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*(Article begins on next page)*

REGULATING ORGANIC FOOD:  
THE CASE FOR THE NATIONAL ORGANIC STANDARDS BOARD

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## ABSTRACT

*The organic food industry involves a mix of diverse interest groups, including agrarian purists, “big organic” industry, environmentalists, and consumer interest groups. This paper addresses how the different institutions charged with overseeing organic food to one extent or another – the USDA, the National Organic Standards Board, and the courts – should interact to produce the best regulations for organic food. The paper advances four arguments. First, courts lack competency in the area of organic food. Second, the USDA is not always transparent in its oversight and may in fact favor big organic businesses over other interests. Third, the NOSB has the expertise that the courts lack and the transparent deliberation that makes its decisions less vulnerable to charges of unfairness or favoritism. Fourth, courts should typically defer to the USDA on organic food decisions. But courts should help ensure that the USDA follows NOSB proposals by engaging in more searching review of agency rules and regulations that are misaligned with the advisory board’s recommendations.*

## I. INTRODUCTION

Regulating organic food is a messy endeavor. The slew of diverse interest groups involved makes it so. “Big organic” businesses often want to relax the standards that their products must meet to earn the “USDA Organic” stamp. Meanwhile, organic movement purists routinely demand stricter regulations that adhere to agrarian ideals. In the mix are also environmentalists, consumers, the agents that certify organic food, and food distributors. With that in mind, Congress charged the United States Department of Agriculture (USDA) with regulating organic food and established the National Organic Standards Board (NOSB) – an advisory body whose members represent each of the various interests in organics – to help. This paper addresses a question of administrative law and institutional competencies: that is, what is the best way for the USDA, the NOSB, and the courts to interact when it comes to the regulation of organic food?

The paper advances four claims – the first three descriptive and the fourth normative. First, courts lack the expertise and competence to properly decide regulatory issues on organic

food.<sup>1</sup> These shortcomings apply to many technical and scientific administrative law matters that courts face, and organic food regulation is no exception. Informed oversight of organics requires technical agricultural knowledge, as well as an awareness of and sensitivity to the myriad value-laden issues at stake – not least of which is what it means to call something “organic.”

Generalist courts are not well-situated to make these judgments. Their lack of competence here is exemplified by the landmark organic food case *Harvey v. Veneman*<sup>2</sup> – a disastrous opinion by the First Circuit Court of Appeals that Congress had to reverse with new legislation. Although the statute at issue in that case was poorly worded in parts, the court’s intervention exposed their incompetence in the area and made matters worse. Ultimately, the *Chevron*<sup>3</sup> doctrine of deference to agency expertise is particularly applicable for organic food regulation.

Second, the USDA, while possessing far more agricultural expertise than federal courts, may adopt decision-making processes that are undemocratic and subject to interest group capture.<sup>4</sup> One example is the agency’s April 2004 guidance statements on organics, which were written behind closed doors and were intended to effect changes pleasing to big organic businesses. The agency ultimately rescinded the rules. But the whole affair raised suspicions, particularly among organic purists, and demonstrated the risk that USDA decisions on organics may lack the open deliberation and compromise needed for an industry replete with diverse interests.

Third, the NOSB is well-situated to overcome the weaknesses inherent in both the courts’ and USDA’s decision-making processes on organic food.<sup>5</sup> The board consists of expert

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<sup>1</sup> See *infra* Part III(A).

<sup>2</sup> 396 F.3d 28 (1st Cir. 2005).

<sup>3</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (establishing judicial deference to agencies through a two-step inquiry into legislative intent and the reasonableness of the agency action).

<sup>4</sup> See *infra* Part III(B).

<sup>5</sup> See *infra* Part III(C).

members who reflect the multitude of interests in the organic movement. Its recommendations are likely educated compromises. Moreover, the board's meetings are open to the public, whose input is welcome and considered. In short, the board possesses the expertise the courts lack, and it embodies the democratic ideals of transparency and deliberation – making it less likely to shut out certain voices and interests from its decision-making processes. The board is less likely than the USDA to be captured by special interests because, by congressional mandate, its membership includes representatives from a slew of interests (not just powerful, well-organized ones) and its decision-making meetings are open to the public – unlike the USDA, which can meet with special interests behind closed doors and craft guidance statements without any public transparency.

Fourth, given the NOSB's advantages, the USDA should give great weight to the board's recommendations.<sup>6</sup> One way to ensure such deference is for Congress to mandate it; however, for reasons discussed later, such formal grants of authority to the board are unlikely. This paper argues instead that indirect pressure through the federal courts is the best way to encourage the USDA to follow the NOSB. That is, federal courts should defer to USDA expertise generally, but they should engage in more searching review for organic rules and regulations that depart substantively from NOSB recommendations. Judges may lack the expertise to routinely question the detailed organic food regulations, but they are likely competent to consider process-related questions, such as whether the NOSB's recommendations were duly considered. Moreover, any chance of judicial error is minimized if the court's opinion matches up with the expert views of NOSB members.

This paper is not arguing that courts should ignore clear statutory language and blindly follow the NOSB. Rather, when statutory language is ambiguous (as it often is and particularly

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<sup>6</sup> See *infra* Part III(D).

has been for organic food law), courts should look hard to see whether the agency gave due weight to NOSB recommendations. Agency rules and guidance documents that are crafted in the absence of great public scrutiny and unduly ignore NOSB suggestions are more likely to have been the product of agency capture. With NOSB's expertise and transparently-formed compromise proposals to back it up, a court should feel more comfortable striking down an organic food regulation from the USDA, even though the court generally lacks the competence to interfere in such matters with confidence.

In sum, generalist courts lack expertise in the area of organic food. The USDA has exhibited a lack of transparent deliberation in issuing organic food rules. The NOSB, by its nature, is best situated to propose informed, compromise regulations in an open, deliberative manner. Courts should ensure that the USDA typically follows these proposals by engaging in more searching review of agency rules and regulations that unduly discount the advisory board's recommendations.

This paper proceeds as follows. Part II(A) discusses the Organic Foods Production Act of 1990 (OFPA)<sup>7</sup>, which established national regulation of organic food. It focuses on the legislative history, the diversity of interest groups involved, and the creation of the NOSB. Part II(B) highlights rules and regulations passed under OFPA, and Part II(C) analyzes the landmark organic foods case *Harvey v. Veneman* and its aftermath. Part III presents the paper's four major claims.

## II. ORGANICS: LEGISLATION, REGULATION, AND JUDICIAL REVIEW

### *(A) The Organic Foods Production Act of 1990*

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<sup>7</sup> 7 U.S.C. § § 6501-6522 (2006).

*(i) Background to the Legislation*

Organic food is a highly-regulated, \$15 billion industry.<sup>8</sup> But two decades ago, it was a largely unregulated industry full of potential – but also rife with misleading labels and barriers to entry for organic producers. The regulations that were in place came from a patchwork of state laws.<sup>9</sup> Before 1990, only seven states had certification programs under which organic food could be labeled “organic.”<sup>10</sup> An additional fifteen states defined “organic” by law but had no certification process.<sup>11</sup> The remaining twenty-eight states did not address “organic” at all.<sup>12</sup>

As a result, most U.S. consumers had no uniform standard to tell them what they were getting when they purchased an organic product. As one commentator put it: “[B]uying organics in the absence of regulation involved guesswork and led many consumers to shy away from buying organic because of confusing labels.”<sup>13</sup> Moreover, this uncertainty and the fractious, state-by-state market were roadblocks to building a national industry.

In the late 1980s, those in the organic food business lobbied Congress to establish uniform standards that organic consumers, producers, handlers, processors, and distributors could all rely on. After researching the issue, Congress found that, indeed, the current regulatory mess was a hindrance to consumer-friendly interstate organic commerce.<sup>14</sup> Studies showed that food labeled “organic” could range from 20% to 100% consisting of organically-grown ingredients, creating the perfect opportunity for disingenuous businessmen to fleece consumers

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<sup>8</sup> See Organic Trade Association, 2006 Manufacturer Survey, available at <http://www.ota.com/pics/documents/short%20overview%20MMS.pdf>.

<sup>9</sup> For a more complete background of state regulation of organic food before 1990, see Part III of Jessica Ellsworth, *The History of Organic Food Regulation* (2001), in Peter Barton Hutt, ed., *FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS*.

<sup>10</sup> See *id.* at 5.

<sup>11</sup> This left organic producers and handlers in these states to rely on independent associations to certify their products as “organic” if they wanted to make any organic claims to catch consumers’ attention. See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Rick Franzen, *Will GATT Take a Bite Out of the Organic Food Production Act of 1990*, 7 MINN. J. GLOBAL TRADE 399, 402 (1998) (discussing mislabeling and the fleecing of consumers in the unregulated organics market).

with misleading labels.<sup>15</sup> Congress concluded that uniform federal standards could ameliorate consumer confusion and help secure a robust organic market. Led by Senator Patrick Leahy, a Vermont Democrat, it took up the task of crafting a comprehensive regulatory scheme for organic food.<sup>16</sup>

*(ii) A Diversity of Interests*

It was immediately clear that such broad legislation would pique the interest of extraordinarily diverse and eclectic groups. Samuel Fromartz, a journalist and author of the exhaustively-researched book *Organic, Inc.*, characterized the spectrum of participants in the organic industry as follows:

There were environmentalists concerned about how pesticides could leach into the water supply. Consumer groups were interested in seeing a viable organic market. Organic certifiers who wanted clear standards to enforce. Nutritionists interested in the healthful effects of organic food. Chefs were interested in the increased flavors of organics. But the two biggest interest groups were agrarians who had a “purist” vision of organic – that is, “small farms, whole food, and local distribution, not factory farms, highly processed food, and national sales” – and “big organic” that viewed the organic label as a business and marketing opportunity.<sup>17</sup>

The agrarian purists saw themselves as upholding ideals that transcended crass capitalistic goals. At the Upper Midwest Organic Farming Conference in 2004, one small farmer presented a well-received vision of the organic movement with radical roots tied to the “indigenous farmer” and based on “local food sovereignty” – under which farm workers were

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<sup>15</sup> See Ellsworth, *supra* note 9, at 5.

<sup>16</sup> See Patrick Leahy, United States Senator, Issues: Organic Foods and Products, <http://leahy.senate.gov/issues/Agriculture/organicsindex.html>.

<sup>17</sup> SAMUEL FROMARTZ, *ORGANIC, INC.* 194 (2006).



treated well, their was fair pricing for small farmers, and growers could use their own resources without being forces to buy patented versions owned by conglomerates.<sup>18</sup>

For purists, the antithesis of this vision is embodied by what Michael Pollan – the nation’s most prominent writer on the business, ethics, and health of our modern food supply – dubbed the “organic-industrial complex.”<sup>19</sup> For Pollan, small organic purists have reason to fear that “big organic” companies will co-opt their purist vision of organic food. Consider, for example, that international industrial food companies have bought many companies that started as small organic brands – witness General Mills purchasing Small Planet Foods and Group Danone (makers of Dannon Yogurt) buying Stonyfield Farms, which started as a small farm in New Hampshire.<sup>20</sup>

Ultimately, this diversity of interests, coupled with the mistrust between the impassioned purists and the big organic businesses, meant that whatever eventually passed Congress would include a hefty amount of compromise. Indeed, the drafting process was contentious at first. “It was very, very difficult, if not impossible, to get groups to sit down together and agree that there was one common cause that was called organic, or even that there was some benefit to us agreeing with each other,” observed the executive director of the Organic Trade Association.<sup>21</sup>

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<sup>18</sup> *Id.* at 189.

<sup>19</sup> Michael Pollan, *Naturally: Behind the Organic-Industrial Complex*, NEW YORK TIMES MAGAZINE, May 13, 2001; see also MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* (2006).

<sup>20</sup> See *The Organic Myth: Pastoral Ideals Are Getting Trampled as Organic Food Goes Mass Market*, BUSINESS WEEK, Oct. 16, 2006, Cover Story.

<sup>21</sup> Fromartz, *supra* note 17, at 195. Elsewhere in his book, Fromartz describes it this way:

They may be driven by health and nutritional concerns, a family or personal history of illness, fear of pesticides, environmental ideals, adherence to principles of agrarianism or biodynamics, spiritual or religious beliefs, a desire for high-quality fresh food, left- or right-wing politics, a commitment to sustainable farming, economic necessity or economic opportunism. This diversity has always been a strength of the movement, since it increases the pool of potential consumers and prevents any one interest group from controlling its fates. At the same time, it has led to pitched conflicts, especially between those who are determined to grow organic farming above all and those who primarily want to protect family farmers from economic annihilation. But one belief about food unites all – they are the alternative to the status quo.

*(iii) Enactment*

Nonetheless, in 1990, a compromise was reached and Congress passed the Organic Food Protection Act. The Act set up the National Organic Program (NOP) as the regulatory framework that the USDA would administer in governing organic food.<sup>22</sup> The regulatory scheme had three explicit aims: (1) to establish national standards “governing the marketing” of organically produced products; (2) “to assure consumers that organically produced products meet a consistent standard”; and (3) to facilitate a national market for organic products.<sup>23</sup>

Absent from the OFPA, though, was any definition of “organic.” It left that to the expertise of the USDA.<sup>24</sup> Nonetheless, Congress provided several key guidelines for the USDA – guidelines that would frame the contentious bargaining among the diverse interests. One important guideline outlined how farmers and food producers must transition their conventional operations into organic ones.<sup>25</sup> This included, for example, how long livestock had to eat organic food before their meat or dairy products could be considered organic. Another guideline involved the use of synthetic chemicals in the production of organic products. The OFPA established the baseline presumption that synthetics are entirely prohibited in the production and handling of organic products. However, OFPA allowed for the compilation of a National List of acceptable synthetic chemicals, which were to be evaluated to ensure that they were not harmful

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*Id.* at 18.

<sup>22</sup> See generally National Organic Program: Background and History, [http://www.ams.usda.gov/nop/nop2000/nop/background and history2.htm](http://www.ams.usda.gov/nop/nop2000/nop/background%20and%20history2.htm).

<sup>23</sup> See 7 U.S.C. § 6501 (2006). “[T]he imposition of a system which would both domestically and internationally align the monetary incentives of producers and consumers of organic food was an overarching congressional objective,” one commentator noted. Beth Dungey, *Drafting Organic Food Regulation: The Case for Incorporating Congressional Intent and Interest Group Commentary* (1999), in Peter Barton Hutt, ed., *FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS*.

<sup>24</sup> See 7 U.S.C. §§ 6517-6518 (2006).

<sup>25</sup> *Id.* § 6504.

to human health or the environment and that they were consistent with the overall process of organic farming and handling.<sup>26</sup>

(iv) NOSB

Perhaps most important, the OFPA established the National Organic Standard Board. The Senate Committee envisioned the NOSB as “an essential advisor to the Secretary on all issues concerning this bill.”<sup>27</sup> Indeed, one commentator has observed: “References to the NOSB appear throughout OFPA, and taken together with the importance attached to the NOSB's function in the legislative history, it becomes abundantly clear the NOSB is a very strong component of the organic regulatory scheme.”<sup>28</sup>

The OFPA mandates that the fifteen-member board include representatives from all the relevant interest groups.<sup>29</sup> Today, sitting on the board are four organic farmers, three environmentalists, two organic handlers, three consumer advocates, one certifying agent, one organic retailer, and one scientist.<sup>30</sup> Members, who will serve staggered five year terms, are appointed by the secretary of agriculture.

Like all advisory bodies, NOSB's actions are nonbinding on federal agencies and the secretary of agriculture.<sup>31</sup> Nonetheless, its recommendations address almost all of the essential facets of organic food regulation. Primarily, the board helps develop standards for the substances used in organic production, including making recommendations on which synthetic chemicals should make it on the National List and the precise regulations that farmers must

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<sup>26</sup> *Id.* § 6517.

<sup>27</sup> S. Rep. No. 101-357, at 650-51 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4950.

<sup>28</sup> Chad M. Kruse, *The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990*, 30 S. ILL. U. L. J. 501, 511 (2006).

<sup>29</sup> 7 U.S.C. § 6518 (2006).

<sup>30</sup> See National Organic Standards Board, <http://www.ams.usda.gov/nosb/>.

<sup>31</sup> 7 U.S.C. § 6518 (2006).

adhere to when converting operations to organic.<sup>32</sup> The board was designed in part as a check on “big organic” interests, helping guard against the secretary of agriculture approving countless synthetics to the dismay of purists. Samuel Fromartz dubbed the board members the “high priests” of the organic world.<sup>33</sup>

*(B) The Rules and Regulations*

*(i) Drafting the Rules*

After the OFPA was passed in 1990, the USDA set out to draft the first set of rules and regulations. Conflict was immediate. Board members bristled at the USDA treating them as “subservient.”<sup>34</sup> Indeed, after the USDA published its first round of proposed final rules under the OFPA,<sup>35</sup> it had disregarded many of the board’s recommendations.<sup>36</sup> This angered some who viewed the USDA as beholden to big business and big organic interests – that is, not the interests of agrarian purists.<sup>37</sup> Comments griped that the rules “completely disregard the long established meaning of organic agriculture” or that they could “fatally undermine consumer confidence in the organic label.”<sup>38</sup> Interestingly though, the USDA withdrew the proposals after it was inundated with complaints during the notice and comment period for the proposals. It had received 275,000 comments on the proposals, the vast majority negative.<sup>39</sup> After the outpouring of public sentiment, the USDA took to redrafting the rules, in many ways making them stricter

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<sup>32</sup> *Id.*

<sup>33</sup> FROMARTZ, *supra* note 17, at 197.

<sup>34</sup> *See id.* at 198.

<sup>35</sup> USDA, Glickman to Announce National Organic Program Proposed Rule, Dec. 12, 1997, 62 FR 65850.

<sup>36</sup> *See Dungey, supra* note 23, at 32 (“The Proposed Rule effectively erodes NOSB’s statutory authority . . . by altering the recommended National List and by ignoring or twisting NOSB’s other recommendations in the following areas . . .”).

<sup>37</sup> For a complete chronicling of public and interest group reaction to the proposed rules, see *id.* at 33-42.

<sup>38</sup> FROMARTZ, *supra* note 17, at 199.

<sup>39</sup> *See id.* at 199.

and more in line with the NOSB's recommendations.<sup>40</sup> The redrafting process, and the nature of agency rulemaking in general, slowed the implementation of final rules. It was not until 2002, twelve years after the OFPA was passed, that the USDA's final rules took effect.

*(ii) USDA Guidance Statement Challenge*

Despite losing to the NOSB in the initial drafting process, the USDA tried again to push through rules that favored big organic businesses. In April 2004, the USDA issued a guidance statement that would change several rules in controversial ways. Guidance statements are not subject to a public notice and comment period, giving the secretary of agriculture room to make substantive interpretations under the radar.<sup>41</sup> Moreover, the statements are not prejudged by the NOSB.

The April 2004 statement made several changes that many felt watered down the regulations severely. First, it allowed organic producers to use pesticides with "unknown inert ingredients" so long as they made a "reasonable effort" to identify those ingredients.<sup>42</sup> Previously, any use of pesticides had to be approved by the NOSB; this change ostensibly pushed the board out of the way when it came to pesticides and organics. Second, the statement allowed organic livestock to feed on fishmeal that may contain synthetic preservatives or toxins; a significant relaxation from the previous standard that required organic feed only.<sup>43</sup> Third, the statement allowed cattle producing organic milk to be treated with antibiotics under certain conditions.<sup>44</sup> The earlier regulation had required that all antibiotic-treated cattle be removed from organic herds. Finally, the USDA allowed seafood, pet food, and body care products to

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<sup>40</sup> National Organic Program, Final Rule, 65 FED. REG., 80548 (2000) (codified at 7 C.F.R. 205).

<sup>41</sup> See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993) (discussing the difference between interpretive rules and legislative rules).

<sup>42</sup> See Carol Ness, *Organic Food Fight: Outcry Over Rule Changes that Allow More Pesticides, Hormones*, S.F. CHRON., May 22, 2004, at A1.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

carry an “organic” label “without meeting any standards other than their own.” The earlier regulation required these categories of products to follow the standards used for organic livestock and crops.<sup>45</sup>

Organic interest groups were outraged.<sup>46</sup> At the NOSB’s meeting, “a parade of commentators chastised the USDA officials who attended.”<sup>47</sup> Their position was understandable, given that Congress had envisioned the NOSB to serve as “an essential advisor”<sup>48</sup> to the USDA, but that these guidance documents “undermined the NOSB.”<sup>49</sup> Clearly the secretary had not sought its guidance before issuing the April 2004 statement, and in fact she had explicitly undercut the board’s advisory role when it came to pesticides. However, the board had broad public support. At the NOSB’s semiannual in April 2004, a slew of commentators sided with the board and chastised the USDA officials in attendance.<sup>50</sup>

In May 2004, the secretary of agricultural bowed under what she said was “a tremendous amount of (public) interest” and revoked the guidance statement.<sup>51</sup> Public input had saved the NOSB version of the rules that reflected genuine compromise.

### (C) Harvey v. Venemenan

#### (i) Mr. Harvey

However, the biggest challenge the NOSB-supported rules came not from big organic but from a lone organic purist. A mere two days after the NOP final rules took effect in October

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<sup>45</sup> *See id.*

<sup>46</sup> *See, e.g.*, Press Release, Organic Trade Association, Organic Trade Association Strongly Objects to National Organic Program’s April 2004 Guidance Documents and Directive, May 26, 2004, [http://www.ota.com/pics/documents/FactSheet\\_All.pdf](http://www.ota.com/pics/documents/FactSheet_All.pdf).

<sup>47</sup> FROMARTZ, *supra* note 17, at 202.

<sup>48</sup> S. Rep. No. 101-357, at 650-51 (1990), as reprinted in 1990 U.S.C.C.A.N. 4656, 4950.

<sup>49</sup> FROMARTZ, *supra* note 17, at 202.

<sup>50</sup> *See id.*

<sup>51</sup> Marian Burros, *Agriculture Dept. Rescinds Changes to Organic Food Standards*, N.Y. TIMES, May 27, 2004, at A17.

2002, a seventy-two-year-old organic blueberry farmer from Maine, Arthur Harvey, challenged them in court pro se.<sup>52</sup> For Harvey, the promulgated regulations were too weak; the purity of organics was at stake.<sup>53</sup>

Harvey was a committed and persistent old guard member of the organic movement. Along with his farming, he was a third-party organic certifier and a member of the Organic Trade Association.<sup>54</sup> During the notice and comment period for the USDA's first proposed rules in 1987, he personally submitted twenty-seven comments.<sup>55</sup>

Litigation was not Harvey's first choice. In early 2002, he appeared before the NOSB and warned that regulations were "likely to be invalidated by a court if this Board and the NOP do not come to their senses."<sup>56</sup> But what Harvey really wanted was just too extreme and onerous for recommendation by the board – a body whose diverse composition was designed to ensure compromise. After Harvey laid out his vision for the organic rules at a NOSB meeting, one board member, apparently exasperated, asked Harvey, "You want us to start all over again. Right?" To which Harvey responded, "I'm afraid you'll have to do quite a bit of that, yes."<sup>57</sup>

Food journalist Samuel Fromartz put it this way: "Many participants compromised in writing the organic rules, but Harvey felt core principles had been sold out."<sup>58</sup> In his own words, Harvey said he was compelled to challenge the final 2002 organic rules: "I had to do this, otherwise the government could get away with anything it wanted."<sup>59</sup>

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<sup>52</sup> See FROMARTZ, *supra* note 17, at ix-xi.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 203.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Harvey had read through all 554 pages of the regulations and cross-referenced them with the underlying organics act.<sup>60</sup> His complaint alleged that nine provisions of the final rules were inconsistent with the underlying Act and sought declaratory and injunctive relief.<sup>61</sup> Among those nine, were challenges to the National List that allowed the use of synthetic ingredients in organic food, as well as a challenge to the percent of organic feed required when dairy farmers transition their cows from conventional to organic milk production.

*(ii) The Opinion*

About a year after Harvey filed suit, a magistrate judge dismissed all but one of Harvey's nine claims – seven on summary judgment and one on standing grounds.<sup>62</sup> The only victory for Harvey was a relatively small holding that the final regulations did not sufficiently regulate the rotation of wild crops lands in and out of organic status.<sup>63</sup> But the district court reviewed the decision and sided with the Secretary of Agricultural on all counts, reversing even that small victory for Harvey.<sup>64</sup> Harvey, however, was unyielding. He appealed to the First Circuit Court of Appeals.<sup>65</sup> By this time, Harvey's crusade in the courts had made waves in the organic community; he garnered support from several environmental groups that filed amici briefs, and a pro-environment, Washington, D.C.-based attorney represented him for a reduced fee.<sup>66</sup>

When the First Circuit's ruling came down, it was immediately clear it was a watershed moment for organics – the first landmark case under the OFPA. The appeals court began by

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<sup>60</sup> *Id.* at x.

<sup>61</sup> *See* Harvey v. Veneman, No. 02-216-P-H, 2003 WL 22327171 (D. Me. Oct. 10, 2003).

<sup>62</sup> *See id.* at \*25.

<sup>63</sup> *See id.* at \*24.

<sup>64</sup> Harvey v. Veneman, 297 F. Supp. 2d 334, 335 (D. Me. 2004).

<sup>65</sup> Harvey v. Veneman, 396 F.3d 28 (1st Cir. 2005).

<sup>66</sup> *See* FROMARTZ, *supra* note 17, at 203.



rebuking the lower courts for finding that Harvey lacked standing on any claims.<sup>67</sup> Then it delved into the merits.

After dismissing the first two counts, the court turned to the third, which challenged the use of synthetic substances in processing. The agency had approved thirty-eight synthetic substances for processing and handling organic food. Harvey argued that this approval contravened the language of the OFPA, which provides in pertinent part that organic food handlers “shall not, with respect to any agricultural product covered by this title . . . add any synthetic ingredient during the processing or any postharvest handling of this product.”<sup>68</sup>

The Secretary argued that, despite the seemingly blanket prohibitory language, the Act also established the National List, thereby impliedly allowing exceptions.<sup>69</sup> The USDA, she argued, was acting under this authority when created the list of thirty-eight synthetics. The court resolved the point by turning to the language authorizing the National List, which “contemplates use of certain synthetic substances during the production, or growing, of organic products, but not during the handling or processing stages.”<sup>70</sup> Because of the OFPA’s seeming distinction between earlier production or growing stages and later processing and handling stages, the court sided with Harvey on this issue. The statutory language, the court said, “simply does not say what the Secretary needs it to say.”<sup>71</sup>

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<sup>67</sup> *Harvey*, at 34, 35 (“Harvey alleges that the Final Rule creates loopholes in the statutory standards, undermines consumer confidence, and fails to protect producers of true organic products. Harvey’s alleged injuries fall precisely within the zone of interests that the statutes at issue were meant to protect.”).

<sup>68</sup> 7 U.S.C. § 6510(a)(1).

<sup>69</sup> *Harvey*, 396 F.3d at 39.

<sup>70</sup> *Id.* at 39. The statutory language states that the National List allows synthetics in organic farming only if the substance:

- (i) is used in production and contains an active synthetic ingredient in the following categories . . .
- (ii) is used in production and contains synthetic inert ingredients that are classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
- (iii) is used in handling and i[s] nonsynthetic but is not organically produced . . .

7 U.S.C. § 6517.

<sup>71</sup> *Harvey*, 396 F.3d at 39.

The court continued to reject the Secretary’s argument that the statute was ambiguous, thus requiring that the court defer to her interpretation under the *Chevron* line of jurisprudence. The statutory language explicitly contemplated exemptions for synthetics used in “farming and handling” activities. The statute then went on to spell out the requirements that must be met for synthetics to be used in “production” and to state that only non-synthetic ingredients could be used in “handling.” In short, the statute seemed to contemplate exemptions for “handling” in one breadth before taking away such exemptions with the next – not to mention the alternating of the term “farming” with the term “production.” Surely, the Secretary, argued, this was ambiguous.<sup>72</sup>

The court, however, declared the statute clear on this point.<sup>73</sup> The OFPA had established three prongs under which synthetics could find their way onto the National List. The court read Prong (A) as clearly setting forth a threshold requirement that all exempt synthetics must pass, whether used in production or handling.<sup>74</sup> For the court, prong (B) narrowed that broader threshold requirement in prong (A) by explicitly banning all synthetics in handling, just as Harvey had argued.<sup>75</sup>

Having declared the three prong test unambiguous, the court sided with Harvey. With that, the thirty-eight synthetics on the National List were still allowed for the growing of organics but they were suddenly not allowed for the processing and postharvest handling of organics.

The other victory for Harvey came in regards to organic milk standards. OFPA provides that a “dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handles in accordance with this title for not less than the 12-month

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 7 U.S.C. § 6517(c)(1)(A)(i)-(iii) (requiring such substances to be “not . . . harmful to human health or the environment”; necessary to production or handling of an agricultural product “because of the unavailability of wholly natural substitute products”; and “consistent with organic farming and handling”).

<sup>75</sup> *Harvey*, 396 F.3d at 39. “Prong (B),” the court wrote, “is not inconsistent with prong (A); it merely sets forth more specific requirements with regard to the types of substances that may be exempted for use in production and handling, respectively.” *Id.*

period immediately prior to the sale of such milk and milk products.”<sup>76</sup> The final rules agreed that organic producers were limited to feeding livestock a “*total feed ration . . . organically produced.*”<sup>77</sup> However, the final rule also established that when a conventional dairy animal is converted to organic, the producer may “[f]or the first 9 months of the year, provide a minimum of 80-percent feed” that is organic, and only has to use completely organic feed for the final three months of that conversion year.<sup>78</sup> The court interpreted the “total feed ration” language in the OFPA as being inconsistent with the agency’s 80-percent feed rule. “The Secretary’s creation of such an exception in the challenged provision of the Rule is contrary to the plain language of the Act.”<sup>79</sup>

Harvey lost on his other counts,<sup>80</sup> but the victories on the charges regarding the National List and the dairy conversion were earthshaking in the world of organics. In a later decree, the court gave the USDA one year to write new rules that conformed with its interpretation of the OFPA. Products that were not in compliance with the court’s interpretation and the new rules would have to be pulled from the shelves within two years.<sup>81</sup>

### *(iii) The Reaction*

The court’s decision on the use of synthetics was viewed in the industry as “an atomic bomb.”<sup>82</sup> Harvey had aimed at big organic businesses, but he had hit almost the entire industry. The Organic Trade Association polled its members and found that 70% of them used at least one

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<sup>76</sup> 7 U.S.C. § 6509(e)(2).

<sup>77</sup> 7 C.F.R. § 205.237 (emphasis added).

<sup>78</sup> 7 C.F.R. § 205.236(a).

<sup>79</sup> *Harvey*, 396 F.3d at 44.

<sup>80</sup> These losing claims included charges that food with less than 95% organic ingredients could not bear a USDA organic seal at all and that prohibition against certifying agents’ provided advice on certifying standards violated the First Amendment. *Id.* at 33.

<sup>81</sup> See FROMARTZ, *supra* note 17, at 207

<sup>82</sup> *Id.* at 206.

synthetic on the National List.<sup>83</sup> The group’s executive director estimated that as high as 90% of organic products would cease to be “organic” if the First Circuit’s holding on the validity of the National List held.<sup>84</sup> Similarly, experts observed that the court’s ruling created a disincentive for conventional dairy farmers to convert their herds to organic production. Without some synthetics allowable, feed costs would rise, making it more costly for producers to enter the organic market.<sup>85</sup>

Even the agrarian purists and Harvey supporters thought the ruling had gone too far, as barring all synthetics would destroy the burgeoning organic market.<sup>86</sup> The list of approved synthetics a compromise effort and informed decision by experts in the field, one reached because most of the interest groups involved recognized that at least some synthetics were necessary.<sup>87</sup> As Samule Fromartz observed, “By the time participants gathered to work on the OFPA, organic farmers had a wealth of practical knowledge about agricultural synthetics and listed those they viewed as indispensable.”<sup>88</sup> In fact, the NOSB had approved all thirty-eight synthetics unanimously in February 1999<sup>89</sup> The NOSB also had recommended the 80-20 feed rule after its September 2002 meeting.<sup>90</sup> Nonetheless, this had not deterred the First Circuit from striking down the rule too.

The OTA lobbied Congress to cure the *Harvey* decision.<sup>91</sup> Congress responded quickly, attaching amendments to the annual agricultural spending bill in October 2005 that effectively

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<sup>83</sup> See *id.* at 207.

<sup>84</sup> See *id.*

<sup>85</sup> See James Gormley, *The New Organics Ruling What Now?*, NATURAL AND NUTRITIONAL PRODUCTS INDUSTRY-CENTER, <http://www.npicenter.com/anm/templates/newsATemp.aspx?articleid=11721&zoneid=43>.

<sup>86</sup> See FROMARTZ, *supra* note 17, at 215.

<sup>87</sup> *Id.* at 209, 213.

<sup>88</sup> *Id.* at 208.

<sup>89</sup> *Id.* at 213.

<sup>90</sup> See Final Recommendations, NOSB, <http://ams.usda.gov/nosb/FinalRecommendations/Oct02/OriginofLivestock.htm>.

<sup>91</sup> See Kruse, *supra* note 28, at 524-25.

reversed the First Circuit on both the use of synthetics and the conversion of herds to organic methods of production. Specifically, it amended the OFPA so that it prohibits the addition of “any synthetic ingredient *not appearing on the National List* during processing or any post harvest handling of the product.”<sup>92</sup> As for the herd conversion feed rule, Congress reversed the court in significant part as well, allowing the 80-20 rule to continue at least until June 2007.<sup>93</sup>

*(iv) Harvey Does Not Give Up*

Despite Congress stepping in to reverse the meat of the First Circuit’s holdings, Harvey was undeterred. He filed suit in federal district court, again arguing that some of the organic regulations were out of line with the OFPA. Harvey argued that the congressional amendment on synthetics only allowed synthetic “ingredients,” whereas the USDA regulations passed after the congressional amendment allowed the use of both synthetic ingredients and synthetic “processing aids” – a term of art that Congress had not mentioned.

Harvey rested his argument on the fact that USDA regulations clearly define “ingredients” and “processing aids” separately.<sup>94</sup> Congress could have included “processing aids” in the amendment if it had wanted, but it did not. Thus, “it must be assumed that Congress’ choice of the term ‘ingredients’ was intentional and means what it says,” Harvey argued to the court.<sup>95</sup>

The district court was not persuaded. The distinction between ingredients and processing aids was a regulatory invention, published by the USDA in the Code of Federal Regulations, and not ever mentioned by Congress in the statute. “Harvey’s claim that Congress intentionally

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<sup>92</sup> 7 U.S.C. § 6510 (2006).

<sup>93</sup> See National Organic Program, Impact of *Harvey v. Johanns* and Restoring the NOP to pre-Lawsuit Status: A Report to Congress, March 2006, [http://www.ams.usda.gov/nop/NOPCongressStudy1\\_06\\_06.pdf](http://www.ams.usda.gov/nop/NOPCongressStudy1_06_06.pdf).

<sup>94</sup> *Johanns*, 462 F. Supp. 2d at 73.

<sup>95</sup> *Id.*

chose the word ‘ingredient’ as distinct from ‘processing aid’ is farfetched,” the court stated.<sup>96</sup>

The court went on to parse the First Circuit’s decision in *Harvey* and Congress’s explicit reference to it as evidence of congressional intent.

But underlying the decision was the idea that Congress, if treated as a monolithic decision-making body, was entirely ignorant of any significant agricultural distinction between the two terms. *Harvey* had argued that the district court’s discussion of the two terms in its previous ruling means that Congress “must be presumed to have been aware of the terms of the Judgment it was purportedly responding to.”<sup>97</sup> But the court was not willing to grant Congress that degree of omniscience. The district judge wrote: “Much as it might be flattering to think that Congress concerned itself with what appeared over my signature, it is the decision of the regional court of appeals, the First Circuit, that concerned Congress.”<sup>98</sup> The court concluded that “the 2005 amendments [to the OFPA] eliminated the First Circuit’s statutory basis for holding the regulations in question invalid.”<sup>99</sup>

The plucky *Harvey* pressed on and appealed to the First Circuit. When it issued its decision on June 24, 2007, the court’s first words made it clear *Harvey* had pushed too far.

Judge Selya began the opinion:

This appeal has many of the characteristics of a civics lesson. One principal characteristic is that it offers a window on the interaction of the three branches that comprise our tripartite system of government.<sup>100</sup>

After summarizing the first *Harvey* case, the 2005 changes to the OFPA, and the claims now before it, the court continued:

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Harvey v. Johanns*, 494 F.3d 237, 238 (1st Cir. 2007).

It seems incontrovertible that these [2005 OFPA] changes were a direct reaction to our decision in *Harvey I*. It seems equally incontrovertible that . . . they were designed to pull the legs out from under that decision. Any other conclusion would ignore both Congress's expression of interest . . . and the sequence of events. Any other conclusion would, therefore, blink reality.<sup>101</sup>

The court characterized *Harvey's* reading of the amendments as “crabbed” and the assertion that Congress intended to distinguish between ingredients and processing aids as “too clever by half.”<sup>102</sup> Finally, in affirming the district court's decision, the First Circuit was overtly aware of the limitations of its competencies and legitimacy: “Were we to accept [*Harvey's*] perverse reading, we would be guilty of outright defiance of Congress's easily discernable intent. . . . Principles of judicial restraint counsel powerfully against undertaking so confrontational a course.”<sup>103</sup>

And with that, *Harvey's* five years of fighting for the pure agrarian ethos in court came to end. At least for now.

### III. THE CASE FOR THE NATIONAL ORGANIC STANDARDS BOARD

#### *(A) Courts Lack Expertise and Competence*

Generalist judges are not well-equipped to issue decisions on organic food regulations. They lack the technical expertise of organic farming and a nuanced understanding of all the compromise interests that lead to those regulations. They also lack the resources to educate themselves on these complex issues in the short time between when they land on their docket and

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<sup>101</sup> *Id.* at 241.

<sup>102</sup> *Id.* at 242.

<sup>103</sup> *Id.* at 243.

when they must write an opinion. Elaborating on the strengths of agencies compared to courts, administrative law expert and legal theorist Adrian Vermeule has written:

[A]gencies have a superior degree of specialized technical competence, a superior understanding of legislative processes (both in general and in the setting of particular statutes), a superior knowledge of the legislative history and the original intentions, purposes, and compromises it reflects, and a degree of political responsiveness that gives them superior information about both public values and policy-relevant facts.<sup>104</sup>

Indeed, the *Chevron* doctrine of judicial deference to agencies when statutes are ambiguous or silent was created in part out of recognition of agencies' comparative advantages in this regard.<sup>105</sup> All of these judicial limitations apply even more so in the context of cases on organic food regulations. Accordingly, courts should typically defer to agency institutions far better equipped to decide organic food regulatory issues than is the federal court system. The *Harvey* case exemplifies why it is misguided for generalist judges to refuse to defer to the USDA and to overly involve themselves in the regulation of organic food.

First, it should have been clear to the *Harvey* court that there were big gaps in the organic food statute. These statutory silences, under *Chevron*, should be filled in by the agency. The court was wrong to overlook these statutory gaps and to declare the statutory language “unambiguous” and thus undeserving of *Chevron* deference.

The question about approved synthetic chemicals for organic food raised in *Harvey* presented a classic question worthy of deference to the agency. The relevant statutory passage,

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<sup>104</sup> ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 213 (2006).

<sup>105</sup> The *Chevron* doctrine requires courts to undergo a two-step inquiry when examining agency decisions. At step one, the question is whether Congress has “directly spoken to the precise question at issue” or whether Congress has unambiguously blocked the proposed agency action. At step two, the question is whether the agency’s interpretation is “based on a permissible construction of the statute.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The upshot is that reasonable agency decisions should always be upheld unless they contradict clear congressional instructions.



at the outset, announced that it was about to lay out exceptions for synthetics in “farming and handling.” In the next breath though, it mentioned exemptions just for “production” and not for handling, followed immediately by the discussion of a broad exemption process.<sup>106</sup> If “handling” did not fit into any of those exemptions, then what was the point of mentioning “handling” at the outset? That was entirely unclear; indeed, the statute was silent on the matter. The agency’s view of the matter was a reasonable interpretation of a statutory silence, which is all that *Chevron* demands of agencies. Thus, under *Chevron*, the court should have upheld the agency’s actions. The statutory gap-filling at issue was the product of careful compromise among NOSB members, and it was crucial to the vitality of the entire organic industry. The court appeared entirely ignorant of the history of compromise that led to the final rule at issue and how overruling it would destabilize the industry.<sup>107</sup> The court’s ignorance is forgivable, but less so its meddling when deference was warranted.

Aside from technical expertise and familiarity with legislative and regulatory history, agencies are also better situated to decide statutory ambiguities that involve mixed questions of fact and values. Indeed, Vermeule and Professor Cass Sunstein convincingly argue that, “[i]t is reasonable to think that by virtue of their specialized competence and relative accountability, agencies are in a better position to make these decisions than courts.”<sup>108</sup>

The *Harvey* court’s decision on organic feed in converting dairy herds to organic involved just such a question of fact and value that should have been left to the USDA. The issue required some operating definition of what it means for a product to be “organic.” Elsewhere in the OFPA, Congress explicitly delegated defining organic to the USDA, with the

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<sup>106</sup> *Harvey*, 396 F.3d at 39.

<sup>107</sup> As Vermeule notes: “Agencies will often possess far better information about the legislative process that produced the statute, about the specialized policy context surrounding the statute’s enactment, and about the resulting legislative deal.” See VERMEULE, *supra* note 104, at 209.

<sup>108</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 927 (2003).

help of the NOSB.<sup>109</sup> The First Circuit should similarly have deferred to the agency's definition of organic when it came to converting dairy herds.

Before the First Circuit was a section of the OFPA that commanded conventional livestock to be "handled organically" for twelve months before their products could be sold as organic.<sup>110</sup> The Harvey court held that a dairy animal was not "handled organically" if it was fed anything less than 100% organic food at any time within twelve months before its products were sold.

The court's interpretation was reasonable for sure. But the question at issue is not whether the court could parse the OFPA and come up with a reasonable interpretation. The question, under *Chevron*, is whether the USDA's interpretation of the value-laden phrase "handled organically" was reasonable. The USDA's reading requires viewing milk from a cow living on food that is 80% organic and 20% nonorganic for several months before the milk is sold is still "handled organically."

The definition of "organic" is something that the diverse organic interests had pitched battles over before the final rules were issued. Ultimately, the agency's final rules included four categories of foods that could be labeled "organic" to some extent. Products for which every ingredient, including processing aids, were organic can be labeled "100 percent organic."<sup>111</sup> If it has 95 percent organic ingredients, then it can be labeled "organic."<sup>112</sup> The label "made with organic ingredients" can be used for products with 70-95 percent organic contents.<sup>113</sup> All other products can only use the word "organic" when listing any organic ingredients it may contain.<sup>114</sup>

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<sup>109</sup> See 7 U.S.C. §§ 6517-6518 (2006).

<sup>110</sup> 7 U.S.C. 6509(e)(2) (2006).

<sup>111</sup> 7 C.F.R. § 205.2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

If the core definition of “organic” is a matter of percentages of organic constituent parts, the USDA should have leeway to define “handled organically” in reference to percentages agreed upon as a compromise by the relevant interest groups.

But again, the First Circuit showed no sensitivity to the history of debates among organic movement members over what “organic” means, and it appeared unconcerned that Congress had side-stepped the value-laden, lexicographic matter and left it to the USDA elsewhere in the statute. Instead, the court delved into the messy of issue of what “organic” means and, in so doing, struck down a regulation that then threw the entire industry into chaos. It should have conceded its inadequacy to make an informed judgment on the mixed question of fact and value. Fortunately, the damage was minimized when Congress stepped in to reverse the decision.

One may argue that the congressional response to the First Circuit was an example of inter-branch dialogue in a well-functioning democratic system. But this is an idealized picture of democracy in action. Congress does not have infinite resources. Anytime Congress must step in to reverse a decision, it wastes valuable legislative resources.<sup>115</sup> “[A]gencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme,” Vermeule notes.<sup>116</sup> Thus, agency decisions are less likely to lead to such congressional reversal. When assessing how the branches of government should interact over organic food issues, we should consider these efficiency concerns.

In sum, the First Circuit disagreed with the USDA on how it defined one value-laden term – “handled organically” – and on one ambiguous statutory section. It was wrong to do so. The court was not just wrong on policy grounds, but more importantly it was wrong on the matter of institutional competency. The court should have deferred to the comparative expertise

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<sup>115</sup> See Sunstein & Vermeule, *supra* note 108, at 930 (discussing the costs when Congress must reverse a judicial decision that should be left to agencies).

<sup>116</sup> See VERMEULE, *supra* note 104, at 213.

of the USDA and the NOSB.<sup>117</sup> Indeed, federal courts should defer to the USDA on organic food regulations typically.

### *(B) Agency Capture*

The natural response to the argument that courts should give freer reign to the USDA on organic food regulations is that the USDA is far from infallible. It is certainly true that, although the USDA is far better situated to make decisions on organic food than courts, it has its institutional weaknesses too. Specifically, the USDA has shown a pattern of favoring one interest – that of big organic businesses – over other interests in the organic movement. Indeed, USDA officials may have some expertise that the First Circuit lacked, but the agency has shown a tendency to issue rules and regulations that do not reflect a commitment to fair, transparently-derived compromises.

The April 2004 guidance statements, which were issued to avoid as much public scrutiny as possible, are illustrative. The statements patently favored big organic businesses, ignored NOSB recommendations, and were crafted behind closed doors and finalized without input from the public or the other organic interests. Although the USDA rescinded the statements after a public outcry, the maneuver rightly called into question the USDA's commitment to always fairly regulating organic food. The whole affair suggested that the USDA was particularly beholden to big organic business interests over other interests. As writer Samuel Fromartz

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<sup>117</sup> The idea that courts should defer to agency expertise and that excessive judicial review hinders effective administrative rulemaking has much support in scholarship. See, e.g., JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *Duke L.J.* 1385 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Parity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 *Duke L.J.* 300.

noted: “This regulatory seesaw raised questions about the USDA’s intentions, doing little to nurture a sense of trust in the government’s ability to oversee the industry.”<sup>118</sup>

This example fits with observations by interest group theorists. As explained by Professor Einer Elhauge, interest group theorists maintain that:

Voters and interest groups demand the regulatory results that benefit them, and legislators and agencies supply regulatory results to the highest bidder. The results need not further the public interest.

Indeed, fundamental distortions in the political process may lead to systematic divergences from the public interest.<sup>119</sup>

These scholars further argue that interest group influence over agencies is likely to favor interests that are concentrated and not diffuse, because “diffuse groups face greater collective action obstacles.”<sup>120</sup> This suggests that large centralized companies, like big organic businesses, are more likely to have influence over an agency like the USDA than a diffuse groups, like small organic farmers scattered throughout the country.

However, not everyone embraces this view of administrative law. They argue, convincingly in part, that government officials are not motivated just by the resources that interest groups throw at them but also by altruism, ideology, and the general public preferences.<sup>121</sup> While it is certainly true that interest group theory does not completely explain agency officials behavior, it is undeniable that “special interest groups often take advantage of [some] economic factors to exercise disproportionate public influence.”<sup>122</sup> When that

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<sup>118</sup> FROMARTZ, *supra* note 17, at 202; *see also* Kruse, *supra* note 28, at 513-14 (noting that “[t]he swift reversals of these degrading changes to OFPA regulations set an early precedent of protecting OFPA from the influence of livestock corporations and other aspiring organic producers. The reaction to these legislative and administrative OFPA challenges illustrates the dedication of the organic community and Senator Leahy in preserving the original intent of the OFPA.”).

<sup>119</sup> Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 36 (1991).

<sup>120</sup> *Id.* at 38.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

disproportionate influence is exercised in the realm of organic food regulation and the USDA, it is likely to favor big organic businesses over the interests of the diffuse purists.

This is not to say that the USDA will always tilt in favor of big organic business. But, so long as the USDA is even somewhat more likely to favor one interest group of the others, particularly in a way that it is not transparent and open to the public, then that it is an institutional fault that should be considered.

This institutional fault may lead some to argue for stronger judicial review. Two points counsel hesitance, though. First, when agency capture happens behind closed doors, courts will not always know it has occurred. Second, given judges' lack of expertise for these technical matters, it is far from clear that courts will correct any capture problems the right way. However, for organic food regulation, there may be a partial answer to both of these points. As this paper argues later, agency regulations or guidance statements that appear to wholly ignore NOSB proposals are more likely the product of agency capture. Courts are certainly competent to easily determine whether USDA regulations in fact align with NOSB recommendations. Therefore, when NOSB recommendations and USDA decisions are patently out of line, courts can justifiably strike down the USDA's decisions or demand more cogent justifications that account for broader public concerns.

### *(C) The NOSB*

So, if courts lack the competence and the USDA lacks transparent fairness at times, where does that leave us? Fortunately, NOSB members have the expertise that the courts lack and the transparent, deliberative decision-making processes that the USDA sometimes eschews to the detriment of its democratic legitimacy.

In democratic societies, Stiglitz writes, “there should be a strong presumption in favour of transparency and openness in government.”<sup>123</sup> Similarly, Vermeule has as noted: “In a democratic polity, the hinge that connects accountability and deliberation is transparency.”<sup>124</sup> When it comes to transparency and deliberation, the NOSB has the USDA beat – giving it a greater claim to democratic legitimacy.

Indeed, one scholar writing recently on advisory bodies noted their legitimacy advantage compared to other government institutions: “[M]any advisory counterparts consult extensively with the public in developing recommendations, and seek to defend their proposals on the basis of these consultation practices.”<sup>125</sup> Moreover, advisory bodies may “develop inhouse technical expertise” and “hold hearings open to anyone interested or curious.”<sup>126</sup>

These democratically-favored characteristics apply to the NOSB. Consider the prime example of the National List of approved synthetics – an issue that is central to the purity and vitality of the organic industry. The OFPA explicitly calls on the NOSB to advise the USDA on the matter and to consider which synthetics to include on the list during meetings that are open to the public and in which public input is accepted. As Fromartz writes: “Lobbyists would not be able to push a synthetic through a back door of the USDA; the substance would have to be considered by the NOSB in public hearings.”<sup>127</sup>

Importantly, the NOSB is far less likely to evince bias or to be captured by special interests like big organic than is the USDA. The NOSB consists of representatives from all the relevant organic food interest groups, not just the big ones, and it holds all of its decision-making

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<sup>123</sup> Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999, at 115, 115-16.

<sup>124</sup> VERMEULE, *supra* note 104, at 180.

<sup>125</sup> Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 999 (2007).

<sup>126</sup> *Id.* at 997.

<sup>127</sup> FROMARTZ, *supra* note 17, at 204.

meetings in front of the public. These embodiments of the democratic ideals of pluralist representation and transparency should give us greater confidence in the NOSB.

Ultimately, the NOSB provides a crucial vehicle to ensure that the decisions on organic food represent compromises between all the organic movement's interests because its fifteen members are chosen to reflect this diversity. Moreover, because of its transparent deliberation, recommendations from the NOSB are more democratically legitimate and less likely to reflect the desires of anyone particular interest in an unfair way.

*(D) Argument of Deference if NOSB Followed*

All this should suggest that the NOSB is most likely to make the best – that is, the most informed and democratically legitimate – proposals for regulations on organic food. Thus, as a policy matter, the USDA should follow the NOSB's recommendations. But the recommendations of the advisory board are just that – recommendations. What can be done to ensure that the USDA regularly follows the board's advice?

One commentator has faulted the USDA for belittling the NOSB and argued that the USDA should “give the NOSB respect and heed the NOSB's recommendations on any changes to the organic regulations.”<sup>128</sup> Indeed, the Agricultural Marketing Services had criticized the USDA for not working to establish a “strong working relationship” with the NOSB.<sup>129</sup> But mere admonition by outside observers is not enough. They provide no mechanisms to ensure that the USDA will indeed follow the NOSB.

There are two ways to rectify that. One way to ensure such deference is for Congress to mandate it. However, such formal grants of authority to the board are unlikely for a couple

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<sup>128</sup> Kruse, *supra* note 28, at 530.

<sup>129</sup> Stephen Clapp, *National Organic Program Faces Court Ruling*, FOOD CHEMICAL NEWS, Aug. 8, 2005, No. 26, Vol. 47, at 1.



reasons. First, as an empirical matter, it is rare in this country for Congress to endow boards like the NOSB with formal binding authority. Second, giving the NOSB such power may eliminate some of its democratic strengths because “the possibility of augmenting an advisory body’s powers through delegation would increase the incentives for lawmakers to try to capture the advisory counterpart and redirect it for partisan purposes.”<sup>130</sup> Furthermore, consider that the Supreme Court has held that the Constitution places substantial limits on Congress’s power to delegate nonjudicial function to federal courts.<sup>131</sup> Perhaps it is best for legislatures to face similar restraints when delegating non-advisory responsibilities to boards whose members are neither chosen through a typical appointment process or from the ranks of the civil service that do most of the work for our administrative agencies.

Instead, this paper argues that indirect pressure through the federal courts is the best way to encourage the USDA to follow the NOSB. That is, federal courts should defer to USDA expertise generally, but they should engage in more searching review for organic rules and regulations that depart substantively from NOSB recommendations without clearly articulated and forceful reasons. USDA decisions made privately and that depart from NOSB recommendations are more likely the product of agency capture. When these kinds of USDA decisions are before courts, they are justified in demanding either that the USDA adopt the NOSB’s position or that it demonstrate the superiority of its position. Importantly, in the *Harvey* case, the USDA was acting in accord with NOSB recommendations; therefore, more searching review was not appropriate there.

Judges are well-equipped to review cases in this manner. Judges may lack the expertise to routinely question the details of organic food regulations, but they are certainly competent to

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<sup>130</sup> Elmendorf, *supra* note 125, at 1036.

<sup>131</sup> *See Morrison v. Olson*, 487 U.S. 654, 677-78 (1988).

consider process-related questions – such as whether the NOSB’s recommendations were duly considered. It has long been noted that “judiciary’s familiarity with procedural devices that facilitate adjudicative factfinding”<sup>132</sup> places judges in far superior positions when they examine procedures and not substantive issues. Moreover, any chance of judicial error due to lack of competence would be minimized because any opinion overruling an agency rule would align with the expert views of NOSB members. This reliance on the NOSB’s expertise should alleviate, at least in part, those who are concerned that judges are not more likely to get things right, even given that agencies may be captured by a particular special interest.<sup>133</sup>

As an empirical matter, the courts involvement here should be relatively rare. To date, the USDA has appear to follow NOSB recommendations in most instances.<sup>134</sup> In the two instances when it did not – during the initial drafting of the proposed final rules and in the April 2004 guidance statements – public outcry, particularly from organic purists, led the agency to back down. In both cases, the agency ultimately issued rules that aligned with the NOSB.

But relying solely on public outrage to check the USDA every time it unduly sides with big organic businesses – or some other interest – provides only a tenuous check on agency capture. It requires resources for interest groups to marshal the kind of focused public outcry that will lead a government institution to reverse course. Groups may not have the resources to engage in such an outcry every time the agency slips through a rule that is it not fair from a deliberative perspective. Knowing that courts will look more closely at rules that depart from NOSB recommendations will make the USDA even more reluctant to disregard the board.

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<sup>132</sup> Lawrence Rosenthal, *Does Due Process Have An Original Meaning*, 60 OK. L. REV. 1, 51 (2007).

<sup>133</sup> See Elhauge, *supra* note 119, at 33 (arguing that “even if interest group theory succeeds in demonstrating defects in the political process, that would not justify the leap to the conclusion that more intrusive judicial review would improve lawmaking”).

<sup>134</sup> For a list of the NOSB’s final recommendations, go to <http://www.ams.usda.gov/nosb/FinalRecommendations/FinalRecommendations.html>.

If an interest group knows it is less likely to win favorable regulation by trying to influence USDA officials, it will likely then put more of its resources into influencing NOSB decisions. But the board is better placed to handle such influence. Unlike the USDA, where such interest group influence may occur behind the scenes and result in guidance statements that are the product of no public input, any interest group resources focused on the NOSB will be part of larger open deliberation on the matter at hand. NOSB meetings are exactly the kind of public forum where we should want the slew of diverse interest groups in organic movements to hammer out their compromise rules and regulations.

The counter argument to this scheme is to question how courts can give deference to the NOSB but not the USDA. The argument in this paper, however, is not that the USDA is unworthy of deference. Rather, it is that when the USDA patently appears to have unduly ignored proposals from the NOSB, the courts are justified in looking more skeptically on the USDA's actions. The USDA does not need to follow the NOSB lock-step on every issue; but when it rejects the board's advice and issues rules or guidance documents without transparency or clearly-articulated and forcefully-reasoned responses to NOSB and public concerns, courts are justified striking down USDA decisions.

#### IV. CONCLUSION

Jim Pierce, of Organic Valley Family of Farms cooperative, once commented: "Hard as I try, I cannot think of another private-sector group being regulated that continually demands tougher regulations be inflicted on them."<sup>135</sup> But not everyone in the organic movement does demand stricter regulations. Impassioned purists often butt heads with big organic businesses

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<sup>135</sup> FROMARTZ, *supra* note 17, at 188.

that want looser standards to determine whether their products deserve the “USDA Organic” stamp. A mix of other interests – environmental and consumer, for example – often want to push the regulations in a different direction entirely. This paper addresses how the different institutions charged with overseeing organic food to one extent or another – the USDA, the NOSB, and the courts – should interact to produce the best regulations of organic food.

The paper advances four arguments. First, courts lack competency in the area of organic food. Second, the USDA is not always transparent in its oversight and may in fact favor big organic businesses over other interests. Third, the NOSB has the expertise that the courts lack and the transparent deliberation that makes its decisions less vulnerable to charges of unfairness or favoritism. Fourth, courts should typically defer to the USDA on organic food decisions. But courts should help ensure that the USDA follows NOSB proposals by engaging in more searching review of agency rules and regulations that are misaligned with the advisory board’s recommendations.