federal regulatory regime with respect to GM crops.<sup>27</sup> Then, the Note will provide a brief discussion of the Supremacy and Dormant Commerce Clauses.<sup>28</sup> Next,

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restrictions on local action); *see also* Maureen Bessette, Note, *Genetic Engineering: The Alternative of Self-Regulation for Local Governments*, 22 SUFFOLK U. L. REV. 1121, 1137-50 (1988) (discussing early local actions attempting regulation of broader area of genetically modified organisms).

16. *See infra* notes 55-190 (discussing and analyzing state and federal law restraints on local authority to legislate).

17. *See* Diller, *supra* note 15, at 1137-50. (stating both federal and state law restricts local action).

18. *See id.* (stating federal preemption may invalidate ordinances).

19. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (explaining types of federal preemption); *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824) (establishing federal preemption doctrine as consequence of Supremacy Clause).

20. *See infra* notes 57-62 and accompanying text (explaining Dormant Commerce Clause).

21. *See* Diller, *supra* note 15, at 1114-15 (discussing state authority over municipalities).

22. *See, e.g.,* Cmty. Commc’ns Co. v. City of Boulder, Colo., 455 U.S. 40, 53-54 (1982) (stating local governments subordinate to state); *City of Trenton v. New Jersey*, 262 U.S. 182, 186-87 (1923) (describing city as political subdivision of state, created as convenient agency exercise of governmental powers); *Atkin v. Kansas*, 191 U.S. 207, 220 (1903) (declaring municipal corporations “creatures” of states).

23. *See* Diller, *supra* note 15, at 1114 (explaining power of state to preempt local ordinances and describing state preemption).

24. *See id.* (describing state preemption as primary threat to local policy innovation).

25. *See* Bailey, *supra* note 9 (depicting states that have passed laws preempting local regulation of GM crops).

26. *See* Diller, *supra* note 15, at 1113-14 (describing state laws as barrier to local action).

27. *See infra* notes 36-57 (describing federal regulations and statutes which regulate GMOs). These statutes and regulations may preempt local regulations. *Id.*

28. *See infra* notes 52-56 and accompanying text (discussing Supremacy Clause); *infra* notes 57-62 (discussing Dormant Commerce Clause).

the Note will examine the two primary approaches to granting and construing municipal power: Home Rule and Dillon's Rule.<sup>29</sup> This Note shall refer to states that grant broad and liberally construed authority to local governments (at least with respect to local issues) either by statute or by constitutional provision as "Home Rule" states.<sup>30</sup> Those states that require express authorizing legislation for areas in which local governments seek to regulate, and whose courts strictly construe local authority shall be referred to as "Dillon's Rule" states.<sup>31</sup> This Note will use Maine and California as examples of Home Rule states and Vermont will illustrate a Dillon's Rule state.<sup>32</sup> This exercise will aid in the determination of whether a town in these states would have the constitutional authority to enact a Montville-style ordinance.<sup>33</sup>

Next, the Note will examine the issue of state preemption, using the so-called "Right to Farm" laws of Maine, California, and Vermont as examples of potential preemptive statutes.<sup>34</sup> Finally, the Note will apply the state's right to farm law to see if it preempts a Montville-style ordinance.<sup>35</sup>

## II. HISTORY

### A. *The Federal Regulation of GM Crops*

At the federal level, GMOs, including GM crops, are regulated entirely under existing health and safety legislation.<sup>36</sup> There are no federal statutes dealing specifically with GMOs or GM crops.<sup>37</sup> The current genetically

29. See *infra* notes 68-81 and accompanying text (defining and differentiating between Home Rule and Dillon's Rule).

30. See generally JESSE J. RICHARDSON, JR. ET AL., BROOKINGS INST., *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT* (2003) (defining Home Rule and addressing common misconceptions about doctrine).

31. See *id.* (defining Dillon's Rule and correcting misconceptions about doctrine).

32. See *infra* note 79 and accompanying text (illustrating Home Rule and Dillon's Rule approaches to municipal authority).

33. See *infra* note 79 and accompanying text (discussing constitutional authority granted to municipalities).

34. See *infra* notes 63-81 (discussing state supremacy over municipalities and approaches to granting power).

35. See *infra* notes 122-44 and accompanying text (analyzing right to farm laws and potential preemptive effect).

36. See DIAHANNA LYNCH & DAVID VOGEL, COUNCIL ON FOREIGN RELATIONS, *THE REGULATION OF GMOs IN EUROPE AND THE UNITED STATES: A CASE-STUDY OF CONTEMPORARY EUROPEAN REGULATORY POLITICS* (2001), <http://www.cfr.org/publication/8688/> (discussing federal regulatory regime for GMOs); see also U.S. Regulatory Agencies Unified Biotechnology Website, Frequently Asked Questions, <http://usbiotechreg.nbi.gov/FAQRecord.asp?qryGUID=2> (last visited Feb. 14, 2009) (stating GMO regulation authorized under statutes created for non-GMOs). The laws currently used to regulate the products of modern biotechnology are the Plant Protection Act, the Federal Food, Drug, and Cosmetic Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Toxic Substances Control Act. See U.S. Regulatory Agencies Unified Biotechnology Website, *supra*.

37. See LYNCH & VOGEL, *supra* note 36, at \*4-6 (stating Congress has yet to pass legislation specific to

modified regulatory regime began in 1984, when President Reagan formed a working group to determine how to regulate GM crops.<sup>38</sup> The resulting document, the *Coordinated Framework for the Regulation of Biotechnology*, divided the task of regulating GM crops among three federal agencies: the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the United States Department of Agriculture (USDA).<sup>39</sup>

### 1. The FDA: Ensuring Purity and Safety of GMOs Intended for Consumption

Under the Federal Food and Drug Control Act (FFDCA), the FDA is charged with the responsibility of ensuring the purity and safety of foods intended for human or animal consumption sold in interstate commerce.<sup>40</sup> The FFDCA, *inter alia*, bans the sale of adulterated foods from interstate commerce.<sup>41</sup> The FFDCA defines an adulterated food as containing “poisonous or deleterious substance which may render it injurious to health.”<sup>42</sup> Therefore, GM crops that contain harmful substances are subject to FDA enforcement.<sup>43</sup>

### 2. The EPA: Regulating GMOs Classified as Pesticides or Toxic Substances

The EPA regulates the testing, distribution, sale, and use of substances classified as pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>44</sup> FIFRA authorizes the regulation of GM crops with plant incorporated protectants (PIPs)—substances inserted into the plant’s DNA which act as pesticides.<sup>45</sup> The Supreme Court has held that FIFRA does not preempt local governmental regulation of pesticide use.<sup>46</sup>

The EPA also has authority to regulate non-pesticidal GM crops as “new chemical substances” under the Toxic Substance Control Act (TSCA).<sup>47</sup> The EPA determines whether substances constitute an unreasonable risk to human health or the environment.<sup>48</sup>

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transgenics).

38. *See id.* (discussing origin of current federal approach to regulating transgenics).

39. *See* Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302 (June 26, 1986) (to be codified at 40 C.F.R. pt. 158) (implementing current division of regulatory oversight regarding GMOs).

40. *See* 21 U.S.C. § 301 (2006) (codifying FDA’s responsibilities).

41. *See id.* § 331(a) (banning introduction or delivery of adulterated foods into interstate commerce).

42. *See id.* § 342 (defining adulterated foods).

43. *See id.* § 331(a) (banning introduction or delivery of adulterated foods into interstate commerce); 21 U.S.C. § 342 (2006) (defining adulterated foods).

44. *See generally* 7 U.S.C. § 136 (2006) (codifying EPA’s regulatory authority over pesticides).

45. *See generally* Regulations Under the Federal Insecticide, Fungicide, and Rodenticide Act for Plant-Incorporated Protectants, 66 Fed. Reg. 37,772-817 (July 19, 2001) (to be codified at 40 C.F.R. pts. 152, 174) [hereinafter Regulations Under FIFRA] (implementing new rules for PIPs).

46. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 614 (1991) (holding FIFRA not violated by local regulation of pesticide).

47. *See* 15 U.S.C. § 2602(9) (2006) (defining new chemical substance).

48. *See id.* § 2605(b) (granting EPA authority to determine whether substances pose unreasonable risk to

### 3. The USDA: Regulating GMOs Considered “Plant Pests”

The Plant Protection Act (PPA) gives the USDA the power to regulate the import, export, and transport of “plant pests,” which are defined as any organism that can “directly or indirectly injure, cause damage to, or cause disease in any plant or plant product.”<sup>49</sup> The Animal and Plant Health Inspection Service (APHIS) is the agency arm in charge of this task.<sup>50</sup> APHIS’s regulation of new GMOs begins in the development stage and continues until it is proven that the GMO is not a plant pest.<sup>51</sup>

## B. Supremacy Clause and Preemption

### 1. Federal Supremacy

With the patch-work of existing regulations and statutes that regulate GM crops as outlined above, one obvious limitation on the ability of local governments to enact laws regulating GM crops is the Supremacy Clause of the U.S. Constitution.<sup>52</sup> The Supremacy Clause dictates that where a federal law and a state law come into conflict, the federal law preempts the state law.<sup>53</sup>

### 2. Federal Preemption

There are two forms of federal preemption: express and implied.<sup>54</sup> Express preemption occurs when Congress has explicitly stated that a statute preempts state law.<sup>55</sup> Implied preemption on the other hand, occurs implicitly through the pervasiveness of federal regulations, or if state action would frustrate the purpose of Congress, or if it would be impossible to comply with both state and federal law.<sup>56</sup>

## C. Dormant Commerce Clause

Another federal restraint on the power of local governments is the Dormant Commerce Clause.<sup>57</sup> Where the federal government refrains from legislating,

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human health or environment).

49. See Plant Protection Act, 7 U.S.C. § 7701 (2000) (codifying authority of USDA); 7 U.S.C. § 7702(14) (2006) (defining “plant pest”).

50. See 7 C.F.R. § 340.0 (2009) (authorizing APHIS).

51. See *id.* (codifying APHIS approval procedure).

52. See U.S. CONST. art. VI, § 2 (declaring federal law “the supreme Law of the Land”).

53. See *Fid. Fed. Sav. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 152-53 (1982) (stating preemption “compelled” whether Congressional intent found explicitly or implicitly in statute’s structure and purpose).

54. See *id.* (stating federal preemption can be explicitly stated or implied).

55. See CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE U.S. CONSTITUTION* 96 (2004) (describing express preemption). Express preemption clauses are common. *Id.* at 97.

56. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (describing types of implied preemption).

57. See *infra* notes 58-62 and accompanying text (explaining Dormant Commerce Clause).

the Dormant Commerce Clause bars states from creating laws or regulations that burden or discriminate against interstate or foreign competition.<sup>58</sup> When analyzing a law under the Dormant Commerce Clause, one must first determine whether the law discriminates against interstate commerce, in which case, the law is presumptively invalid, or if it simply regulates such commerce “even-handedly” with only “incidental effects,” and is therefore valid.<sup>59</sup>

A regulation can be discriminatory in two different ways: facially or as applied.<sup>60</sup> If the regulation favors in-state economic interests over out-of-state competitors, it is discriminatory, and presumably invalid.<sup>61</sup> On the other hand, non-discriminatory regulations are valid so long as the burden on interstate commerce is not “clearly excessive in relation to the putative local benefits.”<sup>62</sup>

#### *D. State Restrictions on Local Action*

##### *1. Local Governments as Subordinate*

While the Tenth Amendment to the U.S. Constitution reserves powers for the states, it makes no mention of local governments.<sup>63</sup> In the modern view,

58. See, e.g., *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (describing Dormant Commerce Clause as driven by concern about “economic protectionism”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) (noting “negative” Commerce Clause prohibits economic protectionism); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (stating Commerce Clause prohibits states from placing themselves in position of economic isolation). The Dormant Commerce Clause is where the affirmative power of Congress to regulate interstate commerce under Article I, § 8, cl. 3 of the Constitution, lies “dormant,” yet still acts as a barrier to state regulations that either discriminate against, or are unduly burdensome to, interstate commerce. See U.S. CONST. art. I, § 8, cl. 3; *Ogden v. Gibbons*, 22 U.S. 1, at \*189 (1824) (explaining Congress’ commerce power may lie “dormant”); see also Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570 (1987) (describing origin and basis of Dormant Commerce Clause).

59. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978) (noting incidental effects on interstate commerce allowable); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding even-handed and incidental consequences on commerce generally acceptable). Discrimination against interstate commerce, however, is virtually always invalid. See *City of Philadelphia*, 437 U.S. at 624 (observing discriminatory regulations face virtual per se rule of invalidity).

60. See *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979) (explaining state action can be discriminatory either facially or as applied).

61. See *Pike*, 397 U.S. at 142 (explaining discriminatory nature of regulations favoring in-state interests). Despite a strong presumption of invalidity, a discriminatory regulation may be upheld provided the state can demonstrate both that it “serves a legitimate local purpose,” and that this purpose could not be accomplished as well by available nondiscriminatory means. See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)) (holding Maine’s statute valid despite discriminatory effect). The Court held that Maine’s prohibition of the importation of bait-fish from outside the state “served a legitimate local purpose,” and because this purpose could not be served as well by available nondiscriminatory means, the statute was valid. See *id.* at 151-52.

62. See *Pike*, 397 U.S. at 142 (applying new balancing test weighing local interests against burden to interstate commerce).

63. See U.S. CONST. amend. X (reserving powers not granted to federal government to states). These reserved powers—the authority to regulate for the health, safety, welfare, and morals—are generally referred to collectively as the “Police Power.” See generally Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (providing history and development of police power doctrine).

local governments are subordinate to, and derive all power from, state authority.<sup>64</sup> States are free to delegate as much or as little authority to local governments as they wish.<sup>65</sup> Therefore, a local government may lack the authority to enact regulations dealing with GM crops because such power has not been delegated to them by the state.<sup>66</sup> There are two approaches to the state and local government power dynamic: Dillon's Rule and Home Rule.<sup>67</sup>

## 2. An Overview of Home Rule

At its essence, Home Rule is where states grant local governments certain self-governing authority.<sup>68</sup> This can be achieved by a provision within the state's constitution that grants Home Rule authority, by statute, or by a combination of the two.<sup>69</sup> The doctrine of Home Rule was essentially a reaction to Dillon's Rule.<sup>70</sup> To many observers, Dillon's Rule was too restrictive of local authority.<sup>71</sup> Home Rule is now the majority approach in the U.S. to granting local governmental authority.<sup>72</sup>

A minority of states have withheld Home Rule authority from local governments.<sup>73</sup> These states are often referred to as Dillon's Rule states.<sup>74</sup> But

64. See, e.g., *Cnty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982) (opining U.S. federalist system has no place for "sovereign" cities); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (asserting cities subordinate to state); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (describing municipalities as "creatures" of states).

65. See *City of Trenton*, 262 U.S. at 187 (recognizing state free to delegate authority to local governments as it chooses).

66. See OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 157 (2d ed. 2001) (indicating local governments must be granted powers from state by law). Local governments only have the authority that has been granted to them in some way, either expressly or by implication. *Id.*

67. See Diller, *supra* note 15, at 1124 (describing Home Rule as alternative to Dillon's Rule). But see RICHARDSON ET AL., *supra* note 30, at 1 (discussing confusion surrounding Home Rule and Dillon's Rule). The authors of this study explain that Home Rule and Dillon's Rule are not mutually exclusive and often "coexist." *Id.* at 6.

68. See REYNOLDS, *supra* note 66, at 112 (defining Home Rule); see also RICHARDSON ET AL., *supra* note 30, at 10-11 (providing various definitions of Home Rule).

69. See REYNOLDS, *supra* note 66, at 111-13 (explaining approaches to granting Home Rule).

70. See, e.g., Diller, *supra* note 15, at 1124 (describing Home Rule as response to scant local authority provided by Dillon's Rule).

71. See *id.* (citing perceived limitation of local authority under Dillon's Rule as reason for Home Rule's rise); see also RICHARDSON ET AL., *supra* note 30, at 1 (stating modern smart growth advocates blame Dillon's Rule for limited authority to enact policies).

72. See, e.g., MICHAEL E. LIBONATI, *LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL, STATUTORY, AND JUDICIAL CLARIFICATION* 1 (1993) (stating forty-eight states grant Home Rule authority to municipalities; thirty-seven grant Home Rule to counties); REYNOLDS, *supra* note 66, at 105 (stating Home Rule authority available in most states); Diller, *supra* note 15, at 1126 (stating Home Rule majority approach to local authority). But see RICHARDSON ET AL., *supra* note 30, at 17 (arguing majority of states retain some aspects of Dillon's Rule).

73. See LIBONATI, *supra* note 72, at 1 (noting majority of states grant local governments Home Rule authority).

74. See, e.g., JOHN RANDOLPH, *ENVIRONMENTAL LAND USE PLANNING AND MANAGEMENT* 147 (2004) (citing to Home Rule states and Dillon's Rule states); RICHARDSON ET AL., *supra* note 30, at 1 (stating many observers refer to states as either Home Rule or Dillon's Rule states); Diller, *supra* note 15, at 1126 (referring

this characterization is somewhat misleading, as Dillon's Rule is better viewed as a rule of statutory construction.<sup>75</sup> Dillon's Rule is named after a nineteenth century Iowa Supreme Court Judge, John Dillon.<sup>76</sup> The rule, which had its inauspicious origin in dicta and was subsequently refined over the years, limits local government powers to: "those granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable."<sup>77</sup> Courts will apply Dillon's Rule by strictly construing statutory grants of power where the legislature fails to articulate legislative intent.<sup>78</sup>

### 3. *Clarifying the Relationship Between Home Rule and Dillon's Rule*

According to at least one study, considerable confusion exists as to the difference between Home Rule and Dillon's Rule.<sup>79</sup> No state has granted its entire reservoir of authority to local governments, nor has any state withheld all power from local governments.<sup>80</sup> Furthermore, the amount of authority bestowed upon local governments varies widely, even amongst self-described Home Rule states.<sup>81</sup>

### 4. *Maine's Home Rule Provisions*

Maine became a Home Rule state in 1969 when it amended its constitution to add a Home Rule provision.<sup>82</sup> This amendment grants municipalities the authority to "alter and amend their charters" on any matter not prohibited by Maine law and which is "local and municipal in character."<sup>83</sup> Maine's legislature governs the procedure by which charter alterations and amendments take place.<sup>84</sup>

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to states not granting Home Rule as retaining Dillon's Rule).

75. See RICHARDSON ET AL., *supra* note 30, at 6 (defining Dillon's Rule as rule of statutory construction).

76. See *id.* at 1 (crediting John Dillon with invention of Dillon's Rule).

77. 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:10 n.6 (3d ed. 2008) (quoting JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, 448, 449 (5th ed. 1911)) (setting forth Dillon's Rule); see *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, at \*12-15 (1868) (first articulating ideas behind Dillon's Rule).

78. See RICHARDSON ET AL., *supra* note 31, at 9 (explaining instances where courts apply Dillon's Rule).

79. See *id.* at 1 (asserting confusion exists regarding relationship between Dillon's Rule and Home Rule).

80. See *id.* at 66, Exec. Summary (concluding many states display concurrent characteristics of Home Rule and Dillon's Rule).

81. See *id.* at 67, Exec. Summary (stating all states reserve and withhold some duties).

82. See ME. CONST. art. VIII, pt. 2, § 1. (granting Home Rule authority to Maine municipalities). Maine enacted this amendment in 1969. *Id.*

83. See *id.* (conditioning grant of municipal Home Rule).

84. See *id.* (dictating legislature shall specify procedure for municipal Home Rule); see also ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (authorizing municipal Home Rule).

Maine's enabling statute goes even further than the state's constitutional grant of authority.<sup>85</sup> Under this statute, a Maine municipality's authority is not limited merely to local or municipal matters, but instead may exercise "any power or function which the Legislature has power to confer upon it" so long as it is neither expressly nor impliedly preempted.<sup>86</sup> In *School Committee of York v. Town of York*,<sup>87</sup> the Maine Supreme Judicial Court addressed the wide gulf between Maine's limited constitutional grant of power to municipalities and the wider grant of power in the enabling statute.<sup>88</sup> The court explained that the statutory grant of Home Rule authority is "an independent and plenary grant of power to municipalities to legislate on matters beyond those exclusively 'local and municipal.'"<sup>89</sup> The statute makes clear that the power of municipalities in Maine is strong—their power is to be construed liberally with a rebuttable presumption that a municipal ordinance is valid.<sup>90</sup>

### 5. California Home Rule

California's constitution allows cities and counties the option to either create a charter giving them Home Rule authority, or be governed by the California Government Code.<sup>91</sup> Nevertheless, California's constitutional grant of power to local governments is broad, even for non-Home Rule cities.<sup>92</sup> California cities that have opted for a Home Rule charter have "supreme authority" over purely municipal, local, or internal concerns.<sup>93</sup> The state legislature is unable to interfere within these realms.<sup>94</sup>

Mendocino County was the first local government in the nation to ban the cultivation of GMOs in March of 2004.<sup>95</sup> Trinity and Marin Counties followed

85. Compare ME. CONST. art. VIII, pt. 2, § 1 (granting power on matters, not prohibited, which are local and municipal in character), with ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (granting any power or function which Legislature has power to confer).

86. See ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (granting any power or function which Legislature has power to confer).

87. 626 A.2d 935 (Me. 1993).

88. *Id.* at 939 (explaining broad grant authority via enabling statute versus narrow constitutional grant).

89. See *id.* (providing further analysis of preemption of municipal ordinances).

90. See ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (declaring liberal construction of statute, creating presumption of municipal authority, and clarifying standard for preemption).

91. See CAL. CONST. art. XI, § 3 (granting option of Home Rule authority to cities and counties).

92. See 45 ROMUALDO P. ECLEVEA, ET AL. CAL. JUR. 3D MUNICIPALITIES § 180 (2009) (discussing powers granted to local governments in California); see also *Cotta v. City & County of San Francisco*, 69 Cal. Rptr. 3d 612, 618 (Cal. Ct. App. 2007) (discussing broad police powers granted to California's local governments by state constitution). See generally CAL. CONST. art. XI (providing for powers of local governments).

93. See ECLEVEA, *supra* note 93 (discussing broad powers granted to chartered local governments in California with respect to municipal affairs).

94. See *id.* (stating chartered local government regulations control in conflicts with state law in wholly municipal affairs).

95. See Elizabeth Larson, *Group Proposes New GMO Ordinance*, LAKE COUNTY NEWS, Apr. 6, 2008, available at <http://lakeconews.com/content/view/3790/742/> (providing history of local GMO prohibitions in California); see also MENDOCINO COUNTY, CAL., CODE ch. 10A.15 (2004) (prohibiting cultivation of GMOs).

banning the cultivation of GMOs that same year, as did the City of Arcata.<sup>96</sup> Point Arena City enacted its ban in 2005.<sup>97</sup> Santa Cruz County and Santa Cruz City enacted their bans of GMOs in 2006.<sup>98</sup> Lake County's Board of Supervisors voted to ban GMOs in October of 2008, but decided to delay final implementation of the ban.<sup>99</sup>

None of the California communities that have banned the cultivation of GMOs have opted for Home Rule charters and are consequently governed entirely by the general laws of California.<sup>100</sup>

### 6. *Vermont: A Dillon's Rule State*

Vermont, unlike Maine and California, does not have a constitutional Home Rule provision.<sup>101</sup> Nor has its legislature granted Home Rule by statute.<sup>102</sup> Vermont is a Dillon's Rule state.<sup>103</sup> Vermont's legislature has provided for municipal authority in discrete areas such as zoning, basic public services, and

96. See Larson, *supra* note 95 (reciting history of local GMO regulation in California); see also TRINITY COUNTY, CAL., CODE ch. 8.25.030 (2004); MARIN COUNTY, CAL., CODE ch. 6.92.020 (2004) (prohibiting growing of GMOs).

97. See Larson, *supra* note 95 (summarizing history of local GMO regulation in state); see also ARCATA, CAL., MUNICIPAL CODE, ch. 10.5 § 5920-5960 (2004) (prohibiting GMOs).

98. See SANTA CRUZ, CAL., MUNICIPAL CODE, ch. 6.10 (2006) (banning cultivation of GM crops); SANTA CRUZ COUNTY, CAL. CODE, ch. 7.31.030 (2006) (banning cultivation of GM crops).

99. See Environmental Commons, *Lake County, California (No Longer) Poised to Become GMO Free*, <http://environmentalcommons.org/Lake-County-GMO-free.html> (reporting board's initial support for ban and subsequent reversal).

100. See County of Mendocino, Cal. Board of Supervisors, County Government, <http://www.co.mendocino.ca.us/bos/gov.htm> (last visited May 19, 2010) (describing Mendocino County as "general law" county); County of Marin Administrator's Office, How County Government Works, Marin County, Cal., <http://www.co.marin.ca.us/depts/AD/main/HowGovWorks.cfm> (last visited May 19, 2010) (characterizing Marin County as "general law county"); California State Association of Counties, County Structure, <http://www.csac.counties.org/default.asp?id=110> (last visited May 19, 2010) (listing Trinity, Marin, Mendocino Counties as "general law" counties); City of Arcata, Cal., Government, Council-Manager Form of Government, <http://www.cityofarcata.com/government> (last visited May 19, 2010) (describing Arcata, California as "General Law City"); see also California State Association of Counties, *supra* (describing powers and restrictions of general law counties).

101. VT. CONST. ch. II, § 69 (stating municipal charters under patronage or control of state).

102. Cf. *Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist.*, 913 A.2d 391, 395 (Vt. 2006) (applying Dillon's Rule in determining if municipality had authority to regulate hunting); *In re Ball Mountain Dam Hydroelectric Project*, 576 A.2d 124, 126 (Vt. 1990) (applying Dillon's Rule in determining whether town authorized to build and operate power production facility); *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 380 A.2d 64, 66 (Vt. 1977) (applying Dillon's Rule in determining whether town authorized to own and operate gravel pit). The court in *Hinesburg Sand & Gravel Co.* stated that in the absence of Home Rule, "a municipality has only those powers and functions specifically authorized by the legislature, and . . . [those] incident, subordinate or necessary to the exercise thereof." *Id.*

103. See, e.g., *Hunters, Anglers & Trappers Ass'n of Vt., Inc.*, 913 A.2d at 395 (applying Dillon's Rule in determining if municipality had authority to regulate hunting); *In re Ball Mountain Dam Hydroelectric Project*, 576 A.2d at 126 (applying Dillon's Rule in determining whether town authorized to build and operate power production facility); *Hinesburg Sand & Gravel Co.*, 380 A.2d at 66 (applying Dillon's Rule in determining whether town authorized to own and operate gravel pit).

education.<sup>104</sup>

Recognizing that Vermont municipalities lack the authority to ban GM crop cultivation, in recent years dozens of Vermont towns have chosen to express their distaste for GM crops by passing nonbinding resolutions, declaring themselves “Genetically Engineered-Free Zones,” instead of enacting prohibitions.<sup>105</sup> Unlike Montville’s ordinance, these resolutions have no legal effect.<sup>106</sup> Organizers of these resolution efforts hope that nonbinding resolutions will spur the state’s legislature to regulate GM crops.<sup>107</sup>

### 7. General Principles of State Preemption

A local government may be granted the authority to regulate in particular areas by the state legislature, but this does not mean the locality will be free to regulate in a manner which conflicts with state law.<sup>108</sup> Just as the federal government can preempt state and local laws, state governments can preempt local governments.<sup>109</sup> State legislatures may expressly preempt local governments from enacting ordinances that would regulate GM crops.<sup>110</sup> In fact, a number of states have done just that.<sup>111</sup> As of 2007, fifteen states had preempted local governments from enacting regulations of GMOs.<sup>112</sup>

State legislatures may also preempt local regulations by implication.<sup>113</sup> Where a legislature has not expressly preempted local laws, a court may be called upon to determine if preemption has been implied.<sup>114</sup> In an implied preemption analysis, the intent of the legislature is the underlying concern.<sup>115</sup>

104. See, e.g., VT. STAT. ANN. tit. 24, §§ 1931-40 (2008) (granting authority to establish police departments); *Id.* §§ 1951-57 (granting authority to establish fire departments); *Id.* §§ 2001-2299 (granting limited police powers); *Id.* § 4414 (listing allowable municipal zoning regulations).

105. See GE Free VT, *supra* note 13 (listing Vermont towns with resolutions against GMOs).

106. See Kevin O’Connor, *We Resolve To . . . Towns Weigh Wide Range of Resolutions*, RUTLAND HERALD, Mar. 5, 2006, available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20060305/NEWS/603050379/1002> (last visited May 19, 2010) (describing resolutions as nonbinding); see also INSTITUTE FOR SOCIAL ECOLOGY, VERMONT TOWNS VS. GENETIC ENGINEERING: A GUIDE TO RECLAIMING OUR DEMOCRACY, REVISED EDITION 4 (2005), <http://www.nofamass.org/programs/pdfs/ATT00250.pdf> (describing resolutions as having “moral force”).

107. See INSTITUTE FOR SOCIAL ECOLOGY, *supra* note 106, at 3 (crediting passage of Vermont’s transgenic seed labeling law to public attention from resolutions).

108. See REYNOLDS, *supra* note 66, at § 37 (discussing conflicts between state and local regulations).

109. See *id.* at § 43 (explaining state legislatures may preempt local government regulations). See generally Diller, *supra* note 15 (discussing various forms of state preemption).

110. See Diller, *supra* note 15, at 1126 (discussing state preemption of innovative local regulations).

111. See Environmental Commons, 2007 Food Democracy Legislation Tracker, <http://environmentalcommons.org/tracker2007.html> (2008) (last visited May 19, 2010) (listing and providing details of preemption legislation throughout U.S.). See generally PEW INITIATIVE ON FOOD AND BIOTECHNOLOGY, *supra* note 15 (summarizing state legislation related to transgenics from 2005-2006).

112. Environmental Commons, *supra* note 111 (listing fifteen states with laws preempting local regulation of transgenics).

113. See REYNOLDS, *supra* note 66, at § 43 (discussing implied preemption of local regulations).

114. *Id.* (stating courts, absent express preemption, must determine whether legislature preempted local laws by implication).

115. *Id.* (indicating various factors are weighed in ascertaining legislative intent).

Courts generally look to two aspects of the state law or regulatory scheme.<sup>116</sup> Just as with federal field preemption analysis, courts will look to whether the state regulation is comprehensive and pervasive.<sup>117</sup> If state regulation is intended to be comprehensive and exclusive, local regulations will likely be preempted.<sup>118</sup> The second area courts often look to in determining whether implied preemption has occurred is the need for uniform treatment throughout the state regarding the matter being regulated.<sup>119</sup> If any local regulation, not just those that conflict with state law, would complicate matters, courts will generally find that the local regulation has been preempted.<sup>120</sup> Courts in Dillon's Rule states avoid implied preemption analysis altogether, as any reasonable doubt concerning local authority is resolved by the courts against the local government.<sup>121</sup>

### 8. Right to Farm Laws and Preemption

One common category of statutes that may impliedly preempt local regulation of GM crops are Right to Farm laws.<sup>122</sup> A typical right to farm law shields farmers from nuisance suits.<sup>123</sup> Nevertheless, some prohibit local governments from enforcing ordinances that interfere with farming operations.<sup>124</sup> Vermont and California each have Right to Farm laws, while Maine recently repealed its own.<sup>125</sup>

### 9. Maine's Preemption Doctrine and Right to Farm Law

Under Maine law, municipal ordinances will only be preempted where the

116. See *id.* at 134 (describing process by which courts conduct implied preemption analysis).

117. See REYNOLDS, *supra* note 66, at § 43 (stating comprehensiveness and pervasiveness of state regulation important considerations in implied preemption analysis).

118. *Id.* (discussing effect of comprehensive and pervasive state regulation).

119. *Id.* (explaining that need for uniform regulation statewide may imply preemption).

120. *Id.* (discussing effect of need for uniform regulation).

121. See MCQUILLIN, *supra* note 77, at § 4:11 (discussing effect of Dillon's Rule on preemption analysis).

122. See Margaret R. Grossman, *Biotechnology, Property Rights and the Environment*, 50 AM. J. COMP. L. 215, 234 (2002) (asserting right to farm laws can restrict local government ordinances from applying to farmland). See generally Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006) (providing overview of right to farm laws).

123. See Centner, *supra* note 122, at 87-88 (asserting right to farm laws intended primarily to shield farmers from nuisance suits).

124. See Grossman, *supra* note 122, at 234 (stating some right to farm laws can prohibit local regulation of farming operations).

125. See CAL. CIV. CODE § 3482.5 (2009) (declaring commercial agricultural operations consistent with accepted customs not nuisances); ME. REV. STAT. ANN. tit. 17, § 2805 (2008) (repealed 2008) (repealing law denoting agricultural practices not nuisance in 2008); VT. STAT. ANN. tit. 24, § 4413(d) (2009) (prohibiting municipal regulation of accepted agricultural practices). But see Letter from Henry Jennings, Dir., Maine Bd. of Pesticides Control, to Abbie Hills, Mun. Clerk, Town of Montville, Me. (Apr. 24, 2008), available at [http://www.mainebioinfo.org/PDF/BPC\\_Letter.pdf](http://www.mainebioinfo.org/PDF/BPC_Letter.pdf) [hereinafter Letter from Henry Jennings] (asserting enactment of Montville ordinance violated Maine law).

ordinance frustrates the purpose of a state law.<sup>126</sup> As a result, Maine courts have been reluctant to find that municipal regulations have been preempted.<sup>127</sup> The Maine Legislature has not expressly preempted local governments from regulating GM crops.<sup>128</sup>

Maine's Right to Farm law was repealed in 2008, shortly after Montville enacted its ban on GM crops.<sup>129</sup> Yet title 22, section 1471-U of the Maine Code has a similar approach and effect.<sup>130</sup> This statute requires municipalities to provide the state pesticide board with notice and a copy of any ordinance that: "specifically appl[ies] to pesticide storage, distribution or use . . . prior to . . . the public hearing at which adoption of the ordinance will be considered."<sup>131</sup> The municipality is also required to notify the board within thirty days of the ordinance's adoption.<sup>132</sup> Failure to file notice renders the ordinance void.<sup>133</sup> The statute is intended to provide information regarding ordinances, not to affect the authority of municipalities to enact ordinances.<sup>134</sup>

#### 10. Vermont's Preemption Doctrine and Right to Farm Law

Vermont courts strictly apply Dillon's Rule, interpreting any reasonable doubt about the authority of a municipality against the municipality.<sup>135</sup> Furthermore, the Vermont Supreme Court has previously held that valid zoning ordinances must be in compliance with the enabling statute, title 24, section 4414 of the Vermont Code.<sup>136</sup> State zoning laws may not be "replaced,

126. See ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (declaring statute granting police powers to municipalities requires liberal construction).

127. See, e.g., *E. Perry Iron & Metal Co. v. City of Portland*, 941 A.2d 457, 463 (Me. 2008) (holding state solid waste law did not preempt town's scrap metal recycling facilities ordinance); *Smith v. Town of Pittston*, 820 A.2d 1200, 1208-09 (Me. 2003) (ruling state licensing of waste facilities did not preempt ordinance prohibiting certain septage disposal); *Sch. Comm. of York v. Town of York*, 626 A.2d 935, 941-42 (Me. 1993) (holding no preemption where charter established school budget committee with exclusive authority).

128. See *Environmental Commons*, *supra* note 111, at 2-11 (listing states preempting local regulation of GMOs).

129. See ME. REV. STAT. ANN. tit. 17, § 2805 (2007) (repealed 2008) (specifying farming operations not subject to nuisance actions).

130. See ME. REV. STAT. ANN. tit. 22, § 1471-U (2004) (requiring municipalities give State Pesticide board notice before enacting pesticide-related ordinances).

131. See *id.* (applying to ordinances specifically addressing pesticides). But see *Montville, Me., Genetically Modified Organisms Ordinance* (Mar. 29, 2008) (addressing GMOs but not pesticides). Therefore, given a plain meaning interpretation of section 1471-U and the ordinance's lack of reference to pesticides, it would appear that the statute does not apply. See *Bushey v. Town of China*, 645 A.2d 615, 617-618 (Me. 1994) (stating words must be given their plain and ordinary meaning).

132. See ME. REV. STAT. ANN. tit. 22, § 1471-U(3) (2004) (requiring notice within thirty days of ordinance's adoption).

133. See *id.* § 1471-U(5) (declaring legal effect of failure to notify board within specified timeframe).

134. See *id.* § 1471-U(4) (stating statutory intent to provide notice rather than prohibit ordinances).

135. See *In re Ball Mountain Dam Hydroelectric Project*, 576 A.2d 124, 126 (Vt. 1990) (stating court consistently adheres to Dillon's Rule).

136. VT. STAT. ANN. tit. 24, § 4414 (2008); see also *In re Richards*, 819 A.2d 676, 881-82 (Vt. 2002) (holding town zoning ordinance inconsistent with enabling statute and thus preempted). The court stated that the town needed to comply with the state law. *In re Richards*, 819 A.2d at 881-82.

overruled, or rendered ineffective by a municipal zoning ordinance.”<sup>137</sup>

Vermont’s Right to Farm law restricts municipalities from regulating accepted agricultural practices as defined by the Secretary of Agriculture, Food, and Markets.<sup>138</sup> Under the Secretary of Agriculture’s stated rules, those engaged in agricultural practices as defined in section 3.2, and who comply with section 4 are presumed to be practicing accepted agricultural practices.<sup>139</sup> Section 3.2, *inter alia*, defines agricultural operations as including: “preparation, tilling, fertilization, planting, protection, irrigation, and harvesting of crops.”<sup>140</sup> Section 4 restricts discharges of waste, regulates a number of activities, including nutrient and pesticide storage and application, as well as soil cultivation.<sup>141</sup>

### 11. California’s Preemption Doctrine and Right to Farm Law

The California Legislature has not expressly preempted local governments from regulating GM crops.<sup>142</sup> In determining whether a local ordinance is preempted, California courts will look to whether the ordinance duplicates a state law; conflicts with a state law; or is preempted by implication.<sup>143</sup> California does have a Right to Farm law, however, which might impliedly preempt a Montville-style ordinance.<sup>144</sup> Section (a) of the Right to Farm statute provides:

No agricultural activity . . . conducted . . . for commercial purposes . . . consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began.<sup>145</sup>

137. See *In re Richards*, 819 A.2d at 681 (describing standard for preemption of local ordinances).

138. See VT. STAT. ANN. tit. 24, § 4413(d) (2009) (describing restrictions placed on municipalities regarding accepted agricultural practices).

139. See Vermont Agency of Agriculture, Food, and Markets, Accepted Agricultural Practice Regulations § 3.1 (Apr. 24, 2006) (stating farmers complying with rules presumed as engaging in accepted agricultural activities); see also *id.* § 3.2 (defining agricultural operations); *id.* § 4 (prohibiting certain activities).

140. Vermont Agency of Agriculture, Food, and Markets, Accepted Agricultural Practices Regulations § 3.2 (Apr. 24, 2006) (defining agricultural operations).

141. See *id.* § 4 (restricting discharge of waste and regulating other activities).

142. See Environmental Commons, *supra* note 112 (listing states preempting local regulation of GMOs).

143. See *Comm. of Seven Thousand v. Superior Court*, 45 Cal. 3d 491 (1988) (holding local authority precluded by implication); *Abbott v. City of Los Angeles*, 53 Cal. 2d 674 (1960) (holding local ordinance duplicative of state law preempted); *People v. Moore*, 40 Cal. Rptr. 121 (Cal. Ct. App. 1964) (holding local regulation preempted where in conflict with state law).

144. See CAL. CIV. CODE § 3482.5 (2008) (limiting nuisance actions against certain agricultural operations).

145. *Id.*

Section (d) further states that, “[t]his section shall prevail over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state.”<sup>146</sup>

### III. ANALYSIS

#### A. Federal Challenges to Montville’s Ordinance

##### 1. Preemption

To avoid being struck down by courts, local governments, when crafting ordinances, must avoid running afoul of federal law.<sup>147</sup> Montville’s ordinance appears to meet this threshold, as is not preempted by federal law, nor invalid under the Dormant Commerce Clause.<sup>148</sup> Additionally, Congress has not expressly preempted state action with respect to GM crops.<sup>149</sup> No conflict with federal law is readily apparent, and the ordinance does not venture into an area that is pervasively regulated by the federal government.<sup>150</sup> Some have argued that the ordinance constitutes a regulation of pesticides.<sup>151</sup> This would place it within the realm of FIFRA.<sup>152</sup> Fortunately for Montville, this would not be a fatal blow to the ordinance, as the Supreme Court has held in *Wisconsin Public Intervenor v. Mortier*<sup>153</sup> that FIFRA does not preempt local regulation of pesticides.<sup>154</sup>

##### 2. Dormant Commerce Clause

Generally, under a Dormant Commerce Clause analysis, “even-handed” measures, such as the Montville ordinance, are upheld in spite of adverse effects on interstate commerce.<sup>155</sup> The degree of a measure’s effect on

146. *Id.*

147. See *supra* notes 52-62 and accompanying text (explaining federal limitations on state and local governments).

148. See *supra* notes 52-62 and accompanying text (outlining federal restraints on state and local governments). See generally Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (banning cultivation of GMOs).

149. See *supra* notes 36-51 (describing and discussing federal regulation of GMOs).

150. See *supra* notes 36-51 (outlining federal regulation of GMOs). See generally Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (banning cultivation of GMOs).

151. See Letter from Henry Jennings, *supra* note 125 (asserting ordinance regulates pesticides). But see ME. REV. STAT. ANN. tit. 22, § 1471-U(1) (2008) (restricting ordinances specifically applicable to “pesticide storage, distribution or use”); Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (lacking mention of pesticides).

152. See 7 U.S.C. § 136 (2006) (regulating pesticide use and storage).

153. 501 U.S. 597 (1991).

154. See *id.* at 614 (concluding FIFRA not violated by local regulation of pesticides).

155. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (stating evenhanded measures usually upheld).

interstate commerce, however, is critical.<sup>156</sup> Applying the balancing test from *Pike v. Bruce Church, Inc.*,<sup>157</sup> a court would look at whether the local regulation's impact on interstate commerce is "clearly excessive" to the local benefits.<sup>158</sup> The purpose of the ordinance is to protect the local environment, as well as the health and property rights of Montville residents.<sup>159</sup> Next, a court would try to determine whether these benefits can be achieved with lesser impacts on interstate commerce.<sup>160</sup> The fact that the issue is one of local concern cuts in favor of the ordinance's validity.<sup>161</sup> Characterizing the ordinance as a safety regulation might also lead a closely divided court to uphold it.<sup>162</sup>

The ordinance allows for some interstate commerce related GMOs.<sup>163</sup> The ordinance does not prohibit the sale or possession of GMOs.<sup>164</sup> And unlike Maine's ban on the importation of out-of-state bait-fish, Montville's ordinance does not in any way regulate the shipping of GMOs.<sup>165</sup> The fact that the ordinance only bans the cultivation of GMOs, and not the sale or possession of GMOs is important for the purpose of Commerce Clause analysis, as commerce comes in many forms—an outright ban on the shipment of GMOs into or from Montville would represent a far bigger burden to interstate commerce than a restriction on their use and production.<sup>166</sup> In conclusion, the limited impact of the ordinance on interstate commerce is likely to be outweighed by Montville's stated purpose of protecting its residents.<sup>167</sup>

156. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (allowing only incidental effects on commerce).

157. See *id.*

158. See *id.* at 142 (applying balancing test).

159. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (explaining motivation behind ban as protection of native flora and garden varieties).

160. See *Pike*, 397 U.S. at 142 (noting alternative means of achieving benefits).

161. See *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977)) (indicating strong deference to local concerns). The *Kassel* court said "[a] State's power to regulate commerce is never greater than in matters traditionally of local concern." *Id.*

162. See *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (indicating safety concerns may weigh towards upholding regulation despite burden on commerce); *Kassel*, 450 U.S. at 670 (weighing state's safety interests against national interests); *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 775-76 (1945) (asserting bona fide safety regulations entitled to "strong presumption of validity").

163. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (prohibiting production of GMOs but remaining silent as to other uses).

164. See *id.* (prohibiting production of GMOs).

165. Compare *id.* (prohibiting production of GMOs but silent as to other uses) with ME. REV. STAT. ANN. tit. 12, § 7613 (repealed 2003) (banning importation of out-of-state bait-fish) and *Maine v. Taylor*, 477 U.S. 131 (1986) (analyzing statute under Dormant Commerce Clause).

166. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (stressing importance of regulation's degree of interference with interstate commerce).

167. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2009) (explaining purpose of ordinance); *supra* notes 154-66 and accompanying text (applying *Pike* balancing test to Montville ordinance).

## *B. State Law Challenges to Montville's Ordinance*

### *1. Maine Law*

#### *a. Authority from Legislature*

Maine's authority enabling statute states that municipal authority is to be construed liberally, and establishes a rebuttable presumption of the validity of municipal ordinances.<sup>168</sup> Maine municipalities have been granted plenary powers by the state legislature.<sup>169</sup> Therefore, if challenged, a Maine court is likely to find that Montville has the authority to regulate GM crops.<sup>170</sup>

#### *b. Maine Preemption*

PIPs are considered pesticides under Maine law.<sup>171</sup> Furthermore, Montville did not provide notice to the Maine Board of Pesticides as required by the statute.<sup>172</sup> Therefore, because of this definition, and because some GM crops have PIP components, the Montville ordinance has an incidental effect on pesticide use.<sup>173</sup> Nevertheless, the statute applies only to ordinances that specifically address pesticides.<sup>174</sup> The ordinance simply refers to "genetically modified organisms."<sup>175</sup> There is no reference to traditional pesticides or PIPs in the ban.<sup>176</sup> Therefore, given a plain meaning construction of the statute, a court would be highly unlikely to find that the ordinance applies specifically to pesticides.<sup>177</sup>

### *2. California Law*

#### *a. Authority from Legislature to Regulate*

As discussed, several local California governments have passed ordinances

168. See ME. REV. STAT. ANN. tit. 30-A, § 3001 (2008) (requiring liberal construction and establishing presumption of authority).

169. See Sch. Comm. of York v. York, 626 A.2d 935, 941 (Me. 1993) (explaining broad grant authority via enabling statute versus narrow constitutional grant).

170. See *id.* (explaining Maine courts' deference to municipal ordinances).

171. See ME. REV. STAT. ANN. tit. 7, § 604(25)-(25-A) (2003) (defining pesticides and plant incorporated protectants); see Regulations Under FIFRA, *supra* note 46 (defining PIPs).

172. See Letter from Henry Jennings, *supra* note 126 (stating town failed to provide notice of adoption of ordinance as required by statute).

173. See *id.* (stating GM crops contain PIPs); Regulations Under FIFRA, *supra* note 46 and accompanying text (defining PIPs).

174. See ME. REV. STAT. ANN. tit. 22, § 1471-U (1964) (qualifying its application to ordinances specifically regulating pesticides).

175. See Montville, Me., Genetically Modified Organisms Ordinance (Mar. 29, 2008) (addressing GMOs, not pesticides).

176. See *id.* (addressing only GMOs).

177. See Bushey v. Town of China, 645 A.2d 615, 617-618 (Me. 1994) (stating words must be given their plain and ordinary meaning).

similar to Montville's, which have yet to be challenged on constitutional grounds.<sup>178</sup> If one of these ordinances was challenged, however, a court would almost certainly hold it constitutionally valid, as cities and counties in California have broad authority to enact health and safety regulations.<sup>179</sup>

*b. California Preemption*

Based on its plain language, California's Right to Farm law only prevents nuisance actions against farmers.<sup>180</sup> The statute does not restrict the ability of local governments to regulate GM crops.<sup>181</sup> Therefore, it would appear quite unlikely that California's Right to Farm law would preempt a Montville-style ordinance.<sup>182</sup>

### 3. Vermont Law

*a. Authority from Legislature to Regulate*

Vermont towns most likely lack the authority to enact a Montville-style ordinance.<sup>183</sup> This is because Vermont grants limited powers to its municipalities.<sup>184</sup> In addition, those limited powers are strictly construed using Dillon's Rule.<sup>185</sup> One might argue, however, that the authority to regulate GM crops is incidental to the authority of Vermont towns to zone.<sup>186</sup> But a Vermont court would be extremely reluctant to ignore the enumeration of powers contained within the zoning enabling statute.<sup>187</sup>

*b. Vermont Preemption*

Even if Vermont towns could convince a court they have the authority to regulate GM crops under their zoning power, they would probably be

178. See *supra* notes 95-99 and accompanying text (listing local restrictions on GMO cultivation in California).

179. See *Cotta v. City & County of San Francisco*, 69 Cal. Rptr. 3d 612, 618 (Cal. Ct. App. 2007) (discussing broad police powers granted to California's local governments by state constitution).

180. See CAL. CIV. CODE § 3482.5 (2008) (declaring commercial agricultural activities operated in manner consistent with accepted customs exempt from nuisance suits).

181. See *id.* (lacking reference to municipal regulations other than those related to nuisances).

182. See *supra* notes 178-79 and accompanying text (discussing absence of restrictions on municipal actions).

183. See *supra* notes 101-107 and accompanying text (discussing limited powers of Vermont local governments).

184. See *supra* notes 101-107 and accompanying text (discussing limited power of local governments in Vermont).

185. See *supra* note 103 and accompanying text (discussing Vermont's status as Dillon's Rule state).

186. See VT. STAT. ANN. tit. 24, § 4414 (2008) (listing allowable municipal zoning regulations).

187. See *id.* (granting no authority to regulate farming practices or specify type of crops farmers may grow); see also *supra* note 103 and accompanying text (discussing Vermont courts' strict construction of municipal authority).

preempted from doing so.<sup>188</sup> This is because Vermont's Right to Farm law forbids local governments from regulating accepted agricultural practices, which the Department of Agriculture has defined very broadly.<sup>189</sup> This definition is so broad that engaging in such operations as the "preparation, tilling, fertilization, planting, protection, irrigation and harvesting of crops" creates a presumption that one is engaged in accepted agricultural practices and therefore immune from local regulation.<sup>190</sup> This seems to preempt all local regulations directed at farming.<sup>191</sup>

#### IV. CONCLUSION

The first local prohibition on GM crops was enacted just a few years ago in Mendocino County, California. Shortly thereafter, several other communities in California followed suit. Setting aside the growing number of towns in Vermont passing non-binding resolutions opposing GM crops, up until 2008 when Montville passed its ordinance, an observer might have viewed local prohibitions on GM crops as being a phenomenon exclusive to California. Montville's ordinance changed this perception. Local regulation of GM crops, while still in its infancy is now a national phenomenon.

Federal law has left the door open for local regulation of GM crops. Federal preemption is not a huge obstacle for local regulators, nor is the Dormant Commerce Clause.

State law, however, represents a significant obstacle for would-be local regulators. States' jealous guarding of their authority represents the initial, and most perilous challenge for the would-be local regulator. If a state grants broad Home Rule authority, either by a constitutional provision or by statute, local authority to regulate GM crops is likely. And with a majority of states adhering to Home Rule, many more communities may join the ranks of local governments asserting their police powers to regulate GM crops.

After determining whether there is authority to act, the next question is whether that authority has been curtailed by preemption. A number of states have expressly preempted local regulations regarding GM crops. Other states may foreclose local regulations based on implied preemption.

Upon completing this analysis, one can see why a Home Rule state like Maine or California, which have deferential preemption doctrines and

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188. See *supra* notes 105-107 and accompanying text (discussing likely preemption of local regulations of GM crops).

189. See *supra* notes 137-141 and accompanying text (discussing Vermont's Right to Farm law and its likely preemptive effect).

190. See *supra* notes 137-141 and accompanying text (discussing preemptive effect of Vermont's Right to farm law and related rules).

191. See *supra* notes 137-141 and accompanying text (discussing preemptive effect of Vermont's Right to farm law and related rules); see also *supra* notes 101-107 and accompanying text (discussing Vermont courts' strict construction of municipal authority).

legislatures willing to leave matters to local control, would produce Montville-style ordinances. It is also easy to see why the residents of many towns in Vermont have resorted to non-binding resolutions in order to express their disapproval of, and concerns about, GM crops. Nevertheless, while state approaches to granting municipal authority and preemption doctrines both suggest which approaches localities will take with respect to GM crops, they do not explain why California and Maine are the vanguards of the local GM crop regulatory revolution, while many other states with similar political leanings and intergovernmental relations approaches have remained silent on this issue.

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