



*Designing State or Local Laws for Purchasing Locally Grown Food:
Suggestions for Policymakers and Advocates*

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A summary of ***Laws to Require Purchase of Locally Grown Food and Constitutional Limits on State and Local Government: Suggestions for Policymakers and Advocates***, by Brannon P. Denning, Samantha Graff, and Heather Wooten, published in 2010 in the *Journal of Agriculture, Food Systems, and Community Development*, 1(1), pp. 139–148; see the full paper at <http://dx.doi.org/10.5304/jafscd.2010.011.014>.

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What is the issue?

A movement to eat locally is growing around the country, affecting food purchasing decisions of private and public consumers. Concerns about nutritional quality, food safety, environmental impact, and local economic loss associated with buying food from far-flung places have prompted the consideration of locally grown food laws. Such grown food laws require, or provide incentives for, purchasing food grown within a defined geographic boundary.

However, these laws are vulnerable to challenge under the U.S. Constitution's restrictions on local and state laws that discriminate against goods and commerce from other states, known as the dormant Commerce Clause doctrine (DCCD). Policymakers and advocates for local food should understand the impact of these restrictions and should take advantage of an important exception to these restrictions when drafting policies to encourage purchase of locally grown food.

How can governments enact laws that favor the purchase of locally grown food?

The market-participant exception to the DCCD is an essential tool for advocates of locally grown food. This exception differentiates between state or local governments acting as market regulators (such as when they impose a soda tax) and acting as market participants (by directly buying or selling goods). When state or local governments act as market participants, they are exempt from the DCCD. In other words, state and local governments can act as any private buyer or seller would in deciding with whom and on what terms they will deal.

In addition, drafters of state and local locally grown laws *that do not fit within an exception to the DCCD* should ensure that such laws are written with-

out reference to the state where goods or services originated.

A local law can maintain selective purchasing under the market-participant exception of DCCD if two conditions are met: (a) the state cannot choose to tax certain transactions or exempt entities or transactions from taxation; and (b) the state cannot use its involvement in one market to regulate the behavior of private individuals outside that market. If the food law offers incentives or requirements to purchase locally grown food, state governments may still be able to uphold such laws. Local governments must simply demonstrate a clear extension of rights parallel to those afforded to a private body.

How were locally grown food laws analyzed?

The authors analyze three proposed local laws (from Woodbury County, Iowa; the city of Cleveland; and the state of Iowa) according to the key objections that might arise with court challenges. Drafting locally grown food policies according to the market-participant exception to DCCD — with the following issues in mind — can help states rebut accusations of restrictive trade.

■ “Is the policy discriminatory?”

The first question to ask when assessing how these policies would fare under the DCCD is whether they are discriminatory. If a court found a policy to be discriminatory, it would very likely invalidate the policy unless the market-participant exception to the DCCD applies. The Cleveland ordinance grants a 2% bid preference for “local food” for city contracts based on the geographical distance established by the state. It is still discriminatory despite the fact that food grown in some in-state counties would not benefit from the ordinance.

■ ***“If the policy is discriminatory, how would it fare under strict scrutiny?”***

If a court were to find a policy to be discriminatory (and if the policy were not subject to any DCCD exception), the policy would almost surely be invalidated. Applying strict scrutiny, a court would examine the goal of the law and means for encouraging locally grown food. If, as with the Cleveland ordinance, the goal is stated as supporting local agriculture, ensuring a market for locally grown food, or something similar, that goal will most surely be seen as protectionist — virtually ensuring invalidation. Even if a court finds a nonprotectionist goal (such as obesity prevention or pursuing sustainability), it is unlikely to be convinced that the exclusion of food grown outside X miles from a geographical reference point is the only means to achieve that goal.

■ ***“If the policy is not discriminatory, how would the balancing test apply?”***

Courts employ a “balancing test” when a law that affects interstate commerce appears to be neutral, and its purpose and effects are untainted by protectionism or discrimination. A court might determine that a policy like the Woodbury County policy (requiring the purchase of locally produced organic food for the county jail) or the Iowa law (giving a 20% tax credit to grocers against the cost of purchasing local farm products, where “local” was defined not by state border but as “produced within 150 miles” and could include areas outside the state) is not discriminatory. In that case, unless the policy were subject to a DCCD exception, the challenger would need to show that the costs to interstate commerce clearly exceeded the local benefits the government claims to be creating.

■ ***“Can these policies claim the market-participant exception?”***

To avoid the uncertainty of how a DCCD analysis would play out, a government ought to craft policies that enable it to claim the market-participant exception to the DCCD. For example, to insulate itself from a DCCD challenge, Iowa should either make the law truly evenhanded by removing the geographic reference or offer a subsidy instead of a tax credit. A switch to a subsidy could have an additional benefit: The overall costs of the program could be reduced by restricting the subsidy to locally produced food purchased from in-state farms.

Are there additional policy disadvantages?

In addition to the DCCD, policymakers should be

aware of two legal frameworks that could, but are unlikely to, affect laws on locally grown food: The Privileges and Immunities Clause of the Constitution, and international trade law (specifically the World Trade Organization’s General Agreement on Tariffs and Trade, known as GATT).

What are recommended best practices?

The authors recommend that policymakers work with local attorneys to ensure workable and applicable policies within their specific jurisdictions. To minimize the chances any law would be invalidated, drafters should:

- Decide whether to craft the law to fit under the market-participant exception to the DCCD.
- If the law is designed to fit under the market-participant exception:
 - It should cover only food bought by the government itself or by firms that contract directly with the government to provide food to schools, jails, and the like.
 - Subsidies to private entities to purchase locally grown foods should come in cash, not tax credits.
 - It should apply only to food purchasing and not attempt to favor other in-state industries by imposing “downstream” market requirements.
- If the law does not fit under the market-participant exception:
 - Define “locally grown” as broadly as possible, consistent with whatever demonstrable benefits flow from locally grown food.
 - At a minimum, include out-of-state food in the law’s definition of locally grown.

Resource

See the Sustainable Food Policy Project for guidance on developing sustainable food purchase policies for public and private entities: www.sustainablefoodpolicy.org

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