

# FARMERS' COOPERATIVES TO REGIONALIZE FOOD SYSTEMS: A CRITIQUE OF LOCAL FOOD LAW SCHOLARSHIP AND SUGGESTION FOR CRITICAL RECONSIDERATION OF EXISTING LEGAL TOOLS FOR CHANGING THE U.S. FOOD SYSTEM

BY

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*Scholarship in food law is replicating broader societal interest in sustainability and local foods as a means to changing the dominant food system. The work of lawyers is critical to helping institutionalize innovative food systems ideas, but the scholarship often fails to engage in reflexive analysis of whether particular policies will effectively advance articulated goals. As a result, attention is disproportionately directed at certain initiatives at the expense of other, potentially more effective strategies. To address this, legal scholars need to incorporate other social science disciplines into their scholarship to develop thoughtful, critical analyses of the roles of law in building alternative food networks.*

*Having recognized the limitations of local food systems, regional and midscale food systems are being advocated to augment the local initiatives. Cooperatives formed under the Capper-Volstead Act are legal entities with significant potential to help regionalize food systems. However, their formation and operation must be undertaken with consideration to the legislative history, statutory interpretation, and current economic contexts that allow some cooperatives to operate in ways that frustrate the goals of alternative food systems advocates. By incorporating social science critiques of food advocacy work and applying these critiques to a reflexive analysis of a legal tool for advancing alternative food systems, this Article demonstrates the important contributions that legal scholars can make through more engaged scholarship with other disciplines.*

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## I. INTRODUCTION

“Why would I get GAP certified? I’m just getting by, and that seems expensive.”

“Because then you can grow your farm, you’ll be able to sell to bigger buyers.”

“That would be great, but how can I know there will be a buyer? And will the sales cover the GAP certification costs?”

"There are buyers. We can pay for the GAP certification as a group, and then coordinate production with a memorandum of agreement with the buyers to make sure there's a buyer."

This paraphrases a conversation that was heard at a meeting among small and very small diversified farmers and a Good Agricultural Practices (GAP) certification advocate.<sup>1</sup> It exemplifies a number of issues in the local food system. Small farms are struggling to get by, and local sales through farmers markets and community supported agriculture can only go so far. Yet scaling up to reach larger institutional buyers and bigger markets—where they could have a more significant impact—is difficult for them because of food safety certification issues and challenges in marketing.<sup>2</sup> Why does this possibly matter? Local food systems advocates care because they desire to see a healthier, more just, ecologically sustainable, and democratic food system—attributes that they do not perceive in the current dominant food system in the United States, and that they think will be outcomes of a local, small farm, direct marketing based food system.

While the struggle of small farms to succeed is a tangible, highly evident problem, there are larger problems with this local foods strategy for changing a food system. These include: the misplaced assumption that local in itself will necessarily produce the results that advocates envision of a local food system, conflating local as the ends rather than as the means, disregarding other scalar and food systems strategies, and failing to engage in critical analyses and politically engaged work.

This Article will draw attention to these issues as they manifest in the legal scholarship, and offer an example of how legal scholars might apply their expertise to identify more effective tools of change for reforming the food system. Part II will expand on the critiques of local food systems scholarship in the legal literature. This is not to denigrate the importance of the work that has been done so far. Rather, the argument in this Part is that scholars should identify the precise goal and think creatively about which legal tools might be most effective at promoting that particular goal. Part III introduces the idea of regionalizing a food system as a strategy to augment local food systems work. This Part will explain what an idealized regional food system is, and how the concept incorporates attributes beyond just geography or scale to achieve food systems change. Part IV lays out the

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<sup>1</sup> Good Agricultural Practices are a set of voluntary standards for food safety that are managed and certified by the United States Department of Agriculture. U.S. DEP'T OF AGRIC., GOOD AGRICULTURAL PRACTICES AND GOOD HANDLING PRACTICES AUDIT VERIFICATION PROGRAM (2009), <https://perma.cc/EF45-DR3U>. These, and similar voluntary standards, are often required of farmers to access larger, institutional markets. Felipe Almeida et al., *Third-Party Certification in Food Market Chains: Are You Being Served?*, 46 J. ECON. ISSUES 479, 482–84 (2010).

<sup>2</sup> ALIDA CANTOR & RON STROHLIC, CAL. INST. FOR RURAL STUDIES, BREAKING DOWN MARKET BARRIERS FOR SMALL AND MID-SIZED ORGANIC GROWERS 32 (2009), <https://perma.cc/EVB2-FGV4>; John Collins, *Small Farms Are Getting Regulated Out of Business*, THESE TIMES: RURAL AMERICA (Apr. 1, 2016), <https://perma.cc/SVA6-ZZ3J>.

history and legal structure of the Capper–Volstead Act.<sup>3</sup> Part V proposes farmers’ cooperatives as a potential tool for achieving regionalized food systems goals. This Part also recognizes limitations of cooperatives. The Article emphasizes that law can be used as a tool for restructuring food systems, but legal scholars need to critically evaluate laws in their broader social and political context in order to fully assess their potential usefulness and drawbacks and identify alternative strategies. Through greater engagement with other areas of agrifood systems scholarship, lawyers can have a powerful impact on how the law is used as a tool to operationalize the goals of alternative food systems advocates.

## II. LOCALISM AS A FLAWED ALTERNATIVE FOOD NETWORK STRATEGY

Dissatisfied with globalized, capitalist, corporatist food regimes and their perceived negative impacts on social and ecological systems,<sup>4</sup> consumers and activists are exploring multiple avenues for building more democratically accountable,<sup>5</sup> socially just, ecologically sustainable, and healthier food systems.<sup>6</sup> These are often grouped together as “alternative food networks” (AFNs).<sup>7</sup>

The concept of local food has gained particular cache as a paradigm among academics and activists for achieving AFN goals.<sup>8</sup> While the particular goals of a project may vary, the general assumption of much local foods work is that more localized systems of production and consumption will create more connected and engaged producers and consumers, thereby

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<sup>3</sup> Capper–Volstead Act of 1922, 7 U.S.C. §§ 291–292 (2012).

<sup>4</sup> E.g., Philip McMichael, *A Food Regime Genealogy*, 36 J. PEASANT STUD. 139, 163–64 (2009); Hugh Campbell, *Breaking New Ground in Food Regime Theory: Corporate Environmentalism, Ecological Feedbacks and the ‘Food From Somewhere’ Regime?*, 26 AGRIC. & HUM. VALUES 309, 313–15 (2009); Jennifer Clapp & Doris Fuchs, *Corporate Power and Global Agrifood Governance: Lessons Learned*, in *CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE* 285, 290 (Jennifer Clapp & Doris Fuchs eds., 2009). See generally HUNGRY FOR PROFIT: THE AGROBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT (Fred Magdoff et al., eds. 2000).

<sup>5</sup> See generally Amy J. Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local*, 78 L. & CONTEMP. PROBS., nos. 1 & 2, 2015, at 101.

<sup>6</sup> G.W. Stevenson et al., *Warrior, Builder and Weaver Work: Strategies for Changing the Food System*, in *REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY* 33, 49–56 (C. Clare Hinrichs & Thomas A. Lyson eds., 2007).

<sup>7</sup> E.g., Henk Renting et al., *Understanding Alternative Food Networks: Exploring the Role of Short Food Supply Chains in Rural Development*, 35 ENV’T & PLAN. A 393, 394 (2003) (“The term alternative food networks (AFNs) is here used as a broad embracing term to cover newly emerging networks of producers, consumers, and other actors that embody alternatives to the more standardised industrial mode of food supply.” (citing Jonathan Murdoch et al., *Quality, Nature, and Embeddedness: Some Theoretical Considerations in the Context of the Food Sector*, 76 ECON. GEOGRAPHY 107 (2000))). AFNs are sometimes called other similar terms. For ease, and reflecting the increasing trend to use AFN as a shorthand, AFN is used here.

<sup>8</sup> Branden Born & Mark Purcell, *Avoiding the Local Trap: Scale and Food Systems in Planning Research*, 26 J. PLAN. EDUC. & RES. 195, 199–200 (2006).

producing a food system with the characteristics of AFNs.<sup>9</sup> The localization of food and direct marketing are also seen as strategies for community and economic development to counter the negative price trends of the globalized food system.<sup>10</sup>

There are, however, a number of critiques of the extent to which local can really achieve the ends its proponents articulate. As Born and Purcell argue, no scale is inherently going to produce any particular outcomes.<sup>11</sup> They make three critiques of the concept of "local." First, the current interest in local problematically assumes local will produce particular outcomes, such as democracy, when case evidence shows it can produce oligarchy.<sup>12</sup> Second, it conflates the ends with the means, rather than treating local as the means to the end.<sup>13</sup> For instance, focusing on local and direct sales as an economic development strategy may cost a community if they fail to take advantage of another region's comparative advantage. And third, it obscures other scalar options that could be more effective.<sup>14</sup> In a similar critique, Bellows and Hamm note that buying local is a form of import substitution, and the relative impacts on fair trade, equity and democracy, and environmental stewardship of local versus global purchasing should be evaluated.<sup>15</sup>

The political failures of localism strategies have received particular attention from other scholars in agrifood studies. Allen notes that workers and the principles of justice are often not adequately considered in local food systems work, and so the work of identifying and addressing the social forces that create inequities is not occurring.<sup>16</sup> She argues that to work towards a more socially just food system involves:

- (i) increasing understanding of the economic, political and cultural forces that have configured the current agrifood system; (ii) a willingness to analyze and reflect upon which local food system priorities and activities move in the direction of, rather than away from, social justice and (iii) establish and periodically evaluate criteria for social justice.<sup>17</sup>

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<sup>9</sup> See *id.* at 195, 203 (explaining the tendency of food activists and researchers to assume that local is desirable and inherently more socially and environmentally just).

<sup>10</sup> Gail W. Feenstra, *Local Food Systems and Sustainable Communities*, 12 AM. J. ALTERNATIVE AGRIC. 28, 28 (1997); Terry Marsden et al., *Food Supply Chain Approaches: Exploring their Role in Rural Development*, 40 SOCIOLOGIA RURALIS 424, 435 (2000).

<sup>11</sup> Born & Purcell, *supra* note 8, at 195–96.

<sup>12</sup> *Id.* at 196.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Anne C. Bellows & Michael W. Hamm, *Local Autonomy and Sustainable Development: Testing Import Substitution in Localizing Food Systems*, 18 AGRIC. & HUM. VALUES 271, 271 (2001).

<sup>16</sup> Patricia Allen, *Realizing Justice in Local Food Systems*, 3 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 295, 296, 300 (2010).

<sup>17</sup> *Id.* at 297.

Allen's focus on justice aligns with several other critiques of how localism has replaced reflexive, political action with a politics of consumption. Much of local food activism relies on market forces to produce civic engagement and sustainability, disregarding many other concerns, such as ecology, cultural and biological diversity, power, justice, and spirituality.<sup>18</sup> Critiques often note that realizing food system reform requires more considerations of the politics of actions and context in which they are embedded—individuals need to take responsibility for examining and addressing the complexities of how and why the food system is producing undesirable results, rather than believing that buying from a local producer is sufficient to transform the agrifood system.<sup>19</sup>

#### A. The “Local Trap” in the Legal Scholarship

Likewise, legal scholarship has jumped on the bandwagon, identifying many ways that law can exempt or help promote local foods.<sup>20</sup> As with the local food systems literature broadly, legal scholars focus on how law can support local foods based on a premise that local foods will advance goals of environmental sustainability, community economic development, public health, and social justice in the food systems.<sup>21</sup> Laws and policies are then analyzed from the perspective of whether they enable the scale to exist, rather than analyzing to what extent the law advances the end goals of health, justice, equity, or sustainability.<sup>22</sup>

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<sup>18</sup> Laura B. DeLind & Jim Bingen, *Place and Civic Culture: Re-thinking the Context for Local Agriculture*, 21 J. AGRIC. & ENVIRON. ETHICS 127, 128–30, 144–49 (2007).

<sup>19</sup> *Id.*; Laura B. DeLind, *Are Local Food and the Local Food Movement Taking Us Where We Want to Go? Or Are We Hitching Our Wagons to the Wrong Stars?*, 28 AGRIC. & HUM. VALUES 273, 273 (2010); E. Melanie DuPuis & D. Goodman, *Should we go “Home” to Eat? Toward a Reflexive Politics of Localism*, 21 J. RURAL STUD. 359, 369 (2005); Allen, *supra* note 16, at 296–99; Born & Purcell, *supra* note 8, at 195–96, 198–200.

<sup>20</sup> E.g., Derrick Braaten & Marne Coit, *Legal Issues in Local Food Systems*, 15 DRAKE J. AGRIC. L. 9 (2010); Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 369 (2014); Nina W. Tarr, *Food Entrepreneurs and Food Safety Regulation*, 7 J. FOOD L. & POL’Y 35, 56–68 (2011); Nicholas Obolensky, Note, *The Food Safety Modernization Act of 2011: Too Little, Too Broad, Too Bad*, 17 ROGER WILLIAMS U. L. REV. 887 (2012); Gregory M. Schieber, Note, *The Food Safety Modernization Act’s Tester Amendment: Useful Safe Harbor for Small Farmers and Food Facilities or Weak Attempt at Scale-Appropriate Farm and Food Regulations?*, 18 DRAKE J. AGRIC. L. 239 (2013); Mia Shirley, Note, *Food Ordinances: Encouraging Eating Local*, 37 WM. & MARY ENVIRON. L. & POL’Y REV. 511 (2013).

<sup>21</sup> E.g., Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of “Local Foods”*, 33 HAMLINE J. PUB. L. & POL’Y 49, 50, 57–58 (2011); Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL’Y 17, 33, 39, 56, 60 (2013); Sarah J. Morath, *The Farmer in Chief: Obama’s Local Food Legacy*, 93 OR. L. REV. 91, 97–99 (2014); Shirley, *supra* note 20, at 512–13, 518–20.

<sup>22</sup> Braaten & Coit, *supra* note 20, at 22–23; Johnson & Endres, *supra* note 21, at 69, 114, 120; Leib, *supra* note 21, at 33–34.; Shirley, *supra* note 20, at 529, 533–34.

A popular subset of local is the urban agriculture movement—it too gets periodic attention from legal scholars who are focused on how law can help promote urban agriculture.<sup>23</sup> While urban agriculture has the potential to improve health and local economies and beautify green spaces, scholars and advocates should also recognize it has limited capacity to impact the underlying causes of the problems it seeks to redress.<sup>24</sup>

This type of analysis—focusing on the means rather than the ends, assuming the scale will achieve the goal, and disregarding the other political activities and strategies that are necessary to achieve health, justice, equity, or sustainability—is precisely what is being critiqued in the broader food systems social science literatures.<sup>25</sup>

### B. The “Special” Trap

Legal scholarship has also tended to fall into the special trap, which is closely related to the local trap. This reflects recent contests that occurred over the enactment of the FDA Food Safety Modernization Act<sup>26</sup> (FSMA).<sup>27</sup>

In the special trap, scholars argue that local or alternative food should be exempted from regulations on the grounds that regulations are written for the “wrong” kind of foods and thus inappropriately burdensome to the “good” food producers and products.<sup>28</sup>

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<sup>23</sup> E.g., Jeffrey P. LeJava & Michael J. Goonan, *Cultivating Urban Agriculture—Addressing Land Use Barriers to Gardening and Farming in Cities*, 41 REAL ESTATE L.J. 216 (2012); Stephanie A. Maloney, Note, *Putting Paradise in the Parking Lot: Using Zoning to Promote Urban Agriculture*, 88 NOTRE DAME L. REV. 2551 (2013).

<sup>24</sup> RAYCHEL SANTO ET AL., JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, VACANT LOTS TO VIBRANT PLOTS: A REVIEW OF THE BENEFITS AND LIMITATIONS OF URBAN AGRICULTURE 1, 3–4, 14, 16 (2016), <https://perma.cc/CF2H-V6M4>.

<sup>25</sup> See, e.g., Allen, *supra* note 16, at 295, 305–06 (explaining that local food systems do not automatically lead to social justice, particularly because “workers as actors and justice as principle are often missing in both theory and practice of alternative agrifood consumer efforts”); Born & Purcell, *supra* note 8, at 195–96 (discussing problems with the “local trap,” the assumption that local is inherently good); DeLind & Bingen, *supra* note 18, at 128–30 (discussing negative consequences of civic agriculture and the importance of practicing “being in place” to local food); DuPuis & Goodman, *supra* note 19, at 360, 369 (arguing that unreflexive localism can allow for corporate cooptation and lead to social justice problems).

<sup>26</sup> Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C. (2012)).

<sup>27</sup> See Peter Anderson, Comment, *Empowering Local and Sustainable Food: Does the Food Safety Modernization Act's Tester-Hagan Amendment Remove Enough Barriers?*, 9 J.L. ECON. & POL'Y 145, 147, 167 (2012) (proposing additional exemptions under FSMA for local food producers, which is an example of the special trap).

<sup>28</sup> E.g., *id.* at 146–47, 167 (arguing that the Tester-Hagan Amendment, which exempts farmers that gross less than \$500,000 annually from the Food Safety Modernization Act, should be amended to remove the revenue ceiling, thereby reducing the burden on local food producers); Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should—And Should Not—Approach Government Regulation*, 39 ECOLOGY L.Q. 773, 827, 829 (2012) (explaining that consumer filtering of labeling may be better for the eat-food movement than government regulation); Laura Fisher, *Administrative Law—All (Food) Politics is Local: Cooperative Federalism, New England Small Farms, and the Food Safety Modernization Act*, 37

This is problematic in several ways. When the exemption is based on scale, it produces a ceiling of growth for AFNs.<sup>29</sup> This may create a niche market space, but it also limits the extent to which local food can scale up to provide the quantity of food needed by consumers and have a broader impact on the social, economic, and environmental goals of the alternative food movements.

The exceptional treatment approach also disregards that regulation is meant to deal with bad actors, which can exist regardless of scale. Time and money are well recognized barriers to small scale enterprises adopting food safety practices.<sup>30</sup> Yet there are multiple, complex other reasons that impact companies food safety practices, regardless of size.<sup>31</sup> Rather than exemptions or scale-based regulation, governance should focus on identifying and regulating bad actors, which depends on the risk of the food, producer's attributes (such as their knowledge and capacity to implement food safety), and social context of the food that affect their incentives to make particular choices—variables which are conflated with scale in the debates over the FSMA.

Even with the exemptions, market forces or other variables can still intervene to require private regulatory standards in lieu of government regulations.<sup>32</sup> Likewise, farmers are exposed to liability for food safety if they do not act to prevent an outbreak, regardless of the requirements of the regulations.<sup>33</sup> These issues may have been more effectively addressed by establishing publicly written food safety standards for small farms, or by having states apply for variances and farmer advocacy organizations

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W. NEW ENG. L. REV. 337, 343–44, 368 (2015) (discussing the burden placed on small to mid-sized farms by the Food Safety Modernization Act and asserting that states should receive discretion in implementing food safety laws); Ben Metzger, *Implementing the Food Safety Modernization Act: An Examination of the Inequitable Impact of the Proposed Preventive Controls and Produce Safety Rules*, 7 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 117, 139–41 (2014–2015) (asserting that regulations implementing the Food Safety Modernization Act should not unfairly burden small producers); David A. Taylor, *Does One Size Fit All? Small Farms and U.S. Meat Regulations*, 116 ENVTL. HEALTH PERSPS. A 529, A 529 (2008) (“Instead of the current mode of federal inspection and risk management, small-scale farmers and farm advocates believe rules should be based on independently measurable standards of sanitation and quality, with sensitivity to scale of the operation being assessed.”).

<sup>29</sup> Anderson, *supra* note 27, at 167.

<sup>30</sup> Charlotte Yapp & Robyn Fairman, *Factors Affecting Food Safety Compliance Within Small and Medium-Sized Enterprises: Implications for Regulatory and Enforcement Strategies*, 17 FOOD CONTROL 42, 46 (2006).

<sup>31</sup> *Id.* at 44–47; Spencer Henson & Michael Heasman, *Food Safety Regulation and the Firm: Understanding the Compliance Process*, 23 FOOD POL'Y 9, 22 (1998); Kamleshwari Pothukuchi et al., *Explaining Disparities in Food Safety Compliance by Food Stores: Does Community Matter?*, 25 AGRIC. & HUM. VALUES 319, 329–30 (2008).

<sup>32</sup> Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, 4 J. INT'L AGRIC. TRADE & DEV. 63, 64 (2008); Spencer Henson & Thomas Reardon, *Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System*, 30 FOOD POL'Y 241, 244–45 (2005).

<sup>33</sup> Kathryn A. Boys et al., *The Food Safety Modernization Act: Implications for U.S. Small Scale Farms*, 41 AM. J.L. & MED. 395, 402–03 (2015).

identifying alternatives that meet the FSMA goals of preventive food safety system from farm to fork.

Finally, going back to the points raised by Born and Purcell, there is no guarantee that exceptions will help or promote the *goals* of local, even if it eases regulatory burden on producers who align with AFNs.<sup>34</sup> Thus, as with the above articles, arguments for exceptional treatment for small, local producers also fall into the local trap.

### C. Scholarly Purpose of Identifying Appropriate Legal Tools for Alternative Food Networks

In pointing out the local trap, Born and Purcell recognized that there is an array of scholarly positions on local foods, but they wanted to highlight that the dominant tone of this scholarship assumes that local and direct sales will be healthier, more sustainable, and more just.<sup>35</sup>

This Article is not arguing that lawyers and legal scholars should not consider how law and policy impacts the local food movement, but that legal scholars interested in the goals of the local food movement should give consideration to whether these are the most effective, impactful strategies for achieving the food system changes they desire. As stated by Santo, Palmer, and Kim, “[i]f [urban agriculture’s] benefits are overstated, or limitations overlooked, this could propel advocates to disproportionately allocate resources to urban agriculture at the expense of other, potentially more effective interventions.”<sup>36</sup>

Ultimately, it is important to focus on the purpose of laws so that meaningful strategies are institutionalized. For instance, if interested in equity in the food system, perhaps a better focus would be wages and labor standards in the agriculture industry (which is exempt from many of the labor laws) and enforcement of those laws in the food industry.<sup>37</sup> The point is that food systems legal scholars need to be attuned to the local trap and focus on how to use law to productively achieve the ends of local—not just local for the sake of local.

There are numerous examples of scholars who do examine alternative strategies for achieving sustainable, just, healthy, democratic, etc. food systems. For instance, Pollans and Roberts argue that urban agriculture fulfills the Jeffersonian ideal and reflects dissatisfaction with the modern food system’s litany of challenges, but they also acknowledge the local trap,

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<sup>34</sup> Born & Purcell, *supra* note 8, at 196.

<sup>35</sup> *Id.* at 195–96, 205.

<sup>36</sup> SANTO ET AL., *supra* note 24, at 3.

<sup>37</sup> E.g., Guadelupe T. Luna, *The Dominion of Agricultural Sustainability: Invisible Farm Laborers*, 2014 WIS. L. REV. 265, 266 (2014) [hereinafter Luna, *Invisible Farm Laborers*]; Guadelupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 487–88, 508 (1997) [hereinafter Luna, *Infinite Distance*].

and the environmental and justice issues with urban agriculture.<sup>38</sup> Likewise, Galey and Endres examine how private and voluntary standards and labeling can help promote goals of social justice and sustainability, and call for further legal action to achieve transformative change.<sup>39</sup> As another example, much of Hamilton's recent work has focused on specific policy initiatives that have helped build opportunities for sustainable farming and enhanced the quality of the food system, as well as the ongoing political barriers to further transformative work.<sup>40</sup> Further, Kerber argues for using law to build a more just food system.<sup>41</sup>

These authors' works emphasize the potential value of the law as a tool to create an institutional context that fosters goals of AFNs. There is a need for a legal regime to "spur innovation to improve conditions for the environment and consumers"<sup>42</sup>—producers should be included in this list as well. As Margaret Sova McCabe notes, "there are many talented people from diverse disciplines proposing powerful solutions and approaches to food system issues. Law is the mechanism that can give life to these solutions and approaches."<sup>43</sup> Hamilton makes a comparable argument that rule of law is important to understand and address in how it shapes our agrifood system.<sup>44</sup>

Thus, the contribution that legal scholars can make to food movements is to provide mechanisms for rebuilding a legal and regulatory system that promotes the goals of AFNs. Focusing locally, and pursuing exceptions, may miss the big picture of how to get there.

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<sup>38</sup> Margot Pollans & Michael Roberts, *Setting the Table for Urban Agriculture*, 46 URB. L.W. 199, 224–25 (2014).

<sup>39</sup> Megan Galey & A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS 3 (2012); *see also* Jason Czarnezki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENVT'L L. & POL'Y F. 281, 281–83 (2015); Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVT'L L. REV. 263, 288–90 (2011).

<sup>40</sup> See generally Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563 (2013) [hereinafter Hamilton, *Thirty Years*]; Neil D. Hamilton, Keynote Address, *Farms, Food, and the Future: Legal Issues and Fifteen Years of the "New Agriculture"*, 26 J. ENVT'L. L. & LITIG. 1 (2011) [hereinafter Hamilton, *New Agriculture*]; Neil D. Hamilton, *America's New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 FORDHAM ENVT'L. L. REV. 523 (2011) [hereinafter Hamilton, *New Agrarians*]; Neil D. Hamilton, *Feeding the World's Future: Agrarian Justice and the Rule Of Law*, 13 DRAKE J. AGRIC. L. 545 (2008).

<sup>41</sup> Eve Kerber, Note, *Securing Food Justice, Sovereignty & Sustainability in the Face of the Food Safety Modernization Act (FSMA)*, 11 SEATTLE J. SOC. JUST. 1271, 1314 (2013).

<sup>42</sup> Jason Foscolo & Michael Zimmerman, *Alternative Growth: Forsaking the False Economies of Industrial Agriculture*, 25 FORDHAM ENVT'L. L. REV. 316, 320 (2014).

<sup>43</sup> Margaret Sova McCabe, *Reconsidering Federalism and the Farm: Toward Including Local, State, and Regional Voices in America's Food System*, 6 J. FOOD L. & POL'Y 151, 154 (2010).

<sup>44</sup> Hamilton, *New Agriculture*, *supra* note 40.

### III. AUGMENTING THE LOCAL

So far this Article has argued that legal scholars interested in food systems change should attend to social science critiques of the problems of assuming local food will achieve the social goals of AFNs. Scholars should consider how to use the law to produce a food system that is engaged, sustainable, and democratic, rather than seeking to carve out a niche for alternatives to exist alongside the dominant, industrial food.

This Part will introduce the concept of regional food systems as proposed by Ruhf and Clancy.<sup>45</sup> The purpose here is to explain how work towards a regional food system can augment the work of local food systems advocates and to summarize what the components would be in idealized regional food systems if they were to become the new, dominant food system.

As a supplement to local, Ruhf and Clancy propose the need for consideration of how to build regional food systems.<sup>46</sup> Their argument is not that local food systems work should be given up, but that work at higher scales is also needed.<sup>47</sup> For Ruhf and Clancy, regional food systems should be composed of locals.<sup>48</sup> "A regional food system includes multiple 'locals' within a state, or that may cross state boundaries. Regional food systems operate in relation to other regions as well as to the national and global food systems."<sup>49</sup>

This approach seeks to build self-reliance. Whereas much of the food for a region as possible should come from within the region, it does not require self-sufficiency. And the regional concept is not just supposed to be about geography, but also about

scale, trade, market options, cultural identity, economics, politics, values and relationships. Regions connect with and relate to other regions. . . . Regions collaborate. They compete. And they overlap especially in large urban areas.

These ways of understanding regions can provide a basis for developing policies and programs that are responsive to regional needs, leveraging regional

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<sup>45</sup> Kathryn Ruhf & Kate Clancy, *It Takes a Region...: Exploring a Regional Food System Approach* (Ne. Sustainable Agric. Working Grp. Working Paper, Sept. 2010), <https://perma.cc/2BGN-LRAN>. This work is closely related to the Agriculture of the Middle project, which is a community of scholars concerned with the declining mid-scale farms that operate at scales between large, commodity chains and direct to consumer sales. *About, AGRIC. MIDDLE*, <https://perma.cc/N33U-PC72> (last visited Feb. 25, 2017). This scale of agriculture is important because these sorts of farms have the capacity to reach a broader base of consumers than direct sales while also operating at a small enough scale that they can innovate and adjust to changing markets, social demands, and ecological pressures. Fred Kirschenmann et al., *Why Worry About the Agriculture of the Middle?*, in *FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE* 3, 4, 15 (Thomas A. Lyson et al. eds., 2008).

<sup>46</sup> Ruhf & Clancy, *supra* note 45, at 4–5.

<sup>47</sup> *Id.* at 10 (describing local food system limitations and benefits of regional food system in volumes).

<sup>48</sup> *Id.* at 4–5.

<sup>49</sup> *Id.* at 5.

economic and institutional strengths, and allocating resources in ways that are efficient, effective, and politically acceptable.<sup>50</sup>

As conceptualized by Ruhf and Clancy, a regional food system is not inherently more just or sustainable; instead, they lay out a vision of an idealized regional food system that has nine attributes:

1. *Produces a volume and variety* of foods to meet as many of the dietary needs and preferences of the population as possible (~ definition of self-reliance).
2. *Does not seek or claim* self-sufficiency (wherein all food needs are met within the geographic bounds). . . .
3. *Emphasizes differentiated products.* . . . Regional food systems emphasize higher quality products (differentiated by place and/or other attributes) and more equity for producers and other workers in the chain than do commodity systems. However, this does not mean that there is no commodity production nor that commodity producers are not land stewards. . . .
4. *Is "beyond local".* . . . A regional food system provides more volume and range of product and more market options than local. It relies less on relationship and identity than local, but embeds information useful to consumers about the product in the label.
5. *Has attributes of both commodity and local systems.* It is an alternative framework to the polarized “local-global” dichotomy in that it includes both but proposes neither as “the solution.”
6. *Connects with both local and national/global levels.* . . .
7. *Is not just about geography.* It’s about scale, markets and values. Optimal/appropriate scale is a cornerstone of a regionalist approach, from farm equipment to processing facilities to retail space. . . .
8. *Works to provide* more affordable good food options to the mass market of consumers/eaters. . . .
9. *Encourages decentralization where appropriate.* Decentralization can pertain to political, administrative, fiscal, market and physical dimensions. A regional approach can foster democratization of decision-making, citizen engagement, and community control over resources, including those that relate to food.<sup>51</sup>

This vision of a regionalized food system provides some clearly articulated criteria for evaluating to what extent and in what ways particular laws promote the transformation of the food system to produce sustainability and justice. Rather than focusing on the intermediate goal of

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<sup>50</sup> *Id.* at 6–7.

<sup>51</sup> *Id.* at 10–11.

local or regional, which can lead to conceptual traps where advocates misguidedly fail to consider other alternatives, scholars can look to these idealized attributes to assess the utility of particular legal tools.

#### IV. THE CAPPER–VOLSTEAD ACT

There are a number of laws and policies that have received scholarly attention for their capacity to promote the goals of AFNs.<sup>52</sup> This paper focuses on the Capper–Volstead Act, and its potential to help build components of a regional food system. Analyzing the potential of the Capper–Volstead Act to promote regionalized food systems first requires discussion of the background of the bill in order to put it in legal context.

##### *A. Sherman, Clayton, and Capper–Volstead Acts*

Understanding the Capper–Volstead Act starts with the Sherman Act,<sup>53</sup> which prohibits “restraint of trade or commerce”<sup>54</sup> and monopolies.<sup>55</sup> As originally conceptualized, the Sherman Act was meant to restrict the market power of big businesses.<sup>56</sup> It was the result of resentment, especially by small businesses, of the perceived abuses of power of the trusts and large corporations.<sup>57</sup>

In seminal decisions interpreting the Sherman Act, the Supreme Court of the United States established a “standard of reason” rule and a “per se”

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<sup>52</sup> For a sampling of some recent law and policy initiatives, see generally, Foscolo & Zimmerman, *supra* note 42; Hamilton, *New Agriculture*, *supra* note 40; Hamilton, *New Agrarians*, *supra* note 40; McCabe, *supra* note 43; Morath, *supra* note 21; Sarah J. Morath, *The Farm Bill: A Wicked Problem Seeking a Systematic Solution*, 25 DUKE ENVTL. L. POL’Y F. 389 (2015). See also Amy Guptil & Rick Welsh, *Is Relationship Marketing an Alternative to the Corporatization of Organics? A Case Study of OFARM*, in FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE, *supra* note 45, at 55 (discussing how additional marketing structures could help support more regional, mid-size food systems).

<sup>53</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).

<sup>54</sup> *Id.* § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the courts.”).

<sup>55</sup> *Id.* § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).

<sup>56</sup> Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 372 (2014).

<sup>57</sup> DONALD A. FREDERICK, U.S. DEPT’ OF AGRIC., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER–VOLSTEAD ACT 22 (2002).

illegality rule for assessing potential violations of the Act.<sup>58</sup> These decisions created uncertainty about conduct courts might determine as antitrust violations, which led to Congress enacting the Federal Trade Commission Act<sup>59</sup> and the Clayton Act<sup>60</sup> to provide clarity on which activities were prohibited.<sup>61</sup>

Among the activities that were potentially limited by the Sherman Act were the ability of farmers and laborers to collectively bargain with the companies that were their buyers and employers.<sup>62</sup> Congress had considered a specific exemption from antitrust for agriculture and labor in the Sherman Act, but no such provisions were ultimately included.<sup>63</sup> In *Loewe v. Lawlor*,<sup>64</sup> the Supreme Court interpreted this, and subsequent failed amendments, to mean that Congress had intended to include *all* contracts, combinations or conspiracy in restraint of trade in the Sherman Act.<sup>65</sup> As a result, there was widespread demand for explicit exemptions from antitrust for farmers and laborers in the Clayton Act.<sup>66</sup> This resulted in the inclusion of section 6 in the Clayton Act, which exempts organizations of farmers and laborers “instituted for the purpose of mutual help” from the antitrust laws.<sup>67</sup>

However, for each group, the exemption turned out to be of limited value. For laborers, since the exemption did not require employers to negotiate with the unionized workers, it was easy for employers to circumvent their cooperative bargaining.<sup>68</sup> This led to the enactment of the

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<sup>58</sup> *Id.* at 36–42 (discussing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Am. Tobacco Co., 221 U.S. 106, 179–80 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. N. Pac. Ry. Co., 142 F. Supp. 679, 684 (W.D. Wash. 1956)). Frederick goes on to discuss how price fixing and group boycotts—common activities of cooperatives—exposed cooperatives to potential Sherman Act liability. *Id.* at 43–58.

<sup>59</sup> Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58 (2012)).

<sup>60</sup> Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27 (2012) and 29 U.S.C. §§ 52–53 (2012)).

<sup>61</sup> FREDERICK, *supra* note 57, at 72–73.

<sup>62</sup> Md. & Va. Milk Producers Ass’n v. United States, 362 U.S. 458, 464 (1960); *see also* David L. Baumer et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 189 (1986); Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 16 (1983).

<sup>63</sup> FREDERICK, *supra* note 57, at 25–27.

<sup>64</sup> 208 U.S. 274 (1908).

<sup>65</sup> *Id.* at 301–02.

<sup>66</sup> FREDERICK, *supra* note 57, at 75.

<sup>67</sup> Clayton Act, 15 U.S.C. § 17 (2012) (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”).

<sup>68</sup> Richard A. Epstein, *Redistribution within Collective Organizations: What Corporations, Condominiums and Unions Tell Us About the Proper Use of Government Power*, 8 N.Y.U. J.L. & LIBERTY 280, 301 (2014).

National Labor Relations Act<sup>69</sup> to force employers to have to negotiate with unions.<sup>70</sup>

The limiting issue for farmers was that they needed capital stock to be able to collectively process and market their goods.<sup>71</sup> Therefore, the Capper–Volstead Act was enacted to enable them to raise capital stock to cooperatively market their products.<sup>72</sup> This provides broad, though not unlimited, protection from antitrust liability for farmers.

In short, the Capper–Volstead Act should be understood as part of a larger populist movement to limit the power of big business. This is noteworthy because, despite the shortcomings that will be discussed, it has an original purpose that resonates with the populist tendencies of the AFN movement to recapture community and individual control of food systems.<sup>73</sup>

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<sup>69</sup> 29 U.S.C. §§ 151–169 (2012).

<sup>70</sup> *Id.*

<sup>71</sup> This issue was debated, but ultimately not resolved, in the debates about the Clayton Act. FREDERICK, *supra* note 57, at 75–83.

<sup>72</sup> Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960). The relevant section of the Act provides that:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Capper–Volstead Act, 7 U.S.C. § 291 (2012).

<sup>73</sup> Jennifer Clapp & Doris Fuchs, *Agrifood Corporations, Global Governance, and Sustainability: A Framework for Analysis*, in CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE, *supra* note 4, at 1, 6, 15–17; Doris Fuchs et al., *Retail Power, Private Standards, and Sustainability in the Global Food System*, in CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE, *supra* note 4 at, 29, 47; Elizabeth Henderson, *Rebuilding Local Food Systems from the Grassroots Up*, in HUNGRY FOR PROFIT: THE AGROBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT, *supra* note 4, at 175, 187; Fred Magdoff et al., *An Overview*, in HUNGRY FOR PROFIT: THE AGROBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT, *supra* note 4, at 7, 8, 20–21; Steffanie Scott et al., *Certification Standards and the Governance of Green Foods in Southeast Asia*, in Corporate Power in Global Agrifood Governance, *supra* note 4, at 61, 67, 83; Eric Holt Giménez & Annie Shattuck, *Food Crises, Food Regimes and Food Movements: Rumblings of Reform or Tides of Transformation?*, 38 J. PEASANT STUD. 109, 128 (2011); Phillip McMichael, *Global Development and the Corporate Food Regime*, 11 RES. RURAL SOC. DEV. 265 (2005).

### B. Privileges and Limits of the Capper–Volstead Act

While the law protects farmers from Sherman Act restraints on their cooperative activities, it does not provide unlimited protection.<sup>74</sup> Rather, it is seen as giving farmers the “same unified competitive advantage” to work together through cooperatives that businessmen enjoy when acting through corporations.<sup>75</sup> Therefore, while farmers enjoy limited immunity to the antitrust laws, they must form and operate the cooperative appropriately to enjoy the privilege.

#### 1. Privileges and Qualifications

The specific permitted activities are “collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged [in the production of agricultural products].”<sup>76</sup> The first major decision interpreting the Capper–Volstead Act, *United States v. Borden Co.*, held that while this gives farmers the right to act together to cooperatively market their products, it does not give them a right to combine or conspire with others in restraint of trade in violation of section 1 of the Sherman Act.<sup>77</sup> Therefore, the Sherman Act can be enforced against cooperatives that engage in conspiracy with noncooperatives, for instance by negotiating contracts to restrain trade with noncooperative members.<sup>78</sup>

To enjoy the privileges of the Capper–Volstead Act, the cooperative must be wholly composed of farmers and operated for their benefit.<sup>79</sup> The only protected persons that cooperatives may restrain trade with are producers and other cooperatives, which can also include foreign growers and cooperatives.<sup>80</sup> The cooperative can control separate legal entities carrying out the protected activities, and these entities can cooperate with one another in restraint of trade.<sup>81</sup> They may even go so far as only engaging in one of the protected activities, including cooperating solely to set prices.<sup>82</sup>

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<sup>74</sup> *United States v. Borden Co.*, 308 U.S. 188, 205–06 (1939).

<sup>75</sup> *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 466.

<sup>76</sup> 7 U.S.C. § 291 (2012).

<sup>77</sup> *Borden*, 308 U.S. 188, 204–05 (1939).

<sup>78</sup> *Id.* at 205–06.

<sup>79</sup> 7 U.S.C. § 291 (2012).

<sup>80</sup> *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc.*, 382 F. Supp. 2d 221, 229 (D. Mass. 2004).

<sup>81</sup> *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (“That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper–Volstead Acts.”).

<sup>82</sup> *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1038–40 (2nd Cir. 1980). However, cooperatives may not fix prices by coordinating to restrict production. *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1157 (D. Idaho, 2011).

However, the presence of nonfarmer members who are solely processors or packinghouses destroys the immunity of the cooperative.<sup>83</sup> As agriculture has become vertically integrated, where to draw the line on who is entitled to Capper-Volstead Act immunity has become increasingly difficult to determine. Farmers may engage in processing, but processors may vertically integrate to the point that they are also engaging in protected farming activities. Processors are the sorts of middlemen that the Act was meant to protect farmers from, and are not meant to be entitled to its protections.<sup>84</sup> The presence of such processors, if they do not engage in at least one step of farming, can destroy a cooperative's immunity<sup>85</sup>—even the presence of only one such middleman who is solely a processor can destroy the immunity.<sup>86</sup> That said, ownership of a farm does not necessarily entitle an entity to Capper-Volstead Act protections if they act more as processors or middlemen.<sup>87</sup> There is not a bright line rule that any vertically integrated entity that engages in farming is entitled to immunity, but rather it is an analysis that must be conducted on a case-by-case basis.<sup>88</sup>

In addition to the right to conspire to restrain trade, cooperatives also have a right to form monopolies.<sup>89</sup> This was debated during enactment of the legislation, and it was clearly intended that cooperatives would be able to develop monopolies in order to counterbalance the powers of their suppliers and buyers.<sup>90</sup>

However, their right to develop monopolies is limited. They may only develop a monopoly through fair, legitimate business practices such as growth and competition based on quality or purchasing a competitor for economic benefits.<sup>91</sup> A cooperative may not develop a monopoly solely with the intent to restrain trade.<sup>92</sup> Thus, while cooperatives can gain monopoly power by purchasing competitors for legitimate business reasons, they cannot acquire competitors solely for the purposes of restraining trade or suppressing competition.<sup>93</sup> Nor may they engage in other predatory or

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<sup>83</sup> *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 395–96 (1967).

<sup>84</sup> *Id.*; see also *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 828–29 (1978).

<sup>85</sup> *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 828–29.

<sup>86</sup> *Id.*; see also *In re Mushroom Purchaser Antitrust Litig.*, 621 F. Supp. 2d 274, 283–84 (E.D. Penn. 2008) (“Both [*Case-Swayne* and *National Broiler Marketing*] held that even one ‘middleman’ infiltrated into an otherwise exempt cooperative destroys Capper-Volstead immunity.”).

<sup>87</sup> *United States v. Hinote*, 823 F. Supp. 1350, 1359–60 (S.D. Miss. 1993).

<sup>88</sup> *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1153–54 (D. Idaho 2011).

<sup>89</sup> James L. Guth, *Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act*, 56 AGRIC. HIST. 67, 75–76 (1982).

<sup>90</sup> *Id.*; see also *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1045 (2nd Cir. 1980).

<sup>91</sup> *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 466–67.

<sup>92</sup> *Id.; Fairdale Farms*, 635 F.2d at 1040.

<sup>93</sup> *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 467 (“[T]he Act did not leave co-operatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.”).

coercive practices to eliminate competitors or force nonmembers to join the cooperative.<sup>94</sup>

Though cooperatives are entitled to create monopolies and fix prices, there are limits. Under section 2 of the Capper–Volstead Act, the United States Department of Agriculture (USDA) has authority to bring an action if they believe the cooperative is unduly raising prices.<sup>95</sup> Early cases tried to argue that enforcement was limited to this provision, precluding Sherman Act actions by the United States Department of Justice or injured businesses.<sup>96</sup> However, it has since been established that the Sherman Act applies to cooperatives that are improperly formed or exceed the bounds of permitted activities, the possibility of enforcement is not restricted to the USDA.<sup>97</sup>

## *2. Continued Importance, Critiques*

As originally envisioned, the Capper–Volstead Act was meant to provide an opportunity for farmers to exercise countervailing power against their buyers and suppliers.<sup>98</sup> Whether the law continues to serve a valid purpose—and if so, whether it is appropriately structured to do so—is an issue that has undergone recurring debates.

Whereas the railroad trusts were the concentrated businesses of the early 20th century, today retailers,<sup>99</sup> packers,<sup>100</sup> and numerous other segments of the agriculture industry are exceedingly concentrated.<sup>101</sup> The relatively concentrated markets that farmers operate in means they are often price takers, and allowing cooperative marketing is one potential strategy for overcoming these economic structural problems.<sup>102</sup>

However, cooperatives' monopoly power and economic abuses have exposed them to important critiques. Some critics see the statutes as obsolete relics of an era when farms were small and atomistic, whereas

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<sup>94</sup> *Holly Sugar Corp. v. Goshen Cty. Coop. Beet Growers Ass'n*, 725 F.2d 564, 569 (10th Cir. 1984).

<sup>95</sup> Capper–Volstead Act, 7 U.S.C. § 292 (2012).

<sup>96</sup> *E.g., United States v. Borden Co.*, 308 U.S. 188, 194–95, 198 (1939); *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 462–64.

<sup>97</sup> *Borden Co.*, 308 U.S. at 203–06.

<sup>98</sup> *Fairdale Farms*, 635 F.2d at 1039, 1045; *see also* Guth, *supra* note 89, at 76, 82.

<sup>99</sup> See generally Analee Heath Leach, Note, *The Almighty Railroad and the Almighty Wal-Mart: Exploring the Continued Importance of the Capper–Volstead Act to the American Farmer and the Agricultural Marketplace*, 32 HAMLINE J. PUB. L. & POL'Y 261 (2011).

<sup>100</sup> See generally Dean Zimmerli, *Something Old, Something New: Relying on the Traditional Agricultural Cooperative to Help Farmers Solve the Power Imbalance in Modern Meatpacker Production Contracts*, 24 SAN JOAQUIN AGRIC. L. REV. 59 (2014–2015); Amber S. Brady, Note, *Post-Smithfield and Hazeltine: An Evaluation of the Capper–Volsted Act as an Alternate Means of Marketing Power for Producers*, 10 DRAKE J. AGRIC. L. 331 (2005).

<sup>101</sup> See generally David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61 (2010); Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33 (2004).

<sup>102</sup> O'Brien, *supra* note 101, at 38–39.

today much of agriculture is carried out by large, powerful, vertically integrated firms that can harm their members as well as consumers.<sup>103</sup> They can also use their power to raise prices over competitive levels, thereby harming consumers.<sup>104</sup>

Such actions weaken the purpose of the antitrust law if it is understood as a populist law meant to protect consumer welfare. As Professor Jim Chen notes, agriculture has enjoyed a long history of exceptional treatment from rules of general applicability, which he argues is irrational today given the industrialization and economic integration that the agriculture sector has undergone.<sup>105</sup> By this reasoning, the exemption from antitrust for farmers is problematically contradictory to goals of improving consumer welfare and overall societal wellbeing.

Nevertheless, there are continued reasons to allow farmer cooperatives to enjoy immunity from the broader antitrust laws. First and foremost, if we are concerned with factors other than simply economic efficiency—such as community and environmental wellbeing—then pure market efficiency is not the only measure for assessing the value of a law.<sup>106</sup>

The social benefits and harms of different structures of agriculture ownership have been studied and debated,<sup>107</sup> showing that accepting economic efficiency does not have to be the only means of improving societal wellbeing.<sup>108</sup> In fact, focusing only on economic efficiency eliminates other desirable characteristics, such as resilience to disasters and change and the ability to produce differentiated, socially and ecologically embedded products.<sup>109</sup>

Thus, while the Capper–Volstead Act may be characterized as an exemption to the antitrust laws that undermine its purpose, it can also be thought of as a law that harmonizes with the antitrust laws by trying to promote populist wellbeing. Albeit, it is flawed to the extent it allows practices that conflict with populist goals.

The argument of the paper is that lawyers should think about how to use legal tools that promote the ends of AFNs. Despite their flaws,

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<sup>103</sup> Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 480–81 (2013).

<sup>104</sup> Baumer et al., *supra* note 62, at 198–201. But cf. Willard F. Mueller & Thomas W. Paterson, *Sherman Section 2 Monopolization for Agricultural Marketing Cooperatives*, 60 TUL. L. REV. 955, 965–66 (1986) (noting that cooperatives are “quantity takers”).

<sup>105</sup> Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 833–37 (1995).

<sup>106</sup> Kirschenmann et al., *supra* note 45, at 13.

<sup>107</sup> WALTER GOLDSCHMIDT, AS YOU SOW: THREE STUDIES IN THE SOCIAL CONSEQUENCES OF AGRIBUSINESS (1978); THOMAS A. LYSON, CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY 61–83 (2004); Craig K. Harris & Jess Gilbert, *Large-Scale Farming, Rural Income, and Goldschmidt's Agrarian Thesis*, 47 RURAL SOC. 449, 449, 455–56 (1982).

<sup>108</sup> Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 533 (2000) (discussing implications of concentrated markets that impose social, political, and economic costs on American farming and ranching, and advocating for change in both antitrust enforcement and market regulations).

<sup>109</sup> Kirschenmann et al., *supra* note 45, at 4, 8, 11–12.

cooperatives can be a tool that should be recognized as serving that purpose. Due to their flaws, they should be used carefully and perhaps revised. For instance, what constitutes monopoly power, abuse of prices, and predatory practices may need to be reexamined to be defined to prevent cooperatives abusing their privileges or their members (regardless of scale), and also redefined in antitrust more generally to achieve more competitive, equitable markets.

## V. THE COOPERATIVE AS A TOOL FOR DEVELOPING REGIONAL FOOD SYSTEMS

While historically cooperatives were formed for the benefit of equalizing marketing power with the big businesses that were their suppliers and buyers, cooperatives can also serve an important function of helping farmers develop an identity and sense of being in a regional or mid-scale food system.<sup>110</sup>

The argument here is not that a particular scale will or will not produce particular types of production and exchange, but that cooperatives are a tool that producers could use to develop regionalized food systems that advance the goals of sustainability, economic development, health, and justice that are articulated by AFN proponents.

There are three reasons cooperatives could operate to advance regional food systems. First, the cooperative principles that are built into the legal structure of the Capper–Volstead Act can help advance democratic control, relationship building, and infrastructure development in regional food systems. Second, their purpose of achieving coordinated marketing can help overcome certain coordination barriers that have hindered the growth of regional food systems. And finally, they can operate across global political boundaries in ways that could alter the dynamics of globalized supply chains.

### *A. Cooperative Principles in the Capper–Volstead Act that Advance Alternative Food Network Goals*

Cooperatives operate according to three principles: 1) user-owned, 2) user-controlled, and 3) user-benefit.<sup>111</sup> These principles are built into the Capper–Volstead Act through restrictions on the ownership and control of cooperatives and their financial management.<sup>112</sup> The following sections addresses how these principles and their accompanying legal restrictions

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<sup>110</sup> Thomas W. Gray & G.W. Stevenson, *Cooperative Structure for the Middle: Mobilizing for Power and Identity*, in *FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE*, *supra* note 45, at 37, 39–41, 50.

<sup>111</sup> JAMES J. WADSWORTH & E. ELDON EVERSON, U.S. DEP’T OF AGRIC., CO-OPS 101: AN INTRODUCTION TO COOPERATIVES 9–11 (2012), <https://perma.cc/4DTJ-XBA8>.

<sup>112</sup> Capper–Volstead Act, 7 U.S.C. § 291 (2012); *see also* Christopher R. Kelley, “*New Generation*” Farmer Cooperatives: The Problem of the “Just Investing” Farmer, 77 N.D. L. REV. 185, 189–90 (2001).

could contribute to cooperatives acting as tools for growth of regional food systems.

### *1. Owned and Operated for the Benefit of Producers*

The legal rules governing cooperatives are important to ensuring that control of the cooperative's activities resides with the farmers that it is meant to benefit. That said, they do not guarantee that the benefit will accrue to the farmers whose values align with the AFN movement. There are many instances of national cooperatives dominating a particular industry, including Land-o-Lakes, Welch's, and Ocean Spray.<sup>113</sup> While these cooperatives may benefit their producers, they are targeting and participating in the dominant, industrialized, commodified food system. Cooperatives of these scale are not helping to build a regionalized food system that advance AFN goals of sustainability, health, justice and community and economic development.

For the cooperative structure to effectively contribute to the idealized regional food system, internal governance decisions would need to be made about the standards for use of and membership in the cooperative. For instance, membership could be restricted to farmers that sell below a certain scale or conditioned on meeting proscribed environmental, economic, or social standards. An instance of this is Organic Valley Cooperative, which requires its member to obtain and maintain organic certification.<sup>114</sup> The cooperative's by-laws regarding the purpose and procedures of the cooperative must be carefully written to ensure the cooperative works towards the ends, not just producing the means as the end.<sup>115</sup>

### *2. Voting, Democracy Controls*

In addition to restrictions on the membership in cooperatives, the Capper–Volstead Act requires cooperative governance to be structured so that political control is equitable, regardless of how much the producer uses the cooperative.<sup>116</sup> To this end, cooperatives usually are structured to have

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<sup>113</sup> Hardesty, *infra* note 142, at 237; *Top 100 Largest Agricultural Cooperatives*, U.S. DEP'T AGRIC., <https://perma.cc/DR98-2TK3> (last visited Feb. 25, 2017).

<sup>114</sup> *Produce Pool: Requirements*, CROPP COOPERATIVE, <https://perma.cc/LEM8-DQ TU> (last visited Feb. 25, 2017).

<sup>115</sup> Another legal tool for ensuring this, which is not explored in this Article but is worth noting, is the "benefit corporation" which allows corporations to prioritize social goals ahead of maximizing profits. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 818–19, 838–39 (2012). Incorporating as a benefit corporation requires entities to define their purposes and establishes systems of transparency and accountability that can contribute to the social mission of a cooperative. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 782 (2015).

<sup>116</sup> Shannon L. Ferrell, Note, *New Generation Cooperatives and the Capper-Volstead Act: Playing a New Game by the Old Rules*, OKLA. CITY U. L. REV. 737, 762–63 (2002).

one-member, one-vote.<sup>117</sup> Some cooperative may allow voting based on the level of cooperative usage, though these usually have limits and are structured to prevent replacing member control with money control.<sup>118</sup> There is also the potential for court review of a cooperative's treatment of current and former members.<sup>119</sup> This means that there are formalized processes for promoting and enforcing equitable democratic participation of all the members.

Some critics argue the assumption that being local will create engaged communities is false; community-building is difficult and requires serious, reflexive engagement with other stakeholders.<sup>120</sup> The cooperative structure, which requires shared investment, creates conditions that could force producers to build community despite the struggles and conflicts that will inevitably arise.<sup>121</sup> By giving all the producers a relatively equal voice and equal opportunity to benefit from the cooperatives, the governance constraints would hopefully create conditions that facilitate politically engaged, reflexive dialogues among members about the purpose and activities of the cooperative.

Another potential benefit is the way that cooperatives can allow small and large producers to work together to gain access to markets. Many cooperatives are set up so that returns are based on how much of a crop the grower has handled by the cooperative.<sup>122</sup> This means that a larger producer and small producer could proportionally benefit from the cooperative, regardless of how much they or other producers market through the cooperative.

The potential benefit of this is that as historically marginalized individuals—such as women and minorities—gain access to the start-up, small-scale farms that many local foods advocates are working to make accessible to beginning farmers,<sup>123</sup> they can join with other more successful farmers and enjoy equitable say in the governance of the cooperative. Again, this depends on the cooperative being appropriately structured to achieve this goal, but the point is that it is doable.

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<sup>117</sup> Kelley, *supra* note 112, at 189.

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., Sharlene F. Roberts-Caudle, *Agricultural Cooperative Member Equity: You Don't Have to Die for it!*, 7 SAN JOAQUIN AGRIC. L. REV. 1, 2–3 (1997) (discussing a case involving a small farming corporation suing its cooperative to force a redemption of the corporation's equity certificate).

<sup>120</sup> DeLind, *supra* note 19, at 276; DuPuis & Goodman, *supra* note 19, at 367.

<sup>121</sup> It should be noted that the cooperative structure only allows producers to be members in the cooperative. Thus, cooperatives are not presented as a panacea to community building, seeing as how numerous other stakeholders throughout the supply chain are explicitly excluded from cooperatives. The argument here is only that cooperatives have the potential to take actors who would otherwise be market-based competitors and help them develop a shared, engaged community.

<sup>122</sup> Kelley, *supra* note 112, at 188.

<sup>123</sup> For an example, see the work of Michigan Food and Farms Systems, which provides programs targeting small and historically disadvantaged farmers. MICH. FOOD & FARMING SYS., <https://perma.cc/Q63S-JUKW> (last visited Feb. 25, 2017).

It should be noted, however, that cooperatives also occupy an ironic position in the exploitation of minorities which needs to be explicitly considered. While cooperatives allow freehold farmers to openly organize, agricultural laborers have been denied the same rights to organize due to exemptions in the National Labor Relations Act.<sup>124</sup> As noted by Professor Chen, this was an outcome of "legislation born of a desire to preserve Southern farmers' access to cheap black labor."<sup>125</sup> This point is raised to emphasize the larger argument of the Article that law can be used as a tool to advance AFN goals, but it needs to be reflexively critiqued to consider whether, and to what extent, it advances or impedes particular goals given the larger social and legal context.

### *3. Restrictions on Profits Enable Investments Back into the Cooperative*

Since the purpose of a cooperative is to help market products and not act as an investment opportunity for the farmers, there is a restriction on the profit returns to the farmers.<sup>126</sup> Excess profits on farmers' products are usually invested back in the cooperative as equity, which will be paid out to the farmer member when they leave the cooperative.<sup>127</sup>

Combined with the governance structures discussed previously, this means a cooperative can raise the funds to invest in the social capital and infrastructure that members need to grow their businesses and regional food systems infrastructures.

One of the major barriers to growing a regional food system is the inability of farmers to meet the quality demands of mid-scale buyers such as hospitals, schools, and local retail chains. For instance, one major issue is food safety, which is stringently regulated through public and private standards that can operate as a barrier to farmers scaling up their marketing.<sup>128</sup> These are perceived as difficult for small and very small farmers because the practices and facilities can be intimidating and costly to implement, and verifying compliance often requires paperwork, costly audits, and certifications.<sup>129</sup>

A cooperative can help address these issues through education and cost sharing. A cooperative can build the educational networks and resources for diversified farmers to gain access and understanding of how they can best manage food safety on their farms. This is akin to the educational and

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<sup>124</sup> National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (excluding agricultural laborers from the definition of employee).

<sup>125</sup> Chen, *supra* note 105, at 813.

<sup>126</sup> Kelley, *supra* note 112, at 241.

<sup>127</sup> *Id.* at 34.

<sup>128</sup> See discussion *supra* Part II.B.

<sup>129</sup> See, e.g., *Healthy Food Initiatives, Local Production and Nutrition: Hearing Before the S. Comm. on Agric., Nutrition & Forestry*, 112th Cong. 12 (2012) (statement of Thomas J. Vilsack, Secretary of Agriculture); *id.* at 32 (statement of Ron McCormick, Senior Director of Local Sourcing & Sustainable Agriculture, Walmart Stores, Inc.).

farming expertise that Organic Valley provides to its cooperative members for organic certification.<sup>130</sup>

For reducing the cost of audits and certification, the USDA's newly emerging GroupGAP procedures may offer a strategy for spreading the cost of certification.<sup>131</sup> This program allows a group of producers to develop an internal auditing and monitoring procedure for ensuring compliance with USDA's GAP standards, which is in turn reviewed, approved, and audited by the USDA.<sup>132</sup> Since the USDA only audits a representative sample of the overall farms,<sup>133</sup> the financial costs are spread out over the farms instead of each individual farm needing to pay for the cost of an audit. Other comparable programs are developing in similar, private food safety regulatory schemes.<sup>134</sup>

Another potential investment for the cooperative could be in general liability insurance for the products marketed through the cooperative. The cost of purchasing insurance individually can be burdensome for small farms, but a cooperative could spread the cost (as well as the risk and liability) of obtaining insurance to protect the farmers as well as any potential injured victims in the event of a foodborne illness outbreak.<sup>135</sup> As the scale of farming grows and the processing and storage increases, there is likely to be a greater chance of an outbreak being detected, due to the nature of how foodborne illness outbreaks are identified.<sup>136</sup> Changes in technology and the detection and enforcement of food borne illness outbreaks are also increasing the likelihood that a farm or cooperative may need insurance. Thus having insurance would become increasingly important for farmers joining cooperatives.

In addition to investing in farmers, a cooperative could work towards building processing and storage infrastructure that are needed for re-regionalizing food systems. A major challenge that Ruhf and Clancy identified was the lack of infrastructure for local and regional food, and current economic preference and competition for infrastructure that favors economies of scale.<sup>137</sup> The 1990s saw a boom in processing cooperatives,

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<sup>130</sup> E.g., *Organic Dairy Transition*, CROPP COOPERATIVE, <https://perma.cc/H83F-KQPZ> (last visited Feb. 25, 2017).

<sup>131</sup> U.S. DEP'T OF AGRIC., GROUP GAP & GHG CERTIFICATION PROGRAM USER'S GUIDE 3 (2016), <https://perma.cc/M3AC-QYQP>.

<sup>132</sup> *Id.* at 2.

<sup>133</sup> *Id.*

<sup>134</sup> E.g., *Standards-Certification and Assessment Options*, GLOBALG.A.P. N. AM. INC., <https://perma.cc/7NZP-AW6E> (last visited Feb. 25, 2017).

<sup>135</sup> See Jean C. Buzby & Paul D. Frenzen, *Food Safety and Product Liability*, 24 FOOD POL'Y 637, 649 (1999) (discussing the potentially devastating financial impact on firms linked to foodborne disease outbreaks).

<sup>136</sup> Neal D. Fortin, *The Hang-up with HACCP: The Resistance to Translating Science into Food Safety Law*, 58 FOOD & DRUG L.J. 565, 567–68 (2003).

<sup>137</sup> Ruhf & Clancy, *supra* note 45, at 18.

mostly for ethanol.<sup>138</sup> However, there are many other instances of vertically integrated cooperatives that assist producers with input costs and the processing and marketing of commodities.<sup>139</sup> A cooperative with a regional growth strategy could identify and invest in the infrastructure that is needed for small farmers to serve mid-scale buyers.

For instance, many schools that want to buy from farmers need product processed to be easy for children to eat because of other institutional limits on the capacities of the schools to process the foods in-school.<sup>140</sup> A facility that can wash and cut apples, carrots, etc. and package them for the schools would be valuable for small farmers to gain access to such institutional purchasers. Similarly, drying, freezing, and canning are important activities for extending the seasonal availability of products, which is important for schools that need food during the off season and retailers that desire a continuous, year-round supply.

A processing facility that could handle multiple crops, and had a coordinated production schedule among the cooperative members, would then allow each farmer in the cooperative to plant a diversified crop so that if one crop fails they will still have other crops to contribute to the facility to achieve financial security for their individual farm.

### *B. Cooperative, Coordinated Marketing and Bargaining*

Rather than processing, the primary activities that cooperatives historically carried out on behalf of their members are marketing and bargaining.<sup>141</sup> These activities could position cooperatives to play a key role in building a regionalized food system by differentiating the cooperative members' products as higher value, identifying market demand for the differentiated products, and then coordinating production to meet that demand.

#### *1. Foster Differentiated, Values Based, Embedded Marketing*

Differentiated, regionally-identified branding is one strategy that farmers can use to enhance the value of their products and create demand for regional foods.<sup>142</sup> This is something that has helped create value added,

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<sup>138</sup> Mary Farrell-Stieve, *Power Formula: Gas Price Hikes Fuel Drive for Ethanol Production; Farmers Look to Co-Ops to Gain Market Share*, RURAL COOPERATIVES, May/June 2000, at 7, <https://perma.cc/UPY9-A8PL>.

<sup>139</sup> JOY HARWOOD, ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., AER-774, MANAGING RISK IN FARMING: CONCEPTS, RESEARCH, AND ANALYSIS 19 (1999), <https://perma.cc/2LFA-LWQG> (listing Ocean Spray, Land O'Lakes, and Sunkist as examples of vertically integrated cooperatives).

<sup>140</sup> Jen Christensen, *Schools Struggle to Feed Kids Healthy Food*, CNN (Sept. 29, 2010), <https://perma.cc/PE7X-GWAY>.

<sup>141</sup> Kelley, *supra* note 112, at 190.

<sup>142</sup> Rosemary J. Coombe & Nicole Aylwin, *Bordering Diversity and Desire: Using Intellectual Property to Market Place-Based Products*, 43 ENV'T & PLAN. A 2027, 2029-38 (2011). But see

short supply chains in Europe,<sup>143</sup> but has been opposed in the United States by food industry interests that seek to create fungible products and supply chains from nowhere.<sup>144</sup> The cooperative could establish standards for the process values or regional attributes that differentiate their product and regimes of governance for assessing and enforcing compliance.<sup>145</sup> These would be self-governed, voluntary, market-based governance mechanisms similar to what have been proposed as strategies for sustainability by other scholars.<sup>146</sup>

There are critiques of these voluntary, market driven approaches because they tend to privilege consumers as political actors<sup>147</sup> and have issues of accountability.<sup>148</sup> The producer-controlled decision making of the cooperative partly addresses the first concern. Although producers will have to negotiate values with consumers—and the intermediaries that represent them, such as retailers and food service institutions—the producers will at least be in a position to negotiate and define the standards to which they want to adhere.

As for the issues of accountability, the factors that seem to be necessary for private regulatory standards to be effective is mutual interdependence and a dedicated corps of people committed to policing the standards.<sup>149</sup> In an ideal construction of the cooperatives, they will be selling based on their reputation for certain qualities and will recruit a dedicated corps of consumers. This would create the sense of shared interdependence and a cohort of stakeholders interested in monitoring the cooperative's activities, thus enhancing the oversight and governance of the audits. The critiques of the audit regimes that have failed to serve their ends have often focused on ones that operate to govern disembedded, anonymized, far-flung

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Shermain D Hardesty, *Cooperatives as Marketers of Branded Products*, 36 J. FOOD DISTRIBUTUION RES. 237, 238–39 (2005) (regarding structural challenges that impede the ability of cooperatives to market branded products).

<sup>143</sup> Renting et al., *supra* note 7, at 398; Vaughan Higgins, Jacqui Dibden & Chris Cocklin, *Building Alternative Agri-food Networks: Certification, Embeddedness and Agri-environmental Governance*, 24 J. RURAL STUD. 15, 15 (2008).

<sup>144</sup> K. WILLIAM WATSON, CATO INST., POLICY ANALYSIS NO. 787, REIGN OF TERROIR: HOW TO RESIST EUROPE'S EFFORTS TO CONTROL COMMON FOOD NAMES AS GEOGRAPHICAL INDICATIONS 8 (2016); Kal Raustiala & Stephen R. Munzer, *The Global Struggle Over Geographic Indications*, 18 EUR. J. INT. L. 337, 351 (2007).

<sup>145</sup> Timothy D. Lytton, *Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints that Frusturate Government Regulation*, 15 THEORETICAL INQUIRIES L. 539, 540 (2014).

<sup>146</sup> Galey & Endres, *supra* note 39, at 34; Czarnezki et al., *supra* note 39, at 305–09.

<sup>147</sup> E.g., Julie Guthman, *Neoliberalism and the Making of Food Policies in California*, 39 GEOFORUM 1171, 1175 (2008).

<sup>148</sup> Maki Hatanaka & Lawrence Busch, *Third-Party Certification in the Global Agrifood System: An Objective or Socially Mediated Governance Mechanism?*, 48 SOCIOLOGIA RURALIS 73, 77 (2008); Timothy D. Lytton & Lesley K. McAllister, *Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest*, 2014 WIS. L. REV. 289, 305–06 (2014).

<sup>149</sup> TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 129 (2013).

supply chains<sup>150</sup>—which are very different from what is envisioned here where the regional locale of the consumers and producers will allow for more direct monitoring and accountability.

## 2. Gain Access to Institutional Buyers by Aggregating Production

Regionalizing food systems will require that growers scale up their production and access larger mid-scale markets, such as local retail chains and institutions. However, there have been a number of barriers for small, atomistic farmers with this goal, including that buyers do not have the capacity or interest to deal with multiple farmers and the farmers have lacked the capacity to individually meet the buyers' demands.<sup>151</sup> By acting as a marketing agent on behalf of the members, the cooperative can work with institutional buyers to identify the quantity of given crops that the buyer needs and coordinate who in the cooperative will produce the crops each year to meet the buyer's needs.<sup>152</sup>

For institutional purchasers, purchasing through a cooperative would allow the buyer to deal with only one supplier—the cooperative—rather than under current conditions when they must deal with numerous individuals. Food hubs and farm-to-institution programs also are working on this issue, but the cooperative structure allows the farmers to maintain governance over the systems of how the foods are aggregated and marketed.<sup>153</sup>

As noted by Ruhf and Clancy:

One of the challenges in building regional supply chains is how to build personal relationships among members of spatially extended chains. Research shows that these relationships are major contributors to their success. There needs to be more effort to study and act on how to build trust among actors in spatially extended chains and with consumers.<sup>154</sup>

Negotiations between cooperatives and buyers is a way for members of spatially extended chains to learn about each other's needs and capacities, a transaction cost that is otherwise quite high when multiple individuals are trying to continuously negotiate and educate one another. This is not saying the cooperatives can act as a substitute for the local, direct sales that

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<sup>150</sup> Carmen Bain, *Structuring the Flexible and Feminized Labor Market: GlobalGAP Standards for Agricultural Labor in Chile*, 35 SIGNS 343, 364–65 (2010); Maki Hatanaka, *Certification, Partnership, and Morality in an Organic Shrimp Network: Rethinking Transnational Alternative Agrifood Networks*, 38 WORLD DEV. 706, 710 (2010).

<sup>151</sup> STEVE MARTINEZ ET AL., U.S. DEP'T OF AGRIC., ERR NO. 97, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES 24, 26–27 (2010), <https://perma.cc/GR25-ATZG>.

<sup>152</sup> *Id.* at 12, 24.

<sup>153</sup> There are numerous examples of farmer-controlled food hubs that are organized according to the cooperative structure. See generally, JAMES MATSON ET AL., U.S. DEP'T OF AGRIC., SERV. REPORT NO. 77, RUNNING A FOOD HUB (2015–2016).

<sup>154</sup> Ruhf & Clancy, *supra* note 45, at 15.

happen at farmers markets, but as an augmentation to this work that helps overcome one barrier to the growth of regionalized food systems.

Once the buyers' needs are identified and understood, the cooperative can play a critical role in coordinating production. This is a significant advantage of cooperatives over other current initiatives to scale-up to institutional buyers because it involves active, intentional coordination. Institutional buyers need consistent, predictable supply and are often unwilling, or struggle, with the decision to buy direct because of this. At the same time, farmers must plan in advance to produce a predictable, large quantity of a crop. For many, this is a risky proposition if they do not have a reliable marketing outlet for the crop.

The cooperative can overcome this constraint by negotiating with the buyers to understand their quantity needs, establishing contracts providing for production and purchase of the agreed upon quantity, and then coordinating which farmers in the cooperative will produce the required crop. The cooperative can also act as the marketing agent to find alternative outlets if there is excess production. In the event of a product shortfall, the cooperative can also act as an agent to buy product from other farmers to meet the contract requirements, thus mediating some of the supply variability risks for an institutional buyer.

This model of cooperative production and marketing has additional benefits for contributing to the diversity and resilience that Ruhf and Clancy identified as desirable features of a regional food system.<sup>155</sup> The cooperative can coordinate production across a region from year to year, achieving rotational planting that function to increase the diversity and resilience of a food system. Currently, many small farmers do this individually on their farms. By doing it on a larger regional scale this would allow the farmers to reduce their workload by narrowing the number of crops they grow in any given year, while still maintaining a diversified farm in the long run. Depending on the how large the region is for a cooperative, the cooperative can also spread the risk of crop failures across the region and possibly achieve some season extension by having production distributed across multiple farms.

Though a cooperative can help a farm access larger buyers, the farm does not have to commit the entirety of their production to the cooperative. They can commit only what they want to or what they have negotiated with the cooperative so that they can also market their products through other outlets, thus maintaining diversified marketing strategies that also spread risk and enhance resilience.

This can present a challenge for cooperatives though. If a farmer can market their product to someone else for a price that exceeds what they have committed to from the cooperative, they could potentially choose to send their product elsewhere and not contribute what the cooperative needs

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<sup>155</sup> *Id.* at 10, 13, 15.

to keep the processing facility operating profitably.<sup>156</sup> The management structure of the cooperative needs to be set up to deal with this pitfall.

### C. Operate Across Political Boundaries

Another valuable feature of cooperatives is that they can operate across local, state, and national boundaries. Though Ruhf and Clancy argue for regionalizing food systems, they have not argued for eliminating local *or* global supply chains. Regional food production may not always be appropriate for achieving sustainability and health, and so some level of connection to globalized supply chains and other regions is still an appropriate component of regional foods for creating a more diverse and resilient food system.<sup>157</sup> Likewise, there are concerns about how myopic localism can disregard the negative external impacts on distant communities.<sup>158</sup>

Cooperatives can act as an intermediary that does not insist on local or global, but instead can prioritize products from within a region and augment them with global and commodified sourcing where appropriate. As mentioned earlier, this structure also encourages more personal relationships among producers in the different regions, which can facilitate understanding of the needs and unintended consequences of various sourcing strategies.<sup>159</sup>

Another potential issue with trying to build regional food systems that Ruhf and Clancy noted was the challenges of overcoming political boundaries and the perverse incentives those create.<sup>160</sup> While a cooperative will not solve this issue, cooperatives could open avenues of communication for identifying and overcoming these negative problems. Private governance initiatives, such as the standards and auditing discussed above, could also help overcome some of the governance coordination problems of political boundaries.

## VI. DO COOPERATIVES REALLY ADDRESS THE SOCIAL SCIENCE CRITIQUES?

Despite the potentials being touted here, the drawbacks of cooperatives must also be considered. As Born and Purcell note,

Which goal is achieved will depend not on the scale itself but on the agenda of those who are empowered by the scalar strategy. Localizing food systems,

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<sup>156</sup> David K. Smith, *Crop Yield Uncertainty: Issues for New Generation Cooperatives*, 10 SAN JOAQUIN AGRIC. L. REV. 41, 49–50 (2000).

<sup>157</sup> Ruhf & Clancy, *supra* note 45, at 13, 15.

<sup>158</sup> Bellows & Hamm, *supra* note 15, at 276–77; Meredith Kolsky Lewis & Andrew D. Mitchell, *Food Miles: Environmental Protection or Veiled Protectionism*, 35 MICH. J. INT. L. 579, 635–36 (2014).

<sup>159</sup> See discussion *supra* Part V.B.2.

<sup>160</sup> Ruhf & Clancy, *supra* note 45, at 17.

therefore, does not lead inherently to greater sustainability or to any other goal. It leads wherever those it empowers want it to lead.<sup>161</sup>

Likewise, although the Capper–Volstead Act was intended to achieve goals that were consistent with the ideals of AFNs, the law's structural design and changing economic conditions can undermine its effectiveness.<sup>162</sup> Therefore, it should not be presumed that adopting cooperatives will automatically produce those results. Instead, consideration must be given to who is empowered by cooperatives, towards what end they might exercise their power, and the social and economic context in which they operate.<sup>163</sup>

#### *A. Regional Food Systems Goals*

To reiterate, this Article has argued that cooperatives are a legal tool that could be used to advance regional food systems. Ideally, regional food systems involve production and consumption of values-based products at an appropriate, devolved scale in order to overcome the local–global dichotomy and provide good food to the masses.

Cooperatives are one potential tool for advancing these ends because they allow producers to coordinate their production and marketing to meet the needs of a regional population. Cooperatives can be organized at multiple scales, including ones that are truly global, but by pooling producers resources they can act as an intermediary between the local and the global that is needed for regional food systems. While they can display attributes of the commodity system, they are also capable of focusing on more local and regional buyers and can embed values into their production, processing, and handling. Through cooperatives, producers can expand the affordable food options that are available to consumers and contribute to decentralization of food economies.

#### *B. Drawbacks of Capper–Volstead Act Cooperatives*

While cooperatives have significant potential to advance the goals of AFNs, both local and regional, they are not without issues. The first issue is that the Capper–Volstead Act intentionally allows cooperatives to gain monopoly control of a market.<sup>164</sup> As a corollary to monopoly control, the law allows price fixing—where producers convene to agree on minimum

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<sup>161</sup> Born & Purcell, *supra* note 8, at 196.

<sup>162</sup> See generally Carstensen, *supra* note 103.

<sup>163</sup> Born & Purcell, *supra* note 8, at 195–99; see also DeLind & Bingen, *supra* note 18, at 128–31, 149 (pointing out that civic agriculture is not inherently equitable and advocating for a stronger sense of place and civic culture).

<sup>164</sup> Guth, *supra* note 89, at 80–82.

prices.<sup>165</sup> However, they are not supposed to engage in predatory or anticompetitive conduct—such as restricting other legitimate producers' access to the market or trying to buy up or prevent competition.<sup>166</sup> This is enforced in two ways. The USDA has authority to bring an action against the cooperative if they believe the cooperative is engaging in anticompetitive practices.<sup>167</sup> Other producers and buyers also can bring Sherman Act claims, which require proving that the cooperative has engaged in conduct that destroys their Capper–Volstead Act immunity.<sup>168</sup>

Nonetheless, there are issues with cooperatives gaining the capacity to control too much of a food supply segment and engaging in activities that contradict the goals of the local or regional food system.<sup>169</sup>

Examples include nationally recognized brands such as Welch's and Ocean Spray, which sell branded produce into the commodified, industrial supply chain,<sup>170</sup> as well as more problematic activities such as alleged unreasonable price-fixing through supply restraints,<sup>171</sup> anticompetitive practices towards competitors,<sup>172</sup> and using vertically integrated control of markets to manipulate members and competitors.<sup>173</sup>

However, the activities of some of these cooperatives are arguably a rational economic response to the current political-economic climate which favors concentrated, industrialized supply chains.<sup>174</sup> This dominant context

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<sup>165</sup> Kenneth R. O'Rourke & Andrew Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL., no. 2, 2010, at 69, 69.

<sup>166</sup> Clapper–Volstead Act, 7 U.S.C. § 292 (2012) (“If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade.”).

<sup>167</sup> *Id.*

<sup>168</sup> See O'Rourke & Frackman, *supra* note 165, at 75 (discussing the use of the Capper–Volstead Act as an affirmative defense).

<sup>169</sup> See generally Carstensen, *supra* note 103 (discussing issues with the statutory scheme adopted in an era of small farms and cooperatives that has survived into an era of big agricultural business); O'Rourke & Frackman, *supra* note 165 (discussing issues with cooperative model and predatory conduct by the largest cooperatives); Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper–Volstead Act*, 80 MO. L. REV. 451 (2015) (discussing outer limitations of the Clapper–Volstead Act).

<sup>170</sup> Hardesty, *supra* note 142, at 237–41.

<sup>171</sup> Peck, *supra* note 169, at 454.

<sup>172</sup> O'Rourke & Frackman, *supra* note 165, at 76 (discussing *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683, 689–90 (E.D. Pa. 2007)).

<sup>173</sup> Worth Rowley & Marvin Beshore, *Chicken Integrators' Price-Fixing: A Fox in the Capper–Volstead Coop*, 24 S.D. L. REV. 564, 571 (1979).

<sup>174</sup> Robert L. Wills, *Evaluating Price Enhancement by Processing Cooperatives*, 67 AM. J. AGRIC. ECON. 183, 187–88 (1985); see also Hamilton, *Thirty Years*, *supra* note 40, at 567–69 (discussing the political climate regarding alternative forms of agriculture and supply chains);

must be taken into consideration when assessing strategies and tools for creating an alternative, regionalized food system.<sup>175</sup> Buyer concentration and market power has increased drastically, limiting the availability of alternative marketing outlets for producers who do not want to sell into the industrial food supply chain.<sup>176</sup>

A cooperative is only a tool to help producers gain access to markets; other strategies will be necessary to ensure there are markets available for them to sell into. Any group considering cooperatives as a strategy for growing regional food systems and advancing AFN goals must consider these issues and reflect on their practices. This is a necessity both for preventing legal liabilities under the Sherman Act, and for making sure the cooperative is effectively advancing goals of the AFN.

### *C. Addressing Social Science Critiques*

Additionally, local producers interested in using cooperatives to build regional food systems should be aware of other potential social science critiques of the tool. First, scaling up can lead to loss of control of the marketing depending on who exercises power,<sup>177</sup> and longer supply chains can undermine the relationships and trust building that have contributed to the legitimacy and appeal of local foods.<sup>178</sup>

Another issue with cooperatives is that they are a producer-controlled, market-oriented strategy. Much scholarship has critiqued the preeminence of market-based strategies as means of achieving food systems change. In addition to the critiques of how this reduces political action and reflexive engagement,<sup>179</sup> there are issues with how such strategies perpetuate the neoliberal logics that underlie many of the structural problems we have in today's food system.<sup>180</sup>

The most important question about this proposal for cooperatives will be whether they actually advance the goals of local and regional food systems. Ruhf and Clancy offer four parameters that are useful for

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Carstensen, *supra* note 108, at 532–35 (discussing the changing economic conditions that are distorting agricultural markets).

<sup>175</sup> Ruhf & Clancy, *supra* note 45, at 18.

<sup>176</sup> Diana L.Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 338, 348–49 (2014); Richard Scheelings & Joshua D. Wright, ‘*Sui Generis?*: An Antitrust Analysis of Buyer Power in the United States and European Union, 39 AKRON L. REV. 207, 209 (2006).

<sup>177</sup> Phil Mount & John Smithers, *The Conventionalization of Local Food: Farm Reflections on Local, Alternative Beef Marketing Groups*, 4 J. AGRIC., FOOD SYS., & COMMUNITY DEV., no. 3, 2014, at 101, 115–17.

<sup>178</sup> Phil Mount, *Growing Local Food: Scale and Local Food Systems Governance*, 29 AGRIC. & HUM. VALUES 107, 109 (2012).

<sup>179</sup> DeLind & Bingen, *supra* note 18, at 148.

<sup>180</sup> Julie Guthman, *The Polanyian Way? Voluntary Food Labels as Neoliberal Governance*, 39 ANTIPODE 456, 473–74 (2007); Guthman, *supra* note 147, at 1180–81; Patricia Allen & Julie Guthman, *From “Old School” to “Farm-to-School”: Neoliberalization from the Ground Up*, 23 AGRIC. & HUM. VALUES 401, 412 (2006).

evaluating the idealized regional characteristics of a food system. The first parameter is food needs and supply.

The parameters and the content of the elements of a food system start with the food needs/demands of the population versus the food supply. The latter is determined by several things: 1) geography, climate and water resources of the region (including season extension technologies); 2) cropping and integrated farming patterns based on knowledge of farmers and new research on which cropping patterns can be modified to meet requirements; and 3) scale of farms.<sup>181</sup>

The second parameter is natural resource sustainability.

The second critical dimension is the sustainability of land, energy, water, and other resources. It does not make sense to develop a new, alternative food system at any scale without requiring that food be produced by sustainable practices, because without them the ability to produce food in the future is jeopardized.<sup>182</sup>

The third parameter is economic development.

A hallmark of a regionally focused food system is that economic returns stay within the region. Making that happen requires addressing markets, new business models, branding, infrastructure, financing, and trade. A regional food system is comprised of multiple market options for farms of all sizes that include local markets as well as broader regional supply chains, thereby providing farmers with more market opportunities that play out through various supply chain structures.<sup>183</sup>

The final parameter is diversity.

Diversity is the last dimension and a cornerstone of a regional food system for several reasons. We believe that in a larger region a wide(r) variety of foods can be produced and processed especially if the region crosses latitudes. . . . Diversity is important in another way: it brings resilience.

Scale also is critical to resiliency. A resilient food system requires components of various scales, much like various sized stones produce a firm roadbed. Connectivity is another necessary facet, requiring that various scales interact and "talk to each other." Institutional and social capacity must exist at all scales within the food system to allow self-organization and adaptation. Thinking regionally catalyzes more resources, and also enables resource

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<sup>181</sup> Ruhf & Clancy, *supra* note 45, at 12.

<sup>182</sup> *Id.* at 13.

<sup>183</sup> *Id.* at 13–14.

efficiency, for example, in the case of financially strapped land grant universities sharing agricultural specialists or laboratories.<sup>184</sup>

If cooperative structures are adopted as a regional food systems strategy, these metrics should be incorporated into their bylaws or missions. The cooperatives should periodically review their activities to evaluate whether, and to what extent, they are actually producing the type of food system they want to create. This is important to producing the reflexive, politically driven and socially embedded ideals of the AFNs.<sup>185</sup>

## VII. CONCLUSION

Following an interest in food systems in the general culture, legal scholars are increasingly analyzing the law's role in shaping the healthfulness, sustainability, democracy, and justice of the U.S. agrifood system. A popular trend, both in law and popular culture, is the belief and argument that local foods could be an effective strategy towards these ends.

However, social science scholars have noted a number of problems with the local strategy. There is a tendency to assume local will achieve its ends merely by implementing that particular scale, to conflate the ends with the means, and to obscure other strategies that may be more effective. Further, the popularity of localism does not always adequately address the social context nor engage in the political work that some see as needed to truly address the issues of democracy and justice in our food systems.

This Article has argued that the legal scholarship is guilty of falling into the local trap as has happened with other disciplines. Additionally, there is a related tendency to fall into the special trap when arguing for exemptions for small scale and local food systems. These trends are particularly problematic with legal scholars because of the importance of law as a mechanism for operationalizing and institutionalizing the goals of alternative food movements. By focusing on the local and failing to consider other scales, other strategies, and the ultimate goals of local, scholars may be missing important opportunities to more effectively achieve change. Further, even when potential legal strategies emerge, their social, political, and economic contexts need to be considered to be realistic about their potential and their limits.

As an example of other strategies that are missed when focusing on the local, this Article proposes that farmers' cooperatives organized under the Capper–Volstead Act could be an effective strategy for advancing regional food systems. As with local, regional suggests a scale; however, the idealized regional food systems would not just be about scale and geography, but about building networks of exchange that produce as much of the regions'

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<sup>184</sup> *Id.* at 15–16 (citation omitted).

<sup>185</sup> DeLind, *supra* note 19, at 273–74; DuPuis & Goodman, *supra* note 19, at 369.

food needs as possible while being ecologically and culturally embedded and connected to the local and the global.<sup>186</sup>

The farmers' cooperatives are a potential legal tool for advancing this type of food system because they can allow farmers to coordinate production to meet the region's food needs and desires through governance structures that are meant to be democratic and inclusive, regardless of the scale or type of each farm included in the cooperative. These structures could also allow farmers to develop differentiated, values-based products and invest in the infrastructure and farmer support that is needed to scale up the marketing and distribution of these products.

Despite their potential, it is also important to recognize that these are just a tool, not a guaranteed silver bullet. As Born and Purcell note, what matters most is who is empowered by a strategy and to what ends they exercise that power.<sup>187</sup> And as others emphasize, the embeddedness and social context and political action of these strategies must also be continuously, reflexively examined. To that end, this Article has noted that cooperatives have limits as well. They only allow producers to be members, so do not address all the democracy issues in the food system. They also were originally designed to allow for monopoly control and price fixing, subject to limited constraints and oversight by the USDA. Thus, they could be (and have been) used as means to ends that contradict the goals of justice and democracy. This occurs in a context of highly competitive, concentrated markets, which are another issue that needs to be addressed—through a strategy other than cooperatives—in order to transform the food system.

Local food systems and other AFN strategies need the attention of legal scholars to identify how laws can act as mechanisms to give life to solutions being proposed by others. These range from government regulation of nutrition and health labeling, to labor practices, to private sustainability initiatives, to addressing issues of competition and antitrust in agrifood supply chains. The strategy considered here has been how to build a regional food system through farmers' cooperatives, but it too is only one possibility.

In shaping our food system, legal scholars need to think critically about what the goals of the alternative food systems are and consider to what extent the strategy they propose is effective or limited for achieving their goals.<sup>188</sup> While local, regional, and AFNs strategies merit consideration, the legal analysis of their utility should be undertaken with consideration of scholarship that highlights the need to be reflexive of the broader social and political context in which legal strategies can be implemented.

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<sup>186</sup> Ruhf & Clancy, *supra* note 45, at 19–21.

<sup>187</sup> Born & Purcell, *supra* note 8, at 196.

<sup>188</sup> Other strategies for transforming governance of regional food systems exist, including under the Agriculture Adjustment Act of 1933. 7 U.S.C. §§ 601–627 (2012). Specifically, via marketing orders pursuant to § 608c or marketing agreements pursuant to § 608b. Another possibility would be pursuant to the Secretary of Agriculture's agricultural promotion authority under the Commodity Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411–7425 (2012).