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# The Dangerous Right to Food Choice

Samuel R. Wiseman

*Florida State University College of Law*

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# The Dangerous Right to Food Choice

*Samuel R. Wiseman*\*

## ABSTRACT

Scholars, advocates, and interest groups have grown increasingly concerned with the ways in which government regulations—from agricultural subsidies to food safety regulations to licensing restrictions on food trucks—affect access to local food. One argument emerging from the interest in recent years is that choosing what foods to eat, what I have previously called “liberty of palate,” is a fundamental right.<sup>1</sup> The attraction is obvious: infringements of fundamental rights trigger strict scrutiny, which few statutes survive. As argued elsewhere, the doctrinal case for the existence of such a right is very weak. This Essay does not revisit those arguments, but instead suggests that if a right to food liberty were recognized, the chief beneficiaries would not likely be sustainable agriculture consumers and producers, but rather those with the most at stake (and the most expensive lawyers)—big agriculture and large food manufacturers.

## I. INTRODUCTION

For a variety of reasons, including concerns relating to health, taste, and the environment, Americans have grown increasingly interested in fresh, healthy, local foods and sustainable agriculture. Scholars, advocates, and interest groups have, in turn, grown increasingly concerned with the ways in which government regulations—from agricultural subsidies to food safety regulations to licensing restrictions on food trucks—affect access to local food. Understandably so. Navigating even well-justified regulatory requirements can be a significant burden for both new and small producers, and, given the size, wealth, and organization of

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\* McConnaughay and Rissman Professor, Florida State University College of Law. J.D., Yale Law School; B.A., Yale University. Many thanks to Sam Halabi, Baylen Linnekin, and Diana Winters for their thoughtful comments, and to Melanie Pugh and the staff of the Seattle University Law Review for all their hard work in putting this symposium together.

1. See Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737 (2013).

large food industry actors, there is reason to suspect that some regulations reflect large food industry interests rather than those of the more numerous, but dispersed, consumers. In light of this dynamic, and the importance of the issues involved, it is understandable that advocates for local food and consumer choice would seek novel legal arguments to allow them to press their claims in court. One such argument that has emerged in recent years is that choosing what foods to eat, what I have previously called “liberty of palate,” is a fundamental right.<sup>2</sup> The attraction is obvious: infringements of fundamental rights trigger strict scrutiny,<sup>3</sup> which few policies survive.<sup>4</sup>

I have argued in previous work that the doctrinal case for the existence of such a right is very weak.<sup>5</sup> My goal here is to suggest that if a right to food liberty were recognized, the chief beneficiaries would not likely be sustainable agriculture consumers and producers, but rather those with the most at stake (and the most expensive lawyers)—big agriculture and large food manufacturers. Recent experience with the First Amendment has reminded us that judicial enforcement of fundamental rights can be a powerful weapon for industry. The First Amendment protects familiar, cherished rights to proclaim political views in public spaces, yet it also has been used to strike down campaign finance laws,<sup>6</sup> tobacco warning labels,<sup>7</sup> and drug marketing regulations.<sup>8</sup> And in the food context, it has been invoked to block mandated disclosure of milk produced from cows treated with bovine growth hormones.<sup>9</sup> Although they

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2. See Wiseman, *supra* note 1.

3. The strict scrutiny test varies slightly in different contexts, but in general the test requires that policies consist of “narrowly tailored measures that further compelling governmental interests.” See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

4. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–10, 748 (2007) (finding that “student assignment plans that rely upon race to determine which public schools certain children may attend” fail to survive strict scrutiny Equal Protection review); *Gratz v. Bollinger*, 539 U.S. 244, 249–50, 275–76 (2003) (finding that “the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause” under strict scrutiny review); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 806 (2000) (under strict scrutiny review, finding that a federal statute that required “cable television operators who provide channels ‘primarily dedicated to sexually-oriented programming’ either to ‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.,” violated the First Amendment (quoting 47 U.S.C. § 561(a) (1994 ed. Supp. III)).

5. See Wiseman, *supra* note 1.

6. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2009).

7. See *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266 (D.C. Cir. 2012).

8. See *Citizens United*, 558 U.S. 310; see also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

9. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73–74 (2d Cir. 1996).

enjoy economies of scale by virtue of their size, large food industry actors have by far the most to gain by reducing their regulatory burden through legal challenges.<sup>10</sup> And because strict scrutiny is so demanding, they would likely succeed, with results antithetical to the values espoused by many in the sustainable food movement.<sup>11</sup>

In many cases, it would be very difficult for governments regulating food to show that a particular threat to health, for example, was serious enough to amount to a compelling interest. And even when an interest is clearly compelling, such as protecting consumers from salmonella poisoning, it would be difficult to prove that the regulations were narrowly tailored to meet that compelling interest. More broadly, agencies that already face resource constraints, and are increasingly ossified<sup>12</sup> due to detailed procedural constraints, will face yet another hurdle in court, thus further chilling regulatory activity. While there are both good and bad food regulations, strict scrutiny is too blunt an instrument to separate them.

This Essay explores the normative aspects of the argument for a fundamental right to food choice, arguing that the food movement stands to lose more than it would gain, and suggesting that a better approach lies in the slow, and often frustrating, process of debating food-based issues on a case-by-case basis. Part II of this Essay explores a nonexhaustive array of food-related policies affecting large and small producers as well as consumers. Part III focuses on the likely downsides of a right to food choice, describing the effect of strict scrutiny review on the policies in

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10. It is of course difficult to empirically prove this assertion, but the limited but growing use of the First Amendment to delegitimize other food and drug regulations, discussed *infra* accompanying notes 70–72, so far suggests that large industry actors are the most likely to successfully take advantage of constitutional provisions to protect their concentrated, valuable interests. For a theoretical public choice argument regarding the likelihood that large, organized, wealthy interests are more likely to use the courts to their advantage than are small, dispersed interests, see, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 67–68 (1991) (“[T]he same interest groups that have an organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts. Increasing the lawmaking power of the courts may only exacerbate the influence of interest groups.”); but see Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519 (2013) (arguing that structural and other differences make courts somewhat more immune to problems identified by public choice theory); *infra* note 67 (describing a case brought by a small farmer and the Institute for Justice).

11. See Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069, 1076–78 (2012) (documenting a variety of goals and values associated with the sustainable food movement, including avoiding the health and environmental effects of the use of chemicals in food production, limiting “food miles” to reduce energy use and increase access to fresh food and support for local farmers, and the enjoyment of fresh, natural, and sustainably produced foods).

12. See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385, 1387 (1992).

Part II, from bans on carcinogens and trans fats in foods to animal welfare laws that require humane conditions for farm-raised chickens. I argue that large industry actors, rather than local and healthy food proponents, would be the main beneficiaries of a fundamental right to food choice. In conclusion, Part IV suggests an alternative, less aggressive path that is not as exciting or transformative as a fundamental right, but that would likely better serve many of the values expressed within the burgeoning sustainable food movement.

## II. GOVERNMENT AND FOOD

The government has long influenced the food supply, issuing food safety regulations in response to public demand—as occurred after Upton Sinclair’s novel *The Jungle* described grossly unsanitary slaughtering and meatpacking processes<sup>13</sup>—and providing billions of dollars in agricultural subsidies. More recently, Congress, through the Food Safety Modernization Act (FSMA),<sup>14</sup> greatly expanded the authority of the Food and Drug Administration (FDA) to regulate food production in an effort to prevent contamination of the food supply. Beyond traditional agricultural subsidies issued to large farms, the U.S. Department of Agriculture (USDA) also influences certain food practices through its small, albeit growing, support of small agricultural operations by funding direct sales operations and supporting the use of food stamps at farmers’ markets.<sup>15</sup> This Part explores several areas of government interaction with all levels of the food production and delivery system, and resistance to some of these regulations from large and small producers, among others.

### A. Food Safety Laws

Congress, the FDA, and a number of state legislatures and regulatory agencies have enacted a wide variety of laws designed to protect the public from illness and death caused by contaminated food and dangerous additives. Federal laws require meat to be sent to certified slaughterhouses;<sup>16</sup> prohibit certain dangerous additives to food;<sup>17</sup> and, most recent-

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13. See generally UPTON SINCLAIR, *THE JUNGLE* (1906).

14. Food Safety Modernization Act, 21 U.S.C. § 350h (2011).

15. USDA Food & Nutrition Serv., *USDA Expands Support for Farmers Markets to Accept Supplemental Nutrition Assistance Program Benefits*, U.S. DEP’T OF AGRIC. (Feb. 3, 2014), <http://www.fns.usda.gov/pressrelease/2013/fns-000813>; Megan Galey & A. Brian Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS J. L. & PUB. POL’Y 3, 32 (2012) (describing other grant programs that support small and sustainable agriculture).

16. See Humane Methods of Slaughter Act, 7 U.S.C. § 1901 (1958); Poultry Products Inspection Act, 21 U.S.C. § 455 (1968); Federal Meat Inspection Act, 21 U.S.C. § 605 (1906).

17. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348 (1997).

ly, require farmers to implement certain safe growing, harvesting, and packing practices on farms to better prevent produce contamination.<sup>18</sup> In draft regulations issued under the FSMA, the FDA directs farms to ensure that workers harvesting produce wash their hands, for example, and does not allow crops to be harvested immediately after manure has been applied to them.<sup>19</sup> The FDA also bans interstate sales of raw milk.<sup>20</sup> At the local level, a number of jurisdictions have implemented trans fats bans,<sup>21</sup> and the FDA has recently made a tentative determination that trans fats are no longer “generally recognized as safe,” which would prevent them from being legally added to foods.<sup>22</sup>

While groups of doctors, food safety public interest groups, and others have lobbied for and supported these laws, they have also faced increasing resistance. Small and sustainable farms argue that certain provisions in the FSMA are infeasible. For example, they worry that farmers would be unable to comply with both the FSMA manure and compost application standards and USDA organic certification standards due to conflicting manure application provisions.<sup>23</sup> Further, they are concerned that implementing the host of requirements associated with safe handling and packing of produce would be overly burdensome for small farmers.<sup>24</sup>

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18. See Food Safety Modernization Act, 21 U.S.C. § 350h (2011).

19. Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 78 Fed. Reg. 3504-01 (proposed Jan. 16, 2013) (to be codified at 21 C.F.R. pts. 16 and 112).

20. See Wiseman, *supra* note 1, at 739–40 (describing food bans around the United States).

21. 21 C.F.R. § 1240.61 (2012).

22. See Notice, Tentative Determination Regarding Partially Hydrogenated Oils; Request for Comments and for Scientific Data and Information, 78 Fed. Reg. 67169 (Nov. 8, 2013).

23. See, e.g., Comment, Nat’l Organic Coal., Re: Comment On the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; and Comments on the Proposed Rule for Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventative Controls for Human Food (Nov. 26, 2013) (“If FDA adopts these intervals in the final rule and does not change these intervals to align with NOP [USDA National Organic Program] requirements, then FDA will be forcing organic farmers out of compliance with NOP regulations and actively endangering the current organic of farmers as well as discouraging farmers from becoming certified organic.”); see also Samuel R. Wiseman, *The Implementation of the Food Safety Modernization Act and the Power of the Food Safety Movement*, AM. J. L. & MED. (forthcoming 2015) (describing and summarizing more comments).

24. See, e.g., Comment, Slow Food USA, Re: Comments On the Proposed Rule for Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; and Comments on the Proposed Rule for Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventative Controls for Human Food (Oct. 31, 2013) (noting that burdens of farmers having to register with and comply with the rule); Ohio Ecological Farm & Food Ass’n, Proposed Rule Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food: FDA-2011-N-0920; and Standards for the Growing, Harvesting, Packing and Holding of Produce for Human Consumption: FDA-2011-N-0921 (Nov. 15, 2013) (expressing similar concerns).

Congress<sup>25</sup> and the FDA<sup>26</sup> responded to a number of these concerns, perhaps because certain large agricultural interests, which public choice theory<sup>27</sup> would predict have a much larger influence on legislation and regulations in this area, aligned with those of small farms.<sup>28</sup> Certain large agricultural interests and small farms also both opposed certain stringent safety standards that they viewed as unduly cumbersome and expensive.<sup>29</sup> However, other provisions in recent food safety legislation passed despite only benefitting small farms: Congress exempted small farms from many of the food safety regulations,<sup>30</sup> and the FDA defined small farms broadly to include any farm with \$25,000 or less in annual sales of produce.<sup>31</sup> In this case, small farmers, despite lacking the organization and resources of large agricultural lobbyists, had sufficient stakes in the outcome of the policy to overcome organizational barriers, and Congress and the FDA responded.

Other groups have objected to food safety regulations because they believe that certain foods labeled as dangerous are in fact healthy, and that individuals should have a right to choose the foods that they consume, even if the government deems these foods unsafe. For example, consumers of raw milk sued the FDA in 2012, unsuccessfully arguing that raw milk is both safe and has significant health benefits, and that the

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25. See 21 U.S.C. § 350h(f)(1) (2011) (Tester–Hagan Amendment).

26. See Standards for the Growing, Harvesting, Packing, and Holding of Produce For Human Consumption, 79 Fed. Reg. 58434-01 (proposed Sep. 29, 2014) (to be codified at 21 C.F.R. pt. 112).

27. Public choice theory describes the tendency of government entities (courts, agencies, and legislatures) to be more powerfully influenced by organized stakeholders with the most to gain or lose from policies and decisions and to marginalize the influence of dispersed interests that collectively have a large interest in the outcome but face organizational impediments. See Richard A. Posner, *Theories of Regulation*, 5 BELL J. ECON. & MGMT. SCI. 595 (1974).

28. See Wiseman, *supra* note 23 (discussing the potential public choice implications). Note that this is not a comprehensive description of large and small agricultural groups' views on the FSMA or an empirical indication that the majority of large or small agricultural groups held a particular view on the FSMA. Agricultural groups submitted comments indicating a spectrum of opinions on the FSMA.

29. *Id.* (describing a range of comments on the rules).

30. See 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)).

31. See Standards for the Growing, Harvesting, Packing, and Holding of Produce For Human Consumption, Supplemental Notice of Proposed Rulemaking, *supra* note 26 (“[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.’”); see also Wiseman, *supra* note 23 (describing this change).

FDA's ban on interstate sales of raw milk interfered with their right to consume food products of their choice.<sup>32</sup>

In sum, food safety regulation has followed a winding path, emerging and sometimes changing in response to various interest groups' support and objections. As discussed in Part III, much of this back-and-forth, which one could view as involving productive deliberation surrounding various food values, would likely be substantially curtailed by a determination that there was a fundamental right to food, in some cases eviscerating very important safety regulations that were nonetheless not "compelling."

### *B. Food Policy for Public Health*

In addition to addressing food contamination issues, governments are increasingly interested in regulating the food supply to address obesity and other associated public health concerns. For example, the FDA has issued food labeling regulations that require chain restaurants and operators of vending machines to indicate calorie content on their products.<sup>33</sup> The FDA has also proposed amendments to the Nutrition Labeling and Education Act that would require food manufacturers to declare any "added sugars" on their labels,<sup>34</sup> and to change serving sizes so that foods and beverages containing 150%–200% of "Reference Amounts Customarily Consumed," such as large sodas, can no longer be labeled as containing more than one serving<sup>35</sup> (a practice that resulted in deceptively low values). These rules have met stiff resistance from industry.<sup>36</sup> While

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32. *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 674–75, 678 (N.D. Iowa 2010), *dismissed for lack of standing* No. C 10–4018–MWB, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012).

33. Affordable Care Act § 4205, 21 U.S.C. § 343(H)(i)(I)(aa) (2004) (nutrition labeling) (requiring chain restaurants to list the number of calories in each "standard" menu item on menus or menu boards, with additional nutrition information in writing, and requiring vending machines to post calorie signs where nutrition information cannot be seen "at the point of purchase," among other requirements).

34. Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 79 Fed. Reg. 11880, 11952 (proposed Mar. 3, 2014), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-03/pdf/2014-04387.pdf>.

35. Food Labeling: Serving Sizes of Foods That Can Reasonably Be Consumed at One-Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain Reference Amounts Customarily Consumed; Serving Size for Breath Mints; and Technical Amendments, 79 Fed. Reg. 11990, 12001 (proposed Mar. 3, 2014), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-03/pdf/2014-04385.pdf>.

36. Jennifer Hatcher, senior vice president for government and public affairs at the Food Marketing Institute, explains: "FDA's proposed menu labeling rule imposes a billion-dollar burden on supermarkets, with no additional, quantifiable benefit to supermarket customers, according to FDA's analysis." Andrea Billups, *Food Industry Faces Costly Menu Labeling Rule Under Obamacare*, NEWSMAX (Dec. 9, 2013), <http://www.newsmax.com/Newsfront/FDA-food-labeling-menu/2013/12/>



many of the objections involve legitimate concerns about the practicality of labeling foods like pizza—the question of whether every possible topping combination must have a different label is a difficult one—others are likely motivated by a concern that revealing calorie counts would in some cases reduce profits.

Bans or taxes on large sugary beverages<sup>37</sup> have also become more common at the local level, with cities citing numerous health studies linking obesity and other health problems to these foods, and documenting the health system costs generated by these problems.<sup>38</sup> While some resistance has come from food choice advocates, who believe that consumers should have the liberty to choose to eat food viewed as “unhealthy,”<sup>39</sup> most of the opposition has emanated from large interest groups with high stakes in the outcome of these laws. For example, various food associations and chambers of commerce (as well as interests not directly associated with large food producer interests, such as the Teamsters) successfully challenged New York City’s large sugary beverages ban in state court, with the court finding that the ban violated the state’s separation of powers requirements and was wholly arbitrary.<sup>40</sup>

### C. Animal Welfare Laws

A growing number of additional regulations—which, like obesity-related food laws, have typically been enacted at the local and state level<sup>41</sup>—are more concerned with animal welfare than the impacts of food on humans. California banned the sale of horsemeat for human consumption in 1998 and the possession or sale of shark fins (prized by some for

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09/id/540815/.

37. See Wiseman, *supra* note 1, at 740 (describing New York City’s effort to ban large sugary beverages).

38. See, e.g., Eric A. Finkelstein, Ian C. Fiebelkorn & Guijing Wang, *State-Level Estimates of Annual Medical Expenditures Attributable to Obesity*, 12 OBESITY RES. 18, 21 (2004).

39. See, e.g., BAYLEN J. LINNEKIN & MICHAEL BACHMANN, *THE ATTACK ON FOOD FREEDOM* (2014) (arguing that “[a] trans fat ban would violate principles of food freedom,” which in the authors’ view is “the right of every American to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods and beverages of their own choosing,” and would make foods “taste worse” as well as increase saturated fat content).

40. Notice of Verified Petition at 18–19, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 553584/2012 (N.Y. Sup. Ct. filed Oct. 12, 2012); *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 653584/12, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2013).

41. For a time, Congress banned USDA horsemeat inspections. See Susanna Kim, *The Strange World of U.S. Horse Meat Regulation*, ABC NEWS (Feb. 26, 2013), <http://abcnews.com/Business/find-horse-meat-us/story?id=18598602>.

their use in soup) in 2011,<sup>42</sup> and, along with Chicago (temporarily),<sup>43</sup> banned foie gras, which is the product of force-fed birds. California has also, through a referendum supported by 63.5% of voters,<sup>44</sup> banned the use of small farm animal enclosures.<sup>45</sup> The California legislature subsequently enacted a law that applied the restrictions on eggs from chickens held in small cages to out-of-state eggs.<sup>46</sup> Approximately eight other states similarly banned the use of small crates for pregnant pigs, and seven states banned veal crates.<sup>47</sup>

As with other food-based regulations, these laws have faced challenges. Farmers in six agriculture-heavy states have sued California, arguing that its egg law is preempted by federal egg safety laws, that the law is grounded in economic protectionism, and that the prohibition unconstitutionally discriminates against interstate commerce.<sup>48</sup>

#### *D. Subsidies*

Many food policies rely on monetary support rather than, or in addition to, regulatory mandates to achieve certain government food-based objectives. The U.S. government's initial efforts to subsidize domestic crops began in 1933 with the intention of controlling crop supply and thus keeping prices relatively stable for farmers, while more recent farm bills have pushed "high-yield production,"<sup>49</sup> thus often supporting large

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42. See Wiseman, *supra* note 1, at 745 n.62 and accompanying text (discussing California's Prohibition of Horse Slaughter and Sale of Horsemeat for Human Consumption Act); Bob Egelko, *California Shark Fin Ban Upheld by Federal Judge*, SF GATE (Mar. 26, 2014, 7:16 AM), <http://www.sfgate.com/science/article/California-shark-fin-ban-upheld-by-federal-judge-5348461.php>.

43. CAL. HEALTH & SAFETY CODE § 25982 (West 2012); CAL. HEALTH & SAFETY CODE § 25980 (West 2012) (noting concerns about humane treatment of ducks); Nick Fox, *Chicago Overturns Foie Gras Ban*, N.Y. TIMES (May 14, 2008, 3:33 PM), <http://dinersjournal.blogs.nytimes.com/2008/05/14/chicago-overturns-foie-gras-ban/>.

44. See SENATE FOOD & AGRIC. COMM., S. REP. NO. AB 1437 (Cal. 2009), available at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1401-1450/ab\\_1437\\_cfa\\_20090615\\_204633\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_cfa_20090615_204633_sen_comm.html).

45. Proposition 2: Standards for Confining Farm Animals (Cal. 2008), available at <http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws/pdf#prop2>.

46. AB 1437, 2009 Leg., 10th Reg. Sess. (Cal. 2009).

47. Lorlei Laird, *States Cry Fowl California's Ban on Standard-Caged Birds Poses a Chicken-Egg Problem*, ABA J. (June 1, 2014, 9:10 AM), [http://www.abajournal.com/magazine/article/californias\\_ban\\_on\\_standard-caged\\_birds\\_poses\\_a\\_chicken-egg\\_problem](http://www.abajournal.com/magazine/article/californias_ban_on_standard-caged_birds_poses_a_chicken-egg_problem).

48. *Id.* (describing the case).

49. Mary Jane Angelo, *Corn, Carbon, and Conservation Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 597 (2010).

agricultural operations—particularly those that grow corn.<sup>50</sup> A growing and diverse array of interest groups and individuals oppose these subsidies because of their environmental impacts, which arise from growing massive quantities of heavily fertilized and carbon-intensive crops,<sup>51</sup> often in marginal soils or areas that otherwise would not have been devoted to crop production. Additionally, a growing number of interest groups and scholars observe that these subsidies have negative public health effects, including occupational and consumer pesticide exposure,<sup>52</sup> reduced availability of nutritionally important non-corn products,<sup>53</sup> exacerbation of domestic and international hunger problems through “trade distortions,” and the subsidization of crops often fed to livestock rather than directly to humans, among other criticisms.<sup>54</sup>

More recently, Congress has begun to support certain small and sustainable farming operations through the Farm Bill, directing the Secretary of Agriculture to make loans to entities that process, distribute, and are otherwise associated with locally or regionally produced agricultural food products.<sup>55</sup> This bill, among other things, encourages agricultural practices that reduce soil erosion and preserve wetlands,<sup>56</sup> provides money for taking certain lands out of production,<sup>57</sup> and supports enhanced access to farmers’ markets for nutritional assistance (“food

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50. *Id.* (describing the history of agricultural subsidies in the United States, which began “with the Agricultural Adjustment Act of 1933,” and noting that in the 2008 Farm Bill corn received the most subsidies, followed by wheat, cotton, soybeans, and rice).

51. *Id.* at 600; William S. Eubanks II, *A Rotten System Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 240–72 (2009) (describing impacts of federally subsidized agriculture on soil, habitats, water, and air); see also Linda Breggin & D. Bruce Meyers, Jr., *Subsidies with Responsibilities*, 37 HARV. ENVTL. L. REV. 487 (2013) (describing nutrient pollution that has caused a “dead zone” in the Gulf of Mexico where most aquatic species cannot survive, pesticide pollution, and other environmental impacts of “industrialized” agriculture supported by U.S. subsidies).

52. Eubanks II, *supra* note 51, at 276.

53. *Id.* at 281–82.

54. *Id.* at 235–36.

55. 7 U.S.C. § 1932 (2014).

56. See *Environmental Quality Incentives Program*, U.S. DEP’T OF AGRIC., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/> (last visited Apr. 9, 2015) (describing how the Farm Bill supports the Environmental Quality Incentives Program, through which the USDA and its state and county offices “provide financial assistance to help plan and implement conservation practices that address natural resource concerns and for opportunities to improve soil, water, plant, animal, air and related resources on agricultural land and non-industrial private forestland”); see also Galey & Endres, *supra* note 15, at 14–16 (providing a history of congressional establishment of agricultural conservation programs).

57. See Galey & Endres, *supra* note 15, at 15 (describing this 2008 Farm Bill development and other congressional support for more sustainable agricultural practices).

stamp”) customers.<sup>58</sup> While these programs have been criticized for the minor amount of money they receive in comparison to subsidies for large agriculture,<sup>59</sup> they show that Congress has begun to acknowledge more food consumer values through its subsidization of the food supply.

### III. IMPLICATIONS OF A FUNDAMENTAL RIGHT TO FOOD CHOICE

The government’s pervasive involvement in the food supply and our daily food consumption choices profoundly affects both producers—large and small, organic and industrial—and consumers. And few stakeholders, if any, are entirely satisfied with the status quo. Some have reacted to the government’s involvement by proposing a fundamental right to food choice, arguing that individuals have a right to “food liberty”—a right to decide the types and amounts of foods that they consume.<sup>60</sup> I have argued elsewhere that courts are unlikely to recognize such a right,<sup>61</sup> but the question I address here is whether liberty of palate<sup>62</sup> is a goal worth pursuing. The results, which would eviscerate many restrictions on food availability and content, would likely please the true food libertarians—those that would support an individual’s right to choose whether or not to consume foods deemed by some to be dangerous, and who are equally supportive of ensuring consumers’ access to raw, locally sourced milk, food trucks, and mass-produced donuts that

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58. See USDA Food & Nutrition Serv., *supra* note 15 (“As a result of funding provided by Congress through the Consolidated and Further Continuing Appropriations Act of 2012, USDA last year announced the availability of \$4 million in funding to expand the availability of wireless point-of-sale equipment in farmers markets not currently accepting SNAP [Supplemental Nutrition Assistance Program] benefits.”).

59. See Galey & Endres, *supra* note 15, at 32 (noting that “[t]he grant programs that benefit local food systems are not sufficiently funded to cover the number of farms that want to participate” and that “the status quo of major subsidies to large-scale, industrialized producers of commodity crops was preserved”).

60. See, e.g., David J. Berg, *Food Choice Is a Fundamental Liberty Right*, 9 J. FOOD L. & POL’Y 173, 190 (2013) (arguing for an “individual’s right to purchase meat and poultry directly from the person who raised and participated in the slaughtering of that meat or poultry without mandatory governmental inspection”); LINNEKIN & BACHMANN, *supra* note 39, at 21 (arguing that “[a] key element of economic liberty is food freedom—your right to grow, raise, produce, buy, sell, share, cook, eat and drink what you want”); see also Schindler, *supra* note 10 (describing the challenge of balancing legitimate liberty interests against “public health justifications” for certain food regulation).

61. See Wiseman, *supra* note 1; see also Schindler, *supra* note 10, at 35–36 (describing libertarian and food sovereignty arguments against regulation of pop-up restaurants and supper clubs); Baylen J. Linnekin, *The “California Effect” and the Future of American Food How California’s Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357, 387–88 (2010).

62. See *supra* note 39 and accompanying text.

contain trans fats.<sup>63</sup> But for many who are part of the sustainable food movement—who are concerned not just with the ability to eat whatever they wish, but also with the health and environmental impacts of the food system—a fundamental right to food would likely do more harm than good.<sup>64</sup> Substantial infringements of fundamental rights trigger strict scrutiny,<sup>65</sup> under which many, if not all, of these regulations would fail. The required showing that a law is narrowly tailored is a high hurdle, even if a compelling government interest exists, thus potentially sweeping away many of these long-deliberated laws, and very likely chilling new, potentially beneficial laws. Moreover, as recent experience with the First Amendment has reminded us, corporate and moneyed interests and the skilled lawyers who represent them are adept at using the Constitution to free themselves from regulatory restraints,<sup>66</sup> and, in the food context, industry has little to lose and much to gain.

Of course, in some cases a fundamental food right would give sustainable food interests a powerful tool—particularly where governmental regulation hinders the sale of healthy, clearly-labeled food from local farmers.<sup>67</sup> But as this Part discusses, it seems likely that a larger number of desirable regulations would be constitutionally suspect.

This Part explores the implications of recognizing a fundamental right to food choice for the issues described in Part II, concluding that,

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63. See, e.g., Berg, *supra* note 60, at 190 (focusing on the right to buy food directly from producers or meat slaughterers “without mandatory governmental inspection”); LINNEKIN & BACHMANN, *supra* note 39, at 10 (“A growing number of these truly awful food regulations are evident at the federal, state and local level—from regulations prohibiting farmers from advertising unpasteurized milk to laws protecting brick-and-mortar restaurants against competition from food trucks. These laws—and many others—act as a direct assault on economic liberty and food freedom.”); Comment, Baylen J. Linnekin, Director, Keep Food Legal, Comments Opposing the FDA’s Tentative Determination Regarding Partially Hydrogenated Oils, Docket No. FDA-2013-N-1317 (Mar. 7, 2014), available at [http://www.keepfoodlegal.org/PDFs/kfl\\_transfat\\_comments.pdf](http://www.keepfoodlegal.org/PDFs/kfl_transfat_comments.pdf) (“A trans fat ban would violate principles of food freedom[.] Keep Food Legal advocates in favor of food freedom—the right of every American to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods and beverages of their own choosing.”).

64. See Tai, *supra* note 11, at 1076–78 (documenting a variety of goals and values associated with the sustainable food movement, including avoiding the health and environmental effects of the use of chemicals in food production; limiting “food miles” to reduce energy use and increase access to fresh food and support for local farmers; and the enjoyment of fresh, natural, and sustainably produced foods). For discussion of the safety and environmental regulations that might not survive strict scrutiny or even intermediate scrutiny, see *infra* Part III.B.

65. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (noting that impingement “upon a fundamental right” requires “strict judicial scrutiny”).

66. See *infra* Part III.A.

67. See, e.g., Order Rejecting Motion to Dismiss, *Ocheese Creamery v. Putnam & Newton*, CASE NO. 4:14cv621-RH/CAS (N.D. Fl., Feb. 9, 2015) (rejecting a motion to dismiss a First Amendment challenge to a Florida regulation that prohibits a farmer from labeling as “skim milk” milk that has simply had the cream skimmed off the top and has not had vitamin A added).

on the whole, it would not advance the values of the sustainable food movement.

#### *A. The Commercial First Amendment*

The First Amendment, while protecting some of the most fundamental U.S. freedoms, has also been invoked by wealthy and corporate interests (as well as smaller interests<sup>68</sup>) to strike down laws and regulations many regard as beneficial. Most prominently, the Supreme Court has in the last few years undone large portions of campaign finance regulations.<sup>69</sup> Relatedly, pharmaceutical manufacturers persuaded the U.S. Supreme Court in 2011 that limiting the distribution of pharmacy records showing physicians' prescribing practices was not content neutral, and that the state's interests in protecting doctors' and patients' privacy did not justify the "burden . . . on protected expression."<sup>70</sup> In the food context, the relatively large actors within the industry have successfully raised First Amendment objections to the FDA's regulation of health claims for dietary supplements,<sup>71</sup> and have more recently opposed government efforts to combat obesity.<sup>72</sup>

The merits of broad protection for commercial speech can, of course, be reasonably debated.<sup>73</sup> However, it is not necessary to resolve that debate to conclude that industry groups are adept at using the Constitution to fight regulation, and that the Supreme Court has recently been sympathetic to their arguments. If a fundamental right to food liberty were recognized, the food industry would be quick to take advantage. As

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68. See *supra* note 67 and accompanying text.

69. See *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

70. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011); see also Tamara Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012) (discussing the case).

71. See *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); see also Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should—and Should Not—Approach Government Regulation*, 39 *ECOLOGY L.Q.* 773, 829 n.239 (2012) (collecting cases); David C. Vladeck, *Devaluing Truth: Unverified Health Claims in the Aftermath of Pearson v. Shalala*, 54 *FOOD & DRUG L.J.* 535, 538 (1999).

72. See Samantha Graff & Tamara Piety, *The New First Amendment and its Implications for Combating Obesity Through Regulations of Advertising*, in *ADVANCES IN COMMUNICATION RESEARCH TO REDUCE CHILDHOOD OBESITY* (Jerome D. Williams, Keryn E. Pasch & Chiquita Collins eds., 2013) ("Obesity prevention advocates are finding that any policy proposal relating to junk food advertising—even government *recommendations* on the nutritional profile of foods that are appropriate to market to children—will be met with aggressive objections that corporations' expressive rights are under siege.").

73. See, e.g., Tamara Piety, *Against Freedom of Commercial Expression*, 29 *CARDOZO L. REV.* 2583 (2008).

discussed below, the industry has much to gain, often at the expense of the interests of the sustainable food movement.

*B. The Effects of Strict Scrutiny on Food Policy*

Requiring the FDA to satisfy strict scrutiny for every regulation in the food safety arena would be an enormous burden. Strict scrutiny would limit the government's ability to intervene except to prevent very serious harms, and even then only once it had amassed compelling evidence.<sup>74</sup> Many restrictions on the use of pesticides and food additives would be susceptible to challenge. Litigants might, for example, challenge the FDA's basis for these laws by pointing out difficulties in translating animal studies to human health impacts.<sup>75</sup> More broadly, it is questionable whether preventing a relatively low risk of cancer constitutes a compelling interest.<sup>76</sup> Prohibitions of trans fats in food, then, could well lack an adequately compelling interest and narrowly tailored solution, despite many studies linking these substances with health problems.<sup>77</sup> Further, evaluating these types of regulations, which involve highly technical scientific issues, will be difficult for judges to accurately assess. Government efforts to combat obesity through taxes or bans on added sugars, as well as to prevent disease outbreaks by banning or limiting the sale of unpasteurized milk products, would likely fail as well. Although the risk of harm from these products is hotly debated,<sup>78</sup> in ei-

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74. Some particularly compelling regulations, such as those directly combatting fraudulent labeling, would of course withstand strict scrutiny. But as discussed in this Essay, even regulations designed to squelch questionable health claims have been deemed to violate the First Amendment. *See, e.g., supra* note 71 and accompanying text.

75. *See, e.g.,* 21 C.F.R. § 170.39 (2014) (providing that to be exempted from regulation as a food additive, "[t]he substance must . . . not contain a carcinogenic impurity or, if it does, must not contain a carcinogenic impurity with a TD<sub>50</sub> value based on chronic feeding studies reported in the scientific literature or otherwise available to the Food and Drug Administration of less than 6.25 milligrams per kilogram bodyweight per day").

76. *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-246, FOOD SAFETY: FDA SHOULD STRENGTHEN ITS OVERSIGHT OF FOOD INGREDIENTS DETERMINED TO BE GENERALLY RECOGNIZED AS SAFE (GRAS) 22 (2010), *available at* <http://www.gao.gov/products/GAO-10-246> (noting an FDA ban on one food ingredient based on evidence of the ingredient causing cancer in mice).

77. *See, e.g.,* Alberto Ascherio et al., *Trans-Fatty Acids Intake and Risk of Myocardial Infarction*, 89 CIRCULATION 94 (1994); Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 NEW ENG. J. MED. 1601, 1601 (2006); Alberto Ascherio et al., *Shining the Spotlight on Trans Fats*, HARV. SCH. OF PUB. HEALTH, <http://www.hsph.harvard.edu/nutritionsource/transfats/> (referencing these and other studies) (last visited Mar. 23, 2015).

78. *See, e.g.,* Wiseman, *supra* note 1 (describing raw milk advocates' arguments regarding health benefits of raw milk and the FDA's safety concerns associated with raw milk).

ther case it seems unlikely to be proven to be great enough to rise to the level of a compelling interest.<sup>79</sup>

More broadly, crafting regulations to survive strict scrutiny would be a crippling administrative burden. The FDA arguably already suffers from the “ossification” problems identified in the administrative law literature,<sup>80</sup> in which agencies subject to supposedly deferential review under the *Chevron* standard are still required to amass vast quantities of information to adequately support a rule.<sup>81</sup> Adding another extremely stringent layer of review to this already constrained regulatory process would likely have a chilling effect—preventing the FDA from drafting any rules that would have difficulty standing up to strict scrutiny review, and even those rules that might survive a fundamental rights challenge. Indeed, the FDA has already indicated that it will not prioritize food labeling laws in light of the difficulty of navigating First Amendment concerns,<sup>82</sup> and adding yet another fundamental right would further chill the FDA’s will to regulate. With the recognition of a fundamental right to food, FDA rules would face a flood of eager litigants—many of them likely from large industry, which has the highest stakes in many food regulations—who would now have an unusually powerful tool at their disposal. Thus, while some food safety regulations affecting small farmers and traditional agricultural techniques would probably be struck down as well, a primary result seems likely to be an increase in the use of chemicals and additives in all stages of food production due to decreased regulation, a result hardly consonant with the goals of much of the sustainable food movement.<sup>83</sup>

The fate of animal welfare laws would likely be mixed. Categorical bans on products like foie gras and shark fins would require courts to determine whether the animal suffering inherent in their production is

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79. See, e.g., *supra* text accompanying note 70 (describing how doctor and patient privacy was not an adequately compelling interest to justify limits on the distribution of pharmacy records showing doctors’ prescribing practices).

80. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385, 1387 (1992); but see Mark Seidenfeld, *Demystifying Deossification Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (agreeing generally that the rulemaking process is cumbersome but suggesting other drivers, and arguing that certain agency actions circumventing rulemaking can be problematic).

81. McGarity, *supra* note 80.

82. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-597, FDA LABELING: FDA NEEDS TO BETTER LEVERAGE RESOURCES, IMPROVE OVERSIGHT, AND EFFECTIVELY USE AVAILABLE DATA TO HELP CONSUMERS SELECT HEALTHY FOODS 61 (2008), available at <http://www.gao.gov/new.items/d08597.pdf> (noting a First Amendment decision striking down FDA’s regulation of potentially misleading claims on health supplements).

83. See Tai, *supra* note 11; see also Goldberg, *supra* note 71, at 738 (“It goes without saying that the eat-food movement would have us avoid all such highly processed ‘foodlike’ substances.”).



enough to overcome the newly fundamental right to consume them.<sup>84</sup> Measures aimed at improving the lives of food animals—like California’s requirement that animal cages allow animals to stand up and move their limbs—which reduce (by raising production costs) but do not eliminate access to food, might not be held to sufficiently infringe the right, although large agricultural interests would no doubt litigate this point extensively.

Finally, agricultural subsidies, which primarily benefit large commodity growers, could well survive a right-to-consume challenge brought on the basis that it distorts the food supply and favors some foods over others. Although the caselaw is far from clear, the Supreme Court has repeatedly recognized that the government has a greater ability to subsidize than it does to directly regulate.<sup>85</sup> As the Court said in *National Endowment for the Arts v. Finley*:

Congress may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” In doing so, “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”<sup>86</sup>

Similarly, favoring commodities over produce would likely be a permissible choice to fund certain crops over others. Here, too, food manufacturing interests would likely come out ahead.<sup>87</sup>

#### IV. CONCLUSION

A small yet influential group of scholars has begun to explore the limits of litigation under existing law to advance the varied and occasionally conflicting goals of the sustainable food movement.<sup>88</sup> Faced with seemingly discriminatory laws inhibiting access to local or natural

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84. *Cf.* *United States v. Stevens*, 559 U.S. 460 (2010) (holding a federal statute prohibiting depictions of animal cruelty unconstitutional on First Amendment overbreadth grounds).

85. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998); *see also* *Maher v. Roe*, 432 U.S. 464, 475 (1977) (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”).

86. *Finley*, 524 U.S. at 587–88 (citations omitted) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

87. Some alternatives would remain. For example, if courts struck down numerous food safety regulations litigants could seek private law remedies for harm caused by contaminated foods. But causation is, *inter alia*, difficult to establish (even regulators with relatively broad inspection powers sometimes have difficulty tracing down the source of bacteria in food).

88. *See* Tai, *supra* note 11; Goldberg, *supra* note 71.

foods, the strong medicine of fundamental rights may seem appealing to this movement. On the whole, however, despite its theoretical basis in individual liberty, agribusiness and the food industry would likely be the chief beneficiaries of a fundamental right to food choice.<sup>89</sup> The interests of the sustainable food movement, and society as a whole, on the other hand, would suffer. This is not, ultimately, particularly surprising; the application of strict scrutiny to laws infringing fundamental rights is premised on the idea that those rights are so important that they must be judicially protected against even well-meaning legislative and executive incursions. Freedom of speech, even if it is interpreted to require unlimited campaign contributions, may be worth this price. Getting to eat whatever we want is, in practice, probably not worth the price, no matter how attractive or intuitive food liberty may be as an abstract concept.

If there is no magic bullet for achieving food system reform, there is still some cause for hope in the legislative and regulatory process, as shown, however imperfectly, by the history of the passage and implementation (so far) of the FSMA. Small farm advocates successfully lobbied for the inclusion of the Tester–Hagan Amendment,<sup>90</sup> and in the rulemaking process the FDA has appeared to take the many comments and concerns of sustainable food advocates seriously.<sup>91</sup> It met with numerous stakeholders and substantially changed the regulations based on comments received—in some cases, the changes were sweeping. For example, when sustainable and small farmers objected to the inclusion of all food, rather than just produce, in calculating the sales threshold for exemption from the Produce Rule, the FDA made the requested change in the face of opposition from both large agricultural and public health groups.<sup>92</sup> Piecemeal litigation and engagement in the political and regulatory processes may be harder, slower, and less exciting than rallying around an asserted fundamental right, but ultimately it is far more productive.

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89. *See supra* note 10.

90. *See Wiseman, supra* note 23.

91. *See id.* (discussing EPA's responses to comments).

92. *See id.*; Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 79 Fed. Reg. 58433 (proposed Sept. 9, 2014) (to be codified at 21 C.F.R. pt. 112), available at <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm>.