

EATERS: POWERLESS BY DESIGN

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Food law, including traditional food safety regulation, anti-hunger programs, and food system worker protections, has received increased attention in recent years as a distinct field of study. Bringing together these disparate areas of law under a single lens provides unique opportunity to understand the role of law in shaping what we eat (what food is produced and where it is distributed), how much we eat, and how we think about food. The food system is rife with problems—endemic hunger, worker exploitation, massive environmental externalities, diet-related disease. Looked at in a piecemeal fashion, the elements of food law appear responsive to these problems. Looked at as a whole, however, food law appears instead to entrench the existing structures of power that generate these problems.

This Article offers a novel conceptual critique of the food system. It argues that food law is built on two contradicting myths: the myth of the helpless consumer who needs government protections from food producers, and the myth of the responsible consumer who needs no government protection and can take on the food system's many problems herself. The first myth is self-actualizing, as the laws that it justifies disempower food consumers and producers. The second myth is self-defeating, as the legal structures that assume consumer responsibility impede meaningful consumer choice.

Food law, as it is shaped by these myths, constructs powerlessness by homogenizing, or erasing diversity within, the food system, suppressing dissent, and polarizing various food system constituents who might otherwise collaborate on reform. Ultimately, food law is designed to thwart food sovereignty. By revealing how the structures of food law itself obstruct reform, this Article also identifies a path forward and some first steps toward true food sovereignty.

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INTRODUCTION

Food system scholars have for decades engaged in critique of food production, distribution, and consumption, pointing in particular to the ways the system reinforces economic inequality, protects the power of the food industry (often referred to as “big food”), and enables exploitation.¹ Critics point to rising rates of diet-related disease (particularly in the global north),² perpetual cycles of poverty and hunger (particularly in the global south),³ environmental externalities of food production,⁴ abuse and economic

¹ See, e.g., Alison Hope Alkon & Teresa Marie Mares, *Food Sovereignty in US Food Movements: Radical Visions and Neoliberal Constraints*, AGRIC. HUM VALUES (2012); Alison Hope Alkon & Julie Guthman, *Introduction*, in THE NEW FOOD ACTIVISM: OPPOSITION, COOPERATION, AND COLLECTIVE ACTION 10-15 (Alison Hope Alkon & Julie Guthman eds. 2017); NORA MCKEON, *FOOD SECURITY GOVERNANCE: EMPOWERING COMMUNITIES, REGULATING CORPORATIONS* (2015) (critiquing neoliberal food trade policy); Marxist critique of the food system is also common. See, e.g., Thomas Cheney, *Historical Materialism and Alternative Food: Alienation, Division of Labour, and the Production of Consumption*, 11 SOCIALIST STUDIES 105 (2016). That the food system is broken is a common refrain. Otto Scharmer, *An Apple Shows Just How Broken Our Food System Is*, HUFFINGTON POST (May 27, 2018), https://www.huffingtonpost.com/entry/opinion-scharmer-our-broken-food-system_us_5b06b0a0e4b05f0fc8455acb; Food Solutions New England, *Our Broken Food System (And How to Fix It)* <http://www.foodsolutionsne.org/news-and-announcements/our-broken-food-system-and-how-fix-it>; Tamar Haspel, *10 Things We Should Do To Fix Our Broken Food System*, THE WASHINGTON POST (Dec. 29, 2015), https://www.washingtonpost.com/lifestyle/food/10-things-we-should-do-to-fix-our-broken-food-system/2015/12/28/ea720336-a8f7-11e5-9b92-dea7cd4b1a4d_story.html?utm_term=.5aa392958674; Peter Lehner, *Fixing Our Broken Food System*, EARTHJUSTICE BLOG (Mar. 25, 2016), <https://earthjustice.org/blog/2016-march/fixing-our-broken-food-system>; Foodtank, *New Report Provides Platform to Fix Broken Food Systems*, <https://foodtank.com/news/2018/06/ruth-richardson-teebagrifood-food-systems/>; Guido Schmidt-Traub & Michael Obersteiner, *Fixing Our Broken Food System—A Crucial SDG Challenge*, Ctr. for Int’l Relations & Sustainable Devel., <https://www.cirsd.org/en/horizons/horizons-summer-2018-issue-no-12/fixing-our-broken-food-system---a-crucial-sdg-challenge>; Amy Leech, ‘Less Is More’—A Fix For Our Broken Food System That We Can All Buy Into, GUARDIAN (Mar. 31, 2014), <https://www.theguardian.com/sustainable-business/food-blog/food-system-broken-solution-less-is-more>; Alison Cairns, *It Is Time to Fix Our Broken Food Systems*, WBCSD (Aug. 25, 2017), <https://www.wbcd.org/Cjgve>.

² See, e.g., Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL’Y 17 (2013).

³ See, e.g., Jennifer Williams Zwagerman, *Recognizing Challenges and Opportunities in the Quest to End Hunger*, 4 TEX. A&M L. REV. 315 (2017); Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT’L L. 131 (2006).

⁴ See, e.g., J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOL. L. Q. 263 (2000).

injustice along the food supply chain,⁵ and, increasingly, infringement of animal welfare.⁶ These concerns have spawned a wealth of social movements and academic literature identifying and targeting a broad range of culprits: the World Trade Organization,⁷ the meat processing industry,⁸ multinational food companies,⁹ grocery retail and fast food chains,¹⁰ genetic engineering, Monsanto (now Bayer),¹¹ and many others.

This Article takes on a different type of culprit: food law itself. This Article explores a variety of mechanisms through which U.S. food law constructs powerlessness. Many food laws treat consumers as victims, but others reflect narratives of blame, holding consumers responsible for their own ills (including hunger and obesity). Arguably as a result of this legal structure, food can serve neither our nutritional nor our cultural needs.

This Article identifies three mechanisms through which food law disempowers: homogenization, information control, and polarization. Together these three phenomena strip individuals and communities of sovereignty both directly through authoritarian-style governance and indirectly through imposition of dominant cultural practices.¹²

⁵ See, e.g., Stephen Lee, *The Food We Eat and the People Who Feed Us*, 94 WASH. U.L. REV. 1249, 1273 (2017); Jennifer L. Pomeranz, *Extending the Fantasy in the Supermarket: Where Unhealthy Food Promotions Meet Children and How the Government Can Intervene*, 9 IND. HEALTH L. REV. 117, 118 (2012).

⁶ See, e.g., Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETH. 63 (2006); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETH. 175 (2006); Stephen A. Plass, *Exploring Animal Rights As an Imperative for Human Welfare*, 112 W. VA. L. REV. 403 (2010).

⁷ See, e.g., Hilal Elver, *The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food*, 20 UCLA J. INT'L L. & FOREIGN AFF. 1, 3 (2016).

⁸ See, e.g., Kelsea Kenzy Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. REV. 611, 612 (2013).

⁹ See, e.g., Sarah A. Roache et. al., *Big Food and Soda Versus Public Health: Industry Litigation Against Local Government Regulations to Promote Healthy Diets*, 45 FORDHAM URB. L.J. 1051, 1052 (2018); Michele Simon, *Pepsico and Public Health: Is the Nation's Largest Food Company A Model of Corporate Responsibility or Master of Public Relations?*, 15 CUNY L. REV. 9 (2011).

¹⁰ See, e.g., Diana L. Moss & Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WISC. L. REV. 337).

¹¹ See, e.g., Rebecca M. Bratspies, *Hunger and Equity in an Era of Genetic Engineering*, 7 UC IRVINE L. REV. 195, 197 (2017); Saby Ghoshray, *Food Safety and Security in the Monsanto Era: Peering Through the Lens of A Rights Paradigm Against an Onslaught of Corporate Domination*, 65 ME. L. REV. 491 (2013).

¹² This Article draws on a broad literature on food sovereignty to define the concept and establish a counterpoint to the system of control that this Article describes. La Via Campesina, an international peasant movement, first defined food sovereignty in 1996 as “the right of peoples to healthy and culturally appropriate food produced through

First, homogenizing, or flattening difference within, a pluralistic society is a mechanism for social control.¹³ Homogenization in the food system targets impurities in food itself and deviations in how food is produced and talked about. It has collateral consequences for diversity of food and participation in food production. As a result, it limits individual and community autonomy in food choice and sterilizes diversified food traditions. Hygiene is one prominent mechanism of, and excuse for, food system homogenization. With the stated goal of food safety, food hygiene rules seek to eliminate impurities. In practice, these rules tend to extend beyond combatting illness and embrace the romantic purity of a mythic past, often a past characterized by racial uniformity.¹⁴ Other food laws seeking to protect consumers from fraudulent or confusing food marketing also contribute to this phenomenon.

Second, information control limits food system participant autonomy and agency. Authoritarian regimes consolidate and hold power by suppressing critique and constraining dissemination of information that might feed dissent. Such regimes also celebrate misinformation, using propaganda to spread false and misleading narratives about dissidents and disfavored political viewpoints.¹⁵ Our food law system is not, strictly speaking, authoritarian, but these practices are nevertheless prevalent. In U.S. food law, we see traditional suppression of access to information about and criticism of the food system as well as the strategic use of information chaos to foster confusion and stymie reform.

ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.” Via Campesina, *Our World is Not for Sale: Priority to People’s Food Sovereignty* (2001); see also Raj Patel, *What Does Food Sovereignty Look Like?*, 36 J. OF PEASANT STUDIES 663, 665 (2009); Madeleine Fairbairn, *Framing Transformation: The Counter-Hegemonic Potential of Food Sovereignty in the US Context*, 29 AGRIC. & HUMAN VALUES 217, 221 (2012); Devon G. Peña, *Autonomía and Food Sovereignty: Decolonization across the Food Chain*, in MEXICAN-ORIGIN FOODS, FOODWAYS, AND SOCIAL MOVEMENTS: DECOLONIAL PERSPECTIVES 10-13 (Devon G. Peña et al., eds., 2017) (critiquing La Via Campesina’s approach to food sovereignty for accepting and promoting western concepts of human rights and accepting sovereign state power and anthropocentric dominionism); Aeyal Gross & Tamar Feldman, “*We Didn’t Want to Hear the Word ‘Calories’*”: *Rethinking Food Security, Food Power, and Food Sovereignty—Lessons From the Gaza Closure*, 33 BERK. J. OF INT’L L 379 (2015) (arguing that food sovereignty is an essential companion concept to food security to understand power dynamics in the context of the Israeli control of Gaza).

¹³ See, e.g., JASON STANLEY, *HOW FASCISM WORKS* 151 (2018) (describing “diversity, with its concomitant tolerance of difference” as “a threat to fascist ideology,” which “rejects pluralism and tolerance”).

¹⁴ TIAGO SARAIVA, *FASCIST PIGS: TECHNOSCIENTIFIC ORGANISMS AND THE HISTORY OF FASCISM* 6 (2018); STANLEY, *supra* note 13, at 4 (identifying as a common feature of fascism the reliance on myth “based on fantasies of a non-existent past uniformity”).

¹⁵ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 341 (1968) (describing the role of information control in authoritarian regimes).

Finally, polarization preserves status quo allocations of power by preventing the development of new coalitions that might challenge that power. In the food system, polarization occurs along multiple lines. Isolation of food consumers from food system workers is common. In a system characterized by lengthy supply chains, food consumption and food production are remote from one another. Even where consumers and producers have shared interests, there are significant barriers to communication and mutual identification. In addition, isolation occurs among food consumers who participate in different types of food markets. Specifically, the food system has fractured into two primary markets—a conventional market emphasizing abundance and low costs that does not account for the externalities of food production, and an elite, high-cost market, promising consumers higher quality, better health, and reduced environmental footprints.¹⁶ As social and political identities form around both markets, consumers become increasingly polarized.

Underlying and justifying many of the legal rules that generate these features are two contradictory myths about food consumers. The first myth is that consumers are helpless: the law must treat them as objects for protection. This myth justifies a series of consumer protection laws focusing on food safety and food fraud. These are the laws that generate homogenization. This myth is self-actualizing, as the laws that it justifies disempower food consumers and producers by limiting what foods are considered safe, clean, and healthy. The second myth is that of the responsible consumer: consumers are encouraged to take personal responsibility both for their own health and for the health of the system as a whole. This myth sets the stage for information control policies that leave consumers helpless. It does so by relieving governmental responsibility either to address food system problems and or to hold food producers accountable for the harmful externalities of their products. This second myth is self-defeating, as the legal structures that assume consumer responsibility impede meaningful consumer choice. This tug-of-war reinforces the wealth and power of narrow segments of the food system while disempowering and devaluing food system workers and food consumers.

Part I explores homogenization in the U.S. food system. It introduces the myth of the helpless consumer and shows how it manifests in two areas of food law: food safety and food fraud. Part I then argues that these laws create homogenization by contributing to consolidation along the food supply chain and standardization of how and what food is produced. Part I concludes by arguing that homogenization is a tool for eater disempowerment because it

¹⁶ Of course, there is significant bleeding between these markets with the elite market driving trends in the conventional market. The growing market share of organics is one example of this bleeding.

narrows the realm of what counts as good food.

Part II considers information control in the U.S. food system. It introduces the myth of the responsible consumer and identifies three key areas of consumer responsibility: personal health, household food security, and equity and sustainability across the food supply chain. Part II then argues that a series of information control laws construct helplessness for the responsible consumer by making it difficult for consumers to access and process meaningful information. Within the morass of food system transparency, it is impossible for consumers to fulfill their alleged responsibilities.

Part III considers how both of these myths, and their attendant food laws and policies, contribute to polarization within the food system, isolating consumers from food systems workers and from one another. This isolation protects existing structures of power in the food system and leaves both workers and consumers open to exploitation.

A final Part briefly discusses how homogenization, information controls, and polarization contribute to powerlessness for many food system participants. It concludes with some preliminary ideas on how to begin to claim sovereignty.

I. FROM HELPLESSNESS TO HOMOGENIZATION

The myth of the helpless consumer underlies several core areas of food law. This myth assumes that consumers do not have the capacity to protect themselves, and it imposes a one way chain of obligation from producers to consumers. Like other areas of consumer protection law, it imposes duties on food producers, processors, distributors, and retailers to adhere to a variety of standards of quality, safety, and truth in labeling. At its extreme, the myth of the helpless consumer generates black markets in particular foods deemed too unsafe to be sold (raw milk is one common example) and rallying cries for food freedom.¹⁷

¹⁷ See, e.g., Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357, 358 (2010) (using the phrase "food fascism" to refer to laws such as California's foie gras ban and its restrictions of the cage sizes of laying hens); but see Samuel R. Wiseman, *The Dangerous Right to Food Choice*, 38 SEATTLE U. L. REV. 1299 (2015) (arguing that those with the most to gain from complete freedom of food choice are not consumers but the food industry). Indeed, these types of food laws are widely critiqued on libertarian grounds. BAYLEN LINNEKIN, *BITING THE HANDS THAT FEED US* (2016) (arguing that overregulation of food production discourages sustainability by driving up production costs and discouraging innovation); JOEL SALATIN, *EVERYTHING I WANT TO DO IS ILLEGAL* (2007) (arguing that food safety law puts particular burdens on smaller scale sustainable food businesses). This "food freedom" movement emphasizes the consequences of food safety law for individual consumer choice. For instance, many outspoken defenders of raw milk challenge state and federal prohibitions, arguing both that raw milk is safe and that individuals should be able to assume the risk of purchasing it. SALATIN, *supra*. This Article

Policy makers use concern about consumers' lack of capacity to protect themselves and consumer confusion about product labeling to justify a wide range of laws. These laws include food safety laws, which dictate food production practices, and food fraud laws, which dictate the language used on food packaging. These laws contribute to homogenization by accelerating corporate consolidation at all stages in the food supply chain and by sterilizing and standardizing food and food production practices. Homogenization thus occurs at a variety of levels, affecting food itself, food production processes, and food system participation. As homogenization narrows the realm of what counts as good food, it disempowers consumers and producers who might want to eat outside of that realm.

A. The Helpless Consumer as the Beneficiary of Food Law

Food safety laws and food fraud laws reflect a one way chain of obligation from producers to consumers. Each of these bodies of law protects consumers from potential bad producer behavior (negligent or otherwise).

1. Protection From Unsafe Food

Food safety is at the core of food law.¹⁸ The primary purpose of food safety law is to protect consumers from acute, ingestion-related harms such as foodborne illness.¹⁹ Indeed, foodborne illness poses a serious threat to food consumers, killing around 3000 every year in the US alone.²⁰ A complex network of federal and state laws govern safety by prohibiting certain types of contaminants, setting tolerance limits on others, and regulating the sanitary conditions in which food is produced, processed, distributed, and served.²¹ Food safety law is entirely consumer oriented, seeking to protect the helpless consumer from unscrupulous producers who might seek to cut costs by using tainted ingredients, producing food in unsanitary conditions, or skipping disinfection steps. Food safety law creates a powerful pressure on food producers to prioritize safety over other interests, including work place safety and environmental protection.²² Food safety laws reflect a legal obsession

is concerned less with individual free choice and more with the systemic constraints that undermine the extent to which the choices we do make can possibly be meaningful.

¹⁸ Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CAL. L. REV. 1173 (2019).

¹⁹ *Id.*

²⁰ See RENÉE JOHNSON, CONG. RESEARCH SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2016) (noting that annually in the United States there are about 48 million illnesses, 128,000 hospitalizations, and 3000 deaths from foodborne illness).

²¹ Federal Food Drug & Cosmetic Act § 402, 21 U.S.C. § 342 (defining adulteration by reference to, among other things, “poisonous or deleterious” ingredients and “insanitary conditions” for preparing, packing, or holding); Food Safety Modernization Act § 419, 21 U.S.C. § 350h (directing the FDA to establish produce safety requirements).

²² Broad Leib & Pollans, *supra* note 18 (discussing the problematic consequences of overprotective food safety laws).

with purity, which, as the next Subpart discusses, drive food system homogenization.

Food safety law drives food production, shaping production methods and conditions and ingredient choice.²³ FDA rules implementing the recently passed Food Safety Modernization Act (FSMA) include specific directives governing a significant swath of the food supply chain from irrigation of produce fields, to produce washing and packing, to food processing and distribution.²⁴ Federal law also closely regulates animal slaughter and meat processing.²⁵ States regulate retail food service, and all fifty states have adopted some version of the FDA's model food code, which applies the same level of precision to regulation of restaurants and other parts of the food service industry.²⁶ Tort law reinforces food safety law, imposing strict liability for harm that follows from food consumption.²⁷ In addition to substantive obligations, food companies also face record keeping requirements.²⁸ For instance, in dairy processing, cheese manufacturers must keep detailed records of pasteurization practices.²⁹ These laws impose significant regulatory burdens on farms, food processors, and food service establishments.

2. Protection From Fraud and Confusion

Like food safety laws, food fraud law seeks to protect consumers from

²³ Author Interview with Legal Team at boxed.com (describing role of food safety law in driving product development and production decisions).

²⁴ FDA Final Produce Safety Rule, 21 C.F.R. pt. 112; 80 Fed. Reg. 74353, 74529 (section XXVII) (Jan. 26, 2016); FDA Final Human Preventive Controls Rule, 21 C.F.R. pt. 117, 80 Fed. Reg. 55907, 56132 (section LX) (Sept. 17, 2015).

²⁵ Federal Meat Inspection Act, 21 U.S.C. § 601 et seq.

²⁶ FOOD CODE (U.S. FOOD & DRUG ADMIN. 2017); U.S. FOOD & DRUG ADMIN., ADOPTION OF THE FDA FOOD CODE BY STATE AND TERRITORIAL AGENCIES RESPONSIBLE FOR THE OVERSIGHT OF RESTAURANTS AND RETAIL FOOD STORES, 2016 5–6 (2016) <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM577858.pdf> (concluding that all fifty states have adopted the code at least in part).

²⁷ RESTATEMENT (SECOND) OF TORTS § 402A, comment d 1965 (“The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them.”). *But see* Melissa Mortazavi, *Tort as Democracy: Lessons From the Food Wars*, 57 ARIZ. L. REV. 929, 939-39 (2015) (arguing that while food-related tort litigation “has traditionally focused on food safety” it has broadened in recent years to address a range of issues including “the cultural, moral, and political meanings of food as a dignitary issue”).

²⁸ *See, e.g.*, Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Subpart O, Recordkeeping Requirements, 21 C.F.R. §§ 112.161-167 (FSMA recordkeeping requirements for produce safety).

²⁹ 2015 Pasteurized Milk Ordinance, Item 16p.D, <https://www.fda.gov/downloads/food/guidanceregulation/guidancedocumentsregulatoryinformation/milk/ucm513508.pdf>.

food producers who might take advantage of their ignorance. These laws emphasize the importance of truth-in-labeling and penalize producers and marketers for misbranding. Food fraud law relies on control of language. Although control of language ostensibly protects the helpless consumer from confusion, it also serves as a mechanism to shape participation in markets and participation in political processes.³⁰ This subpart provides a brief overview of food fraud laws and then delves into two examples: standards of identity and organic labeling. Both are particularly illustrative of how the quest to protect consumers from confusion ultimately disempowers those same consumers by controlling the language we have to describe food.

Food fraud laws serve to protect consumers from false and misleading claims on food packaging and advertising. A slew of information disclosure laws are designed to prevent fraud.³¹ These include requirements to display food identity and a net quantity statement.³² Packages must display a nutrition facts panel.³³ Similar nutrition facts disclosure requirements apply to chain restaurants.³⁴ In addition, all other information on the display must comply with a comprehensive rules regarding misbranding and health claims.³⁵ Many of these laws target “economic adulteration,” a practice in which a food manufacturer uses a cheaper substitute for a listed ingredient. Economic adulteration is common in fish, honey, wine, and olive oil.³⁶

Reinforcing these federal statutory obligations are state statutory and common law fraud protections. Consumer fraud law reinforces misbranding laws, creating liability for material misrepresentation.³⁷ Recently, a spate of law suits under state consumer protection laws have targeted label claims

³⁰ Perhaps the paradigmatic example of the power of language control comes from George Orwell’s *1984*. In that story, the government of Oceania used Newspeak, a state-created and enforced language as a tool of mind control. If the vocabulary to object doesn’t exist, you cannot object. No totalitarian state has ever reached this level of control, but the extreme establishes for us the premise: Control of language can shape lived experiences.

³¹ Information disclosure is discussed in more detail in Part II, below.

³² 21 C.F.R. §§ 101.1, 1.21(a)(1), 101.105(h); *see also* 9 C.F.R. § 317.2(d) (requiring an inspection legend and establishment number for meat products); *id.* § 381.116(b) requirement safe handling information for poultry).

³³ Nutrition Labeling and Education Act, 21 U.S.C. § 343(q).

³⁴ 21 U.S.C. § 343(q)(5)(H).

³⁵ 21 U.S.C. § 343 (defining misbranding).

³⁶ RENEE JOHNSON, FOOD FRAUD AND “ECONOMICALLY MOTIVATED ADULTERATION OF FOOD AND FOOD INGREDIENTS, CONG. RESEARCH SERV. REP. NO. R43358 (Jan. 10, 2014).

³⁷ *See, e.g.,* *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84 (D.N.J. 2011) (evaluating a consumer allegation that “less sodium” claim on a Campbell’s Soup can). The Federal Trade Commission, which regulates marketing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45, also regulates food marketing. *See also* *FTC Policy Statement on Deception*, Oct. 14, 1983, Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984 (describing how the FTC defines material misrepresentation).

such as “natural.”³⁸ Fraud laws open up producers to a range of possible litigation (from consumers, the FDA, and the Federal Trade Commission), and, while they leave some room for “puffery” and assume that consumers are reasonable, they create significant constraints for producers.³⁹

a. Standards of Identity

A variety of current and recently proposed federal and state laws seek to define specific terms used in food labeling and marketing. The examples of “milk,” “meat,” and “organic” illuminate this phenomenon. In recent years, the markets for vegan alternative foods have expanded significantly amid concerns about animal welfare and the carbon footprint of animal agriculture. The Food Drug and Cosmetic Act (FDCA) authorizes the FDA to develop standards of identity for foods.⁴⁰ These standards specify with great particularity what constitutes a particular type of food, and they are intended to prevent consumer confusion.⁴¹ The agency has set standards for many foods including peanut butter, maple syrup, sherbert, and milk.⁴² For many years, the FDA relied heavily on food standards of identity, often using very precise standards for common food terms.⁴³ Although such standards have mostly fallen out of favor, recently the dairy industry and some members of Congress have been pushing the agency to crack down on rampant use of the term milk on non-dairy products.⁴⁴ FDA first defined milk in 1977 as “the lacteal secretion . . . of one or more healthy cows.”⁴⁵ This definition, which

³⁸ Neal Hooker, Christopher T. Simons, & Efthimios Parasidis, “Natural” Food Claims: Industry Practices, Consumer Expectations, and Class Action Lawsuits, 73 FOOD & DRUG L.J. 319 (2018).

³⁹ Paul Chan, *Liabile Labels Consumer Groups and Regulators Are Continuing to Test New Theories Against Manufacturers over Food Labels*, 37 L.A. LAW. 25 (2015) (describing the rise of consumer food litigation).

⁴⁰ On the history and operation of these standards, see Richard A. Merrill & Earl M. Collier, Jr., “Like Mother Used to Make”: An Analysis of FDA Food Standards of Identity, 74 COLUM. L. REV. 561, 562 (1974).

⁴¹ Food & Drug Admin., Food Standards; General Principles and Food Standards Modernization, Proposed Rule, 70 Fed. Reg. 29214, 29216 (May 20, 2005) (describing the function of and legal authority for standards of identity).

⁴² For a complete list of foods with standards of identity, see 21 C.F.R. parts 130 to 169 (codifying standards).

⁴³ See, e.g., 21 C.F.R. § 135.140 (establishing the standard for sherbert).

⁴⁴ See, e.g., Petition, Nat’l Milk Producers Federation to FDA (Feb. 21, 2019), <https://www.nmpf.org/wp-content/uploads/2019/03/National-Milk-Producers-Federation-Citizen-Petition-and-Attachments.pdf> (petitioning the FDA to enforce existing “imitation” labeling requirements “against nutritionally inferior non-dairy substitutes for standardized dairy foods,” and “to codify in more detailed form longstanding FDA policies that permit the name of a standardized dairy food . . . to be used in the statement of identity of a non-dairy substitute for the standardized food only under limited and defined conditions”).

⁴⁵ 21 C.F.R. § 131.110(a).

the FDA has not strictly enforced, excludes non-dairy milks and even milk from other mammals such as goats or sheep.⁴⁶ In a 2016 letter to FDA, members of Congress called current misuse “harmful to the dairy industry.”⁴⁷ The campaign is an explicit attempt to use language control to curb the growing popularity of plant-based products.

In 2018, the FDA announced plans to review the issue in order to “ensure that the labeling of such products does not mislead consumers, especially if this could compromise their health and well-being.”⁴⁸ It is concerned with whether consumers are aware of, and understand, the nutritional characteristics and differences between dairy alternatives, and between these products and dairy in determining their own dietary choices.⁴⁹ The agency claims to be collecting information as part of “efforts to reduce chronic disease and its impact on public health.”⁵⁰

A similar fight is playing out over use of the word meat. Almost half of the states have introduced legislation known as “meat censorship laws”, “fake

⁴⁶ The FDA sent occasional warning letters to companies selling non-dairy products. See, e.g., *Warning Letter to Lifesoy, Inc.* (Aug. 8, 2008) <https://www.fdalabelcompliance.com/letters/ucm1048184>. There have also been occasional consumer suits. Priscilla DeGregory, *Woman sues vegan ‘butter’ for not being real butter*, NEW YORK POST (Nov. 12, 2018) <https://nypost.com/2018/11/12/woman-sues-vegan-butter-for-not-being-real-butter/>.

⁴⁷ Letter, 25 Members of Congress to FDA Commissioner Robert M. Califf (Dec. 16, 2016), <https://www.nmpf.org/wp-content/uploads/Welch-Simpson%20Letter.pdf>; Beth Kaiserman, *Dairy Industry Struggles in a Sea of Plant-Based Milks*, FORBES (Jan. 31, 2019), <https://www.forbes.com/sites/bethkaiserman/2019/01/31/dairy-industry-plant-based-milks/#3f4abd981c9e>. On January 12, 2017, Wisconsin Senator Tammy Baldwin introduced the “Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese To Promote Regular Intake of Dairy Everyday Act” or “Dairy Pride Act,” which Act seeks to compel the FDA to enforce against plant-based dairy alternatives “misbranding” themselves as milk, cheese, yogurt, etc. S. 130, 115th Cong. (2017).

⁴⁸ U.S. Food & Drug Ass’n, *Statement from FDA Commissioner Scott Gottlieb, M.D., on modernizing standards of identity and the use of dairy names for plant-based substitutes* (Sep. 27, 2018) <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm621824.htm>. The effort is one of multiple in a multi-year Nutrient Innovation Strategy. *Id.* The agency solicited comments and feedback from the public to gain more insight into how consumers use plant-based alternatives and how they understand terms like “milk” or “cheese” when used to label products made, for example, from soy, peas or nuts. *Use of the Names of Dairy Foods in the Labeling of Plant-Based Products*, 83 Fed. Reg. 49103, 49207 (Sep. 28, 2018).

⁴⁹ *Use of the Names of Dairy Foods in the Labeling of Plant-Based Products*, 83 Fed. Reg. 49103, 49207 (Sep. 28, 2018).

⁵⁰ *Id.* The Senate rejected a proposal to block FDA spending on this inquiry. Katherine Tully-McManus, *Senators Ask ‘What Is Milk?’*, ROLL CALL (Oct. 1, 2018) <https://www.rollcall.com/news/politics/got-milk-senators-ask-milk>. Senator Mike Lee (R-UT) sponsored the bill, expressing his view that consumers are fully informed on the differences between dairy and plant-based milks. *Id.*

meat laws”, and “real meat advertising laws.”⁵¹ The legislation aims to stop meat alternatives, including both plant-based and lab-grown products, from being marketed as “meat.”⁵²

Ten states have passed such laws. Missouri, which was the first in August 2018, requires that products not derived from poultry or livestock include phrases such as “lab-grown” or “plant-based” on their packaging.⁵³ Any producer failing to include an appropriate disclaimer after January 1, 2019 would be subject to fines and a possible jail sentence.⁵⁴ The law is the subject of ongoing litigation on First Amendment and Dormant Commerce Clause grounds.⁵⁵ Wyoming’s version of the law stricter, prohibiting the use of the word “meat” on labeling for any product not derived from poultry or livestock.⁵⁶ Other states with similar laws include Arkansas,⁵⁷ Kentucky,⁵⁸ North Dakota,⁵⁹ South Dakota,⁶⁰ Montana,⁶¹ Louisiana,⁶² South Carolina, and Mississippi.⁶³ Various other states have either tried and failed to pass such

⁵¹ Elaine Watson, *Plant-based and cell-cultured 'meat' labeling under attack in 25 states*, FOOD NAVIGATOR (May, 30 2019), <https://www.foodnavigator-usa.com/Article/2019/05/29/Plant-based-and-cell-cultured-meat-labeling-under-attack-in-25-states#>.

⁵² The majority of states at the forefront of these legislative pushes have a heavy livestock and agricultural presence. *Id.*

⁵³ MISSOURI DEPT. OF AGRIC., PUBLIC STATEMENT: MEAT LABELING LAW (2018).

⁵⁴ *Id.*

⁵⁵ Complaint for Plaintiff at 2, Turtle Island Foods, SPC v. Richardson, No. 18-cv-4173 (Aug. 27, 2018). Settlement talks between the parties, including the Good Food Institute, the Animal Legal Defense Fund, the ACLU of Missouri, and Tofurky broke down in 2019. Michelle C. Pardo, *No Meating of the Minds: Settlement Reaches An Impasse In Missouri Meat Advertising Lawsuit*, ANIMAL DEVELOPMENTS (July 9, 2019) <https://blogs.duanemorris.com/animallawdevelopments/2019/07/09/no-meating-of-the-minds-settlement-reaches-an-impasse-in-missouri-meat-advertising-lawsuit/>.

⁵⁶ S. SF0068, 65th Gen. Assemb., Reg. Sess. (Wyo. 2019) (also requiring use of clarifying word such as “vegetarian,” “veggie,” or “cell-cultured”).

⁵⁷ H.R. 1407, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019) (making no distinction between traditional vegan alternatives and cell cultured meat).

⁵⁸ H.R. 311, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019) (stipulating that the law only pertains to “cultured animal tissue produced from in vitro animal cell cultures outside of the 25 organism from which it is derived”).

⁵⁹ H.R. 1400, 66th Gen. Assemb., Reg. Sess. (N.D. 2019) (prohibiting only the misrepresentation of cell-cultured products as meat).

⁶⁰ S. 68, 94th Gen. Assemb., Reg. Sess. (S.D. 2019) (prohibiting products that “misrepresents the product as a meat food product, a meat by-product, or as poultry”).

⁶¹ H.R. 0327, 66th Gen. Assemb., Reg. Sess. (Mont. 2019) (

⁶² S. 152, Gen. Assemb., Reg. Sess. (La. 2019).

⁶³ S. 2922, Gen. Assemb., Reg. Sess. (Miss. 2019). This law is also the subject of an ongoing lawsuit. Alabama’s legislature has also passed a law, but the Governor has yet to sign it. H.R. 518, 195th Gen. Assemb., Reg. Sess. (Ala. 2019) (prohibiting cell-cultured products from using the words “meat” or “meat food product”).

laws,⁶⁴ or are still in process.⁶⁵

b. Organic Labeling

The development of organics law predates these milk and meat debates and reflects a slightly different pattern of linguistic control. Whereas with milk and meat, traditional and powerful industries are struggling to retain control of key words to prevent market encroachment from vegan alternatives, the control of “organic” was originally intended to protect an alternative market. Over the course of the definition’s development, however, control over the word has shifted.

The 1990 Organic Food Production Act (OFPA) authorizes the USDA to regulate use of the term “organic.” Designed to preempt various state and private organic certification schemes, the federal law delegates authority to the USDA’s Agricultural Marketing Service (AMS). AMS determines which food production and processing practices qualify as organic, and how the word may be used in food labels and advertising.⁶⁶ Although the statute has some underlying environmental goals, its primary purpose is to facilitate marketing of organic products by ensuring the validity of the label.⁶⁷

The “organic” movement began as a reactionary movement to the industrialization of agriculture. Critical food scholar Julie Guthman has identified two key constituents of the movement: “those who see organic agriculture as a simply a more ecologically benign approach to farming and those who seek a radical alternative to a hegemonic food system.”⁶⁸ Guthman observes that the organic label ultimately serves neither of these ends particularly well in part because of how the industry has itself industrialized and replicated the conventional agricultural industry.⁶⁹ Many have expressed

⁶⁴ L.B. 14, 106th Leg., 1st Sess. (Neb. 2019). H.R. 2604, 54th Leg., 1st Reg. Sess. (Ariz. 2019). H.R. 2274, 2019 Gen. Assemb., Reg. Sess. (Va. 2019). H.R. 222, 54th Leg., 1st Sess. (N.M. 2019). Nebraska is also currently considering another law on the topic. L.B. 594, 106th Leg., 1st Sess. (Neb. 2019).

⁶⁵ S. 0304, 110th Gen. Assemb., Reg. Sess. (Tenn. 2019). H.R. 2556., 101st Gen. Assemb., Reg. Sess. (Ill. 2019). H.R. 1414, 55th Gen. Assemb., Reg. Sess. (Ind. 2019). S. 2035, 86th Leg., Reg. Sess. (Tex. 2019). S. 211, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019). H.R. 1519, 66th Leg., Reg., Sess. (Wash. 2019).

⁶⁶ USDA, Agric. Marketing Serv., *About Us*, <https://www.ams.usda.gov/about-ams>.

⁶⁷ Margot J. Pollans, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. Rev. 621, 640 (2010) (describing the organics program as marketing regulation).

⁶⁸ JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* 3 (2004).

⁶⁹ *Id.* at 22 (also observing that despite the critique organic food is less toxic for farmworkers, neighbors, and eaters than the alternative); BRIAN K. OBACH, *ORGANIC STRUGGLE: THE MOVEMENT FOR SUSTAINABLE AGRICULTURE IN THE UNITED STATES* 159-60 (2017) (observing that the passage of OFPA contributed to consumers and conventional agribusiness enterprises flooding into the market). *See also* GUNTRA A. AISTARA, *ORGANIC*

concern that large-scale agribusiness has flooded into the industry, following the letter but not the spirit of the law. Meanwhile, smaller enterprises that continue to follow the spirit of the law are not always able to comply with its letter.

In each of these examples, control of language is justified on the grounds of protecting helpless consumers from confusion. In all three cases there is, however, another primary constituency: competitors. Like other types of food fraud laws, particularly those governing economic adulteration, these language controls protect other industry participants by establishing legal monopolies over certain words. Control of language in the guise of helping the helpless thus allows for some degree of control over food itself. Its primary function is to steer consumer purchasing toward products complying with state sanctioned definitions.

B. Homogenizing Food and Food Production

The law of the helpless consumer homogenizes the food system. The proliferation of standards in the food system generates a set of forces that expand the reach of those standards: consumer expectations, retailer and other wholesale buyer standards, and individual inspectors with discretion. As a consequence, the entire system works to iron out inconsistencies—to reign in foreign practices. Uniformity across the food system, which is increasingly a global phenomenon, serves to sterilize diverse food cultures, to suppress creative expression that falls outside narrowly defined food norms, and to homogenize the experience of food consumption.

In a moment when foodie culture proliferates, the diversity of available food types appears to be on the rise; nevertheless, this Subpart hypothesizes that although choice appears to be increasing from a consumer perspective (particularly an elite consumer perspective), this increase masks a more fundamental narrowing that follows from the control that state regulators and consolidated food processors and retailers have over the food system. Indeed, while total number of available food products continues to increase, the selection becomes increasingly consistent from store to store as consolidation continues in the retail and restaurant industries. This appearance of choice, particularly from the perspective of elite consumers in the United States, also masks how the reorientation of the global food system to create this choice comes at great costs for many people in developing countries and for low-income communities within the US.⁷⁰ While surface level choice proliferates,

SOVEREIGNTIES: STRUGGLES OVER FARMING IN AN AGE OF FREE TRADE (2018) (exploring how free trade regimes and the pressure for regulatory harmonization have undermined “organic sovereignties” in other countries).

⁷⁰ See Mohsen Al Attar Ahmed, *Monocultures of the Law: Legal Sameness in the Restructuring of Global Agriculture*, 11 DRAKE J. AGRIC. L. 139, 147 (2006) (exploring how agricultural intellectual property law contributes to declining crop diversity and the rise of

meaningful choice disappears. Two main mechanisms contribute to this homogenization. The first is consolidation of production, processing, distribution, and retail. The second are processes of sterilization and cultural hegemony that reduce diversity both of food itself and of participation in different aspects of food production and food production governance. As the following discussion explains, the law of the helpless consumer contributes to both consolidation and sterilization.

1. Consolidating Food Production and Distribution

Consolidation is perhaps the single word that best sums up change in the food system over the last century.⁷¹ Part of this story is familiar. Throughout the twentieth century, food production at all stages—from production of agricultural inputs, through farming, through processing, and through retail, has increased in scale and uniformity. Indeed, despite threads championing subsistence or small-scale market farming, federal policy in the United States consistently favors scale.⁷² Federal policy facilitated cheap labor first through state-sponsored slavery and then through exclusions of agricultural workers from labor laws.⁷³ Other early federal supports for scale include investment in irrigation projects in the West.⁷⁴ In the twentieth century, state support for large-scale agriculture dates largely to the New Deal, during which time Congress developed a series of agricultural supports that benefited larger scale operations.⁷⁵ Of course, federal policy is not the sole cause of consolidation in the food system. Technology, such as refrigeration, mechanical harvesting, and agricultural biotechnology, also played a key role.⁷⁶

“homogenous industrial production systems”).

⁷¹ See Moss & Taylor, *supra* note 10 (describing the extent of consolidation).

⁷² Noa Ben-Asher & Margot J. Pollans, *The Right Family*, 39 COLUM. J. OF GENDER & L. 1 (2020); Nathan Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. OF FOOD L. & POL'Y 12, 20-22 (2017) (arguing that consolidation was not the inevitable result of technological development but instead the intentional result of federal policy).

⁷³ Ben-Asher & Pollans, *supra* note 72; Amy E. Dase, *Hell-Hole on the Brazos: A Historic Resources Study of Central State Farm, Fort Bend County, Texas*, (Sept. 2004), <https://int.nyt.com/data/documenthelper/151-hell-hole-on-the-brazos/f39a6d5be573318f1fa3/optimized/full.pdf#page=1> (finding that after the Civil War, black prisoners were leased for labor to sugar plantations, railroads, and other businesses for forced labor); Southern Poverty L. Center, *Close to Slavery: Guestworker Programs in the United States* (2013); see also Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>

⁷⁴ See, e.g., DONALD WORSTER, *RIVERS OF EMPIRE* (1985).

⁷⁵ Rosenberg & Stucki, *supra* note 72.

⁷⁶ WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A*

Consolidation is widely criticized because of the power it confers to the remaining players in the system to set prices, determine working conditions, and formulate food.⁷⁷ Consolidation also contributes to homogenized food systems primarily by nationalizing products, retailers, and restaurant chains, such that the food landscape looks relatively similar from one town to the next. For example, a recent study of Walmart, the largest food retailer in the world, found that “[i]n 43 metropolitan areas and 160 smaller markets, Walmart captures 50 percent or more of grocery sales. . . . In 38 of these regions, Walmart’s share of the grocery market is 70 percent or more.”⁷⁸ In many rural areas, dollar stores also play newly significant roles in the retail food environment.⁷⁹ Overall, in the past several decades the number of food products available for sale has increased at the national level, but it has decreased at the global level.⁸⁰

Helpless consumer laws exacerbate concentration, and the resulting food homogenization, by creating barriers to entry and increasing capital

HISTORICAL ANALYSIS (1993 2nd ed.). Federal policy has, historically, tended to reinforce the consolidating effect of technology by affirmatively requiring certain technologies that favor scale (e.g. milk pasteurization) or by preferencing farmers who used certain technologies in the allocation of agricultural subsidies. See Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L. J. 1213, 1240-41 (2019) (describing how USDA County Committees, which help to distribute subsidies, favored wealthier farmers and supported the adoption of the newest technology).

⁷⁷ See *infra* notes 180-185 and accompanying text (discussing the consequences of consolidation in the poultry industry); Moss & Taylor, *supra* note 10 (arguing that consolidation squeezes both farmers and consumers); David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61, 62 (2000); but see Government Accountability Office, *U.S. Agriculture: Retail Food Prices Grew Faster than the Prices Farmers Received for Agricultural Commodities, but Economic Research Has Not Established That Concentration Has Affected These Trends*, GAO-09-746R, 3 (2009) (arguing that concentration has not affected prices received by farmers).

⁷⁸ Stacy Mitchell, *Walmart’s Monopolization of Local Grocery Markets*, INST. FOR LOCAL SELF-RELIANCE 1-2 (June 2019) (relying on data from the Grocery Industry Market Share Report and finding that overall Walmart captures 1 in 4 dollars spent on groceries in the US).

⁷⁹ *Id.* at 2; Marie Donahue & Stacy Mitchell, *Dollar Stores are Targeting Struggling Urban Neighborhoods and Small Towns. One Community Is Showing How to Fight Back*. <https://ilsr.org/dollar-stores-target-cities-towns-one-fights-back/> (Dec. 6, 2018) (noting that between 2011 and 2018 the number of dollar stores grew from 20,000 to nearly 30,000).

⁸⁰ In the U.S., the USDA’s Economic Research Service tracks introduction of new food and beverage products. Its data shows a significant increase in recent decades. USDA, Econ. Res. Serv., *New Products*, <https://www.ers.usda.gov/topics/food-markets-prices/processing-marketing/new-products/> (showing data from 1998 to 2018). Internationally, the trend is the reverse as globalization crowds out diversity in many contexts. Colin K. Khoury et al., *Increasing Homogeneity in Global Food Supplies and the Implications for Food Security*, PNAS EARLY EDITION (observing increasing similarity in national food supplies around the world).

requirements for standard business operations. Food safety regulation in particular contributes to consolidation in the food industry.⁸¹ Where prior authorization is required for foods to enter into commerce, the “application of authorization requirements is costly and time-consuming. Therefore, procedures can only be managed by high-capital enterprises.”⁸² Organic certification is also an example of this phenomenon. The high cost of certification, including transition costs from conventional production, is a significant causal factor in industry consolidation.⁸³

Food safety laws impose onerous requirements that are particularly burdensome to small-scale food businesses.⁸⁴ It is often the case that larger scale operations are better able to absorb the costs of regulatory compliance, but this is not simply a problem of ability to pay. Instead, this is a problem of regulatory design. Many of these laws are designed in response to the input from and examination of the business model of large-scale operations. When applied to small-scale businesses, they often appear arbitrary and irrational.⁸⁵ For instance, laws governing cheese production in New York State treat small farmstead cheese makers the same as industrial cheese makers that use milk from many farms. Sanitation requirements designed to account for risks associated with drawing milk from numerous farms, transporting it to a single processor, and producing cheese in large volumes, appear less rational for a farm milking twelve cows and processing the milk into cheese on site.

Sociologist Melanie Dupuis describes FSMA as one of the most recent developments in a decades long “purity treadmill,” in which regulation generates the need for scale in order to afford compliance, scale generates

⁸¹ Spencer Henson & John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes* 7, Codex Alimentarius Commission (May 2009), available at https://www.fsis.usda.gov/shared/PDF/Codex_al32_09Dbe.pdf.

⁸² Bernd van der Meulen et al., “Food Safety Regulation Applied to Traditional and Ethnic Foods,” in *REGULATING SAFETY OF TRADITIONAL AND ETHNIC FOODS* 464 (VISHWESHWARAIAH PRAKASH ET AL. EDS. 2016).

⁸³ GUTHMAN, *supra* note 68 (describing how agribusiness came to dominate organic production).

⁸⁴ See, e.g., John Bovay, Peyton Ferrier, & Chen Zhen, *Estimated Costs for Fruit and Vegetable Producers to Comply with the Food Safety Modernization Act*, USDA Econ. Research Serv. Econ. Info. Bulletin No. 195 (Aug. 2018) (estimated that while the largest farms will pay about .33 percent of annual sales to comply the smallest will pay as much as seven percent). See also Broad Leib & Pollans, *supra* note 18, at 159 (describing how FSMA and other food safety laws impose greater costs, expressed as a percentage of profits, on smaller businesses than on larger ones).

⁸⁵ Patrick Baur, Christy Getz & Jennifer Sowerwine, *Contradictions, Consequences and the Human Toll of Food Safety Culture*, 24 *AGRIC. & HUM. VALUES* 713, 722 (2017) (suggesting that while large-scale businesses often view food safety regulations as “an abstract formalization of common sense,” for smaller operators they appear as hoops to jump through, generating significant costs).

additional risk, and thus more regulation is ultimately needed.⁸⁶ She observes, “Experts agree that there is no way to make food completely safe. Yet, every outbreak leads to another round of purification requirements that don’t necessarily purify but that do lead to the further shakeout of small farms. The ultimate end of this treadmill may be vegetables grown in vast ‘protected’ production facilities—large dirt-free vertical greenhouses using hydroponics.”⁸⁷

Recognizing this concern, some federal laws, including FSMA, create exceptions or reduced burdens for smaller food businesses, particularly those making low-risk products. But many producers experience pressure from wholesale buyers and insurers to comply with the law regardless of these exemptions.

In some contexts, large-scale players in the food system have expressly sought food safety laws as a competitive tool. For instance, the Leafy Green Growers Association, which represents the leafy greens industries of California and Arizona, supported passage of FSMA. Members of the association were already subject to produce safety requirements through the California Leafy Green Marketing Agreement and sought to level the playing field and establish uniform national regulations.⁸⁸ In other words, the express purpose of their support for the law was to improve their competitive position in the leafy greens industry.

2. Sterilizing and Standardizing Food and Food Production

A second mechanism of homogenization is the tendency toward sterilization and standardization in food law. I have argued elsewhere that the current structure of food safety law is irrational because it focuses narrowly on one of food’s health-related features at the expense of others.⁸⁹ Here, I add to that critique that food safety regulation can reduce diversity in the food system, not just of scale, not just of microbes,⁹⁰ but also of methods of production and types of food produced.

⁸⁶ E. MELANIE DUPUIS, *DANGEROUS DIGESTION: THE POLITICS OF AMERICAN DIETARY ADVICE* 123 (2015). Many critics of modern food safety law express concern that scale itself is a primary source of risk in the food supply because of the ways that scale magnifies and agglomerates risk. *See* Broad Leib & Pollans, *supra* note 18, at 159-61 (describing how larger scale food production can exacerbate food safety risks).

⁸⁷ DUPUIS, *supra* note 86, at 124.

⁸⁸ Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 *WAKE FOREST L. REV.* 399 (2015) (citing industry comments on FSMA rulemaking).

⁸⁹ *Id.* (examining conflicts between produce safety and environmental protection); Broad Leib & Pollans, *supra* note 18 (considering food safety vis-à-vis the full range of food system health risks).

⁹⁰ Broad Leib & Pollans, *supra* note 18, at 154-56 (describing the consequences of sterilizing farm environments).

The standard approach to food safety is sterilization of food production environments and standardization of food production practices.⁹¹ Sterilization and standardization make food safety easy to police, but they also shut down diversity within the food system. Food safety becomes a tool to suppress development of alternative food cultures and alternative food networks. From its earliest history in the Progressive Era, modern food safety law has had an underlying “purity” agenda, seeking to secure the human body in ways that were highly racialized.⁹² Advocacy for regulation against “adulteration” of the food supply went hand-in-hand with advocacy for immigration controls and even eugenics.⁹³ Stories about the use of food safety law to stamp out non-white or non-European foodways are common.⁹⁴

Many of these laws also have an international reach. Foreign food producers seeking to export products to the United States must comply with U.S. food safety laws.⁹⁵ The U.S. engages not only in foreign facility inspection but also in foreign food safety education.⁹⁶ In the US and abroad, these laws impose particular burdens on “traditional” and “ethnic” foods.⁹⁷ An exemption to strenuous food additive safety requirements for foods “generally recognized as safe,” creates a potential bias against new ingredients brought into U.S. markets by more recent immigrant

⁹¹ By contrast, advocates for food sovereignty identify true transparency, achieved by shortened supply chains, as a primary mechanism to ensure food safety. Although food safety is extremely important, food safety is a small-scale problem when compared with the other public health concerns of the food system (worker exploitation, diet-related disease, environmental contamination). See Broad Leib & Pollans, *supra* note 18.

⁹² DUPUIS, *supra* note 86, at 80-87 (describing early advocacy for sanitation in food production); Andrea Freeman’s *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251 (2013).

⁹³ *Id.*; LORINE SWAINSTON GOODWIN, *THE PURE FOOD, DRINK, AND DRUG CRUSADERS, 1879-1914* (1999).

⁹⁴ For instance, NPR profiled the “chili queens” of San Antonio who for decades served homemade chili from makeshift stands in San Antonio until the town elders determined that their appearance was inconsistent with the aesthetic of the community. It was ultimately under the guise of public health laws that they were fully shut down. *The Chili Queens of San Antonio*, NPR (OCT. 15, 2004), <https://www.npr.org/templates/story/story.php?storyId=4107830>.

⁹⁵ Linda R. Horton, *Food from Developing Countries: Steps to Improve Compliance*, 53 *FOOD & DRUG L.J.* 139 (1998); FSMA § 301, 21 U.S.C. § 805.

⁹⁶ Horton, *supra* note 95, at 163-65 (describing and calling for expansion of U.S. food safety training programs abroad).

⁹⁷ See Vishweshwaraiah Prakash, “Introduction: The Importance of Traditional and Ethnic Food in the Context of Food Safety, Harmonization, and Regulations,” *in* REGULATING SAFETY OF TRADITIONAL AND ETHNIC FOODS 1-2 (VISHWESHWARIAH PRAKASH ET AL. EDS. 2016) (defining “traditional” food as “foods that are typically whole, naturally grown or raises, and used in their original form or have undergone only basic processing,” and defining “ethnic” food as “those edibles that are eaten and prepared by groups of people who share a common religion, language, culture, or heritage”).

populations.⁹⁸ Many countries have laws that recognize experience, and “traditional foods [are] usually considered safe on the basis of experience,” but “[t]his may be different outside the cultural area where the foods at issue are traditional.”⁹⁹

Food safety laws in particular “devalue[] the expertise and experience of the people working every day to grow, harvest, pack and distribute produce.”¹⁰⁰ Narrowing of legitimate sources of food safety knowledge contributes to uniformity both in available foods and in underlying safety and production practices. This narrowing reduces control over vocabularies and knowledge, limiting the ability of non-“experts” to participate in governance processes.

A similar pattern occurs in the context of public nutrition programs. In this context, a scientific approach to nutrition, referred to as “nutritionism” by one historian, reduces our food needs to a universalizable set of nutrients and ignores the variety and complexity of diet, practice, and other nutritional contexts.¹⁰¹ Historically, nutritionism has been used as a tool in colonial projects to emphasize “the superiority of a scientifically-established ideal diet over local cultural and religious traditions.”¹⁰² In the modern era, nutritionism is entrenched in law through the Dietary Guidelines for Americans and nutrition facts panels.¹⁰³

Language control laws function in a similar way. Language, vocabulary itself, “helps mark the boundaries of permissible discourse, discourages the clarification of social alternatives, and makes it difficult for the dispossessed to locate the source of their unease.”¹⁰⁴ Organics laws in particular frequently

⁹⁸ van der Meulen *supra* note 82, at 444 (arguing that there is flexibility in treatment of “traditional” and “ethnic” foods but noting that confusion in different standards and different layers of regulation can create problems).

⁹⁹ van der Meulen *supra* note 82, at 464.

¹⁰⁰ Patrick Baur, Christy Getz & Jennifer Sowerwine, *Contradictions, Consequences and the Human Toll of Food Safety Culture*, 24 *AGRIC. & HUM. VALUES* 713, 718 (2017).

¹⁰¹ GYORGY SCRINIS, *NUTRITIONISM: THE SCIENCE AND POLITICS OF DIETARY ADVICE* (2013).

¹⁰² David M. Kaplan, *Hunger Hermeneutics*, *TOPOI* 4, 6 (2020) (noting examples from British colonial rule in parts of sub-Saharan Africa and in India).

¹⁰³ Relatedly, but tangential to food law itself, anti-discrimination law allows disparate treatment based on weight, typically measured through body mass index, a standard obesity metric that fails to take into account racial differences in body morphology. JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM* (2011); SABRINA STRINGS, *FEARING THE BLACK BODY: THE RACIAL ORIGINS OF FAT PHOBIA* (2019) (observing early overlaps between nutrition science and eugenics). BMI is often used as a basis for employer-based health insurance incentive schemes. Yofi Tirosh, *The Right To Be Fat*, 12 *YALE J. OF HEALTHY POL., L. & ETHICS* 264, 326-37 & n. 246 (2012).

¹⁰⁴ T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 *AMER. HISTORICAL REV.* 567, 569-70 (1985) (interpreting the writings of Italian communist and antifascist Antonio Gramsci).

become a tool of cultural hegemony. What began as a counterculture movement, in reaction the rise of industrial agriculture, was appropriated by industrial agriculture. Through taking control of the word, the industrial agricultural complex exerts influence over the agricultural counterculture. This influence is powerful domestically, where smaller “organic” operations must turn to other mechanisms to communicate with their customers, and internationally, where farmers must suddenly comply with internationally negotiated organic harmonization agreements to continue using the vocabulary.¹⁰⁵ The widespread resistance to the use of “milk” and “meat” on vegan products may also reflect the underlying cultural hegemony “regarding not just the acceptability, but the *necessity* of animal consumption.”¹⁰⁶

In sum, food safety, fraud laws, and language control laws achieve safety and prevent misrepresentation at the expense of diversity of scale, food types, and food production practices. They make alternative, ethnic, and counterculture foodways more challenging to import, establish, and maintain. They reinforce a dominant food culture that undermines the food sovereignty of any community whose preferences and practices are not aligned with that dominant food culture.¹⁰⁷ In this sense, the myth of the helpless consumer is self-actualizing, at least, and especially, for consumers who are outside of the dominant food culture.

3. Homogenization as a Disempowerment Tool

Homogenization occurs for many reasons—technology, efficiency, culture, individual preferences—and is not inherently a bad thing. At a large scale, however, homogenization is a common feature of social control precisely because it eliminates differences; it fosters “purity.”¹⁰⁸ For instance, a key feature of rising fascism in 1930s Germany was a push to eliminate class differences, or at least class allegiances.¹⁰⁹ At its most extreme, in ultranationalist Nazi Germany, homogenization took on the genocidal form of mass murder—targeting those of religious, sexual, and physical

¹⁰⁵ See AISTARA, *supra* note 69, at 21-22 (describing the consequences of international harmonizations for farmers in countries that want to trade with the United States).

¹⁰⁶ A.J. FITZGERALD & N. TAYLOR, *THE RISE OF CRITICAL ANIMAL STUDIES: FROM THE MARGINS TO THE CENTRE* 166 (2014).

¹⁰⁷ See *supra* note 12 (describing the origins and definition of “food sovereignty”).

¹⁰⁸ STANLEY, *supra* note 13, at 151 (describing “diversity, with its concomitant tolerance of difference” as “a threat to fascist ideology,” which “rejects pluralism and tolerance”); ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 41 (2004) (identifying as a “mobilizing passion” of fascism “the need for closer integration of a purer community, by consent if possible, or by exclusionary violence if necessary”). In practice, the successful rise of fascism often requires relaxing ideas about purity in order to broaden the tent enough to take control. *Id.*

¹⁰⁹ SARAIVA, *supra* note 14, at 6 (describing the building of the Autobahn as a key technological feature designed to level society).

difference.¹¹⁰ Even in Nazi Germany, purity movements were connected not just to racial and physical difference but also to public health science: “The discovery of the role of bacteria in contagion . . . and the mechanisms of heredity . . . made it possible to imagine whole new categories of internal enemy: carriers of disease, the unclean, and the hereditarily ill, insane, or criminal.”¹¹¹ Historian Tiago Saraiva considers specifically the role of homogenization of food production in the rise of fascist states, observing that the industrialization and standardization of food production were key not just for the production of food that would support the populace but also for development of the governmental bureaucracies that would eventually solidify totalitarian power.¹¹² Thus, while homogenization is at times reasonable, it has a long history of weaponization at a variety of levels from racial purging to food production.

So where do we draw the line between malignant homogenization as a tool of social control and fully benign homogenization? This is, of course, not a question with a precise answer. Once homogenizing forces (including a combination of market forces and legal prohibitions) begin to cut into racial and cultural diversity or to undermine community sovereignty, they cross the line. As the above discussion establishes, the law of the helpless consumer contributes to legally mandated homogenizing of food and food production that targets immigrant and minority communities and that reduces food sovereignty across the board.

II. PARALYZING THE RESPONSIBLE CONSUMER

Standing in contrast to the myth of the helpless consumer is a second equally powerful myth driving food law: the myth of the responsible consumer. Food is both a staple (everyone must eat) and a morally fraught domain (what should we eat?). Moralizing around food is age old, and many religious traditions are deeply imbued with complex food rules.¹¹³ In the U.S. today, food moralizing takes the predominant form of blame. Individuals commit moral wrongs through a broad range of food choices from overeating to eating animals, and, even, to experiencing hunger. Threads of blame in

¹¹⁰ PAXTON, *supra* note 108, at 134 (describing the role of medical professionals in the Nazi genocide through “sterilization of the ‘unfit’ and the elimination of ‘useless mouths’—the mentally and incurably ill—and from there to ethnic genocide”).

¹¹¹ PAXTON, *supra* note 108, at 36-37 (noting that the urge to purify on these lines influenced liberal states as well as fascist ones and that the United States and Sweden “led the way in the forcible sterilization of habitual offenders (in the American case, especially African Americans)”).

¹¹² SARAIVA, *supra* note 14, at 11-13 (describing the role of particular food technologies).

¹¹³ DUPUIS, *supra* note 86, at 100-101 (describing the historic role of morality in food reform movements).

food policy put the onus on food consumers to take control not just of their own nutrition but also of a wide variety of food system ills. The responsible consumer needs no legal protections other than those facilitating provision of information.

According to the myth, the responsible consumer uses information to make food choices that reflect personal preferences and identity and that protect individual health and well-being. The responsible consumer also works to achieve food security, and, finally, the responsible consumer makes food choices that protect the environment, food system workers, and animals used in food production. While the myth of the helpless consumer contradicts narratives about consumer food freedom, the myth of the responsible consumer relies on them. The responsible consumer is free to choose whatever foods they want, and can therefore be freely deemed to choose whatever consequences follow. One advocacy group, playing up the myth of the responsible consumer, put it this way:

A growing cabal of activists has meddled in Americans' lives in recent years. They include self-anointed "food police," health campaigners, trial lawyers, personal-finance do-gooders, animal-rights misanthropes, and meddling bureaucrats. Their common denominator? They all claim to know "what's best for you." In reality, they're eroding our basic freedoms—the freedom to buy what we want, eat what we want, drink what we want, and raise our children as we see fit.¹¹⁴

By contrast to the helpless consumer, the responsible consumer is self-possessed, influential, and capable. And, while the myth of the helpless consumer is self-actualizing, the myth of the responsible consumer is self-defeating.

The myth plays a role in a variety of food laws that control information. "Knowledge" serves as a central rallying cry for food system reform in three different but overlapping contexts: nutrition regulation, food security, and the consumer food movement. In each of these contexts, information is offered as a tool of empowerment, but, in practice, serves instead to reinforce creation of a two-tiered food system, in which only some consumers have the time, money, access to information, and inclination to research their food choices and spend more money on food.¹¹⁵ In all three contexts, consumers are charged with responsibility to help themselves and others and blamed if they

¹¹⁴ The Center for Consumer Freedom, "About Us," <https://www.consumerfreedom.com/about/>.

¹¹⁵ DUPUIS, *supra* note 86, at 99 (observing that "The 'food revolution' described by so many food reformers was, in fact, a partition of the food system into two distinct systems: one determined by increasing speed and decreasing cost and a separate quality-based system that, by comparison requires more time, labor, and materials."); *see infra* Part III.C (elaborating on this critique).

do not do so successfully.¹¹⁶ These movements rely on the assumption that individuals have full agency over their food consumption decisions.¹¹⁷ Within this framework, the primary barrier to change is thus either inadequate transparency or individual irresponsibility. At the same time, the rhetoric of the responsible consumer empowers the food industry to resist efforts at public governance on the ground that consumers demand is the only legitimate impetus for change.

In theory, these information-based laws facilitate healthy consumer decisions without legally mandating either consumer behavioral change or product reformulation. In practice, however, the shift to information-based policy and advocacy allows for the subtle use of information control to disempower many food consumers. In other words, debunking the myth of the responsible consumer reveals not that consumers are irresponsible, but that they are not truly empowered to engage in the kind of self-help that the myth suggests they should.

A. Domains of Consumer Responsibility

1. Personal Health

In recent years, concern about rising rates of diet-related disease has led to a spate of new policies aimed at improving diet. From Happy Meal restrictions, to fast food zoning laws, to soda taxes, to school lunch nutrition standards, many of these laws recognize that food choices follow, at least in part, from our economic circumstances and our physical environments.¹¹⁸ These laws have met with staunch opposition. Proponents of responsabilization for consumer health rely on rhetoric of “freedom” to resist these food environment laws. For instance, rhetoric of “freedom” is responsible in calls for state laws that preempt local attempts to regulate fast food restaurants and in opposition to soda taxes.¹¹⁹ Thus, the primary function

¹¹⁶ Both are examples of neoliberal “responsibilization,” which shifts responsibility to individuals from government. See WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION (2015).

¹¹⁷ BROWN, *supra* note 116, at 41-42 (describing the “responsibilized turn” in the “neoliberal political imaginary”); Andrew Calabrese, *Caveat Emptor! The Rhetoric of Choice in Food Politics*, 6 COMMUNICATION +1 (2017) (arguing that corporate lobbyists use the rhetoric of freedom of choice to resist policies that protect consumers from unhealthy foods).

¹¹⁸ See, e.g., Deborah Rhodes, *Obesity and Public Policy: A Roadmap for Reform*, 22 VA. J. SOC. POL’Y & L. 491 (2015) (cataloguing possible policy responses to the rise of diet related disease).

¹¹⁹ Consider also opposition to the New York City soda portion control law, and nanny state concerns related to the affordable care act and broccoli eating. See Lawrence O. Gostin, *Bloomberg’s Health Legacy: Urban Innovator or Meddling Nanny?*, 43 HASTINGS CTR. REP. 19, 20–21 (2013); Lindsay F. Wiley et al., *Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J.L. MED. & ETHICS 88, 88–89 (2013)

of the rhetoric of responsabilization is to oppose “nanny-state” health laws.¹²⁰ Although information provisions, such as restaurant menu calorie labeling have also met with resistance, label policies have been more successful on the national stage.

At an extreme, these narratives ascribe diet-related personal health to personal choice. Failure—as evidence by obesity or by diet-related disease—follows from poor discipline.¹²¹ The myth of the responsible consumer characterizes these as moral failings.

2. Household Food Security

Responsibilization has been a dominant thread in social welfare reform since the mid-1990s. At that time, federal social safety networks abandoned legalistic organization around categorical eligibility rules in favor of a series of legal structures that “marginalize[.]” categorical eligibility rules “in favor of a heavy practical and rhetorical emphasis on claimants’ choices.”¹²² A primary feature of this shift was the addition of work requirements to both welfare and food assistance programs.

In recent years, lawmakers have pushed to strengthen work requirements in food assistance programs. In 2018, an effort by House Republicans to add additional work requirements during the farm bill reauthorization process ultimately failed (the Senate would not pass the provisions). The House Bill proposed extending requirements to some parents with dependent children over six and strengthened documentation requirements.¹²³ The USDA has recently taken action on its own to undertake similar reforms. Specifically, the USDA proposed a rule that would eliminate some flexibility for states to waive work requirements.¹²⁴ Individual states have also taken steps to limit eligibility on other responsibility grounds. For instance, in 2018, Wisconsin

(exploring “public health paternalism”); Deborah L. Rhode, *Obesity and Public Policy: A Roadmap for Reform*, 22 VA. J. SOC. POL’Y & L. 491, 501–03, 507 (2015).

¹²⁰ Language of responsabilization is not new. See DUPUIS, *supra* note 86, at 101 (situating modern food responsabilization within a lengthy tradition of “civic republican purification of personal lifestyle as the solution to social problems”); see also STANLEY, *supra* note 13, at 151-52 (identifying “self-sufficiency” as a fascist virtue).

¹²¹ See Tirosh, *supra* note 103 (describing fat stereotypes).

¹²² David Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 820 (2004).

¹²³ H.R.2 § 4015 (passed in House June 21, 2018, including extensive new work requirements); compare H.R.2 § 4103 (passed in Senate on June 28, 2018, not including same requirements); and Agriculture Improvement Act of 2018, Pub. LL. 115-334, § 4005 (enacted Dec. 20, 2018, and tracking Senate version).

¹²⁴ Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults without Dependents, Proposed Rule, 84 Fed. Reg. 980 (Feb. 1, 2019) (to be codified at 7 C.F.R. pt. 273).

embedded drug testing requirements into its eligibility requirements.¹²⁵

Proponents for reform justify calls for work requirements by relying on narratives of laziness. In the 1990s, the image of the “Welfare Queen” depicted young women, typically Black single mothers, as choosing not to work because they could collect federal benefits, and, in the extreme, of having additional children specifically to collect the additional benefits to which a larger family would entitle them.¹²⁶ These narratives characterize hunger as resulting from unwillingness to work hard and characterize program participants as leaches, living off the efforts of other hard working Americans.¹²⁷ These narratives transform hunger itself into evidence of a moral wrong.¹²⁸ While proponents typically do not advocate for eliminating social welfare programs entirely, they seek to focus these programs on the morally worthy—children, the elderly, and the disabled—and to decrease access for the morally unworthy, able-bodied adults.

Proponents of responsabilization deemphasize structural causes of poverty and place the blame on the poor.¹²⁹ Responsibilization is unidimensional; if you are hungry, you should work harder so you can afford more food.

3. Equity and Sustainability

In recent decades, a growing set of food-related social movements call on

¹²⁵ Wis. Stat. § 49.791 (2019) (governing substance abuse screening, testing, and treatment for employment and training programs); Claire Brown, *Buried in Wisconsin Republican’s Lame-Duck Legislation: Drug Testing Requirements for Food Stamp Applicants*, *The Intercept* (Dec. 6, 2018, 5:25 PM), <https://theintercept.com/2018/12/06/wisconsin-food-stamps-drug-testing/>. No other state currently requires drug testing for non-felon SNAP participants.

¹²⁶ See, e.g., Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 265 (2016) (describing the political salience of the welfare queen image).

¹²⁷ See *id.* at 266 (observing that although the welfare queen herself is rarely invoked today “the construct still has broad regulatory power”); Ben-Asher & Pollans, *supra* note 72.

¹²⁸ This trend revives an old idea that poverty was commonly believed to be a result of a moral failing. Super, *supra* note 122, at 818-19 (observing that from the Early Republic through the Great Depression, the “poorhouse remained a potent symbol of moral opprobrium”).

¹²⁹ Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1077-79 (2017) (describing how conceptions of “deserving” and “undeserving poor” are believed to have shaped reform of social safety nets); LISA DUGGAN, *THE TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 15 (2003) (describing welfare reform as an effort “to transfer the function of providing a social safety net from public agencies to private households” and observing that this reform funnels people into low wage work to the benefit of corporate profits).

consumers to “vote with their forks” for a better food system.¹³⁰ These movements articulate a wide variety of goals from children’s health, to fair wages, to animal welfare, to environmental protection. The common thread in these movements is the theory of change: if enough consumers express their preferences, the market will shift and provide more food that meets whatever standard for which consumers are expressing.

Activists in this area typically characterize ethical food consumption decisions as political acts. Exemplifying this view, Michael Pollan wrote the following a few weeks after tax day in 2006:

A couple of weeks ago we all paid our taxes. Whenever I write that check, I can’t help but think of the various uses to which that money is put. Whatever your politics, there are activities your tax money supports that I’m sure you find troublesome, if not deplorable. But you can’t do anything about those activities — you can’t withdraw your support — unless you’re prepared to go the jail. Food is different. You can simply stop participating in a system that abuses animals or poisons the water or squanders jet fuel flying asparagus around the world. You can vote with your fork, in other words, and you can do it three times a day.¹³¹

The “vote with your fork” rallying cry asks consumers to take responsibility for all ills of the food system from how workers are treated to the environmental footprint of food production.¹³² The rhetoric of the movement also tacitly accepts that consumers must become responsible for these issues because government is not. Indeed, as other scholars have thoroughly documented, protections for workers and the environment in the food system are extremely limited.¹³³ The consumer food movement invites consumers to step into a regulatory role as the dominant force holding food producers accountability for their costs of their activities.

These movements rely on transparency. Product labels serve as the

¹³⁰ The phrase dates to the 1990s and was coined by the Boston-based nonprofit organization Oldways Preservation and Exchange Trust. “Vote with your fork,” (Nov. 14, 2010), https://www.barrypopik.com/index.php/new_york_city/entry/vote_with_your_fork (describing the history of the phrase).

¹³¹ Michael Pollan, *Voting with Your Fork*, NEW YORK TIMES BLOG (May 7, 2006), <https://michaelpollan.com/articles-archive/voting-with-your-fork/>; see also Marion Nestle, *Ethical Dilemmas in Choosing a Healthful Diet: Vote with Your Fork!*, 59 PROCEEDINGS OF THE NUTRITION SOCIETY 619 (2000).

¹³² See, e.g., Joshua Ulan Galperin, Graham Downey & D. L. Miller, *Eating Is Not Political Action*, 13 J. OF FOOD L. & POL’Y 113 (2017) (describing and critiquing this phenomenon).

¹³³ On the paucity of environmental protections, see Ruhl, *supra* note 4, and Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195 (2016). On the paucity of worker protections, see *infra* Part III.B (describing the legal shortfalls of worker protection across the food system).

primary tool for transparency.¹³⁴ Labels convey information about products themselves and about production processes. While most labels are unverified claims made by food producers themselves, more and more third-party certification programs police use of particular claims.¹³⁵ For instance, as many consumers and farmers have become disappointed with the organic label, various organizations have begun to develop organic plus certification programs.¹³⁶ Numerous other certification schemes—such as Fair Trade, Animal Welfare Approved, Non-GMO Project Verified, and Marine Stewardship Council Certified Sustainable Seafood—focus on particular characteristics of food production.¹³⁷ These movements also rely on investigative journalism. Exposés of working conditions, sanitary conditions of food processing facilities, and components of specific foods can shape consumer behavior and, in some cases, generate industry reform.¹³⁸

The responsible consumer can protect herself and others through their food choices. In contradiction to the helpless consumer, the responsible consumer needs from the government only the assurance of sufficient transparency to enable good decision making. As a consequence, the myth is used both to scale back existing regulation and to block creation of new regulation.

B. Information Controls and Constructed Helplessness

The myth of the responsible consumer feeds a key feature of food law: knowledge promotion.¹³⁹ The responsible consumer is meant to sort through

¹³⁴ For a taxonomy of eco-labels, see Jason J. Czarnezki, Margot J. Pollans, & Sarah Main, *Eco-Labeling*, in *THE OXFORD HANDBOOK ON COMPARATIVE ENVIRONMENTAL LAW* 999-1003 (Emma Lees & Jorge E. Viñuales, eds., 2019).

¹³⁵ *Id.* at 1004-08 (describing various approaches to ecolabel governance).

¹³⁶ For instance, the Real Organic Project has its own certification program based on a series of provisional standards that extend beyond USDA's requirements particular with regard to soil health and animal welfare. Real Organic Project, *Why the Real Organic Project Exists*, <https://www.realorganicproject.org/what-does-usda-organic-mean-today/> (explaining that the project exists because lack of enforcement from the USDA means that "Family farmers meeting the letter and spirit of organic law are suffering while consumers are once again in need of transparency in the market place").

¹³⁷ See Ecolabel Index, *All Ecolabels in United States on Food*, <http://www.ecolabelindex.com/ecolabels/?st=country=us;category=food> (listing 65 ecolabel programs used in the US).

¹³⁸ In some cases, these exposés can also result in legal reform. See Broad Leib & Pollans, *supra* note 18, at 121-32 (discussing several examples of this in the food safety context, and explaining why it is more common with food safety than with other types of food system public health concerns).

¹³⁹ See LISA HEINZERLING, *FOOD LAW: CASES & MATERIALS* 7-8 (2015) (identifying "knowledge-promotion" as one of the three main goals of food law). Knowledge promotion in this context should be understood in the context of the neoliberal era in regulatory law in which information serves as a primary tool of regulation. Richard Stewart, *A New Generation of Environmental Regulation?*, 29 *CAP. U. L. REV.* 21, 35-36 (2001); Jason J. Czarnezki &

all of the information available to them, and, often, demands additional information. In theory, the responsible consumer can then use this information to make self-actualized and self-interested decisions, or not.

Although there is widespread consensus about the value of information—both from conservatives arguing against more invasive health regulations and for liberals pushing for systemic reform—the primacy of information makes consumers vulnerable. The myth of the responsible consumer is part of a broader trend in neoliberal regulatory reform in which information regulation alone is considered sufficient and regulation of substantive issues such as nutritional content is deemed invasive and unnecessary. But information regulation is deceptive. It is ultimately a tool to maintain an unequal distribution of power in the food system because it renders the theoretically responsible consumer helpless.

Through control of information, food law undermines the utility of information to achieve any of these substantive goals. First, are traditional forms of information suppression. A variety of food laws protect food producers, processors, and manufacturers from having to share information that might be damaging to reputation. Some of these laws go so far as to punish individuals who might disseminate this information or use it as the basis of public critique. Second, the ultimate tool of suppression of dissent is confusion. Generated by a proliferation of mandatory information disclosure laws and legal facilitation of voluntary disclosures, excess information hinders the capacity of consumers to use it in ways that would be consistent with the myth of the responsible consumer.

1. Suppressing Dissent

The food system is full of examples of restrictions on information access and food system critique. First, ag-gag laws place restrictions on investigation and reporting about agricultural facilities.¹⁴⁰ These laws typically make it illegal to lie to gain entrance to agricultural facilities and to film or photograph at these facilities.¹⁴¹ Ag-gag laws target animal rights activists, seeking to protect the animal agriculture industry from public exposure of its

Katherine Fiedler, *The Neoliberal Turn in Environmental Law*, 2016 UTAH L. REV. 1.

¹⁴⁰ See *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1189 (9th Cir. 1999) (framing ag-gag laws as constraints on investigative journalism); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1469 (2015) (noting that 25 states have introduced ag-gag legislation and 8 states have enacted laws).

¹⁴¹ Chen & Marceau, *supra* note 139, at 1470 (explaining that these laws extend beyond traditional trespass and fraud by specifically targeting those investigating agricultural facilities and criminalizing investigation even if produces no injury beyond the exposure of criminal animal treatment).

practices.¹⁴² Although some aspects of these laws have been successfully challenged on First Amendment grounds, they remain on the books in several states.¹⁴³ These laws simultaneously limit access to information about conditions on farms generally and CAFOs in particular, and they disincentivize reporting about those conditions by creating the risk of prosecution.¹⁴⁴

Similarly, food disparagement laws create a civil cause of action against critics of food products. A more robust form of product disparagement (trade libel), food disparagement statutes seek to limit dissemination of false information about perishable food or agricultural products.¹⁴⁵ These laws are on the books in thirteen states and many appear to place on the defendant the burden of proof of truth rather than placing on the plaintiff a burden of proof of falsity.¹⁴⁶ These laws have been invoked in several high profile cases against national reporting on food. For instance, in 2012, after ABC aired a segment on “pink slime,” a label it applied to lean finely textured beef, a ground beef filler made of processed meat trimmings, several manufacturers sued pursuant to South Dakota’s food disparagement statute.¹⁴⁷ ABC ultimately settled for \$177 million.¹⁴⁸ Although in theory these laws punish only false statements, in practice they can discourage critique by generating fear of prosecution.¹⁴⁹

¹⁴² *Id.* at 1470-71 (arguing that “when the information revealed through the use of deception relates to a matter of great political significance or public debate, and the information revealed is not of an intimate personal nature, the deceptions used to gain such information should enjoy protected status under the First Amendment”).

¹⁴³ *Wasden*, 878 F.3d at 1190 (striking parts of Idaho’s ag-gag law); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017) (striking Utah’s law).

¹⁴⁴ *Herbert*, 263 F. Supp. 3d at 1213 (describing Utah’s law as “suppressing broad swaths of speech without justification”).

¹⁴⁵ David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in A Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 196-97 (1998) (explaining that the purpose of these laws is to protect the perishable foods industry from scares that lead to dramatic drops in demand).

¹⁴⁶ *Id.* at 195-96 (citing statutes for all 13 states and noting which states have considering but not ultimately passed legislation); *id.* at 212-13 (suggesting that this burden may make these laws unconstitutional).

¹⁴⁷ JOEL L. GREENE, LEAN FINELY TEXTURED BEEF: THE “PINK SLIME” CONTROVERSY,” CONG. RES. SERV. REP. NO. 42473, at 2 (2012) (describing the public outcry and the immediate decline in demand following reporting); Melissa Mortazavi, *Tort As Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 972-73 (2015) (noting that despite the litigation public outcry was strong enough that many companies voluntarily reduced used of the product).

¹⁴⁸ Roy S. Gutterman, *Actually ... A Renewed Stand for the First Amendment Actual Malice Defense*, 68 SYRACUSE L. REV. 579, 581 & n.11 (2018) (describing the settlement).

¹⁴⁹ Bederman, *supra* note 144, at 213-14 (raising concern that these laws will chill expression of opinions because of the burden many of them put on defendants to offer “reasonable and reliable scientific” support for their challenged statements).

Second, public information policies, particularly at USDA, hide information from public view. Under the Trump Administration, the USDA announced a decision to move its Economic Research Service (ERS) and the National Institute of Food and Agriculture (NIFA) out of the Washington D.C. area.¹⁵⁰ ERS conducts research into emerging issues in food, agriculture, the environment, and rural America, and its research frequently influences decision making in Congress, at USDA, by state agencies, by industry groups, and by individual farmers.¹⁵¹ The USDA explained the goal of the move to bring the research service closer to its many stakeholders.¹⁵² Critics have, however, questioned this motive, raising concern that this move threatens to separate the agency's political decision making from its data collection and to reduce access to and relevance of that data collection.¹⁵³ One group of fifty-six former USDA and federal statistical agency officials raised concerns about retaining staff expertise, continuing valuable collaborations both within and outside the USDA in the DC area, maintaining visibility with policymakers, and risks to independence and credibility.¹⁵⁴

¹⁵⁰ Notice of Request for Expression of Interest for Potential Sites for Headquarters Office Locations, 83 Fed. Reg. 40499 (Aug. 15, 2018). Although the move was completed, a recent report from the USDA's Inspector General suggests it might be illegal because the agency did not have requisite congressional approval for spending appropriated money to make the move. USDA Office of the Inspector General, Inspection Report 91801-0001-23 (Aug. 2019), <https://www.usda.gov/oig/webdocs/91801-0001-23.pdf>.

¹⁵¹ Liz Crampton, *Economists Stunned by USDA decision to Move ERS*, POLITICO (Aug. 15, 2018), <https://www.politico.com/newsletters/morning-agriculture/2018/08/15/economists-stunned-by-usda-decision-to-move-ers-317393>.

¹⁵² United States Department of Agriculture, *USDA Extends Deadline for Expressions of Interest for New ERS & NIFA Headquarters* (Sep. 7, 2018) <https://www.usda.gov/media/press-releases/2018/09/07/usda-extends-deadline-expressions-interest-new-ers-nifa> <https://www.federalregister.gov/documents/2018/09/13/2018-19877/extension-of-period-to-submit-expression-of-interest-for-potential-sites-for-headquarters-office> (also suggesting that the move would increase the ability of ERS and NIFA to attract talent from land grant universities).

¹⁵³ Laurie Ristino, *Draining Washington of Science and Talent*, CENTER FOR PROGRESSIVE REFORM BLOG (Sept. 20, 2018), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=A968269B-C263-DFCC-2197908F3262CE67>.

¹⁵⁴ Letter to Chairs Hoeven and Aderholt and Ranking Members Bishop and Merkley (Oct. 9, 2018), http://www.copafs.org/UserFiles/file/ERS_ReorgAgencyHeadsAppropsCmte.pdf. Indeed, early evidence suggests that a large percentage of staffers selected to relocate have declined and will leave the agency instead. See also Agricultural & Applied Economics Association, *AAEA review finds that USDA benefit-cost analysis underestimates the true cost of relocating researchers to Kansas City I (2019)* <https://www.aaea.org/UserFiles/file/Report-MovingUSDAResearchersWillCostTaxpayers-AAEAReport2019june19final.docx.pdf> (conducting an independent analysis of the proposed move and finding it will cost taxpayers between \$83 and 182 million); Former USDA Officials Unified in Opposing ERS Relocation

Others have suggested that the purpose of the move is to silence an agency whose research conclusions often contradict Trump Administration talking points.¹⁵⁵ Although the Biden Administration may well decide to reverse the move, it is likely to have long term damage on the agency's ability to gather and disseminate information because so many career personnel decided to leave rather than relocate.¹⁵⁶

The USDA has also recently come under scrutiny for its treatment of agency reports related to climate change. In September 2019, the Senate Democratic Policy and Communication Committee released a report charging that the USDA had failed to publicize hundreds of scientific studies evaluating the impacts of climate change on agricultural production.¹⁵⁷ The report also identified numerous instances in which the Trump Administration has directed individual agencies, including the U.S. Forest Service (a subdivision of USDA) to remove references to climate change and climate science from their websites.¹⁵⁸

Third, efforts to intimidate academics engaging in criticism of industrial animal agriculture are increasingly prevalent. In one notable case, in 2010, the Maryland legislature threatened to withhold funding from the University of Maryland Environmental Law Clinic because of its role in a lawsuit against Perdue Poultry.¹⁵⁹ As another example, Murphy Brown, a North Carolina pork processor and subsidiary of Smithfield Foods, subpoenaed UNC epidemiologist and Professor Steven Wing who had been researching the environmental impacts of hog CAFOs. The company demanded that he produce detailed research records including information protected by confidentiality agreements required by federal law for research involving

Plans, FEEDSTUFFS (Oct. 9, 2018) <https://www.feedstuffs.com/news/former-usda-officials-unified-opposing-ers-relocation-plans>.

¹⁵⁵ Sam Bloch, *Why is Trump Slashing the USDA's Independent Research Arm? Look at its Findings*, NEW FOOD ECONOMY (Aug. 18, 2018), <https://newfoodeconomy.org/usda-economic-research-service-ers-reorganization/> (looking at ERS research on issues such as food assistance, crop insurance, and farmer incomes and noting how that research is discordant with the politics of the Trump Administration).

¹⁵⁶ Liz Crampton & Ryan McCrimmon, "Trump Administration to Move USDA Researchers to Kansas City Area," POLITICO (June 13, 2019), <https://www.politico.com/story/2019/06/13/usda-kansas-city-area-1529072>.

¹⁵⁷ Democratic Policy and Communication Committee, "The Trump Administration is Jeopardizing Our Future by Attacking Science and Climate Research (Sept. 19, 2019), <https://www.stabenow.senate.gov/imo/media/doc/DPCC%20Attacks%20on%20Science%20Report.pdf> (including assessment of Trump Administration treatment of climate science across multiple agencies).

¹⁵⁸ *Id.*

¹⁵⁹ Annie Linskey, *Funding Restored to Maryland Law Clinic*, THE BALTIMORE SUN (Apr. 6, 2010), <https://www.baltimoresun.com/politics/bs-xpm-2010-04-06-bal-lawschool06-story,amp.html>.

human subjects.¹⁶⁰

Each of these examples demonstrates a jab at the free flow of information about food, and, in some cases, an attempt to punish critics. These constraints on information collection, analysis, and distribution limit consumer capacity to make informed decisions. Perhaps more significantly, they also hinder advocates attempting to use litigation and legislative strategies to achieve systemic reform.

2. Promoting Confusion

Transparency itself undermines the “responsible consumer” by sowing confusion. On the surface, the food system is full of information. Indeed, as consumers, we are subject to “information flooding,” a veritable barrage of labels, which convey information about personal health, animal welfare, and environmental protection.¹⁶¹ Many food movement advocates urge consumers to use these labels to make more ethical food choices. But, despite this transparency, the average consumer still has very little information about whether their food is healthy for themselves, for food system workers, and for the environment.¹⁶² And the average consumer has very little capacity to sort through the information to determine which is reliable and which is relevant.¹⁶³ The meaningless label, for example “natural,” shares prominence with potentially more meaningful labels such as “no added sugar” or “employee-owned.” For the food consumer, the information glut can be paralyzing and thus disempowering.

Food manufacturers use hundreds of labels, some certified by third-parties others not, to convey information about various aspects of their products. Labels address environmental attributes, supply chain worker treatment, animal welfare, health features and more. Although a few labels, such as organic, as discussed in Part I above, are tightly regulated, most are governed only by general fraud and truth in marketing laws.¹⁶⁴ This is a case in which the cacophony of opinions contributes not to a “marketplace of ideas” but to a drowning out of reason.¹⁶⁵

¹⁶⁰ Rachel Carson Council, *Dr. Steve Wing Under Attack*, <https://rachelcarsoncouncil.org/dr-steve-wing-attack/>.

¹⁶¹ Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755, 756 (2015) (defining information flooding as the dumping of information for the purpose of “hid[ing] bad facts”). On chaos in food labeling in particular, see Jason Czarnezki et al., *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENVTL. L. & POL’Y F. 281 (2015).

¹⁶² Czarnezki, Pollans, & Main, *supra* note 134 (describing the limitations of consumer capacity to process available information).

¹⁶³ *Id.*

¹⁶⁴ *Id.* (describing the legal frameworks surrounding eco-labels).

¹⁶⁵ STANLEY, *supra* note 13, at 66-71 (rejecting John Stuart Mill’s claim that no opinions should be silenced).

The rise of labeling is self-perpetuating. As consumers come to rely on it and expect it, they advocate for more of it, focusing on “the right to know” rather than on system reform. In some cases, information access can facilitate reform, but in practice, the right to know may supplant other more substantive regulatory fights. Consider, for instance, the history of advocacy around genetically modified foods. Advocacy calling for substantive standards for introduction of GMOs was drowned out by the Just Label It movement, which culminated in a near meaningless federal labeling law.¹⁶⁶ The law uses the less recognized phrase “bioengineered” and its acronym “BE” rather than more commonly understood “genetically modified” or “genetically engineered.”¹⁶⁷ The selected symbol requires either the phrase “bioengineered” or “derived from bioengineering” and includes a graphic of a sun over a field of row crops.¹⁶⁸ Genuine concerns about seed sovereignty and pesticide pollution are dismissed as fringe, and consumers are placated by the theoretical right to choose for themselves.

3. Information Control as a Disempowerment Tool

Information control has long been understood as a mechanism to consolidate power.¹⁶⁹ This may occur in a variety of forms—lying, controlling access to information, exaggerating, and breaking down clarity

¹⁶⁶ See, e.g., Katherine Wenner, Comment, *Quick Response Codes for Genetically Engineered Foods: A "Quick Fix" to America's Deep-Rooted Debate Surrounding Genetically Engineered Foods*, 53 WAKE FOREST L. REV. 623, 624 (2018) (characterizing the law as an attempt by Congress “to sidestep the underling unease regarding these food products”); Zoe S. Spector, Note, *The National Bioengineered Food Disclosure Standard: A Solution to the Gmo Labeling Political Debate?*, 2018 U. ILL. J.L. TECH. & POL'Y 457, 466-74 (critiquing the law on a variety of grounds including the choice to allow manufacturers to opt for electronic disclosure using QR codes and the law’s broad exemptions).

¹⁶⁷ Final Rule, National Bioengineered Food Disclosure Standard, Agric. Marketing Serv., 83 Fed. Reg. 65814, 65815 (Dec. 21, 2018) (explaining that the purpose of the federal law, which preempts state GE labeling laws, is to “provide a mandatory disclosure standard for BE food, by which uniform information is provided to consumers”); National Bioengineered Food Disclosure Standard, 7 U.S.C. § 1639b (amending the Agricultural Marketing Act of 1946, 7 U.S.C. 1621 et seq.). See also Lucas A. Westerman, *Consumer Choice or Confusion: That Gmo Label Doesn't Mean What You Think It Means*, 23 DRAKE J. AGRIC. L. 199, 218 (2018) (arguing that these labels are misleading that consumers would actually be better served by voluntary third-party certification schemes).

¹⁶⁸ Agric. Marketing Service, “BE Symbols” <https://www.ams.usda.gov/rules-regulations/be/symbols>. Rejected alternatives included a variety of versions of yellow and green smiley face suns with the letters BE. Agric. Marketing Service, “National Bioengineered Food Disclosure Standard Proposed Symbols,” <https://www.ams.usda.gov/sites/default/files/media/ProposedBioengineeredLabels.pdf>.

¹⁶⁹ As Hannah Arendt observed, “totalitarian movements struggling for power can use terror to a limited extent only.” ARENDT, *supra* note 15, at 341. Terror must be accompanied by propaganda and other forms of information manipulation that can facilitate indoctrination. *Id.*

between truth and fiction.¹⁷⁰ Control of information silences potential dissent when the potential factual bases for critique are obscured or when the criticism itself is discouraged through threat either of violence or of prosecution. And the muddying of truth prevents dissent by distracting and confusing potential dissenters. Together these information control mechanisms—suppression of dissent and confusion—render consumers helpless, while promising to maximize consumer responsibility.

III. A POLARIZED FOOD SYSTEM

Parts I and II explore how the myths of the helpless and responsible consumer each lay the foundation to strip power from most food system participants. The myth of the helpless consumer generates the basis for homogenization, which threatens diversity of traditions, scale, demographics, and food itself. The myth of the responsible consumer creates a reliance on information as the basis for both individual choice and advocacy and is then susceptible to a constructed helplessness as supplies of information are shut off, diluted, or drowned out. An additional mechanism through which food law serves to strip power emerges from the juxtaposition of these myths: polarization.

A. Polarization as a Disempowerment Tool

Hannah Arendt argues that “[s]ocial atomization and extreme individualization preced[e] the mass movements” that allow for the rise of governance regimes characterized by extreme disempowerment.¹⁷¹ This is achieved through isolation of those with common interests. Focusing in particular on the breakdown of social classes, she observes that without these common bonds to overcome difference, “the whole fabric of visible and invisible threads which bound the people to the body politic” disintegrates.¹⁷²

¹⁷⁰ *Id.* at 341-351; STANLEY, *supra* note 13, at 35 (explaining that fascist regimes use propaganda to “elevate[] the irrational over the rational, fanatical emotion over the intellect”); *id.* at 36 (asserting that “[f]ascist politics seeks to undermine public discourse by attacking and devaluing education, expertise, and language”); *id.* at 56 (arguing that fascist propaganda seeks “cast reality into doubt”).

¹⁷¹ ARENDT, *supra* note 15, at 316-17.

¹⁷² *Id.* at 314; *see also* Stanley, *supra* note 13, at 172; Theodor W. Adorno, *Freudian Theory and the Pattern of Fascist Propaganda* (1951) (observing that the central structure of fascism lies in erasing difference among an in group and emphasis of difference with outsiders to prevent any “realization of true equality”). Ultrnationalism feeds on “us versus them” rhetoric to mobilize solidarity that is oriented around the state, encouraging a strong relationship between each individual and the state and discouraging other kinds of solidarity relationships. Indeed, fascist regimes frequently targeted labor unions, which created “mutual bonds along lines of class.” STANLEY, *supra* note 13, at 172; *see also* PAXTON, *supra* note 108, at 10 (describing how fascist regimes often began with anticapitalist rhetoric but once in power “banned strikes, dissolved independent labor unions, lowered wage earners’ purchasing power, and shower money on armament industries . . . came to the aid of

This same polarizing dynamic plays out in the food system. Patterns of food systems and food law isolate those who may otherwise have common interests. This fragmentation preserves the economic power of the food industry and exacerbates exploitation of both food system workers and food consumers.

B. Food System Workers Versus Consumers

As described in Part I, the myth of the helpless consumer helps to support a unidirectional chain of obligation in which producers owe a variety of duties to consumers. At the same time, the myth of the responsible consumer helps to support an environment in which consumers come to producers with a range of demands. These two features set up consumers and producers as oppositional.¹⁷³ This polarization allows for exploitation of food workers and preserves the economic power of the food industry.

While consumers benefit from numerous legal protections, producers, and, often more importantly, their employees, enjoy very few. As a result of the suite of helpless consumer laws, food businesses invest significant time and resources into catering to consumer expectations and ensuring consumer protection. Following a “customer is always right” mentality, these laws reflect a belief that the interests of the consumer overshadow all other interests at stake in the food system, including those of employees, animals, and the environment. This dynamic is at its most extreme in the tipped wages segments of the industry, where customer satisfaction literally determines employee pay scales.¹⁷⁴ The ongoing experience of workers during the Covid-19 pandemic is an extreme example of this phenomenon.

Labor law is rife with food related exceptions. Agricultural workers, who, historically were not entitled to federal minimum wage, remain exempt from the right to engage in collective bargaining.¹⁷⁵ In part as a result, agricultural

capitalism in trouble”). Class bonds are particularly threatening to fascist regimes because “Fascist politics is most effective under conditions of stark economic inequality.” STANLEY, *supra* note 13, at 172. In the US, just as in Germany and elsewhere, “racial division has always countered the unifying force of the labor movement.” *Id.* at 173. Fascism thus relies on a magnification of some differences—often, though not always, race—and a playing down of others—often class or otherwise economic.

¹⁷³ See Margot J. Pollans, *Farming and Eating*, 13 J. OF FOOD LAW & POL’Y 99 (2017) (describing the us versus them rhetoric that characterizes both the consumer food movement and the defenses of conventional food production).

¹⁷⁴ See Lee, *supra* note 5, at 1273.

¹⁷⁵ Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489 (1998) (describing labor law exceptions for agricultural workers); REBECCA E. BERKEY, ENVIRONMENTAL JUSTICE AND FARM LABOR 65 (2017) (describing exclusion of field laborers, as distinguished from food processing laborers, from the Wagner Act of 1935, which established protections for worker organization); Sarah O. Rodman et al., *Agricultural Exceptionalism at the State Level: Characterization of Wage and Hour Laws for U.S. Farmworkers*, 6 J. OF AGRIC., FOOD

workers are underprotected from a variety of workplace risks including extreme exposure to pesticides.¹⁷⁶ Evidence of exploitation of agricultural workers is substantial.¹⁷⁷

The juxtaposition of the helpless consumer, in need of protection from their food, with food system workers, who are not protected as they make that food, establishes a troubling asymmetry. There is considerable overlap between producers and consumers. Essentially all Americans are food consumers, and about one-sixth of the workforce works in the food system.¹⁷⁸ For food system workers, they are protected as consumers but ignored as workers. Put another way, lettuce is deemed to pose a risk to the person who might get sick from eating it if it is contaminated with *e. Coli*. It is not deemed a risk to the person who might get sunstroke from harvesting it during a heat wave. The helpless consumer is thus dangerous not because the consumer is relieved of responsibility for the farmworker but because the system is structured to protect consumers at the expense of all others, regardless of need.

A parallel set of tensions exist between food consumers and farmers. Although some farmers receive significant federal financial support, many do not. For instance, recent subsidies distributed to respond to former President Trump's trade war with China were given almost entirely to white farmers.¹⁷⁹ Some categories of farmers are particularly vulnerable within the structure of the food system. For example, the vast majority of broiler chickens are raised under contract with poultry processors.¹⁸⁰ The structure of contract markets leaves poultry farmers open to exploitation. Contracts allow farmers to share yield and price risk with their buyers, who commit to particular prices up front, and, often, actually purchase the final products in advance of

SYSTEMS & COMMUNITY DEV. 89, 99 (2015) (no state overtime laws apply to agricultural workers and only eleven states, California, Connecticut, Maryland, Montana, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Wisconsin, apply minimum wages laws for farmworkers).

¹⁷⁶ Berkey, *supra* note 175, at 39-42 (surveying studies of prevalence of pesticide-related illness among farmworkers).

¹⁷⁷ Berkey, *supra* note 175, at 38-48 (describing occupational injury, lack of access to health care, pesticide-related illnesses, poor housing conditions, food insecurity, debt to labor contractors, sexual violence, and poverty wages).

¹⁷⁸ FOOD CHAIN WORKERS ALLIANCE, *THE HANDS THAT FEED US: CHALLENGES AND OPPORTUNITIES FOR WORKERS ALONG THE FOOD CHAIN* 12 (2012) (including jobs in food production, processing, distribution, service, and retail) (relying on 2010 data from the Bureau of Labor Statistics and the 2007 Census of Agriculture).

¹⁷⁹ Nathan Rosenberg & Bryce Wilson Stucki, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout to White Farmers*, *NEW FOOD ECONOMY* (July 29, 2019), <https://newfoodeconomy.org/usda-trump-trade-war-bailout-white-farmers-race/> (also citing research that the bailout disproportionately benefited wealthy landowners).

¹⁸⁰ James MacDonald, *Trends in Agricultural Contracts*, 30(3) *CHOICES* 1, 3 (2015).

production. Some contracts—marketing contracts—specify price, or a pricing mechanism, and an outlet for sale, insulating the farmer from price fluctuation.¹⁸¹ Other contracts—production contracts—are much more detailed, often “giv[ing] the [buyer] direct control of farm production methods.”¹⁸² They may specify specific inputs (seed stock, fertilizer, pesticides), direct production methods, and allow the contracting buyer to make field visits.¹⁸³ In a 2010 report, after a series of listening sessions, the Department of Justice concluded that “producers who raise or sell animals under contract are subjected to unfair or abusive treatment.”¹⁸⁴ In 2016, what was then the USDA’s Grain Inspection, Packers and Stockyards Administration, promulgated new rules seeking to protect these farmers from unfair practices, but the rules were withdrawn in 2017.¹⁸⁵

Although farmers remain a potent symbolic force in politics, their economic and political power is declining.¹⁸⁶ Farmers have less market power and face significant barriers to changing their practices, including costs of capital investment to adopt new production methods or shift crops and lack of access to markets for different crops.¹⁸⁷ At the same time, they are subject to widespread critique from environmental groups and consumer groups.¹⁸⁸ A recent article in *Ag Daily*, a farming magazine, captured the perceived divide between farmers and consumers: “consumers ha[ve] a hard-to-satisfy

¹⁸¹ James MacDonald et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, Econ. Res. Serv. Agric. Econ. Rep. No. 837, 4 (Nov. 2004). Marketing contracts may also specify product quality. Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 *HAMLIN L. REV.* 397, 401 (1995).

¹⁸² Kelley, *supra* note 181, at 401.

¹⁸³ MacDonald, *supra* note 181, at 4.

¹⁸⁴ U.S. DEPT. OF JUSTICE, COMPETITION IN AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 20-21 (May 2012).

¹⁸⁵ GIPSA, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Interim Final Rule, 81 Fed. Reg. 92,566 (Dec. 20, 2016) (allowing individual farmers to establish unfair practices under the Packers and Stockyards Act without proving harm to the entire market as was required under previous case law such as *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc)); see also GIPSA, Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, Proposed Rule, 81 Fed. Reg. 92,703 (Dec. 20, 2016) (defining what kinds of contracting practices would violate the Act); 82 Fed. Reg. 48,584 (Oct. 18, 2017) (withdrawing the interim final rule); 82 Fed. Reg. 48,603 (Oct. 18, 2017) (announcing no further action on the proposed rule). The Trump Administration disbanded GIPSA as part of a USDA reorganization.

¹⁸⁶ Ben-Asher & Pollans, *supra* note 72 (describing the symbolic power of the family farm in American politics); Pollans, *supra* note 173, at 107-08 (describing the declining market power of farmers).

¹⁸⁷ Pollans, *supra* note 173, at 106-07.

¹⁸⁸ *Id.* at 101-02 (describing the anti-farmer rhetoric of the environmental and consumer food movements).

wish list for those who put food on our tables—with most claiming to feel knowledgeable about how our food is raised.”¹⁸⁹ The framework of the responsible consumer underlies this illusion of oppositional interests between farmers and consumers.

The myth of consumer responsibility means no government intervention in food production is necessary. A corollary narrative is that intervention would in fact be detrimental to consumers because it would make food more expensive. Producers must be free to produce as much food as cheaply as possible. If farmers can protect consumers, then farmers are free to do what is necessary to achieve this goal, and consumers are otherwise on their own. This view of the food system relies on the theory of productivism, which assumes that increasing agricultural productivity is the key to reducing hunger.¹⁹⁰ Faced with projections of population growth, global policy makers speak of the need to double levels of food production.¹⁹¹ In the U.S., policy makers and agricultural industry advocates regularly focus on the role of farmers in “feeding the world.”¹⁹²

¹⁸⁹ AgDaily Reporters, *Survey: Consumer Expectations Make it Tough to be a Farmer*, AG DAILY (Aug. 6, 2019), <https://www.agdaily.com/insights/consumer-expectations-take-toll-farmers/> (characterizing data from a new study by Cargill); *see also* Pollans, *supra* note 173, at 103 (quoting a Trump-Pence campaign talking point promising to “defend American Agriculture against its critics, particularly those who have never grown or produced anything beyond a backyard tomato plant”).

¹⁹⁰ NORA MCKEON, *FOOD SECURITY GOVERNANCE: EMPOWERING COMMUNITIES, REGULATING CORPORATIONS* 72-73 (2015) (observing that productivity is typically measured in homogenous ways—focusing on yield—and thus productivity analysis often misses more context specific measures, such as productivity per unit of labor, that might be more useful); Olivier De Schutter, *The Specter of Productivism and Food Democracy*, 2014 WISC. L. REV. 199, 199-200 (2014). Productivism remains a central focus of the food security framework. John Ingram, *A Food Systems Approach to Research Food Security and Its Interactions with Global Environmental Change*, 3 J. FOOD SEC. 417, 418-19 (2011) (concluding based on a literature review that research into increased productivity vastly outstrips research into other aspects of food security). In 2001, the United Nations Food and Agriculture Organization defined food security as follows: “Food security exists when all people, at all times, have physical, social, and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” The USDA definition is similar: “access by all people at all times to enough food for an active, healthy life.” USDA, *Household Food Security 2016* at 2 (stating that food security “is one of several conditions necessary for a population to be healthy and well-nourished.”). FAO breaks down this definition into four more specific metrics: food availability, food utility, food access, and stability. FAO 2006.

¹⁹¹ *See, e.g.*, L. VAL GIDDINGS, MATTHEW STEPP, & MARK CAINE, *FEEDING THE PLANET IN A WARMING WORLD* 7-8 (Apr. 2013), <http://www2.itif.org/2013-feeding-planet-warming-world.pdf>.

¹⁹² AgDaily Reporters, *supra* note 189 (using this rhetoric); Margaret Mellon, Union of Concerned Scientists, *Let’s Drop “Feed the World”: A Plea To Move Beyond an Unhelpful Phrase* (Aug. 30, 2013), <https://blog.ucsusa.org/margaret-mellon/lets-drop-feed-the-world->

In part as a result of this rhetoric, those working in the food system remain in poverty. “[T]hose who produce our nation’s food are among the most likely to be hungry or food insecure.”¹⁹³ Agricultural workers are more susceptible to food insecurity, and susceptibility is higher for workers without legal status in the U.S. as these workers do not have access to SNAP benefits.¹⁹⁴ Agricultural workers “have been recruited and expelled to meet growers’ shifting needs for labor in the fields.”¹⁹⁵ Consumer responsibility narratives on food security, and, in particular, work requirements for access to social safety nets reinforce this pattern. Low-income people have to accept low-wage work in order to remain eligible for benefits.¹⁹⁶

C. *Consumer Versus Consumer*

The myth of the responsible consumer also generates a second axis of polarization. As personal health, household food security, and equity and sustainability are tied to individual choice, individual capacity to and interest in making those choices becomes a source of division. While some consumers have the time, money, and inclination to invest significantly into researching their food choices, others do not. Just as consumers are asked to do more and more with their food dollars, social welfare support to supplement those dollars is declining.¹⁹⁷

Consumer responsibility for equity and sustainability results in dichotomous rhetoric. On the one hand is the “if they only knew” rhetoric, which laments lack of education and argues that if consumers only knew better where their food came from they would make different choices.¹⁹⁸

a-plea-to-move-beyond-an-unhelpful-phrase-229?.

¹⁹³ Sandy Brown & Christy Getz, *Farmworker Food Insecurity and the Production of Hunger in California*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* 66 (Alison Hope Alkon & Julian Agyeman eds., 2011) (“[T]he concept of food security, as deployed by domestic actors, has largely sidestepped a structural analysis of hunger. The result has been a focus on feeding hungry people, rather than altering the production relations and modes of governance that underpin food insecurity.”).

¹⁹⁴ Brown & Getz, *supra* note 193, at 132 (reviewing findings from a study of agricultural workers in Fresno County).

¹⁹⁵ *Id.* at 134 (describing the historical construction of “ideologies of racial difference” to justify exploitation and foment backlash against labor militancy).

¹⁹⁶ *See supra* notes 126-129 (describing how corporate interests benefit from social welfare work requirements).

¹⁹⁷ *See supra* Parts II.A (describing growing expectations on consumers on all of these fronts); Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 *AM. J.L. & MED.* 315, 316 (2015) (arguing that it is cost and availability and not lack of information that prevents low income consumers from buying healthy food).

¹⁹⁸ Julie Guthman, *“If They Only Knew”*: *The Unbearable Whiteness of Alternative Food*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* (ALISON HOPE ALKON & JULIAN AGYEMAN EDS., 2011); Dupuis, *supra* note 86, at 102 (explaining that “the notion of unveiling is itself romantic, a promise that the “real” good food can be found underneath the veil”).

Michael Pollan exemplifies this philosophy:

If I've learned anything over the past several years . . . , it is that the more you know about this food, the less appetizing it becomes to eat. If people could peer over the increasingly high walls of our industrial agriculture they would surely change the way they eat. Increasing numbers of Americans aren't waiting: they're changing now. This desire for something better—something safer, something more sustainable, something more humane and something tastier—is what's bringing people to Whole Foods and the farmer's market¹⁹⁹

Some advocates espouse an even more insidious version, arguing that if people could only taste real food, they would make better choices.²⁰⁰ Scholars have long critiqued this aspect of the movement as neoliberal, pointing out that it relieves the public sector of responsibility for serious public problems, puts the burdens of those problems on individuals, and allows the food industry to continue with business as usual.²⁰¹

The trend places responsibility on individual consumers without considering structural barriers that hinder choice. The first of these barriers is cost. From a food producer's perspective, the primary function of a certification is to charge a price premium. Healthier, more sustainable, more humane food choices are often more expensive.²⁰² Second, the moral choice is not always straight forward. How, for instance, should a consumer balance label information about animal welfare with information about carbon footprint?²⁰³ Labels themselves also face numerous methodology and legitimacy problems and may not be reliable sources of information.²⁰⁴

In part because of these barriers, the myth of the responsible consumer is susceptible to the charge of elitism—the other side of the dichotomous rhetoric. Critical food scholar Julie Guthman refers to Michael Pollan's

¹⁹⁹ Pollan, *supra* note 131.

²⁰⁰ See, e.g., DAN BARBER, *THE THIRD PLATE* (2015) (describing how chefs have “the potential to get people to rethink their eating habits” and arguing that “taste” “can be a guide in reimagining our food system, and our diets, from the ground up”).

²⁰¹ Guthman, *supra* note 198; Julie Guthman, *Can't Stomach It: How Michael Pollan et al. Made Me Want to Eat Cheetos*, 7 *GASTRONOMICA: THE JOURNAL OF CRITICAL FOOD STUDIES* 75 (2007); Alison Hope Alkon & Julie Guthman, *Introduction*, in *THE NEW FOOD ACTIVISM: OPPOSITION, COOPERATION, AND COLLECTIVE ACTION* 10-15 (Alison Hope Alkon & Julie Guthman eds. 2017) (arguing that the “when food activists argue that the best way to create a sustainable food system is to become a producer or consumer of local and organic food, they are working within [a] neoliberal worldview” that focuses on “the primacy of the so-called free market, unconstrained by government intervention”).

²⁰² Pollans, *supra* note 173, at 109 & n.48.

²⁰³ Czarnezki, Pollans, & Main, *supra* note 134, at 1016 (describing the problem of cross-product comparison and the inadequacy of labels to guide consumers in these choices).

²⁰⁴ *Id.* at 1008-16 (cataloguing these potential problems).

approach as “privileged,”²⁰⁵ and more pointed critiques fill the pages of conservative and libertarian media.²⁰⁶ Critics have also observed that consumer food movement tends to create and reproduce “white spaces” that are exclusive both for the structural reasons described above and for cultural reasons.²⁰⁷

This fight over what constitutes good food and who gets to decide what good food is—even the basic assumption that there is such a thing as “good food”—fosters mutual judgment and magnifies ideological divides. As I have argued elsewhere, the big winner of this ideological divide is the food industry.²⁰⁸ Food law, including the consumer protection laws that create a one way set of obligations from producers to consumers and the information control regimes that undermine the capacity of food consumers to understand the system they participate in, plays a critical role in fostering this polarization.

CONCLUSION: FROM POWERLESSNESS TO SOVEREIGNTY

This Article describes a variety of mechanisms through which food law facilitates the loss of individual and community sovereignty. This Article has primarily framed this loss of sovereignty as a matter of powerlessness. But where law constructs powerlessness, it arguably also tends to advance an even more objectionable ideology: fascism. Hannah Arendt puts the loss of individual and community sovereignty at the core of fascism, and, indeed, the constructed powerlessness that this Article describes is perhaps a democracy-friendly euphemism for fascism.²⁰⁹ It might be that fascism is actually a useful analytical tool to assess the U.S. food system.²¹⁰ Even in the absence

²⁰⁵ Guthman, *supra* note 201 (calling his approach both “privileged” and troublingly “apolitical”).

²⁰⁶ Matthew Continette, *Freedom is Eating Steak Well Done with Ketchup*, NAT’L REV. (Mar. 18, 2017), <https://www.nationalreview.com/2017/03/donald-trump-steak-liberals-show-their-elitism-while-mocking-trump/>; Katherine Timpf, *Study: Michelle Obama’s Nutrition Advice is Sexist and ‘Elitist’*, NAT’L REV. (Sept. 16, 2014), <https://www.nationalreview.com/2014/09/study-michelle-obamas-nutrition-advice-sexist-and-elitist-katherine-timpf/>; Suzanne Zuppello, *Slow Food’s Elitism Only Fueled My Craving for McDonald’s*, EATER.COM (Oct. 18, 2018).

²⁰⁷ See, e.g., Margot Pollans & Michael Roberts, *Setting the Table for Urban Agriculture*, 46 URB. LAWYER 199, 219-22 (2014) (describing how urban agriculture projects and farmers’ markets can become “white spaces”); Kristen Aiken, *‘White People Food’ Is Creating An Unattainable Picture of Health*, HUFFINGTON POST (Sept. 17, 2018) (identifying a phenomenon that certain kinds of food are widely consider “white people food”).

²⁰⁸ Pollans, *supra* note 173, at 112.

²⁰⁹ ARENDT, *supra* note 15, at 433 (explaining that the meaning of freedom is also undermined by the arbitrariness of the exercise of totalitarian power).

²¹⁰ Like all political ideologies, fascism is imprecise. Fascism perhaps more than others. Gilbert Allardyce, *What Fascism is Not: Thoughts on the Deflation of a Concept*, 84 AMER. HIST. REV. 367, 367 (1979) (lamenting that “we have agreed to use the word without agreeing on how to define it”). As historian Kevin Passmore has observed, “the final meaning of a

of authoritarian power, the dominant global food system has taken on the key hallmarks of fascist ordering. Food has a deep relationship to political power. It has always played a significant role in fascist and other authoritarian regimes. From forced starvation (for example, in Nazi concentration camps²¹¹) to centralized food system planning (for example, in Italy under Mussolini²¹²), control of food is a key path to control of people.²¹³ Historian Tiago Saraiva puts food at the center of the rise of fascism, arguing that “every fascist regime of the interwar period became obsessed with projects for making the national soil feed the national body.”²¹⁴

Through this lens, homogenization, information control, and polarization are simply features of fascist ordering. Homogenization creates powerlessness by eliminating meaningful choice. This powerlessness is felt most acutely by those whose traditional foodways fall outside the prescribed norms of the U.S. food system. Information control creates powerlessness by disempowering those who might otherwise like to exercise their political and social preferences through food choice just as consumers are distracted away from other more direct means of food-related political participation. Finally, polarization creates powerlessness by curtailing possible community organizing across the different segments of the population who suffer from exploitation at the hands of the food industry.

If this Article provides a conceptual critique of the U.S. food system, it

political label is ungraspable”; its meaning derives only from specific contexts in which the label is used. KEVIN PASSMORE, *FASCISM: A VERY SHORT INTRODUCTION* 20; *see also* RENZO DE FELICE, *INTERPRETATIONS OF FASCISM* (concluding that each fascist regime is unique and that no general interpretation is possible). In this sense, he concludes “the only thing that really distinguishes fascism from other concepts is its enormous negative moral charge.” *Id.* at 20. Likewise, in her recent book, *Fascism: A Warning*, Madeleine Albright observes the recent trend to overuse the term in all arenas of our lives and concludes that using the label for anything we do not like can “drain[] the potency from what should be a powerful term.” MADELEINE ALBRIGHT, *FASCISM: A WARNING* 8 (2018).

²¹¹ ADAM TOOZE, *THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY* 529-44 (2007) (describing food policies in concentration camps and in prisoner of war labor camps).

²¹² Carol Helstosky, *Fascist Food Politics: Mussolini’s Policy of Alimentary Sovereignty*, 9 *J. OF MODERN ITAL. STUDIES* 1 (2004).

²¹³ The term “food fascism” has also been used in modern parlance to describe governmental policies, such as California’s foie gras ban, or New York City’s soda portion control policy that restrict access to certain foods. *See supra* note 17 (offering one example of this phenomenon). But these kinds of critiques overemphasize individual free choice, losing track of how much that choice is constrained in neoliberal economic systems, and ignoring the importance of community self-determination.

²¹⁴ SARAIVA, *supra* note 14, at 7. Perhaps the overt fascist regimes of the twentieth century focused so intently on food because they emerged during an era of widespread poverty and hunger, but, even so, food provides an essential axis for control because of its universal centrality.

also offers a roadmap for reform, identifying the laws, policies, and institutional actors that strip power from the majority of food system participants. The primary goal of reform should be to establish food sovereignty, a functional inverse of food fascism.²¹⁵ Sovereignty, as distinct from food freedom (and other forms of food libertarianism) relies not on the absolute right of the individual to choose what and how to eat but on the power of individuals, communities, and nations to participate in the critical decisions that shape the food system. Building sovereignty begins with dismantling the fascist structures of food law. In some cases, this dismantling is simple, requiring only the repeal of a problematic policy (for instance, SNAP work requirements or food disparagement laws). In other cases, the dismantling requires more complex tradeoffs between the goal of sovereignty and the need for risk management (for instance, food safety or food fraud law reform²¹⁶). Ultimately, dismantling food fascism is necessary to make the apparent goal of the food system—to allow eating that is physically, culturally, and emotionally sustainable—an achievable reality.

²¹⁵ See *supra* note 12 for a definition of food sovereignty.

²¹⁶ For discussion of potential approaches to food safety law reform, see generally Broad Leib & Pollans, *supra* note 18.