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The Implementation of the Food Safety Modernization Act and the Strength of the Sustainable Agriculture Movement

Samuel R. Wiseman[†]

In the wake of growing public concerns over salmonella outbreaks and other highly publicized food safety issues, Congress passed the FDA Food Safety Modernization Act in 2011, which placed more stringent standards on food growing and packaging operations. In negotiations preceding the Act's passage, farmers of local, sustainable food argued that these rules would unduly burden local agricultural operations or, at the extreme, drive them out of business by creating overly burdensome rules. These objections culminated in the addition of the Tester-Hagan Amendment to the Food Safety Modernization Act, which created certain exemptions for small farms. Proposed Food and Drug Administration (FDA) rules to implement the Act threatened to weaken this victory for small farm groups, however, prompting a loud response from small farmers¹ and local food proponents.

The FDA's second set of proposed rules, issued in September 2014 in response to these and other complaints, were, perhaps surprisingly, responsive to small farmers' concerns. Using comments submitted to the FDA, this article explores the responses of

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¹ The category of "small" farmers encompasses a range of farm sizes and is perhaps more accurately categorized as a group of small and mid-sized growers, as contrasted with clearly large agribusiness operations. For examples of definitions of farm sizes, see ALIDA CANTOR & RON STROCHLIC, CAL. INST. FOR RURAL STUD., BREAKING DOWN MARKET BARRIERS FOR SMALL AND MID-SIZED ORGANIC GROWERS 1 n.1 (2009), available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5081306> (noting that the agency's definition of "small farm" includes farms with less than \$250,000 in annual sales, but that in this study the authors relied on farmers' own characterizations of their operations as small or mid-sized). Many advocacy groups that commented on the rules represented a spectrum of farm sizes, from the very small, independent farm to the very large agribusiness. See, e.g., Comment from Carolina Farm Stewardship Ass'n on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 1 (Nov. 14, 2013), available at www.regulations.gov/contentStreamer?objectId=090000648147cc92&disposition=attachment&contentType=pdf (noting that its members "range from large-scale produce operations with over 1,000 acres of certified organic farmland" to "less-than-an-acre market gardens"); Comment from Slow Food USA on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 1 (Oct. 31, 2013), available at www.regulations.gov/contentStreamer?objectId=090000648148e54e&disposition=attachment&contentType=pdf (noting that the organization's "supporters include small- and mid-scale, sustainable and organic family farmers . . .").

the agriculture industry and public health organizations, as well as small farm groups, consumers of local food, and sustainable agriculture interests (which, for simplicity, I alternately describe as comprising the “sustainable agriculture” or “small farm” movement), to three aspects of the FDA’s proposed rules—involving manure application, on-farm packing activities, and exemptions for very small farms—to assess the strength of the sustainable agriculture movement. The rules involving manure application and on-farm packing, it turns out, reveal little about the independent political strength of the local food movement, as large industry groups also objected to these provisions. But for the third issue discussed here—exemptions for very small farms—the interests of sustainable agriculture groups were directly opposed to both industry and public health organizations, and yet prevailed. This suggests that the high salience of locavore and “slow food” issues might have allowed relatively small, dispersed interests to overcome traditional obstacles to political organization, and that the sustainable agriculture movement has indeed become an effective political force.

I. INTRODUCTION

Food is—not surprisingly, given its necessity and ubiquity—at the heart of multiple, important health issues affecting the American public. One is foodborne disease: The Centers for Disease Control and Prevention (CDC) estimates that pathogens borne by contaminated foods sicken millions, and kill thousands, each year.² Another is obesity—more than one-third of Americans are obese, contributing to a variety of conditions including heart disease, stroke, and diabetes—and other maladies associated with a poor diet.³ To combat the former problem, Congress passed the FDA Food Safety Modernization Act (FSMA) in 2011, “the most sweeping reform of our food safety laws in more than 70 years,”⁴ granting the Food and Drug Administration (FDA) broad new authority to prevent and detect contamination in most aspects⁵ of food production. Among other requirements, the Act directed the FDA to publish standards for produce safety within one year of the FSMA’s enactment—rules that would “establish science-based minimum standards for the safe production and harvesting” of raw fruits and vegetables to “minimize the risk of serious adverse health consequences or death.”⁶ These standards were to address “soil amendments, hygiene, packaging, temperature controls, animals in the growing area, and water,” and implementation would be prioritized for “raw agricultural products.”⁷ Since the FSMA was first proposed in Congress, however, there have been fears that the legislation will slow the move away from over-consumption of heavily processed foods that many believe is essential to improving the quality of American diets and ending the obesity epidemic. By imposing new and costly burdens on small producers, some warned, the FSMA would reduce access to fresh, local produce and other

² See *Foodborne Illness, Foodborne Disease, (Sometimes Called “Food Poisoning”)*, CDC, <http://www.cdc.gov/foodsafety/facts.html#howmanycases> (last updated Sept. 23, 2014).

³ See *Adult Obesity Facts*, CDC, <http://www.cdc.gov/obesity/data/adult.html> (last updated Sept. 9, 2014).

⁴ *FDA Food Safety Modernization Act (FSMA)*, FDA, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm> (last updated Apr. 26, 2015).

⁵ See, e.g., FDA Food Safety Modernization Act § 105, 21 U.S.C. § 350h(a)(1)(A) (2012) (directing the FDA to establish standards for the “safe production and harvesting” of raw fruits and vegetables).

⁶ *Id.*

⁷ *Id.* § 350h(a)(3)(B).

minimally-processed foods from farmers' markets, Community Supported Agriculture (CSAs), and farm sales.⁸

Due to these competing concerns, as well as the lobbying efforts of consumer groups, the food industry, and local agriculture proponents, exemptions for small producers from the FSMA's requirements have been, and will continue to be, extremely contentious. Efforts by small-farm advocates led to the introduction of the Tester-Hagan Amendment to the FSMA, which "provides an exemption from the produce safety standards if a farm can demonstrate a previous three-year average gross income of less than \$500,000 and over 50% of sales were to [consumers, restaurants, or retailers within a certain geographic region]."⁹ This amendment was harshly criticized by both food safety proponents and the agriculture industry, who observed that food safety issues can arise on farms of any size, but it was ultimately adopted.¹⁰ The fight did not end there, however. The enacted version of the FSMA left the FDA significant discretion in crafting rules and exemptions while directing the agency to

. . . provide sufficient flexibility to be applicable to various types of entities engaged in the production and harvesting of fruits and vegetables that are raw agricultural commodities, including small businesses and entities that sell directly to consumers, and be appropriate to the scale and diversity of the production and harvesting of such commodities.¹¹

After holding a variety of hearings and issuing updates on progress, the FDA finally issued rules in January 2013.¹² The "Produce Rule"—"Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption"—focused on produce that is generally consumed raw and aimed to minimize health risks of food by preventing "the introduction of known or reasonably foreseeable biological hazards into or onto produce."¹³ To avoid the contamination of food, the FDA proposed regulations including personnel training standards; limits on the type of water used to irrigate crops; standards for the use of soil amendments, manure, and sewage on crops; and rules regarding food packing and building sanitation.¹⁴ The FDA also proposed a rule on "Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food" (the "Preventive Controls Rule") in January 2013.¹⁵ Many provisions of the proposed Preventive Controls Rule related to Section

⁸ See Comment from Carolina Farm Stewardship Ass'n, *supra* note 1, at 18-19.

⁹ Gregory M. Schieber, *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, 248 (2013) (citing 21 U.S.C. § 350h(f)(1)).

¹⁰ See Laurie J. Beyranevand, *Balancing Food Safety and Burdens on Small Farms*, 28 NAT. RESOURCES & ENV'T 17, 18 (2013). One compromise that led to the adoption of the Tester-Hagan Amendment was the addition of the "exemption withdrawal" provisions in the Act. See 21 U.S.C. § 350g(l)(3)(A) (providing that if the Secretary is investigating a "foodborne illness outbreak that is directly linked to a qualified facility" under the Act, and if the qualified facility is exempt from the hazard-analysis and risk-based preventive controls required under the Act, the Secretary may withdraw the facility's exemption after making certain safety-based determinations); *id.* § 350i(f)(3)(A) (providing a similar provision for farms linked to outbreaks).

¹¹ 21 U.S.C. § 350h(a)(3)(A).

¹² See *What's New, Actions Implemented Under the FSMA*, FDA, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm257986.htm> (last updated May 1, 2015).

¹³ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504, 3505 (proposed Mar. 20, 2013) (to be codified at 21 C.F.R. pt. 16, 112).

¹⁴ See *id.* at 3513-17.

¹⁵ Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 78 Fed. Reg. 3646 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pt. 1, 16, 106, 110, 114, 117, 120, 123, 129, 179, 211); see also Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food; Correction, 78 Fed. Reg. 17,142 (proposed Mar. 20,

418 of the Food, Drug & Cosmetic Act, which, as amended by the FSMA, required the FDA to issue regulations for conducting hazard analyses of food handling and to implement preventive controls, among other actions.¹⁶ The FDA's proposed rules therefore addressed practices associated with managing, packing, and holding human foods, such as bagging and canning foods, and concerns about unsanitary conditions within these processes.¹⁷ Under the rules, covered facilities were to register with the FDA and "have and implement a written food safety plan" indicating safety hazards at the facility and associated preventive controls, monitoring, corrective action, and verification, as well as a recall plan for when preventive measures were inadequate to protect consumer safety.¹⁸

These proposed rules generated a great deal of comment and criticism from small farm and sustainable agriculture groups and consumers of local food.¹⁹ They objected to, *inter alia*: proposed restrictions on the use of manure fertilizer, which is essential to organic farming; the inclusion of animal feed and other non-produce in the calculation of food sales limits for various exemptions, which potentially limits the ability of existing non-produce farms to experiment with growing produce; differing requirements for on-farm packing and holding of agricultural products based on the ownership of the agricultural products; required documentation for operations qualifying under the Tester-Hagan formula and the potential application of these documentation requirements to small-scale pickling and canning operations; and procedures for the withdrawal of exemptions.²⁰ As National Sustainable Agriculture Coalition (NSAC) Policy Specialist Sophia Kruszewski put it, the "rules must not only ensure a safe food supply, but also that family farms can thrive and that consumers can access foods that are safe, healthy, and sustainably produced, including fresh food from local producers."²¹

The FDA issued revised proposed rules addressing some of these concerns in September 2014.²² These rules, which are now available for further public comment, suggest that the small farm movement has a relatively great amount of lobbying power. Indeed, post-revision, NSAC is "cautiously optimistic . . . that some of [its] concerns have been addressed."²³ In the context of public choice theory, which would predict that numerous, dispersed stakeholders with individually minor stakes in federal decisions would have less influence in the political process than large, well-established

2013) (to be codified at 21 C.F.R. pt. 1, 16, 106, 110, 114, 117, 120, 123, 129, 179, 211) (correcting typographical errors, stylistic errors, and a mistake regarding a reference date).

¹⁶ Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 78 Fed. Reg. at 3658.

¹⁷ See *id.* at 3651 (discussing current practices in this area and priorities for improvement).

¹⁸ *Id.* at 3672.

¹⁹ As introduced above, for simplicity, I alternately describe this group of advocates as comprising the "sustainable agriculture" or "small farm" movement in this Article.

²⁰ See Comment from Carolina Farm Stewardship Ass'n, *supra* note 1, at 8, 32, 51; see also Tom Philpott, *4 Foods that Could Disappear if New Food Safety Rules Pass*, MOTHER JONES (Nov. 6, 2013, 7:00 AM), <http://www.motherjones.com/tom-philpott/2013/11/will-new-food-safety-law-small-farms-organic-FSMA>.

²¹ Release: *FDA's Revised Draft Food Safety Rules for Farms Responsive to NSAC's Concerns*, NAT'L SUSTAINABLE AGRIC. COAL. (Sept. 19, 2014), <http://sustainableagriculture.net/blog/release-fdas-revised-draft-food-safety-rules-for-farms-responsive-to-nsacs-concerns>.

²² See Standards for the Growing, Harvesting, Packing, and Holding of Produce For Human Consumption, 79 Fed. Reg. 58,434 (proposed Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 112); see also Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, 79 Fed. Reg. 58,524 (proposed Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 1, 16, 117).

²³ NAT'L SUSTAINABLE AGRIC. COAL., *supra* note 21.

firms and industry groups,²⁴ this is perhaps surprising. While it is difficult to draw direct causal lines between groups' comments and other lobbying and an agency's decision to modify a rule, this article will examine the responses of small farms, industry, and public health organizations to three revised provisions in the supplemental rules—relating to the use of manure fertilizer, on-farm packing activities, and the sales threshold for exemption from the Produce Rule—to explore the small farm movement's influence.

This Article begins in Part II by briefly describing each of these three provisions of the FDA's original proposed rules, small farm criticisms of the rules, and the changes in the recently issued supplemental rules. Part III then explores the positions of larger industry groups as well as public health organizations in order to determine where their interests diverge from those of the small farm movement, and thus where the changes to the rules may reflect the growing power of the small farm movement. Parts II and III both include examples from a sampling of commenters on the proposed rule, including groups representing a range of farm sizes, produce handlers and marketers, and food safety nonprofits.²⁵ As shown below, the manure fertilizer and packing rules were attacked by large industry (and attracted relatively little attention from public health organizations), thus allowing small farm groups to benefit from their resources and influence. The exemption of "very small" farms from the Produce Rule, however, drew negative comments from large agricultural interests and some public health groups, yet was expanded in the supplemental rule. This result, along with the adoption of the Tester-Hagan Amendment, suggests that the sustainable agriculture movement may indeed be growing in influence, and that the importance of the issue to both consumers and producers of local, sustainable products may have allowed these relatively small, dispersed interests to overcome the organizational barriers that usually impede effective participation in the political process.²⁶

II. THREE CHANGES IN THE SUPPLEMENTAL RULES

A. MANURE AND COMPOST APPLICATION UNDER THE PRODUCE RULE

One focus of the FDA rules was the use of fertilizers such as raw and composted manure. These soil amendments can contaminate food during application, or when food contacts the amended soil. Under the original proposed Produce Rule untreated manures that could potentially contact produce had to be applied at least nine months before harvest, unless the covered farm could demonstrate that alternative techniques

²⁴ See, e.g., RONALD A. CASS ET AL., ADMINISTRATIVE LAW 8 (6th ed. 2011) ("Public choice theory . . . focuses on the way in which individual preferences will be aggregated and expressed through public decisionmaking processes . . .").

²⁵ I selected comments that provided the most relevant examples of the broad range of interests and that best demonstrated how these interests differed and converged. This Article does not comprehensively describe the comments.

²⁶ Recent farm bills also suggest that small farm influence might be expanding. The 2002 Farm Bill created the Farmers Market Promotion Program, which provides grants for "assisting in the improvement and expansion of[] domestic farmers' markets, roadside stands, community-supported agriculture programs, and other direct producer-to-consumer market opportunities." Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 3005(b)(1)(A) (2012). The broader Farmers Marketing and Local Food Promotion Program (FMLFPP) added by Congress in 2014 provides grants to a larger set of participants, including those who help farmers gain access to consumers. For a summary, see *Farmers Market and Local Food Promotion Program*, NAT'L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/local-food-systems-rural-development/farmers-market-promotion-program> (last updated Apr. 2015).

adequately avoided food contamination.²⁷ Manures treated by a composting process, which met certain microbial standards, required a minimum forty-five-day interval between application and produce harvest.²⁸ The rules prohibited the use of human waste as fertilizer, with the exception of sewage sludge biosolids applied under other regulations.²⁹ The rules were somewhat less stringent with respect to working animals grazing in fields while produce was grown, although they required an “adequate waiting period between grazing and harvesting” of covered produce to ensure produce safety.³⁰

A variety of groups representing small farmers argued that many small, sustainable, and/or organic operations would be unable to comply with the proposed manure and compost rules for a variety of reasons. Some commenters observed that the required wait time between manure application and produce harvest was longer than the growing season in some regions,³¹ forcing farmers to leave a field fallow for an entire season after manure application and plant the following year³²—a practice that could be economically infeasible. Further, several commenters noted that the proposed FDA rules were more stringent than certain standards that had to be met if farmers chose to be certified as organic under the USDA’s National Organic Program (NOP).³³ They typically described this problem as a compliance issue, suggesting that complying with the organic standards would cause farmers to be out of compliance with the FDA standards, or vice versa.³⁴ More accurately, some of the FDA’s proposed regulations were simply more stringent than the NOP standards, and some were less stringent; in some cases, a farmer could comply with one standard or regulation but not both. For crops with edible portions that touch soil, the NOP standards require a four-month wait between raw manure application and harvest, whereas the FDA’s proposed standards required a nine-month wait for similar crops.³⁵ And for composted manure applied to crops where manure never comes in contact with the crops, the FDA proposed a forty-five-day interval between application and harvesting, whereas the NOP standards require no wait.³⁶ The NOP standards are more stringent than the

²⁷ Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, *supra* note 13, at 513 (providing a nine-month “minimum application interval”).

²⁸ *Id.*

²⁹ *Id.* at 511.

³⁰ *Id.* at 516.

³¹ Comment from Nat’l Sustainable Agric. Coal. on the Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Rule, Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 19 (Nov. 15, 2013), *available at* <http://sustainableagriculture.net/wp-content/uploads/2008/08/NSAC-EIS-Scoping-Notice-Comments-FINAL-11-15-13.pdf>.

³² *Id.*

³³ *See id.* at 22.

³⁴ *See, e.g., id.* (“In practice, however, the Rule may create a preference for conventional growing due to its restrictions on raw manure and compost application, and the Rule’s corresponding preference for synthetic fertilizers. These preferences will severely compromise the ability of certified organic producers to comply with the National Organic Program regulations.”); *see also* Comment from Ne. Sustainable Agric. Working Grp. on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 7 (Nov. 26, 2013), *available at* www.regulations.gov/contentStreamer?objectId=090000648147f41a&disposition=attachment&contentType=pdf (“Because the biological soil amendment standard requirements directly conflict with NOP regulations . . . [c]ertified organic producers would be forced out of compliance with NOP regulations . . .”).

³⁵ The FDA’s proposed rules defined contact between soil and crops differently than the USDA, providing that crops that did not come into contact with manure during application but later contacted the manure-amended soil required a nine-month wait.

³⁶ *Compare* Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504, 3637 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pt. 16, 112) with 7 C.F.R. 205.203(c)(1) (2015).

FDA's proposed rule for raw manure application to crops that do not touch soil; the FDA requires no time interval between application and harvest, and the NOP standards require a ninety-day interval.³⁷ The Northeast Sustainable Agriculture Working Group, a coalition of small farms and supporters of small farm systems in twelve states,³⁸ concluded that "[i]f FDA adopts these intervals in the final rule and does not change these intervals to align with NOP requirements, then FDA will be forcing organic farmers out of compliance with NOP regulations and actively discouraging farmers from becoming certified organic."³⁹ The Midwest Organic and Sustainable Education Service⁴⁰ and National Organic Coalition⁴¹ submitted separate comments using nearly identical language, and the Oregon State University Small Farmers Program argued that the "FDA should amend the rule to match NOP regulations, which rest on a solid scientific foundation."⁴² The National Young Farmers Coalition made a similar observation but suggested that the manure rules were not only inconsistent with NOP standards but also with broader farming practices, arguing that "the proposed intervals would effectively eliminate the use of untreated biological soil amendments of animal origin (including raw manure, aged manures, and cool-composted amendments with any ingredients of animal origin) in most production systems, and create significant barriers to the use of compost."⁴³ According to these commenters, limiting or eliminating these methods would force farmers to use other, less sustainable methods such as "greater reliance on costly agrichemicals."⁴⁴

For the proposed manure rule, the FDA substantially modified its requirements: It changed the forty-five-day wait for composted manure to zero days, "reserved" the nine-month interval for further study and indicated that it would not "take exception" to farms following the NOP standards.⁴⁵

B. ON-FARM PACKING UNDER THE PREVENTIVE CONTROLS RULE

Small farms often rely on larger farms, which collect produce from a variety of small farms in a region, to pack, hold, and market their produce.⁴⁶ As the Organic

³⁷ See Comment from Ne. Sustainable Agric. Working Grp., *supra* note 34, at 6-7 (summarizing the differences between the NOP and FDA rules).

³⁸ See *id.* at 1.

³⁹ *Id.* at 6.

⁴⁰ See Comment from Midwest Organic & Sustainable Educ. Serv., to FDA (Nov. 15, 2013), *available at* <http://mosesorganic.org/wp-content/uploads/Policy/MOSES-comments-on-Produce-rule-Nov-15-2013.pdf>.

⁴¹ See Comment from Ctr. for Food Safety on the Food Safety Modernization Act Produce Rule (Nov. 19, 2013), *available at* http://www.nationalorganiccoalition.org/_literature_119611/CFS_Comments_to_FDA_on_the_Food_Safety_Modernization_Act_%28FSMA%29.

⁴² Comment from Or. State Univ. Extension Small Farms Program, to FDA 3 (Oct. 28, 2013), *available at* http://smallfarms.oregonstate.edu/sites/default/files/osu_smallfarmprogram_comments_proposed_produce_rule_28oct2013.pdf.

⁴³ Comment from Nat'l Young Farmers Coal. on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 9 (Dec. 15, 2014), *available at* <http://www.youngfarmers.org/wp-content/uploads/2014/12/NYFC-Produce-Rule-Comments-December-2014.pdf>.

⁴⁴ *Id.*

⁴⁵ See Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. 58,434, 58,458 (proposed Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 112).

⁴⁶ See Comment from Organic Trade Ass'n 8 (Nov. 18, 2013), *available at* https://ota.com/sites/default/files/indexed_files/OTA_ProduceSafety_Final_11-18-13.pdf ("It's not uncommon for several smaller farms to send their produce to a larger farm with on-site packing sheds where the produce is packed for distribution.").

Trade Association explains, “[t]hese kinds of situations offer a combination of production, aggregation, distribution, and marketing services, and make it possible for producers to gain entry into new and additional markets that would be difficult or impossible to access on their own.”⁴⁷ Farmers were therefore alarmed by the potential impacts of proposed FDA safety rules for packing facilities that, although not directly applicable to farmers who grow their own food, could hinder packing facilities’ operations and prevent these facilities from accepting certain produce.

In one of the more contentious portions of the proposed Preventive Controls Rule, the FDA defined various businesses that hold and pack produce that would not be required to follow hazard analysis and risk-based preventive control requirements. Facilities defined as “farms”—those that grow and pack their own produce⁴⁸—were not covered by the Rule. Specifically, harvesting and washing food on the farm on which it was grown did not count as “manufacturing” or “processing” food and thus was not covered by the Rule.⁴⁹ However, “farm mixed-type facilities,” involving farms that grow crops and/or raise animals and also pack or hold *other producers’* produce, were covered and thus had to comply with strict handling practices to prevent food contamination during packing and similar processing activities.⁵⁰

Interests representing the sustainable food movement, including small farms, objected. The Carolina Farm Stewardship Association, which advocates for “a sustainable regional food system centered on organic agriculture and local food,”⁵¹ argued that treating the harvesting and washing of crops as non-processing or non-manufacturing activity only if it occurred on the farm “fails to account for the joint and cooperative nature of harvesting activities in certain circumstances – including the CSA, food hub, and farm incubator”⁵² Slow Food USA similarly argued:

FDA should change the definitions of “farm,” “facility,” and “manufacturing/ processing” to align with the common-sense understanding and practice that the basic packing, handling, and storing activities that farms have traditionally performed in preparing intact fruits and vegetables for marketing – including to someone else’s raw agricultural commodities – do not make a farm a “facility” that must register with FDA and that is subject to the Preventive Controls Rule.⁵³

The Ohio Ecological Food and Farm Association submitted a separate but nearly identical comment,⁵⁴ with other small farm and sustainable consumer groups making

⁴⁷ *Id.*

⁴⁸ See Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. at 58,448-49.

⁴⁹ *Id.* at 58,450; see also Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504, 3540 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pt. 16, 112).

⁵⁰ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. at 58,449.

⁵¹ Comment from Carolina Farm Stewardship Ass’n, *supra* note 1, at 1.

⁵² *Id.* at 17.

⁵³ Comment from Slow Food USA, *supra* note 1, at 15. The language used in Slow Food USA’s commentary was similar to twenty-six other submitted comments. See *id.*

⁵⁴ See Comment from Ohio Ecological Food & Farm Ass’n on the Proposed Rule for Standards for the Growing, Harvesting, Packing and Holding of Produce for Human Consumption (Nov. 15, 2013), available at www.regulations.gov/contentStreamer?objectId=09000064814844b5&disposition=attachment&contentType=pdf.

similar comments.⁵⁵ The California Farm Bureau, which represents large as well as small farm interests, noted that the rule hurt small farmers:

Small growers who fall under a Produce Rule exemption . . . may be defined as a facility [under the Preventive Controls Rule] if they sell crops from another farm. Small growers sometimes sell produce from their neighbor's farm, which in this case would qualify them as a mixed-type facility. We do not believe this is reasonable.⁵⁶

And indeed, in its supplemental rules, the FDA revised the definition of “farm” in both the Produce Rule and the Preventive Controls Rule to allow the packing and holding of crops, regardless of where grown.⁵⁷

C. THE SALES THRESHOLD FOR EXEMPTION FROM THE PRODUCE RULE

In its initial Produce Rule, the FDA proposed to exempt farms with “an average annual value of food sold during the previous three-year period of \$25,000 or less.”⁵⁸ Small farm groups argued for an even more expansive exemption—one that would exempt from the Produce Rule farms that sold \$25,000 in produce annually, rather than \$25,000 in all food sales. A large number of these groups commented that the “FDA should consider covering farms based on a calculation of sales of only those foods covered by the Rule,”⁵⁹ or used similar language.⁶⁰ As NSAC explained,

⁵⁵ See, e.g., Comment from Ne. Sustainable Agric. Working Grp., *supra* note 34, at 18 (“Packing and Holding Someone Else’s Fruits and Vegetables Should Not Make a Farm a ‘Facility.’”); Comment from Pa. Ass’n for Sustainable Agric. on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (Nov. 14, 2013), available at www.regulations.gov/contentStreamer?objectid=09000064814801d2&disposition=attachment&contentType=pdf (“In the ‘farm’ definition, FDA should . . . [i]nclude packing (and packaging) and holding of others’ RACs . . .”).

⁵⁶ Comment from Cal. Farm Bureau Fed’n 1 (Nov. 22, 2013), available at <http://www.regulations.gov/contentStreamer?objectid=09000064814933d2&disposition=attachment&contentType=pdf>.

⁵⁷ See Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. 58,434, 58,439 (proposed Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 112) (explaining that under the “amended proposed definition of ‘farm,’ farms that pack or hold produce [raw agricultural commodities (RACs)] that are grown on a farm that is under a different ownership would no longer necessarily be ‘farm mixed-type facilities’ subject to the requirements of the Preventive Controls for Human Food regulation”); see also Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food, Supplemental Notice of Proposed Rulemaking, 79 Fed. Reg. 58,476, 58,532 (Sept. 29, 2014) (“We tentatively conclude that it is appropriate for packing and holding of RACs, including produce, conducted on farms to remain within the farm definition. This would result in packing and holding of covered produce being subject to the proposed produce safety rule, regardless of whether the activity is conducted on the farm’s own produce or whether the activity is conducted on others’ produce.”).

⁵⁸ Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504, 3505 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pt. 16, 112).

⁵⁹ Comment from Nat’l Sustainable Agric. Coal. on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 4 (Nov. 15, 2013), available at <http://sustainableagriculture.net/wp-content/uploads/2008/08/NSAC-Produce-Rule-Comments-FINAL-11-15-13.pdf>.

⁶⁰ See, e.g., Comment from Carolina Farm Stewardship Ass’n, *supra* note 1, at 22 (“The exclusion from the coverage of the Produce Rule for farms with gross sales under \$25,000 should be triggered based on sales of covered produce, not sales of ‘all food.’”); Comment from Midwest Organic & Sustainable Educ. Serv., *supra* note 40, at 4 (“The \$25,000 Gross Sales Exemption Should be Retained, But Modified to Apply Solely to Covered Produce as Provided by FSMA”); Comment from Nat’l Organic Coal. on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 4 (Nov. 14, 2013), available at <http://www.regulations.gov/contentStreamer?objectid=0900006481488635&disposition=attachment&contentType=pdf> (“NOC believes that the exemption for farms with \$25,000 or less in gross sales should be based on the value of covered produce, not all food.”); Comment from Ne.

In § 112.3(c), “food” is defined as “food as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act... Section 201(f) of the [Food, Drug, & Cosmetic Act], in turn, defines “food” as “(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.” The definition of food is very broad and encompasses food that is not covered by the Produce Rule. This will be a problem for producers that have part of their operation growing non-covered food....⁶¹

Similarly, the Midwest Organic and Sustainable Education Service argued that “the diversification of farm production, in many cases adding another income stream to a small or mid-scale fresh produce operation, has been an important strategy to protect the economic viability of the family farm,”⁶² and would be endangered by the proposed definition.

As the Northeast Sustainable Agriculture Working Group noted:

Focusing the definition on regulated product instead of all food would provide some flexibility in the rule for beginning farmers, entrepreneurs trying to launch value-added food businesses, and family farmers who have diversified operations through value-added processing. . . . Northeast farmers and food makers need to be able to diversify operations *without inappropriate regulations and high compliance costs* in order to meet consumer demand.⁶³

Once again, in the supplemental Produce Rule, the FDA made the desired change, substituting “produce” for “food” in the \$25,000 sales threshold for exemption from the Produce Rule.⁶⁴

III. OVERLAPPING AND DIVERGING INTERESTS, AND THE POWER OF THE SMALL FARM MOVEMENT

Although sustainable agriculture groups submitted numerous comments, they were not the only interests lobbying the FDA. In order to get a better sense of where lobbying by small farm groups may have been decisive, this Part examines the positions of two other major stakeholders: organizations that primarily or exclusively represent large agriculture interests, and public health and consumer groups concerned about (inter alia) food safety.

A. MANURE AND COMPOST APPLICATION UNDER THE PRODUCE RULE

An examination of comments from groups representing large agriculture shows that, with respect to manure and compost application, their interests aligned with, or at

Sustainable Agric. Working Grp., *supra* note 34, at 14 (“Establish an Exemption for Facilities With an Average Annual Monetary Value of Covered Product of \$25,000 or Less”); Comment from Or. State Univ. Extension Small Farms Program, *supra* note 42, at 5 (“This should be changed so that the income threshold is based only on food covered by the rule.”); Comment from Slow Food USA, *supra* note 1, at 3 (“The \$25,000 Gross Sales Exemption Must be Fixed to Apply Solely to Covered Produce as Provided by FSMA.”).

⁶¹ Comment from Nat’l Sustainable Agric. Coal., *supra* note 59, at 45-46.

⁶² Comment from Midwest Organic & Sustainable Educ. Serv., *supra* note 40, at 4.

⁶³ Comment from Ne. Sustainable Agric. Working Grp., *supra* note 34, at 14.

⁶⁴ See Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504, 3505 (proposed Mar. 20, 2013) (to be codified at 21 C.F.R. pt. 16, 112).

least did not strongly diverge from, those of sustainable agriculture. The American Farm Bureau, which represents both large and small farms, argued that “[t]he current accepted standard is 120 days between application of soil amendments and harvest” and “strongly encourage[d]” the FDA to use this standard.⁶⁵ The California Farm Bureau noted a division within its membership over whether to exempt very small farms from the Produce Rule, but its comment did not reflect a division on this issue, instead echoing the national organization’s comments.⁶⁶ Similarly, numerous state departments of agriculture supported adoption of the NOP standard.⁶⁷ On the other hand, the Produce Marketing Association, the “largest trade association representing companies in the fresh fruits and vegetables industry,”⁶⁸ including growers, supported the 270 day interval, arguing that it is “important for the Agency to affirm that the USDA NOP program [which allows a shorter application interval] assures the organic integrity of produce and USDA NOP is not a food safety program.”⁶⁹

Some public health and consumer groups aligned with small farm interests on this issue, as they appeared to prioritize the importance of organics and to believe that the organic standards, which allow manure application closer to harvest, were not problematic. The American Public Health Association, which “represents a diverse community of public health professionals who have championed the health of all people and communities,”⁷⁰ used similar language to that submitted by several farm groups, commenting:

If FDA adopts these intervals in the final rule and does not change these intervals to align with NOP requirements, then FDA will be forcing organic farmers out of compliance with NOP regulations and actively discouraging farmers from becoming certified organic.⁷¹

The Consumers Union, the “advocacy arm of Consumer Reports,”⁷² also argued for decreasing the interval between manure application and harvest from nine to four months.⁷³ Nonetheless, at least one consumer group appeared to be more concerned about potential bacteria from manure than they were about encouraging organics. STOP Foodborne Illness, a “national non-profit public health organization” that

⁶⁵ Comment from Am. Farm Bureau Fed’n 10 (Nov. 21, 2013), www.regulations.gov/contentStreamer?objectId=090000648148bec&disposition=attachment&contentType=pdf.

⁶⁶ See Comment from Cal. Farm Bureau Fed’n, *supra* note 56.

⁶⁷ See, e.g., Comment from Fla. Dep’t of Agric. & Consumer Servs. (Nov. 9, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648148e47f&disposition=attachment&contentType=pdf>; Comment from Mass. Dep’t of Agric. Res. 1 (Nov. 22, 2013), <http://www.regulations.gov/contentStreamer?objectId=09000064814915ba&disposition=attachment&contentType=pdf> (“FSMA should be unified with NOP”); Comment from Wash. State Dep’t of Agric. (Nov. 6, 2013), <http://www.regulations.gov/contentStreamer?objectId=0900006481472eb3&disposition=attachment&contentType=pdf>.

⁶⁸ Comment from Produce Mktg. Ass’n on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 2 (Nov. 15, 2013), www.regulations.gov/contentStreamer?objectId=090000648147f68b&disposition=attachment&contentType=pdf.

⁶⁹ *Id.* at 40.

⁷⁰ Comment from Am. Pub. Health Ass’n on the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 1 (Nov. 18, 2013), www.regulations.gov/contentStreamer?objectId=090000648148846a&disposition=attachment&contentType=pdf.

⁷¹ *Id.* at 6.

⁷² Comment from Consumers Union on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 1 (Nov. 22, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648148ed8b&disposition=attachment&contentType=pdf>.

⁷³ *Id.* at 2.

represents “over a thousand victim advocates,”⁷⁴ commented: “[i]n order to best protect consumers from the risk of bacteria commonly found in manure, FDA should: . . . [m]aintain the proposed 270 day interval between application and harvest for untreated manure”⁷⁵

It appears that in the case of the manure rules, for the most part, industry and public health groups either supported the position taken by the sustainable agriculture groups, or at least did not strenuously oppose it. Thus, while the FDA’s shift is clearly good news for the sustainable agriculture movement, it does not in itself bespeak significant lobbying strength.

B. ON-FARM PACKING UNDER THE PREVENTIVE CONTROLS RULE

With respect to the rules governing on-farm packing activities, the interests of large and small agriculture groups aligned even more clearly than in the case of the manure provisions. Several industry commenters objected to the distinction between the packing of agricultural products grown on a particular farm and all others, arguing, for example, for a system in which “all operations that serve the primary ‘farm purpose’ of growing, packing, cooling, and holding intact produce fall under the same standards, regardless of ownership of the facility or ownership of the fruits and vegetables that are being packed or held.”⁷⁶ United Fresh Produce similarly noted that it is common for “packing and holding facilities” to “aggregate fruits and vegetables from more than one grower” and commented: “[w]e strongly recommend that all operations that serve the primary ‘farm purpose’ of growing, packing, cooling and holding intact produce fall under the same standards, regardless of ownership of the facilities or ownership of the fruits and vegetables that are being packed or held.”⁷⁷ The American Farm Bureau described the proposal as “simply illogical,” arguing that “[m]andating that washing or packaging the neighboring farm’s produce makes a farm a ‘mixed-type’ facility directly contradicts FSMA’s requirement that the regulations provide sufficient flexibility and acknowledge risk variances.”⁷⁸

As with the manure and compost restrictions under the Produce Rule, some public health and consumer groups aligned with small and large farms in addressing the Preventive Controls exemptions, while others did not. For example, the American Public Health Association broadly argued that “[e]stablishments and farms that pack and hold fruits and vegetables should not be classified as facilities.”⁷⁹ The Center for Science in the Public Interest largely agreed with the FDA approach but objected to any further broadening of the term “farm” that would exempt more activities from the

⁷⁴ Comment from STOP Foodborne Illness on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, §112.21 1 (Nov. 22, 2013), www.regulations.gov/contentStreamer?objectId=0900006481493643&disposition=attachment&contentType=pdf.

⁷⁵ *Id.* at 8.

⁷⁶ Comment from Fla. Fruit & Vegetable Ass’n 4 (Nov. 13, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648147a978&disposition=attachment&contentType=pdf>; Comment from Tex. Int’l Produce Ass’n 8 (Nov. 14, 2013),

<http://www.regulations.gov/contentStreamer?objectId=090000648147bc3c&disposition=attachment&contentType=pdf>; *see also* Comment from Fresh Produce Ass’n of the Ams. 3 (Nov. 22, 2013), <http://www.regulations.gov/contentStreamer?objectId=0900006481492b93&disposition=attachment&contentType=pdf>.

⁷⁷ Comment from United Fresh Produce Ass’n on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 8 (Nov. 15, 2013), <http://www.regulations.gov/contentStreamer?objectId=0900006481482cb7&disposition=attachment&contentType=pdf>.

⁷⁸ Comment from Am. Farm Bureau Fed’n, *supra* note 65, at 4.

⁷⁹ Comment from Am. Public Health Ass’n, *supra* note 70, at 12.

Preventive Controls Rule.⁸⁰ At least one public health group, on the other hand, supported FDA's original approach.⁸¹

Small and large agricultural interests were largely in agreement on the issues of manure application and the application of food safety rules to farms that pack others' produce but not their own, while public health and consumer groups voiced preferences on both sides of each of these issues. The small farm exemption from the Produce Rule tells a different story, though—one that suggests a relatively strong small farm lobby that is able to counter, to some extent, large agricultural interests.

C. THE SMALL FARM EXEMPTION FROM THE PRODUCE RULE

In contrast to the provisions discussed above, the exemption from the Produce Rule for very small farms put sustainable agriculture groups at odds with both industry and public health organizations. As noted above, the proposed rule exempted farmers with all food sales under \$25,000 annually, and, despite substantial opposition, the FDA's supplemental rule significantly expanded this exemption⁸² by applying the threshold solely to produce.

The Produce Marketing Association argued that exempting small farms based on their revenue "is not science- or risk-based" and that [p]roduce contamination can occur in any operation that uses unsafe processes and practices."⁸³ The Food Marketing Institute submitted a separate but very similar comment.⁸⁴ And the California Farm Bureau, which represents both small and large farmers, noted the split in its membership and thus remained neutral, observing:

Those who oppose this proposed exemption do so because a foodborne illness is blind to size. Only a few contaminated products would shut down the domestic market for that product, causing irreparable harm. Those who support the exemption believe the impact of such a small operation is less concerning.⁸⁵

Public health and consumer groups, moreover, tended to agree with the large agricultural commenters. The American Academy of Pediatricians argued that "[a]ll

⁸⁰ Comment from Ctr. for Sci. in the Pub. Int. on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Subpart I—Standards Directed to Domesticated and Wild Animals 1 (Nov. 14, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648147e644&disposition=attachment&contentType=pdf>.

⁸¹ Comment from STOP Foodborne Illness, *supra* note 74, at 3 ("We believe that it is reasonable for FDA to include in the definition of 'farm' what it is calling a 'farm mixed-type facility.' We also agree with the five organizing principles for determining which activities (e.g., harvesting, packing, holding) should be considered within this definition set out in the Preamble . . .").

⁸² See Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. 58,434, 58,437 (proposed Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 112) ("[W]e are proposing to amend paragraph (a) of proposed § 112.4 to establish that if you are a farm or farm mixed-type facility with an average annual monetary value of produce (as 'produce' is defined in § 112.3(c)) sold during the previous 3-year period of more than \$25,000 (on a rolling basis), you are a 'covered farm' subject to this part, and that if you are a 'covered farm' subject to this part, you must comply with all applicable requirements of this part when you conduct a covered activity on 'covered produce.'").

⁸³ Comment from Produce Mktg. Ass'n, *supra* note 68, at 25.

⁸⁴ Comment from Food Mktg. Inst. on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption 4 (Nov. 22, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648149328a&disposition=attachment&contentType=pdf> ("This exclusion is not science or risk-based. Produce contamination can occur in any operation that uses unsafe processes and practices.").

⁸⁵ Comment from Cal. Farm Bureau Fed'n, *supra* note 56, at 13.

produce growers should produce safe products, regardless of their size.”⁸⁶ STOP Foodborne Illness asserted that “pathogens are not farm size selective,”⁸⁷ and the National Association of County and City Health Departments similarly commented that “[t]he risk [to public health] is present regardless of the size of business and therefore the implementation dates for the rules should not be tied to the size of the business based on revenue.”⁸⁸ With respect to the small farm exemption, then—unlike the manure rule and on-farm packing rule—the sustainable agriculture lobby was successful despite fairly unified opposition by large agriculture and public health groups.

IV. CONCLUSION

The comments discussed here, of course, only reveal the official position of these organizations, and not the amount of lobbying effort (or lack thereof) behind them. A number of other factors could have also influenced the rules—influential FDA staff members or senators might have personally prioritized the issue, for example, on the basis of individual values or a broad sense of good will toward proponents of local foods as healthy foods, or the FDA may simply have found the arguments of the small farm interests compelling.⁸⁹ Further, the typical public choice dynamic involving individually small (but collectively large) interests might not have applied in this case. As discussed above, it appears that some of the rules would have substantially impacted small farms by prohibiting common growing practices. For farms with small annual sales, these effects could be quite large, thus incentivizing participation in the political process. Nonetheless, given the weight of the opposing interests, the FDA’s decision to maintain, and even to broaden, the small farm exemption from the Produce Rule suggests that the sustainable agriculture movement has become a potent lobbying force. In light of the small and diverse nature of the interests it represents, this is perhaps surprising. The explanation for the FDA’s decision may lie in the importance of the issue to sustainable agriculture advocates: Despite their relatively small economic stakes, proponents of local food have the zeal needed to effectively organize and lobby. James Gray Pope observed in 1990 that the public choice theory of politics is difficult to refute, and noted the “systems-thinking” we tend to employ in this area.⁹⁰ The chances of designing a political system that successfully “maintain[s] a steady, high level of nationwide political participation”⁹¹ in order to counter interest group politics are slim indeed. Yet Pope suggested that this approach overlooks the fact that “[o]ur history has from the outset been characterized by periodic outbursts of democratic participation”—“republican moments” where “social movements exert direct popular power on governmental and private institutions.”⁹²

⁸⁶ Comment from Am. Acad. of Pediatricians 4 (Nov. 14, 2013), <http://www.regulations.gov/contentStreamer?objectId=090000648147f43d&disposition=attachment&contentType=pdf>.

⁸⁷ Comment from STOP Foodborne Illness, *supra* note 74, at 22.

⁸⁸ Comment from Nat’l Ass’n of Cnty. & City Health Officials on Food and Drug Administration Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (Nov. 15, 2013), www.regulations.gov/contentStreamer?objectId=090000648148323e&disposition=attachment&contentType=pdf.

⁸⁹ See generally Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (describing a range of agency motivations).

⁹⁰ See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 289-90 (1990).

⁹¹ *Id.* at 291.

⁹² *Id.* at 292-93.

The seeming success of the local food movement in influencing the FDA is, of course, not an achievement on remotely the same scale as the momentous changes Pope was describing. Nonetheless, the same principle may be at work: The deeply felt and widely spread sentiments behind the local food movement appear to have provided the motivation for an unusual degree of participation in the political process.⁹³ With dire statistics on obesity and rising healthcare costs, Michelle Obama's highly publicized planting of a vegetable garden on the White House lawn,⁹⁴ and a growing number of devoted readers of Michael Pollan's and others works on local, sustainable food,⁹⁵ the focus on small farms and slow food has grown substantially in recent years.⁹⁶ A small yet growing and devoted portion of the population cares deeply about the food that it consumes, citing not only to superior freshness and taste but also the social benefits, such as supporting local businesses and more humane treatment of livestock. While many food consumers do not have the time or patience to plant a backyard garden, they flock to farm-to-table restaurants, farmers' markets and community-supported agriculture, and they are increasingly willing to drive to nearby farms to pick up food. The Internet and social media have likely played a part in the movement's success as well, allowing for easier dissemination of information about controversial aspects of the FSMA's implementation and how to submit a comment and contact a congressional delegation.

It is too soon, of course, to tell whether the sustainable food movement is a passing fad or a fundamental shift in the American approach to food. At least for the moment, however, it appears to be capable of exerting a significant influence on national policy.

⁹³ For further discussion of how salient political issues can incentivize individuals to overcome organizational barriers and participate in political processes, see David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 363 n.55 (2014).

⁹⁴ See Press Release, Office of the First Lady, *First Lady Michelle Obama, School Children, and FoodCorps Leaders to Plant Sixth Annual White House Kitchen Garden* (Mar. 27, 2014), <http://www.whitehouse.gov/the-press-office/2014/03/27/first-lady-michelle-obama-school-children-and-foodcorps-leaders-plant-si>.

⁹⁵ See generally MICHAEL POLLAN, *IN DEFENSE OF FOOD: AN EATER'S MANIFESTO* (2009); MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2007); ALICE WATERS, *THE ART OF SIMPLE FOOD: NOTES, LESSONS, AND RECIPES FROM A DELICIOUS REVOLUTION* (2007).

⁹⁶ See Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1073-80 (2012) (noting "greater public attention to the [food system]" and describing the growing food movement).