
COMMENT

SUBSIDIZING FAT: HOW THE 2012 FARM BILL CAN ADDRESS AMERICA'S OBESITY EPIDEMIC

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INTRODUCTION

On a bus in West Philadelphia, a woman feeds her baby an artificial orange beverage from his bottle. The drink costs much less than baby formula, partly because it is mostly comprised of corn—the largest beneficiary of U.S. agricultural subsidies.¹ Currently the least expensive food available is also the most caloric and the least nutritious: a dollar’s worth of cookies or potato chips yields 1200 calories, while a dollar’s worth of carrots yields only 250 calories.² A savvy shopper seeking to satiate her family will naturally seek out these more caloric but less nutritious items.³ The sticker price is a small fraction of the true cost of highly processed foods, which contain excessive amounts of sodium, fat, and calories that contri-

¹ From 1995 to 2010 the United States Department of Agriculture (USDA) provided \$77,123,770,222 in subsidy payments for corn, the largest of all subsidized crops. Envtl. Working Grp., *The United States Summary Information*, 2011 FARM SUBSIDY DATABASE, <http://farm.ewg.org/region?fips=00000®name=UnitedStatesFarmSubsidySummary> (last visited Oct. 15, 2011). Americans spend 6.8% of their income on food—down from 29% a century ago, far less than industrialized nations such as France and Japan whose citizens spend approximately 14% of their income on food. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 853 tbl.1358 (2010), available at <http://www.census.gov/prod/2011pubs/11statab/intlstat.pdf>.

² Adam Drewnowski & SE Specter, *Poverty and Obesity: The Role of Energy Density and Energy Costs*, 79 AM. J. CLINICAL NUTRITION 6, 9 (2004).

³ See HEATHER SCHOONOVER & MARK MULLER, INST. FOR AGRIC. & TRADE POLICY, FOOD WITHOUT THOUGHT: HOW THE U.S. FARM POLICY CONTRIBUTES TO OBESITY 8 (2006) (“Studies have demonstrated that price plays a major role in people’s food purchasing decisions. For many people, purchasing cheaper foods may not be a matter of choice. But even for those who can afford different options in their food purchases, price often drives choices.”); Drewnowski & Specter, *supra* note 2, at 11 (“There is substantial evidence that food purchases are influenced by food costs We hypothesize that consuming energy-dense foods, and energy-dense diets, is an important strategy used by low-income consumers to stretch the food budget.”).

bute to an estimated \$147 billion in annual healthcare costs.⁴ Moreover, these products are artificially cheap because their production is subsidized with tens of billions in taxpayer funds each year.⁵ Federal agricultural subsidies have provided Americans with high-calorie, low-nutrient processed foods that are less expensive and more readily available than whole grains and produce.⁶ Until very recently, poverty was associated with emaciated faces and rail-thin limbs, but today malnutrition persists despite an abundance of cheap calories.⁷ Our nation is in the midst of an obesity epidemic that is not only a question of weight, but also implicates serious health conditions caused by poor nutrition such as heart disease, diabetes, and some types of cancers.⁸ The next generation of

⁴ Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFF. w822, w828 (2009), <http://content.healthaffairs.org/content/28/5/w822.full.pdf+html?sid=8e3da08f-804a-4e9a-bdb5-ba052755032e>; see also B. Sherry et al., *Vital Signs: State-Specific Obesity Prevalence Among Adults—United States, 2009*, 59 MORBIDITY & MORTALITY WKLY REP. 951, 952 (2010) (reporting that obese individuals spend \$1429 more on healthcare annually than nonobese people).

⁵ See Env'tl. Working Grp., *USDA Subsidies for Farms in United States Totaled \$246,718,000,000 from 1995 Through 2009*, 2011 FARM SUBSIDY DATABASE, <http://farm.ewg.org/regiondetail.php?fips=00000&summlvl=2&stname=theUnitedStates> (last visited Oct. 15, 2011) (showing that the United States paid annual subsidies ranging from over \$15 billion to nearly \$25 billion between 2000 and 2010).

⁶ See SCHOONOVER & MULLER, *supra* note 3, at 6-7 (indicating that the cost of fruits and vegetables has risen forty percent since 1985, while soda, fats, and oils have decreased in price due to “[t]he low cost of commodities like corn and soybeans [which] make sugars and fats some of the cheapest food substances to produce”); Drewnowski & Specter, *supra* note 2, at 14 (“Americans are gaining more and more weight while consuming more added sugars and fats and are spending a lower proportion of their income on food”).

⁷ In 2010 14.5% of American households, or 48.8 million people, were food insecure at some point, meaning those households were uncertain of being able to obtain enough food to meet the needs of all members. Econ. Research Serv., *Food Security in the United States: Key Statistics and Graphics*, USDA, http://www.ers.usda.gov/briefing/foodsecurity/stats_graphs.htm (last visited Oct. 15, 2011).

⁸ A Surgeon General’s report characterized obesity as an epidemic:

Overweight and obesity may not be infectious diseases, but they have reached epidemic proportions in the United States In 1999, an estimated 61 percent of U.S. adults were overweight or obese, and 13 percent of children and adolescents were overweight. Today there are nearly twice as many overweight children and almost three times as many overweight adolescents as there were in 1980 Approximately 300,000 deaths a year in this country are currently associated with overweight and obesity.

U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE SURGEON GEN., *THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY*, at xiii (2001).

Americans may be the first in history to have a shorter lifespan than its parents.⁹

The national obesity epidemic is a multifaceted crisis with many factors that go beyond the scope of this Comment.¹⁰ Similarly, the 2008 Farm Bill is omnibus legislation spread across more than a dozen titles in the United States Code, spanning everything from food stamps and school lunches to environmental conservation and agricultural research.¹¹ This Comment evaluates how programs intended to support farm prices and income influence producers and consumers.¹² Commodity production¹³ is at the core of the obesity epidemic because highly processed foods and meats are mostly comprised of subsidized corn, soy, and cereal grains.¹⁴ While domestic production¹⁵

⁹ See Samuel H. Preston, *Deadweight?—The Influence of Obesity on Longevity*, 352 NEW ENGL. J. MED. 1135, 1136-37 (2005) (arguing that the obesity problem in the United States must be addressed to prevent a reduction in life expectancy).

¹⁰ For example, physiological factors such as insulin resistance, psychological factors such as addictive emotional eating, and environmental factors such as sedentary work, entertainment, and fast-food marketing to children all contribute to food-related health problems. Drewnowski & Specter, *supra* note 2, at 13. Moreover, individual taste preference and the cultural importance of certain foods are important factors in food choice. *Id.* at 13-14.

¹¹ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (codified as amended in scattered titles of the United States Code).

¹² Consumer benefits programs—food stamps, school lunches, and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)—are also important components of agricultural policy and public health. See Jess Aldernman et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 92-94 (2007), for a general discussion of the evolution these programs in response to the obesity epidemic. Congress recently made significant improvements to the school lunch program by imposing nutritional requirements beyond a minimum caloric content. Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 208, 124 Stat. 3183, 3221-22 (2010) (to be codified at 42 U.S.C. § 1779). This and other efforts by commercial processors to respond to the health crisis discussed below may be attributed to First Lady Michelle Obama's "Let's Move!" campaign to address childhood obesity. LET'S MOVE: AMERICA'S MOVE TO RAISE A HEALTHIER GENERATION OF KIDS, <http://www.letsmove.gov> (last visited Oct. 15, 2011).

¹³ An agricultural commodity is a crop such as corn, wheat, cotton, rice, soy, oats, wool, oil, livestock, or frozen concentrated orange juice that is sold on an exchange market. Commodity Exchange Act § 1a, 7 U.S.C. § 1a(4) (2006).

¹⁴ See Drewnowski & Specter, *supra* note 2, at 14 (explaining that these are the most high-density foods with the lowest consumption costs). Supporters of agricultural subsidies contend that the benefits of subsidies go far beyond the farm to everyone involved in the food production and distribution chain. See, e.g., Robert Goodman, *A Six-Point Defense of Farm Subsidies*, EXTENSION DAILY (Oct. 8, 2004, 1:15 PM), <http://www.aces.edu/departments/extcomm/npa/daily/archives/000749.php> ("Farmers receive direct benefits, but others along the way benefit indirectly through cheaper production inputs, which, in turn, contribute to lower production costs.").

and food price are not the only factors contributing to the problem, this Comment questions the value of using the third-largest federal benefits program¹⁶ to reduce the cost of commodities that contribute to \$147 billion in annual obesity-related health costs.¹⁷ The issue of obesity has been well addressed by social scientists and natural scientists, by writers and food advocates.¹⁸ Yet legal scholarship on agriculture has focused entirely on environmental or international trade issues without addressing how federal legislation impacts what farmers decide to plant and what people choose to eat.¹⁹ This Comment recommends legislative action for the 2012 Farm Bill to make fruits, vegetables, and whole grains comparatively less expensive than unhealthy processed foods and meats.

Part I evaluates past and current legislation that was designed to impact food production and prices. Farm legislation has focused on controlling the supply or price of agricultural commodities through income supports, acreage reduction programs, marketing agreements

¹⁵ While many agricultural products are imported, data indicate that U.S. commodity prices significantly influence international market prices, which is why the World Trade Organization consistently pressures the United States to end agricultural subsidies. DARYLL E. RAY ET AL., *AGRIC. POLICY ANALYSIS CTR., UNIV. OF TENN., RETHINKING US AGRICULTURAL POLICY: CHANGING COURSE TO SECURE FARMER LIVELIHOODS WORLDWIDE 2* (2003), available at <http://www.agpolicy.org/blueprint/APACReport8-20-03WITHCOVER.pdf>; see also *Review of US Agricultural Policy in Advance of the 2012 Farm Bill: Hearing Before the H. Comm. on Agric.*, 111st Cong. 4 (2010) (statement of Daryll E. Ray, Professor, Univ. of Tenn.) (arguing that an “increase in domestic [consumption] has been far more important to U.S. farmers than the vacillation of grain exports”).

¹⁶ Behind Social Security and Medicare, the Farm Bill is the largest federal benefits program (although approximately half of the budget is spent on food stamps, school lunches, and WIC programs). DAVID RAPP, *HOW THE U.S. GOT INTO AGRICULTURE AND WHY IT CAN'T GET OUT 15* (1988).

¹⁷ See Finkelstein et al., *supra* note 4, at w828 (stating that “obesity continues to impose an economic burden on both public and private payers”).

¹⁸ Michael Pollan, Eric Schlosser, and Mark Bittman have done excellent work connecting health problems to food production. See MICHAEL POLLAN, *OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006) (examining the American “national eating disorder” by tracing food production from the source to the table); ERIC SCHLOSSER, *FAST FOOD NATION* (2005) (offering a critical account of the development and current state of the American fast food industry); Mark Bittman, *A Food Manifesto for the Future*, N.Y. TIMES OPINIONATOR (Feb. 1, 2011, 10:28 PM), <http://opinionator.blogs.nytimes.com/2011/02/01/a-food-manifesto-for-the-future> (discussing ideas for making the “growing, preparation, and consumption of food healthier, saner, more productive, less damaging, and more enduring”). However, a legal perspective is required to move from policy points to legislative action.

¹⁹ See, e.g., Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 602-13 (2010) (considering the environmental problems the current agricultural system creates).

and processing taxes, nonrecourse loans, and direct payments. Each of these methods is explained and evaluated with respect to how it creates incentives to plant particular crops. Part II proposes future legislation to realign production incentives with modern consumption needs. Part III addresses the potential legal hurdles to implementing the suggested legislation: whether eliminating benefits programs might give rise to due process concerns; whether regulating agricultural land use might degrade property values to create a regulatory takings issue; whether Congress has authority to impose the recommended regulations in light of the Commerce Clause limitations articulated in *United States v. Lopez*;²⁰ and whether the tax and spend powers of Congress may again be relied upon after *Wickard v. Filburn*.²¹

Price supports and acreage allotments have increased surpluses and decreased prices; these measures should not continue. In order to reduce consumption of unhealthy foods and support farm income, farm payments must be entirely decoupled from production, programs must encourage product diversification,²² and highly processed foods must be priced to reflect the true costs they impose on the public. Agricultural reform can address the food challenges of the twenty-first century: rather than increase the quantity of available food, agricultural legislation must increase the quality of affordable food. By decoupling income supports, ending acreage reduction and limitation, and using taxes to impose the true cost of food on processors and consumers, the 2012 Farm Bill can help remedy the obesity epidemic.

I. AGRICULTURAL LEGISLATION AND FOOD PRICES

Farm programs were initiated to stabilize crashing farm prices and support family farmers who would otherwise have been bankrupted in the midst of the Great Depression.²³ However, farm programs have consistently caused commodity prices to fall, because the support of

²⁰ 514 U.S. 549, 601-02 (1995).

²¹ 317 U.S. 111, 125 (1942).

²² This Comment uses the term polyculture to refer to the agricultural production of several different kinds of plants or animals. It may include a variety of the same plant—such as chili peppers, sweet peppers, and ancho peppers—or a variety of species.

²³ R. DOUGLAS HURT, PROBLEMS OF PLENTY: THE AMERICAN FARMER IN THE TWENTIETH CENTURY 67-68 (2002). Government sponsorship of agriculture is older than the United States. Earl Butz, *The Politics of Agricultural Subsidies*, PROC. ACAD. POL. SCI., May 1952, at 54, 55. As early as 1620, tobacco production was limited in Virginia to stabilize falling prices. *Id.* Most dramatically, the 1862 Homestead Act provided free land to those who farmed and lived on the frontier. *Id.*

program crops encourages their overproduction.²⁴ The government guarantees a minimum price for program crops, creating a compelling incentive to grow more of these crops because government subsidies negate the risk of market collapse.²⁵ As the supply increases, prices fall.²⁶ This problem of excess supply was the problem that the first farm bill, the Agricultural Adjustment Act of 1933,²⁷ was intended to remedy, but the problem of perpetual surplus has persisted through the twenty-first century.²⁸

Rather than stabilize minimum farm prices, farm programs have resulted in decreased commodity prices. The average cost of production is twenty to forty percent below the prices received for program crops, meaning that commodity subsidies directly contribute up to one-third of the price reduction.²⁹ For example, in 2000 farmers spent an average of \$2.72 to produce a bushel of corn with a market value of \$1.77.³⁰ Farmers continue to produce corn because government payments exceed the difference, generating a one percent net income for the farmer regardless of the actual market price.³¹ The reduction in the price of commodity crops has harmed consumers by

²⁴ This Comment uses the term “program crops” to refer to the commodities supported through farm programs. Farm programs do not cover all commodity crops. “Program crops” are therefore a subset of all commodity crops.

²⁵ Nearly three-fourths of all U.S. cropland is dedicated to production of commodity crops. See INST. FOR AGRIC. & TRADE POLICY, THE FARM BILL AND PUBLIC HEALTH: AN OVERVIEW 2 (2007) (drawing a connection between the high program payments that go to these crops and the significant portion of cropland dedicated to producing them).

²⁶ *Id.*

²⁷ Ch. 25, 48 Stat. 31.

²⁸ There are a few notable exceptions to the surplus problem, mostly fueled by government purchase of grain. During World War II and the Korean War, the federal government used grain surpluses to feed troops serving abroad. HURT, *supra* note 23, at 110. In 1979, the United States contracted to sell billions of dollars worth of wheat to the Soviet Union, which caused a significant rise in agricultural exports. *Id.* at 139. Since 1976, however, most U.S. sales of agricultural commodities have been purely domestic. See DARYLL E. RAY & HARWOOD D. SCHAFER, AGRIC. POLICY ANALYSIS CTR., UNIV. OF TENN., HOW FEDERAL FARM POLICY INFLUENCES THE STRUCTURE OF OUR AGRICULTURE 2-3 (2005), available at <http://www.agpolicy.org/pubs/RaystructureessionSummary.pdf> (contending that the export theory of agricultural markets has never been realized).

²⁹ RAY ET AL., *supra* note 15, at 15-23. But see Julian M. Alston et al., *Farm Subsidies and Obesity in the United States*, AGR. & RESOURCE ECON. UPDATE, Nov.-Dec. 2007, at 1, 4 (arguing that the real impact of this price decrease on consumers is minimal and that the price decrease from price support programs is substantially offset by acreage reduction programs).

³⁰ RAY ET AL., *supra* note 15, at 10.

³¹ The average difference between the subsidy price that the farmer receives and the cost of production is approximately one percent. *Id.* at 10-11.

encouraging overproduction of corn, wheat, rice, and soy.³² In response to the overabundance of these crops, manufacturers have found inventive ways to process these commodities, creating unhealthy foods that are highly processed concoctions of many unpronounceable ingredients created in a lab.³³ Farmers who grow fruits and vegetables are not subsidized, and are ineligible even for most conservation programs, because they do not grow program crops.³⁴

Contrary to the legislation's purpose,³⁵ agricultural subsidies do not support small family farmers; real farm income has declined since the 1970s.³⁶ Further, the majority of subsidy payments goes to large farms with annual revenues of more than half a million dollars.³⁷ Thus, both consumers and small family farmers are harmed by the artificial deflation of commodity prices.³⁸ Farm Bill reform can provide

³² See, e.g., MARK MULLER ET AL., CONSIDERING THE CONTRIBUTION OF U.S. FOOD AND AGRICULTURAL POLICY TO THE OBESITY EPIDEMIC: OVERVIEW AND OPPORTUNITIES 21-23 (2007) (connecting the subsidization of poor-quality foods to obesity).

³³ See POLLAN, *supra* note 18, at 18-19 (explaining how technology has put components of corn in nearly every food product—even other vegetables—and many non-food products as well).

³⁴ See DEMECY JOHNSON ET AL., U.S. DEP'T OF AGRIC., ELIMINATING FRUIT AND VEGETABLE PLANTING RESTRICTIONS: HOW WOULD MARKETS BE AFFECTED? 19-23 (2006) (explaining that fruit and vegetable farmers must weigh the costs of forgoing payments).

³⁵ Senator Byron Dorgan explained the Farm Bill's goal of providing a safety net:

If you have a real tough time, price depressions and other things, the big corporate agrifactories, they can make it through there, but the family farms get washed away. So we developed instead a safety net. That safety net is rooted in the legislation before us, which incidentally I think improves the safety net.

153 CONG. REC. 13,763 (2007) (statement of Sen. Byron Dorgan).

³⁶ See RAY ET AL., *supra* note 15, at 9 (“Despite these record-level [farm] payments, net farm income in the U.S. declined 16.5 percent between 1996 and 2001.”). Net farm income in 2009 was again at 2001 levels after fluctuating significantly from 2004 through 2008 due to large price fluctuations. Econ. Research Serv., *Farm Income and Costs: 2009 Farm Sector Income Estimates*, USDA, <http://www.ers.usda.gov/Briefing/FarmIncome/2009incomeaccounts.htm> (last visited Oct. 15, 2011). Steady increases in production expenses were also observed from 1999 through 2009. *Id.*

³⁷ ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., FARM FINANCES FOR ALL FARMS: ALL SURVEY STATES GOVERNMENT PAYMENTS 1-2 (2011).

³⁸ Family farmers are of particular concern because they provide the bulk of agricultural production. See JAMES MACDONALD ET AL., U.S. DEP'T OF AGRIC., GROWING FARM SIZE AND THE DISTRIBUTION OF FARM PAYMENTS 2 (2006) (“Family-operated farms continue to account for most U.S. agricultural production.”). However, it should be noted that many family-owned farms are also some of the largest farms in the country. *Id.* This Comment specifically addresses “small” family-owned farms because they are crucial to preserving robust domestic agriculture.

a remedy to the nutrient-scarcity problem that has resulted in an epidemic of obesity, diabetes, and heart disease.³⁹

A. *How Farm Bill Legislation Attempts to Implement Agricultural Policies*

Agricultural subsidies focus on “base crops” for pragmatic reasons.⁴⁰ The first national system of agricultural supports was the Agricultural Adjustment Act of 1933, enacted in response to the Great Depression.⁴¹ The federal government paid farmers for each acre of base crops they took out of production.⁴² The initial commodities included corn, wheat, rice, cotton, tobacco, milk, and hogs.⁴³ The government targeted these products because they had significant surpluses and the market demand of these commodities affected the prices of others.⁴⁴ For example, the price of corn impacts the price of beef and poultry, since corn is the primary feed for industrial-scale meat production. Further, each of the program crops had to be processed before they reached the consumer, making the inputs easier to regulate.⁴⁵ The first farm bill managed the market supply by imposing processing taxes, licensing requirements, and marketing quotas on processors and handlers (such as grain elevators).⁴⁶ This legislation was among the first New Deal statutes to be declared un-

³⁹ See MULLER ET AL., *supra* note 32, at 21-27 (concluding that farm subsidies contribute to obesity because they subsidize unhealthy foods). *Contra* Alston et al., *supra* note 29, at 4 (arguing that farm program payments do not significantly impact obesity, because direct payments have only a small impact on commodity prices and the average consumer does not make purchasing decisions based on such minimal price differences). This Comment disputes Alston’s contention because the impact of farm subsidies extends beyond cash payments. The incentive to overproduce commodity crops drives down prices most dramatically. The Alston study further presumes that acreage reduction offsets price declines due to direct subsidies. *Id.* Unfortunately, acreage reduction has virtually no impact on production, as farmers continue to increase yield per acre nearly every year. See *infra* subsection I.B.2.

⁴⁰ Base crops originally included corn, wheat, cotton, rice, tobacco, and milk. Allen H. Olson, *Federal Farm Programs—Past, Present and Future—Will We Learn from Our Mistakes?*, 6 GREAT PLAINES NAT. RESOURCES J. 1, 4 (2001). Now soybeans and grain sorghum are supported instead of tobacco and milk. There are separate milk programs in the 2008 Farm Bill. 7 U.S.C. §§ 8771–73 (Supp. III 2010).

⁴¹ See Butz, *supra* note 23, at 55.

⁴² HURT, *supra* note 23, at 69.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Olson, *supra* note 40, at 3-4.

constitutional.⁴⁷ However, it was not the tax itself that was deemed unconstitutional in *Butler v. United States*, but the fact that the proceeds of the tax funded payments to farmers who reduced the acreage used to produce commodity crops.⁴⁸ This regulation of production was held to be an exclusively local concern, and beyond Congress's Commerce Clause authority.⁴⁹ Six years later the Supreme Court in *Wickard v. Filburn* overruled *Butler* and declared that the Commerce Clause reaches any commodity that impacts national commerce in the aggregate.⁵⁰

In response to *Butler*, agricultural legislation focused on nonrecourse loans,⁵¹ and acreage reduction was reframed as soil conservation.⁵² These measures remain cornerstones of agricultural supports.⁵³ Although the base crops shifted slightly over time—soybeans and oil seeds replaced tobacco, milk, and hogs—agricultural supports continued to focus on attempts to limit the supply of commodity crops to drive up prices.⁵⁴ In order to reform the current system of subsidies, it is important to understand the legislative mechanisms for influencing agricultural production and to consider which statutory measures may be more or less successful in reducing the cost of fresh produce and increasing the relative cost of highly processed nonnutritious foods. The central problem of agriculture is that, unlike other industries, efficiency gains can ultimately reduce profits because increased production results in surpluses that drive down market prices.⁵⁵

⁴⁷ See *United States v. Butler*, 297 U.S. 1, 74 (1936) (“Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.”).

⁴⁸ *Id.* at 70.

⁴⁹ *Id.* at 64.

⁵⁰ 317 U.S. 111, 113 (1942). See Section III.B for a full discussion of congressional authority to regulate agricultural production under the Commerce Clause.

⁵¹ See *infra* subsection I.B.4.

⁵² See, e.g., Butz, *supra* note 23, at 56. Indeed, the 1936 legislation was titled the Soil Conservation and Domestic Allotment Act. Pub. L. No. 74-461, 49 Stat. 163 (1936) (codified as amended at 16 U.S.C. § 590 (2006)). The Soil Act avoided invalidation because the Court in *Butler* held environmental protection to be a legitimate federal object. 297 U.S. at 84.

⁵³ See *infra* Section I.B.

⁵⁴ RENÉE JOHNSON, CONG. RESEARCH SERV., RL 34696, THE 2008 FARM BILL: MAJOR PROVISIONS AND LEGISLATIVE ACTION 11 (2008).

⁵⁵ See generally HURT, *supra* note 23, at 134 (arguing that the agricultural industry, unlike other industries, does not generate more income for producers as efficiency increases because increased production creates surpluses that in turn drive down prices). The gains in agricultural efficiency relative to manufacturing industries are stag-

B. *Principal Methods of Price Control*

There are two calamities that confront farmers. One is crop failure due to drought or other natural disasters.⁵⁶ The federal government provides disaster crop insurance to farmers suffering from crop failure.⁵⁷ The other is an overabundance of crops due to increased yields or overplanting.⁵⁸ This drives down prices for the commodity, often below the cost of inputs the farmer has spent to raise and harvest the crop.⁵⁹ When surpluses cause commodity prices to fall, federal price and income supports supplement the market price farmers receives, encouraging continued production despite negative returns.⁶⁰ In fact, in recent years government payments have accounted for the majority or all of net income for some farms.⁶¹ This problem has persisted through all price support methods, from acreage reduction and nonrecourse loans to target prices and deficiency payments.⁶² In the 1996 Federal Agriculture Improvement and Reform (FAIR) Act⁶³ Con-

gering: agricultural production efficiency increased 330% from 1952 to 1972, while manufacturing efficiency increased by 160% during the same period. These efficiencies are found in new machinery, chemical fertilizers and pesticides, and genetically engineered crops. JIM HIGHTOWER, FOOD, FARMERS, CORPORATIONS, EARL BUTZ . . . AND YOU, AGRIBUSINESS ACCOUNTABILITY PROJECT 1 (1973); *see also* POLLAN, *supra* note 18, at 95-99 (discussing how food demand is inelastic because it is limited to the capacity of human food consumption and that in response food processors have created new “value-added” foods).

⁵⁶ MULLER ET AL., *supra* note 32, at 16.

⁵⁷ Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1524 (2006).

⁵⁸ For example, when corn production reached an all-time high in 2009, average corn prices fell thirty-six cents from 2008 prices, fifty cents less than 2007 prices. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., CROP VALUES 2009 SUMMARY 21 (2010).

⁵⁹ *See* RAY ET AL., *supra* note 15, at 10 (showing that in 2003 it cost \$2.72 to produce a bushel of corn, but the price per bushel was \$1.77); *see also* HIGHTOWER, *supra* note 55, at 4 (noting that even during the 1970s export boom, commodity prices were up 6% since 1952, but input costs had increased 122%).

⁶⁰ Income supports were intended to maintain domestic agricultural production, but since payments are tied to production, they have the same impact on planting choices as price supports. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., DIRECT AND COUNTER-CYCLE PAYMENTS PROGRAM 1-2 (2008) (outlining commodities eligible for direct and countercycle payment programs).

⁶¹ MACDONALD ET AL., *supra* note 38, at 2; *see also, e.g.*, RAPP, *supra* note 16, at 31 (explaining that when target prices were paid during the price collapse of the 1980s, fifty-seven percent of farm income was derived from government payments in 1988, up from seven percent just eight years earlier); RAY & SCHAFFER, *supra* note 28, at 2 (“For grain farmers, government payments can—depending on the year—represent all (or more than all) of their net farm income.”).

⁶² Olson, *supra* note 40, at 22-23.

⁶³ Pub. L. No. 104 -127, 110 Stat. 888 (codified as amended in scattered titles of the United States Code).

gress attempted to transition farmers to the free market by offering production contracts that would support income after price supports were eliminated.⁶⁴ However, the 2002 and 2008 Farm Bills returned to income supports, price supports, and acreage reduction programs.⁶⁵

1. Income Supports

Income supports differ from price supports because, unlike price supports, income supports are not intended to impact production.⁶⁶ Rather, income supports are designed to provide farming families with incomes comparable to non-farming families.⁶⁷ The famous Brannan Plan of 1949 first conceived of income supports through target prices,⁶⁸ which were not implemented until the Agriculture and Consumer Protection Act of 1973.⁶⁹ Crop prices were subsidized by the difference between the market price and the price that would raise incomes to the level of nonfarm workers, called “parity prices.”⁷⁰

⁶⁴ Daryll Ray has argued that agricultural production, particularly grain production, has a very low response rate to prices. Daryll E. Ray, Dir., Agric. Policy Analysis Ctr., Univ. of Tenn., Testimony Before the Democratic Policy Committee, 1996 Farm Bill: A Price Response Experiment 2-4 (Feb. 2, 2000), *available at* <http://www.agpolicy.org/pubs/fbttest0200.PDF>. He attributed this problem to the fact that agricultural land remains in production, even when individual farmers go out of business, so the overall supply is not significantly affected. *Id.* at 1. Three years later he wrote that while the same amount of land remained in production after Canada reduced commodity supports by thirty-five percent, the mix of crops grown had changed significantly. RAY ET AL., *supra* note 15, at 40. The Canadian outcome is a goal of this Comment’s legislative recommendations.

⁶⁵ See *infra* subsection I.B.5 for a discussion of the retreat from reform in the 2002 and 2008 Farm Bills.

⁶⁶ See Olson, *supra* note 40, at 9 (explaining that an income support would calculate subsidization based on the size of a typical farm family).

⁶⁷ *Id.*

⁶⁸ See Reo M. Christenson, THE BRANNAN PLAN: FARM POLITICS AND POLICY 64-72 (1959) for a general discussion of Secretary of Agriculture Charles Brannan’s reform proposals. The Brannan Plan differed from the 1973 Act in that it sought to expand supports beyond the base commodities to include fruits and vegetables. See Olson, *supra* note 40, at 9 (discussing direct payments for fruits and vegetables included in the Brannan Plan). The programs imposed limits both on the maximum benefit amount and farm size in an effort to direct supports to small family farms.

⁶⁹ Pub. L. No. 93-86, 87 Stat. 221 (codified as amended in scattered sections of 7 U.S.C.).

⁷⁰ Parity prices are a measure of the purchasing power of commodity prices. Olson, *supra* note 40, at 1. Agricultural supports use an index of input costs and consumer prices to set target agricultural prices. Typically, a program will support prices between seventy and ninety-two percent of parity prices to ensure sufficient income to keep a family farm in business. See, e.g., HURT, *supra* note 23, at 108 (explaining that

Target prices were set at average prices over the previous ten years, and when the market price fell below the target price, farmers could receive the difference in a “deficiency payment.”⁷¹ While deficiency payments are no longer in use, target payments are used to calculate market loan rates and “countercycle” payments.⁷² Countercycle payments are made when market prices fall below target prices.⁷³ Market loans are nonrecourse loans⁷⁴ (the crop serves as collateral) to farmers who do not sell at lower prices during harvest time, but keep their crop off of the market until prices rise later in the season.⁷⁵

While these supports are styled as “income” supports, payments are still based on the amount of program crops that farmers produce. These supports artificially deflate prices because farmers can afford to accept prices below the cost of production since the farm programs pay them the difference.⁷⁶ This is a significant contributor to the explosion of cheap processed foods and meats, as confined animal feeding operations (CAFOs) can purchase feed grains for less than the cost of growing and harvesting them.⁷⁷ Thus, it is more expensive to raise animals fed on crops grown on the same farm than it is to raise cattle in a confined feedlot with purchased grain. This increases the

Secretary Brannan believed this method would encourage farmers to produce at a rate that would create ideal commodity prices).

⁷¹ See *id.* at 133 (explaining that after the initial year, target prices were based on the previous year’s target price and adjusted by production levels and an index of input costs). Deficiency payments were capped at the difference between the target price and the nonrecourse loan rate. *Id.* Olson notes that the target price is “referred to by some economists as a ‘what ought to be price.’” Olson, *supra* note 40, at 13.

⁷² See JOHNSON, *supra* note 54, at 11 (noting significant increases in countercycle and market loan supports from the 2002 to the 2008 Farm Bill).

⁷³ Countercycle payments are calculated by taking the product of the farm’s yield under the countercycle payment program, the payment rate, and eighty-five percent of the farm’s acreage used to grow base crops. FARM SERV. AGENCY, *supra* note 60, at 1.

⁷⁴ See *infra* subsection I.B.4 for a complete discussion of nonrecourse loans.

⁷⁵ UNITED STATES DEP’T OF AGRIC., MARKETING ASSISTANCE LOANS & LOAN DEFICIENCY PAYMENTS 1-2 (2008), available at www.usda.gov/documents/Marketing_Assistance_Loans_and_Loan_Deficiency_Payments.pdf. While a program with the name “deficiency payment” still exists, it is a fundamentally different program because it is not linked to target prices. *Id.* at 1. Current loan deficiency payments provide farmers with a payment to keep their crops off an overcrowded market, instead of using their crops as collateral in a market loan. *Id.*

⁷⁶ See RAY ET AL., *supra* note 15, at 10-11 (showing that corn prices are 23% lower than the cost of production and farm payments provide 24% of the farmer’s revenue, generating 1% net income on corn production).

⁷⁷ See RAPP, *supra* note 16, at 31 (“For both crop prices and farm income federal subsidies now play the dominant role in determining how much of certain commodities will be produced and what prices they will bring at market.”).

trend toward large industrial farms and away from diverse farms that raise both crops and animals.⁷⁸

Allowing prices to fall without income supports has consistently resulted in increased production in the short term as farmers scramble to make up the difference in revenues with greater volume.⁷⁹ One of the reasons that crop prices plummeted in the wake of the 1996 FAIR Act is that farmers had become significantly invested in monoculture⁸⁰ and could not easily respond to market conditions.⁸¹ For example, when the FAIR Act sought to decouple price supports from production, commodity prices dropped 15.5%, but production of the eight major crops only decreased by 3.7% over the same period.⁸² Lack of diversification has been identified as a major inhibitor to market response, because farms engaged in monoculture cannot respond to a change in price by changing the crops in production.⁸³ Thus, farmers have continually increased sunk costs in equipment in order to decrease per-unit costs, becoming more beholden to the same commodities with each capital investment. The ability of well-capitalized farms to reduce per unit costs is one of the reasons industrial agriculture has thrived in the past decade. The fall in price due to increased production does not impact the return because farm programs guarantee a minimum price.⁸⁴

⁷⁸ See RAY & SCHAFFER, *supra* note 28, at 3 (arguing that large farms generally benefit from policy decisions aimed to assist small farms).

⁷⁹ HURT, *supra* note 23, at 107.

⁸⁰ See POLLAN, *supra* note 18, at 38-40 (discussing the rise of monoculture and its impacts on food production and farming practices).

⁸¹ See RAY & SCHAFFER, *supra* note 28, at 2-4 (describing the economic policies and technological advances that lead to the concentration of agriculture in a small number of large farms specializing in a small number of crops); see also Mary Clare Ahearn et al., *How Do Decoupled Payments Affect Resource Allocations Within the Farm Sector?*, AMBER WAVES, Nov. 2004, at 8, 8 (explaining that government subsidies distort market responses because farmers do not exclusively consider input costs and market prices, but also factor government payments in their production decisions).

⁸² Ray, *supra* note 64, at 1-2.

⁸³ Cf. RAY & SCHAFFER, *supra* note 28, at 4 (explaining that industrial farms are highly invested in technology designed for one particular crop).

⁸⁴ See MACDONALD ET AL., *supra* note 38, at 2 (showing agricultural production shifting to larger farms).

2. Acreage Reduction

The purpose of acreage reduction is to reduce production by controlling a principal agricultural input: land.⁸⁵ The Agricultural Adjustment Act of 1933 sought to reduce the acreage in production through voluntary agreements with farmers⁸⁶ who received payments from the Department of Agriculture to reduce the acres on which they grew basic crops.⁸⁷ By 1937 it was clear that reducing acreage did not actually reduce the crop supply because farmers increased the productivity of the acres remaining in production.⁸⁸ While there ultimately may be some limit on how much corn a farmer can physically grow on a single acre of land, farm productivity has continued to increase, with the greatest production per acre in history in 2009.⁸⁹ Un-

⁸⁵ However, increasing other inputs nullifies these efforts. *See, e.g.*, WAYNE D. RASMUSSEN & GLADYS L. BAKER, *THE DEPARTMENT OF AGRICULTURE* 110 (1972) (“A price-support system relying on acreage limitation can be rendered ineffective by technological progress.”).

⁸⁶ The Supreme Court found the Agricultural Adjustment Act’s “coercive” control of production, which it considered a purely local concern, to be beyond the scope of congressional authority under the Commerce Clause. *United States v. Butler*, 297 U.S. 1, 63-64 (1936). In response, the 1936 Soil Conservation Act continued to limit acreage on which farmers planted base crops, but did so under the guise of environmental conservation. *See* Ch. 104, 49 Stat. 163 (1936) (codified as amended at 16 U.S.C. § 590) (paying farmers to plant in accordance with “soil conservation” goals, to fix nutrients to the soil, and to prevent erosion). While conservation has become an important component of agricultural policy, this Comment discusses these programs only as they relate to production controls and income supports.

⁸⁷ *See* WAYNE D. RASMUSSEN ET AL., *ECON. RESEARCH SERV., AGRIC. INFO. BULLETIN* No. 39, *A SHORT HISTORY OF AGRICULTURAL ADJUSTMENT, 1933-75*, at 2 (1976) (describing the programs implemented by the Agricultural Adjustment Act of 1933). In order to address emergency problems in commodity prices before the legislation took effect, the USDA contracted with farmers to plough under crops that had already been planted that season and to slaughter sows and cattle. *Id.* This famous event in agricultural history is often portrayed as a gruesome waste, but lost in this narrative is the detail that products including pork, butter, cheese, and flour were given to unemployed families struggling to feed themselves during the Great Depression. *Id.*

⁸⁸ *See id.* at 4 (explaining that the 1936 drought concealed the increase in productivity per acre); *see also* HIGHTOWER, *supra* note 55, at 1 (noting that agricultural productivity increased 330% from 1952 to 1972, compared to manufacturing productivity that increased 160% over the same period). The land retired in conservation or allotment programs is typically the least productive, resulting in more intense production on the most productive land. RASMUSSEN & BAKER, *supra* note 85, at 110. The only program to focus on actual production levels was the poundage quotas program implemented in 1965 for flue-cured tobacco. *Id.*

⁸⁹ In 2009, corn yield per acre hit an historic high: 165.2 bushels per acre, producing 13.2 billion bushels of corn. *See 2009 Crop Year Is One for the Record Books, USDA Reports*, USDA (Jan. 12, 2010), http://www.nass.usda.gov/Newsroom/2010/01_12_2010.asp. These gains in efficiencies resulted from the use of machinery, chemical

fortunately, the cost of the additional inputs required to realize such yields reduced farm income, even when agricultural prices were soaring in the 1970s.⁹⁰

3. Marketing Agreements, Processing Taxes, and Licensing Requirements

Marketing agreements, processing taxes, and licensing requirements focused on processors and handlers of agricultural commodities, such as grain elevators and CAFOs. Legislators targeted commodities requiring processing before human consumption in part because the production and distribution process allowed for easy monitoring and regulation.⁹¹ Marketing agreements went into effect once two-thirds of processors voted in a referendum to limit the total supply, and the government taxed any amount processed above the limit so heavily that it was essentially confiscated.⁹² However, these marketing agreements and processing taxes were eliminated after the 1933 Agricultural Adjustment Act was held unconstitutional. These agreements and taxes were a specific target of the Supreme Court's decision in *United States v. Butler*.⁹³ The Court held that Congress did not have the

fertilizers and pesticides, and genetically modified crops that can withstand cold and pests. *Id.*

⁹⁰ See HIGHTOWER, *supra* note 55, at 4 (explaining that the average debt of a family farmer increased 335% between 1952 and 1973). The 1970 Farm Bill altered the acreage reduction requirements for crops, including wheat, by replacing the per-crop acreage allotments with a percentage reduction in total cropland. Agricultural Act of 1970, Pub. L. No. 91-524, sec. 402, § 397(c)(b)(1), 84 Stat. 1358, 1362 (1970); see also RASMUSSEN & BAKER, *supra* note 85, at 111 (noting that the bill abolished marketing quotas for corn, wheat, and cotton). Although certain crops, such as rice, peanuts, sugar, and tobacco, were still subject to production quotas, the goal was to provide farmers with greater flexibility in choosing what to plant. *Id.* However, price supports were still calculated using the base crop—the number of acres the farmer planted of the commodity crop, multiplied by the farm's average productivity per acre. Olson, *supra* note 40, at 21. Thus, removing the allotment barrier to planting different crops did not affect production because the incentives had not changed. *Id.* at 22. Another striking example of this problem is the In-Kind program, which paid farmers to not plant 50% to 100% of their crops. 7 C.F.R. §§ 770.1–770.6 (1984). The program cut corn production in half and removed more cropland from use than Western Europe planted in 1983. Olson, *supra* note 40, at 16. However, this reduction of supply did not help the farm depression. In 1985 a record number of farmers filed for bankruptcy, sixty-eight agricultural banks failed, and many equipment and chemical suppliers went out of business. *Id.*

⁹¹ HURT, *supra* note 23, at 69.

⁹² Olson, *supra* note 40, at 6.

⁹³ The Court reasoned, "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it

authority to impose these taxes under the power to tax and spend because they were not imposed to generate revenue but were used to control supply, which was an exclusively local prerogative.⁹⁴ While *Wickard v. Filburn* later held that Congress did have authority to regulate wheat production, the Court established this authority under the Commerce Clause,⁹⁵ and the taxation method of regulating production was not resumed in later years.⁹⁶

4. Nonrecourse Loans

Nonrecourse loans are a cornerstone of modern price supports. This program creates a price floor by guaranteeing farmers a minimum price for certain commodity crops.⁹⁷ The Secretary of Agriculture sets loan rates—essentially a target price—for each commodity.⁹⁸ When market prices fall below the loan rates, farmers can take out a loan from the government for the value of the crop instead of selling the crop on the market.⁹⁹ The crop serves as collateral for the loan, and the government has a right to the crops if the farmer fails to repay the loan.¹⁰⁰ Farmers hold the loan for up to nine months, keeping their crops off an overcrowded market until sufficient demand returns

may not indirectly accomplish those ends by taxing and spending to purchase compliance.” 297 U.S. 1, 74 (1936).

⁹⁴ The Court explained, “Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government.” *Id.* at 69 (quoting *Linder v. United States*, 268 U.S. 5, 17 (1925)).

⁹⁵ 317 U.S. 111, 128 (1942).

⁹⁶ The Soil Conservation Act of 1936 and subsequent farm bills focused on acreage reduction and price supports rather than processing fees and production limitations to control supply. See *infra* Section III.C for a discussion of the possibility of resuming processing taxes under the Taxing and Spending or Commerce Clause authority.

⁹⁷ Initially, loans supported the prices of corn, cotton, rice, wheat and tobacco. RASMUSSEN ET AL., *supra* note 87, at 6. The 2008 Farm Bill provided price supports to twenty different crops, including soybeans, oilseeds, additional feed grains, wool, dry peas, lentils, and the newest crop large chickpeas. Food, Conservation, and Energy Act of 2008 § 1001(4), 7 U.S.C. § 8702(4) (Supp. III 2010).

⁹⁸ RASMUSSEN ET AL., *supra* note 87, at 6.

⁹⁹ Olson, *supra* note 40, at 6-7.

¹⁰⁰ Originally, the federal government stored the collateral crops for only nine months. RAPP, *supra* note 16, at 35. If a farmer failed to repay the loan, the government retained the commodity as part of the “Ever-Normal Granary” program. RASMUSSEN ET AL., *supra* note 87, at 6. Through this program the federal government maintained surplus crops that could be sold to normalize supply when scarcity drove up food prices. Ruth R. Harkin & Thomas R. Harkin, “Roosevelt to Reagan” *Commodity Programs and the Agriculture and Food Act of 1981*, 31 DRAKE L. REV. 499, 501 (1982). However, the program was extremely costly—the government paid over one million dollars per day just to store the crops. HURT, *supra* note 23, at 123.

to drive up prices and warrant the release of more supply.¹⁰¹ Loans are typically repaid upon sale at a higher market price.¹⁰² This cycle creates a price floor by encouraging farmers to store excess supplies when prices fall below a certain level.¹⁰³

The program sought to control prices by both reducing the incentive to sell at plummeting prices and keeping surplus crops off the market. The modern program includes market loans and loan deficiency payments that permit farmers to repay loans at market prices if prices are below the loan rate at the time the loan comes due rather than forfeit the commodity.¹⁰⁴ These programs were continued through the 1996 FAIR Act, which sought to transition farmers to the free market, but continued the same production incentives by maintaining loan rates at eighty-five percent parity prices.¹⁰⁵

When the Secretary of Agriculture sets a loan rate that exceeds the market price a farmer could get for her crops, the only sensible choice is to take out a loan. There is no penalty for defaulting on these loans—no negative impact on the farmer's credit rating or additional fees imposed—so the loans function essentially as a sale of the grain to the United States government at above-market prices.¹⁰⁶ Indeed, banks typically require farmers to participate in the farm program to qualify for loans to purchase land or equipment because the program guarantees a minimum rate of return even if crop prices plummet.¹⁰⁷

While nonrecourse loans are referred to as a type of income support, the purpose of these loans is to control prices by limiting the supply on the market. These loans do not effectively limit supply, because they create a price floor, encouraging farmers to produce more commodity crops because they are guaranteed a minimum price.¹⁰⁸ Farmers are paid by the bushel, so these programs create incentives to produce as many bushels per acre as possible regardless of market conditions. This practice ultimately drives down prices.¹⁰⁹ Further, sup-

¹⁰¹ RAPP, *supra* note 16, at 35.

¹⁰² *Id.*

¹⁰³ Olson, *supra* note 40, at 6-7.

¹⁰⁴ *See supra* subsection I.B.1.

¹⁰⁵ Olson, *supra* note 40, at 21.

¹⁰⁶ RAPP, *supra* note 16, at 35.

¹⁰⁷ *Id.* at 32.

¹⁰⁸ *See* Olson, *supra* note 40, at 22 (arguing that price supports create surpluses).

¹⁰⁹ Prices have increased significantly only as a result of global food disasters, such as the OPEC embargo combined with famine and drought in the 1970s. *See id.* at 13 (describing the effects of famines in Africa and Asia, a grain deal with the Soviet Union, and the Arab oil embargo on U.S. food prices). Commodity

porting only base crops promotes excessive production of those commodities at the expense of nonsubsidized crops, like fruits and vegetables.¹¹⁰ As a result, reform advocates have urged Congress to adopt income support programs that are “decoupled” from production.¹¹¹

5. Production Flexibility Contracts and Direct Payments

The 1996 FAIR Act attempted to end agricultural production payments.¹¹² Also known as the Freedom to Farm Act, the statute ended deficiency payments and all supply-management programs such as the acreage reduction program and the 50-92 program.¹¹³ To implement these drastic decreases in farm payments, the statute offered a Production Flexibility Contract, a one-time annual payment designed to transition farmers to the free market over the course of seven years.¹¹⁴ Ninety-nine percent of eligible farms enrolled, but only participants in corn, wheat, cotton, or rice programs in the previous five years were eligible.¹¹⁵

The Act based payments on past production with the idea that farmers would plant more nonprogram crops like fruits and vegetables when they transitioned to a free market system.¹¹⁶ Importantly,

prices are again rising today due to drought in Russia, floods in Australia, and political unrest in the Middle East. See, e.g., Elizabeth Campbell, *Record Beef Price Gains as Corn Cost Slows Feedlot Cattle Buying*, BLOOMBERG (Mar. 17, 2011, 9:00 PM), <http://www.bloomberg.com/news/2011-03-18/record-beef-price-gains-as-corn-cost-slows-feedlot-cattle-buying.html> (reporting that grain prices increased by seventy-three percent over the last year and corn futures had the biggest gain in five months).

¹¹⁰ See Olson, *supra* note 40, at 22-23 (explaining why farmers have little incentive to grow crops that do not have price supports).

¹¹¹ See, e.g., Mary E. Burfisher & Jeffrey Hopkins, *Farm Payments: Decoupled Payments Increase Households' Well-Being, Not Production*, AMBER WAVES, Feb. 2003, at 39, 41 (showing that farm families who received decoupled payments during the 1996 FAIR Act had greater disposable income); Olson, *supra* note 40, at 28 (arguing that farmers should not receive payments based on the volume they produced, but should be provided with the “amount necessary to guarantee a farm family a basic minimum income in times of low crop or low livestock prices”).

¹¹² See HURT, *supra* note 23, at 152 (contending that policymakers believed price supports and acreage reduction programs were the cause of surplus production, vertical integration, and rural poverty).

¹¹³ See Olson, *supra* note 40, at 20-21 (describing the abolishment of various payment structures under the FAIR Act).

¹¹⁴ 7 U.S.C. § 7211 (2006); see also HURT, *supra* note 23, at 152 (explaining how the FAIR Act provided for a systematic reduction in payments to farmers over seven years).

¹¹⁵ Olson, *supra* note 40, at 20-21.

¹¹⁶ See Edwin Young & Dennis A. Shields, *1996 FAIR Act Frames Farm Policy for 7 Years*, AGRIC. OUTLOOK, Apr. 1996, at 1, 1 (“Farmers will have much greater flexibility

eligibility was based on historic participation in farm programs, and was not dependent on future planting choices.¹¹⁷ Since payments did not depend on the amount produced, these were called “decoupled” payments. Similarly, direct payments, which continue today, were designed to encourage farmers to respond to market conditions rather than support programs, but eligibility for such payments is still dependent on base-crop acreage.¹¹⁸

Decoupling payments from production levels was not successful in the 1996 FAIR Act, because the reduction in deficiency payments was made up in market loan and nonrecourse loan payments, which were dependent on production levels.¹¹⁹ Indeed, from 1996 to 2002, when income supports comprised two-thirds of farm payments maintaining the same production incentives, the contract payments constituted a small portion of overall farm payments.¹²⁰ Further, conservation measures continued acreage-reduction payments, which were contingent on base-crop acreage, so the incentives to overproduce the eight major commodities did not change.¹²¹ The 1996 Act was further undermined by emergency payments to compensate for natural disasters and price collapses.¹²² Contract payments were scheduled to end in

to make planting decisions . . .”). However, the FAIR Act did in fact impose planting restrictions on fruits and vegetables. *Id.*

¹¹⁷ *Id.* at 1-2.

¹¹⁸ FARM SERV. AGENCY, *supra* note 60, at 1.

¹¹⁹ In 1999 the government spent \$5 billion on nonrecourse loans. HURT, *supra* note 23, at 167. Essentially, market loans replaced the portion of farm income deficiency payments that the government provided before 1996. See Ahearn et al., *supra* note 81, at 9 (graphing the proportion of farm payments from 1991 through 2001 to show the decrease in deficiency and diversion payments in favor of increasing market loan benefits); see also Olson, *supra* note 40, at 21 (arguing that the failure to decouple these other income supports negated the impact of eliminating price supports).

¹²⁰ Burfisher & Hopkins, *supra* note 111, at 40.

¹²¹ As Allen Olson explains,

By providing larger income subsidies for program crops than for other crops or livestock, the 1996 farm bill encouraged farmers to keep growing the same crops they had been growing for years. By 2000, surpluses were again a major problem. Like other farm bills, the 1996 legislation interfered with the operation of a free market.

Olson, *supra* note 40, at 24.

To be eligible for the Conservation Reserve Program, a farmer must have planted base crops in at least four out of the six years between 1996 and 2001. TADLOCK COWAN, CONG. RESEARCH SERV., RS 21613, CONSERVATION RESERVE PROGRAM: STATUS AND CURRENT ISSUES 1 (2010).

¹²² However, only ten percent of farms received emergency payments, including farms owned by Ted Turner, Rockefeller heirs, and wealthy members of Congress who passed the bill. HURT, *supra* note 23, at 166-167.

2002, but the farm bill passed in that year reinstated price supports and subsidy payments.¹²³

C. *Current Status of Agricultural Production Legislation*

The Food, Conservation, and Energy Act of 2008 and the 2002 Farm Bill,¹²⁴ both of which perpetuated the same mechanisms of price control through target prices, countercycle payments, and nonrecourse loans, replaced the FAIR ACT. The scope of these price supports has not extended beyond the core group of base crops, although some legumes and chickpeas are now supported.¹²⁵ No direct aid is provided to producers of fruits and vegetables.¹²⁶ In fact, farmers lose eligibility for nonrecourse loans and conservation programs if they plant fruits and vegetables instead of program crops, because only program crops count in the base-acreage calculation used for these benefits.¹²⁷ Most importantly, income supports primarily appear in the form of nonrecourse loans, which encourage increasing commodity production and discourage product diversification.¹²⁸ Thus, the largest farms are increasingly the largest beneficiaries of farm programs because the Farm Bill bases payments on the number of productive acres and historic yields.¹²⁹ Current agricultural legislation encourages farmers to plant as many acres of commodity crops as possible, regardless of the market price, because the government will make up the difference. This incentive has driven commodity prices

¹²³ This support continued through the 2008 Farm Bill, which defines “base acres” as “the number of acres established under section 7911 of this title as in effect on September 30, 2007, subject to any adjustment under section 8711 of this title.” 7 U.S.C. § 8702(2)(A) (Supp. III 2010). However, decoupled income supports have been continued in the form of “direct payments.” *Id.* § 8702(5).

¹²⁴ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered sections of 7, 16, and 21 U.S.C.).

¹²⁵ See JOHNSON, *supra* note 54, at 11 (noting that in 2009 dry peas, lentils, and large and small chickpeas were to become eligible for countercycle payments).

¹²⁶ In fact, fruit and vegetable producers are not eligible for the same disaster relief as farmers who grow commodity crops. ROBERT WOOD JOHNSON FOUND., THE 2012 FARM BILL: AN OPPORTUNITY TO SUPPORT FARMERS AND PROMOTE PUBLIC HEALTH 1 (2010), available at <http://www.rwjf.org/files/research/20100803flag.pdf>.

¹²⁷ See JOHNSON ET AL., *supra* note 34, at 4 (explaining that farms that planted fruits and vegetables on base acres from 1991 to 2001, excluding 1996 and 1997, may plant nonprogram crops, but that a farm without a history of planting program crops violated its contract for direct and countercycle payments and would be penalized for each acre on which it grew fruits and vegetables).

¹²⁸ *Id.* at 10.

¹²⁹ See MACDONALD ET AL., *supra* note 38, at 1 (“Commodity program payments shifted sharply to higher income households between 1989 and 2003.”).

down, resulting in artificially inexpensive processed foods, while the cost of produce has increased forty percent over the same period.¹³⁰ Federal farm programs make it more expensive for consumers to purchase and consume healthy food.

II. RECOMMENDATIONS FOR A TWENTY-FIRST CENTURY FARM BILL

Agricultural policy is a story of incentives for both producers and consumers. Most agricultural legislation has focused on influencing producers, although the successful discouragement of tobacco use is a striking example of legislation impacting consumer behavior. To address the obesity epidemic, agricultural legislation must do both.

In order to enable consumers to afford healthier foods while maintaining a strong domestic agricultural system, the 2012 Farm Bill must consider the actual incentives it creates and use those incentives to support producers and consumers who are both suffering under the current system. Since price supports and acreage allotments have resulted in increased surpluses and decreased prices, these legislative measures should not be perpetuated. Further, income supports that are tied to levels of production have the same effects as price supports. Income supports should be decoupled from production. Promoting diversification of agricultural production will stabilize farm income without additional government spending. Finally, the new bill should encourage processors to consider the health impact of their products by imposing a graded tax, modeled after the tobacco tax system.

A. End Price Supports

Acreage reduction, nonrecourse loans, and deficiency payments have not met their aim of increasing long-term crop prices.¹³¹ Economists have demonstrated that commodity subsidies, instead of bolstering prices to support domestic agriculture, actually depress farm prices by at least twenty percent.¹³² Further, price supports create a perverse incentive to invest exclusively in program crops because they

¹³⁰ The real cost of fruits and vegetables has risen forty percent since 1985, while soda, fats, and oils have decreased in price. SCHOONOVER & MULLER, *supra* note 3, at 6-7. The decreasing cost of commodities like corn and soybeans has made "sugars and fats some of the cheapest food substances to produce." *Id.*

¹³¹ See RAY ET AL., *supra* note 15, at 8 fig.2 (showing that crop prices have on average declined about forty percent).

¹³² See *id.* at 10 (demonstrating that market prices for corn, soybeans, cotton, and rice were between twenty-three and fifty-two percent below cost of production in 2001).

guarantee a minimum return when prices collapse.¹³³ A better way to protect farm income against market fluctuations is through decoupled income supports and encouragement of diversification of agricultural products.

Ending price supports is the simplest legal measure,¹³⁴ but this approach was unsuccessful in the 1996 FAIR Act. The 1996 Act attempted to transition farmers to the free market through an annual income support payment, but the legislation maintained other forms of support tied to production.¹³⁵ In order to effectively end price supports, all farm payments must be decoupled from production.

Decoupled income supports can provide the appropriate safety net for farmers in difficult times without significantly influencing farmers' crop-selection decisions.¹³⁶ Income supports can thus avert the short-term consequence of eliminating price supports, because farmers do not have to outproduce one another for marginal returns, and can instead focus on crops that have higher market prices. This in turn bolsters market prices for commodity crops by reducing the supply.

Other nations have successfully supported robust agricultural production after eliminating price supports. In 1995, Canada eliminated thirty-five percent of all commodity supports, which resulted in a significant change in the mix of crops planted, including a twenty-three percent decline in wheat, Canada's principal crop.¹³⁷ While the total land in production did not change significantly, the prices and quantity of individual crops did change.¹³⁸ Similarly, Australia was no longer able to support its primary agricultural product, wool, in

¹³³ See RAPP, *supra* note 16, at 35 (describing how nonrecourse loans effectively set a price floor on commodities).

¹³⁴ The political challenges of ending price supports present a more difficult question beyond the scope of this Comment. Recently, significant support for farm programs has come from urban representatives whose constituents receive nutrition program benefits. Olson, *supra* note 40, at 12. Olson suggested that the Food Stamp Act's incorporation in the 1962 Farm Bill brought urban support for agricultural benefits. *Id.* Since obesity disproportionately impacts low-income urban residents, there may be room for political consensus on reform, particularly in a time of sharp budget cuts when other entitlement programs may be reduced. See, e.g., Joe Davidson, *Making Smart Budget Cuts*, WASH. POST, Sept. 27, 2011, at B4 (reporting on recommendations to more effectively cut budgets of federal agencies).

¹³⁵ 7 U.S.C. §§ 7211, 7231 (2006).

¹³⁶ See FARM SERV. AGENCY, *supra* note 60, at 1 ("Because direct payments provide no incentive to increase production of any particular crop, the payments support farm income without distorting producers' current production decisions.").

¹³⁷ RAY ET AL., *supra* note 15, at 40.

¹³⁸ *Id.*

1991.¹³⁹ The number of sheep declined by thirty-one percent, but rather than go out of business, farmers began to plant crops to maintain income.¹⁴⁰ These experiences indicate that farmers are capable of adjusting to market conditions, but they cannot do so when other components of farm programs require continued production of base crops to receive benefits.

B. *Decouple Income Supports from Production Capacity*

Currently, the highest-grossing farms are the greatest beneficiaries of farm payments.¹⁴¹ Deficiency payments are intended to serve as income supports but in fact work on a base-acreage system, meaning that larger farms benefit more, and farmers who use base acres to plant nonprogram crops are penalized.¹⁴² This creates a strong incentive to plant the same crops and to accept marginal returns because government programs guarantee a return when the increase in input costs outpaces commodity prices. Further, countercycle payments are based on average per-acre yields.¹⁴³ The USDA calculates countercycle payments based on the number of acres per farm and the expected average yield per acre.¹⁴⁴ Thus, the farmer who can increase yield per acre above that average will receive both the value that the government estimates the crop should be sold at and the market value of the crop that is actually produced.

To maintain a robust national agricultural system, Allen Olson has suggested providing a minimum guaranteed income to family farms, regardless of the quantity of program crops produced.¹⁴⁵ Under Olson's scheme, farm payments would supplement the difference between the family's income and a \$50,000 to \$75,000 target income for families actively engaged in farming. This plan is limited to established farms and excludes hobby farmers, absentee owners, landlords,

¹³⁹ *Id.* at 41.

¹⁴⁰ *Id.* While Professor Ray describes this incident as a failure of eliminating price supports, such a diversification of agriculture is precisely what this Comment advocates. Indeed, this example shows that farmers can transition to different modes of production when faced with falling income.

¹⁴¹ See MACDONALD ET AL., *supra* note 38, at 3 (showing that farms with sales over half a million dollars were the largest recipient of commodity payments in 2003).

¹⁴² See 7 U.S.C. § 8702 (Supp. III 2010) (defining base acres as acres where program crops were grown in previous years).

¹⁴³ Olson, *supra* note 40, at 21.

¹⁴⁴ FARM SERV. AGENCY, *supra* note 60, at 1.

¹⁴⁵ Olson, *supra* note 40, at 28.

and speculators.¹⁴⁶ Eliminating incentives to produce program crops, would give farmers greater liberty to diversify production, particularly if polyculture were independently encouraged. Further, structuring income supports around minimum household needs benefits small family farms at the expense of high-grossing industrial farmers.¹⁴⁷ When farm income is no longer tied to producing program crops, farmers can focus on higher-value crops, such as fruits and vegetables. The increased production of fruits and vegetables will in turn make produce more affordable for consumers.

C. Promote Polyculture

Distributing risk among a variety of crops reduces the overall impact of a price decline in any single product.¹⁴⁸ Diversification reduces reliance on commodity crops and, in turn, reduces the need for income supports when prices for those crops collapse.¹⁴⁹ In fact, price supports are linked to the rise of monoculture when farmers shifted from rotating fields through a five-year period to cycling between just corn and soybeans.¹⁵⁰ This exclusive production of program crops exacerbated

¹⁴⁶ *Id.*

¹⁴⁷ Being well capitalized, large industrial farms are more wedded to monoculture and focus on increasing production per acre to increase returns. RAY & SCHAFFER, *supra* note 28, at 4. These efficiencies of industrial agriculture can only be realized in a monoculture operation, because reducing per unit cost is dependent on producing more units of the same crop. *See id.* at 3-4 (explaining that significant capital expenditures in inputs encourage expanding production and acreage because these fixed costs reduce operating expenditures, pushing down the per-unit cost of production while also driving down price at a rate that often outpaces reductions in production costs).

¹⁴⁸ *See, e.g.,* Shiva S. Makki et al., *Decoupled Payments and Farmers' Production Decisions Under Risk*, in AGRIC. ECON. REP. NO. 838, DECOUPLED PAYMENTS IN A CHANGING POLICY SETTING 33, 34 (Mary E. Burfisher & Jeffrey Hopkins eds., 2004) (discussing how farmers use diversification as a risk-management tool).

¹⁴⁹ Not every region is capable of supporting diverse crops, however. For example, many wheat farmers do not have the option of switching to soy or corn because the high plains region will not support those plants. RAPP, *supra* note 16, at 32-33. However, farmers in those regions could at a minimum pasture goats or raise chickens to decrease dependence on commodity crops. Ending price supports that enable feedlots to purchase grain below the cost of production would promote an economically feasible agricultural model. Diversifying agricultural production with animal husbandry would also challenge the dominance of the confined animal feedlot system, which has been highly criticized for environmental degradation, animal abuse, and an unbalanced diet focusing excessively on meat products. *See, e.g.,* Bittman, *supra* note 18 ("It would be hard to devise a more wasteful, damaging, unsustainable system.")

¹⁵⁰ RAY & SCHAFFER, *supra* note 28, at 1.

the surplus problem once the export boom of the 1970s subsided.¹⁵¹ Further, input costs have exceeded prices, reducing farm income.¹⁵² Polyculture reduces the need for inputs such as chemical fertilizers, pesticides, and patented genetically modified seeds because cycling soil through different uses replenishes nutrients, inhibits annual pests, and improves plant health.¹⁵³ Thus, polyculture reduces dependence on a single volatile crop market, and increases a farmer's net income by reducing input costs. Moreover, diversifying agricultural production may increase the supply of fruits and vegetables while decreasing the supply of commodity crops, adjusting their prices accordingly.

Congress can encourage polyculture by eliminating acreage limits on nonprogram crops, such as fruits and vegetables,¹⁵⁴ and providing incentives similar to those used in conservation measures.¹⁵⁵ Just as farmers are paid "rents" to retire crop acres to conservation uses, farmers could be paid for the percentage of acreage that is dedicated to more than two different agricultural uses (such as grain crops and livestock). Second, the concept of "base crops" should be eliminated. One of the most significant impediments to diversification is the Farm Bill's exclusive focus on commodity crops. Everything from conservation program eligibility to income supports are calculated based on acreage dedicated to growing commodity crops.¹⁵⁶ All acreage used for agricultural production should be counted for farm program benefits. To avoid overinclusion, programs may limit benefits to households whose primary income is derived from farming.¹⁵⁷ These re-

¹⁵¹ See, e.g., RAPP, *supra* note 16, at 14 (noting that since the 1980s, farm programs have been the third largest domestic spending item). From the origination of the program through 1960, government payments never exceeded ten percent of farm income. *Id.* at 15.

¹⁵² RAY ET AL., *supra* note 15, at 9.

¹⁵³ This is not to suggest that polyculture and organic farming are synonymous. Rather, most organic farms are polycultured because it enables them to farm effectively without chemicals. See POLLAN, *supra* note 18, at 196-97 (explaining how biodiversity reduces the need for farm inputs, and even labor, by maximizing automated processes of nature, such as photosynthesis).

¹⁵⁴ JOHNSON ET AL., *supra* note 34, at 23.

¹⁵⁵ See SCHOONOVER & MULLER, *supra* note 3, at 4 (recommending policies that reward production of organic products, and promote perennial agriculture).

¹⁵⁶ JOHNSON ET AL., *supra* note 34, at 4.

¹⁵⁷ Legislatures face challenges in crafting provisions to limit benefits to farming families because self-employed farmers increasingly supplement household income with nonfarm work. See RAY & SCHAFFER, *supra* note 28, at 3 (estimating that farmers spend up to forty hours working off the farm on nights and weekends to increase household income). Some farming families may be excluded if benefits are underinclusive.

forms would enable farmers to diversify production without losing the safety net of federal income supports in lean years.

D. *Amend Conservation Program Benefit Calculations*

Conservation programs should credit all acreage used in production, including land that farmers rotate out of production. This proposal would address the conservation programs that attempt to impact supply but often result in encouraging more intensive use of the same acreage.¹⁵⁸ Indeed, some conservation programs may ultimately harm the environment because farmers increase inputs such as chemical fertilizers and pesticides to generate the same yield from fewer acres.¹⁵⁹ As American farmers came to understand during the Dust Bowl, conservation measures are essential to preserving agriculture, as well as to protecting humans and wildlife who suffer from pollution and environmental degradation.¹⁶⁰ However, the way that program benefits are currently calculated inhibits diversification of agricultural operations.¹⁶¹ The 1996 FAIR Act demonstrated this problem when Congress's goal to increase market response was thwarted by conservation benefits and income support programs that retained dependence on program crops.¹⁶² Thus, it is essential to revise conservation program benefits calculations so that commodities reforms may be effective.

E. *Influence Consumer Choice*

Congress should impose a graded excise tax on the least healthy products, such as those that contain trans fats, hydrogenated oils, ingredients produced in a laboratory rather than on a farm, and products that have insufficient nutrients relative to the amount of calories for a balanced diet.¹⁶³ The goal of this tax would be to increase the relative expense of these products to enable consumers to make food choices that are more beneficial to their health while remaining with-

¹⁵⁸ See Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 661 (1994) (explaining that conservationists are concerned with federal programs that result in greater use of environmentally degrading chemicals).

¹⁵⁹ See POLLAN, *supra* note 18, at 42 ("Before synthetic fertilizers the amount of nitrogen in the soil strictly limited the amount of corn an acre of land could support.").

¹⁶⁰ Cf. HURT, *supra* note 23, at 84-85 (noting that the first conservation programs were initiated to protect farms rather than ecology).

¹⁶¹ See RAPP, *supra* note 16, at 85-86 (explaining that conservation programs illustrate the federal government's assumption of a significant regulatory role).

¹⁶² Olson, *supra* note 40, at 21.

¹⁶³ See MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 64 (2008).

in their budget. Clinical studies show that altering the price of foods significantly impacts consumer food choices.¹⁶⁴ In addition, processors would be encouraged to reconsider the nutritional value of the food they create. This concept is similar to the taxation of tobacco products that has been very successful in reducing smoking in the United States.¹⁶⁵ Processors would also be encouraged to reconsider the nutritional value of the food they create and to find innovative new ways to make whole foods less expensive and more convenient.¹⁶⁶ Merely adding vitamins and minerals to processed foods, such as calcium-enriched cereal, does not achieve this goal.¹⁶⁷

Similar to tobacco use, highly processed foods impose functional negative externalities on all Americans.¹⁶⁸ The additional health care costs due to the excessive consumption of these foods is paid for through public benefits programs like Medicare and Medicaid,

¹⁶⁴ See SCHOONOVER & MULLER, *supra* note 3, at 8 (commenting on studies that found reducing food prices by a small amount significantly impacted consumer choice); Drewnowski & Specter, *supra* note 2, at 14 (pointing to studies where researchers observed changes in food choice based on changing prices in a vending machine). Nutritional science is still developing, and the definition of “healthy food” is still evolving; however, unprocessed foods are healthier than processed foods, even when those processed foods have vitamins and minerals added to the final product. See, e.g., POLLAN, *supra* note 163, at 76 (“The uncomfortable fact is that the entire field of nutritional science rests on a foundation of ignorance and lies about the most basic question of nutrition: What are people eating?”).

¹⁶⁵ See Gary S. Backer et al., *An Empirical Analysis of Cigarette Addiction*, 84 AM. ECON. REV. 396, 396 (1994) (concluding that a 10% permanent increase in cigarette prices reduces consumption by 4% in the short run and 7.5% in the long run).

¹⁶⁶ This is a current trend in some large companies, such as McDonald’s, which is now offering an oatmeal product, and Wal-Mart, which pledged to reduce sugar, saturated fats, and sodium in its processed foods. See, e.g., Sheryl Gay Stolberg, *Wal-Mart Takes a Healthy Turn*, N.Y. TIMES, Jan. 20, 2011, at B1 (describing Wal-Mart’s five-year plan to reduce the amount of sodium, sugar, and hydrogenated oils in its processed foods—mirroring a pledge by ConAgra to reduce these unhealthy components in its processed foods). However, many of these attempts are rooted in marketing goals, rather than nutritional science. For example, McDonald’s oatmeal product “contains more sugar than a Snickers bar and only 10 fewer calories than a McDonald’s cheeseburger or Egg McMuffin.” Mark Bittman, *How to Make Oatmeal . . . Wrong*, N.Y. TIMES OPINIONATOR (Feb. 22, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/02/22/how-to-make-oatmeal-wrong>.

¹⁶⁷ For example, Michael Pollan has written on studies showing that beta-carotene supplements do not have the same health benefits as carrots. See POLLAN, *supra* note 163, at 64.

¹⁶⁸ That is not to suggest that McDonald’s should be prohibited from selling junk food. This Comment merely asserts that the federal government should not directly subsidize the principal inputs of unhealthy foods and suggests taxing these foods to reflect their true cost.

through higher health insurance premiums, and through higher fees charged by hospitals to cover emergency treatment of the uninsured.¹⁶⁹

Processors such as McDonald's, ConAgra, and Kraft Foods do not bear the health costs of their products. Instead these health costs are paid for by consumers, taxpayers, and the insured.¹⁷⁰ While federal courts consistently dismiss claims against McDonald's for imposing health costs on consumers, these opinions are principally based on the contention that consumers know, or should know, that fast food has health risks, so the consumers assumed these risks when choosing to eat at McDonald's.¹⁷¹ The problem is that even for an informed consumer the choice is skewed because the food is artificially inexpensive. If consumers were presented with the actual cost of the food at the time of purchase, it would be much easier to make informed eating decisions.¹⁷² In the long run, an 800-calorie candy bar costs much more than the \$1 sticker price.¹⁷³

Two concerns arise when proposing measures to selectively increase food prices. First, increasing food prices could hurt low-income families who are already food insecure.¹⁷⁴ For example, advo-

¹⁶⁹ See Finkelstein et al., *supra* note 4, at w828 (describing how health care costs are spread across the population). Absent insurance and public benefits individual consumers could be expected to bear the entire cost of their food choices. However, indirect costs due to reduced productivity, increased disability, and the use of limited health care services to treat obesity, heart disease, and diabetes would still impact all Americans.

¹⁷⁰ The direct health care costs of obesity are estimated at \$147 billion per year, which are paid by consumers who need the medical treatment, taxpayers who fund Medicaid and Medicare, and those with health insurance who pay higher insurance premiums in order to cover medical costs of those who develop obesity-related conditions. *Id.* Beyond these direct costs, there are also indirect costs due to lost productivity and the decline in the quality of life of those impacted by the abundance of artificially inexpensive junk food. See *id.* at w831 (asserting that reforms to address these indirect costs "will require policy and environmental changes that extend far beyond what can be achieved through changes in health care financing and delivery").

¹⁷¹ See, e.g., *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 541-42 (S.D.N.Y. 2003) (finding that because the dangers of McDonald's food are "open and obvious," McDonald's could not be liable for failure to warn). *But cf. Reyes v. McDonald's Corp.*, Nos. 06-1604, 06-2813, 2006 WL 3253579, at *2 (N.D. Ill. Nov. 8, 2006) (denying a motion to dismiss Reyes' claim that McDonald's fraudulently advertised false caloric and fat content information for its french fries, inducing Reyes to consume french fries more frequently than she would have with the correct information).

¹⁷² See Drewnowski & Specter, *supra* note 2, at 14 (explaining that price can have a significant impact on consumer choice).

¹⁷³ Cf. K.M. Venkat Narayan et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 JAMA 1884, 1887-88 (2003) (estimating that the lifetime risk of diagnosed diabetes in the United States is about one in three for men and two in five for women).

¹⁷⁴ USDA data shows that low-income households spend nearly forty percent of their income on food, while high-income households spend only nine percent of their

cates for the poor were highly critical of New York Mayor Michael Bloomberg's proposed pilot program prohibiting the purchase of soda with food stamps.¹⁷⁵ Increasing food prices is a serious problem for low-income families and the goal of these legislative recommendations is to make healthy food choices more affordable.¹⁷⁶ An increase in the production of fruits, vegetables, and whole grains will reduce their cost just as excessive production of commodity crops has reduced the cost of those food products. Moreover, additional food stamp benefits could be provided with funds not spent on crop subsidies or with revenues from taxing highly processed foods.¹⁷⁷

It is true that soda and potato chips will become more expensive: that is the goal. Soda and fried foods are luxury items to be enjoyed infrequently but have become integrated into the basic American diet.¹⁷⁸ The long-term objective is to use pricing to reflect the fact that soda and french fries are luxury foods, not staples of a daily diet.¹⁷⁹ Thus, individuals who choose to continue to consume principally these foods will face higher food prices, just as those who continue to smoke cigarettes face higher tobacco prices. The purpose of this rec-

income on food. Elizabeth Frazão et al., *Converging Patterns in Global Food Consumption and Food Delivery Systems*, AMBER WAVES, Feb. 2008, at 22, 24.

¹⁷⁵ See Anemona Hartocollis, *Food Stamps as New Front in Soda Wars*, N.Y. TIMES, Oct. 7, 2010, at A1 (reporting that advocates were concerned food stamp beneficiaries were being singled out in a stigmatizing fashion and suggesting an educational program to reduce soda consumption). The proposed legislation seeks to avoid that pitfall. However, low-income people will face more food choice constraints as highly processed food becomes more expensive.

¹⁷⁶ If this goal is realized, then low-income families will spend less money on health care, ideally saving money in the long-run. See Sherry et al., *supra* note 4, at 952 (noting that obese adults are "at increased risk for many serious health conditions," which will result in an estimated cost of billions of dollars).

¹⁷⁷ Researchers have found that simply increasing food stamp benefits does not increase fruit and vegetable consumption and have suggested supplemental vouchers or coupons that can only be spent on fruits and vegetables. JOANNE F. GUTHRIE ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 29-1, CAN FOOD STAMPS DO MORE TO IMPROVE FOOD CHOICES? 3 (2007).

¹⁷⁸ In food surveys Americans report spending most of their money on items the USDA labels "other foods," including, processed foods, condiments, desserts, nonalcoholic beverages, and snacks. ELIZABETH FRAZAO ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 29-4, FOOD SPENDING PATTERNS OF LOW-INCOME HOUSEHOLDS: WILL INCREASING PURCHASING POWER RESULT IN HEALTHIER FOOD CHOICES? 2 fig.1 (2007).

¹⁷⁹ This Comment does not propose regulating the sale of processed foods, but rather questions the wisdom of spending billions of dollars directly subsidizing its cost.

ommendation is to make whole foods less expensive and more affordable for all families.¹⁸⁰

The second objection questions the role of government in shaping consumer attitudes toward food.¹⁸¹ Political commentators such as Julie Grunlock have voiced opposition to Michelle Obama's "Let's Move!" campaign because they believe parents should be free to make food choices for their children without government interference.¹⁸² Grunlock contends that parents can be educated on healthy and unhealthy foods and then make decisions that are best for their own families.¹⁸³ However, a recent study found that calorie information posted on a restaurant menu under new laws had no impact on food choice.¹⁸⁴ The relative price of foods has been found to significantly impact food choice.¹⁸⁵ Moreover, the government already significantly impacts consumption by directly subsidizing certain foods, and regulating the consumption of tobacco, alcohol, and narcotics.

If critics like Grunlock are correct, then reversing the current incentive structure of food, where the least expensive food is the least healthy, will enable consumers to make food choices based on their family's nutritional needs, rather than just its budget.¹⁸⁶ This proposed legislation will level the price-per-calorie playing field to pro-

¹⁸⁰ While food prices have been increasing over the course of 2011, soda is not properly characterized as "food." The stigma that Mayor Bloomberg's plan imposes on food stamp recipients is problematic, but limiting overall access to soda is not. This goal is also no more paternalistic than limiting consumers' access to cigarettes. Just like tobacco products, all Americans end up paying for the ill effects of poor food.

¹⁸¹ This objection loses force since the government currently plays an important role in food choice by subsidizing the production of certain foods. Further, consumer choice is more directly impacted through regulation of tobacco, alcohol, and narcotics. Finally, the federal government actively markets certain food products directly to consumers.

¹⁸² Julie Grunlock, *Federalizing Fat*, NAT'L REV. ONLINE (Feb. 9, 2010, 4:00 AM), <http://www.nationalreview.com/articles/229099/federalizing-fat/julie-grunlock>.

¹⁸³ *Id.*

¹⁸⁴ See Brian Elbel, *Calorie Labeling and Food Choices: A First Look at the Effects On Low-Income People in New York City*, 28 HEALTH AFF. w1110, w1117 (2009), <http://content.healthaffairs.org/content/28/6/w1110.full.pdf+html> (finding no evidence that menu labeling influenced the total number of calories purchased).

¹⁸⁵ See Neil Gandal & Anastasia Shabelansky, *Obesity and Price Sensitivity at the Supermarket*, 13 F. FOR HEALTH ECON. & POL'Y no. 2, 2010, at 4, <http://www.bepress.com/cgi/viewcontent.cgi?article=1191&context=fhep> (concluding that price sensitivity is the most important factor in food choice).

¹⁸⁶ A twenty percent increase in the price of beverages with added sugars could reduce the percentage of at-risk-of-overweight and overweight American children by five and three percent, respectively. TRAVIS A. SMITH ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., TAXING CALORIC SWEETENED BEVERAGES: POTENTIAL EFFECTS ON BEVERAGE CONSUMPTION, CALORIE INTAKE, AND OBESITY, at iii-iv (2010).

vide consumers with a more viable option: comparing apples to apples, rather than apples to subsidized corn chips.

III. LEGAL HURDLES TO IMPLEMENTING REFORM RECOMMENDATIONS

There are three possible constitutional objections to these recommendations.¹⁸⁷ First, eliminating commodity price supports would function as a revocation of entitlements to government benefits subject to due process requirements.¹⁸⁸ Second, regulating the use of agricultural land may rise to the level of a regulatory taking if the regulation sufficiently impacts the value of the property.¹⁸⁹ Finally, reforms may be beyond Congress's authority to regulate interstate commerce.¹⁹⁰ When the Supreme Court invalidated the Agricultural Adjustment Act of 1933 in *Butler*, it found the act's production tax and payments for acreage reduction to be "coercive" uses of the power to tax and spend.¹⁹¹ The more recent holdings in *Lopez* and *Morrison* raise new concerns about the scope of Congress's Article I authority.¹⁹²

A. Due Process Challenges to Proposed Legislation

Price supports are an entitlement program, similar to social security and welfare: an individual who qualifies for benefits has a right to those benefits. In *Goldberg v. Kelly*, the Supreme Court held that the Fifth Amendment prohibits deprivation of rights to government benefits without due process.¹⁹³ The defendants in *Goldberg* conceded that the plaintiff had a property interest in welfare benefits under the So-

¹⁸⁷ These objections are in addition to the political hurdles beyond the scope of this Comment.

¹⁸⁸ See *Goldberg v. Kelly*, 397 U.S. 255, 261-62 (1970) (requiring the Social Security Administration to provide an oral hearing prior to terminating disability benefits).

¹⁸⁹ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (denying the claim that restrictions on the construction of a fifty-story office tower on top of Grand Central Station constituted a taking because it did not deprive the property of all economic use, was for a legitimate public purpose, and did not interfere with a reasonable investment-backed expectation).

¹⁹⁰ See *United States v. Butler*, 297 U.S. 1, 63-64 (1936) (declaring the Agricultural Adjustment Act of 1933 unconstitutional because agricultural production is exclusively a local concern).

¹⁹¹ *Id.*

¹⁹² See *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (striking down the Violence Against Women Act as beyond Commerce Clause authority because it regulated noncommercial activity); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (finding the Gun-Free School Zones Act beyond Congress's Commerce Clause authority).

¹⁹³ 397 U.S. at 261-62.

cial Security Act.¹⁹⁴ Not until *Board of Regents v. Roth* did the Court determine that government benefits constitute a property right when an individual has a legitimate claim of entitlement grounded in a non-constitutional source of law.¹⁹⁵ Although Roth failed to demonstrate that he was entitled to a renewed teaching contract,¹⁹⁶ the plaintiff in the companion case *Perry v. Sindermann* showed sufficient evidence that there may have been a tacit system of tenure, creating an implicit right to entitlement.¹⁹⁷ Since *Goldberg*, courts have recognized government entitlements as property, and if plaintiffs meet the *Roth* legitimate claim of entitlement standard, the revocation or denial of an entitlement creates due process concerns.¹⁹⁸

While *Goldberg* rested on a statutory entitlement, the *Roth* court held that any nonconstitutional source of law could provide a basis for a legitimate claim for entitlement.¹⁹⁹ The *Roth* holding emphasized the issue of reliance:

It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.²⁰⁰

Sindermann echoed the importance of reasonable reliance by holding that no written rule or law is required to give rise to a legitimate claim of entitlement, so long as there is a clear expectation justified by the circumstances.²⁰¹ This standard opens the door to a potential challenge by farmers who have relied on federal farm payments to supplement their income. For many farms, agricultural supports con-

¹⁹⁴ See *id.* (“Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of entitlement for persons qualified to receive them.”).

¹⁹⁵ See 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it He must, instead, have a legitimate claim of entitlement to it.”).

¹⁹⁶ *Id.* at 578.

¹⁹⁷ 408 U.S. 593, 602-03 (1972).

¹⁹⁸ The Court in *Roth* distinguished between statutory and constitutional grounds for entitlements in rejecting Roth’s argument that his entitlement was grounded in the First Amendment right to free speech (he was allegedly fired for speaking out against the school’s administration). 408 U.S. at 575 n.14. The Court explained that “[w]hatever may be a teacher’s rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.” *Id.*

¹⁹⁹ *Id.* at 577.

²⁰⁰ *Id.*

²⁰¹ 408 U.S. at 602-03.

stitute the majority of household income.²⁰² Could this be sufficient reliance to warrant procedural safeguards?²⁰³

Goldberg illustrates the potential consequences of repealing a statutory benefits program. While a tacit entitlement can create a property right under *Sindermann*, the repeal of the program altogether eliminates the basis for that property right—whether it is the termination of a de facto tenure program or the repeal of entitlements issued through the Social Security Act or the Farm Bill.²⁰⁴ For example the Social Security Act was amended to increase the retirement age at which individuals receive full benefits.²⁰⁵ Younger workers had no claim to entitlement because the statute no longer provided them with a right to benefits.²⁰⁶ Similarly, when the FAIR Act ended price supports through deficiency payments, due process issues did not invalidate the act. Although the FAIR Act maintained income supports, it entirely revoked entitlements that comprised over half of total farm payments prior to the Act.²⁰⁷ Based on the success of these changes, ending price support programs should not pose a constitutional problem under the Due Process Clause.

B. *Regulating Agricultural Use of Land and Just Compensation*

The Fifth Amendment's prohibition on taking property without just compensation²⁰⁸ has been extended to include regulatory takings where a restriction on land use reduces its value so dramatically that it requires compensation.²⁰⁹ *Penn Central Transportation Co. v. New York*

²⁰² See RAY & SCHAFFER, *supra* note 28, at 2 (“For grain farmers, government payments can—depending on the year—represent all (or more than all) of their net farm income.”).

²⁰³ For a discussion of the degree of due process that is required, see *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976), which establishes a balancing test to determine what kinds of procedures are required to legitimately deny an individual a property interest.

²⁰⁴ See *Goldberg v. Kelly*, 397 U.S. 251, 262-65 (1970) (emphasizing that the eligibility for benefits, as defined by the statute, is what supports the claim to entitlement).

²⁰⁵ See 42 U.S.C. § 416(I)(1)(A)–(D) (2006) (increasing the retirement age by three months per year, from sixty-five years in 2000 to sixty-seven years in 2021).

²⁰⁶ Indeed, an extensive case law search revealed no cases challenging the 1983 amendments on due process grounds.

²⁰⁷ See *Ahearn et al.*, *supra* note 81, at 9 (analyzing the effects of the introduction of decoupled payments on farm purchasing behavior).

²⁰⁸ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

²⁰⁹ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (striking down a Pennsylvania law prohibiting coal mining under a residence in a manner that would endan-

City defined the modern taking doctrine as a balancing test.²¹⁰ The Court considered the economic impact of the regulation on the claimant, the extent to which the regulation interfered with reasonable investment-backed expectations of the property holder, the character of the government action, and the regulation's role in promoting "the health, safety, morals, or general welfare."²¹¹ The case concerned an historic landmark law, which prohibited a proposed office tower construction above Grand Central Station.²¹² The ordinance did not impact current and expected use of the property, nor did it prohibit all construction in the airspace.²¹³ The Court concluded that the regulations did not amount to a taking because the regulations were "substantially related to the promotion of the general welfare" and also "permit[ted] reasonable beneficial use of the landmark site."²¹⁴

Agricultural regulations more often limit land use than prevent construction.²¹⁵ For example, the Washington State Department of Wildlife issued a regulation prohibiting possession, breeding, or sale of elk.²¹⁶ In *Schreiner Farms, Inc. v. Smitch*, an elk farmer challenged the ordinance as a taking because it deprived him of the economic value of the land.²¹⁷ The court disagreed, finding that the regulation did not result in a total deprivation of economic use, and its protection of wildlife was "one of the state's most important interests."²¹⁸ Thus, farmers may be prohibited from engaging in certain agricultural practices, even if such regulation interferes with the current economic use of their land.

ger the structural stability of the home, because the regulation effectively revoked the mining rights without compensation, in violation of the Fifth Amendment).

²¹⁰ 438 U.S. 104, 124-25 (1978).

²¹¹ *Id.* at 125.

²¹² *Id.* at 107.

²¹³ *Id.* at 136-37.

²¹⁴ *Id.* at 138.

²¹⁵ However, environmental regulations are often challenged as a taking when they prohibit construction on uninhabited property. *See, e.g.,* Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156 (1999) (determining that an order to restore eleven lots in the plaintiff's housing development to wetlands under the Clean Water Act did not violate the Fifth Amendment because the plaintiff had notice of this possibility before he purchased the land, and the Act promoted public welfare). *But see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031-32 (1992) (finding that South Carolina's Beachfront Management Act prohibiting the plaintiff from constructing any buildings was a taking because it deprived the owner of all economic use of the land, and went into effect after he had purchased the lots).

²¹⁶ WASH. ADMIN. CODE § 232-12-064(2) (2005).

²¹⁷ 940 P.2d 274, 275-76 (Wash. Ct. App. 1997).

²¹⁸ *Id.* at 278-79.

Farm conservation measures have faced similar takings challenges. An Iowa soil erosion regulation²¹⁹ required one farmer to remove cropland from production and to spend more than \$12,000 to meet erosion standards.²²⁰ The court in *Woodbury Soil Conservation District v. Ortner* did not find that this imposition violated the Fourteenth Amendment, because soil erosion was an important state interest, and the cost to the defendant was “one the state has a right to exact.”²²¹ The court further posited that “[a] law does not become unconstitutional because it works a hardship.”²²²

An economic imposition alone is insufficient to constitute a taking.²²³ A farmer must demonstrate that a reasonable investment-backed expectation will be destroyed. Prohibiting an entire agricultural use did not result in a taking under *Schreiner Farms* because the land could be used for other economic purposes.²²⁴ Even permanently removing parts of agricultural land from production and requiring financial investment in infrastructure did not rise to the level of a taking in *Ortner*, because “[d]efendants still have the use and enjoyment of their property, limited only by the necessity to prevent soil erosion beyond allowable standards.”²²⁵ This line of cases suggests that regulating agricultural production is not a taking because, as in *Schreiner Farms*, the land subject to this regulation may be put to other kinds of agricultural use. Absent a showing of physical invasion or total deprivation of economic use, a court will consider whether there is a sufficient public interest to justify the taking.²²⁶ Both environmental protection and public health are sufficient interests to support regulations.²²⁷ Indeed the court in *Ortner* wrote, “It should take no extended discussion to demonstrate that agriculture is important to the welfare and prosperity of this state. It has been judicially recognized

²¹⁹ IOWA CODE ANN. § 467A.49 (West 1974).

²²⁰ *Woodbury Cnty. Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276, 277 (Iowa 1979).

²²¹ *Id.* at 279.

²²² *Id.* (citing *Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 25 (Iowa 1977)).

²²³ *Id.*

²²⁴ 940 P.2d at 279. The court explained, “*Schreiner Farms* has failed to establish that [the regulation] destroyed or derogated a fundamental attribute of property ownership, in particular, the regulation did not amount to a ‘total taking.’” *Id.*

²²⁵ 279 N.W.2d at 279.

²²⁶ *Schreiner Farms*, 940 P.2d at 277.

²²⁷ *See Ortner*, 279 N.W.2d at 278 (“The state has a vital interest in protecting its soil as the greatest of its natural resources, and it has a right to do so.”).

as our leading industry.”²²⁸ Thus Fifth Amendment concerns do not impose any barriers to regulating agricultural production.

C. *Congressional Authority to Regulate Agricultural
Production and Consumption*

Congress has regulated agricultural production under its Commerce Clause authority since the 1936 Soil Conservation and Domestic Allotment Act. In *Wickard v. Filburn*, the Supreme Court held that the Commerce Clause reaches any activity that in the aggregate exerts substantial effects on national markets.²²⁹ This ruling effectively overturned *Butler*, which struck down the Agricultural Adjustment Act of 1933 as beyond Congress’s authority.²³⁰ In *Butler* the Court held that Congress did not have the authority to regulate agricultural production under the Commerce Clause because agricultural production was an exclusively local concern.²³¹ Now that the limits of the Commerce Clause have been reasserted in *Lopez* and *Morrison*, is there room to challenge *Wickard*? For regulation beyond the reach of the Commerce Clause, can Congress turn to the Taxing and Spending Clause to authorize the proposed legislation?

1. Limits on Congress’s Commerce Clause
Authority After *Lopez* and *Morrison*

In *Wickard*, the Supreme Court specifically addressed the mandatory wheat production limitations imposed by the 1936 Soil Conservation Act.²³² The Court determined that growing wheat was a commercial activity and could be regulated even when a farmer did not sell most of his crop.²³³ The purpose of the legislation was to influence national wheat prices by controlling supply, and when Filburn grew

²²⁸ *Id.* (citing *Benschoter v. Hakes*, 8 N.W.2d 481, 486 (Iowa 1943)).

²²⁹ 317 U.S. 111, 125 (1942). The Court explained that “even if appellee’s activity may be local and though it not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Id.*

²³⁰ *United States v. Butler*, 297 U.S. 1, 63-64 (1936).

²³¹ *Id.* at 73.

²³² *See Wickard*, 317 U.S. at 115 (“The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.”).

²³³ *See id.* at 124 (“Whether the subject of the regulation in question was ‘production,’ ‘consumption,’ or ‘marketing’ is, therefore, not material for purposes of deciding the question of federal power before us.”).

and consumed wheat on his own farm beyond the maximum quota, he added wheat to the national supply that he would have otherwise purchased to feed his cattle.²³⁴ Even if the amount of wheat that Filburn grew would not on its own affect national commerce, similar actions of other farmers would have an impact in the aggregate.²³⁵ Thus, Congress could regulate production of agricultural goods grown for personal consumption.

The Supreme Court consistently reaffirmed this interpretation of the Commerce Clause over the following five decades.²³⁶ However, in 1995 the Court limited the seemingly boundless commerce authority in determining that Congress could not regulate gun possession on or near school grounds.²³⁷ As in *Butler*, the Court in *Lopez* found the regulated area to be a state prerogative holding that Congress could not regulate the activity absent a showing it had a substantial effect on interstate commerce, or a connection to the channels of interstate commerce.²³⁸ The Court echoed this holding five years later in *Morrison*. The Violence Against Women Act challenged in *Morrison* included lengthy congressional findings on the economic impact of violence against women.²³⁹ The Court determined that violence itself is not an economic activity, which is why its economic effect cannot be aggregated to show an impact on interstate commerce.²⁴⁰ *Lopez* was similarly grounded in the finding that gun possession near schools was

²³⁴ See *id.* at 127 (“The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop.”).

²³⁵ *Id.* at 127-28.

²³⁶ See, e.g., *Hodel v. Va. Surface Mining*, 452 U.S. 264, 281-82 (1981) (holding that congressional power to regulate mining under the Commerce Clause extended to regulating surface coal mining operations, because pollution may have effects on more than one state); *Perez v. United States*, 402 U.S. 146, 155-56 (1971) (upholding a prohibition of loan sharking through threats of violence because in the aggregate this activity supports organized crime, even if the particular defendant did not have ties to organized crime); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding the Civil Rights Act in an enforcement action against a restaurant that only served in-state customers, because a substantial portion of the restaurant’s food had moved in interstate commerce).

²³⁷ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The statute still remains in force, although it now applies only to firearms known to have traveled through or affected interstate commerce. 18 U.S.C. § 922(q)(2)(A) (2006).

²³⁸ *Lopez*, 514 U.S. at 558-59.

²³⁹ *United States v. Morrison*, 529 U.S. 598, 614-15 (2000) (citing H. R. Conf. Rep. No. 103-711, at 385 (1994); S. REP. NO. 103-138, at 40 (1993); S. REP. NO. 101-545, at 33 (1990)).

²⁴⁰ See *id.* at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”).

not an economic activity.²⁴¹ Justice Stevens offered a persuasive dissenting opinion asserting that guns are articles of commerce falling within Congress's regulatory authority.²⁴² In this sense, *Lopez* and *Morrison* leave *Wickard* unaltered because growing wheat was a patently economic activity, and thus its impact on interstate commerce may be aggregated.

In 2005 the Supreme Court echoed the *Wickard* holding in *Gonzales v. Raich*, in which respondent Angel Raich challenged the Controlled Substances Act's prohibition of medical marijuana grown for personal consumption.²⁴³ The Court held that marijuana was a marketable commodity, and when it traveled in interstate commerce there was no means of distinguishing marijuana legally grown for personal medical use and commercial marijuana sold for illegal recreational use.²⁴⁴ Thus, even though the marijuana Raich grew had not traveled in interstate commerce, as in *Wickard*, the economic activity in the aggregate affected interstate commerce, and consequently Congress could regulate it.²⁴⁵ Similarly, agricultural products, even those grown for home consumption or sold to in-state producers, affect the national market for grains and produce. *Raich* is an important reminder of the difference between Congress's authority to regulate commercial and noncommercial activities articulated in *Lopez* and *Morrison*. Most significantly, *Raich* confirms that raising agricultural products is most certainly an economic activity and thus can be regulated by Congress.

2. Regulating Consumption Under the Taxing and Spending Clause

While agricultural production can be regulated under the modern Commerce Clause doctrine, regulating consumption is not a clearly enumerated power under Article I. Yet, Congress is permitted to condition federal funding on meeting federal policy objectives, even if it does not have authority to directly regulate in that area.²⁴⁶

²⁴¹ *Lopez*, 514 U.S. at 561.

²⁴² *Id.* at 602-03 (Stevens, J., dissenting).

²⁴³ 545 U.S. 1, 12-20 (2005).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 18-19. The Court reasoned that "[t]he similarities between this case and *Wickard* are striking. . . . In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." *Id.*

²⁴⁶ As the Court stated in *South Dakota v. Dole*,

"[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power

For example, the federal government created a minimum drinking age of twenty-one by offering federal highway funding to states that impose this standard. In *South Dakota v. Dole*, the Court held that Congress may use the power to tax and spend as an incentive for states to adopt policies that Congress cannot directly regulate, provided that such inducements are not coercive.²⁴⁷ However, the *Butler* Court held that the 1933 Agricultural Adjustment Act program payments were conditioned on compliance and thus were not voluntary: “The amount offered is intended to be sufficient to exert pressure on [farmers] to agree to the proposed regulation.”²⁴⁸ There were two components to this holding. The first concerned marketing agreements, whereby processors voted in a referendum to limit total supply, and any producer who did not comply with the production quota was taxed at such a rate that it amounted to a confiscation of the excess crops.²⁴⁹ The Court held that raising revenue was clearly a pretext for regulation, and the tax imposed was the penalty for noncompliance.²⁵⁰ Second, the revenues raised through this penalizing taxation were offered to farmers who complied with the acreage-reduction program.²⁵¹ These payments created incentives beyond Congress’s taxation authority because they were coercive.²⁵² The Court applied a more relaxed standard of coercion in *Dole* finding that withholding five percent of the state’s federal funding for failure to impose a minimum drinking age

found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative fields,” may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

483 U.S. 203, 207 (1987) (citations omitted) (quoting *United States v. Butler*, 297 U.S. 1, 65-66 (1936)).

²⁴⁷ *Id.* In addition to the limitation on coercion, the spending must be for the “general welfare” and Congress must unambiguously state any condition of funding. Finally, the conditions imposed on receipt of the funds must be related “to the federal interest in particular national projects or programs.” *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

²⁴⁸ *Butler*, 297 U.S. at 70-71.

²⁴⁹ Olson, *supra* note 40, at 6; see also *supra* subsection I.B.3.

²⁵⁰ *Butler*, 297 U.S. at 69-70.

²⁵¹ *Id.* at 70-71.

²⁵² See *id.* at 71 (“The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin.”). The Court then noted that the program was not particularly successful at coercing compliance. See *supra* Part I.

did not “pass the point at which ‘pressure turns into compulsion.’”²⁵³ More recently, the Seventh Circuit held that the federal Swampbuster program (denying benefits to farmers who converted wetlands to agricultural production)²⁵⁴ was not unconstitutionally coercive, and by denying certiorari the Supreme Court may have indicated that it was not yet willing to disturb the circuit court’s conclusion.²⁵⁵

The best model for tax-based consumption disincentives is tobacco taxation. Tobacco excise taxes are framed as revenue-raising provisions, although they have a significant impact on tobacco consumption. For example, the largest increase in federal tobacco taxes was passed as a funding measure in the 2009 Children’s Health Insurance Program Reauthorization Act (CHIP).²⁵⁶ This statute increased federal tobacco taxes from \$0.39 per pack of cigarettes to \$1.01 per pack.²⁵⁷ Studies show that every ten percent increase in cigarette tax results in a four percent decrease in tobacco use.²⁵⁸ While smoking cessation was the policy purpose of the financing provision, the measure was framed purely as a revenue-raising effort, avoiding any of the constitutional questions that arose in *Butler*. Moreover, cigarettes are not taxed to the extent of confiscation. Imposing excise taxes on highly processed foods could be implemented as a financing measure in a number of federal statutes, as was done in CHIP.²⁵⁹ Therefore, if there is sufficient political will, there is no constitutional barrier to encouraging better food production and consumption through excise taxes.

CONCLUSION

The federal government alone cannot reverse obesity and related diseases, but it may encourage certain behavior to make it possible for families to make healthier food choices. Beyond improving public

²⁵³ 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

²⁵⁴ 16 U.S.C. §§ 3821–3824 (2006).

²⁵⁵ *Horn Farms, Inc. v. Johanns*, 397 F.3d 472 (7th Cir. 2005), *cert. denied*, 547 U.S. 1018 (2006).

²⁵⁶ § 701, I.R.C. § 5701 (Supp. III 2010).

²⁵⁷ *See id.* § 701(b), I.R.C. § 5701(b) (increasing taxes from \$19.55 to \$50.33 per thousand cigarettes).

²⁵⁸ *Steady Increases in Tobacco Taxes Promote Quitting, Discourage Smoking*, CENTERS FOR DISEASE CONTROL, <http://www.cdc.gov/Features/SecondhandSmoke> (last visited Oct. 15, 2011).

²⁵⁹ For example, some costs of the Affordable Care Act could be offset with taxes on disease-causing processed foods in order to further reduce national healthcare costs.

health, the key question is whether taxpayers should spend twenty billion dollars each year to reduce the cost of highly processed, low-nutrition foods. Current farm programs push farmers to intensively cultivate millions of acres of the same crop and make it less expensive to purchase feed grain than to grow it on the farm. These are not issues of economies of scale, but are the direct result of the government paying the difference between the cost of production and a much lower market price. Eliminating these price supports and coupled income payments seems to be an obvious policy choice, but determining which legislative measures would produce the desired effects is a more complex problem.

While nutritional programs and health initiatives are beginning to address consumer food choice, the most direct consumer incentive is prices, not educational programs alone.²⁶⁰ Income supports need to actually support farm income, not prices, and should be decoupled from production. Polyculture is an important way to stabilize farm income, while increasing the supply of produce and lowering the cost to consumers. Finally, requiring processed food manufacturers to internalize the costs they impose on consumers will alleviate consumer choice between short-term food costs and long-term health care costs. These reforms will reduce the relative cost of healthy foods as compared to unhealthy foods, enabling consumers to make good nutritional and financial choices. It is imperative that the 2012 Farm Bill alter production trends and consumer habits in order to address this national health crisis.

²⁶⁰ See Gandal & Shabelansky, *supra* note 185, at 10 (showing that price sensitivity is an important influence on food choice).