

Note

Exemption Federalism: Regulatory Carve-Outs and the Protection of Local Farms

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Abstract

When national regulatory programs exempt small-scale operators or producers from certain requirements, the result looks surprisingly like federalism. That is, many local (or intrastate) operators end up subject only to state or local regulations; most national (or interstate) operators end up subject to federal regulation. While small-scale businesses may rely on these exemptions in practice, the exemptions are understudied and undertheorized in the legal scholarship. This Note proposes a new way of looking at exemptions to large national programs: as “exemption federalism.” In an era when federal regulatory power is nearly limitless, exemption federalism may prove to be a significant source and style of contemporary federalism. To illustrate, this Note takes a close look at one particular statute—the 1957 Poultry Products Inspection Act—and its exemptions for small-scale poultry producers. By examining the historical context of the Act, the debates surrounding its passage, its expansion, its exemptions, and its practical effect today, this Note traces the contours of modern American federalism through an agricultural lens. It also zooms out further, asking where else we can find exemption federalism, where it comes from, its costs and benefits, and its implications for industries outside of agriculture, from finance, to healthcare, to housing.

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*“The story of American constitutional law is in many respects an agrarian fable.”*¹

Introduction

As late as the twentieth century, small farms in America were basically off-limits for federal regulators. State and local governments could regulate small farms, as they had since colonial times,² but the federal government had no power over truly local agriculture. By 1957, however, the landscape had changed completely. Congress passed a series of agricultural laws: from price controls to labor regulation, from consumer protection to environmental standards. One such law was the Poultry Products Inspection Act (PPIA), mandating federal inspection of nearly every chicken slaughtered in the United States.³

This Note tells that story—how big government ended up on small farms—but it also tells the story of an important exemption to the PPIA. Growers who raise fewer than twenty thousand chickens per year are exempted from many of the inspection requirements of the law; growers who raise fewer than one thousand chickens are exempted even further.⁴ Small chicken operations across the country rely on these exemptions, while cattle and pig operators fight for similar exemptions from their own inspection laws.⁵ What accounts for these exemptions? As Congress found the authority to regulate more and more aspects of the American farm, why did representatives and senators agree to these local carve-outs? Where did the poultry exemptions come from, what can account for them, and how do they apply to American agriculture today?

The answers have implications for understanding American federalism more generally in the twentieth and twenty-first centuries. The relationship between the federal government and the states has evolved throughout the state-building process of American history: from a “compact theory” of the states to “dual federalism,” to “cooperative federalism,” to “coercive federalism,” and to

1. Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Commerce*, in CONSTITUTIONAL LAW STORIES 69, 69 (Michael C. Dorf ed., 2009).

2. See, e.g., CYNTHIA A. ROBERTS, THE FOOD SAFETY INFORMATION HANDBOOK 91 (2001) (describing a 1641 Massachusetts “Meat and Fish Inspection Law”).

3. 21 U.S.C. §§ 451-472 (2018).

4. 21 U.S.C. § 464 (2018); 9 C.F.R. § 381.10 (2018).

5. Abbie F. Swanson, *Small Meat Producers Take Their Slaughterhouse Gripes to Congress*, NAT’L PUB. RADIO (Oct. 15, 2015), <https://www.npr.org/sections/thesalt/2015/10/15/448942740/small-meat-producers-take-their-slaughterhouse-gripes-to-congress> [<https://perma.cc/K6MV-URJ3>].

the Court-led “federalism revival.”⁶ Recent scholarship has focused on a possible return to cooperative federalism, in which national programs partner with the states for funding, implementation, or design.⁷ But the story of the PPIA illuminates an underexplored element of modern federalism: the use of exemptions to leave the choice of whether and how to regulate to the states. When national regulatory schemes can reach down to the individual consumer, restaurant, or farmer, modern federalism might best be understood through what the federal government chooses not to regulate (exemptions) rather than what it cannot regulate (the ever-shrinking world of “dual federalism”) or what it regulates in conjunction with the states (“cooperative federalism”). This new way of looking at regulatory carve-outs, as “exemption federalism,” might help us better understand, for instance, the small-business exemptions in the Affordable Care Act,⁸ owner-operator exemptions in the Fair Housing Act,⁹ or, the subject of this Note, small farmer exemptions from national food safety regulations.

This Note proceeds in three parts. Part I outlines the theory of “exemption federalism” in general, arguing for its usefulness in describing, justifying, and critiquing significant federal regulatory programs. Part II is a case study in exemption federalism, examining the Poultry Products Inspection Act. Section II.A traces the changing nature of American federalism through the history of federal regulation of small-scale American farming. Section II.B tells the story of the PPIA through original research into congressional floor debates and hearings from 1957 and 1968. This Section explains how the federal poultry inspection law was passed, how it was amended, and how exemptions were integrated into the law’s text and application. Section II.C discusses how the PPIA functions today on the nationwide, statewide, and local levels. Part III returns to “exemption federalism” broadly, further refining the theory and exploring other potentially significant applications.

I. Exemption Federalism: The Theory

An early and long-lasting understanding of federalism in commerce was that state governments would regulate local concerns and the federal government would regulate national concerns. This neat division first gave way to the federal government’s need to regulate local activities with cumulative national impact,¹⁰ and then further collapsed under the federal government’s effort to find a

6. See, e.g., KARREN ORREN & STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* 92-96 (2017) (outlining the history of theories of American federalism).

7. See, e.g., Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Health Care For?*, 70 *STAN. L. REV.* 1689 (2018).

8. See, e.g., 26 U.S.C. § 4980H (2018) (limiting “[s]hared responsibility for employers regarding health coverage” to “applicable large employers” with more than fifty employees).

9. 42 U.S.C. § 3603(b)(2) (2018).

10. *Wickard v. Filburn*, 317 U.S. 111 (1942).

constitutional hook for civil-rights legislation.¹¹ Where, then, can one find federalism in a world that “acknowledges the almost-infinite reach of the regulatory power of the modern federal government . . . ?”¹² To Abbe Gluck, the answer is what she has called “intrastatutory federalism,” referring to the ways in which federal statutes use states as policy-implementers, and thus include them in regulatory schemes.¹³ Other scholars have described “federalism by waiver,” whereby state officials can have a substantial role tailoring federal mandates or programs.¹⁴ This Note proposes a new theory, “exemption federalism”: when national programs exempt small operators from a given regulation, they can leave a surprisingly large number of operators to state or local regulation. Furthermore, large operators tend to have a disproportionate market share in many industries, so exemption federalism can often achieve the benefits of centralization *and* decentralization. That is, when small operators are exempted, most of a *market* can be regulated from Washington, D.C., while most *market operators* are left to local oversight.

An example may help to illuminate the nature of exemption federalism. Imagine a federal law that regulated the pharmacy industry, with an exemption for pharmacies with a single location. Every interstate or national chain, by definition, would fall under the federal statute. Every local “mom-and-pop” pharmacy would fall under the exemption. Although more than a third of pharmacies are single-store operations, large chains dominate the market in terms of revenue and items sold.¹⁵ For example, just two chains—CVS and Walgreens—account for nearly forty percent of all prescription drug revenue in the pharmacy industry.¹⁶ Therefore, this hypothetical law would cover most of the national pharmacy market, while leaving a substantial number of pharmacies to state or local regulation. Indeed, any interstate pharmacy would end up regulated by the national government, while many intrastate pharmacies would

11. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

12. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 542 (2011).

13. *Id.* at 538.

14. See, e.g., Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* (Gillian Metzger et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013) (describing waivers as the ability of agencies to unmake specific congressional rules—the reverse of conventional agency delegation, where agencies make rules that Congress left unspecified); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1756 (2013) (“[I]n the same spirit of federalism, Congress often gives states flexibility to do this federal work; for example . . . by allowing states to apply for waivers from federal requirements”); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2029 (2014) (“[S]cholars recently have begun to see waivers as significant vehicles of federalism.”).

15. SK&A, NATIONAL PHARMACY MARKET SUMMARY 3 (2016), <http://www.documentcloud.org/documents/2840154-SKA-Pharmacy-List-National-Summary.html> [https://perma.cc/Z9XJ-YXRF].

16. *The Top 15 U.S. Pharmacies of 2017*, DRUG CHANNELS (Feb. 21, 2018), <https://www.drugchannels.net/2018/02/the-top-15-us-pharmacies-of-2017-market.html> [https://perma.cc/39A3-23EX].

only be subject to state regulation. In other words, despite the fact that this law is an ambitious, far-reaching, and modern commerce power program, the real-world result looks a lot like federalism.

This example helps clarify where—or in which industries—we should expect exemption federalism to have the most descriptive and normative value. Exemption federalism applies most usefully to industries in which there are many small players, but large operators dominate output or revenue.¹⁷ In these industries, a small-operator exemption will leave most businesses to local regulation while national standards will still oversee most of the market. This is the fascinating sweet spot where exemption federalism can achieve the benefits of both decentralization and centralization: state and local innovation and accountability for small operators, and product uniformity and baseline market protections for consumers nationwide. In these industries, most of the drugs, or financial transactions, or apartment buildings—or chickens—are subject to national standards. But many of the providers of these goods remain in a regulatory environment of state-by-state diversity.

One of the most important and exciting elements of exemption federalism is that the number of industries embodying these characteristics is growing. Measures of corporate concentration show the extent to which large operators dominate the output of a given industry. As long as small players still exist, industries dominated by large operators are where exemption federalism has the most to offer. Indeed, increasing corporate concentration is one “of the most important economic facts of the last few decades”¹⁸ In the 893 industries analyzed by the Census’s latest economic survey, the average “share of the top four firms’ revenues ha[d] risen from 26% to 32%” between 1997 and 2012.¹⁹ In other words, the top four firms in the average industry make nearly a third of the industry’s total income—and that share is rising. In some industries, the numbers are even more striking. In secondary market financing, tobacco manufacturing, warehouse clubs and supercenters, couriers and express delivery services, and petrochemical manufacturing, the top four firms in each industry account for 90% of the entire industry’s revenues.²⁰ In credit card issuing, pharmacies and

17. In other words, industries where production per operator generally exhibits the characteristics of the Pareto Principle (the “80/20” rule), or some power law distribution. *See, e.g.*, RICHARD KOCH, *THE 80/20 PRINCIPLE* (1997) (applying the informal rule that 80% of effects in management and business can often be attributed to 20% of causes); M.E.J. Newman, *Power Laws, Pareto Distributions and Zipf’s Law*, 46 *CONTEMP. PHYSICS* 323, 325 (2005) (noting the “extraordinarily diverse range of phenomena” that “follow power-law distributions”).

18. Neil Irwin, *Are Superstar Firms and Amazon Effects Reshaping the Economy?*, *N.Y. TIMES* (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/upshot/big-corporations-influence-economy-central-bank.html> [<https://perma.cc/XB6R-D82C>].

19. *Corporate Concentration*, *ECONOMIST* (Mar. 24, 2016), <https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration> [<https://perma.cc/T5L4-PNY3>].

20. *Id.*

drug stores, food service contractors, and consumer lending, the top four firms in each industry control more than half of that industry's revenue.²¹

Nationwide, there are 28.2 million small businesses with fewer than five hundred employees, and only 17,700 business with more than five hundred employees.²² Yet while small businesses make up 99.7% of U.S. firms, they account for less than half of private-sector output.²³ Economic trends in corporate concentration and jurisprudential trends in federalist theory are both converging on the usefulness of exemption federalism to describe and justify various national laws and their exemptions.

This Note now turns to one of those laws, the Poultry Products Inspection Act, which exhibits all the characteristics that make exemption federalism interesting. While 75% of American farms make up only 3% of farm sales, the largest 0.4% of farms account for 32% of farm sales.²⁴ The Poultry Products Inspection Act takes us through the history of American federalism and into the next chapter of exemption federalism.

II. The Poultry Products Inspection Act: History and Practice

A. *How the Federal Government Got onto Small Farms*

The story of the growth of the federal government's power is a familiar one, as is the related battle between President Franklin Roosevelt and the Supreme Court. But they are stories typically told in terms of industry, manufacturing, and the welfare state—not farming. Nevertheless, they are deeply agricultural stories and worth retelling in brief with a focus on the farm.

As late as 1936, in *United States v. Butler*, the Supreme Court routinely struck down national agricultural laws as beyond the scope of the Commerce Clause.²⁵ The Agricultural Adjustment Act (A.A.A.) of 1933 was, according to the Court, “a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.” Justice Owen Roberts's opinion emphasized that no power “to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.”²⁶ Around the same time as *Butler*, the Court unanimously struck down the “Live Poultry Code” of the National Industrial Recovery Act.²⁷ “Neither the

21. *Id.*

22. Office of Advocacy, *Frequently Asked Questions*, SMALL BUS. ADMIN. (Mar. 2014), https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf [<https://perma.cc/F4H3-R2A5>].

23. *Id.*

24. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2012 CENSUS OF AGRICULTURE - CENSUS HIGHLIGHTS - FARM ECONOMICS 2 fig.3 (2014), https://www.nass.usda.gov/Publications/Highlights/2014/Farm_Economics/Highlights_Farm_Economic_s.pdf [<https://perma.cc/856F-ZWQ5>].

25. 297 U.S. 1 (1936).

26. *Id.* at 68.

27. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

slaughtering nor the sales by defendants were transactions in interstate commerce,” the Court announced. “If the commerce clause were construed to reach all enterprises [that] . . . have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people.”²⁸

In the radio address announcing his famous Court-packing plan, President Roosevelt specifically discussed these farm cases as justification for his actions. He used *Butler*, “the case holding the A.A.A. unconstitutional,” as an example of pernicious judicial activism that prevented necessary New Deal legislation from “stabiliz[ing] national agriculture.” An agricultural metaphor even provided the guiding image of President Roosevelt’s plan: “[T]he American form of Government [is] a three horse team Two of the horses are pulling in unison today; the third is not It is the American people themselves who want the furrow plowed.”²⁹

When the Justices next considered a New Deal farm bill, they had made their famous “switch in time.”³⁰ A new Agricultural Adjustment Act set production limits on wheat and established penalties for excess harvests. Farmer Roscoe Filburn grew 239 excess bushels—“wholly for consumption on the farm”—and was convicted of violating the Act.³¹ The Court unanimously upheld his conviction and the constitutionality of the law. “The commerce power,” the Court held, “extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate.”³² The Court continued, in direct contradiction to its earlier farm cases: “[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce.”³³ If Congress could use its commerce power to regulate farm-consumed wheat, it could doubtless repass the kind of law that had earlier been struck down: a poultry inspection regime. Congress turned to that task in 1957.

28. *Id.* at 546.

29. Franklin D. Roosevelt, *Fireside Chat*, AM. PRESIDENCY PROJECT (Mar. 9, 1937), <http://www.presidency.ucsb.edu/ws/index.php?pid=15381> [<https://perma.cc/YNH9-QP9B>].

30. This is the contemporary journalistic, and now conventional, name for the Supreme Court’s about-face in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). For a revisionist take on the “switch,” see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998). Finally, for a more modern, empirical take on the “switch,” see Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010).

31. *Wickard v. Filburn*, 317 U.S. 111, 118 (1942).

32. *Id.* at 124 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

33. *Id.* at 125.

B. The Act's Passage, Exemptions, and Amendments

Through the early twentieth century, poultry production was regarded as “a sideline to farmers” or “a Sunday dinner specialty.”³⁴ It was not until after World War II that American poultry production began to take off. In the 1930s, there were around one million broilers (chickens raised for meat, not eggs) produced annually in the United States. By 1957, there were over one billion.³⁵ In late February of that year, Congress held hearings on a proposed national poultry inspection law.³⁶ Representatives from the poultry industry, the healthcare industry, labor unions, consumer organizations, and farm organizations all presented to the House. “Without exception,” the House reported, “all the witnesses expressed themselves in favor of some type of compulsory poultry inspection.”³⁷ As written, the law would “establish a system of compulsory inspection by the Federal Government of poultry and poultry prod[ucts] in interstate commerce and in major intrastate consuming areas of such size and consequence as to necessarily effect interstate commerce.”³⁸

There was ambiguity, therefore, as to how far into local production the law would actually reach. Indeed, despite the alleged unanimity reported by the House, there were some critical voices during the Senate hearings. Clement Thurnbeck, Vice President of the National Turkey Federation, worried about the bill’s impact on small farmers. “[The law] would put out of business many small farm processors and ultimately would increase the cost of turkeys to the consumers.”³⁹ Senator Hubert Humphrey of Minnesota disagreed: “How would you put them out of business if you do not even touch them?”⁴⁰ The bill did in fact provide for the Secretary of Agriculture to “exempt from specific provisions . . . poultry producers [that] . . . sell directly to household consumers or restaurants, hotels, and boarding houses.”⁴¹

Matt Triggs, of the American Farm Bureau Federation, agreed with Thurnbeck that inspection would be prohibitively expensive for small farmers, but he also agreed with Senator Humphrey that small farmers were exempted.

34. COMM. ON PUB. HEALTH RISK ASSESSMENT OF POULTRY INSPECTION PROGRAMS OF THE NAT’L RESEARCH COUNCIL, POULTRY INSPECTION: THE BASIS FOR A RISK-ASSESSMENT APPROACH 12 (1987).

35. STEPHEN R. CRUTCHFIELD ET AL., USDA ECON. RES. SERV., AN ECONOMIC ASSESSMENT OF FOOD SAFETY REGULATIONS: AGRICULTURAL ECONOMIC REPORT No. 755, at 5 (1997), https://www.ers.usda.gov/webdocs/publications/40807/32409_aer755.pdf?v=0 [<https://perma.cc/82HQ-4CXG>].

36. H.R. REP. NO. 85-465 (1957).

37. *Id.* at 2.

38. *Id.* at 1.

39. *Bills to Provide for the Compulsory Inspection by the United States Department of Agriculture of Poultry & Poultry Products: Hearing on S. 313, S. 645 & S. 1128 Before the S. Comm. on Agric. & Forestry*, 85th Cong. 69 (1957) (statement of Clement Thurnbeck, Nat’l Turkey Fed’n).

40. *Id.* at 73 (statement of Sen. Hubert Humphrey).

41. Poultry Products Inspection Act, Pub. L. No. 85-172, § 15(a)(1), 71 Stat. 441, 447 (1957).

“In most rural areas there are large numbers of poultrymen or very small slaughtering establishments which market small amounts of poultry in the adjoining area or community . . . It is not practical to provide inspection in such instances except at prohibitive cost.”⁴² But “no one, to our knowledge, has considered that the extension of mandatory poultry inspection in such instances would be undertaken under the original language.”⁴³

Some experts at the hearings disagreed with the idea that exemptions should be included at all. Dr. Aaron Haskin, City Health Officer of Newark, New Jersey, believed that exempting anyone from the requirement that inspected poultry would be labeled as such “would only confuse the housewife and make difficult the task of State and local regulatory officials.”⁴⁴

Nevertheless, despite the competing concerns of interested parties like Thurnbeck (make exemptions clearer), Humphrey and Triggs (the exemptions are clear), and Haskin (remove the exemptions), the bill was passed. The Poultry Products Inspection Act, a bill to “provide for the compulsory inspection by the United States Department of Agriculture of poultry and poultry products,” became law on August 28, 1957.⁴⁵

By 1962, Congress was worried about consumer-protection gaps left by the PPIA. Apart from federally-inspected slaughterhouses for poultry in interstate commerce, only twenty-six states otherwise required slaughterhouse inspections for poultry in intrastate commerce.⁴⁶ On June 13, 1968, the House debated revisions to the PPIA. “Change in poultry inspection procedures is clearly needed,” argued Representative Graham Purcell of Texas. “Most poultry moving in intrastate commerce receives little or no inspection.”⁴⁷ Similar concerns were voiced in contemporaneous Senate debates. “For the poultry products not covered [by the 1957 act], inspection service, when provided, is often inadequate,” argued Senator Allen Ellender of Louisiana.⁴⁸ Congress was considering a bill that would “exten[d] Federal inspection and regulation to poultry processed for shipment within the States where the States do not enforce requirements at least equal to the Federal requirements.”⁴⁹ Eighty-seven percent of the poultry in the United States was already being federally inspected. The proposed amendments to the PPIA would ensure that the “bulk of the 13 percent” would also be inspected under the federal standards.⁵⁰ The bill was designed as a “cooperative effort between the Federal Government and the State

42. *Hearing, supra* note 39, at 114 (statement of Matt Triggs, Am. Farm Bureau Fed’n).

43. *Id.*

44. *Id.* at 182 (statement of Dr. Aaron Haskin, City Health Officer, City of Newark, N.J).

45. Poultry Products Inspection Act §1, 71 Stat. at 441.

46. CRUTCHFIELD, *supra* note 35, at 5.

47. 114 CONG. REC. H17,065-66 (daily ed. June 13, 1968) (statement of Rep. Graham Purcell).

48. 90 CONG. REC. S23,837 (daily ed. July 27, 1968) (statement of Sen. Allen Ellender).

49. *Id.*

50. *Id.*

governments,” but it was also clearly a nationalizing of poultry inspection standards.⁵¹ States could only have their own inspection regimes for intrastate poultry if those standards were equal to or greater than the federal standards.⁵²

Nevertheless, Congress never seriously debated removing the exemptions for truly local production from the PPIA. Even Representative Purcell, who believed national standards were “clearly needed,” explained that the new standards would be uniform “[w]ith the exception of the provisions which provide for exemptions.”⁵³ Representative Charles Chamberlain of Michigan argued that the exemptions were “an equitable way of allowing a truly small poultry farmer not to have to meet all of the regulations and requirements that regular commercial farms would be meeting.”⁵⁴ Senator Joseph Montoya of New Mexico agreed: “We have some operations which are too small to make it feasible and would be too costly to require them to meet all the conditions of the act.”⁵⁵ In addition, Senator Montoya moved that the exemptions be capped at a specific number of birds; he proposed four thousand turkeys per year.⁵⁶

On August 1, 1968, a Conference Committee worked out the differences between the House and Senate bills and proposed a final version. There would be two levels of exemption: one for producers raising fewer than “5,000 turkeys or an equivalent number of poultry,” with four birds of other species being equivalent to one turkey, and another for producers raising fewer than “250 turkeys, or not more than an equivalent number of birds.”⁵⁷ Both small-scale producer classes would be granted exemptions from the PPIA, with the smaller-scale class receiving greater exemptions.

On August 18, 1968, the revisions “to clarify and otherwise amend the Poultry Products Inspection Act” became law.⁵⁸ Now, almost every bird slaughtered in the United States—whether bound for interstate commerce or local markets—would have to submit to the PPIA sanitation and inspection standards.⁵⁹

C. Applying the Act: National, State, and Local Levels

As written and amended, the PPIA requires “post mortem inspection of the carcass of each bird processed,” with the processing to occur in “official

51. *Id.*
 52. *Id.*
 53. 114 CONG. REC. H17,065-66 (daily ed. June 13, 1968) (statement of Rep. Graham Purcell).
 54. *Id.* at H17,082 (statement of Rep. Charles Chamberlain).
 55. 90 CONG. REC. 23,850 (daily ed. July 27, 1968) (statement of Sen. Joseph Montoya).
 56. *Id.*
 57. H.R. REP. NO. 90-1839, at 14 (1968) (Conf. Rep.).
 58. Wholesome Poultry Products Act, Pub. L. No. 90-492, 82 Stat. 791 (1968).
 59. Apart from minor technical changes in 1982 (substituting “20,000 poultry” and “1,000” poultry for “5,000 turkeys” and “250 turkeys”), the PPIA and its exemptions are the same today as they were in 1968. Poultry Products Inspection Act, Pub. L. No. 97-206, 96 Stat. 136 (1982).

establishments.”⁶⁰ This is the continuous inspection requirement of the Act, which can be prohibitively expensive for small growers. In a U.S. Department of Agriculture (USDA)-inspected slaughterhouse, poultry carcasses move down the processing line at a rate of 140 birds per minute.⁶¹ A USDA inspector is supposed to examine each one. Imagine a relatively small producer raising ten thousand birds, and spreading production over the course of the year. At that rate, the grower would have to find a slaughterhouse willing, each week, to load in the birds, start up its processing line, run it for just over one minute, shut it down, clean it up, and ship out the processed birds. It is hard to imagine a slaughterhouse that would consider a small grower’s business remotely worthwhile. That is before even considering the cost to the farmer of transporting his or her birds from the farm to the slaughterhouse and back, a cost which could easily destroy any profit.⁶²

The key exemptions to the PPIA provide that “[t]he requirements of the Act and the regulations for inspection of the processing of poultry and poultry products shall not apply to . . . [t]he slaughtering of sound and healthy poultry . . . by any poultry producer on his own premises with respect to poultry raised on his premises.”⁶³ The exemption only applies “for distribution by him solely within such jurisdiction directly to household consumers, restaurants, hotels, and boardinghouses.”⁶⁴ In addition, the producer cannot buy or sell poultry not raised on his or her farm, and the poultry cannot move in interstate commerce. Producers who raise between one thousand and twenty thousand birds must label their poultry with their name, address, and “Exempted—P.L. 90-492.”⁶⁵

Three states, Alabama, Arkansas, and Georgia, each raise more than one billion chickens per year.⁶⁶ Around a dozen states raise hundreds of millions of chickens annually. But other states, for instance, every state in New England, raise fewer than five hundred thousand chickens per year and are not even considered “production states” by the USDA.⁶⁷ To understand how the PPIA’s requirements and exemptions actually operate and vary among states, it is worth studying a pair of these states in detail. Virginia is a “production state”; in 2012

60. 21 U.S.C. § 455(b) (2018).

61. Michael Lewis, *Inside Trump’s Cruel Campaign Against the U.S.D.A.’s Scientists*, VANITY FAIR (Nov. 2, 2017), <https://www.vanityfair.com/news/2017/11/usda-food-stamps-school-lunch-trump-administration> [<https://perma.cc/7MCV-5RMM>].

62. In 2017, the average sale price per bird was \$3.39. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, POULTRY – PRODUCTION AND VALUE: 2017 SUMMARY 5 (2018), <http://usda.mannlib.cornell.edu/usda/current/PoulProdVa/PoulProdVa-04-27-2018.pdf> [<https://perma.cc/8YQZ-PBKC>] (“The value of broilers produced during 2017 was \$30.2 billion The total number of broilers produced in 2017 was 8.91 billion . . .”).

63. Exemptions for Specified Operations, 9 C.F.R. § 381.10 (2018) (using similar language to 21 U.S.C. § 464 (2018)).

64. *Id.* § 381.10(a)(6).

65. *Id.*

66. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, POULTRY, *supra* note 62, at 6.

67. *Id.*

over two hundred million broilers were raised there.⁶⁸ Connecticut is not a production state; in the same year, fewer than three hundred thousand birds were raised there.⁶⁹ These two states provide illuminating examples of how the PPIA does and does not apply to American poultry farms.⁷⁰

According to the latest Census of Agriculture, there were 193 farms in Connecticut raising broilers in 2012. Nearly all of them, 176 total, raised fewer than 2,000 birds. Another ten farms raised 2,000 to 15,999 birds, six farms raised 16,000-29,999, and one farm raised 60,000-99,999 birds. Not a single farm in Connecticut raised over 100,000 birds.⁷¹ Because the Census ranges and the exemption limits do not neatly overlap, it is possible that only one farm in all of Connecticut was subject to the PPIA's requirements.

Nevertheless, as provided for in the 1968 amendments to the PPIA, no state can establish inspection guidelines below the federal standards.⁷² Connecticut's "Inspection of Poultry Producers" law explicitly pegs its standards to the national baseline: "Any inspection conducted pursuant to this subsection shall be consistent with the requirements of the federal Poultry Products Inspection Act."⁷³ To accommodate the PPIA exemption, Connecticut has established a "Small Poultry Processor Inspection Program" ("the Program").⁷⁴ Producers raising fewer than twenty thousand birds may either go to a USDA-inspected slaughterhouse or sign up for the Program. The Program requires small farmers to be certified with the Connecticut Department of Agriculture by submitting their name, address, number of birds raised, and approximate slaughter schedule. Small farms are inspected by the Department of Agriculture at least once a year for waste disposal, sanitation, food-handling, animal-handling, record-keeping, and water supply compliance. In addition to the annual inspection, the growers

68. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2012 CENSUS OF AGRICULTURE - VIRGINIA 25 tbl.32 (2014), https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Virginia/vav1.pdf [<https://perma.cc/VXR7-V9SA>] [hereinafter VIRGINIA CENSUS OF AGRICULTURE].

69. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2012 CENSUS OF AGRICULTURE - CONNECTICUT 25 tbl. 32 (2014), https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Connecticut/ctv1.pdf [<https://perma.cc/H7EG-8CHS>] [hereinafter CONNECTICUT CENSUS OF AGRICULTURE].

70. The Farm-to-Consumer Legal Defense Fund maintains, on its website, a very basic "State-by-State Review of On-Farm Poultry Processing Laws." *Poultry Map and Chart*, FARM-TO-CONSUMER LEGAL DEFENSE FUND, <https://www.farmtoconsumer.org/poultry-map> [<https://perma.cc/N6MS-XNLK>]. Some states (Arkansas and Kentucky) have chosen not to adopt the PPIA exemptions. Most states have adopted the PPIA exemptions, but state laws vary in terms of what small farmers must do to qualify in terms of permits, sales limitations, or licenses.

71. CONNECTICUT CENSUS OF AGRICULTURE, *supra* note 69, at 126 tbl.66.

72. 90 CONG. REC. S23,837 (daily ed. July 27, 1968) (statement of Sen. Allen Ellender).

73. CONN. GEN. STAT. § 22-326t(b) (2012).

74. CONN. DEP'T. OF AGRIC., POULTRY REQUIREMENTS 1 (2011), http://www.ct.gov/doag/lib/doag/marketing_files/16._poultry_11-28-2011.pdf [<https://perma.cc/4GYV-LP5A>].

can also be inspected at any time. Once certified through the Program, these growers can sell to “household consumers, restaurants, or boarding houses.”⁷⁵

In Virginia, there were 807 farms raising broilers in 2012.⁷⁶ As in Connecticut, the most common-sized farm raised fewer than two thousand birds.⁷⁷ Under Virginia state regulations, these hundreds of farms, as well as the handful producing between two thousand and twenty thousand birds, were required to apply for and receive a permit to avoid continuous-inspection requirements.⁷⁸ The rest of the farms were subject to all of the PPIA’s requirements. Unlike in Connecticut, however, these large farms made up a substantial portion of the chicken industry in Virginia. Though non-exempt farms made up merely 59.5% of Virginia’s poultry farms by number, they produced 99.9% of the broilers raised in the state.⁷⁹

Non-exempt farms included those contracting with some of the largest chicken producers in the country:⁸⁰ Tyson, Pilgrim’s Pride, and Perdue—all of which have a presence in Virginia, though not in Connecticut.⁸¹ Together, these three companies alone produce nearly four billion chickens a year nationwide.⁸² To put that number in perspective, it would take all the chicken-raising farms in Connecticut more than 14,000 years to equal the annual production of those three companies. To put it another way, even if every Connecticut poultry farmer today had been producing chickens since the dawn of agriculture, together they still would not have equaled the number of chickens raised by those three companies last year.⁸³

75. CONN. DEP’T. OF AGRIC., SMALL POULTRY PROCESSOR INSPECTION PROGRAM: COMPLIANCE GUIDE AND APPLICATION 1 (2012), http://www.ct.gov/doag/lib/doag/inspection_regulation/ct_small_poultry_slaughter_compliance_guide_v8.5.pdf [<https://perma.cc/UAJ6-VT2D>].

76. VIRGINIA CENSUS OF AGRICULTURE, *supra* note 68, at 25 tbl.32.

77. *Id.*

78. 2 VA. ADMIN. CODE § 5-210-30, pt. 303 (2017).

79. VIRGINIA CENSUS OF AGRICULTURE, *supra* note 68, at 25 tbl.32 (totaling the production quantities from all the farms raising more than thirty thousand birds).

80. In fact, 96% of chickens were raised by farmers under a production contract for another operator. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2012 CENSUS OF AGRICULTURE - CENSUS HIGHLIGHTS - POULTRY AND EGG PRODUCTION 2 (Jan. 2015), https://www.nass.usda.gov/Publications/Highlights/2015/Poultry_and_Egg_Production.pdf [<https://perma.cc/W2A5-JSS8>].

81. *Poultry Plants Directory*, WATT POULTRYUSA, <https://www.wattagnet.com/ext/resources/uploadedFiles/1002USplants.pdf> [<https://perma.cc/3W77-8MK9>] (listing ten poultry processing plants operated by “integrated broiler compan[ies]” in Virginia, but none in Connecticut).

82. *WATT Poultry USA’s 2016 Top Broiler Companies*, WATT POULTRYUSA 17 (Mar. 2016), http://www.wattpoultryusa-digital.com/fx/save/dbindex.php?book_id=__NXT__d51916ba827942edbdca6776425879d6&sid=8b43775472afeac6f3dd03d0ec5cc250&pdf=1 [<https://perma.cc/JGH5-KZUJ>] (working from their average weekly slaughter numbers of 33.41 million, 28.85 million, and 12.99 million birds).

83. Dividing the roughly 3.9 billion birds slaughtered annually by Tyson, Pilgrim’s Pride, and Perdue by the 265,099 birds slaughtered in the state of Connecticut in 2012 results in more than 14,711 years. *Id.*; CONNECTICUT CENSUS OF AGRICULTURE, *supra* note 69, at 25 tbl.32; JAMES SCOTT,

Clearly, the Tyson, Perdue, and Pilgrim's chickens were not all raised in a single state, but from a federalist perspective, that is exactly the point. The largest operators within any state are likely involved in interstate, or even international, commerce, whereas the smallest operators may be involved in intrastate commerce only. These large operators—the ones most likely to have a national footprint—are subject to national regulation. They raise most of the chickens and they must submit to continuous USDA inspection. But most of the farms in both low-production states like Connecticut and high-production states like Virginia are still small enough to qualify for the PPIA exemption. These small farms exist in an alternate regulatory world from their federally-inspected Tyson-contracting neighbors. In Connecticut, for example, these small farms are part of the state's Small Poultry Processor Inspection Program. In Virginia, they go through the permitting process organized by the Virginia Department of Agriculture. Poultry inspection for these local farms is a state, not a federal, matter.

To further examine how the PPIA operates, it is worth zooming in on one of those local farms. One of the most outspoken advocates for small farms and farmers is Joel Salatin, author of twelve books on farming and owner of Polyface Farms in Virginia.⁸⁴ He raises broilers, turkeys, laying hens, rabbits, cattle, and pigs, and his work has been featured in the *New York Times*, documentaries like *Food, Inc.*, and the best-selling *The Omnivore's Dilemma*.⁸⁵ Most importantly for this Note, Salatin also holds PPIA exemption number 1001—the first issued in his state.⁸⁶ While Polyface is a higher-profile farm than most, it too relies on the small-grower exemption of the PPIA. Although a portrait of one farm is necessarily anecdotal rather than comprehensive, it can nevertheless help illustrate how the Act applies locally.

Salatin believes that the PPIA exemption makes small poultry farming possible. If every farm had to use USDA-inspected slaughterhouses, he argues, “it would eliminate the outliers from being able to dip their toe in the water and start.”⁸⁷ Though the PPIA was intended to protect consumers, Salatin believes that “risk of abuse, or problems, follow scale.” That is, he argues that the exemption does not just make sense for cost-of-business reasons but also from a consumer-safety perspective. He believes that the flexibility, openness, and customer-facing aspects of small farms provide safety in a way agribusiness cannot. “Do you fear unsafe food?” he asks. “Do you fear food-borne bacteria? There is a way to have safer food, but you are denied having the most efficacious way to ensure that safe food by the strict codification of orthodoxy that makes it

AGAINST THE GRAIN 43-44 (2017) (dating the origins of agriculture to the warming of the planet around 9,600 B.C.E.).

84. *Joel's Bio*, POLYFACE, <http://www.polyfacefarms.com/joels-bio> [https://perma.cc/J549-5LN7] (disclosure: the author worked for Joel Salatin in the summer of 2012).

85. MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* 300-33 (2006).

86. Telephone Interview with Joel Salatin, Co-owner, Polyface Farms (Nov. 18, 2017).

87. *Id.* All the following quotes from Salatin are from this interview.

inherently difficult for people who innovate safe approaches to get their product to market.”

On one hand, Salatin believes that the “regulatory bureaucracy does not take this exemption lightly—it is well enforced.” On the other hand, he acknowledges that though “the official idea is that someone visits you every other year . . . we haven’t had a visit for ten, twelve years.” Salatin’s impression is that the enforcement scheme is complaint-oriented. While inspection might not happen as often it is supposed to, a consumer complaint would make a farm an enforcement priority. “Often that’s how people are found,” Salatin says. But barring a complaint, most farms will operate “under-the-radar” of the PPIA.

But at small farms like Polyface, Salatin would argue, there is a kind of inspection that happens every day. Salatin’s farm store is on the same concrete slab as the poultry-slaughtering station. Every time a consumer decides to purchase meat there, or at similar small farms around the country, the consumer inevitably “inspects” the operation himself.

More than half of the nearly thirty-three thousand poultry farms in the nation are, like Salatin’s, small enough to qualify for the PPIA exemption.⁸⁸ Therefore, in states like Connecticut and Virginia, exempted farmers can be numerous while exempted chickens are rare. Nationwide, these patterns hold. Despite the fact that most chicken farmers qualify for the PPIA exemption, in 2012, large farms produced 99.9% of all chickens sold.⁸⁹

III. Unpacking Exemptions

Local carve-outs from national regulatory schemes embody federalist values and can be examined through federalism theory. Exemptions are not just random loopholes; federalism is not just what the federal government cannot do but what it chooses not to do. Part I of this Note outlined this theory, while Part II used agricultural regulation to trace the decline of dual federalism and illustrate an example of exemption federalism.

We are left, however, with several important questions. First, *why* did the federal government exempt small poultry farmers from the PPIA after decades of fighting for the ability to regulate farms? More generally, the theory of exemption federalism may accurately describe PPIA-like exemptions—but does not yet account for their origins. What makes a national legislature enact a federalism-promoting policy? Second, what are the possible limitations or caveats to the theory? What are possible counterarguments? Third, and finally,

88. NATIONAL AGRICULTURAL STATISTICS SERVICE, USDA, 2012 CENSUS OF AGRICULTURE – UNITED STATES 86 tbl.64 (2014), https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1_Chapter_1_US/usv1.pdf [<https://perma.cc/3D6Q-LK2T>] (reporting 16,514 farms raised fewer than 2,000 chickens out of 32,935 total chicken-raising farms).

89. *Id.* (totaling the production quantities from all the farms raising more than 30,000 chickens to be 8,457,343,356 out of 8,463,194,794 total chickens sold).

what are possible expansions or further applications for the theory? Where should we look for it next?

A. Why Exemption Federalism?

It is no stretch to describe as “federalist” a world in which small farmers are left to state regulation, and large agribusinesses are covered by national laws. But why would a national legislature help bring about this world? What is the motivation for Congress to assume the power of intrastate agricultural regulation—but then voluntarily exempt those farms from national oversight? At least three component hypotheses may help unpack the motivation behind national exemptions for local operators. (1) The federal government may not always have the practical legal ability to regulate truly local concerns. (2) The federal government may legitimately believe that local practices adequately regulate some local issues. (3) The federal government may be more responsive to local pressures than typically understood.

The first hypothesis suggests that the federal government may have been unable to pass an effective law regulating small farms. Lon Fuller has outlined “eight ways to fail to make law,” only the first of which is not to pass a law at all.⁹⁰ His other seven methods are:

(2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) . . . retroactive legislation, [which cannot] guide action . . . (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing . . . frequent changes in the rules . . . (8) a failure of congruence between the rules as announced and their actual administration.⁹¹

In the case of small poultry farmers, methods (2), (4), (6), and (8) may help explain the PPIA exemptions. Method (2) suggests that many small farmers might not know about their PPIA obligations. If farmers do not know about the law, whether through a lack of publicity or perhaps strategic ignorance, the law would “fail” to have an effect, with or without the exemption. Under method (4), even if farmers knew about the law, it may not be comprehensible. Without hiring a lawyer, how can any farmer be sure that their understanding of “commerce” or “sound and healthy” is the same as the government’s? Method (6) provides for laws that are well-publicized and comprehensible but simply unachievable. This was the concern of Clement Thurnbeck and others in the congressional debates of 1957 and 1968: that the requirements of the law would put small farms out of business.⁹² Finally, Joel Salatin’s comment that Polyface

90. LON FULLER, *THE MORALITY OF LAW* 33-39 (1964).

91. *Id.* at 39.

92. *See Bills to Provide for the Compulsory Inspection by the United States Department of Agriculture of Poultry & Poultry Products: Hearing on S. 313, S. 645 & S. 1128 Before the S. Comm.*

has rarely been inspected supports method (8). A law will have minimal effect if the government announces that it will inspect small farms, but never has the budget for or interest in actually conducting the inspections.

A national law regulating small farms could end up unknown, incomprehensible, unachievable, or mis-enforced. Any one of these outcomes would be a good reason for the federal government to simply exempt small farms from the law in the first place. The PPIA exemptions may, therefore, be a real-world example of Fuller's thesis. According to Fuller, laws that can work are a subset of laws that can be passed. Normatively, this first hypothesis provides justification for appreciating, exploring, and accepting the ways in which the federal government cannot solve all problems. Rather than pass a law that "fails," the federal government can exempt hard-to-reach sectors of society or the economy.

The second hypothesis suggests that sometimes the relevant issue is not the federal government's competence in regulating a local issue, but the locality's competence in regulating itself. Under this theory, the federal government is willing to allow community expertise or norms to regulate exempted areas. When the federal government decides to exempt small farmers from inspection, the slack is picked up by local actors. This theory does not rely on particular ideological assumptions: to a libertarian, market choices will reward safe farms and punish unsafe farms; to a communitarian, local communities will support safe farms and abandon unsafe farms.

Theoretical support for this model comes from James Scott and Robert Ellickson. James Scott has celebrated and popularized *mētis*: "knowledge embedded in local experience [as compared] with the more general, abstract knowledge deployed by the state and its technical agencies."⁹³ Scott quotes Albert Howard to further explain the concept: "A glance on the part of . . . a butcher accustomed to deal with high class animals, is sufficient to tell him whether all is well or whether there is something wrong."⁹⁴ This echoes the theory of Polyface—if consumers see the farm, they will have a good sense of the relative health and safety of its operations.

Further support for this model comes from Robert Ellickson's analysis of land disputes in rural California. He ultimately concluded that "neighbors apply informal norms, rather than formal legal rules, to resolve most of the issues that arise among them."⁹⁵ Ellickson's theory is that "members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate

on Agric. & Forestry, 85th Cong. 69 (1957) (statement of Clement Thurnbeck, Nat'l Turkey Fed'n); 90 CONG. REC. S23,837 (daily ed. July 27, 1968) (statement of Sen. Allen Ellender); 90 CONG. REC. H17,065-66 (daily ed. June 13, 1968) (statement of Rep. Graham Purcell).

93. JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 311 (1998).

94. *Id.* at 330.

95. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 1 (1991).

welfare that members obtain in their workaday affairs with one another.”⁹⁶ In other words, as long as local farmers and local consumers have the kind of close-knit relations created by repeated interactions, their norms of food safety and consumption will tend to maximize both parties’ welfare. To the extent that legislatures recognize or acknowledge either justification for leaving issues to local parties (Scott’s *mētis* or Ellickson’s norms), they too could be the source of exemptions like those in the PPIA.

The third, and final, hypothesis for the origin of exemptions leads us back to a modern theory of American federalism. Three years before the PPIA became law, Herbert Wechsler argued that federalism was preserved not only through the states acting as “separate sources of authority,” but also through the states’ role “in the composition and selection of the [federal] government.”⁹⁷ Local districts pick national representatives, states pick senators, and states pick presidential electors. Therefore, to the extent that “local sensitivity exists, it cannot fail to find a reflection in the Congress.”⁹⁸ The Supreme Court has endorsed this theory above the conventional “separate spheres” federalism story: “[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority.”⁹⁹

In this “process federalism” model, the federal government itself legitimately and sincerely reflects state and local interests as much as national interests. For example, Representative Purcell, from the 1968 congressional debates, was elected by a local district in Texas.¹⁰⁰ Senator Humphrey, in 1957, was accountable to the voters of Minnesota.¹⁰¹ Under this theory, Congress is incentivized to provide local exemptions to national laws because the members of the national legislature themselves are representatives of states or local districts.

Viewing the PPIA exemption in this light could be significant because it would provide empirical support to an otherwise mostly theoretical understanding of federalism that has found favor in the academy and Supreme Court. Real-life examples of Wechsler’s theory would provide proof that his, and the Court’s, theory of federalism actually works in practice.

These three hypotheses all work together to help explain where exemption federalism might come from. Exemptions from national programs recognize the

96. *Id.* at 167.

97. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

98. *Id.* at 547.

99. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

100. GPO, *Biographical Directory of the United States Congress 1774-2005* at 440, <https://www.gpo.gov/fdsys/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf> [<https://perma.cc/U4ZQ-BQQ8>].

101. *Id.* at 413.

difficulty of regulating truly local affairs from Washington, D.C., defer to on-the-ground expertise, and come from locally-elected national politicians surprisingly sensitive to local concerns. The first two hypotheses explain why the national legislature might find these exemptions valuable, and how they connect to federalist values like subsidiarity. The final hypothesis explains why national legislators would be especially—perhaps surprisingly—receptive to local concerns.

B. Why Not Exemption Federalism?

There are important caveats and possible counterarguments to exemption federalism. First, Edward Rubin and Malcolm Feeley have argued that “decentralization”—when the federal government leaves regulation or implementation to the states—is not actually “federalism” at all.¹⁰² From this perspective, exemption federalism is not *real* federalism. In that case, however, neither is “intrastatutory federalism,” “field office federalism,” or “federalism by waiver.”¹⁰³ Ultimately, this Note agrees with Barry Friedman: federalism is the kind of decentralization we have in this country, and the two concepts of federalism and decentralization are not as easily separable as Rubin and Feeley suggest.¹⁰⁴ This Note also agrees with Gluck’s “intrastatutory” project:¹⁰⁵ rather than insist on a pure federalism that may not exist (any longer), it is more interesting and relevant to ask what kinds of federalism exist here and now.

Second, to what extent can exemptions be labelled “federalist” or “federalism-promoting” if that was not the intended goal or explicit origin of the legislation? For example, in the pharmacy hypothetical from Part I, what if no legislator ever said anything like, “This exemption is meant to preserve our American system of federalism?” What if every discussion was centered around the language of cost-benefit analysis and whether it would be too expensive to regulate every little mom-and-pop drugstore? Or, to take the PPIA case study from Part II, what if the exemption “came from” the dedicated lobbying of the poultry (or turkey) interests? In other words, do either lobbying or cost-benefit analysis explain the exemptions better than a theory of federalism? Ultimately, these critiques are more question-begging than theory-undermining. Stories of cost-benefit analyses or successful lobbying themselves contain underlying value assumptions: why did Congress find *this* analysis, or *this* lobbyist, persuasive? Specifically, why would a national legislator be persuaded by the cost constraints of a small farmer (versus the efficiency benefits of a nationally-

102. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994).

103. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 368 (1997) (“[M]uch of the devolutionary legislation is ‘field office federalism,’ in which the national government dictates the terms of the transfer of power and retains substantial power to see that its will is done.”).

104. *Id.* at 381-82.

105. Gluck, *supra* note 12.

standardized market), or be receptive to local-interest lobbyists (versus the arguments of non-exempted national brands)? When lobbying or cost-benefit analyses themselves speak in federalist terms, they are constituent parts of—not counterarguments to—a federalist theory. The terms (or values, or goals) of federalism include: greater public participation in democracy; greater accountability; more state and local innovation; better protection of health, safety, and welfare; protection or promotion of cultural and local diversity; and diffusion of power to protect liberty.¹⁰⁶ An argument that local exemptions could protect local businesses, save money, protect consumers, provide diversity, or maintain accountability *is* a cost-benefit argument. But it is also a federalist argument. When a law or exemption promotes federalist values, it can usefully be described as federalism-supporting, whether or not that is the explicit language preserved in the Congressional Record.¹⁰⁷

A third caveat or counterargument: exemption federalism makes an assumption familiar to farmers' markets and chambers of commerce everywhere—that “small” and “local” can be relatively synonymous. This is perhaps an uncontroversial assumption because businesses with hundreds of locations and thousands of employees are more likely to be engaged in interstate commerce than a standalone shop with two workers. But it may not always apply. Imagine a Silicon Valley technology firm with ten employees and a global presence, or a large, multi-location barbecue chain that only operates in Texas. Still, it is intuitive and helpful to assume that small is more often intrastate and large is more often interstate.

Fourth, and last, it is worth noting that not all exemptions can or should be categorized as exemption federalism. For example, many nonprofit organizations rely on exemptions from various provisions of the tax code. These exemptions are better described as a “subsidy for nonprofit organizations that provide some good or service that benefits society or is otherwise underproduced.”¹⁰⁸ Thus, while these exemptions reflect value choices, they do not reflect standard federalist values. Religious exemptions provide a similar example—although there may be some federalism overlap, to the extent that Friedman is correct to list “liberty protection” as a federalist value.¹⁰⁹ Or consider the many other exemptions that riddle the tax code, most of which may be better

106. Friedman, *supra* note 103, at 389-404.

107. Imagine, for instance, an argument that some local-innovation program was not about promoting “federalism,” it was about promoting “laboratories of democracy.” See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“a single courageous State may, if its citizens choose, serve as a laboratory”). Clearly, a program that is designed to satisfy such a famous value of federalism can be described as federalism-promoting. Similarly, a cost-benefit analysis that demonstrates the economic value of subsidiarity co-exists with—and even helps explain—federalism arguments. See *supra* Section III.A.

108. Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115, 117 (2013); see also Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

109. Friedman, *supra* note 103, at 402.

theorized as the result of special interests, as opposed to federalism values.¹¹⁰ Just as exemption federalism is not meant to be a comprehensive theory of federalism, it is not meant to be a comprehensive theory of exemptions.¹¹¹

C. Where Next for Exemption Federalism?

If exemption federalism helps explain the PPIA, it may also explain similar exemptions—especially when the majority of an industry is concentrated in nationwide operators, but the bulk of operators are small and local. Indeed, in addition to the PPIA, exemption federalism may already help us understand aspects of landmark statutes like the Affordable Care Act, the Fair Housing Act, and the Dodd-Frank Act. It can also add to the discussion and analysis around proposed laws and their exemptions, such as Elizabeth Warren’s suggested Accountable Capitalism Act.¹¹²

In a recent article, Abbe Gluck and Nicole Huberfeld analyze and criticize the role of federalism in the Affordable Care Act (ACA).¹¹³ But they only view the federalist aspects of the ACA as originating from the ways in which Congress chose to “incorporate states into federal schemes.”¹¹⁴ Exemption federalism provides an additional perspective. The ACA originally exempted employers with fewer than fifty employees from the Act’s mandate.¹¹⁵ This exempted 96% of employers in the United States¹¹⁶ while covering the vast majority of employees, who generally work for large employers.¹¹⁷ While agreeing with Gluck and Huberfeld that “separate spheres” or “dual” federalism does not explain the ACA (that is, agreeing that there is a federal role in health insurance), exemption federalism also sees federalism in the ways small players were exempted and not only in the ways states were included. In this way, the ACA is significantly more federalism-promoting than its critics—or even Gluck and Huberfeld—acknowledge.

110. Daniel J. Mitchell, *Everything You Need to Know About Deductions, Loopholes, and Special-Interest Tax Provisions*, CATO INSTITUTE (Nov. 30, 2015), <https://www.cato.org/blog/everything-you-need-know-about-deductions-loopholes-special-interest-tax-provisions> [https://perma.cc/AW7L-CMC4].

111. Though, unlike the well-trodden ground of federalism theory, “exemptions” as a category in the law remains a remarkably undertheorized area of study and research.

112. 164 CONG. REC. S5,618 (daily ed. Aug. 15, 2018).

113. Gluck & Huberfeld, *supra* note 7.

114. *Id.* at 1697.

115. 26 U.S.C. § 4980H (2018); IRS, *Find Out How ACA Affects Employers with Fewer Than 50 Employees* (May 13, 2015), <https://www.irs.gov/affordable-care-act/individuals-and-families/find-out-how-aca-affects-employers-with-fewer-than-50-employees> [https://perma.cc/KCC2-9TQW].

116. U.S. TREASURY DEP’T, *Fact Sheet: Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*, <https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%2020150114.pdf> [https://perma.cc/83KR-2MLV].

117. Theo Francis, *Why You Probably Work for a Giant Company, in 20 Charts*, WALL ST. J. (Apr. 6, 2017), <http://www.wsj.com/graphics/big-companies-get-bigger> [https://perma.cc/G3K7-MQ49].

Another landmark statute from the Obama-era, the Dodd-Frank Wall Street Reform and Consumer Protection Act, similarly exhibits features of exemption federalism. Dodd-Frank holds systematically important financial institutions to higher regulatory standards and measures the systemic importance of traditional banks by size.¹¹⁸ Below the cutoff, banks are “exempt” from some of Dodd-Frank’s requirements. Recently, the Senate reached a bipartisan agreement to raise the systemically-important cutoff from fifty billion to two hundred and fifty billion dollars in assets.¹¹⁹ Discussion surrounding this change has been a textbook study in exemption federalism. The theory requires some elision between *small* and *local*, or *intrastate*, and *large* and *interstate*. The discussion around Dodd-Frank exhibits that elision. Reports on which banks would be exempted describe the institutions as “small and regional”¹²⁰ or as “deriv[ing] most of their funds and lending operations in the local areas where they operate.”¹²¹ The expanded exemption is meant to “relieve community banks” but “rein in the large financial institutions”¹²² that have been described as “globally systemically important.”¹²³ In 2017, the *smallest* of those large institutions was HSBC North America Holdings Inc., a massive multinational “serv[ing] clients worldwide.”¹²⁴ Here too, then, we see a regulatory landscape rarely described as federalist but exhibiting classic federalist traits. Small, local operators are exempt from (some) federal regulations but are still subject to state oversight. Large, interstate or international operators are not exempt at all.

Not all examples of exemption federalism are obviously or even arguably positive, just as federalism more broadly is a mixed bag. The small-operator exemption in the Fair Housing Act (FHA) is a good example of the negative impacts of exemption federalism. The FHA allows owners who rent four or fewer units and live in one of those units to ignore certain provisions of the Act.¹²⁵ One of the values of centralization, as opposed to the values of

118. MARC LABONTE & DAVID W. PERKINS, CONG. RESEARCH SERV., R45036, BANK SYSTEMIC RISK REGULATION: THE \$50 BILLION THRESHOLD IN THE DODD-FRANK ACT (2017).

119. Andrew Ackerman et al., *Senators Support Rollback of Bank Oversight*, WALL ST. J. (Nov. 13, 2017), <https://www.wsj.com/articles/senate-lawmakers-reach-tentative-deal-to-ease-post-crisis-bank-rules-1510593991> [<https://perma.cc/3CWD-UMET>].

120. *Id.*

121. Emily Stewart, *The Bank Deregulation Bill the Senate Just Passed, Explained*, VOX (Mar. 14, 2018), <https://www.vox.com/policy-and-politics/2018/3/6/17081508/senate-banking-bill-crapo-regulation> [<https://perma.cc/N3M8-6S8E>].

122. *Id.*

123. Donna Borak, *Fed: Banks Under \$250 Billion Threshold Get Break on Stress Tests*, WALL ST. J. (Jan. 30, 2017), <https://www.wsj.com/articles/fed-banks-under-250-billion-threshold-get-break-on-stress-tests-1485812085> [<https://perma.cc/7MHZ-P4LD>].

124. LABONTE & PERKINS, *supra* note 118, at 4 tbl.1; *see also* HSBC North America Holdings Inc., BLOOMBERG, <https://www.bloomberg.com/profiles/companies/8207521Z:US-hsbc-north-america-holdings-inc> [<https://perma.cc/36NY-GHEJ>].

125. 42 U.S.C. § 3603(b)(2) (2018); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 (1999) (“Section 3603(b)(2) . . . exempts dwellings intended to be occupied by four or fewer families from the prohibitions of § 3604, other than § 3604(c), if the owner lives in one of the units).

federalism, is a polity-wide baseline in fundamental rights.¹²⁶ But the FHA exemption, sometimes known as the “Mrs. Murphy” exemption, allows small landlords across the country to discriminate.¹²⁷ If the housing market resembles agriculture or the other concentrated markets discussed above, this exemption would impact a larger percentage of landlords (“producers” of housing) than renters (“consumers” of housing). But there may be no reason to tolerate state diversity in baseline anti-discrimination measures at all. Just as the value of federalism in this area is questionable, the value of exemption federalism is also questionable. Indeed, there have been repeated calls to repeal the exemption, though it still remains.¹²⁸ Nonetheless, as is true throughout these examples, states are free to regulate themselves. In Vermont, for instance, a state fair housing law restricts the exemption to owner-occupiers of dwellings with no more than three, instead of four, units.¹²⁹ And in New York, the exemption is further restricted to two-unit dwellings only.¹³⁰ While a nationwide standard applies to all large operators, small operators exist in a diverse, state-regulated landscape.

The latest example of exemption federalism may be Senator Elizabeth Warren’s proposed “Accountable Capitalism Act,” which, like Dodd-Frank, would have stricter regulations for larger institutions.¹³¹ Also like Dodd-Frank, the discussion around the Act perfectly illuminates the assumptions and values of exemption federalism. For instance, one account of the Act explained that some provisions would cover “any corporation with revenue over \$1 billion,” which is “only a few thousand companies, but a large share of overall employment and economic activity”¹³²

This realization that the federal government can regulate a national market while exempting most local operators is the core of exemption federalism. While the realization occasionally shows up, as in some journalistic coverage of Warren’s Act,¹³³ or legislative debates around agricultural bills,¹³⁴ it remains understudied. Without a name, recognition of this phenomenon has been isolated to its individual occurrences, with the general pattern unnoticed. Exemption

126. Friedman, *supra* note 103, at 319 (listing “the reasons for exercising national or central control, [including to] provide a national floor on fundamental rights.”).

127. Walsh, *supra* note 125, at 607 (“The existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination.”).

128. *Id.*

129. VT. STAT. ANN. tit. 9, § 4504(2) (2018).

130. See, e.g., N.Y. ST. OFF. OF THE ATT’Y GEN., *Fair Housing*, [https://perma.cc/HF9T-BYUL](https://ag.ny.gov/civil-rights/fair-housing).

131. 164 CONG. REC. S5,618 (daily ed. Aug. 15, 2018) (“A bill to establish the obligations of certain large business entities in the United States”).

132. Matthew Yglesias, *Elizabeth Warren has a Plan to Save Capitalism*, VOX (Aug. 15, 2018), <https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations> [<https://perma.cc/S4PS-QWB2>].

133. *Id.*

134. See, e.g., *Hearing, supra* note 39, at 114 (statement of Matt Triggs, Am. Farm Bureau Fed’n).

federalism hopes to tie these threads together and explain the intriguing similarities of the PPIA, ACA, FHA, and other laws. As a positive matter, the theory is worth discussing under the rubric of federalism because that is how it manifests itself: as national regulation of interstate operators and local regulation of local players. As a normative matter, the theory is worth discussing because it may connect the national regulatory ambitions of Congress and the federalist ideals of today's Court. A vocabulary that can describe these national regulatory programs in their federalist aspects has value in bridging differences between centralizers and localists. Furthermore, the Court has so far been suspicious and unreceptive to nontraditional flavors of federalism.¹³⁵ Perhaps exemption federalism will prove more attractive. Whether dealing with small-scale wheat growers¹³⁶ or health insurance mandates,¹³⁷ the Court has struggled to adjust the boundaries of modern American federalism. But reconsider the fact that most supermarket chickens nationwide have been inspected by a national overseer, yet most farmers are subject only to the rules of their community. That seems, hopefully, like a promising compromise.

135. See, e.g., Gluck, *Federalism from Federal Statutes*, *supra* note 14, at 1750 (arguing that the ACA exhibited federalism through “intrastatutory” federalism, but that *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), revealed “that the Court emphatically disagrees”).

136. *Wickard v. Filburn*, 317 U.S. 111 (1942).

137. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).