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LIBERTY OF PALATE

Samuel R. Wiseman

INTRODUCTION

I. UNDERSTANDING FUNDAMENTAL RIGHTS

II. THE UNLIKELY CONSTITUTIONAL BASIS FOR LIBERTY OF PALATE

A. *The Lack of a Fundamental Right to Food Choice*

B. *Rational Basis Review*

III. A FUNDAMENTAL RIGHT AGAINST MANDATED FOOD CONSUMPTION

A. *The Right to Refuse Food*

B. *Other Legal Arguments*

CONCLUSION

LIBERTY OF PALATE

*Samuel R. Wiseman**

As lawmakers concerned with problems as diverse as childhood obesity, animal cruelty, and listeria have increasingly focused their attention on consumers, legal issues surrounding food choice have recently attracted much broader interest. Bans on large sodas in New York City, fast food chains in South Los Angeles, and foie gras in California and Chicago have provoked national controversy, as have federal raids on raw milk sellers. In response, various groups have decried restrictions on their ability to consume the food products of their choice. A few groups have organized around the principle of what we might call liberty of palate, and one commentator has even suggested, based on some old Supreme Court dicta, that a fundamental substantive due process right to food choice may exist. At the same time, the ominous possibility of a federal broccoli consumption mandate became a central point in the debate over the constitutionality of the Affordable Care Act. Advocates, in advancing the argument that the Commerce Clause should be interpreted to prevent Congress from forcing people to consume certain types of food, at least implicitly assumed that no fundamental food rights exist. This Essay will examine both of these claims and show that they are wrong. While no fundamental right to a liberty of palate exists, there likely is a right to be free of mandates to consume any particular type of food. The Commerce Clause thus need not be considered in future fights over certain food regulation, yet those arguing for a broader right to food will find little solace in the Constitution, apart from knowing that they can still push away their plates of uneaten broccoli.

INTRODUCTION

As judges and justices sparred over the constitutionality of the Affordable Care Act, a topic typically limited to childhood dinner table conversations became central to the debate. Broccoli—the food despised by the senior President Bush¹ and thousands of unhappy children of health-conscious parents—captured the attention of courts and the public. The prospect of a Commerce Clause that would allow the federal government to impose a broccoli mandate chilled the hearts of libertarians and carnivores across the country. Judge Marcus of the Eleventh Circuit, for example, felt compelled in his dissent to assure everyone that upholding the health care mandate would not portend “impending doom” in the form of a

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1. Maureen Dowd, *'I'm President,' So No More Broccoli!*, N.Y. TIMES, Mar. 23, 1990, available at <http://www.nytimes.com/1990/03/23/us/i-m-president-so-no-more-broccoli.html>; see also Jamal Greene, *FDR and Obama: Are There Constitutional Lessons from the New Deal for the Obama Administration?*, 15 U. PA. J. CONST. L. 265, 265 (2012) (noting President Bush's banning of broccoli on Air Force One and describing the surprising amount of broccoli discussion in the health care opinion).

requirement that we “purchase and consume broccoli.”² And, of course, the opinion authored by Justice Roberts, finding no Commerce Clause basis for the Act, devoted an entire paragraph to broccoli, rebutting the government’s argument that broccoli and cars, unlike healthcare, were purchased “for their ‘own sake,’” unlike purchases of health insurance to address universal risk.³ Justice Scalia’s dissent also mentioned the much-debated vegetable four times.⁴

Broccoli may have attracted so much attention in the healthcare debate partly due to Americans’ rising obsession with food—and governments’ arguably intrusive interference with food choice. Federal, state, and local officials in California have raided farms and markets selling raw milk and filed criminal charges against the perpetrators.⁵ The state’s legislature has been similarly busy, banning foie gras⁶—with the approval of the Terminator himself⁷—on the grounds of humane treatment for ducks and geese.⁸ California also prohibits elementary schools from selling foods other than “full meals” and “individually sold portions of nuts, nut butters, seeds, eggs, cheese packaged for individual sale, fruit, vegetables that have not been deep fried, and legumes.”⁹ It further requires that schools offer certain healthy foods by conditioning the receipt of funds for free and reduced cost meals¹⁰ on schools following USDA nutrition guidelines or state menu planning options.¹¹ The state also bans all artificial trans fats in foods within food facilities.¹²

New York City similarly prohibited the sale of foods with artificial trans fats,¹³

2. *Florida ex rel Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1351 (11th Cir. 2011) (Marcus, J., dissenting).

3. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2591 (2012).

4. *Id.* at 2650.

5. Dana Goodyear, *Dept. of Gastronomy, Raw Deal*, THE NEW YORKER, Apr. 30, 2012, at 32, available at http://www.newyorker.com/reporting/2012/04/30/120430fa_fact_goodyear#ixzz2CW1w21FR.

6. See CAL. HEALTH & SAFETY CODE § 25982 (West 2012) (“A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size.”).

7. Governor Schwarzenegger added a signing message reassuring critics that the ban was not in fact a ban, as the bill allowed “seven and one-half years for agricultural husbandry practices to evolve and perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes”). CAL. HEALTH & SAFETY CODE § 25980 (West 2012) (see notes following the text of the code). Most restaurants have reportedly stopped serving foie gras, however; see also Norimitsu Onishi, *Some in California Skirt a Ban on Foie Gras*, N.Y. TIMES, Aug. 12, 2012, at A7, available at <http://www.nytimes.com/2012/08/13/us/some-california-restaurants-skirt-foie-gras-ban.html> (reporting that “most of the 340 to 400 establishments that served [foie gras] before the ban have taken it off their menus”).

8. CAL. HEALTH & SAFETY CODE § 25980.

9. CAL. EDUC. CODE § 49431 (a)(1) (West 2006).

10. *Id.* § 49430.5.

11. *Id.* § 49430.7(b).

12. CAL. HEALTH & SAFETY CODE § 114377 (West 2009).

13. N.Y.C., N.Y., ADMIN. CODE § 17-192 (2007), available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$ADC17-192\\$\\$@TXADC017-192+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=21230378+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC17-192$$@TXADC017-192+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=21230378+&TARGET=VIEW) (“No foods containing artificial trans fat shall be stored, distributed, held for service, used in preparation of any menu item or served by any food service establishment or by any mobile food unit commissary . . .”).

and went even further: In September 2012, the City's Health Panel approved Mayor Bloomberg's proposal to prohibit most sales of sugary drinks larger than sixteen ounces.¹⁴ Other governments have focused more on fats. Philadelphia, citing to concerns about impacts on "the human cardiovascular system,"¹⁵ provides that "[n]o person shall store, distribute, hold for service, use in preparation of any menu item or serve any foods containing artificial trans fat"¹⁶ Moreover, King County, Washington bans distribution and the use of artificial trans fats in foods in permitted food service establishments.¹⁷ The Boston Public Health Commission similarly banned all food service establishments, vending machines, and mobile food vendors from preparing, distributing, holding for service, or serving food or beverages with artificial trans fats.¹⁸

The U.S. government is also increasingly involved in curtailing food choice—often for safety reasons.¹⁹ It reportedly "regularly entertains a complete raw-milk cheese ban,"²⁰ and Food and Drug Administration (FDA) regulations already ban the sale of unpasteurized milk or milk products in interstate commerce.²¹ The FDA also has stepped up its enforcement of this law. In 2012, it infiltrated a Washington, DC-based buyers' group using undercover agents that posed as raw milk enthusiasts and shut down an Amish farmer's dairy in Lancaster County, Pennsylvania—much to the chagrin of Ron Paul.²² Tony West of the Justice Department's Civil Division reassured consumers that "[w]orking with our federal partners, we will bring enforcement actions like this one to ensure that the American food supply is safe and consumers are not exposed to such risks."²³

As with the health care mandate, all of these restrictions have provoked a

14. Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, at A24. See also N.Y.C., N.Y., HEALTH CODE art. 81.53. For proposal, see Notice of Public Hearing, N.Y.C. Dep't of Health & Mental Hygiene, Opportunity to Comment on the Proposed Amendment of Article 81 (Food Preparation & Food Establishments) of the New York City Health Code, found in Title 24 of the Rules of the City of New York (July 24, 2012), available at <http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/amend-food-establishments.pdf>.

15. PHILADELPHIA DEPARTMENT OF PUBLIC HEALTH, COMPLYING WITH THE PHILADELPHIA TRANS FAT BAN, 2 (2007), available at http://www.phila.gov/health/pdfs/Trans_Fat.pdf.

16. PHILA., PA., HEALTH CODE § 6-307 (2007) (effective Sept. 1, 2007, for oils, fats, and margarines used in frying and spreads and Sept. 1, 2008, for other foods).

17. KING COUNTY, WASH., CODE OF THE KING COUNTY BOARD OF HEALTH ch. 5.10.035 (2007) (exempting food served directly to patrons in a manufacturer's original sealed package).

18. BOS., MASS., REGULATION TO RESTRICT FOOD CONTAINING ARTIFICIAL TRANS FAT IN THE CITY OF BOSTON (Mar. 2008), available at http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs_transfat-Mar08.pdf.

19. See, e.g., Press Release, U.S. Dep't of Justice, Pennsylvania Dairy Farmer Operator Found in Violation of Food, Drug and Cosmetic Act (Feb. 15, 2012) available at <http://www.justice.gov/opa/pr/2012/February/12-civ-217.html> ("Unpasteurized milk can contain a wide variety of harmful bacteria, including Listeria, E.coli, Salmonella, Campylobacter, Yersinia and Brucella.").

20. Mrill Ingram, *Keeping Up with the E. Coli Considering Human-Nonhuman Relationships in Natural Resources Policy*, 50 NAT. RESOURCES J. 371, 379 (2010).

21. 21 C.F.R. § 1240.61 (2012).

22. James Eng, *Amish Farmer Targeted by FDA Raids Shuts Down Raw Milk Business*, NBC NEWS (Feb. 15, 2012, 4:54 PM) http://usnews.nbcnews.com/_news/2012/02/15/10418406-amish-farmer-targeted-by-fda-raids-shuts-down-raw-milk-business?lite; U.S. Dep't of Justice, *supra* note 19.

23. U.S. Dep't of Justice, *supra* note 19.

backlash. A growing number of consumers pay increasingly close attention to food—thronging to food trucks,²⁴ artisanal farm products and markets,²⁵ and farm-to-table restaurants and watching celebrity chefs scour the world for the most unhealthy²⁶ imbibements. Raw milk lovers see benefits in the bacteria it contains, arguing that it promotes a healthy immune system and is safe.²⁷ Locavores point to the allegedly lower carbon emissions of a farm-to-table lifestyle²⁸ and the social benefits of supporting small community farms.²⁹ Governments' involvement in the commonplace but uniquely personal activity of consuming food, coupled with the growing American obsession with food, has inspired a loud chorus of dissenters. Groups who believe in a "liberty of palate" argue that the government must keep its hands off their dinner tables.³⁰ And although the founding fathers failed to put food on the same plane as speech, jury trials, and quartering of soldiers, some of these activists argue that food rights merit close constitutional scrutiny.³¹ As these claims expand, Kathleen Sebelius, the Secretary of the U.S. Department of Health

24. See, e.g., *Our Mission*, KEEP FOOD LEGAL <http://www.keepfoodlegal.org/mission> (last visited Jan. 18, 2013) (positively acknowledging a variety of food preferences, including "flavorful organic vegetables sold by small farmers and producers," "artisan cheeses, wines, and meats," "fast food," "fine dining," and "street foods—tacos, barbecue, and the like").

25. See, e.g., *About Us*, FARM-TO-CONSUMER LEGAL DEF. FUND, <http://www.farmtoconsumer.org/about.html> (last visited Jan. 18, 2013) (protecting food consumers' and others' rights "to engage in direct commerce free of harassment by federal, state and local government interference" and supporting artisanal foods).

26. Guy Fieri tours the country finding often fatty and caloric meals at diners, for example, and has developed a devoted following. See, e.g., *Diners Declassified, Behind the Scenes with Guy Fieri*, FOOD NETWORK, <http://www.foodnetwork.com/shows/diners-declassified/index.html> (last visited May 3, 2013) (describing a "calorie bomb of a breakfast" eaten by Guy Fieri, which involved "a pork belly po'boy with maple mayonnaise, sautéed foie gras with french fries, and fish and chips with tartar sauce").

27. See, e.g., Pat Shannan, *The True Benefits of Raw Milk*, WIS. RAW MILK ASS'N, <http://www.wisrawmilkassociation.com/about-raw-milk.html> (last visited Jan. 18, 2013) (citing to a source that suggests that pasteurization kills "good bacteria"); *Benefits of Raw Milk (Unpasteurized)*, ROBINSON FARM, <http://www.robinsonfarm.org/FactsRawMilk.html> (last visited Jan. 18, 2013) ("Raw milk assists in maintaining a healthy balance of beneficial bacteria in the intestinal tract."); Weston A. Price Foundation, A CAMPAIGN FOR REAL MILK, <http://realmilk.com/> (last visited Jan. 18, 2013) [hereinafter A CAMPAIGN FOR REAL MILK] (providing contacts for raw milk farmers and foundation-written materials that rebut government claims about the dangers of raw milk); *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 675 (N.D. Iowa 2010) (dismissed for lack of standing, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012) (challenging the FDA's ban on raw milk in interstate commerce); The Center for Media and Democracy, *About*, FOOD RIGHTS NETWORK, <http://www.foodrightsnetwork.org/about/> (last visited Jan 18, 2013) [hereinafter FOOD RIGHTS NETWORK].

28. Christopher L. Weber & Scott H. Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 ENVIRON. SCI. TECH. 3508, 3512 (2008) (concluding that "a totally 'localized' diet reduces GHG emissions per household equivalent to 1000 miles/yr (1600 km/yr) driven").

29. See, e.g., Judith Weinraub, *Q&A with Michael Pollen Think Global, Eat Local*, WASH. POST, June 28, 2006, at F1, available at <http://michaelpollan.com/interviews/qa-with-michael-pollan-think-global-eat-local/>.

30. See, e.g., *Our Mission*, KEEP FOOD LEGAL, <http://www.keepfoodlegal.org/mission> ("KFL is the first nationwide membership organization devoted to food freedom—the right of every American to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods of their own choosing.").

31. See, e.g., *infra* note 36 and accompanying text (arguing for a fundamental right to food choice).

and Human Services, won't just face continued arguments against the implementation of national healthcare and hypothetical broccoli laws; the Farm-to-Consumer Legal Defense fund has already sued her for her Department's regulation banning interstate sales of raw milk.³² As these types of debates expand, the contours of food rights may be tested in a more serious manner.

Without addressing the merits of the underlying policy debates, this short Essay aims to add some constitutional clarity to these debates by assessing the merits of both sets of claims—that the Due Process Clause gives us the right to eat whatever foods we want, and that we need to interpret the Commerce Clause to avoid a broccolian catastrophe. Both, it concludes, lack substance. Part I of this Essay introduces fundamental rights under the Substantive Due Process Clause, setting the stage for an analysis of whether individuals have a fundamental right to food choice—or, to be free of government-imposed consumption of particular foods. Part II explores whether food choice activists can persuasively claim a fundamental right to liberty of palate, finding a low likelihood of success, while Part III addresses the more promising argument for a due process right against government-mandated food consumption. It is a small point, perhaps, but due to the likely existence of a fundamental right against forced food consumption, the broccoli debate within *National Federation of Independent Business* appears unnecessary—we need not address Congress's Commerce Clause powers to force broccoli consumption if Congress could not compel this activity under the Fourteenth Amendment. On the other hand, the Essay concludes that although Americans likely have a fundamental right to *not* eat broccoli, those searching for an affirmative right to eat local vegetables, raw milk, or donuts will find little support in the Constitution. And despite growing unity of the food rights movement, with raw milk drinkers joining food truck enthusiasts, broad food rights legislation to fill a constitutional gap is unlikely. For now, the liberty of palate will likely be a limited right against forced rations of despised vegetables.

I. UNDERSTANDING FUNDAMENTAL RIGHTS

As governments have expanded their control over the contents of consumers' plates, Americans have paid ever more attention to the products that they purchase and eat. Many opponents to bans on food—especially junk food—are industry representatives who are more concerned about the bottom line than liberty.³³ However, a number of consumer groups have asserted a more fundamental right to food. The Food Rights Network, for example, supports “the milk drinker's right to purchase raw milk both on and off the farm.”³⁴ The Keep Food Legal organization supports a broader variety of food liberty positions, asserting that it “hate[s]” food

32. *Farm-to-Consumer Legal Def. Fund*, 734 F. Supp. 2d at 674-75, 678 (dismissed for lack of standing, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012) (arguing that “the right to produce, obtain, and consume the foods of choice for themselves and their families, including their children” is fundamental).

33. See, e.g., Notice of Verified Petition at 18-19, *N.Y. Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Mental Health & Hygiene*, No. 553584/2012 (N.Y. Sup. Ct. filed Oct. 12, 2012), available at <http://s3.documentcloud.org/documents/463325/soda-industry-v-new-york-city-petition.pdf> (noting various concerns about the impact of the large sugary beverage ban on business).

34. FOOD RIGHTS NETWORK, *supra* note 27.

bans of all kinds.³⁵ The group's founder has suggested that there is an unenumerated, fundamental substantive due process right to food—arguing that although “[t]he Supreme Court has never recognized an explicit right to eat certain foods,” some justices seem to recognize a “negative right,” which is not an “explicit right” to eat food but may provide a “right to make and procure food” and protect against certain food bans.³⁶

Indeed, hints of fundamental food rights have emerged in recent challenges to food laws. The Farm-to-Consumer Legal Defense Fund, in challenging the FDA's mandate that milk sold in interstate commerce be pasteurized, has alleged that milk consumers have been deprived of fundamental privacy rights—including the right to protect one's own bodily health.³⁷

On the other side of the coin, the national health care/broccoli debate implicitly assumed that only the Commerce Clause stands between us and whatever Congress wants us to eat—but this assumption is highly questionable in light of the Court's forced nutrition precedents.

To understand whether either of these fundamental rights exists—a liberty of palate or a right against government-mandated consumption of particular foods—a basic understanding of fundamental rights is in order. As the Court recently reaffirmed in *McDonald v. City of Chicago*,³⁸ “the only rights protected against state infringement by the Due Process Clause”³⁹ are “those rights ‘of such a nature that they are included in the conception of due process of law,’”⁴⁰ and for unenumerated rights, the Court employs several “different formulations in describing the boundaries of due process.”⁴¹

At various times, the Court has said that certain rights are associated with “‘immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.’”⁴² At other times, that some rights are “‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁴³ Relatedly, “due process protects those rights that are ‘the very essence of a scheme of ordered liberty’ and essential to ‘a fair and enlightened system of justice.’”⁴⁴ And finally, the Court has told us that a right that involves “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice”⁴⁵ is fundamental.

For all of these questions—addressing whether the right is fundamental to an

35. KEEP FOOD LEGAL, *supra* note 24.

36. 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).

37. Farm-to-Consumer Legal Def. Fund v. Sebelius, 734 F. Supp. 2d 668, 679-80 (N.D. Iowa 2010) (dismissed for lack of standing, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012)).

38. 130 S.Ct. 3020 (2010).

39. The Court has, at times, conducted a fundamental rights analysis under the Equal Protection Clause, but the underlying analysis is the same.

40. *Id.* at 3031 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

41. *Id.* at 3032.

42. *Id.* (quoting *Twining*, 211 U.S. at 102).

43. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

44. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

45. *Id.* (quoting *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897)).

ordered scheme of liberty, has deeply-rooted traditions, and is a necessary component of a civilized society—the Court tends to look to norms exhibiting the need for and importance of the right and to historical recognition of the right.⁴⁶ In *McDonald*, the Court explored the statements of “[f]ounding-era legal commentators,” which demonstrated the importance of an individual right to bear arms,⁴⁷ evidence showing that the drafters of the Bill of Rights considered the right to be fundamental,⁴⁸ and the existence of the right to self-defense “from ancient times to the present day.”⁴⁹

With this general understanding of a fundamental right as a foundation, Parts II and III explore fundamental rights in the context of food—finding only a likely right against government-mandated consumption of specific foods.

II. THE UNLIKELY CONSTITUTIONAL BASIS FOR LIBERTY OF PALATE

Justice Douglas once wrote that “[o]ne’s hair style, like one’s taste for food, or one’s liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people.”⁵⁰ Unfortunately for advocates of food choice, however, the long history of curtailment of food choice, and the lack of any constitutional protection or tradition of broadly protecting food rights, cuts against this admittedly creative and intuitively appealing position.

A. *The Lack of a Fundamental Right to Food Choice*

Simply put, the right to consume broccoli, raw milk, or trans-fat fried donuts, or any other particular food, is probably not “fundamental to *our* scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.”⁵¹ Significantly, the right has not been “recognized by many legal systems from ancient times to the present day.”⁵² As early as the late 1800s, experts recommended laws for federal food safety, and numerous bills were introduced;⁵³ by 1906, Congress passed the Pure Food and Drug Act and the Federal Meat Inspection Act and assigned two federal agencies to administer them, with a focus on avoiding the sale of contaminated foods, diluted products, and dangerous additives.⁵⁴ By 1938, Congress had amended the Pure Food and Drug Act to specifically prevent selling

46. *Id.* at 3036.

47. *Id.* at 3037.

48. *Id.*

49. *Id.* at 3036.

50. See *Ollf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting from denial of certiorari).

51. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). See also Kammi L. Rencher, Note, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?* 12 NEV. L.J. 418, 425 (2012) (“Food choice is not explicitly included in the Constitution, and has little to do with ordered liberty.”).

52. *McDonald*, 130 S.Ct. at 3036.

53. *Significant Dates in U.S. Food and Drug Law History*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/aboutfda/whatwedo/history/milestones/ucm128305.htm> (last updated Nov. 6, 2012).

54. Diana R. H. Winters, *Not Sick Yet: Food-Safety-Impact Litigation and Barriers to Justiciability*, 77 BROOK. L. REV. 905, 926 (2012).

“adulterated or misbranded” foods,⁵⁵ and 2011 amendments gave the Food and Drug Administration a “preventive” role in food safety.⁵⁶

Operating within these expanding powers, the FDA has banned a variety of food additives⁵⁷ and has frequently recalled specific products from shelves.⁵⁸ Beyond recalls, the FDA has the power to set quality standards and definitions of foods, as well as to ban foods or food additives.⁵⁹ Additionally, as discussed in the introduction, states and municipalities increasingly ban entire food products for reasons beyond direct risks to human health and safety, including humane treatment of animals.⁶⁰

Historic limits on food consumption have stemmed not only from traditional health and safety concerns, but also from broader public policy goals. President Kennedy banned imports of all goods (including food) from Cuba in the 1960s, and Congress reaffirmed the ban in 1992.⁶¹ Governments have also banned the consumption of animals for which we have a particular soft spot—California voters passed the Prohibition of Horse Slaughter and Sale of Horsemeat for Human Consumption Act⁶² by initiative in 1998.

The courts have generally upheld attempts by various levels of government to regulate food. Indeed, the Court’s famous *Carolene Products* decision applied a rational basis test to Congress’s Filled Milk Act, which prohibited “the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat”—even though many consumers may have been sad to see Milnut go.⁶³ Even before the modern Commerce Clause era, the Supreme Court in 1891 noted (in striking down a food law that improperly interfered with interstate commerce) that “[u]ndoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats,” provided that the law falls within constitutional boundaries.⁶⁴

Where food and drug legislation and regulations have failed, they have fallen for reasons other than a lack of a rational basis: They have been beyond the bounds of an agency’s authority, have improperly burdened interstate commerce by, for example, requiring expensive inspections of meats slaughtered “one hundred miles or more from the place of sale,”⁶⁵ or, increasingly, have violated the First

55. *Id.* at 911 (citing 21 U.S.C. §§ 331, 342-343 (2006)).

56. *Id.*

57. Cf. Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should—and Should Not—Approach Government Regulation*, 39 *ECOLOGY L.Q.* 773, 793 (2012) (noting that the “FDA evaluates ingredients, as opposed to finished food products”).

58. See U.S. Food and Drug Administration, *Recalls, Market Withdrawals, & Safety Alerts*, <http://www.fda.gov/safety/recalls/default.htm>.

59. *Food Additive Status List*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/food/foodingredientspackaging/foodadditives/foodadditivelistings/ucm091048.htm> (last updated Jan. 19, 2012) (Foods and food additives marked “BAN” have been banned.).

60. See *supra* notes 6 - 18 and accompanying text.

61. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (2006).

62. Cal. Proposition 6 (1998) (enacted) *available at* <http://vote98.sos.ca.gov/VoterGuide/Propositions/6text.htm>.

63. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 145-47 (1938) (citing 21 U.S.C. §§ 61-63 (2006)).

64. *Id.*

65. *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891).

Amendment.⁶⁶

Even if there is no general, fundamental right to food liberty, there are some limits on the government's ability to regulate consumption. Indeed, if the government endeavored to ban the consumption of all bread or meat products—foods that have become deeply ingrained within our diet and culture—this would perhaps unduly interfere with “the historic practices of our society.”⁶⁷ This would not, of course, prevent governments from banning particular breads or meats for human health or other purposes. Finally, in some cases, particular foods are deeply intertwined with other fundamental rights, such as religious freedom.⁶⁸ Others have noted the increasing use of the First Amendment's Speech Clause to combat restrictions on food-related advertising.⁶⁹ Moreover, the government could not, of course, ban *all* food consumption without triggering strict scrutiny; that would violate the due process right to life. And a ban on nearly all foods would be a de facto requirement to eat particular foods, which, as discussed below, likely also must survive strict scrutiny. Otherwise, however, rational basis review likely applies to food bans.

B. Rational Basis Review

Because the right to consume particular foods seems to lack a fundamental nature (or involve any type of suspect classification), challenges to laws banning or curtailing access to certain foods will fall within the notoriously deferential rational basis standard of review. Under this standard, a law will survive unless the challenger can “negative every conceivable [rational] basis which might support it.”⁷⁰

Despite the high hurdle of rational basis review, plaintiffs attempting to challenge the FDA's ban on interstate sales of raw milk argued that there was “no legitimate federal interest” in prohibiting them from receiving raw milk and dairy products from another state or in preventing sales to residents of other states in which the sale of raw milk is illegal.⁷¹ Furthermore, they asserted, the government has no legitimate interest in prohibiting raw milk from crossing state lines when a raw milk product was “legally purchased in accordance with state law.”⁷² The Northern District of Iowa dismissed the case on standing grounds,⁷³ but the case

66. Cf. *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (reversing on First Amendment grounds a conviction for marketing an off-brand drug).

67. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion). *But see id.* at 122 (noting that the right must be both fundamental and “an interest traditionally protected by our society”—a protection “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

68. *E.g.*, sacramental wine and matza.

69. See SAMANTHA GRAFF & TAMARA R. PIETY, *THE NEW FIRST AMENDMENT AND ITS IMPLICATIONS FOR COMBATING OBESITY THROUGH REGULATION OF ADVERTISING*, http://changelabsolutions.org/sites/default/files/Piery_Graff_NewFirstAmendImplications_FINAL_%28CLS_updated_20120612%29_20120312.pdf.

70. *FCC v. Beach Comm.*, 508 U.S. 307, 315 (1993) (quotations omitted).

71. *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 680 (N.D. Iowa 2010) (dismissed for lack of standing, 2012 WL 1079987 (N.D. Iowa Mar. 30, 2012)).

72. *Id.*

73. *Farm-to-Consumer Legal Defense Fund v. Sebelius*, 2012 WL 1079987 *2 (N.D. Iowa, Mar. 30, 2012).

demonstrates plaintiffs' willingness to raise liberty-based arguments.⁷⁴

Other plaintiffs recently succeeded in convincing a state trial court that New York City's ban on large sugary drinks violated the state's separation of powers doctrine and is "arbitrary and capricious" because "[i]t is wholly irrational to prohibit selected businesses from selling covered beverages, while permitting thousands of corner markets, convenience stores, gas stations, and grocery stores . . . to sell the *exact same beverages in any size*."⁷⁵ As a matter of federal law, however, this type of Equal Protection claim is unlikely to succeed. As the Supreme Court has explained:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.⁷⁶

Thus, although a few cases⁷⁷ have suggested that certain food regulations lack a rational basis, these arguments will probably nearly always fail. In light of the ever-expanding science on the dangers of everything from raw milk to sugary drinks, courts will have no need to assume a rational basis for a variety of constraints on food consumption—the evidence is abundant and highly accessible, and frequently cited by municipalities, states, and federal agencies banning or limiting a variety of products. The fact that obesity-attributable medical expenditures per state range from \$87 million to \$7.7 billion annually⁷⁸ allows governments to easily rebut most substantive due process challenges to sugary and fatty food bans. Indeed, groups supporting New York City's ban on large, sugary drinks noted that "an expert public health body . . . reviewed relevant scientific

74. The plaintiffs could not show a "threat of injury in fact" because the FDA, according to the court, stated that "[w]ith respect to the interstate sale and distribution of raw milk, the FDA has never taken, nor does it intend to take, enforcement action against an individual who purchased and transported raw milk across state lines solely for his or her own personal consumption." *Id.* at * 2 (citing an FDA November 1, 2011 press release in Plaintiff's Appendix at 292). The FDA's enforcement priorities could reflect, inter alia, a respect for food liberty, concern over the political consequences of prosecuting consumers, a desire to focus on producers and distributors, or some combination of the three.

75. Notice of Verified Petition, *supra* note 33, at 36-37. A New York Supreme Court (trial court) judge declared the rule invalid and "enjoined and permanently restrained" the Department of Health from enforcing it, finding that the Health Board lacks the authority to implement the ban, that the ban would violate the separation of powers doctrine, and that it is arbitrary and capricious because its many loopholes "gut the purpose of the Rule." *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene*, No. 653584/12, at 34-35 (N.Y. Sup. Ct. N.Y. County Mar. 11, 2013), available at <http://online.wsj.com/public/resources/documents/sodaruling0311.pdf>. The City has appealed. Tom Watkins, *New York Appeals Soda-Cup Decision*, CNN (Mar. 30, 2013), <http://www.cnn.com/2013/03/29/health/new-york-soda-appeal>.

76. *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975) (internal quotations omitted); see also *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.")

77. See, e.g., *Alta-Dena Dairy v. County of San Diego County*, 76 Cal. Rptr. 510, 513-1570-71, 73 (Cal. Ct. App. 4 Dist. 1969).

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

evidence on the health hazards associated with consumption of sugar-sweetened beverages and the effect of portion sizes on consumption patterns.”⁷⁹ Furthermore, Boston found that “heart disease is a leading cause of death in the United States” and that “there is a clear association between an increase in the intake of trans fat and the risk of heart disease” when it banned trans fats.⁸⁰

In light of the long history of food regulation and the lack of a historic right or tradition to eat foods of one’s choice, a broad-based, fundamental right to a liberty of palate is extremely unlikely. But this does not mean that the government need only a rational reason to cram broccoli, or anything else, down our throats. As discussed in Part III, the Court has strongly suggested that government cannot force competent individuals to accept food or drink even if it is necessary to keep them alive.⁸¹ So while it may deny us certain affirmative pleasures like fried donuts, it very likely cannot force us to consume them absent an extremely compelling justification.

III. A FUNDAMENTAL RIGHT AGAINST MANDATED FOOD CONSUMPTION

Food lovers and health nuts alike will find little substantive due process support for consumption of fried donuts or raw milk. But as Supreme Court dicta has long suggested, there is probably a fundamental right against government-mandated consumption of particular foods. Government efforts to mandate consumption of broccoli (or any other food), even for the most laudatory health-based reasons, would probably not survive strict scrutiny.

A. *The Right to Refuse Food*

Taken together, *Cruzan v. Missouri Department of Health*⁸² and *Washington v. Glucksberg*⁸³ show that individuals have a fundamental right to refuse food altogether, even if necessary to sustain life. If this is true, then it appears *a fortiori* that the government may not mandate consumption of any particular food. In *Cruzan*, Nancy Cruzan was rendered incompetent after a car accident, and her family requested that the hospital remove a feeding tube despite the lack of “clear and convincing evidence of Nancy’s desire to have life-sustaining treatment withdrawn under such circumstances.”⁸⁴ When her parents sought authorization in the state trial court for termination of the artificial nourishment and hydration, the court determined that individuals like Nancy, who had no chance of regaining brain function, had a fundamental right to “refuse or direct the withdrawal of ‘death prolonging procedures,’”⁸⁵ and a divided state supreme court reversed.⁸⁶

79. Jennifer L. Pomeranz & Kelly D. Brownell, *Portion Sizes and Beyond—Government’s Legal Authority to Regulate Food-Industry Practices*, 367 NEW ENG. J. MED. 1383, 1384 (2012), available at <http://www.nejm.org/doi/full/10.1056/NEJMp1208167>.

80. BOS., MASS., *supra* note 18.

81. And, as mentioned above, banning too many foods—everything but beets, for example—likely would unconstitutionally force the consumption of beets.

82. 497 U.S. 261 (1990).

83. 521 U.S. 702 (1997).

84. *Cruzan*, 497 U.S. at 265.

85. *Id.* at 268 (quoting App. To Pet. For Cert. A99).

86. *Id.* at 267-68.

The Supreme Court inferred from prior decisions “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”⁸⁷ Having found a liberty interest, however, the Court declined to directly address whether individuals had a specific right to refuse food and drink, only assuming for the purposes of the case that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”⁸⁸ Justice O’Connor, concurring, argued that “the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment, including the artificial delivery of food and water.”⁸⁹

In *Glucksberg*, the Court, while refusing to recognize a fundamental right to assisted suicide, acknowledged that the right assumed in *Cruzan* “was entirely consistent with this Nation’s history and constitutional traditions.”⁹⁰

The fact that individuals have a fundamental right to refuse all food and drink—even if this choice will end their lives—suggests, quite powerfully, that individuals have the right to refuse certain *types* of food and drink, such as broccoli. Indeed, as Professor Jamal Greene argues, based on a similar Court holding that forced stomach pumping violated the Due Process Clause, “[i]t would seem to follow *a fortiori* that force-feeding broccoli to an otherwise sui juris person suspected of nothing but an aversion to eating broccoli would also violate either the Fifth or the Fourteenth Amendment, depending on whether the force-feeders were federal or state officials.”⁹¹ Privacy-based fundamental rights cases similar to *Cruzan* and *Glucksberg*, although less related to food, support this likely right. Even prisoners, who enjoy the most curtailed liberty rights, also possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”⁹²

Barbecue and raw milk lovers alike might try to frame their arguments in these terms. Those who drive miles to meet the illicit milk van could argue that regulations against interstate sales of raw milk force them, against their will, to consume unhealthy, enzyme and bacteria-deprived pasteurized substances. But efforts to frame a right to consume any type of food as a right against forced consumption will probably not be successful—the government is not, after all, tying down consumers in hospital beds and force-feeding them pasteurized milk.

B. Other Legal Arguments

Whether arguing against negative bans or positive obligations to consume food, legal scholars advocating for food choice point to several other state and federal constitutional bases for food liberty beyond substantive due process, including the Dormant Commerce Clause,⁹³ takings,⁹⁴ separation of powers,⁹⁵ and

87. *Id.* at 278.

88. *Id.* at 279.

89. *Id.* at 289 (O’Connor, J., concurring).

90. *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

91. Greene, *supra* note 1, at 266.

92. *Cruzan*, 497 U.S. at 278 (quoting *Washington v. Harper*, 494 U.S. 210, 221-22 (1990)).

93. Linnekin, *supra* note 36, at 386-87.

procedural due process.⁹⁶ Although an analysis of the merits of these arguments is beyond the modest scope of this Essay, most have failed or have not yet been decided. Although a Dormant Commerce Clause challenge to a Chicago ban on foie gras failed,⁹⁷ scholars argue that the case was incorrectly decided: The bans “illegally interfere with interstate commerce” with no acceptable police power justification.⁹⁸ In any case, many of these laws might avoid Dormant Commerce Clause issues by including language that exempts from bans “foods served in the manufacturer’s original, sealed packaging such as packages of crackers or bags of potato chips.”⁹⁹

Other arguments for food choice are simply rooted in a lack of governmental authority to pass certain laws. The American Beverage Association, unions, restaurant associations, and chambers of commerce all argued that New York City’s large soda ban “[r]epresents [a] [d]ramatic [d]eparture [f]rom [t]he [p]owers [t]raditionally [e]xercised [b]y [t]he Department [o]f Health”¹⁰⁰ because the Board has an executive, not legislative, role,¹⁰¹ and New York’s supreme court agreed with this position in March 2013, determining that the ban is beyond the

94. Alexandra R. Harrington, *Not All It’s Quacked up to Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, 12 DRAKE J. AGRIC. L. 303, 321-22 (2007) (“While it is true that the lands used by domestic foie gras manufacturers could in all likelihood be used to raise other livestock, and would retain some value in the face of a foie gras ban, the owners of these lands would still have a valid suit against their respective states under the Takings Clause based on the motivations behind the foie gras bans.”).

95. The American Beverage Association and other plaintiffs argued that the New York City Charter’s authorization of the Board to act legislatively in banning many large, sugary drinks violates the separation-of-powers doctrine in New York’s constitution because the City has ceded its “fundamental policy-making authority to an administrative agency.” Notice of Verified Petition, *supra* note 33, at 35-36.

96. In a 1969 California case, a raw milk producer argued that it had a vested right to sell its product, and that a board order to discontinue sales denied this right without due process. *Alta-Dena Dairy v. County of San Diego*, 76 Cal. Rptr. 510, 513-14 (Cal. Ct. App. 1969). In that case, San Diego’s Director of Public Health ordered discontinuation of “the production of raw milk for sale,” finding that where “an order of an administrative officer adversely affects a valuable and existing property right, where it is made without notice or hearing under a regulation which makes no provision for hearing or administrative review, the fundamental principles of due process come into play”. *Id.* at 514, 517-18. The court agreed that the order required a trial de novo, which would allow the producer to contest the decision. *Id.* at 517.

97. *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 897-906 (N. D. Ill. 2007) (cited in Linnekin, *supra* note 36, at 386).

98. Linnekin, *supra* note 36, at 386-87. *See also* Harrington, *supra* note 94, at 318 (arguing that “[t]his violation occurs because the effect of banning the sale of foie gras within the boundary of a state or city is that domestic foie gras producers cannot sell their wares in that jurisdiction, and food wholesalers, restaurants, and other third parties in the process located within these jurisdictions cannot allow foie gras to complete its interstate journey from one state to another for consumption,” and that vague assertions that force feeding ducks are inhumane lack merit). Baylen Linnekin cites to this piece in arguing that the Dormant Commerce Clause may be a successful means of challenging food legislation. Linnekin, *supra* note 36, at 386.

99. *See, e.g.*, PHILADELPHIA DEPARTMENT OF PUBLIC HEALTH, *supra* note 15, at 3. *See also* KING COUNTY, WASH., CODE OF THE KING COUNTY BOARD OF HEALTH ch. 5.10.035 (2007) (exempting food served directly to patrons in a manufacturer’s original sealed package).

100. Notice of Verified Petition, *supra* note 33, at 22.

101. *Id.*

Department's authority.¹⁰² Further, the petitioners argued, the soda ban is strikingly dissimilar to "[p]revious DOH regulations," which "involved such matters as keeping poisonous products outside of food establishments, or providing consumers with the means to make informed choices where there was a gap to be filled in the legislation governing this policy."¹⁰³ The plaintiffs-petitioners concluded that the Board "engaged in legislative policy-making without a proper statutory basis,"¹⁰⁴ and this, again, persuaded the court, which found a separation of powers violation.¹⁰⁵ Consumers and producers of raw milk have raised similar arguments at the federal level, asserting that the Public Health Service Act, which allows regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession" does not authorize a ban on interstate sales of raw milk.¹⁰⁶

Opponents of local bans on raw milk or other food products have also argued that municipal laws impermissibly conflict with state law, but this claim—at least in one old case—has not been successful. In *Natural Milk Producers' Ass'n. v. City of San Francisco*,¹⁰⁷ a California court allowed the city to prohibit the sale and distribution of two types of raw milk that the California Agricultural Code permitted; San Francisco was simply creating an "additional regulation" by allowing only *certified* raw milk to be sold—one of the grades allowed by state law.¹⁰⁸ Whatever the merits of these arguments, however, the controversy over food choice is likely to continue.

CONCLUSION

As Americans have become obsessed with food, demands for food liberty have risen. Regulations limiting individuals' choice of food products have been labeled as "food fascism,"¹⁰⁹ and a growing number of groups are taking on this alleged war against their food rights. Many of these groups have narrow agendas, and advocates of the dense nutrients and beneficial bacteria found only in raw milks¹¹⁰ will often find little common ground with beverage corporations opposed to soda bans.¹¹¹ The interests at stake are varied, and their relative strengths are hotly disputed. But these groups do have a core interest in common: They do not want

102. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene, No. 653584/12, at 35 (N.Y. Sup. Ct. N.Y. County Mar. 11, 2013), available at <http://online.wsj.com/public/resources/documents/sodaruling0311.pdf>.

103. *Id.* at 23.

104. *Id.* at 34.

105. *Id.* at 34-25.

106. *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 678 (N.D. Iowa 2010) (dismissed for lack of standing in *Farm-to-Consumer Legal Defense Fund v. Sebelius*, 2012 WL 1079987 *2 (N.D. Iowa Mar. 30, 2012)).

107. 124 P.2d 25 (Cal. 1942) (reversed on other grounds).

108. *Id.* at 30.

109. Peter Ferrera, Op-Ed., *Rise of Food Fascism*, WASHINGTON TIMES, May 31, 2003, at B3, available at <http://www.washingtontimes.com/news/2003/may/31/20030531-092643-1371r/>. See also Linnekin, *supra* note 36, at 358 (advocating against "food fascism" and citing to this op-ed).

110. A CAMPAIGN FOR REAL MILK, *supra* note 27.

111. See, e.g., Notice of Verified Petition, *supra* note 33 (showing the American Beverage Association as a plaintiff-petitioner in the lawsuit challenging New York City's large soda ban).

the government to dictate the content or quantity of the food they eat. And as noted in this Essay, a small but vocal libertarian contingent, citing to Ron Paul and broader Tea Party principles, has emerged around a broader food rights agenda.¹¹²

With more angry foodies and food producers complaining to courts and legislatures, there is a possibility that these groups will find common cause. Soda and junk food lovers have begun to band together with raw milk purists to fight off threatened incursions into their divergent food consumption choices.¹¹³ Nonetheless, given the sometimes-conflicting nature of the interests involved—fans of allegedly healthy raw milk may favor bans on unhealthy sugared soda—a broader food-rights movement may have difficulty finding traction.

As discussed in this Essay, several groups have begun to argue for a fundamental right to food. While there likely is no fundamental right to choose the food that one eats, the Due Process Clause likely does protect a fundamental right against forced consumption of particular foods. So while the Supreme Court dicta in *National Federation of Independent Business*¹¹⁴ was probably correct that the government cannot force its citizens to consume broccoli, it was likely unnecessary to reach the question. If citizens have a fundamental right against forced food consumption, the broccoli debate under the Commerce Clause was, ahem, a red herring. But despite this likely right against consumption mandates, a broader liberty of palate has little purchase under Due Process.

112. See Goodyear, *supra* note 5; 2012.01.30 RMFR at Sheriff Conference Las Vegas, RAW MILK FREEDOM RIDERS, <http://rawmilkfreedomriders.wordpress.com/past-events/home/> (last visited Feb. 2, 2013) (“Join us on January 30th in Las Vegas, Nevada where the organizers of the Raw Milk Freedom Riders will stand side by side with fellow Farm Food Freedom advocates as we educate the Nation’s Sheriffs about the injustice occurring against independent farmers around the country.”).

113. See, e.g., Memorandum from Baylen J. Linnekin, Exec. Dir., Keep Food Legal, to Donald S. Clark, Sec’y, Fed. Trade Comm’n (Dec. 2, 2011) *available at* <http://www.keepfoodlegal.org/content/keep-food-legal-submits-comments-ftc-supports-consent-agreement-four-loko-maker-phusion> (“Keep Food Legal members and supporters hail from across the United States and are key cogs in nearly every link in the food chain: farmers, ranchers, fishermen, hunters, manufacturers, grocers, restaurateurs, tavern owners, chefs, consumers, foodies, activists, academics, and authors.”).

114. 132 S.Ct. 2566 (2012).