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Eaters, Powerless by Design

Margot J. Pollans

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

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

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

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INTRODUCTION

Food system scholars have for decades critiqued food production, distribution, and consumption, pointing in particular to the ways the system reinforces economic inequality, protects the power of the food industry (often referred to as "big food"), and enables exploitation.[1] Critics point to rising rates of diet-related disease (particularly in the Global North),[2] perpetual cycles of poverty and hunger (particularly in the Global South),[3] environmental externalities of food production,[4] abuse and economic injustice along the food supply chain,[5] and, increasingly, infringement of animal welfare.[6] These concerns have spawned a wealth of social movements and academic literature identifying and targeting a broad range of culprits: global entities such as the

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1. Alison Hope Alkon & Teresa Marie Mares, *Food Sovereignty in US Food Movements: Radical Visions and Neoliberal Constraints*, 29 AGRIC. & HUM. VALUES 347 (2012); Alison Hope Alkon & Julie Guthman, *Introduction*, *in* THE NEW FOOD ACTIVISM: OPPOSITION, COOPERATION, AND COLLECTIVE ACTION 1, 10–15 (Alison Hope Alkon & Julie Guthman eds., 2017); Sarah A. Roache, Charles Platkin, Lawrence O. Gostin & Cara Kaplan, *Big Food and Soda Versus Public Health: Industry Litigation Against Local Government Regulations to Promote Healthy Diets*, 45 FORDHAM URB. L.J. 1051 (2018). Marxist critiques of the food system and the refrain that the food system is broken are also common. *See, e.g.*, Thomas Cheney, *Historical Materialism and Alternative Food: Alienation, Division of Labour, and the Production of Consumption*, 11 SOCIALIST STUD. 105 (2016); Otto Scharmer, Opinion, *An Apple Shows Just How Broken Our Food System Is*, HUFFPOST (Mar. 11, 2019), https://www.huffingtonpost.com/entry/opinion-scharmer-our-broken-food-system_us_5b06b0a0e4b05f0fc8455acb [perma.cc/E2VB-ND6Y]; Tamar Haspel, *10 Things We Should Do to Fix Our Broken Food System*, WASH. POST (Dec. 28, 2015), https://www.washingtonpost.com/lifestyle/food/10-things-we-should-do-to-fix-our-broken-food-system/2015/12/28/ea720336-a8f7-11e5-9b92-dea7cd4b1a4d_story.html [perma.cc/32HJ-X44J]; Guido Schmidt-Traub & Michael Obersteiner, *Fixing Our Broken Food System: A Crucial SDG Challenge*, HORIZONS, Summer 2018, at 160. More recently, advocates have begun to argue, and this author agrees, that "broken" is the wrong word because, as this Article demonstrates, the system is functioning exactly as was designed. *See, e.g.*, Sarah Mock, *The Problem with the Food System Is It Works: And How to Break It*, MEDIUM (Nov. 18, 2018), https://sarah-k-mock.medium.com/the-problem-with-the-food-system-is-it-works-39604d56a84f [perma.cc/M7F4-KDTL].

2. *E.g.*, Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL'Y 17, 20–25 (2013).

3. *E.g.*, Jennifer Williams Zwagerman, *Recognizing Challenges and Opportunities in the Quest to End Hunger*, 4 TEX. A&M L. REV. 315, 317–18 (2017); Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131, 137–42 (2006).

4. *E.g.*, J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 274–92 (2000).

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

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

World Trade Organization;[7] the meat processing industry;[8] multinational food companies;[9] grocery, retail, and fast-food chains;[10] genetic engineering; Monsanto (now Bayer);[11] and many others.

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

This Article identifies three mechanisms through which food law disempowers: homogenization, information control, and polarization. Together these three phenomena strip individuals and communities of sovereignty, both directly through authoritarian-style governance and indirectly through imposition of dominant cultural practices. Drawing on a broad literature on food sovereignty, this Article describes U.S. food law as a system of control rather than a system of nourishment.[12]

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7. *See* Hilal Elver, *The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food*, 20 UCLA J. INT'L L. & FOREIGN AFFS. 1, 19–20 (2016).

8. *See* Kelsea Kenzy Sutton, Note, *The Beef with Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. REV. 611, 629 (2013).

9. Roache et al., *supra* note 1, at 1061–67; Michele Simon, Commentary, *PepsiCo and Public Health: Is the Nation's Largest Food Company a Model of Corporate Responsibility or Master of Public Relations?*, 15 CUNY L. REV. 9 (2011).

10. *See* Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 353–56.

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

12. La Via Campesina, an international peasant movement, first defined food sovereignty in 1996 and has described it as "the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems." *Declaration of Nyéléni*, LA VIA CAMPESINA (Feb. 27, 2007), https://viacampesina.org/en/declaration-of-nyi [perma.cc/FRK8-HGHJ]; *see also* Raj Patel, *What Does Food Sovereignty Look Like?*, 36 J. PEASANT STUD. 663, 665 (2009); Madeleine Fairbairn, *Framing Transformation: The Counter-Hegemonic Potential of Food Sovereignty in the US Context*, 29 AGRIC. & HUM. VALUES 217, 222–23 (2012); Aeyal Gross & Tamar Feldman, *"We Didn't Want to Hear the Word 'Calories'": Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure*, 33 BERKELEY J. INT'L L. 379 (2015) (arguing that food sovereignty is an essential companion concept to food security for understanding power dynamics in the context of Israeli control of Gaza). *But see* Devon G. Peña, *Autonomía and Food Sovereignty: Decolonization Across the Food Chain*, *in* MEXICAN-ORIGIN FOODS, FOODWAYS, AND SOCIAL MOVEMENTS: DECOLONIAL PERSPECTIVES 5, 10–13 (Devon G. Peña, Luz Calvo, Pancho McFarland & Gabriel R. Valle eds., 2017) (critiquing La Via Campesina's approach to food sovereignty for promoting western concepts of human rights and accepting sovereign state power and anthropocentric dominionism).

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

Second, information control limits food system participants' autonomy and agency. Drawing a parallel to authoritarian regimes, which consolidate and hold power by suppressing critique and constraining dissemination of information that might feed dissent, is illuminating. Such regimes also celebrate misinformation, using propaganda to spread false and misleading narratives about dissidents and disfavored political viewpoints.[15] Our food law system is not, strictly speaking, authoritarian, but these practices are nevertheless prevalent. U.S. food law suppresses information about, and criticism of, the food system, and it allows for strategic use of information chaos to foster confusion and stymie reform.

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

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13. *Cf.* JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM 151 (2018) (describing "diversity, with its concomitant tolerance of difference," as "a threat to fascist ideology," which "rejects pluralism and tolerance").

14. *See id.* at 4 (identifying as a common feature of fascism the reliance on myth "based on fantasies of a nonexistent past uniformity"); TIAGO SARAIVA, FASCIST PIGS: TECHNOSCIENTIFIC ORGANISMS AND THE HISTORY OF FASCISM 6 (2016).

15. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 341 (new ed. 1973) (describing the role of information control in authoritarian regimes).

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

Underlying and justifying many of the legal rules that generate these features are two contradictory myths about food consumers. The first myth is that consumers are helpless: the law must treat them as objects for protection. This myth justifies a series of consumer protection laws focusing on food safety and food fraud. These are the laws that generate homogenization. This myth is self-actualizing, as the laws that it justifies disempower food consumers and producers by limiting what foods are considered safe, clean, and healthy.

The second myth is that of the responsible consumer: consumers are encouraged to take personal responsibility both for their own health and for the health of the system as a whole. This myth sets the stage for information-control policies that leave consumers helpless. It does so by limiting availability of meaningful information and relieving governmental responsibility either to address food system problems or to hold food producers accountable for the harmful externalities of their products. This second myth is self-defeating, as the legal structures that assume consumer responsibility impede meaningful consumer choice. This tug-of-war reinforces the wealth and power of narrow segments of the food system while disempowering and devaluing food system workers and food consumers.

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

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

Part III considers how both these myths, and their attendant food laws and policies, contribute to polarization within the food system, isolating consumers from food systems workers and from one another. This isolation protects existing structures of power in the food system and leaves both workers and consumers open to exploitation. Part III then briefly revisits how homogenization, information controls, and polarization contribute to powerlessness for many food system participants. It concludes with some preliminary ideas on how to begin claiming sovereignty.

Organic Market Summary and Trends, USDA ECON. RSCH. SERV. (Feb. 12, 2021), https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-summary-and-trends [perma.cc/UL8T-PW6F].

I. FROM HELPLESSNESS TO HOMOGENIZATION

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

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

A. *The Helpless Consumer as Food Law's Beneficiary*

Food safety laws and fraud laws protect consumers from potential bad-producer behavior (negligent or otherwise) and from risks associated with food consumption. Both sets of laws assume that producers are better positioned to protect consumers from these risks because producers have more information about, and control over, food ingredients and production processes.

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17. *See* Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357, 358, 364 (2010) (using the phrase "food fascism" to refer to laws such as California's foie gras ban and its restrictions on the cage sizes of laying hens). *But see* Samuel R. Wiseman, *The Dangerous Right to Food Choice*, 38 SEATTLE U. L. REV. 1299 (2015) (arguing that those with the most to gain from complete freedom of food choice are not consumers but the food industry). Indeed, these types of food laws are widely critiqued on libertarian grounds. *See* BAYLEN J. LINNEKIN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE (2016) (arguing that overregulation of food production discourages sustainability by driving up production costs and discouraging innovation); JOEL SALATIN, EVERYTHING I WANT TO DO IS ILLEGAL: WAR STORIES FROM THE LOCAL FOOD FRONT (2007) (arguing that food safety law puts particular burdens on smaller-scale sustainable-food businesses). This "food freedom" movement emphasizes the consequences of food safety law for individual consumer choice. For instance, many outspoken defenders of raw milk challenge state and federal prohibitions, arguing both that raw milk is safe and that individuals should be able to assume the risk of purchasing it. *See id.* at 17. This Article is concerned less with individual free choice and more with the systemic constraints that undermine the extent to which the choices we do make can possibly be meaningful.

1. Protection from Unsafe Food

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

Food safety law influences food product development, shaping production methods and conditions as well as ingredient choice.[22] Food and Drug Administration (FDA) rules implementing the Food Safety Modernization Act of 2011 (FSMA) include specific directives governing a significant swath of the food supply chain, including irrigation of produce fields, produce washing and packing, and food processing and distribution.[23] Federal law also closely regulates animal slaughter and meat processing.[24] States regulate retail

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

19. RENÉE JOHNSON, CONG. RSCH. SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1 (2016) (noting that annually in the United States there are about 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths from foodborne illness). It is also worth noting that although food safety is extremely important, it is a small-scale problem compared with the other public-health concerns of the food system (such as worker exploitation, diet-related disease, and environmental contamination). *See* Broad Leib & Pollans, *supra* note 18.

20. *E.g.*, Federal Food Drug and Cosmetic Act § 402, 21 U.S.C. § 342(a)(1) (defining adulteration by reference to, among other things, "poisonous or deleterious" ingredients and "insanitary conditions" for preparing, packing, or holding); Food Safety Modernization Act § 105, 21 U.S.C. § 350h (directing the FDA to establish produce safety requirements).

21. Broad Leib & Pollans, *supra* note 18, at 1202 (discussing the problematic consequences of overprotective food safety laws).

22. Telephone Interview with Aaron Singer, Gen. Couns., Boxed (Apr. 30, 2021) (explaining that bulk-food delivery service Boxed has internal food safety standards that are more stringent than regulatory requirements and that, from the perspective of the legal team, food safety considerations are more pressing than environmental or consumer health considerations for which there are not specific production requirements); Camila Gadotti, *Examining the Role of Food Safety During R&D*, FOOD SAFETY TECH (Sept. 4, 2015), https://foodsafetytech.com/column/examining-the-role-of-food-safety-during-rd [perma.cc/95SL-9MS3].

23. *E.g.*, Produce Safety Rule, 21 C.F.R. pt. 112 (2020); Human Preventive Controls Rule, 21 C.F.R. pt. 117 (2020).

24. Federal Meat Inspection Act, 21 U.S.C. §§ 601–695.

food service, and all fifty states have adopted some version of the FDA's model food code, which applies the same level of precision to regulation of restaurants and other parts of the food service industry.[25] Tort law reinforces food safety law, imposing strict liability for harm that follows from food consumption.[26] In addition to substantive obligations, food companies also face record-keeping requirements.[27] For instance, in dairy processing, cheese manufacturers must keep detailed records of pasteurization practices.[28] These laws impose significant regulatory burdens on farms, food processors, and food service establishments.

2. Protection from Fraud and Confusion

Like food safety laws, food fraud law seeks to protect consumers from food producers who might take advantage of information asymmetries. These laws emphasize the importance of truth in labeling and penalize producers and marketers for misbranding. Food fraud law relies on control of language. Although this mechanism ostensibly protects the helpless consumer from confusion, it also shapes participation in food markets.[29] This Section provides a brief overview of food fraud laws and then delves into two examples: standards of identity and organic labeling. Both are illustrative of how the quest to protect consumers from confusion ultimately disempowers those same consumers by controlling the language we use to describe food.

Food fraud laws serve to protect consumers from false and misleading claims on food packaging and advertising. A slew of information disclosure laws are designed to prevent fraud.[30] These include requirements to display

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25. NAT'L RETAIL FOOD TEAM, U.S. FOOD & DRUG. ADMIN., ADOPTION OF THE FDA FOOD CODE BY STATE AND TERRITORIAL AGENCIES RESPONSIBLE FOR THE OVERSIGHT OF RESTAURANTS AND RETAIL FOOD STORES 5–6 (2019), https://www.fda.gov/media/107543/download [perma.cc/5GPC-HKJJ]; *see* FOOD CODE (U.S. FOOD & DRUG ADMIN. 2017), https://www.fda.gov/media/110822/download [perma.cc/T7SZ-SCY5].

26. RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (AM. L. INST. 1965) ("The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them."). *But see* Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 938–39 (2015) (arguing that while food-related tort litigation "has traditionally focused on food safety," it has broadened in recent years to address a range of issues, including "the cultural, moral, and political meanings of food as a dignitary issue").

27. *See, e.g.*, 21 C.F.R. §§ 112.161–.167 (detailing FSMA record-keeping requirements for produce safety).

28. GRADE "A" PASTEURIZED MILK ORDINANCE item 16p.(D), at 108 (U.S. FOOD & DRUG ADMIN. 2015), https://www.fda.gov/media/99451/download [perma.cc/5MES-67FZ].

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

30. *See, e.g.*, 21 C.F.R. § 1.21(a)(1) (2020). Information disclosure is discussed in more detail in Part II.

food identity and a net quantity statement.[31] Packages must display a nutrition facts panel.[32] Similar nutrition facts disclosure requirements apply to chain restaurants.[33] In addition, all other information on the display must comply with a comprehensive set of rules regarding misbranding and health claims.[34] Many of these laws target "economic adulteration," a practice in which a food manufacturer uses a cheaper substitute for a listed ingredient.[35] Economic adulteration is common in fish, honey, wine, and olive oil.[36]

Reinforcing these federal statutory obligations are state statutory and common law fraud protections. Consumer fraud law reinforces misbranding laws, creating liability for material misrepresentation.[37] Recently, a spate of lawsuits under state consumer protection laws have targeted label claims such as "natural."[38] Fraud laws open up producers to a range of possible litigation (from consumers, the FDA, and the Federal Trade Commission). Although these laws leave some room for "puffery" and assume that consumers are reasonable, they create significant constraints for producers.[39]

a. Standards of Identity

A variety of current and recently proposed federal and state laws seek to define specific terms used in food labeling and marketing. The examples of "milk," "meat," and "organic" illuminate this phenomenon. In recent years, the markets for vegan alternative foods have expanded significantly amid concerns about animal welfare and the carbon footprint of animal agriculture.[40] The Food Drug and Cosmetic Act (FDCA) authorizes the FDA to develop

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31. *Id.* §§ 101.3, 101.107(h); *see also* 9 C.F.R. § 317.2(i) (2020) (requiring an inspection legend and establishment number for meat products); *id.* § 381.125(a) (requiring safe handling information for poultry).

32. 21 U.S.C. § 343(q).

33. *Id.* § 343(q)(5)(H).

34. *Id.* § 343 (defining misbranding).

35. RENÉE JOHNSON, CONG. RSCH. SERV., R43358, FOOD FRAUD AND "ECONOMICALLY MOTIVATED ADULTERATION" OF FOOD AND FOOD INGREDIENTS (2014).

36. *Id.* at 1.

37. *See, e.g.*, Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84 (D.N.J. 2011) (evaluating a consumer allegation that "less sodium" on a Campbell's Soup can was misleading). The Federal Trade Commission, which regulates marketing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45, also regulates food marketing. *See* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 182–83 (1984) (describing how the FTC defines material misrepresentation).

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

39. *See generally* Paul Chan, *Liable Labels*, L.A. LAW., Feb. 2015, at 25 (describing the rise of consumer food litigation).

40. Amy Brown, *Growing Fears for Climate Help Fuel Rise in Plant-Based Diets*, REUTERS EVENTS (May 28, 2019) https://www.reutersevents.com/sustainability/growing-fears-climate-help-fuel-rise-plant-based-diets [perma.cc/QFE4-F9XH].

standards of identity for foods.[41] These standards specify with great particularity what constitutes a particular type of food, and they are intended to prevent consumer confusion.[42] The agency has set standards for many foods, including peanut butter, maple syrup, sherbet, and milk.[43] For many years, the FDA relied heavily on food standards of identity, often using very precise standards for common food terms.[44] Although such standards have mostly fallen out of favor, recently the dairy industry and some members of Congress have been pushing the agency to crack down on rampant use of the term "milk" on nondairy products.[45] The FDA first defined milk in 1977 as "the lacteal secretion . . . of one or more healthy cows."[46] This definition, which the FDA has not strictly enforced, excludes nondairy milks and even milk from other mammals, such as goats or sheep.[47] In a 2016 letter to the FDA, members of Congress called current misuse "harmful to the dairy industry."[48] The

41. *See* 21 U.S.C. § 341. On the history and operation of these standards, see Richard A. Merrill & Earl M. Collier, Jr., *"Like Mother Used to Make": An Analysis of FDA Food Standards of Identity*, 74 COLUM. L. REV. 561, 562–81 (1974).

42. *See* Food Standards; General Principles and Food Standards Modernization, 70 Fed. Reg. 29,214, 29,216 (proposed May 20, 2005) (to be codified at 21 C.F.R. pt. 130) (describing the function of and legal authority for standards of identity).

43. 21 C.F.R. § 164.150 (2020) (peanut butter); *id.* § 168.140 (maple syrup); *id.* § 135.140 (sherbet); *id.* § 131.110 (milk). For a complete list of foods with standards of identity, see *id.* §§ 130–169 (codifying standards).

44. *See, e.g.*, *id.* § 135.140 (establishing the standard for sherbet).

45. *See, e.g.*, NAT'L MILK PRODUCERS FED'N, CITIZEN PETITION ON BEHALF OF THE NATIONAL MILK PRODUCERS FEDERATION 4 (2019), https://www.nmpf.org/wp-content/uploads/2019/03/National-Milk-Producers-Federation-Citizen-Petition-and-Attachments.pdf [perma.cc/F7H2-H6VQ] (petitioning the FDA to enforce existing "imitation" labeling requirements "against nutritionally inferior non-dairy substitutes for standardized dairy foods" and "to codify in more detailed form longstanding FDA policies that permit the name of a standardized dairy food . . . to be used in the statement of identity of a non-dairy substitute for the standardized food only under limited and defined conditions").

46. 21 C.F.R. § 131.110(a) (2020).

47. The FDA sent occasional warning letters to companies selling nondairy products. *See, e.g.*, Letter from Alonza E. Cruse, L.A. Dist. Off., U.S. Food & Drug Admin., to Long H. Lai, Lifesoy, Inc. (Aug. 8, 2008), https://www.fdalabelcompliance.com/letters/ucm1048184 [perma.cc/8VQX-RZY2]. There have also been occasional consumer suits. *See, e.g.*, Priscilla DeGregory, *Woman Sues Vegan 'Butter' for Not Being Real Butter*, N.Y. POST (Nov. 12, 2018, 8:06 PM), https://nypost.com/2018/11/12/woman-sues-vegan-butter-for-not-being-real-butter [perma.cc/TMF9-2WTQ].

48. Letter from 32 Members of Congress to Robert M. Califf, Comm'r, U.S. Food & Drug Admin. (Dec. 16, 2016), https://www.nmpf.org/wp-content/uploads//Welch-Simpson%20Letter.pdf [perma.cc/LX7B-MWZJ]. For a discussion of the effect of nondairy milks on the dairy industry, see Beth Kaiserman, *Dairy Industry Struggles in a Sea of Plant-Based Milks*, FORBES (Jan. 31, 2019, 10:39 AM), https://www.forbes.com/sites/bethkaiserman/2019/01/31/dairy-industry-plant-based-milks [perma.cc/9X79-ADGJ]. In April 2021, Senator Tammy Baldwin of Wisconsin introduced the "Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act" or "DAIRY PRIDE Act," which seeks to compel the FDA to enforce the standard of identity against plant-based alternatives to milk, cheese, yogurt, etc. S. 1346, 117th Cong. (2021).

campaign is an explicit attempt to use language control to curb the growing popularity of plant-based products.

In 2018, the FDA announced plans to review the issue in order to "ensure that the labeling of such products does not mislead consumers, especially if this could compromise their health and well-being."[49] The agency solicited comments and feedback from the public to gain more insight into how consumers use plant-based alternatives and how they understand terms like "milk" or "cheese" when used to label products made from soy, peas, or nuts.[50] The FDA was concerned with whether consumers understood the nutritional characteristics and differences between those products and dairy in determining their own dietary choices.[51] The agency claimed to be collecting information as part of "efforts to reduce chronic disease and its impact on public health."[52]

A similar fight is playing out over the word "meat." Nearly half of the states have introduced meat-label censorship laws that aim to stop meat alternatives, including both plant-based and lab-grown products, from being marketed as "meat."[53] Ten states have passed such laws. Missouri, which was the first in August 2018, requires that products not derived from poultry or livestock include phrases such as "lab-grown" or "plant-based" on their packaging.[54] Any producer failing to include an appropriate disclaimer after January 1, 2019, would be subject to fines and a possible jail sentence.[55] The law is the subject of ongoing litigation on First Amendment and Dormant Commerce Clause grounds.[56] Wyoming's version of the law is stricter, prohibiting using

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49. Press Release, Scott Gottlieb, Comm'r, U.S. Food & Drug Admin., Statement on Modernizing Standards of Identity and the Use of Dairy Names for Plant-Based Substitutes (Sept. 27, 2018), https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-modernizing-standards-identity-and-use-dairy-names [perma.cc/HE5W-486P]. The effort is one of multiple in a multiyear Nutrient Innovation Strategy. *Id.*

50. Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, 83 Fed. Reg. 49,103, 49,103 (Sept. 28, 2018).

51. *Id.*

52. Press Release, Scott Gottlieb, *supra* note 49. The Senate rejected a proposal to block FDA spending on this inquiry. Katherine Tully-McManus, *Senators Ask 'What Is Milk?': Dairy Industry Wants to Limit the Word to What Comes out of Cows*, ROLL CALL (Aug. 1, 2018, 11:19 AM), https://www.rollcall.com/news/politics/got-milk-senators-ask-milk [perma.cc/8JC8-XBHZ]. Senator Mike Lee sponsored the bill, expressing his view that consumers are fully informed on the differences between dairy and plant-based milks. *See id.*

53. Elaine Watson, *Plant-Based and Cell-Cultured 'Meat' Labeling Under Attack in 25 States*, FOODNAVIGATOR (July 29, 2019, 8:34 AM), https://www.foodnavigator-usa.com/Article/2019/05/29/Plant-based-and-cell-cultured-meat-labeling-under-attack-in-25-states [perma.cc/Q4BG-9BBU]; *see also Federal Court Blocks 'Veggie Burger' Censorship Law*, ACLU (Dec. 11, 2019), https://www.aclu.org/press-releases/federal-court-blocks-veggie-burger-censorship-law [perma.cc/22PP-N35Q].

54. *Public Statement—Meat Labeling*, MO. DEP'T OF AGRIC. (Aug. 30, 2018), https://agriculture.mo.gov/animals/meat.php [perma.cc/7FTB-F9YT].

55. *See id.*

56. Complaint at 2, Turtle Island Foods, SPC v. Richardson, 425 F. Supp. 3d 1131 (W.D. Mo. 2019) (No. 18-cv-04173). Settlement talks between the parties, including the Good Food Institute, the Animal Legal Defense Fund, the ACLU of Missouri, and Tofurky broke down in

the word "meat" on labeling for any product not derived from poultry or livestock.[57] Other states with similar laws include Arkansas,[58] Kentucky,[59] North Dakota,[60] South Dakota,[61] Montana,[62] Louisiana,[63] South Carolina,[64] Mississippi,[65] Georgia,[66] and Alabama.[67] A number of other states have tried and failed to pass such laws.[68]

b. Organic Labeling

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

The Organic Foods Production Act of 1990 (OFPA) authorizes the Department of Agriculture (USDA) to regulate use of the term "organic" and is designed to preempt various state and private organic-certification schemes.[69] The Agricultural Marketing Service (AMS) determines which food production and processing practices qualify as "organic" and how the word may be

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2019. Michelle C. Pardo, *No Meating of the Minds: Settlement Reaches an Impasse in Missouri Meat Advertising Lawsuit*, DUANE MORRIS: ANIMAL L. DEVS. (July 9, 2019), https://blogs.duanemorris.com/animallawdevelopments/2019/07/09/no-meating-of-the-minds-settlement-reaches-an-impasse-in-missouri-meat-advertising-lawsuit [perma.cc/H3AK-XT5H].

57. WYO. STAT. ANN. § 35-7-119 (2021).

58. ARK. CODE ANN. § 2-1-302 (Supp. 2021).

59. KY. REV. STAT. ANN. § 217.035 (LexisNexis Supp. 2020).

60. N.D. CENT. CODE § 19-02.1-12.1 (Supp. 2021).

61. S.D. CODIFIED LAWS § 39-4-26 (Supp. 2021).

62. MONT. CODE ANN. § 50-31-103(19) (2019).

63. LA. STAT. ANN. § 3:4743 (Supp. 2021).

64. S.C. CODE ANN. § 47-17-510 (Supp. 2020).

65. MISS. CODE ANN. § 75-35-15 (Supp. 2020). In 2019, the Mississippi Department of Agriculture promulgated a rule clarifying that a plant-based product including a front of package qualifier such as "plant-based" or "meat-free" would not violate the law. 2-7 MISS. CODE R. § 112.01 (LexisNexis 2019). The Institute for Justice, which had brought suit challenging the law, suggested that the changes were in response to their lawsuit. Press Release, Inst. for Just., Under New Proposed Regulation, "Veggie" Burgers Will Be Legal in Mississippi (Sept. 6, 2019), https://ij.org/press-release/under-new-proposed-regulation-veggie-burgers-will-be-legal-in-mississippi [perma.cc/UZ5A-LMUZ].

66. GA. CODE ANN. § 26-2-152 (Supp. 2021).

67. ALA. CODE § 2-17-10 (LexisNexis Supp. 2020).

68. *See, e.g.*, S. 304, 110th Gen. Assemb., Reg. Sess. (Tenn. 2019); H.R. 2556, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); L. 594, 106th Leg., 1st Sess. (Neb. 2019); H.R. 1414, 55th Gen. Assemb., Reg. Sess. (Ind. 2019); S. 2035, 86th Leg., Reg. Sess. (Tex. 2019); H.R. 1519, 66th Leg., Reg. Sess. (Wash. 2019); H.R. 2604, 54th Leg., 1st Reg. Sess. (Ariz. 2019); H.B. 2274, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); H.R. 222, 54th Leg., 1st Sess. (N.M. 2019).

69. *See* 7 U.S.C. §§ 6503(a), 6505(a)(1); 7 C.F.R. § 2.79(a)(8)(liii) (2021).

used in food labels and advertising.[70] Although the statute has some underlying environmental goals, its primary purpose is to facilitate marketing of organic products by ensuring the label's validity.[71]

The "organic" movement began as a reaction to the industrialization of agriculture.[72] Critical food scholar Julie Guthman has identified two key constituents of the movement: "those who see organic agriculture as simply a more ecologically benign approach to farming and those who seek a radical alternative to a hegemonic food system."[73] Guthman observes that the organic label ultimately serves neither end particularly well, in part because of how the organic industry has itself industrialized and replicated the conventional agricultural industry.[74] Many have expressed concern that large-scale agribusiness has flooded into the industry, following the letter but not the spirit of the law.[75] Meanwhile, smaller enterprises that continue to follow the spirit of the law are not always able to comply with its letter. For instance, Roxbury Farm, a four-hundred-acre farm in Kinderhook, New York, that has operated a community-supported agriculture program since 1991, decided only recently to apply for organic certification.[76] As the farm explained to members in a weekly newsletter, "[f]or years we followed all of the rules but didn't certify as we have such a direct connection to all of you. An expensive certification didn't seem necessary. Each year we pay between $3000 and $4000 to use the certified organic label."[77]

In each of these examples, language control is justified on the grounds of protecting helpless consumers from confusion. In both cases, however, there is

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70. *See About AMS*, USDA AGRIC. MKTG. SERV., https://www.ams.usda.gov/about-ams [perma.cc/JTX8-BCTU]; *Organic Production/Organic Food: Information Access Tools*, USDA NAT'L AGRIC. LIBR. (Oct. 2021), https://www.nal.usda.gov/afsic/organic-productionorganic-food-information-access-tools [perma.cc/4D82-BWJ3].

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

72. JULIE GUTHMAN, AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA 12 (2014) (situating the origins of the "organic critique" of industrialized agriculture in the latter's "social and ecological exploitation").

73. *Id.* at 3.

74. *Id.* at 21–22 (observing that despite the critique, organic food is less toxic for farmworkers, neighbors, and eaters than the alternative); BRIAN K. OBACH, ORGANIC STRUGGLE: THE MOVEMENT FOR SUSTAINABLE AGRICULTURE IN THE UNITED STATES 159–60 (2015) (observing that the passage of OFPA contributed to consumers and conventional agribusiness enterprises flooding into the market); *see also* GUNTRA A. AISTARA, ORGANIC SOVEREIGNTIES: STRUGGLES OVER FARMING IN AN AGE OF FREE TRADE 21–26 (2018) (exploring how free-trade regimes and the pressure for regulatory harmonization have undermined "organic sovereignties" in other countries).

75. *E.g.*, OBACH, *supra* note 74.

76. *Week #13*, Newsletter (Roxbury Farm CSA, Kinderhook, N.Y.), Sept. 1, 2020 [hereinafter Roxbury Farm Newsletter], https://mailchi.mp/roxburyfarm.com/june-8-2020-news-from-the-farm-1732452 [perma.cc/N9QK-G8LV].

77. *Id.* (lamenting that "once Cheetos could be certified organic, the meaning of the label was watered down a bit for us").

another primary constituency: competitors. Like other types of food fraud laws, particularly those governing economic adulteration, these language controls protect other industry participants by establishing legal monopolies over certain words. Language control in the guise of helping the helpless thus allows for some degree of control over food itself. Its primary function is to steer consumer purchasing toward products complying with state-sanctioned definitions and to protect the economic interests of the producers of those products.

B. *Homogenizing Food and Food Production*

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

In a moment when foodie culture proliferates, the diversity of available food types appears to be on the rise. This Section nevertheless hypothesizes that although choice appears to be increasing from a consumer perspective (particularly an elite consumer perspective), the increase masks a more fundamental narrowing that follows from the control that state regulators and consolidated food processors and retailers have over the food system. Indeed, while the total number of available food products continues to increase, the selection becomes increasingly consistent from store to store as consolidation continues in the retail and restaurant industries.[78] This appearance of choice hides how the reorientation of the global food system to create this choice generates great costs for many people in developing countries and for low-income communities within the United States.[79] While surface-level choice proliferates, meaningful choice disappears.

Consider, for instance, a virtual stroll through the frozen-pizza department at stopandshop.com. A quick search turns up 185 different types of frozen pizza, pizza bites, pizza bagels, pizza pockets, and pizza-flavored burritos, burgers, and even macaroni and cheese. This pizza cornucopia creates an illusion of choice, but the meaningful range of difference in this universe of highly processed frozen foods is actually quite limited. And the vast majority of the offerings come from just a handful of companies. Two main mechanisms contribute to this homogenization. The first is consolidation of production, processing, distribution, and retail. The second are processes of sterilization and

78. *See infra* notes 86–89 and accompanying text.

79. *See* Mohsen Al Attar Ahmed, *Monocultures of the Law: Legal Sameness in the Restructuring of Global Agriculture*, 11 DRAKE J. AGRIC. L. 139, 147, 154–57 (2006) (exploring how agricultural intellectual property law contributes to declining crop diversity and the rise of "homogenous industrial production systems" (emphasis omitted)).

cultural hegemony. These processes reduce diversity of food choice and of participation in food production. They also reduce diversity of participation in food production governance by narrowing the realms of permissible expertise on which that governance relies. As the following discussion explains, the law of the helpless consumer contributes to both consolidation and sterilization.

1. Consolidating Food Production and Distribution

Consolidation is perhaps the single word that best sums up change in the food system over the last century.[80] Part of this story is familiar. Throughout the twentieth century, food production at all stages—from agricultural-input production to farming, processing, and retail—has increased in scale and uniformity.[81] Indeed, despite occasional programs championing subsistence or small-scale market farming, federal policy in the United States consistently favors scale.[82] Federal policy facilitated cheap labor, first through state-sponsored slavery and then by excluding agricultural workers from labor laws.[83] Other early federal supports for scale include investment in irrigation projects in the West.[84] In the twentieth century, state support for large-scale agriculture dates largely to the New Deal, during which time Congress developed a series of agricultural supports that benefited larger-scale operations.[85] Of course, federal policy is not the sole cause of consolidation in the food system.

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

81. CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, U.S. DEP'T OF AGRIC., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2, 7 (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf [perma.cc/5APT-ZLXD].

82. Noa Ben-Asher & Margot J. Pollans, *The Right Family*, 39 COLUM. J. GENDER & L., no. 1, 2019, at 1, 35; Nathan A. Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL'Y 12, 20–22 (2017) (arguing that consolidation was not the inevitable result of technological development but instead the intentional result of federal policy).

83. Ben-Asher & Pollans, *supra* note 82, at 38; AMY E. DASE, HELL-HOLE ON THE BRAZOS: A HISTORIC RESOURCES STUDY OF CENTRAL STATE FARM, FORT BEND COUNTY, TEXAS 5 (2004) [perma.cc/5C75-XTAN] (finding that after the Civil War, Black prisoners were leased for labor to sugar plantations, railroads, and other businesses for forced labor); S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [perma.cc/83WJ-VHUF]; *see also* FARMWORKER JUST., NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS, http://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf [perma.cc/2MN4-XN7K].

84. *E.g.*, DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST 51–52 (1985) (describing federal power in the western United States through capital investment in water infrastructure projects); *id.* at 130–31 (identifying the National Reclamation Act of 1902, which federalized construction and management of western irrigation projects, as "the most important single piece of legislation in the history of the West").

85. Rosenberg & Stucki, *supra* note 82, at 14.

Technology, such as refrigeration, mechanical harvesting, and agricultural biotechnology, also played a key role.[86] Federal policy has historically tended to reinforce the consolidating effect of technology by affirmatively requiring certain technologies that favor scale (e.g., milk pasteurization) or by preferencing farmers who used certain technologies in allocating agricultural subsidies.[87]

Consolidation is widely criticized because of the power it confers on the remaining players in the system to set prices, determine working conditions, and formulate food.[88] Consolidation also contributes to homogenized food systems primarily by nationalizing products, retailers, and restaurant chains, such that the food landscape looks relatively similar from one town to the next. For example, a recent study of Walmart, the largest food retailer in the world, found that "[i]n 43 metropolitan areas and 160 smaller markets, Walmart captures 50 percent or more of grocery sales . . . . In 38 of these regions, Walmart's share of the grocery market is 70 percent or more."[89] In many rural areas, dollar stores also play newly significant roles in the retail food environment.[90] Overall, in the past several decades, the number of food products available for sale has increased at the national level, but it has decreased at the global level.[91]

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86. *See* WILLARD W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS 90–91, 384–85 (2d ed. 1993).

87. *See* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1240–41 (2020) (describing how USDA county committees, which help to distribute subsidies, favored wealthier farmers and supported the adoption of the newest technology).

88. *See infra* notes 212–217 and accompanying text (discussing the consequences of consolidation in the poultry industry); Moss & Taylor, *supra* note 10, at 348 (arguing that consolidation squeezes both farmers and consumers); David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61, 62 (2010). *But see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-746R, U.S. AGRICULTURE: RETAIL FOOD PRICES GREW FASTER THAN THE PRICES FARMERS RECEIVED FOR AGRICULTURAL COMMODITIES, BUT ECONOMIC RESEARCH HAS NOT ESTABLISHED THAT CONCENTRATION HAS AFFECTED THESE TRENDS 3 (2009).

89. STACY MITCHELL, INST. FOR LOC. SELF-RELIANCE, WALMART'S MONOPOLIZATION OF LOCAL GROCERY MARKETS 1–2 (2019), https://ilsr.org/wp-content/uploads/2019/06/Walmart_Grocery_Monopoly_Report-_final_for_site.pdf [perma.cc/D4ER-8Z2A] (relying on data from the Grocery Industry Market Share Report and finding that, overall, Walmart captures one in four dollars spent on groceries in the United States).

90. *See id.* at 2; Stacy Mitchell & Marie Donahue, *Report: Dollar Stores Are Targeting Struggling Urban Neighborhoods and Small Towns. One Community Is Showing How to Fight Back.*, INST. FOR LOC. SELF-RELIANCE (Dec. 6, 2018), https://ilsr.org/dollar-stores-target-cities-towns-one-fights-back [perma.cc/R3ZT-9XBJ] (noting that between 2011 and 2018 the number of dollar stores grew from twenty thousand to nearly thirty thousand).

91. In the United States, the USDA's Economic Research Service tracks introduction of new food and beverage products. Its data show a significant increase in recent decades. *New Products*, USDA ECON. RSCH. SERV. (May 27, 2021), https://www.ers.usda.gov/topics/food-markets-prices/processing-marketing/new-products [perma.cc/WJ7W-QCU3] (showing data from 1998 to 2018). Internationally, the trend is the reverse, as globalization crowds out diversity in many contexts. Colin K. Khoury et al., *Increasing Homogeneity in Global Food Supplies and the Implications for Food Security*, 111 PNAS 4001 (2014) (observing increasing similarity in national food supplies around the world).

Helpless consumer laws exacerbate industry consolidation, and the resulting food homogenization, by creating barriers to entry and increasing capital requirements for standard business operations. Food safety regulations, which often include burdensome disinfection and record-keeping requirements, contribute to consolidation in the food industry.[92] Where prior authorization is required for foods to enter into commerce, the "application of authorization requirements is costly and time-consuming. Therefore, procedures can only be managed by high-capital enterprises."[93] Two prominent examples are food additives, which are subject to an onerous premarket approval system,[94] and produce sold to institutional buyers, which is commonly subject to USDA's Good Agricultural Practices food safety certification.[95] Organic certification is also an example of this phenomenon. The high cost of certification, including transition costs from conventional production, is a significant causal factor in industry consolidation.[96]

Food safety laws impose onerous requirements that are particularly burdensome for small-scale food businesses.[97] It is often the case that larger-scale operations are better able to absorb the costs of regulatory compliance, but this is not simply a problem of ability to pay. Instead, this is a problem of regulatory design. Many of these laws are designed in response to input from, and

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92. *See* SPENCER HENSON & JOHN HUMPHREY, FOOD & AGRIC. ORG. & WORLD HEALTH ORG., THE IMPACTS OF PRIVATE FOOD SAFETY STANDARDS ON THE FOOD CHAIN AND ON PUBLIC STANDARD-SETTING PROCESSES 7 (2009), http://www.fao.org/3/i1132e/i1132e.pdf [perma.cc/8MXU-DPD6].

93. Bernd van der Meulen et al., *Food Safety Regulation Applied to Traditional and Ethnic Foods*, *in* REGULATING SAFETY OF TRADITIONAL AND ETHNIC FOODS 441, 464 (Vishweshwaraiah Prakash et al. eds., 2016).

94. 21 U.S.C. § 348 (requiring prior authorization for new food additives unless they are "generally recognized as safe" and establishing a zero-risk standard for carcinogenic additives). In part because of the costly nature of the prior approval process, the "generally recognized as safe" standard is widely used and, many argue, abused. MICHAEL T. ROBERTS, FOOD LAW IN THE UNITED STATES 87–91 (2016) (describing the food additives standard and its exceptions).

95. USDA's Good Agricultural Practices (GAP) certification program is a voluntary food safety audit, but many wholesale distributors, supermarket chains, and public institutional purchasers buy only from GAP-certified farms. *See, e.g.*, Florence A. Becot, Virginia Nickerson, David S. Conner & Jane M. Kolodinsky, *Costs of Food Safety Certification on Fresh Produce Farms in Vermont*, 22 HORTTECHNOLOGY 705 (2012) (assessing compliance costs and identifying buyers requiring compliance).

96. GUTHMAN, *supra* note 72 (describing how agribusiness came to dominate organic production).

97. *See, e.g.*, JOHN BOVAY, PEYTON FERRIER & CHEN ZHEN, U.S. DEP'T OF AGRIC., EIB-195, ESTIMATED COSTS FOR FRUIT AND VEGETABLE PRODUCERS TO COMPLY WITH THE FOOD SAFETY MODERNIZATION ACT'S PRODUCE RULE (2018) (estimating that while the largest farms will pay about 0.33 percent of annual sales to comply, the smallest will pay as much as 7 percent); *see also* Broad Leib & Pollans, *supra* note 18, at 1232–33 (describing how FSMA and other food safety laws impose greater costs, expressed as a percentage of profits, on smaller businesses than on larger ones).

examination of, large-scale operations.[98] When applied to small-scale businesses, they often appear arbitrary and irrational.[99] For instance, laws governing cheese production in New York treat small farmstead cheese makers the same as industrial cheese makers that use milk from many farms.[100] Sanitation requirements designed to account for risks associated with drawing milk from numerous farms, transporting it to a single processor, and producing cheese in large volumes, appear less rational for a farm milking twelve cows and processing the milk into cheese on site.

Sociologist Melanie DuPuis describes FSMA as one of the most recent developments in a decades-long "treadmill of purity," on which regulation generates the need for scale to afford compliance, creating additional risk that necessitates even more regulation.[101] She observes:

> Experts agree that there is no way to make food completely safe. Yet, every outbreak leads to another round of purification requirements that don't necessarily purify but that do lead to the further shakeout of smaller farms. The ultimate end of this treadmill may be vegetables grown in vast "protected" production facilities—large dirt-free vertical greenhouses using hydroponics.[102]

Recognizing this concern, some federal laws, including FSMA, create exceptions or reduced burdens for smaller food businesses, particularly those making low-risk products.[103] But many producers experience pressure from

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98. Diana Stuart & Michelle R. Worosz, *Risk, Anti-reflexivity, and Ethical Neutralization in Industrial Food Processing*, 29 AGRIC. & HUM. VALUES 287, 291–92 (2012) (describing the role of industry influence in approaches to meat safety and observing that meat safety standards are modeled on existing industry practices); Kathryn A. Boys, Michael Ollinger & Leon L. Geyer, *The Food Safety Modernization Act: Implications for U.S. Small Scale Farms*, 41 AM. J.L. & MED. 395, 405 n.13 (2015) (suggesting that FSMA rules were modeled on the California and Arizona Leafy Green Marketing Agreement, quasi-private regulatory structures developed by the large-scale leafy-greens industry).

99. *See* BOVAY ET AL., *supra* note 97, at 1–4; Gregory M. Schieber, Note, *The Food Safety Modernization Act's Tester Amendment: Useful Safe Harbor for Small Farmers and Food Facilities or Weak Attempt at Scale-Appropriate Farm and Food Regulations?*, 18 DRAKE J. AGRIC. L. 239, 245–46 (2013); Patrick Baur, Christy Getz & Jennifer Sowerwine, *Contradictions, Consequences and the Human Toll of Food Safety Culture*, 34 AGRIC. & HUM. VALUES 713, 722 (2017) (suggesting that while large-scale businesses often view food safety regulations as "an abstract formalization of common sense," for smaller operators they appear as hoops to jump through, generating significant costs).

100. N.Y. AGRIC. & MKTS. LAW § 46-a (McKinney 2019); N.Y. COMP. CODES R. & REGS. tit. 1, § 2.1 (2020) (establishing that New York's food safety standards for dairy production apply to any facility not in compliance with federal standards for dairy production).

101. E. MELANIE DUPUIS, DANGEROUS DIGESTION: THE POLITICS OF AMERICAN DIETARY ADVICE 123 (2015). Many critics of modern food safety law express concern that scale itself is a primary source of risk in the food supply because of the ways that scale magnifies and agglomerates risk. *See* Stuart & Worosz, *supra* note 98 (examining the safety risks associated with large scale production of lettuce and meat).

102. DUPUIS, *supra* note 101, at 124.

103. *See, e.g.*, Schieber, *supra* note 99, at 245–46.

wholesale buyers and insurers to comply with the law regardless of these exemptions.[104]

In some contexts, large-scale players in the food system have expressly sought food safety laws as a competitive tool. For instance, the Leafy Green Growers Association, which represents the leafy-greens industries of California and Arizona, supported passage of FSMA.[105] Members of the association were already subject to produce safety requirements through the California Leafy Green Marketing Agreement and sought to level the playing field by establishing uniform national regulations.[106] In other words, their express purpose for supporting the law was to improve their competitive position in the leafy-greens industry.

2. Sterilizing and Standardizing Food and Food Production

A second mechanism of homogenization is the tendency toward sterilization and standardization in food law. I have argued elsewhere that the current structure of food safety law is irrational because it focuses narrowly on one of food's health-related features at the expense of others.[107] Here, I add to that critique by arguing food safety regulation can reduce diversity in the food system, not just of scale, not just of microbes,[108] but also of methods of production and types of food produced.

The standard approach to food safety is sterilization of food production environments and standardization of food production practices.[109] Sterilization and standardization make food safety easy to police, but they also shut down diversity within the food system. In other words, food safety law "whitewashes" food safety, suppressing development of alternative food cultures and

104. *Id.* at 272 (noting that farmers will need to forgo their Tester-Hagan exemption status to take advantage of certain kinds of marketing opportunities); Boys et al., *supra* note 98, at 400–01; Jose Perez, *Recordkeeping and Labeling: FSMA Requirements for Qualified Exempt Operations*, UNIV. OF FLA. IFAS (Jan. 25, 2017), http://blogs.ifas.ufl.edu/smallfarms/2017/01/25/fsma-qualified-exempt [perma.cc/EU7X-9WVR].

105. Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 416–17 (2015).

106. *Id.* (citing industry comments on FSMA rulemaking).

107. *Id.* at 418–20 (examining conflicts between produce safety and environmental protection); Broad Leib & Pollans, *supra* note 18 (considering food safety vis-à-vis the full range of food system health risks).

108. Broad Leib & Pollans, *supra* note 18, at 1226–27 (describing the consequences of sterilizing farm environments).

109. *See id.*

alternative food networks.[110] By contrast, advocates for food sovereignty identify true transparency, achieved by shortened supply chains, as a primary mechanism for ensuring food safety.[111]

From its earliest history in the Progressive Era, modern food safety law has had an underlying "purity" agenda, seeking to secure the human body in ways that were highly racialized.[112] Advocacy for regulation against "adulteration" of the food supply went hand in hand with advocacy for immigration controls and even eugenics.[113] Stories about the use of food safety law to whiten foodways are common. For instance, NPR profiled the "chili queens" of San Antonio, who for decades served homemade chili from makeshift stands in San Antonio until the town leaders determined that their appearance was inconsistent with the aesthetic of the community.[114] It was ultimately under the guise of public health laws that they were fully shut down.[115]

Many of these laws also have an international reach. Foreign food producers seeking to export products to the United States must comply with U.S. food safety laws.[116] The United States engages not only in foreign-facility inspection but also in foreign food safety education.[117] In the United States and abroad, these laws impose particular burdens on "traditional" and "ethnic" foods.[118] For example, an exemption to strenuous food additive safety requirements for foods "generally recognized as safe" creates a potential bias against

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110. Industrialization of agriculture, which typically entails dramatic narrowing of the number of crop varietals produced, similarly contributes to loss of cultural diversity. Peter J. Jacques & Jessica Racine Jacques, *Monocropping Cultures into Ruin: The Loss of Food Varieties and Cultural Diversity*, 4 SUSTAINABILITY 2970, 2972 (2012) ("Cultural and biological diversity co-evolve in complex and constitutive feedbacks . . . .").

111. Sarah Schindler, *Food Federalism: States, Local Governments, and the Fight for Food Sovereignty*, 79 OHIO ST. L.J. 761, 771–72 (2018).

112. *See* DUPUIS, *supra* note 101, at 80–87 (describing early advocacy for sanitation in food production); Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251 (2013).

113. *See* DUPUIS, *supra* note 101, at 80–87; LORINE SWAINSTON GOODWIN, THE PURE FOOD, DRINK, AND DRUG CRUSADERS, 1879–1914 (1999).

114. *The Chili Queens of San Antonio*, NPR (Oct. 15, 2004, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4107830 [perma.cc/G9DK-XUMX].

115. *Id.*

116. *E.g.*, Food Safety Modernization Act § 301, 21 U.S.C. § 384a; *see* Linda R. Horton, *Food from Developing Countries: Steps to Improve Compliance*, 53 FOOD & DRUG L.J. 139 (1998). The United States also exports homogenization through support for the spread of industrialized agriculture and expansion of the "green revolution." Jacques & Jacques, *supra* note 110 (explaining how the green revolution, which involved export of a package of monoculture cropping practices, hybrid seeds, fertilizers, and pesticides, contributed to significant loss of cultural diversity and traditional knowledge).

117. Horton, *supra* note 116, at 163–65 (describing and calling for expansion of U.S. food safety training programs abroad).

118. *See* Vishweshwaraiah Prakash, *Introduction: The Importance of Traditional and Ethnic Food in the Context of Food Safety, Harmonization, and Regulations*, *in* REGULATING SAFETY OF TRADITIONAL AND ETHNIC FOODS, *supra* note 93, at 1, 1–2 (defining "traditional" food as "foods that are typically whole, naturally grown or raised, and used in their original form or have

new ingredients brought into U.S. markets by more recent immigrant populations.[119] Many countries have laws that recognize experience, and "traditional foods usually are considered safe on the basis of experience," but "[t]his may be different outside the cultural area where the foods at issue are traditional."[120]

Food safety laws in particular "devalue[] the expertise and experience of the people working every day to grow, harvest, pack and distribute" food.[121] Devaluing lay expertise results in a narrowing of legitimate sources of knowledge, rejecting experiential and generational knowledge in favor of formal training.[122] This narrowing contributes to uniformity both in available foods and in underlying safety and production practices by reducing the range of acceptable practices. It also reduces control over vocabularies and knowledge, limiting the ability of non-"experts" to participate in governance processes.

A similar pattern occurs in the context of public nutrition programs. In this context, a scientific approach to nutrition, referred to as "nutritionism" by one historian, reduces our food needs to a universal set of nutrients and ignores the variety and complexity of diet, practice, and other nutritional contexts.[123] Historically, nutritionism has been used as a tool in colonial projects to emphasize "the superiority of a scientifically[ ]established ideal diet over local cultural and religious traditions."[124] In the modern era, nutritionism is entrenched in law through the Dietary Guidelines for Americans and nutrition facts panels.[125]

Language-control laws function in a similar way. Vocabulary itself "helps mark the boundaries of permissible discourse, discourages the clarification of

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undergone only basic processing," and defining "ethnic" food as "those edibles that are eaten and prepared by groups of people who share a common religion, language, culture, or heritage").

119. van der Meulen et al., *supra* note 93, at 442–44 (arguing that there is flexibility in treatment of "traditional" and "ethnic" foods but noting that confusion in different standards and different layers of regulation can create problems).

120. *Id.* at 463–64. It is, of course, important to distinguish between additives that are unfamiliar, and thus not generally recognized as safe, because they were not traditionally used in U.S. food production, and new chemical formulations, which require more scrutiny. *See* ROBERTS, *supra* note 94, at 90–91 (describing concerns about abuse of the "generally recognized as safe" exception for new chemical formulations).

121. Baur et al., *supra* note 99, at 719.

122. *Cf.* Jacques & Jacques, *supra* note 110, at 2974 ("[T]he central difference between industrial and traditional agricultur[e] is epistemological.").

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

124. David M. Kaplan, *"Hunger Hermeneutics,"* 40 TOPOI 527, 531, 535 (2020) (noting examples from British colonial rule).

125. Relatedly, but tangential to food law itself, antidiscrimination law allows disparate treatment based on weight, typically measured through body mass index, a standard obesity metric that fails to take into account racial differences in body morphology. JULIE GUTHMAN, WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM 96–97 (2011); SABRINA STRINGS, FEARING THE BLACK BODY: THE RACIAL ORIGINS OF FAT PHOBIA (2019) (observing early overlaps between nutrition science and eugenics). BMI is often used as a basis for employer-based health insurance incentive schemes. Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264, 326 & n.246 (2012).

social alternatives, and makes it difficult for the dispossessed to locate the source of their unease."[126] Organics laws in particular frequently become a tool of cultural hegemony. What began as a counterculture movement reacting to the rise of industrial agriculture was appropriated by industrial agriculture. By taking control of the word "organic," the industrial-agricultural complex exerts influence over the agricultural counterculture. This influence is powerful both domestically, where smaller organic operations must turn to other mechanisms to communicate with their customers,[127] and internationally, where farmers must suddenly comply with internationally negotiated organic-harmonization agreements to continue using the term.[128] The widespread resistance to the use of "milk" and "meat" on vegan products may also reflect the underlying cultural hegemony "regarding not just the acceptability, but the *necessity* of animal consumption."[129]

In sum, food safety regulations and food fraud language-control laws achieve safety and prevent misrepresentation at the expense of diversity of scale, food types, and food production practices. They make alternative, ethnic, and counterculture foodways more challenging to import, establish, and maintain. They reinforce a dominant food culture that undermines the food sovereignty of any community whose preferences and practices are not aligned with that of the dominant food culture.[130] In this sense, the myth of the helpless consumer is self-actualizing, especially for consumers who are outside of the dominant food culture.

3. Homogenization as a Disempowerment Tool

Homogenization occurs for many reasons—technology, efficiency, culture, individual preferences—and is not inherently a bad thing. At a large

126. T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567, 569–70 (1985).

127. Willow Saranna Russell & Lydia Zepeda, *The Adaptive Consumer: Shifting Attitudes, Behavior Change and CSA Membership Renewal*, 23 RENEWABLE AGRIC. & FOOD SYS. 136, 144 (2008) (identifying the weekly newsletter as a key feature of community-supported agriculture because it provides farmers an opportunity to educate members). For an example, see Roxbury Farm Newsletter, *supra* note 76; *see also* CORE ORGANIC, FARMER CONSUMER PARTNERSHIPS COMMUNICATING ETHICAL VALUES: A CONCEPTUAL FRAMEWORK 1–2 (Susanne Padel & Katharina Gössinger eds., 2008), https://orgprints.org/id/eprint/12821/1/CORE_FCP_Vol1_Final_31_July.pdf [perma.cc/2UHU-F5VX] (identifying the need for farmers and other food producers to communicate commitment to ethical values that exceed those communicated by compliance with regulatory frameworks).

128. *See* AISTARA, *supra* note 74, at 21–22 (describing the consequences of international harmonization for farmers in countries that want to trade with the United States).

129. Amy J. Fitzgerald & Nik Taylor, *The Cultural Hegemony of Meat and the Animal Industrial Complex*, *in* THE RISE OF CRITICAL ANIMAL STUDIES: FROM THE MARGINS TO THE CENTRE 165, 166 (Nik Taylor & Richard Twine eds., 2014).

130. *See Declaration of Nyéléni*, *supra* note 12 (describing the origins and definition of "food sovereignty").

scale, however, homogenization is a common feature of social control precisely because it eliminates differences and fosters "purity."[131] For instance, a key feature of rising fascism in 1930s Germany was a push to eliminate class differences, or at least class allegiances.[132] At its most extreme, in ultranationalist Nazi Germany, homogenization took on the genocidal form of mass murder—targeting those of religious, sexual, and physical difference.[133] Even in Nazi Germany, purity movements were connected not just to racial and physical difference but also to public-health science: "The discovery of the role of bacteria in contagion . . . and the mechanisms of heredity . . . made it possible to imagine whole new categories of internal enemy: carriers of disease, the unclean, and the hereditarily ill, insane, or criminal."[134] Historian Tiago Saraiva considers the role of food production homogenization in the rise of fascist states, observing that the industrialization and standardization of food production were key not just for the production of food that would support the populace but also for developing governmental bureaucracies that would eventually solidify totalitarian power.[135] Thus, while homogenization is sometimes appropriate and reasonable, it is often weaponized in both subtle (food production) and aggressive (racial purging) ways.

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

II. PARALYZING THE RESPONSIBLE CONSUMER

Standing in contrast to the myth of the helpless consumer is a second equally powerful myth driving food law: the myth of the responsible consumer. Food is both a staple (everyone must eat) and a morally fraught domain (what and how much should we eat?). Moralizing around food is age-

131. *See* STANLEY, *supra* note 13, at 151; ROBERT O. PAXTON, THE ANATOMY OF FASCISM 41 (2004) (identifying as a "mobilizing passion[]" of fascism "the need for closer integration of a purer community, by consent if possible, or by exclusionary violence if necessary"). In practice, the successful rise of fascism often requires relaxing ideas about purity to broaden the tent enough to take control. *Id.* at 40.

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

133. PAXTON, *supra* note 131, at 134–35 (describing the role of medical professionals in the Nazi genocide through "sterilization of the 'unfit' and the elimination of 'useless mouths'—the mentally and incurably ill—and from there to ethnic genocide").

134. *Id.* at 36. Paxton notes that the urge to purify on these lines influenced liberal states as well as fascist ones and that the United States and Sweden "led the way in the forcible sterilization of habitual offenders (in the American case, especially African Americans)." *Id.* at 36–37.

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

old, and many religious traditions are deeply imbued with complex food rules.[136] In the United States today, food moralizing takes the predominant form of blame: individuals commit alleged moral wrongs through a broad range of food choices, such as overeating, eating animals, or even experiencing hunger. Threads of blame in food policy put the onus on food consumers to take control not just of their own nutrition but also of a wide variety of food system ills. The responsible consumer needs no legal protections other than those facilitating provision of the information that enables moral choices.

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

> A growing cabal of activists has meddled in Americans' lives in recent years. They include self-anointed "food police," health campaigners, trial lawyers, personal-finance do-gooders, animal-rights misanthropes, and meddling bureaucrats.
>
> Their common denominator? They all claim to know "what's best for you." In reality, they're eroding our basic freedoms—the freedom to buy what we want, eat what we want, drink what we want, and raise our children as we see fit.[137]

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

The myth plays a role in a variety of food laws that control information. "Knowledge" serves as a central rallying cry for food system reform in three different but overlapping contexts: nutrition regulation, food security, and the consumer food movement. In each of these contexts, information is offered as a tool of empowerment. In practice, however, information reinforces a two-tiered food system, one in which only some consumers have the time, money, access to information, and inclination to research their food choices and spend more money on food.[138] In all three contexts, consumers are charged

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136. *See* DUPUIS, *supra* note 101, at 100–01 (describing the historic role of morality in food reform movements).

137. *About Us*, CTR. FOR CONSUMER FREEDOM, https://www.consumerfreedom.com/about [perma.cc/T9YC-VRBE].

138. DUPUIS, *supra* note 101, at 99 ("The 'food revolution' described by so many food reformers was, in fact, a partition of the food system into two distinct systems: one determined by

with responsibility to help themselves and others and are blamed if they do not do so successfully.[139] These movements rely on the assumption that individuals have full agency over their food consumption decisions.[140] Within this framework, the primary barriers to change are thus inadequate transparency and individual irresponsibility. At the same time, the rhetoric of the responsible consumer empowers the food industry to resist efforts at public governance on the ground that consumer demand is the only legitimate impetus for change.

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

A. *Domains of Consumer Responsibility*

1. Personal Health

In recent years, concern about rising rates of diet-related disease has led to a spate of new policies aimed at improving diet. From Happy Meal restrictions to fast food zoning laws, soda taxes, and school lunch nutrition standards, many of these laws recognize that our economic circumstances and physical environments influence food choices.[141] These laws have met with staunch opposition. Proponents of responsibilization rely on rhetoric of "freedom" to resist these food environment laws.[142] For instance, the rhetoric of "freedom" is prevalent in calls for state laws that preempt local attempts to regulate fast-food restaurants and impose taxes on sodas.[143] Thus, the primary

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increasing speed and decreasing cost and a separate quality-based system that, by comparison, requires more time, labor, and materials."); *see infra* Section III.C (elaborating on this critique).

139. Both are examples of neoliberal "responsibilization." Wendy Brown defines "responsibilization" as the shifting of "moral burden[]" to "the entity at the end of the pipeline" of power and authority. In other words, it is the shifting of responsibility from government and business to private individuals. *See* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 132 (2015).

140. *Id.* at 41–42 (describing the "responsibilized turn" in the "neoliberal *political* imaginary"); Andrew Calabrese, *Caveat Emptor! The Rhetoric of Choice in Food Politics*, COMMC'N +1, Oct. 2017,art. 2, https://doi.org/10.7275/R5CZ35CR (arguing that corporate lobbyists use the rhetoric of freedom of choice to resist policies that protect consumers from unhealthy foods).

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

142. *See supra* note 139 (defining responsibilization).

143. Consider also opposition to the New York City soda-portion control law and nanny-state concerns related to the Affordable Care Act and broccoli eating. *See* Lawrence O. Gostin, *Bloomberg's Health Legacy: Urban Innovator or Meddling Nanny?*, HASTINGS CTR. REP., Sept.–Oct. 2013, at 19, 20–21; Lindsay F. Wiley, Micah L. Berman & Doug Blanke, *Who's Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J.L. MED. &

function of responsibilization is to oppose "nanny-state" health laws.[144] Although information provisions, such as restaurant menu calorie labeling, have also met with resistance, label policies have been more successful on the national stage than more directive regulatory programs.[145]

Responsibilization ascribes diet-related personal health to personal choice. Failure—as evidenced by obesity or by diet-related disease—follows from poor discipline.[146] The responsible consumer myth characterizes these as moral failings.

2. Household Food Security

Responsibilization has been a dominant thread in social welfare reform since the mid-1990s. At that time, lawmakers reformed federal social-safety networks, abandoning categorical eligibility rules focusing on objective factors, such as income, assets, and family size, in favor of benefit-eligibility rules that "emphasi[ze] . . . claimants' choices."[147] A primary feature of this shift was the addition of work requirements to welfare and food assistance programs.

In recent years, lawmakers have pushed to strengthen work requirements in food assistance programs. In 2018, House Republicans proposed extending work requirements to some parents with dependent children over six years old and strengthening documentation requirements.[148] When the proposal failed, the USDA subsequently, and also unsuccessfully, attempted its own similar reforms. Specifically, the agency proposed a rule that would have eliminated some flexibility for states to waive work requirements.[149] Individual states have also taken steps to limit eligibility on other responsibility grounds.

ETHICS (SPECIAL ISSUE) 88, 88–89 (2013), https://doi.org/10.1111/jlme.12048 (exploring "public health paternalism"); Rhode, *supra* note 141, at 501–03, 507.

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

145. Broad Leib & Pollans, *supra* note 18, at 1187–89 (describing the current landscape of U.S. nutrition regulation).

146. *See* Tirosh, *supra* note 125, at 279–81 (describing fat stereotypes).

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

148. H.R. 2, 115th Cong. § 4015 (as passed by House, June 21, 2018). The proposal ultimately failed in the Senate. *Compare* H.R. 2, 115th Cong. § 4103 (as passed by Senate, June 28, 2018), *with* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4005, 132 Stat. 4490.

149. Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66,782 (Dec. 5, 2019) (to be codified at 7 C.F.R. pt. 273); *see also* District of Columbia v. U.S. Dep't of Agric., 496 F. Supp. 3d 213 (D.D.C. 2020) (finding the rule invalid on both procedural and substantive grounds and ordering vacatur), *appeal dismissed*, No. 20-5371, 2021 WL 1439861 (D.C. Cir. Mar. 23, 2021); Supplemental Nutrition Assistance Program: Rescission of Requirements for Able-Bodied Adults Without Dependents: Notice of Vacatur, 86 Fed. Reg. 34,605 (June 30, 2021).

For instance, in 2018, Wisconsin embedded drug testing into its eligibility requirements.[150]

Proponents for reform justify calls for work requirements by relying on narratives of laziness. In the 1990s, the image of the "welfare queen" depicted young women, typically Black single mothers, as choosing not to work because they could collect federal benefits and, in the extreme, of having additional children specifically to collect the additional benefits to which a larger family would entitle them.[151] These narratives characterize hunger as resulting from unwillingness to work hard and characterize program participants as leeches living off the efforts of hard-working Americans.[152] Hunger itself is evidence of a moral wrong.[153] Although reform proponents typically do not advocate eliminating social welfare programs entirely, they seek to focus these programs on the "morally worthy" (children, the elderly, and the disabled) and to decrease access for the "morally unworthy" (able-bodied adults).

Responsibilization thus deemphasizes structural causes of poverty and places the blame on the poor.[154] This ideology is unidimensional; if you are hungry, you should work harder so you can afford more food.

3. Equity and Sustainability

In recent decades, a growing set of food-related social movements call on consumers to "vote with their forks" for a better food system.[155] These movements articulate a wide variety of goals, from children's health to fair wages,

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150. WIS. STAT. § 49.791 (2019–2020) (governing substance-abuse screening, testing, and treatment for employment and training programs); *see* H. Claire Brown, *Buried in Wisconsin Republicans' Lame-Duck Legislation: Drug Testing Requirements for Food Stamp Applicants*, INTERCEPT (Dec. 6, 2018, 5:25 PM), https://theintercept.com/2018/12/06/wisconsin-food-stamps-drug-testing [perma.cc/V6P2-VE7Z]. No other state currently requires drug testing for nonfelon SNAP participants. *Id.*

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

152. *See id.* at 266 (observing that although the welfare queen herself is rarely invoked today, "the construct still has broad regulatory power"); Ben-Asher & Pollans, *supra* note 82, at 54–55.

153. This trend revives an old idea that poverty was commonly believed to be a result of a moral failing. Super, *supra* note 147, at 818–19 (observing that from the early republic through the Great Depression, the "poorhouse remained a potent symbol of [] moral opprobrium"). For a general history of the transformation of public conceptions of hunger in the nineteenth and twentieth centuries, see JAMES VERNON, HUNGER: A MODERN HISTORY (2007).

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

155. The phrase was coined by the Boston-based nonprofit organization Oldways Preservation and Exchange Trust in the 1990s. Barry Popik, *"Vote with Your Fork,"* BIG APPLE (Nov.

animal welfare, and environmental protection.[156] The common thread in these movements is the theory of change: if enough consumers express their preferences, the market will shift and provide more food that meets the standard of whatever cause consumers support.

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

> Whatever your politics, there are activities your tax money supports that I'm sure you find troublesome, if not deplorable. But you can't do anything about those activities—you can't withdraw your support—unless you're prepared to go [to] jail. Food is different. You can simply stop participating in a system that abuses animals or poisons the water or squanders jet fuel flying asparagus around the world. You can vote with your fork, in other words, and you can do it three times a day.[157]

Rather than critique government for failing to regulate, the "vote with your fork" rallying cry asks consumers to take responsibility for all the food system's ills, from how workers are treated to the environmental footprint of food production.[158] This rhetoric tacitly accepts that consumers rather than governments are responsible for these issues. Indeed, as other scholars have thoroughly documented, government has not taken on this responsibility; protections for workers and the environment in the food system are extremely limited.[159] The consumer food movement invites consumers to step into a regulatory role as the dominant force holding food producers accountable for the costs of their activities.[160]

14, 2010), https://www.barrypopik.com/index.php/new_york_city/entry/vote_with_your_fork [perma.cc/SY75-6F6Z].

156. *See, e.g.*, Linda Buzzell, *Vote with Your Fork!*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/vote-with-your-fork_b_234086 [perma.cc/S3SS-T67G] (describing the "purchase of genuinely organic, local and/or sustainably grown food" as "a vote against factory farming, Frankenfoods, animal torture and the pesticide companies"); *Voting with Your Fork*, MICHAEL POLLAN (May 7, 2006), https://michaelpollan.com/articles-archive/voting-with-your-fork [perma.cc/FPK4-VM5J] (suggesting that people stop participating in a system that "abuses animals or poisons the water").

157. Pollan, *supra* note 156; *see also* Marion Nestle, *Ethical Dilemmas in Choosing a Healthful Diet: Vote with Your Fork!*, 59 PROC. NUTRITION SOC'Y 619 (2000).

158. *See, e.g.*, Joshua Galperin, Graham Downey & D. Lee Miller, *Eating Is Not Political Action*, 13 J. FOOD L. & POL'Y 113 (2017) (describing and critiquing this phenomenon). To be sure, there are numerous advocacy organizations that are putting pressure on regulators to address these issues; the key point here, however, is about the prevalence and popularity of the consumers-as-regulators model.

159. On the paucity of environmental protections, see Ruhl, *supra* note 4, and Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195 (2016). On the paucity of worker protections, see *infra* Section III.A.

160. In the context of the COVID-19 pandemic, some consumers felt this burden particularly acutely as they tried to balance keeping their own families safe and fed with supporting employment and worker-protection practices in the food industry. In the absence of adequate government support for restaurants and other food businesses, the latter two concerns were of-

To enable consumers to make informed decisions, advocates in these movements promote transparency, chiefly through product labels.[161] Labels convey information about food products and production processes. Although most labels are unverified claims made by food producers themselves, an increasing number of third-party certification programs police particular claims.[162] For instance, as many consumers and farmers have become disappointed with the organic label, various organizations have begun to develop "organic plus" certification programs.[163] Numerous other certification schemes—such as Fair Trade, Animal Welfare Approved, Non-GMO Project Verified, and Marine Stewardship Council Certified Sustainable Seafood—focus on particular characteristics of food production.[164] These movements also rely on investigative journalism. Exposés of working conditions, sanitary conditions of food processing facilities, and ingredients of specific foods can shape consumer behavior and even generate industry and legal reform.[165]

The responsible consumer can protect herself and others through her food choices. Unlike the helpless consumer, the responsible consumer needs the government only to ensure sufficient transparency to enable good decisionmaking. Consequently, the myth is used both to justify scaling back existing regulation and to block creation of new regulation.

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ten in conflict. Contributing to the financial viability of a business, and thus the continued employment of its workers, typically meant obligating those workers to face high levels of coronavirus exposure. *See, e.g.*, Ellie Krupnick, *Fluke Tartare with Quinoa and Strawberries Is Not Worth Someone's Life*, EATER (July 28, 2020, 10:34 AM), https://www.eater.com/2020/7/28/21340453/dining-out-covid-19-ethics-decisions [perma.cc/9ZMP-FVF5]; Joe Pinsker, *Is It Ethically Okay to Get Food Delivered Right Now? A Guide to This and Other Pandemic Food Dilemmas*, ATLANTIC (Apr. 16, 2020), https://www.theatlantic.com/family/archive/2020/04/grocery-delivery-takeout-eating-ethically-pandemic/610111 [perma.cc/C3LJ-SDN8].

161. For a taxonomy of ecolabels, see Jason Czarnezki, Margot Pollans & Sarah M. Main, *Eco-Labeling*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 996, 999–1003 (Emma Lees & Jorge E. Viñuales eds., 2019).

162. *Id.* at 1004–08 (describing various approaches to ecolabel governance).

163. For instance, the Real Organic Project has a its own certification program based on a series of provisional standards that extend beyond USDA's requirements, particularly regarding soil health and animal welfare. *Why the Real Organic Project Exists*, REAL ORGANIC PROJECT, https://www.realorganicproject.org/what-does-usda-organic-mean-today [perma.cc/ES9L-6VF4] (explaining that lack of enforcement from the USDA means that "[f]amily farmers meeting the letter and spirit of organic law are suffering while consumers are once again in need of transparency in the market place").

164. *See All Ecolabels in United States on Food*, ECOLABEL INDEX, http://www.ecolabelindex.com/ecolabels/?st=country=us;category=food [perma.cc/Y5PF-HQ26] (listing sixty-five ecolabel programs used in the United States).

165. In some cases, these exposés can also result in legal reform. *See* Broad Leib & Pollans, *supra* note 18, at 1194–96 (discussing several examples in the food safety context).

B. *Information Controls and Constructed Helplessness*

The myth of the responsible consumer feeds a key feature of food law: knowledge promotion.[166] The responsible consumer is meant to sort through all the information available to them and often demands additional information. In theory, the responsible consumer can then use this information to make self-actualized and self-interested decisions.

Although there is widespread consensus about the value of information—among conservatives arguing against more invasive health regulations and liberals pushing for systemic reform—the primacy of information makes consumers vulnerable. The myth of the responsible consumer is part of a broader trend in neoliberal regulatory reform in which information regulation alone is considered sufficient and regulation of substantive issues such as nutritional content is deemed invasive and unnecessary.[167] But information regulation is deceptive. It is ultimately a tool to maintain an unequal distribution of power in the food system because in practice it renders the theoretically responsible consumer helpless.

Through information control, food law undermines the utility of information to achieve any of the substantive goals discussed in Section II.A, above. First, a variety of laws protect food producers, processors, and manufacturers from having to share information that might be damaging to their reputations. Some laws even punish individuals who might disseminate this information or use it as the basis of public critique. Second, food law suppresses dissent through excess information. Generated by a proliferation of mandatory information-disclosure laws and legal facilitation of voluntary disclosures, excess information hinders consumer capacity to exercise true responsibility.

1. Suppressing Dissent

The food system is replete with examples of restrictions on information access and food system critique. First, ag-gag laws seek to squelch critical speech about agricultural facilities by placing restrictions on investigating and reporting about those facilities.[168] These laws typically make it illegal to lie to gain entrance to agricultural facilities and to film or photograph them.[169] Ag-

166. *See* LISA HEINZERLING, FOOD LAW: CASES & MATERIALS 7–8 (2015 ed. 2015) (identifying knowledge promotion as one of the three main goals of food law).

167. For discussion of this trend in the context of environmental law, see Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 134–36 (2001); Jason J. Czarnezki & Katherine Fiedler, *The Neoliberal Turn in Environmental Law*, 2016 UTAH L. REV. 1.

168. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1189 (9th Cir. 2018) (framing ag-gag laws as constraints on investigative journalism); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1469 (2015) (noting that from 2012 to 2015, twenty-five states introduced ag-gag legislation and eight states enacted laws).

169. Chen & Marceau, *supra* note 168, at 1470 & n.207 (explaining that these laws extend beyond traditional trespass and fraud by specifically targeting those investigating agricultural facilities and criminalizing investigation, even if it produces no injury beyond the exposure of criminal animal treatment).

gag laws target animal rights activists, seeking to protect the animal agriculture industry from public exposure of its practices.[170] Although some aspects of these laws have been successfully challenged on First Amendment grounds, they remain on the books in several states.[171] These laws simultaneously limit access to information about conditions on farms generally and large-scale concentrated animal feeding operations (CAFOs) in particular, and they disincentivize reporting about those conditions by creating the risk of prosecution.[172]

Second, like ag-gag laws, food disparagement laws disincentive food critique. These laws, on the books in thirteen states, create a civil cause of action against critics of food products.[173] A more robust form of product disparagement (trade libel) law, food disparagement statutes seek to limit dissemination of false information about perishable food or agricultural products.[174] Many of these laws shift the traditional burden of proof by placing the burden of proving truth on the defendant rather than placing the burden of proving falsity on the plaintiff.[175] These laws have been invoked in several high-profile cases involving national reporting on food. Most famously, after ABC aired a segment on a meat product it referred to as "pink slime," several manufacturers sued pursuant to South Dakota's food disparagement statute.[176] ABC ultimately settled for $177 million.[177] Although on paper these laws punish only

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170. *Id.* at 1470–71 ("[W]hen the information revealed through the use of deception relates to a matter of great political significance or public debate, and the information revealed is not of an intimate personal nature, the deceptions used to gain such information should enjoy protected status under the First Amendment.").

171. *See, e.g.*, *Wasden*, 878 F.3d at 1190 (striking parts of Idaho's ag-gag law); Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1196 (D. Utah 2017) (striking Utah's law); *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, https://aldf.org/issue/ag-gag [perma.cc/TLG2-VS3D].

172. *See, e.g.*, *Herbert*, 263 F. Supp. 3d at 1213 (describing Utah's law as "[s]uppressing broad swaths of protected speech without justification").

173. David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 195–96 (1998) (citing statutes for all thirteen states and noting which states have considered but not ultimately passed legislation).

174. *Id.* at 196–97 (explaining that the purpose of these laws is to protect the perishable-foods industry from scares that lead to dramatic drops in demand).

175. *Id.* at 212–13 (suggesting that this burden may make these laws unconstitutional).

176. JOEL L. GREENE, CONG. RSCH. SERV., R42473, LEAN FINELY TEXTURED BEEF: THE "PINK SLIME" CONTROVERSY 2 (2012) (describing the public outcry and the immediate decline in demand following reporting); Mortazavi, *supra* note 26, at 972–73 (noting that despite the litigation, public outcry was strong enough that many companies voluntarily reduced used of the product); *BPI Announces Defamation Lawsuit over 'Pink Slime,'* ABC NEWS (Sept. 12, 2012, 8:22 PM), https://abcnews.go.com/Health/bpi-announces-defamation-lawsuit-pink-slime/story?id=17222933 [perma.cc/772G-AYLF]; Ben Nuelle, *'Pink Slime' Defamation Lawsuit Begins in South Dakota*, AGRI-PULSE (June 5, 2017, 6:53 PM), https://www.agri-pulse.com/articles/9328-pink-slime-defamation-lawsuit-begins-in-south-dakota [perma.cc/C83H-VRYX].

177. James Nord, *ABC Settled 'Pink Slime' Defamation Suit for More Than $177 Million*, CHI. TRIB. (Aug. 10, 2017, 7:43 AM), https://www.chicagotribune.com/business/ct-pink-slime-defamation-suit-20170810-story.html [perma.cc/2EQ6-8WDG].

false statements, in practice they discourage critique by generating fear of prosecution.[178]

Third, public-information policies hide critical information from public view. For instance, a series of statutes, federal agency actions, and court decisions have limited access to public records on CAFO size and location.[179] Perhaps more significantly, in 2018 the USDA announced a decision to move its Economic Research Service (ERS) and the National Institute of Food and Agriculture (NIFA) out of the Washington, D.C., area.[180] ERS conducts research into emerging issues in food, agriculture, the environment, and rural America, and its research frequently influences decisionmaking by Congress, the USDA, state agencies, industry groups, and individual farmers.[181] The USDA explained the move as bringing the research service closer to its many stakeholders.[182] Critics, however, questioned this motive. For example, one group of fifty-six former USDA and federal statistical-agency officials raised concerns about risks to agency independence and credibility, specifically citing retaining staff expertise, continuing valuable collaborations both within and outside the USDA in the D.C. area, maintaining visibility with policymakers.[183] Others suggested that the purpose of the move was to silence an agency

178. Bederman, *supra* note 173, at 213–14 (raising concern that these laws will chill expression of opinions because of the burden many of them put on defendants to offer "reasonable and reliable scientific" support for their challenged statements).

179. D. LEE MILLER & GREGORY MUREN, NAT'L RES. DEF. COUNCIL, CAFOS: WHAT WE DON'T KNOW IS HURTING US 4–5 (2019), https://www.nrdc.org/sites/default/files/cafos-dont-know-hurting-us-report.pdf [perma.cc/79N7-RVLX].

180. Notice of Request for Expression of Interest for Potential Sites for Headquarters Office Locations, 83 Fed. Reg. 40,499 (Aug. 15, 2018). Although the move was completed, a recent report from the USDA's inspector general suggests it might be illegal because the agency did not have requisite congressional approval for spending appropriated money to make the move. OFF. OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., INSPECTION REP. NO. 91801-0001-23, USDA'S PROPOSAL TO REORGANIZE AND RELOCATE THE ECONOMIC RESEARCH SERVICE AND NATIONAL INSTITUTE OF FOOD AND AGRICULTURE (2019), https://www.usda.gov/sites/default/files/91801-0001-23.pdf [perma.cc/EQ7S-3H3W].

181. *About ERS*, USDA ECON. RSCH. SERV. (Jan. 28, 2019), https://www.ers.usda.gov/about-ers [perma.cc/PW32-KMFL].

182. Press Release, U.S. Dep't of Agric., USDA Extends Deadline for Expressions of Interest for New ERS & NIFA Headquarters (Sept. 7, 2018), https://www.usda.gov/media/press-releases/2018/09/07/usda-extends-deadline-expressions-interest-new-ers-nifa [perma.cc/3W69-SF3C] (suggesting also that the move would increase the ability of ERS and NIFA to attract talent from land grant universities).

183. Letter from 56 Individuals to Chairs Hoeven and Aderholt and Ranking Members Bishop and Merkley (Oct. 9, 2018), https://copafs.org/wp-content/uploads/2020/11/ERS-Reorg AgencyHeadsAppropsCMTE.pdf [perma.cc/3PG8-KJ4K]; *see also* AGRIC. & APPLIED ECON. ASS'N, AAEA REVIEW FINDS THAT USDA BENEFIT-COST ANALYSIS UNDERESTIMATES THE TRUE COST OF RELOCATING RESEARCHERS TO KANSAS CITY 1 (2019), https://www.aaea.org/UserFiles/file/Report-MovingUSDAResearchersWillCostTaxpayers-AAEAReport2019june19final.docx.pdf [perma.cc/EMT5-WJEP] (conducting an independent analysis of the proposed move and finding it will cost taxpayers between $83 and $182 million); Liz Crampton, *Economists Stunned by USDA Decision to Move ERS*, POLITICO (Aug. 15, 2018, 10:00 AM), https://www.politico.com

whose research conclusions often contradicted Trump administration talking points.[184] The Biden administration has no plans to reverse the move, which is likely to cause long-term damage to the agency's ability to gather and disseminate information because so many career personnel decided to leave rather than relocate.[185]

The USDA also recently came under scrutiny for its treatment of agency reports related to climate change. In September 2019, the Senate Democratic Policy and Communication Committee released a report charging that the USDA had failed to publicize hundreds of scientific studies evaluating the impacts of climate change on agricultural production.[186] The report also identified numerous instances in which the Trump administration had directed individual agencies, including the U.S. Forest Service (a subdivision of the USDA), to remove references to climate change and climate science from their websites.[187]

Finally, efforts to intimidate academics who criticize industrial animal agriculture are increasingly prevalent. In 2010, the Maryland legislature threatened to withhold funding from the University of Maryland Environmental Law Clinic because of its role in a lawsuit against Perdue Poultry.[188] As another example, Murphy Brown, a North Carolina pork processor and subsidiary of Smithfield Foods, subpoenaed UNC epidemiologist and professor Steven Wing, who had been researching the environmental impacts of hog

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/newsletters/morning-agriculture/2018/08/15/economists-stunned-by-usda-decision-to-move-ers-317393 [perma.cc/56BQ-2WKH].

184. Sam Bloch, *Why Is Trump Slashing the USDA's Independent Research Arm? Look at Its Findings*, COUNTER (Aug. 20, 2018, 12:48 PM), https://thecounter.org/usda-economic-research-service-ers-reorganization [perma.cc/6YGZ-9J58] (noting how ERS research on issues such as food assistance, crop insurance, and farmer incomes was discordant with the politics of the Trump administration).

185. Jessica Fu, *Vilsack Confirms That USDA Research Arms Will Not Return to Washington, D.C.*, COUNTER (Apr. 29, 2021, 12:19 PM), https://thecounter.org/vilsack-usda-research-kansas-city-missouri-washington-dc-ers-nifa [https://perma.cc/9LLU-LXKC]; Liz Crampton & Ryan McCrimmon, *Trump Administration to Move USDA Researchers to Kansas City Area*, POLITICO (June 13, 2019, 4:46 PM), https://www.politico.com/story/2019/06/13/usda-kansas-city-area-1529072 [perma.cc/YZT3-5MX8].

186. DEMOCRATIC POL'Y & COMMC'NS COMM., THE TRUMP ADMINISTRATION IS JEOPARDIZING OUR FUTURE BY ATTACKING SCIENCE AND CLIMATE RESEARCH (2019), https://www.stabenow.senate.gov/imo/media/doc/DPCC%20Attacks%20on%20Science%20Report.pdf [perma.cc/PE53-4URQ] (assessing the Trump administration's treatment of climate science across multiple agencies).

187. *Id.*

188. *See* Annie Linskey, *Funding Restored to Maryland Law Clinic*, BALT. SUN (Apr. 6, 2010), https://www.baltimoresun.com/politics/bs-xpm-2010-04-07-bal-md-ci-lawschool07apr07-story.html [perma.cc/9MHD-YWFS].

CAFOs.[189] The company demanded that he produce detailed research records, including information protected by confidentiality agreements required by federal law for research involving human subjects.[190]

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

2. Promoting Confusion

Transparency itself undermines the responsible consumer by sowing confusion. On the surface, the food system is full of information. Indeed, as consumers, we are subject to "information flooding," a veritable barrage of labels that convey information about personal health, animal welfare, and environmental protection, among other things.[191] Many food movement advocates urge consumers to use these labels to make more ethical food choices. But despite this transparency, the average consumer still has very little information about whether their food is healthy for themselves, food system workers, or the environment.[192] And the average consumer has very little capacity to sort through the information to determine which is reliable and which is relevant.[193] Meaningless labels like "natural" share prominence with potentially more meaningful labels, such as "no added sugar" or "employee-owned."[194] For the food consumer, this information glut can be paralyzing and thus disempowering.

Food manufacturers use hundreds of labels, some certified by third-parties, others not, to convey information about various aspects of their products. Labels address environmental attributes, supply chain worker treatment, animal welfare, health features, and more. Although a few labels are tightly regulated, most are governed only by general fraud and truth-in-marketing

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189. *University of North Carolina – Asheville*, RACHEL CARSON COUNCIL, https://rachelcarsoncouncil.org/campus-program/university-north-carolina-asheville [perma.cc/S3EB-UU5V]; Barry Yeoman, *The Stink and Injustice of Life Next to an Industrial Hog Farm*, NATION (Dec. 20, 2019), https://www.thenation.com/article/archive/hog-farm-lawsuit-south [perma.cc/LR44-HYCS].

190. *See University of North Carolina – Asheville*, *supra* note 189; Yeoman, *supra* note 189.

191. Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755, 756 (2015) (defining "information flooding" as the dumping of information for the purpose of "hid[ing] bad facts"). On chaos in food labeling in particular, see Jason Czarnezki, Andrew Homan & Meghan Jeans, *Creating Order Amidst Food Eco-Label Chaos*, 25 DUKE ENV'T L. & POL'Y F. 281 (2015).

192. Czarnezki et al., *supra* note 161, at 1014–16 (describing the limitations of consumer capacity to process available information).

193. *Id.*

194. *See* Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69,905 (Nov. 12, 2015) (cataloguing requests that FDA provide clarification on the meaning of "natural").

laws.[195] This is a case in which the cacophony of opinions contributes not to a "marketplace of ideas" but to a drowning out of reason.[196]

The rise of labeling is self-perpetuating. As consumers come to rely on and expect labels, they advocate for more of them, focusing on "the right to know" rather than on system reform. In some cases, information access can facilitate reform, but in practice the right to know supplants more substantive regulatory aims. Consider, for instance, the history of advocacy around genetically modified foods. Advocacy calling for substantive standards for the introduction of GMOs was drowned out by the Just Label It movement, which culminated in a nearly meaningless federal-labeling law.[197] The law and the implementing regulations use the less recognized phrase "bioengineered" and its acronym "BE" rather than the more commonly understood "genetically modified" or "genetically engineered."[198] The USDA selected a labeling symbol that requires either the phrase "bioengineered" or "derived from bioengineering" and includes a graphic of a sun over a field of row crops.[199] The USDA's regulations are currently the subject of litigation charging that the rules facilitate "de facto concealment of [genetically engineered] foods and avoidance of their labeling."[200] Genuine concerns about seed sovereignty and pesticide pollution are dismissed as fringe, and consumers are placated by the theoretical right to choose for themselves.

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195. Czarnezki et al., *supra* note 161, at 1004 (describing the legal frameworks surrounding eco-labels); *see also supra* Section I.C (discussing organics labeling).

196. *See* STANLEY, *supra* note 13, at 66–71 (rejecting John Stuart Mill's claim that no opinions should be silenced).

197. *See, e.g.*, Katherine Wenner, Comment, *Quick Response Codes for Genetically Engineered Foods: A "Quick Fix" to America's Deep-Rooted Debate Surrounding Genetically Engineered Foods*, 53 WAKE FOREST L. REV. 623, 623 (2018) (characterizing the law as an attempt by Congress "to sidestep the underling unease regarding these food products"); Zoe S. Spector, Note, *The National Bioengineered Food Disclosure Standard: A Solution to the GMO Labeling Political Debate?*, 2018 U. ILL. J.L. TECH. & POL'Y 457, 465–74 (criticizing the law on a variety of grounds including the choice to allow manufacturers to opt for electronic disclosure using QR codes and the law's broad exemptions).

198. National Bioengineered Food Disclosure Standard, 7 C.F.R. pt. 66 (2021); 7 U.S.C. § 1639(b); *see also* Lucas A. Westerman, *Consumer Choice or Confusion: That GMO Label Doesn't Mean What You Think It Means*, 23 DRAKE J. AGRIC. L. 199, 223–27 (2018) (arguing that these labels are misleading and that consumers would be better served by voluntary third-party certification schemes).

199. *BE Symbols*, USDA AGRIC. MKTG. SERV., https://www.ams.usda.gov/rules-regulations/be/symbols [perma.cc/H3ZZ-WACS]. Rejected alternatives included other versions of yellow and green smiley face suns with the letters "BE." AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., OVERVIEW OF THE NATIONAL BIOENGINEERING FOOD DISCLOSURE STANDARD (2018), https://www.ams.usda.gov/sites/default/files/media/BELabelingOverviewWebinarSlides.pdf [perma.cc/9QWB-GVDC].

200. First Amended Complaint at 1–2, Nat. Grocers v. Perdue, No. 20-cv-5151, 2021 U.S. Dist. LEXIS 121201 (N.D. Cal. filed July 27, 2020) (challenging the language and imagery of the label and the USDA's choice to allow producers to replace the label with a QR code). Plaintiffs in the lawsuit alleged violations of the Bioengineered Food Disclosure Act itself, the Administrative Procedure Act, and the First, Fifth, and Tenth Amendments. *Id.* at 1–4.

3. Information Control as a Disempowerment Tool

Information control has long been understood as a mechanism for consolidating power.[201] This may occur in a variety of forms—lying, controlling access to information, exaggerating, and breaking down the line between truth and fiction.[202] Information control silences dissent when the factual bases for critique are obscured or when the criticism itself is discouraged through threat of violence or prosecution. And muddying the truth prevents dissent by distracting and confusing potential dissenters. Together, these information-control mechanisms—suppression of dissent and confusion—render consumers helpless under the guise of facilitating consumer responsibility.

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I recognize that there is an inherent tension between the logical policy conclusions of Part I—reducing prescriptive regulation and allowing communities to engage in self-determination—and the logical policy conclusions of Part II—ramping up regulation and freeing consumers from their burdens. This tension is resolved, in part, by resisting the instinct to take either of these critiques to its fullest extreme. There is a role for laws that protect consumers, particularly in the face of information asymmetries and other structural barriers to free choice. And there is a role for laws that empower consumers, particularly those participating in nondominant food cultures.

III. A POLARIZED FOOD SYSTEM

Parts I and II explored how the myths of the helpless and responsible consumer strip power from many food system participants. The myth of the helpless consumer generates the basis for homogenization, which threatens diversity of traditions, scale, demographics, and food itself. The myth of the responsible consumer creates a reliance on information as the basis for both individual choice and advocacy. Consumers are then susceptible to a constructed helplessness as information supplies are shut off, diluted, or drowned out. An additional mechanism through which food law strips power emerges from the juxtaposition of these myths: polarization. Polarization occurs along two axes: between food producers (including food system workers) and food consumers, and among food consumers. Polarization, in turn, exacerbates powerlessness by inhibiting the kind of cooperative advocacy necessary to resist corporate power.

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

202. *Id.* at 341–51; STANLEY, *supra* note 13, at 35 (explaining that fascist regimes use propaganda to "elevate[] the irrational over the rational, fanatical emotion over the intellect"); *id.* at 36 ("Fascist politics seeks to undermine public discourse by attacking and devaluing education, expertise, and language."); *id.* at 57 (arguing that when fascist propaganda succeeds, "reality itself is cast into doubt").

A. *Axes of Polarization*

1. Food System Workers Versus Consumers

As described in Part I, the myth of the helpless consumer helps to support a unidirectional chain of obligation in which producers owe a variety of duties to consumers. At the same time, the myth of the responsible consumer helps to support an environment in which consumers come to producers with a range of demands. These two features set up consumers and producers as oppositional.[203] This polarization allows for exploitation of food workers and preserves the economic power of the food industry.

While consumers benefit from numerous legal protections, producers, and often more importantly their employees, enjoy very few. As a result of the suite of helpless consumer laws, food businesses invest significant time and resources into catering to consumer expectations and ensuring consumer protection. Following a "customer is always right" mentality, these laws reflect a belief that the interests of the consumer overshadow all other interests at stake in the food system, including those of employees, animals, and the environment. This dynamic is at its most extreme in the tipped-wages segments of the industry, where customer satisfaction literally determines employee pay scales.[204] The ongoing experience of workers during the COVID-19 pandemic also illustrates this phenomenon vividly and heartbreakingly. Food system workers deemed "essential" were expected to risk their own lives to ensure that consumer food experiences remained uninterrupted.[205]

Legal structures mirror this dynamic. Labor law is rife with food-related exceptions. Agricultural workers, who historically were not entitled to a federal minimum wage, remain exempt from the right to engage in collective bargaining.[206] In part as a result, agricultural workers are underprotected from a

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

204. *See* Lee, *supra* note 5, at 1273–76, 1290.

205. This example may perhaps also highlight the lack of a clear outer bound of consumer willingness to sacrifice food system workers when their interests are not aligned. Despite significant public outcry in response to dangerous conditions in many workplaces, perhaps most particularly in meat-processing plants, meat consumption hardly changed. *See, e.g.*, Sophie Attwood & Cother Hajat, *How Will the COVID-19 Pandemic Shape the Future of Meat Consumption?*, 23 PUB. HEALTH NUTRITION 3116, 3117 (2020).

206. Guadalupe T. Luna, *An Infinite Distance? Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489–92 (1998) (describing labor law exceptions for agricultural workers); REBECCA E. BERKEY, ENVIRONMENTAL JUSTICE AND FARM LABOR 65 (2017) (describing exclusion of field laborers, as distinguished from food-processing laborers, from the Wagner Act of 1935, which established protections for worker organization); *see also* Sarah O. Rodman et al., *Agricultural Exceptionalism at the State Level: Characterization of Wage and Hour Laws for U.S. Farmworkers*, J. AGRIC. FOOD SYS. & CMTY. DEV., Winter 2015–2016, at 89, 99 (noting that as of 2015 no state overtime laws applied to agricultural workers and that only eleven states guaranteed farmworkers a minimum wage). Since 2016, California (2016), New York (2019), and Washington (2021) have extended overtime pay to farmworkers. Act. of

variety of workplace risks, including extreme exposure to pesticides.[207] Evidence of agricultural workers' exploitation, including occupational injury, lack of access to health care, pesticide-related illnesses, poor housing conditions, food insecurity, debt-to-labor contractors, sexual violence, and poverty wages, is overwhelming.[208] The myth of the responsible consumer and its attendant "vote with your fork" advocacy, which calls for consumer benevolence toward workers, has, unsurprisingly, done little to improve workplace protections, as consumers tend to focus on spending to protect their own interests first.[209] Likewise, homogenized food systems exacerbate workplace risks by prioritizing consumer protection and efficiency. For instance, in regulating line speed in hog processing facilities, the USDA's Food Safety Inspection Service focuses primarily on whether increased speeds, which processors are clamoring for, will jeopardize food safety.[210] Faster line speeds also generate significant risk of workplace injury, but the agency has historically viewed its authority to take worker safety into account narrowly, and it has sometimes declined to consider it altogether.[211]

Sept. 12, 2016, ch. 313, § 2, 2016 Cal. Laws 2789, 2790–91 (codified at CAL. LAB. CODE §§ 857–864 (West 2020)); Farm Laborers Fair Labor Practices Act, ch. 105, § 6, 2019 N.Y. Laws 848, 849 (codified as amended at N.Y. LAB. LAW § 163-a (McKinney Supp. 2021)); Act of May 11, 2021, ch. 249, 2021 Wash. Sess. Laws 1897 (codified at WASH. REV. CODE § 49.46.130(6)–(9) (2021)); *see also* Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc., 475 P.3d 164 (Wash. 2020) (holding that the exemption of dairy workers from state overtime laws violated the state constitution).

207. *See* BERKEY, *supra* note 206, at 39–42 (surveying studies of prevalence of pesticide-related illness among farmworkers).

208. *See id.* at 38–50.

209. *See* Lee, *supra* note 5, at 1273–76 (explaining why this type of advocacy has limited value in the context of worker protection); *see also supra* Section II.A.3 (describing the trend of placing responsibility for workers onto consumers).

210. Line speed refers to the number of animals a facility can process per minute, and faster speeds increase risk of repetitive-stress injury. *USDA Increases Line Speeds, Endangering Poultry Processing Plant Workers*, UNION OF CONCERNED SCIENTISTS (Jan. 9, 2019), https://www.ucsusa.org/resources/attacks-on-science/usda-increases-line-speeds-endangering-poultry-processing-plant [perma.cc/ZFN8-WVDU].

211. United Food & Com. Workers Union Loc. 663 v. U.S. Dep't of Agric., 532 F. Supp. 3d 741 (D. Minn. 2021) (finding USDA's failure to consider worker safety when repealing line-speed regulations at pork-processing plants arbitrary and capricious). Although the Biden administration announced that it would not appeal the decision, Secretary of Agriculture Tom Vilsack testified to the House Agriculture Committee in October 2021 that the USDA intended to revisit the issue and find ways for pork processors to speed up operations again. Tom Polansek, *U.S. Mulls Waivers for Pork Plants Forced to Slow Down*, REUTERS (Oct. 7, 2021), https://www.reuters.com/article/usa-pork-slaughtering/u-s-mulls-waivers-for-pork-plants-forced-to-slow-down-vilsack-idUSKBN2GX2CV [perma.cc/LDG7-ZADQ]. The agency has a process for allow waivers from existing line speeds for poultry and pork facilities that lists employee safety as just one of twelve criteria for approval. *Salmonella Initiative Program Criteria*, USDA FOOD SAFETY & INSPECTION SERV. (Nov. 9, 2021), https://www.fsis.usda.gov/science-data/data-sets-visualizations/microbiology/microbiological-testing-program-rte-meat-and [perma.cc/HY3F-NS87]. A recent USDA Office of Inspector General report noted that regulators approving waivers typically did not maintain sufficient documentation with regard to this criterion, such that it was difficult to assess whether reviewers adequately enforced the criterion. OFF. OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 24601-0007-31, FSIS WAIVER

The juxtaposition of the helpless consumer, in need of protection from their food, with food system workers, who are not protected as they make that food, establishes a troubling asymmetry. It is also illogical. There is considerable overlap between producers and consumers. Essentially all Americans are food consumers, and about one-sixth of the workforce works in the food system.[212] Food system workers are protected as consumers but ignored as workers. Put another way, lettuce is deemed to pose a risk to a person who might get sick from eating it if it is contaminated with *e. Coli*. It is not deemed a risk to the same person who might get sunstroke from harvesting it during a heat wave. The helpless consumer is thus dangerous not because the consumer is relieved of responsibility for the farmworker but because the system is structured to protect consumers at the expense of all others, regardless of need.

A parallel set of tensions exist between food consumers and farmers. Although some farmers receive significant federal financial support, many do not. For instance, recent subsidies distributed to respond to former president Trump's trade war with China were given almost entirely to white farmers.[213] And some categories of farmers are particularly vulnerable within the food system's structure. For example, the vast majority of broiler chickens are raised under contract with poultry processors.[214] In theory, contracts are beneficial because they allow farmers to share yield and price risk with their buyers, who commit to prices up front and often purchase the final products in advance of production. In practice, however, the structure of contract markets leaves poultry farmers open to exploitation.[215] During a series of Department

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OF REGULATORY REQUIREMENTS 6 (2021), https://www.usda.gov/sites/default/files/audit-reports/24601-0007-31_final_distribution.pdf [perma.cc/ZS84-NZBF].

212. This includes jobs in food production, processing, distribution, service, and retail. FOOD CHAIN WORKERS ALL., THE HANDS THAT FEED US: CHALLENGES AND OPPORTUNITIES FOR WORKERS ALONG THE FOOD CHAIN 11–12 (2012), https://foodchainworkers.org/wp-content/uploads/2012/06/Hands-That-Feed-Us-Report.pdf [perma.cc/XB5J-EMWG] (relying on 2010 data from the Bureau of Labor Statistics, the 2007 Census of Agriculture, and 2009 U.S. Census figures).

213. Nathan Rosenberg & Bryce Wilson Stucki, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout to White Farmers*, COUNTER (July 29, 2019, 10:05 AM), https://newfoodeconomy.org/usda-trump-trade-war-bailout-white-farmers-race [perma.cc/C93T-NCSX] (citing research that the bailout disproportionately benefited white and wealthy landowners); HOSSEIN AYAZI & ELSADIG ELSHEIKH, HAAS INST., THE US FARM BILL: CORPORATE POWER AND STRUCTURAL RACIALIZATION IN THE UNITED STATES FOOD SYSTEM 50–60 (2015), https://belonging.berkeley.edu/sites/default/files/haasinstitutefarmbillreport_publish_0.pdf [perma.cc/2X9X-F3D8].

214. See James MacDonald, *Trends in Agricultural Contracts*, 30 CHOICES, no. 3, 2015, at 2, https://www.choicesmagazine.org/UserFiles/file/cmsarticle_461.pdf [perma.cc/QFB9-BUNA].

215. There are two types of contracts. Marketing contracts specify price or a pricing mechanism and an outlet for sale, insulating the farmer from price fluctuation. JAMES MACDONALD ET AL., U.S. DEP'T OF AGRIC., AER-837, CONTRACTS, MARKETS, AND PRICES: ORGANIZING THE PRODUCTION AND USE OF AGRICULTURAL COMMODITIES 4 (2004), https://www.ers.usda.gov/webdocs/publications/41702/14700_aer837_1_.pdf?v=0 [perma.cc/63GZ-8HAT]. Marketing contracts may also specify product quality. Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397, 401 (1995). By contrast, production

of Justice listening sessions, many participants charged that "producers who raise or sell animals under contract are subjected to unfair or abusive treatment."[216] In 2008, Congress directed USDA to address this issue, but subsequent congresses and the Trump administration have stymied meaningful change.[217]

Although farmers remain a potent symbolic force in politics, their economic and political power is declining.[218] Farmers have less market power and face significant barriers to changing their practices, including the cost of adopting new production methods or shifting crops and lack of access to markets for different crops.[219] At the same time, they are subject to widespread critique from environmental and consumer groups.[220] A recent article captured the perceived divide between farmers and consumers: "[C]onsumers ha[ve] a hard-to-satisfy wish list for those who put food on our tables—with most claiming to feel knowledgeable about how our food is raised."[221] The

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contracts are much more detailed, often "giv[ing] the [buyer] direct control of farm production methods." *Id.* at 401. They may specify inputs (seed stock, fertilizer, pesticides), direct production methods, and allow the contracting buyer to make field visits. MACDONALD ET AL., *supra*, at 4.

216. U.S. DEP'T. OF JUST., COMPETITION IN AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 20–21 (2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf [perma.cc/7KZ9-M9YB].

217. The USDA first promulgated new regulations in 2011 but was prevented from enforcing them by a series of appropriations riders. JOEL L. GREENE, CONG. RSCH. SERV., R41673, USDA'S "GIPSA RULE" ON LIVESTOCK AND POULTRY MARKETING PRACTICES (2016) (describing the statutory and regulatory history from 2008 to 2016). In 2016, the USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) promulgated rules to protect farmers from unfair practices, only to withdraw them a year later. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92,566 (Dec. 20, 2016) (allowing individual farmers to establish unfair practices without proving harm to the entire market); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92,703 (proposed Dec. 20, 2016) (defining what kinds of contracting practices would violate the Act); 82 Fed. Reg. 48,584 (Oct. 18, 2017) (withdrawing the interim final rule); 82 Fed. Reg. 48,603 (Oct. 18, 2017) (announcing no further action on the proposed rule). The Trump administration disbanded GIPSA as part of a USDA reorganization. Revisions of Delegations of Authority, 83 Fed. Reg. 61,309, 61,310 (Nov. 29, 2018). The Biden administration has announced plans to revive some aspects of the Obama-era rules. Exec. Order No. 14,036, § 5(i), 86 Fed. Reg. 36,987, 36,992–94 (July 9, 2021) (directing USDA to revisit these rules); Poultry Grower Ranking Systems: Withdrawal, 86 Fed. Reg. 60,779 (Nov. 4, 2021) (withdrawing a stalled Obama-era proposed rule and announcing plans to commence a new rulemaking).

218. *See* Ben-Asher & Pollans, *supra* note 82, at 28–29 (describing the symbolic power of the family farm in American politics); Pollans, *supra* note 203, at 107–08 (describing the declining market power of farmers).

219. Pollans, *supra* note 203, at 106–07.

220. *Id.* at 101–02 (describing the antifarmer rhetoric of the environmental and consumer food movements).

221. *Survey: Consumer Expectations Make It Tough to Be a Farmer*, AGDAILY (Aug. 6, 2019), https://www.agdaily.com/insights/consumer-expectations-take-toll-farmers [perma.cc/7V4Q-TG3N] (characterizing data from a new study by Cargill); *see also* Pollans, *supra* note 203, at 103 (quoting a Trump-Pence campaign talking point promising to "defend American

framework of the responsible consumer underlies this illusion of oppositional interests between farmers and consumers. To put it crudely, the responsible consumer is invited to have preferences about farming practices, a fraught endeavor for even the most informed consumer and one that seems almost certain to alienate farmers, who do not want to be told how to do their jobs by people lacking practical farming knowledge.

The myth of consumer responsibility suggests that government intervention in food production is unnecessary because consumers are empowered not to need it. At the same time, a corollary narrative is that intervention would in fact be detrimental to consumers because it would make food more expensive. Producers must be free to produce as much food as cheaply as possible. If farmers can protect consumers, then farmers are free to do what is necessary to achieve this goal, and consumers are otherwise on their own. This view of the food system relies on the theory of productivism, which assumes that increasing agricultural productivity is the key to reducing hunger.[222] Although the USDA defines food security more broadly as "access by all people at all times to enough food for an active, healthy life" and "one of several conditions necessary for a population to be healthy and well-nourished,"[223] productivism remains a central focus of the food security framework.[224] Faced with projections of population growth, global policymakers speak of the need to double levels of food production.[225] In the United States, policymakers and agricultural-industry advocates regularly focus on farmers' role in "feeding the world."[226]

In part because of this rhetoric, those working in the food system remain in poverty and are often food insecure themselves.[227] This connection remains

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Agriculture against its critics, particularly those who have never grown or produced anything beyond a backyard tomato plant").

222. *See* NORA MCKEON, FOOD SECURITY GOVERNANCE: EMPOWERING COMMUNITIES, REGULATING CORPORATIONS 71–73 (2015) (observing that typical measures of productivity, such as yield, often miss more context-specific measures, such as productivity per unit of labor, that might be more useful); Olivier De Schutter, *The Specter of Productivism and Food Democracy*, 2014 WIS. L. REV. 199, 199–200.

223. ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN A. GREGORY & ANITA SINGH, U.S. DEP'T OF AGRIC., ERR-270, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2018, at 2 (2019), https://www.ers.usda.gov/webdocs/publications/94849/err-270.pdf?v=340.9 [perma.cc/6ZRC-D37S].

224. *See* John Ingram, *A Food Systems Approach to Researching Food Security and Its Interactions with Global Environmental Change*, 3 FOOD SEC. 417, 418–19 (2011) (concluding that research into increased productivity vastly outstrips research into other aspects of food security).

225. *See, e.g.*, L. VAL GIDDINGS, MATTHEW STEPP & MARK CAINE, INFO. TECH. & INNOVATION FOUND., FEEDING THE PLANET IN A WARMING WORLD: BUILDING RESILIENT AGRICULTURE THROUGH INNOVATION 7–8 (2013), http://www2.itif.org/2013-feeding-planet-warming-world.pdf [perma.cc/FD6X-S44H].

226. *See, e.g.*, AGDAILY, *supra* note 221 (using this rhetoric); Margaret Mellon, *Let's Drop "Feed the World": A Plea to Move Beyond an Unhelpful Phrase*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Aug. 30, 2013, 9:19 AM), https://blog.ucsusa.org/margaret-mellon/lets-drop-feed-the-world-a-plea-to-move-beyond-an-unhelpful-phrase-229 [perma.cc/C2Z2-QZH8].

227. Sandy Brown & Christy Getz, *Farmworker Food Insecurity and the Production of Hunger in California*, *in* CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY 121, 121

invisible because "the concept of food security, as deployed by domestic actors, has largely sidestepped a structural analysis of hunger. The result has been a focus on feeding hungry people, rather than altering the production relations and modes of governance that underpin food insecurity."[228] Agricultural workers are particularly susceptible to food insecurity, and susceptibility is higher for workers without legal status in the United States as these workers do not have access to Supplemental Nutritional Assistance Program (SNAP) benefits.[229] Over the years, agricultural workers "have been recruited and expelled to meet growers' shifting needs for labor in the fields."[230] Consumer-responsibility narratives on food security, and in particular on work requirements for access to social safety nets, reinforce this pattern. Low-income people are compelled to accept low-wage work to remain eligible for benefits.[231]

2. Consumer Versus Consumer

The myth of the responsible consumer also generates a second axis of polarization. As personal health, household food security, and equity and sustainability are tied to individual choice, individual capacity to and interest in making those choices becomes a source of division. While some consumers have the time, money, and inclination to invest significantly into researching their food choices, others do not. Just as consumers are asked to do more and more with their food dollars, social-welfare support to supplement those dollars is declining.[232]

Consumer responsibility for equity and sustainability results in dichotomous rhetoric. On the one hand is the "if they only knew" rhetoric, which laments lack of education and argues that consumers would make different choices if they knew better where their food came from.[233] Michael Pollan exemplifies this philosophy:

(Alison Hope Alkon & Julian Agyeman eds., 2011) (observing that "those who produce our nation's food are among the most likely to be hungry or food insecure").

228. *Id.* at 122.

229. *Id.* at 132 (reviewing findings from a study of agricultural workers in Fresno County, California).

230. *Id.* at 134–35 (describing the historical construction of "ideologies of racial difference" to justify exploitation and foment backlash against labor militancy).

231. *See supra* notes 148–149 and accompanying text (describing public benefit infrastructure); AYAZI & ELSHEIKH, *supra* note 213, at 41–42 (arguing that SNAP provides a significant subsidy to businesses who can get away with paying low wages because their employees can supplement their earnings with SNAP benefits).

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

233. Julie Guthman, *"If They Only Knew": The Unbearable Whiteness of Alternative Food*, *in* CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY, *supra* note 227, at 263; DUPUIS, *supra* note 101, at 102 (explaining that "the notion of unveiling is itself romantic, a promise that the 'real' good food can be found underneath the veil").

> If people could peer over the increasingly high walls of our industrial agriculture they would surely change the way they eat.
>
> Increasing numbers of Americans aren't waiting: they're changing now. This desire for something better—something safer, something more sustainable, something more humane and something tastier—is what's bringing people to the Whole Foods and the farmer's market . . . .[234]

Some advocates espouse an even more insidious version, arguing that if people could only taste real food, they would make better choices.[235] Scholars have long critiqued this aspect of the movement as neoliberal, pointing out that it relieves the public sector of responsibility for serious public problems, puts the burdens of those problems on individuals, and allows the food industry to continue with business as usual.[236]

The trend places responsibility on individual consumers without considering structural barriers that hinder choice. The first of these barriers is cost. From a food producer's perspective, the primary function of a certification is to charge a price premium. Healthier, more sustainable, and more humane food choices are often more expensive.[237] Second, the moral choice is not always straightforward. How, for instance, should a consumer balance label information about animal welfare with information about carbon footprint?[238] Labels themselves also face numerous methodology and legitimacy problems and may not be reliable sources of information.[239]

In part because of these barriers, the myth of the responsible consumer is susceptible to the charge of elitism—the other side of the dichotomous rhetoric. Critical food scholar Julie Guthman refers to Michael Pollan's approach as "privileged,"[240] and more pointed critiques fill the pages of conservative and libertarian media.[241] Critics have also observed that the consumer food movement tends to create and reproduce "white spaces" that are exclusive both for

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234. Pollan, *supra* note 156.

235. *See, e.g.*, DAN BARBER, THE THIRD PLATE: FIELD NOTES ON THE FUTURE OF FOOD 11, 22 (2014) (describing how chefs have "the potential to get people to rethink their eating habits" and arguing that taste "can be a guide in reimagining our food system, and our diets, from the ground up").

236. *See, e.g.*, Guthman, *supra* note 233; Julie Guthman, *Can't Stomach It: How Michael Pollan et al. Made Me Want to Eat Cheetos*, GASTRONOMICA, Summer 2007, at 75; Alkon & Guthman, *supra* note 1, at 10–15 (arguing that "[w]hen food activists argue that the best way to create a sustainable food system is to become a producer or consumer of local and organic food, they are working within [a] neoliberal worldview" that focuses on "the primacy of the so-called free market, unconstrained by government intervention").

237. *See* Pollans, *supra* note 203, at 109 & n.48.

238. *See* Czarnezki et al., *supra* note 161, at 1016 (describing the problem of cross-product comparison and the inadequacy of labels for guiding consumers' choices).

239. *Id.* at 1008–16.

240. Guthman, *supra* note 233, at 78 (calling his approach both "privileged" and troublingly "apolitical").

241. *See, e.g.*, Matthew Continetti, *Freedom Is Eating Steak Well Done with Ketchup*, NAT'L REV. (Mar. 18, 2017, 4:00 AM), https://www.nationalreview.com/2017/03/donald-trump-steak-

the structural reasons described above and for cultural reasons.[242] Here, processes of food homogenization reinforce this culture war by stigmatizing non-dominant foodways. As discussed in Part I, homogenization others outsider foods and food production practices.[243] In conjunction with responsibilization, it also sets the stage for the charge that consumers who do try to take action and demand change from food producers are themselves deviant and should be dismissed.

This fight over who gets to decide what good food is—and even the basic assumption that there is such a thing as "good food"—fosters mutual judgment and magnifies ideological divides. As I have argued elsewhere, the big beneficiary of this ideological divide is the food industry.[244] Food law—including consumer protection laws that create one-way obligations from producers to consumers and information-control regimes that undermine food consumers' capacity to understand the system they participate in—plays a critical role in fostering this polarization.

B. *Polarization as a Disempowerment Tool*

Polarization magnifies the collective-action problem already facing those advocating for systemic change. Hannah Arendt argues that "[s]ocial atomization and extreme individualization preced[e] the mass movements" that allow for the rise of authoritarian regimes.[245] This is achieved through isolation of those with common interests. Focusing in particular on the breakdown of social classes, she observes that without these common bonds to overcome difference, "the whole fabric of visible and invisible threads which bound the people to the body politic" disintegrates.[246] Ultranationalism feeds on "us ver-

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liberals-show-their-elitism-while-mocking-trump [perma.cc/SFT4-72YC]; Katherine Timpf, *Study: Michelle Obama's Nutrition Advice Is Sexist and 'Elitist,'* NAT'L REV. (Sept. 16, 2014, 7:30 PM), https://www.nationalreview.com/2014/09/study-michelle-obamas-nutrition-advice-sexist-and-elitist-katherine-timpf [perma.cc/DAL9-DRTQ]; Suzanne Zuppello, *Slow Food's Elitism Only Fueled My Craving for McDonald's: Carlo Petrini's Cult-Like Food Movement Is One for the Privileged*, EATER (Oct. 18, 2018, 10:17 AM), https://www.eater.com/2018/10/18/17943358/slow-food-manifesto-elitist-fast-food [perma.cc/78MB-Y5ZR].

242. *See, e.g.*, Margot Pollans & Michael Roberts, *Setting the Table for Urban Agriculture*, 46 URB. LAW. 199, 218–20 (2014) (summarizing literature that identifies how urban agriculture projects and farmers' markets can become "white spaces"); Kristen Aiken, *'White People Food' Is Creating an Unattainable Picture of Health*, HUFFPOST (Mar. 9, 2021), https://www.huffpost.com/entry/white-people-food_n_5b75c270e4b0df9b093dadbb [perma.cc/4VCB-VW3H].

243. *See supra* Section I.B.

244. *See* Pollans, *supra* note 203, at 112.

245. ARENDT, *supra* note 15, at 316–17.

246. *Id.* at 314; *see* STANLEY, *supra* note 13, at 172; Theodor W. Adorno, *Freudian Theory and the Pattern of Fascist Propaganda* (1951), *reprinted in* THE CULTURE INDUSTRY 131 (J.M. Bernstein ed., 1991) (observing that the central structure of fascism lies in erasing differences within an in-group and emphasizing differences with outsiders to prevent any "realization of true equality"); *see also* PAXTON, *supra* note 131, at 10 (describing how fascist regimes often began with anticapitalist rhetoric but, once in power, "banned strikes, dissolved independent

sus them" rhetoric to mobilize solidarity oriented around the state, encouraging a strong relationship between each individual and the state and discouraging other kinds of solidarity relationships.[247] Indeed, fascist regimes frequently targeted labor unions, which those regimes deemed threats because they created "mutual bonds along lines of class."[248]

As the previous Sections established, this same polarizing dynamic plays out in the food system. Food law generates and reinforces us-versus-them sentiments along several axes, isolating those who may otherwise have common interests. This fragmentation preserves the economic power of the food industry and exacerbates exploitation of food system workers and food consumers, particular minority and low-income consumers.

C. *From Fascism to Sovereignty*

This Article argues that food law facilitates the loss of individual and community sovereignty, and it frames this loss of sovereignty as a matter of powerlessness. Homogenization creates powerlessness by eliminating meaningful choice. This powerlessness is felt most acutely by those whose traditional foodways fall outside the prescribed norms of the U.S. food system. Information control creates powerlessness by disempowering those who might otherwise express their political and social preferences through food choice just as consumers are distracted from more direct means of food-related political participation. Finally, polarization creates powerlessness by curtailing solidarity between the different segments of the population exploited by the food industry.

Where law produces powerlessness, it advances something more insidious: fascism. Hannah Arendt puts the loss of individual and community sovereignty at the core of fascism, and the constructed powerlessness that this Article describes is perhaps a democracy-friendly euphemism for fascism.[249] It might be that fascism is a useful analytical tool to assess the U.S. food system.[250] Even in the absence of authoritarian power, the dominant food system,

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labor unions, lowered wage earners' purchasing power, and showered money on armaments industries"). Class bonds are particularly threatening to fascist regimes because "[f]ascist politics is most effective under conditions of stark economic inequality." STANLEY, *supra* note 13, at 172. In the United States, just as in Germany and elsewhere, "racial division has always countered the unifying force of the labor movement." *Id.* at 173. Fascism thus relies on a magnification of some differences—often, though not always, of race—and a playing down of others—often of class or otherwise economic in nature.

247. *See* ARENDT, *supra* note 15, at 323–24.

248. STANLEY, supra note 13, at 172.

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

250. "Fascism" is an imprecise term. *See* Gilbert Allardyce, *What Fascism Is Not: Thoughts on the Deflation of a Concept*, 84 AM. HIST. REV. F. 367, 367 (1979) (lamenting that "we have agreed to use the word without agreeing on how to define it"). As historian Kevin Passmore has observed, "the final meaning of a political label is ungraspable"; its meaning derives only from specific contexts in which the label is used. KEVIN PASSMORE, FASCISM: A VERY SHORT

as characterized by homogenization, information control, and polarization, has taken on the key hallmarks of fascist ordering.[251]

Food has a deep relationship to state power. At one extreme, it plays a significant role in fascist and other authoritarian regimes. From forced starvation (for example, in Nazi concentration camps[252]) to centralized food system planning (for example, in Italy under Mussolini[253]), controlling food is a key path to controlling people. Historian Tiago Saraiva puts food at the center of fascism's rise, arguing that "every fascist regime of the interwar period became obsessed with projects for making the national soil feed the national body."[254] At the other extreme, food plays a key role in anarchist communities. Articulating a theory of "escape agriculture," anarchist historian James Scott describes how communities around the world intentionally adopted certain foods and agricultural practices, such as shifting agriculture and tuber crops, that evade state appropriation because they are difficult to locate and tax.[255] These food choices and food production practices allowed communities to resist the control of oppressive governmental regimes and remain essentially stateless.[256]

If this Article provides a conceptual critique of U.S. food law, it also offers a roadmap for reform, identifying the laws, policies, and institutional actors that strip power from the majority of food system participants. The primary

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INTRODUCTION 20 (2d ed. 2014); *see also* RENZO DE FELICE, INTERPRETATIONS OF FASCISM (Brenda Huff Everett trans., Harvard Univ. Press 1977) (1969) (concluding that each fascist regime is unique and that no general interpretation is possible). In this sense, Passmore concludes "[t]he only thing that really distinguishes fascism from other concepts is its enormous negative moral charge." PASSMORE, *supra*, at 20. Likewise, Madeleine Albright observes the recent trend to overuse the term in all arenas of our lives and concludes that using the label for anything we do not like can reduce the potency of an otherwise powerful term. MADELEINE ALBRIGHT, FASCISM: A WARNING 8 (2018).

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

252. ADAM TOOZE, THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY 529–44 (2006) (describing food policies in concentration camps and in prisoner-of-war labor camps).

253. Carol F. Helstosky, *Fascist Food Politics: Mussolini's Policy of Alimentary Sovereignty*, 9 J. MOD. ITALIAN STUD. 1, 1 (2004).

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

255. JAMES C. SCOTT, THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA 187–207 (2009) (rejecting the "civilizational narrative" of progress from foraging through pastoral nomadism, shifting cultivation, sedentary fixed-field agriculture, and irrigated agriculture to industrial agriculture and observing that oscillation between foraging, shifting agriculture, and settled agriculture was "a strategic option to circumvent the many inconveniences of state power").

256. *Id.* (identifying forced labor, crop confiscation, taxation, forced relocation, and epidemics, among others, as state practices communities sought to evade).

goal of reform should be to establish food sovereignty, the functional inverse of food fascism.[257] Sovereignty, as distinct from food freedom (and other forms of food libertarianism) relies not on an individual's absolute right to choose what and how to eat but on the power of individuals, communities, and nations to participate in the critical decisions that shape the food system. Building sovereignty begins with dismantling the fascist structures of food law. In some cases, the dismantling is simple, requiring only the repeal of a problematic policy (for instance, SNAP work requirements or food disparagement laws). In other cases, the dismantling requires more complex tradeoffs between the goal of sovereignty and the need for risk management (for instance, food safety or food fraud law reform).[258] Ultimately, dismantling food fascism is necessary to make the apparent goal of the food system—to allow eating that is physically, culturally, and emotionally sustainable—an achievable reality.

CONCLUSION

I end with a word of caution. Fascist regimes depend on myth.[259] Therefore, dismantling the two myths at the core of the U.S. food-law system—the myths of the helpless and responsible consumer—is a necessary yet fraught first step. Unwinding the myth of the helpless consumer requires embracing lay expertise in food safety, but it also requires empowering communities to assess safety. Doing so without simultaneously dismantling the myth of the responsible consumer risks doubling down on the latter myth's oppressions. Likewise, dismantling the myth of the responsible consumer, which would involve alleviating burdens on consumers to eat the "right food," risks doubling down on the helpless consumer myth. Instead, the two myths must be understood and unwound together through investment in food system governance that can reflect our diverse social, religious, physical, and emotional food needs.

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

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

259. On the centrality of myth to fascist nation-making, see generally PHILIPPE LACOUE-LABARTHE, HEIDEGGER AND THE POLITICS OF POETRY (Jeff Fort trans., Univ. of Ill. Press 2007) (2002).