

January 2015

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Recommended Citation

Marbury, Reed M. (2015) "The Faulty Focus of Food Regulation: The Regulatory Roadblock to Entrepreneurship and Innovation," *Liberty University Law Review*: Vol. 9: Iss. 2, Article 5.
Available at: http://digitalcommons.liberty.edu/lu_law_review/vol9/iss2/5

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COMMENT

THE FAULTY FOCUS OF FOOD REGULATION: THE REGULATORY ROADBLOCK TO ENTREPRENEURSHIP AND INNOVATION

Reed M. Marbury[†]

I. INTRODUCTION

“Social fashion, delusion, and propaganda have combined to persuade the public that our agriculture is for the best of reasons the envy of the Modern World. . . . What these men are praising . . . is a disaster that is both agricultural and cultural.”¹

If abundant crops and a deluge of cheap food were the standards of success, surely the American farming story would be the pinnacle of success.² But the underside of what is perceived as success can reveal the subtle and deceptive delusion of a limited perspective. The family farm has undergone a dramatic transformation over the past century and with it, so to has our entire way of life. The industrial revolution hit the world of agriculture and shifted the foundation by which the farm-food industry works.³ Today, consumers spend less of their income on food than ever before in history, and farmers also receive a smaller percentage of this reduced budget item.⁴ What could once be summarized in words of self-sufficiency, community, and local was replaced with what can essentially be summarized as specialized, consolidated, contracting, integrated, and globalized.⁵ These new aims of agriculture shifted the emphasis from quality to quantity—failing to understand that to “pursue quantity alone is to destroy those disciplines in the producer that are the only assurance of

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1. RONALD JAGER, THE FATE OF FAMILY FARMING: VARIATIONS ON AN AMERICAN IDEA 195 (2004) (alteration in original) (quoting WENDELL BERRY, THE UNSETTLING OF AMERICA (1977)).

2. *Id.*

3. *Id.* at 196.

4. *Id.* at 195-96.

5. *Id.* at 196.

quantity.”⁶ “But any abundance, in any amount, is illusory if it does not safeguard its producers, and in American agriculture it is now virtually the accepted rule that abundance will destroy its producers.”⁷ As the personal source of the food on our table was replaced with an impersonal and anonymous system, questions of safety and adulteration arose, and so too arose a system of regulation to meet it.

This Comment will look at the history of food regulation in the United States as it relates to the political influences at various times and in various ways with the object of looking at the scope of legitimate State regulation of food safety and some potential limitations of the State’s power to regulate. Part II looks at the various steps in the regulatory history of America that contributed to our current view of regulation and the context in which these steps arose. Part III identifies the difficulty in regulation and the political nature of regulatory standards at a federal level, looking at what can perhaps be identified as a pretext of safety in some legislation. Part IV offers a change in direction for safety regulation, with a call to reclaim the liberty to take personal responsibility in food safety decisions, a call to remove artificial infrastructure requirements, and a call to allow exceptions for informed consent of the consumer for food products.

II. BACKGROUND

A. *Theories of Regulatory Necessity*

There are essentially two categories of theories on the reason for, or origins of, federal regulation—“market failure” theories and political theories.⁸ This first category is the traditional view of regulation, described as the “market failure” theory of regulation, which espouses that regulatory measures are necessary to correct perceived failures in the market that impede market efficiency.⁹ There are three categories of perceived market failures that “market failure” economists have identified as primary: (1) natural monopoly, (2) imperfect information, and (3) externalities.¹⁰ In the area of food-safety regulation, it is this second category that most often

6. WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* 42 (softcover ed. 1986).

7. *Id.* Berry is referring to the destruction of smaller producers through consolidation and the degradation of the disciplines that insure quality in any industry. *Id.* at 41-42.

8. ROBERT E. LITAN & WILLIAM D. NORDHAUS, *REFORMING FEDERAL REGULATION* 36 (1983).

9. *Id.*

10. *Id.*

comes into play as justification for government intervention.¹¹ The supporters' theory for regulation is that the "efficiency of a market economy requires that all market participants possess the information necessary to make reasoned choices."¹²

The political theories about the necessity of regulation identify special interest as the root of regulation. These theories identify regulatory measures as growing from the efforts of certain special interest groups because of the benefits that regulation will have on them specifically, in contrast to the theoretical general economic efficiency goal of the "market failure" theory.¹³

One author describes the "market theory" of regulation this way: "Safety regulation aims not at suppressing crimes involving private force and fraud, but at forcibly altering certain resource allocations that have resulted from peaceful, voluntary interactions among suppliers and demanders of goods or services in the market."¹⁴ Thus, the two views of regulatory necessity can be summarized as stemming from a theory that the market fails to naturally provide something necessary, or that capitalists are exploiting the market.¹⁵ This Comment focuses on regulation related to food safety.

B. *Historical Context of Food Safety: The Shift from Family to Factory Farm*

One cannot really consider elements of food safety and regulatory measures without looking at the context from which that food is derived. The twentieth century ushered in a fundamental shift in the paradigm of food production from the family farm to what more resembles a factory farm, even though often still owned by a family.¹⁶ During the nineteenth century, almost all food was grown for one's own family, or grown by a family farmer in the local community.¹⁷ At the local level, the methods, nature, and quality of the food

11. Final Regulation Agency Background Document, Virginia Regulatory Town Hall, May 28, 2003, http://townhall.virginia.gov/l/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5C48%5C588%5C2413%5CAgencyStatement_ (last visited Feb. 6, 2015).

12. LITAN & NORDHAUS, *supra* note 8, at 36.

13. *Id.* at 39-40.

14. JAMES ROLPH EDWARDS, REGULATION, THE CONSTITUTION, AND THE ECONOMY: THE REGULATORY ROAD TO SERFDOM 118 (1998).

15. *Id.*

16. Nicholas Obolensky, *The Food Safety Modernization Act of 2011: Too Little, Too Broad, Too Bad*, 17 ROGER WILLIAMS U. L. REV. 887, 888 (2012); BERRY, *supra* note 6, at 36; Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 943 (2010). This article discusses how the family farm was redefined during this time. *Id.*

17. Obolensky, *supra* note 16, at 888.

were not really questionable because there was immediate transparency and accountability.¹⁸ Yet, as urban populations began to grow, the farmers began to adopt the industrial methods of the cities in their farming practices.¹⁹ This industrial system would prove dangerous for food production, and the geographical disconnect between the buyer and the producer would shield unscrupulous producers from customer scrutiny.²⁰ Applying this large-scale, mechanized model to food production had, and continues to have, major negative consequences on society.²¹

C. Regulation in the United States

It is necessary to look back further than the societal issues of the twentieth century to understand the origin and progression of regulation, both generally and specifically, regarding food safety.

1. The Regulatory Inheritance of the United States

a. Medieval mercantilism

Government regulation is not a modern phenomenon of Western Civilization.²² Business regulation was pervasive in the mercantile states of the late medieval economies.²³ In the mercantile system, a dubious union was forged between the merchants and the monarchs.²⁴ This union brought about the removal of most of the local trade barriers, but erected barriers to imports at the national level in their place; thus, the economic stagnation of the medieval times was maintained.²⁵ “The monarchs systematically granted and enforced monopolies and cartels over various lines of commerce, industry, and skilled trades to favored individuals and producer groups.”²⁶ The groups who offered the highest bribes and agreed to be taxed at the highest rates attained these monopolies.²⁷ Bribes, or contributions, of this nature will be referred to as political rent-seeking. The cartels and monopolies, true to their nature, would then decrease output and raise price

18. *Id.* at 887-88.

19. *Id.* at 888.

20. *Id.*

21. BERRY, *supra* note 6, at 41.

22. EDWARDS, *supra* note 14, at 1.

23. *Id.*

24. *Id.* at 1-2.

25. *Id.* at 2.

26. *Id.*

27. *Id.*

levels to extract higher profits from a populace that was largely powerless to do anything about it.²⁸ This profit-seeking practice was paired with the mercantile system of heavily restricting imports while maximizing exports, resulting in a futile protectionist policy aimed at the accumulation of gold.²⁹

b. From mercantilism to classical liberal philosophy

As we know from mercantilism being a vestige of the past, the strict control of the monarchies and merchants was not strong enough to make up for the inherent faults of the mercantile system.³⁰ Mercantilism, and monarchy itself, began to give way to the rise of classical liberal political philosophy of natural rights, individualism, and constitutionally limited democratic government.³¹ Thousands of years of economic stagnation had resulted in a belief that the wealth of the world was a fixed sum, with conquest or exploitation being the only means of gaining wealth.³² This paradigm was proven false with the rise of the economic philosophy taught in Adam Smith's book, *The Wealth of Nations*.³³

c. Regulatory perspective in early America

The founders of the American Republic had knowledge of and direct experience with the evils of mercantilism, and did their best to end them in America.³⁴ Still, many of the earlier colonies began levying restrictions on imports from other colonies by the time of the Constitutional Convention, and so the founders added the Commerce Clause to restrict any regulation of interstate commerce to Congress and not to the individual states.³⁵ Seen through the lens of guarding against the temptations of mercantilism, much of the basic structure of the Constitution was arguably intended to prevent mercantile practices—such as the ability of the government to grant favors to special interest groups.³⁶ Thus, the protection of private property, the freeing of the market, and the reduction of political rent-seeking created an atmosphere of innovation and entrepreneurship in early America—an

28. *Id.*

29. *Id.* at 4.

30. *Id.* at 5.

31. *Id.*

32. *Id.* at 6.

33. *Id.* The “basic principles of an economy based on private property and voluntary exchange in open, competitive markets” being implemented demonstrated that there could be an “increase in world production, from which all nations could gain . . .” *Id.*

34. *Id.* at 7.

35. *Id.*

36. *Id.*

atmosphere made possible by Congress having a very narrow interpretation of its power to regulate interstate commerce, thus leaving safety regulation to the states through their police powers.³⁷

Although constitutional interpretation in both the executive and judicial branches was to limit federal and state regulation prior to the Civil War, there were some notable forms of regulation that were not stamped out in early America.³⁸ The modern ability to grant or withhold a business license is a remnant of states having a right to grant or withhold corporate charters.³⁹ The states also subsidized infrastructure development—most notably with the railroad industry—before the federal government began to engulf these areas of regulation.⁴⁰ These subsidy programs resulted in a lower quality and far less efficient railway construction process.⁴¹ Regulation of food adulteration fell under the police power reserved to the states, until a shift in Commerce Clause jurisprudence led to the expansion of the federal government in this area.⁴²

2. The Progression of Federal Purported Food Safety Regulation

With the paradigm shift of Commerce Clause jurisprudence came federal involvement in things that were practically entirely safety related, but viewed by the court as having some effect on interstate commerce.⁴³ Still, it was not until 1906 that federal food regulation in America really came onto the scene in earnest.⁴⁴ On June 30, 1906, President Theodore Roosevelt signed both the Pure Food and Drug Act and the Meat Inspection Act into law.⁴⁵ The FDA claims that adulteration of food-packing plants and baseless cure-all claims on drugs was common practice at the time, and the discovery of these undesirable methods led to the enactment of these two

37. *Id.* at 7-8.

38. *Id.* at 9.

39. *Id.*

40. *Id.*

41. *Id.*; THOMAS E. WOODS, JR., *THE POLITICALLY INCORRECT GUIDE TO AMERICAN HISTORY* 94-95 (2004). “The government subsidies introduced perverse incentives,” since railways were compensated based on the amount of track they laid, with no real emphasis on quality and an efficient route. *Id.* at 94. In fact, circuitous routes were incentivized by this policy. *Id.*

42. See Jim Chen, *Filburn’s Legacy*, 52 *EMORY L.J.* 1719, 1743-44 (2003).

43. *Id.* at 1744.

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

45. *Id.*

laws.⁴⁶ Dr. Harvey W. Wiley, who became known as the “Father of the FDA,” was largely responsible for the text of the Act.⁴⁷ In this, the FDA holds a different view of his place in the history of regulation than Dr. Wiley does himself. By March of 1912, just a little over five years after the law had been implemented, Dr. Wiley regretfully resigned from his position, expressing his belief that he could “find opportunity for better and more effective service to the work which [was] nearest [his] heart, namely, the pure food and drug propaganda, as a private citizen than [he] could any longer find in [his] late position.”⁴⁸ Dr. Wiley went on to explain, in his resignation and a later book exposé, that the plain provisions of the Act had been undermined time after time.⁴⁹ The authority the Act placed in the Bureau of Chemistry, headed by Dr. Wiley, to determine whether a product was adulterated or misbranded was usurped as products that the Bureau concluded to be misbranded or adulterated were given approval by various secretaries of the executive office.⁵⁰ Thus, the Act was effectively nullified as pressure from various lobbyists led to concessions and exceptions to the rule for large players in the targeted industries of the time.⁵¹ This rent-seeking activity of private interests quickly led to a selective enforcement and disregard of the law for those with enough political influence at various levels of government.⁵² Thus, the law intended to protect the health of the people was “perverted to protect adulteration of food and drugs.”⁵³ It has

46. *Id.*

47. *Harvey W. Wiley: Pioneer Consumer Activist*, FDA Consumer Magazine, U.S. FOOD & DRUG ADMIN. (Jan.-Feb., 2006), <http://www.fda.gov/AboutFDA/WhatWeDo/History/CentennialofFDA/HarveyW.Wiley/ucm081121.htm>.

48. HARVEY W. WILEY, *THE HISTORY OF A CRIME AGAINST THE FOOD LAW: THE AMAZING STORY OF THE NATIONAL FOOD AND DRUGS LAW INTENDED TO PROTECT THE HEALTH OF THE PEOPLE, PERVERTED TO PROTECT ADULTERATION OF FOODS AND DRUGS* 92 (1929).

49. *Id.* at 93.

50. *Id.* at 89, 97.

51. *Id.* at 95-97, 106-07.

52. *Id.* at 398-400.

[T]he precise nature of the political corruption needs to be understood. Every act of political rent-seeking involves *two* sets of parties, including one or more private citizens and one or more politicians. It is not clear *a priori* which initiates the transaction.

It is too easily asserted . . . that the sequence of ideological change is: businessmen corrupt the political process, public finds out, and interventionist, anti-business sentiment is stimulated.

EDWARDS, *supra* note 14, at 200.

53. WILEY, *supra* note 48, at title page. Noted Austrian Economics professor Ludwig von Mises speaks to this: “But the very existence of a government apparatus of coercion and

been, and likely will always be, the primary political problem of the ages: “how to prevent the rulers from turning into despots and making the state totalitarian.”⁵⁴

Due to these developments following the passage of the Pure Food and Drug Act, it lacked real teeth and Congress viewed the Act as obsolete by 1933.⁵⁵ Congress began work on a revamped regulatory act.⁵⁶ The efforts of Congress were accelerated in 1937 when 107 people, many of whom were children, died after consuming a product called Elixir of Sulfanilamide that contained a poisonous solvent.⁵⁷ Congress enacted the Federal Food, Drug, and Cosmetic Act with its stated purpose to “protect the public health by ensuring that—foods are safe, wholesome, sanitary, and properly labeled.”⁵⁸ This new Act contained many new provisions and expanded the scope of the previous Pure Food and Drug Act.⁵⁹ Some of the new expanded provisions included ones that extended regulatory control to cosmetics and therapeutic devices, required drugs to be shown safe before marketing, provided for safe tolerances to be set for unavoidable poisonous substances, authorized standards of identity and quality for foods, and authorized factory inspections.⁶⁰ This Act has been amended over thirty times since its enactment, with each amendment expanding the authority and detail of the regulations in place.⁶¹

With the traction gained in this new expansive view of food regulation, the newly renamed Food and Drug Administration, and Congress, began shaping and expanding the regulatory climate of food in America.⁶² Yet, for all the purported advances in safety and methodology, the American food

compulsion makes a new problem arise. The men handling this apparatus yield too easily to the temptation of misusing their power. They turn their weapons against those whom they were expected to serve and to protect.” LUDWIG VON MISES, *ECONOMIC FREEDOM AND INTERVENTIONISM* 67 (Bettina Bien Greaves, ed., Liberty Fund, Inc. 1990).

54. *Id.*

55. *FDA Dates*, *supra* note 44.

56. *Id.*

57. *Id.*

58. 21 U.S.C. § 393(b)(2) (2006).

59. *FDA Dates*, *supra* note 44; PATRICIA A. CURTIS & WENDY DUNLAP, *GUIDE TO FOOD LAWS AND REGULATIONS* 31 (2005). Specifically, the Act added provisions that: (1) required safe tolerances be set for unavoidable poisonous substances, (2) authorized standards of identity, quality, and fill-of-container for foods, (3) authorized factory inspections, (4) added the remedy of court injunctions to the previous penalties of seizures and prosecutions, and (5) expanded the definitions of adulteration and misbranding. *Id.*

60. *FDA Dates*, *supra* note 44.

61. Obolensky, *supra* note 16, at 888-89.

62. *Id.*

system is still plagued with outbreak after outbreak of food-borne illnesses, often from what seem like the most unlikely of candidates, such as jalapeños.⁶³ And so, after many decades of incrementally building upon the Act of 1938, Congress passed another overhaul of the regulatory landscape in 2010 with the Food Safety Modernization Act (the “FSMA”).⁶⁴

The FSMA is a one-size-fits-all approach to food safety that does not really distinguish the small family farm from the large factory farm as far as safety requirements are concerned.⁶⁵ One of the key elements of the FSMA is the requirement that food production facilities implement preventative controls to essentially identify and eliminate high-risk areas in the production line.⁶⁶ The FSMA provides for increased mandatory inspection frequency, broader access to records, and testing by accredited laboratories in order to ensure compliance with the new preventative controls requirement.⁶⁷ The full effects of this legislation have not yet been felt because much of the language is vague and will need to be interpreted and implemented before it will be fully defined.⁶⁸ This is especially dubious due to the vast amount of agency discretion it gives to the FDA in further clarifying and enforcing the FSMA.⁶⁹ As respected economist F.A. Hayek

63. *Id.* at 889.

64. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (“amend[ing] the Federal Food, Drug, and Cosmetic Act with respect to the safety of the food supply.”).

65. Obolensky, *supra* note 16, at 890. The bill included an amendment, called the *Tester-Hagan* amendment, that appeared to distinguish between requirements based on the size of the operation (in gross income), but the amendment is largely ineffective due to being too limited within the full scope of the FSMA and being undermined by broad agency discretion within that limited scope of the bill to which the amendment applies. *Id.*; see Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 350h(f) (2012) (showing the terms of the exemption allowed). One of the key elements of the FSMA requires facilities and producers to develop internal hazard analysis and risk-based control plans (HARCP) that require the business to identify points in the system that could pose some danger, and to develop controls and plans to prevent those potential dangers from realizing. 21 U.S.C. § 350g(b)-(c) (2012). Technically, this is the only portion of the FSMA that small producers are somewhat exempt from under § 350h(f) of the FFDC, and yet within the exemption, qualified facilities must still submit documentation proving that they qualify and either submit what looks strikingly similar to the HARCP they are supposed to be exempt from, or declare compliance with other applicable laws and display various information on a label. Obolensky, *supra* note 16, at 901-02. But at the end of the day, the FDA has the discretion to withdraw the exemption if the Secretary determines that it is necessary to protect public health. *Id.* at 902.

66. *Id.* at 892.

67. *Id.* at 893.

68. *Id.* at 922.

69. *Id.* at 921-22.

declares, “We have progressively abandoned that freedom in economic affairs without which personal and political freedom has never existed in the past.”⁷⁰

3. The Philosophy of Safety Regulation

It is important to realize that the view of regulation that has dominated from the Meat Inspection Act of 1906 to today comes from the perspective of the regulators.⁷¹ This has been the view taught in public schools and continually repeated by the agencies whose very existence depends on the survival of a philosophic and politic support for the need of regulation.⁷²

The Meat Inspection Act of 1906 arose from a public outcry following the publishing of the novel *The Jungle* by Upton Sinclair.⁷³ *The Jungle* tells a story of a corrupt oligopoly of Chicago meat packing firms that dominated the industry, treated their workers like animals, and operated the facility with complete disregard of public health and safety in the unsanitary slaughtering and packing of meat.⁷⁴ Sinclair was, and is, seen by most as a courageous journalist who investigated and exposed these conditions to the public.⁷⁵ While there are some elements of truth in this story concerning the messy nature of slaughterhouses—especially at this time⁷⁶—Sinclair’s efforts over two years to infiltrate and gather evidence against the meat packers were wholly unsuccessful. In the end, the best Sinclair could come up with was a collection of slanderous, unproven accusations in an openly fictional story.⁷⁷

Sinclair was a socialist ideologue, intent on vilifying the large Chicago meat packing firms, and his story was successful in stirring the public to outrage at this perceived danger and injustice.⁷⁸ Although Sinclair’s main goal was to incite outrage over the working conditions, the public was stirred to action primarily in response to his stories about the safety of the

70. F.A. HAYEK, *THE ROAD TO SERFDOM* 16 (50th Anniversary ed. 1994).

71. EDWARDS, *supra* note 14, at 50-51.

72. *Id.*

73. *Id.* at 56-57.

74. *Id.*

75. *Id.* at 56.

76. *Id.* at 57.

77. *Id.*

78. *Id.* at 56-57; see JAYSON LUSK, *THE FOOD POLICE: A WELL-FED MANIFESTO ABOUT THE POLITICS OF YOUR PLATE* 49 (2013). Sinclair’s main purpose was to promote socialism, as evidenced by the main character in *The Jungle* “eventually converting to the cause and going by the name Comrade Jurgis.” *Id.*

food.⁷⁹ Sinclair later lamented, “I aimed at the public’s heart, and by accident I hit it in the stomach.”⁸⁰ It was never shown, however, that the Chicago meat packing firm growth had been associated with any increased risks for workers in the plants, or consumers of the meat.⁸¹ In fact, the rapid growth of the firms was a result of efficiency and innovation such as refrigerated packing plants and railroad cars, the canning process, and the use of chemical preservatives.⁸² This natural market competition resulted in a decrease in the health risks in the production and consumption of the meat products.⁸³

The biggest distortion of the facts surrounding the aftermath of *The Jungle* and the public outcry that followed is the idea that the Meat Inspection Act was aimed against these big firms in the Chicago area, when in fact, these firms were in favor of the Meat Inspection Act and had worked to obtain it.⁸⁴ These firms had already been subjected to federal, state, and local government inspectors for more than a decade.⁸⁵ Furthermore, the big firms believed the laws would help them against their foreign and domestic competitors, as well as provide a general public relations boon after the market for meat plummeted in response to *The Jungle*.⁸⁶ It was not ultimately about safety; it was about perceived safety and special protection given to certain industry players by the government.⁸⁷ This is generally the thrust of the motivation for any regulation that benefits one party at the expense of others, and it is almost always presented politically as for the benefit of the community at large.⁸⁸

4. Regulating Towards the Consolidation of Farms

Apart from the coercive or manipulative hand of government intervention, consolidation and expansion are not inherently bad.⁸⁹ The direct regulation

79. Lawrence W. Reed, *Ideas and Consequences: Of Meat and Myth*, FREEMAN (Nov. 1, 1994), http://www.fee.org/the_freeman/detail/ideas-and-consequences-of-meat-and-myth#axzz2l1LOji5v.

80. LUSK, *supra* note 78, at 49.

81. *Id.*; see EDWARDS, *supra* note 14, at 57-58.

82. *Id.* at 58.

83. *Id.*

84. *Id.*

85. *Id.* at 57-59.

86. *Id.*

87. See Reed, *supra* note 79.

88. EDWARDS, *supra* note 14, at 194.

89. MISES, *supra* note 53, at 239.

through the Meat Inspection Act coincided with a legislative policy that continually encouraged the consolidation of food production in American agriculture.⁹⁰ Congressional policy pushed for a consolidation of farmland with a mentality of “[g]et big or get out.”⁹¹ Congress did this by incentivizing specific commodity crops, with subsidies structured to scale the reward with increased production, thus favoring large monocultures.⁹² In the 1980s, there was further consolidation of farmland following a financial crisis in the field of agriculture as farmers became heavily indebted.⁹³ The definition of family farm changed with this consolidation, and thus, while families still own American farms, the farms have become much larger, mechanized, less diversified, and more capital intensive than ever.⁹⁴ It is important to note that legislative policy continued to encourage this consolidation and industrialization of agricultural operations in response to this specific financial crisis. The country laments the loss of small business, while the interventionist policies in place artificially fuel the normal market forces that lead to this on a smaller scale.⁹⁵

5. Regulation of Biotechnology

The complexities of issues surrounding genetically modified food production is beyond the scope of this Comment, but it is important to note a few key details about regulation of biotechnology in America. Biotechnology allows scientists to modify the genetic makeup of various plants and animals.⁹⁶ This is most frequently used in agriculture to make a plant resistant to a particular pesticide, or to enable the plant itself to produce pesticides.⁹⁷ The general regulatory policy in America is that the biotechnology process itself is not inherently dangerous or risky.⁹⁸ Thus, the United States Department of Agriculture, the Environmental Protection Agency, and the Food and Drug Administration regulate biotechnology in fragments.⁹⁹ In a paradigm of pervasive and expansive regulations and barriers on most aspects of the food supply, it is somewhat surprising to see

90. Schneider, *supra* note 16, at 943.

91. BERRY, *supra* note 6, at 41.

92. Schneider, *supra* note 16, at 943.

93. *Id.*

94. *Id.*

95. MISES, *supra* note 53, at 238-39.

96. Claire Althouse, "Farming Out" Regulatory Responsibility: Private Parties in the Biotechnology Age, 23 GEO. INT'L ENVTL. L. REV. 421, 421-22 (2011).

97. *Id.*

98. *Id.* at 423.

99. *Id.*

relatively little regulation or caution over biotechnology applied to food production.¹⁰⁰ The most common complaint is that biotechnology companies do not have to “prove the new products won’t cause illness,” but there is a maxim in logic that one cannot prove a negative.¹⁰¹

D. Liberty Interest in Food Choice

“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”¹⁰² Perhaps this quotation from Benjamin Franklin has become trite over the years. It is often thrown around without much thought at any government program—specifically after the events on September 11, 2001.¹⁰³ But what is the heart of Franklin’s message? What is essential liberty? What qualifies as temporary safety?

1. Fundamental Rights Acknowledged Today

A fundamental right is one that is deemed so important that the government cannot infringe upon it without clearly proving that it is necessary to do so.¹⁰⁴ Within the framework of modern constitutional jurisprudence, a primary avenue through which food choice could be viewed as a fundamental right is under the liberty right of the Fourteenth Amendment.¹⁰⁵ Perhaps most similar to the issue at hand are the implied

100. LUSK, *supra* note 78, at 105. The biggest inconsistency between the regulatory policy of biotechnology and other foods and products is the minimal barriers to entry or testing requirements of biotechnology food; and, most notably, the lack of any label requirement stating there has been genetic modification, which implicates potential claims of misbranding or adulteration. Karen Charman, *Genetically Modified Food Has Great Potential for Harm*, in *FOOD SAFETY* 41, 44, 50 (Stuart A. Kallen ed., 2005).

101. LUSK, *supra* note 78, at 106; Charman, *supra* note 100, at 41 (arguing that genetically engineered foods have been rushed to market and have not been proven safe).

102. BENJAMIN FRANKLIN, PENNSYLVANIA ASSEMBLY: REPLY TO THE GOVERNOR (Nov. 11, 1755), *reprinted in* THE PAPERS OF BENJAMIN FRANKLIN 238, 242 (Leonard W. Labaree et al. eds., 1963).

103. See e.g., Ben Theobald, *After 9/11: Sacrificing Liberty for Security*, IOWA ST. DAILY (Sept. 9, 2011), http://www.iowastatedaily.com/911/article_91e8f1f0-da31-11e0-9e25-001cc4c002e0.html; Michael Lofti, *9/11—The Funeral For Freedom*, BEN SWANN (Sept. 11, 2013), <http://benswann.com/911-the-funeral-for-freedom/>.

104. Kammi L. Rencher, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418, 423 (2012).

105. *Id.* at 424.

fundamental rights recognized by the Court to be free of state interference in personal choices concerning health and medical care.¹⁰⁶

Implied rights under the Fourteenth Amendment are derived using three tests that reason from a general right of liberty to the particulars of what the liberty right looks like when applied. The first test asks whether a right in question is “fundamental to the very existence and survival of the race.”¹⁰⁷ This same test was later expressed by the Supreme Court as a right that is a “vital personal right[] essential to the orderly pursuit of happiness by free men.”¹⁰⁸ The second test asks whether the right at stake is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁰⁹ The third and final test asks whether government invasion of a personal liberty is “so outrageous that it shocks the conscience.”¹¹⁰

Using these and other tests, the Court has firmly established a “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”¹¹¹ It is important to know what rights the Court has seen as fundamental over the years, because this precedent will be used for any analogous right analysis. The Court has recognized as fundamental the right to control the upbringing of one’s own children,¹¹² the right to marry regardless of race,¹¹³ the right to custody of children,¹¹⁴ the right to procreate,¹¹⁵ and the right to keep the family together.¹¹⁶

Without detailing every step along the fundamental right progression, it is sufficient to know that the Court takes into consideration any number of the following factors when recognizing certain rights as fundamental: (1) the importance of the disputed right; (2) the right is implicit in the concept of ordered liberty or is implicitly guaranteed by the Constitution; (3) the right is deeply rooted in the history and tradition of the Nation; (4) the right is in need of special protection because government action shocks the

106. *Id.* at 425. Rencher provides a more in depth look at the issue of how the right of food choice would likely be handled by the Supreme Court. *See e.g., id.* at 423-42.

107. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

108. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

109. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

110. *Rochin v. California*, 342 U.S. 165, 172 (1952); Rencher, *supra* note 104, at 424.

111. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing court cases that recognize the right).

112. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

113. *Loving*, 388 U.S. at 12.

114. *Santosky*, 455 U.S. at 753.

115. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

116. *Moore v. City of E. Cleveland*, 431 U.S. 494, 505-06 (1977).

conscience; (5) the right is a necessary implication of the structure of the government or Constitution; (6) the right provides necessary access to government processes; and (7) the right has been identified by previous Supreme Court decisions.¹¹⁷

2. Fundamental Right Test Applied to Food Choice

As stated above, the most analogous fundamental right analysis for a discussion on food choice is the recognition by the Court of a fundamental right to be free from state interference in personal choices concerning health and medical care.¹¹⁸ But there are other facets of the fundamental right analysis that can be discussed as it relates to food choice. Food choice encompasses aspects of personal identity. Certainly food choice has a direct impact on a person's health, but food also goes deeper than just sustenance; it is often a form of expression—sometimes implicating religious expression.

3. Liberty of Contract

a. Contract Clause

Long before the Fourteenth Amendment came the Contract Clause,¹¹⁹ and before the Contract Clause was man's right to contract.¹²⁰ Man's right to contract is a natural right *recognized* in—not *created* by—the United States Constitution.¹²¹ The reality and awareness of natural law was pervasive during the period of America's founding.¹²² It was expressed in the Declaration of Independence's proclamation of "self-evident truths," human equality, the necessity of having the consent of the governed, and even the right to revolution when justified.¹²³ What is meant by these truths

117. Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216 (2007).

118. See *Washington v. Harper*, 494 U.S. 210 (1990) (holding that prisoners could not be forced to take antipsychotic drugs); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

119. U.S. CONST. art. I, § 10, cl. 1.

120. Hadley Arkes, *The Shadow of Natural Rights, or A Guide from the Perplexed*, 86 MICH. L. REV. 1492, 1512 (1988) [hereinafter *Shadow*].

121. *Id.*: The Contract Clause of the U.S. Constitution does not create nor establish a right to contract; the language of this clause assumes this inherent right and prohibits the States from infringing upon it, just as it does for the rights contained in the Bill of Rights and elsewhere in the Declaration of Independence and the Constitution. *Id.*; U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

122. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 61 (2010).

123. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). While it is true that the American Founders were unable, as a whole, to remedy the violation of natural law in their

being self-evident is not that everyone knows them, but that they are true regardless of their being known to all.¹²⁴ Natural law principles stand as the foundation of the structure of the U.S. Constitution that followed, though it is not as overtly apparent in the text of the Constitution itself. More than that, "natural law is bound up with the laws of reason, or the canons of logic."¹²⁵ Thus, in reality, natural law is unavoidable.¹²⁶ "Judges are 'doing'

time on the issue of slavery, they declared a truth of "a law that runs counter to [their] own inclinations or interests" in the founding words that "all men are created equal." ARKES, *supra* note 122, at 56. Regarding the principle that "all men are created equal," Arkes says:

The political Left in our own day reproaches the American Founders for their putative failure to respect that principle. In that argument, the Founders have been indicted for the accommodations they made with the evil of slavery. But as we have seen, the embarrassment for writers on the Left is that they deny that there is a "nature" that provides the ground for these claims of equality and rights. They take a moral high ground in relation to the Founders, and yet they deny that there are moral truths that reason can know. And so, while they elevate "equality" as a principle, they deny that principle, or any other moral principle, the standing of a truth.

Id.

124. ARKES, *supra* note 122, at 56; see 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* bk. I, question 96, art. 5, pt. II (Fathers of the English Dominican Province trans., Christian Classics 1981) (c. 1265) ("The Apostle says: *Let every soul be subject to the higher powers.* But subjection to a power seems to imply subjection to the laws framed by that power.") (internal citation omitted); see also THE FEDERALIST NO. 31 (Alexander Hamilton). Hamilton discusses the nature of eternal truths:

In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. . . . Of this nature are the maxims in geometry that "the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other." Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation.

Id. This line of reasoning is not based on experience, which could only conclude that "Most men are created equal, most of the time," but rather as a necessary proposition, since we have no experience of the future. ARKES, *supra* note 122, at 57-58. These necessary propositions are first principles from which we draw judgments in the law and in life. *Id.* at 59.

125. ARKES, *supra* note 122, at 60.

126. *Id.* at 24.

John Locke suggested this chain of reasoning: We might say that the legislature is the source of the positive law, the law that is posited or enacted. But then what is the source of the legislature, or the authority to legislate? In our own country, the Constitution would establish that we have a legislature, of two

natural law when they simply appeal, as Blackstone said, to the ‘law of nature and reason.’”¹²⁷ It is within this natural law framework that Chief Justice John Marshall referred to the Contract Clause as “a bill of rights for the people of each state.”¹²⁸ Natural law is scoffed at by legal scholars of our day, and the trend away from natural law reasoning and assumptions began long ago. But man cannot function apart from relying on immutable presuppositional truths as the foundation of logic and reason, whether he acknowledges it or not.¹²⁹ Sadly, the Contract Clause was essentially rendered invalid in the 1934 Supreme Court decision of *Home Building & Loan Assoc. v. Blaisdell*.¹³⁰ “In this manner did Chief Justice Hughes make a

houses, with the authority to enact laws. The source of the legislature then would be in the positive law of the Constitution, the Constitution that was drafted and ratified in a vote by the people. But then what was the ground of that original right, exercised by the people, to enact a Constitution? As Locke put it in his *Second Treatise*, “the constitution of the legislative being the original and supreme act of the society,” it had to be “antecedent to all positive laws.” The power to make the positive law is defined by the Constitution, but the Constitution itself cannot spring then from the positive law. It had to find its origins, as Locke said, in that understanding “antecedent to all positive laws,” and that authority was “depending wholly on the people,” on their natural right to be governed with their own consent.

Id. This proposes that natural law is not merely *inductive*. *Id.*

127. *Id.* at 25.

128. Paul Moreno, *The U.S. Supreme Court and Natural Law*, <http://www.nlnrac.org/american/u.s.-supreme-court>. Like the other Bill of Rights, this implies the pre-existing nature of the right. The American Founders were hesitant to include the Bill of Rights provisions in the Constitution because they saw them as unnecessary in the system of enumerated powers that the Constitution established. EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 6-7 (1957). In fact, the Bill of Rights was seen as potentially dangerous in giving people the impression that their rights were limited by those expressed in the Bill of Rights, or implying that the federal government was given any power to restrict the rights listed. *Id.* at 7. Alexander Hamilton addressed his concerns, saying,

For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive power, by the indulgence of an injudicious zeal for bills of rights.

THE FEDERALIST No. 84 (Alexander Hamilton). The point Marshall is making is significant because the Contract Clause is distinct from the Bill of Rights in that it is a specific restriction on the states, much like the Commerce Clause. U.S. CONST. art. I, § 10, cl. 1.

129. ARKES, *supra* note 122, at 24.

130. See *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 416, 443 (1934); ARKES, *supra* note 122, at 15.

nullity of the Contracts Clause through ‘adaptation,’¹³¹ as Chief Justice Marshall warned in *Ogden v. Saunders*.¹³²

b. Liberty of contract as economic substantive due process

Today, any notion of Liberty of Contract brings to mind the case of *Lochner v. New York*.¹³³ The freedom to contract was viewed in this case as protected under what has become known as the economic branch of the substantive due process clause.¹³⁴ This idea of substantive due process really amounts to natural law, as the specific applications are merely drawn from the rights to life, liberty, and property. The judges during the time of *Lochner* saw this natural right to contract as originating outside of positive law.¹³⁵ Yet, this liberty, as with most, was rightly seen as subject to limitations that can be placed upon it based on other natural laws of morality, as established and enforced by the police powers vested in a state.

In *Lochner*, the problem did not arise from an intent to restrict liberty in furtherance of a legitimate police power, but rather, the purported police power being enacted was seen as a pretense.¹³⁶ The factual circumstances

131. ARKES, *supra* note 122, at 15.

132. *Ogden v. Saunders*, 25 U.S. 213 (1827). Allowing the government to change the obligation of contracts after it had been established would “make a nullity of the very notion of an ‘obligation of contract.’” ARKES, *supra* note 122, at 16.

133. ARKES, *supra* note 122, at 86; *Lochner v. New York*, 198 U.S. 45 (1905).

134. *Lochner*, 198 U.S. at 60-62 (discussing the undue interference with the liberty of contract).

135. *Id.* at 60-61. The legislation that restricted the hours an employee could work at a bakery was certainly not explicitly addressed in the Constitution, and therefore the natural right found by the judges in *Lochner* was a particular application of “liberty” reasoned by way of natural law to apply in this case, viewed within the constraints placed upon this liberty under natural law. Constitutional professor and Dean, Jeffrey Tuomala, identifies the view of common law as necessarily being identified with God’s law, or natural law. Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 319 (2010). Dean Tuomala explains,

The problem of defining the concept of general principles of law is intertwined with the problem of defining “common law.” Today, common law has no generally accepted meaning, though it is often referred to as judge-made law. This assertion is made despite the fact that Article I of the U.S. Constitution and probably all state constitutions vest the power to make law in a legislative body separate from the courts. The judge-made view of law, unless it recognizes a preexisting law, is a form of legal positivism—that law is simply the command of the sovereign.

Id. at 316-17.

136. ARKES, *supra* note 122, at 93, 100. The *Lochner* Court struck down the State statute as unconstitutional under the Due Process Clause of the Fourteenth Amendment, declaring

leading up to this case certainly imply the kind of rent-seeking activities described above.¹³⁷ The first call for the regulation came from a meeting of bakers and members of the bakers' union; and the effect of the law once passed was primarily to reduce the number of small bakeries, advancing a concentration of the baking companies.¹³⁸ "Regulations of business, then, raised no moral strains for the judges. But the jurists also had the wit to recognize those gradations by which a law advertised as a regulation of business turned itself into something else."¹³⁹ Thus, the *Lochner* decision was not a reactionary laissez-faire decision to guard businesses against regulation at all costs.¹⁴⁰ Even so, the judges "saw nothing denigrating in the notion that they were defending in these cases rights of property, for those rights were indeed natural rights, or human rights."¹⁴¹ It was believed that the "right to make a living at an ordinary calling, to enter a legitimate occupation, without arbitrary restrictions, was a right that ran as deep as the right to speak or publish."¹⁴² At the heart of the *Lochner* decision is a sense that people merit "a presumption of their competence to govern their own lives; that they would not find in our patronizing tenderness the main security for their well-being; and they surely would not find there the source of their rights."¹⁴³

E. Liberty Interests Versus Safety Interests in the Case of Raw Milk

One of the best modern examples of this tension between liberty interests in food choice, set out above, and State regulation is the battle over raw milk consumption and the State's aggressive tactics to take down this heavy consumer-driven industry.¹⁴⁴ The FDA and CDC have long lambasted raw

that there was "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker." *Lochner*, 198 U.S. at 58.

137. ARKES, *supra* note 122, at 101; see *supra* Part II.C.1.

138. *Id.* at 101; *Shadow*, *supra* note 120, at 1510.

139. ARKES, *supra* note 122, at 93.

140. *Id.* at 94.

141. *Id.*

142. *Id.*

143. *Id.* at 106.

144. A prime example of this occurred in 2011, when a year-long FBI sting operation culminated in an armed multi-agency raid on an Amish farm that had been selling raw milk to local customers. See Baylen J. Linnekin, *Mopping Up the Raw-Milk Mob*, WASH. TIMES (May 13, 2011), <http://www.washingtontimes.com/news/2011/may/13/mopping-up-the-raw-milk-mob/?page=all#pagebreak>. But this was no isolated incident. Raids on small farms and community food co-ops have been on the rise, both at the state and federal level. See *Raids Against America's Small Farms*, FARM FOOD FREEDOM COALITION, <http://farmfoodfreedom.org/section/raids->

milk consumption as extremely dangerous, the FDA going so far as to equate it with “playing Russian roulette with your health.”¹⁴⁵ But there are experts who claim that raw milk has many health benefits that are destroyed with pasteurization.¹⁴⁶

It is not really disputed that milk-related illnesses did arise at one point in history, but it was actually due to unsafe farming practices in dirty cities and not a factor of any inherent danger in raw milk.¹⁴⁷ Raw milk consumption was not problematic before the industrial revolution, and it would not be problematic once refrigeration allowed for dairies to be removed from city limits.¹⁴⁸ It was simply a “blip on the screen of human history.”¹⁴⁹ During the early 1900s, as cities grew in size, dairy farms sprang up within the city limits, fueled by the byproduct of the breweries, called distiller’s grain.¹⁵⁰ This feed altered the pH balance of the cows’ rumen and led to sickness among the dairies.¹⁵¹ The sickness of the cows combined with a confluence of factors, including cities and streets overrun with manure, disease, and a general lack of human hygiene, to create a pathogen-rich environment that was a major threat to the health of the city dwellers.¹⁵² The result was an unprecedented pathogen proliferation, and the accepted solution was to impose pasteurization, rather than addressing the source of the contamination.¹⁵³

Many individuals claim experiencing healing of chronic illness accomplished, at least in part, by the consumption of raw milk, and many people that are unable to digest pasteurized milk without experiencing allergic reactions are able to digest raw milk with ease.¹⁵⁴ The bacteria that is naturally occurring in raw milk, combined with the enzymes that aid in digestion, are actually one of the primary things that make it desirable by many, as the bacteria is understood to be a probiotic, or helpful bacteria,

against-americas-small-farms (last visited Feb. 6, 2015); Erik Kain, *Police Raid Rawesome Foods, Dump Raw Milk*, FORBES.COM (Aug. 3, 2011), <http://www.forbes.com/sites/erikkain/2011/08/03/swat-team-raids-raw-milk-farm-rawesome-arrests-owner/>.

145. Rencher, *supra* note 104, at 421.

146. *Id.*

147. JOEL SALATIN, *EVERYTHING I WANT TO DO IS ILLEGAL* 15-16 (2007).

148. *Id.*

149. *Id.* at 15.

150. *Id.*

151. *Id.*

152. *Id.* at 15-16.

153. *Id.*

154. Rencher, *supra* note 104, at 422.

and the lactic acid is viewed as a natural preservative.¹⁵⁵ Raw milk advocates rightly highlight the fact that pasteurized milk may still contain the pathogens that raw milk is decried to harbor.¹⁵⁶ The FDA refuses to even debate the safety of raw milk, clinging to skewed statistics that, viewed in the worst light possible for raw milk, only show how insignificant a health threat raw milk consumption really is in the large picture of the estimated 76 million people who are sickened by food each year.¹⁵⁷

In a strange perversion of events, the very consumers the FDA was purportedly established to protect became the targets of the FDA's scorn and persecution. Those farmers seeking to provide what they see as a higher quality product to that of the pasteurized alternative to these consumers who desire it are shut down without any adulteration being shown. The CDC at least concedes that the pasteurization process degrades some vitamins that are naturally occurring in raw milk—as is the case with most foods that are heated.¹⁵⁸ Proponents of raw milk often cite a 2005 European study and general statistics of the Amish which seem to indicate that consumption of raw milk offers protection from asthma and allergies, but there are certainly more variables between the eating and lifestyle habits of these two study groups than just raw milk consumptions.¹⁵⁹

The purpose of this discussion is to show that there are studies that claim to support both sides of the argument. One's conclusion about the safety of raw milk—and of the many food choices and preparation methods—really hinges on whose opinion one chooses to agree with, as a matter of discretion and wisdom. With this backdrop, a few specific problems can be addressed as it pertains to food safety regulation.

III. PROBLEM

A. *The Shifting Sands of Safety: Safe Today, Poisonous Tomorrow*

One does not need to live a century to see the often subjective, and often wrong, conclusions of scientists and experts when it comes to the health and safety of various foods and products that affect food.¹⁶⁰ Perhaps there is

155. Donna M. Byrne, *Raw Milk in Context*, 26 J. ENVTL. L. & LITIG. 109, 116 (2011).

156. *Id.* at 112-14.

157. Rencher, *supra* note 104, at 422.

158. Byrne, *supra* note 155, at 115.

159. *Id.* at 116.

160. I am reminded of the poor, incredible, edible egg, which has fallen in and out of favor over the years. See John Berardi, *Eggs: Healthy or Not?*, HUFFINGTON POST (July 16, 2013), http://www.huffingtonpost.com/john-berardi-phd/eggs-and-health_b_3499583.html?

more subjectivity in the debate over the *healthfulness* of different foods, but there is still plenty of disagreement over the *safety* of various products and methods, such as foods grown with pesticides, genetically modified organisms, growth hormones, chemical ripening, antibiotics in meat animals, and many more.¹⁶¹ Given the difficulty to come to objective conclusions, and the various interests involved, some believe food safety regulation to be as much a matter of politics as it is of science.¹⁶²

B. *Legitimate State Interest in Regulation*

1. Regulating to Protect From the Known and Desired?

a. The legitimate scope of state safety regulation

The primary purported intent of all early regulation was to protect the consumer from unknown, or misrepresented, adulterated products; yet the modern paradigm seeks to purport legitimacy in prohibiting products of which the regulators do not really know better than the informed consumer who desires a certain product.¹⁶³ At the state level, aside from adulteration and misrepresentation, the determination of the safety or health of a particular food item is largely subjective—as are the methods for achieving safety in production and processing.¹⁶⁴

b. The illegitimate reach of state safety regulation

If the goal of food safety regulation is to protect the consumer from what he does not know, a paternalistic-looking regulation that disregards the consumer's knowledge and desire cannot really be seen as for safety or protection of anything other than the corporate interest that has market

Eating Egg Yolks as 'Bad as Smoking,' NHS CHOICES (Aug. 15, 2012), <http://www.nhs.uk/news/2012/08august/Pages/Eating-egg-yolks-as-bad-as-smoking.aspx>; see also JOEL SALATIN, *FOLKS, THIS AIN'T NORMAL: A FARMER'S ADVICE FOR HAPPIER HENS, HEALTHIER PEOPLE, AND A BETTER WORLD* 301 (2011). Referring to a discussion on sterilization not being optimum for health, Salatin says, "Food safety is completely subjective. I don't think for a minute that most of what's in the supermarket is safe. But it's been deemed safe because it only kills you slowly." *Id.* Salatin argues that the primary factor that regulatory agencies look at in food safety is only what would be a lethal single dose. *Id.* He calls the idea that what doesn't kill you right now is safe nonsense. *Id.* See also JAMES T. O'REILLY, *A CONSUMER'S GUIDE TO FOOD REGULATION AND SAFETY* 2 (2010).

161. Rencher, *supra* note 104, at 421.

162. *Id.*

163. See *supra* Part II.C.2; Part III.A. This is true mostly in dealing with cottage industry products from local farms or markets.

164. Rencher, *supra* note 104, at 421.

share at stake.¹⁶⁵ At what point does the interest of the State to help promote the safety of the people become illegitimate? Is the FDA meant to function as a parent and protect the people from making their own fully informed decisions?¹⁶⁶ The nature of some regulations drift so far away from the problems for which the regulations spawned that it becomes clear that ulterior motives are at play.¹⁶⁷ Issues like raw-milk consumption and on-farm meat processing, taken as a whole, do not fall within any framework of adulteration or protection from an unknown threat or danger.¹⁶⁸ To seek to ban entire industries over a difference in opinion becomes not a policy of safety, but of economic protection for certain other industries.¹⁶⁹

A prime example of the attitude of regulatory agencies towards citizens is found in the official response of the Virginia Department of Agriculture and Consumer Services to citizens' resistance to increased regulations governing raw milk and the production of cheeses from raw milk.¹⁷⁰ The Agency responded to citizen comments advocating the view that it should be a matter of choice for people to decide what to eat by stating, "For individuals to make a choice implies that they have some basic knowledge on which to base a decision. The Department believes that the average consumer does not possess the basic knowledge to be able to determine if milk and dairy products are safe."¹⁷¹ There is a discomfoting problem with

165. SALATIN, *supra* note 147, at 62.

166. As discussed in Part II, the origin of the FDA's charge was to combat adulteration and deception of the public. See *supra* Part II.C.2. This line is crossed when regulation crosses into overriding informed decisions of things that are not inherently dangerous by their very nature. As Mr. Lusk eloquently puts it:

So, if we're not responsible for ourselves, who is? And who is responsible for the people who think they're responsible for us? The elite's motive for denying personal responsibility is self-evident. As Thomas Sowell put it, "To believe in personal responsibility would be to destroy the whole special role of the anointed, whose vision casts them in the role of rescuers of people treated unfairly by 'society.'"

LUSK, *supra* note 78, at 145.

167. See SALATIN, *supra* note 147, at 62. Salatin argues that prohibiting only the sale of such goods identifies the regulation of the sale as a pretext for achieving a safety regulation. *Id.*

168. These products are not really seen as inherently dangerous, such as drugs (which are banned even for possession) as there is no prohibition from possessing, consuming, or giving raw milk away, or any other prohibited home-grown foods, such as vegetables, or home-processed meat; the prohibition is only in the selling of these goods. *Id.* at 61-62.

169. *Id.* at 62.

170. Final Regulation Agency Background Document, *supra* note 11.

171. *Id.* at 13. The Department goes on to say that consumers assume the products being offered for sale are safe based off experience, not knowledge of actual safety. *Id.* The

this view of consumers. In the eyes of the regulatory agencies, the “consumer is too pitifully ignorant to make her own decisions.”¹⁷² No amount of research, knowledge, or disagreement will help a consumer escape the limitations placed upon her by this paternalistic paradigm. The regulatory agency allows questions and statements to be offered here, as they do with many proposed regulations, but it seems more like a formality since it summarily dismisses all opposing statements or questions.¹⁷³

2. The Faulty Focus of Food Regulation

One major criticism of the current regulatory approach by the FDA and USDA is that it focuses on infrastructure, rather than results.¹⁷⁴ As farmer and author Joel Salatin says,

The problem is that the rules become requirements of system rather than requirements of competency. If a touchdown is the goal, you can have just as valid a touchdown on a short field as a long one. If food safety is the goal, you can have just as safe a food produced in a home kitchen as in a Campbell’s soup factory. If the goal is safe food, who cares what the infrastructure is as long as the food is safe?¹⁷⁵

The common regulatory response is that the agency must provide an even playing field, but this is a fallacy, as the safety concerns and infrastructure requirements are just not equal among operations of different sizes.¹⁷⁶ The people being contaminated with food-borne bacteria are not getting it from small-scale facilities—“they are getting it from the industrial-sized closed-door federal facilities where the government-corporate fraternity speaks the same language and colludes to make sure that whatever truly innovative

Department also declares that consumers “lack basic understanding of risk factors involved with sanitation, production and processing methods, packaging, handling, labeling, and distribution.” *Id.*

172. SALATIN, *supra* note 147, at 75. Understandably, Salatin views this statement as extremely condescending and identifies much hypocrisy in the other portions of the statement. *Id.*

173. See generally Final Regulation Agency Background Document, *supra* note 11. The agency generally responds to any contrary public comment by simply saying it disagrees and offering some further comment, but no challenge or comment had any impact on the outcome. *Id.* at 10-17.

174. SALATIN, *supra* note 147, at 69.

175. *Id.* at 73.

176. *Id.* at 72.

answers exist to today's problems will never see the light of day."¹⁷⁷ Salatin sums up the problem perfectly: "These ludicrous requirements are an attempt to legislate integrity, and integrity cannot be legislated."¹⁷⁸

Not only does increased infrastructure not guarantee food safety, it imposes significant barriers of entry to upstart entrepreneurs and slowly works towards shutting out competitive forces in the marketplace, enshrining the status quo of the day and protecting the businesses that are already established.¹⁷⁹

One cannot sell milk from a few cows anymore; the law-required equipment is too expensive. Those markets were done away with in the name of sanitation—but, of course, to the enrichment of the large producers. We have always had to have "a good reason" for doing away with small operators, and in modern times the good reason has often been sanitation, for which there is apparently no small or cheap technology.¹⁸⁰

This focus on infrastructure has created an accelerated consolidation in the food production market.¹⁸¹ In light of new regulations and infrastructure requirements, businesses constantly seek expansion in order to spread out the cost of regulations.¹⁸² This consolidation creates a problem, when encouraged and protected by legislation, as it becomes totalitarian; it "establishes an inevitable tendency toward the *one* that will be the biggest of all."¹⁸³ "It is now, for the first time, deemed provident and wise to put all the eggs in one basket."¹⁸⁴ Thus, the focus on infrastructure creates an undue burden in cost to future entrepreneurial activity, but this is only one piece of the cost puzzle imposed by regulation.

C. *The Costs of Regulation*

All forms of regulation impose various costs on the economy, and the costs are not limited to monetary costs.¹⁸⁵ Most obvious and quantifiable is the budgetary cost of regulation—the money taken by taxes from the

177. *Id.* at 62.

178. *Id.* at 73.

179. BERRY, *supra* note 6, at 41; *see also* SALATIN, *supra* note 147, at 62.

180. BERRY, *supra* note 6, at 41.

181. *Id.*

182. SALATIN, *supra* note 147, at 74.

183. BERRY, *supra* note 6, at 41.

184. *Id.* at 36.

185. EDWARDS, *supra* note 14, at 166.

private sector—reducing what would otherwise be employed for production or consumption.¹⁸⁶ The budgetary cost of regulation is staggering, and ever on the rise, with the projected budget of \$59.4 billion for the development and enforcement of federal regulations sought for 2014.¹⁸⁷ This regulatory budget has nearly doubled every ten years since 1980, when the budget was \$7.3 billion.¹⁸⁸ But these soaring budgetary costs pale in comparison to the non-budgetary costs of regulation, which ultimately fall on private producers and consumers.¹⁸⁹ The non-budgetary costs of regulation were most completely and accurately measured by Thomas Hopkins of the Rochester Institute of Technology, who had been tracking this information from 1977 to the publication of his research in 1996.¹⁹⁰ As of 1996, Hopkins and his team estimated an annual compliance cost of \$668 billion imposed on the private sector.¹⁹¹

Even these two main prongs of the cost of regulation do not give the whole cost picture. One of the main intangible costs is the barrier to entry that such regulations play on would-be participants in the market. With respect to infrastructure requirements placed on the food processing industry, Salatin rightly concludes that the practical effect of these regulations is to ensure that “whatever money is made in tomorrow’s food system, will be made by today’s players. Upstarts are not allowed.”¹⁹² This cost in the barrier to innovation and entrepreneurship is significant, even though it is not easily quantified.

D. Regulatory Capture

The analysis of certain regulatory measures being only a pretext of achieving some legitimate object of safety implies the problem of “regulatory failure,” as contrasted with “market failure.” Regulatory failure is caused by an

186. *Id.*

187. Susan Dudley & Melinda Warren, *Sequester’s Impact on Regulatory Agencies Modest*, REGULATORY STUDIES CENTER 1 (July 2013), http://wc.wustl.edu/files/wc/imce/2014_regulators_budget_0.pdf.

188. *Id.* at title page.

189. EDWARDS, *supra* note 14, at 171.

190. *Id.*

191. THOMAS D. HOPKINS, CENTER FOR STUDY OF AM. BUS., REGULATORY COSTS IN PROFILE 1 (Aug. 1996), http://wc.wustl.edu/files/wc/imce/regulatory_costs_in_profile.pdf. With the increase in budgetary costs since this report was published, we can imagine a similar upward trend in this non-budgetary figure, as the regulatory requirements continue to increase and impose additional costs in the market.

192. SALATIN, *supra* note 147, at 62.

effective capture of the regulatory agencies by the regulated industries.¹⁹³ Many political scientists and economists have identified this problem since the rise of the regulatory state in America.¹⁹⁴ Economists developed the idea of regulatory capture into an economic theory of regulation.¹⁹⁵ Under this theory, regulation can be viewed as a commodity that is essentially available in the political marketplace.¹⁹⁶ Thus, politicians and bureaucrats supply regulation “by reference to the demand of those who would benefit from its promulgation, the price being some form of political, generally electoral, support.”¹⁹⁷ The problem with regulation is that after the initial public outcry leads to particular regulatory measures being passed, the continual coordinated influence is most effectively sustained by the regulated industry that is most connected and involved with the ongoing regulation.¹⁹⁸ Thus, producers, rather than consumers will most often secure the “commodity” of regulation over time.¹⁹⁹ The problem of regulatory capture becomes even more problematic in combination with policies that artificially fuel consolidation of industry, leading to a more uniform power base from which to secure the “commodity” of regulation in any specific industry.

IV. PROPOSAL

It has been necessary to look at regulation in a broad, philosophical view for this Comment. Specific applications and discussions of food-safety regulation, and the impact of any potential changes, need to be addressed individually and thoroughly. With a fresh awareness of the dangers involved in combining the power of the state with the interests of political rent-seeking behavior, it is necessary to carefully discern when state action is outside of any plausible police power authority. This proposal will advocate a change in the paradigm through which we view food-safety regulation and will recommend specific steps towards achieving such change. The first and foundational change that must take place is one of perspective, with a refocus on a proper view of personal responsibility in decision making about one’s health and purchase decisions. The second change is to remove infrastructure as a requirement for safety. The third

193. ANTHONY OGUS, *Economics and the Design of Regulatory Law*, in THE LEGAL FOUNDATIONS OF FREE MARKETS 104, 108 (Stephen F. Copp ed., 2008).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

proposed change is to allow individuals to opt-out of the purported protections of various regulatory requirements placed on producers, allowing the individual and the producer to assume responsibility of the integrity of the food exchanged.

A. *Removing the Paternalistic Perspective*

“Assuming the right to care for someone when they haven’t asked for it is only slightly shy of tyranny.”²⁰⁰ We live in a time when people are less likely to take responsibility for the decisions that they make. It is a paradigm that grows stronger each day, as the more we outsource our responsibility, or the more someone else assumes it on our behalf, the more we begin to lose our sense of being personally responsible for our decisions. “The champions of freedom can win only if they are supported by a citizenry fully and unconditionally committed to the ideal of freedom.”²⁰¹ Regulators and legislators seeking to impose their opinions on others do so, in part, by “exaggerating the importance of low-probability risks.”²⁰²

Thus, the first necessary step is to reject the idea of the paternalistic state and to recognize that regulation is *inherently* medieval and dictatorial.²⁰³ Ownership and responsibility of any property or idea will always yield a more careful treatment with rational self-interested people, and a lack of responsibility inevitably moves people towards ignorance and complacency.²⁰⁴ The government cannot respond as necessary to change to the ever-accelerating pace of innovation. “Government bureaucracy lacks this key dynamism embedded in the market.”²⁰⁵ “There is a viable alternative to paternalism. It is what it always has been—the market.”²⁰⁶

200. LUSK, *supra* note 78, at 69.

201. MISES, *supra* note 53, at 201.

202. LUSK, *supra* note 78, at 70.

203. *See, e.g.*, EDWARDS, *supra* note 14, at 226.

204. SALATIN, *supra* note 160, at 313. Salatin states, “Every time the government takes away decision-making power and choice risks, it dumbs down the populace in that arena.” *Id.* at 314.

205. LUSK, *supra* note 78, at 79 (referring to the dynamics of market induced changes that occur frequently based on the changing needs/wants/desires of the customer).

206. *Id.* at 80; Robert Sugden, *Why Incoherent Preferences Do Not Justify Paternalism*, 19 CONST. POL. ECON. 226, 247 (2008).

B. Specific Steps in Food Safety Regulation

Without some systematic crises, incremental steps are likely to be the only realistic way forward.²⁰⁷ This proposal offers three specific steps towards a proper view of government oversight and requirements in the area of food safety.

1. A Shift Away from Requirements of Infrastructure

It is tempting—and quite fashionable—to invoke what looks like a patriotic call for government intervention to help the quintessential, independent small farmer.²⁰⁸ It is undisputed that regulatory requirements affect smaller enterprises more dramatically, largely due to their inability to spread the cost. But we have seen the pernicious effect that government intervention has had on agriculture, and we still live with it today. In any market, it is good for inefficient businesses to go *out* of business—no matter their size—and in a free market, efficient small businesses are almost sure to grow and cease to be small.²⁰⁹ But if the “government grants privileges to certain categories of small business, it must neatly circumscribe the conditions that entitle a man to claim these privileges and must enforce these regulations,” and so the privilege becomes a regulation in disguise.²¹⁰

Thus, the focus of our action must be on removing arbitrary barriers to growth that were implemented in the name of safety, and not on artificially propping up what does not work. The law must view food safety enforcement in terms of the objective safety of the output, and not the expanse of the means used to get to that output. Infrastructure is simply not the problem in food safety, and infrastructure will naturally grow to meet a business’s needs as it grows. It seems as if the current food safety law looks to the infrastructure in place at the biggest and most technologically advanced enterprise, and establishes that as the standard for all. But this one-size-fits-all infrastructure requirement will achieve neither safety nor innovation.²¹¹ Purported safety policies that insulate a business of any size from competitive forces must be abandoned.²¹² At the very least, food safety regulations must be reformed to remove arbitrary and expensive

207. EDWARDS, *supra* note 14, at 224-25.

208. MISES, *supra* note 53, at 236-37.

209. *Id.* at 239.

210. *Id.* at 237. This concept is illustrated in the case of the recent Food Safety Modernization Act and the exemption for small enterprises contained therein. See *supra* text accompanying note 65.

211. SALATIN, *supra* note 147, at 61-62.

212. *Id.* at 62.

infrastructure requirements from artificially blocking business startup, development, and innovation.

2. Opting-out of Government Food Choice Responsibility: Informed Consent for the Consumer

Looking at the foundational purported purpose and intent of food safety regulation as being to address the issue of adulterated and misbranded products—both of which require a deceived or unknowing consumer—safety regulation must not be able to trump the willingness of parties to enter into a contract for the sale of food. There are no moral limitations on the liberty of contract implicated in this situation. Thus, regulatory law needs to be changed to remove restrictions on a consumer's ability to purchase any food product, assuming both buyer and seller opt-out of regulatory oversight or assurance of the safety of the product. This can be easily affected by the creation of buying clubs or organizations that consumers and producers can become members of, whereby sufficient education on safety risks can be required, and the opting-out can be fully informed.

It is critical to remember that producers of any product have incentives to test their products for safety and effectiveness before marketing them, and have in fact always tested their products as allowed by the technology of the time.²¹³ The primary incentive is always the competition of other players in the marketplace; specifically, the threatened or actual loss of customers who quickly change what products they purchase and from whom they are purchased in response to concerns.²¹⁴ Similarly, consumers certainly have an incentive to verify the safety of the source of the food they acquire, and consumers will be much more inclined to do this without the often-false sense of security that comes with regulation. Consumers are not helpless to address problems without our current paternalistic regulatory perspective. If producers are not sufficiently motivated by market incentives and competition, they are subject to criminal and civil liability from people who are harmed by their products.²¹⁵ In fact, compliance with regulations often insulates producers from liability for actual harm done.

“Our freedom of choice in a competitive society rests on the fact that, if one person refuses to satisfy our wishes, we can turn to another. But if we face a monopolist we are at his mercy. And an authority directing the whole economic system would be the most powerful monopolist conceivable.”²¹⁶

213. EDWARDS, *supra* note 14, at 121.

214. *Id.*

215. *Id.*

216. HAYEK, *supra* note 70, at 102.

V. CONCLUSION

“The fundamental principle that in the ordering of our affairs we should make as much use as possible of the spontaneous forces of society, and resort as little as possible to coercion, is capable of an infinite variety of applications.”²¹⁷ We will never have a perfect food system, for it is filled with fallible people. We will never have risk-free food, just as we will never have risk-free *anything*.²¹⁸ Reductions in product risk occur over time as technology advances, but “at any point in time, with a given level of technology and structure of public tastes, perfect safety is *not* optimal.”²¹⁹ Any market failures are dwarfed by the reality of regulatory failures and the high cost of regulatory “success.” The answer isn’t more government control or involvement; it’s less.

The danger is not immediate, it is true Yet, though the road be long, it is one on which it becomes more difficult to turn back as one advances. If in the long run we are the makers of our own fate, in the short run we are the captives of the ideas we have created. Only if we recognize the danger in time can we hope to avert it.²²⁰

In food safety regulation, we must get off this regulatory road to serfdom, and we must work towards reapplying the ideals that have proven their efficacy in the history of the United States, and the western world before.

We are ready to accept almost any explanation of the present crisis of our civilization except one: that the present state of the

217. *Id.* at 21.

218. James Edwards discusses the tension between safety and cost within the framework of product safety being incapable of perfection, saying:

Products (or the workplace) can be engineered for improved safety, but only at a rising marginal cost for each additional unit of risk reduction. Increasing product safety thus increases the cost of the product unless other features, which may be as valuable to consumers, are reduced to offset the higher cost of improved safety. Producers try to find a *combination* of product features including safety that most satisfies customers, and since customers differ in their risk attitudes, different producers will fill different segments of the market. Product safety will therefore vary across producers, as will other quality dimensions, just as the auto industry offers Cadillacs at one end of the spectrum and Yugos at the other. The process constitutes an efficient matching of scarce resources to the spectrum of public tastes and needs.

EDWARDS, *supra* note 14, at 118-19.

219. *Id.* at 119.

220. HAYEK, *supra* note 70, at 4.

world may be the result of genuine error on our own part and that the pursuit of some of our most cherished ideals has apparently produced results utterly different from those which we expected.²²¹

In our culture of fear-mongering media, we have stopped thinking about the goal of regulation, and seek only to do something—*anything*—in response to any particular perceived problem that arises.²²² We must not lose sight of the most critical aspect in ensuring safety: integrity, *not* infrastructure. We must not lose sight of the importance of individual choice and we must not accept the viability of a paternalistic government that will “protect” us from ourselves, thinking that it knows better than us.

“It is often said that political freedom is without value in the absence of economic freedom.”²²³ But economic freedom is not to be free of the need and the power to choose, but rather freedom over our economic activity, with both the risk and the responsibility of that right.²²⁴

221. *Id.* at 13-14. Hayek is referring to the crisis of World War II; however, the principle applies today. *Id.* at 14.

222. It is a historical reality that government growth in America has largely followed times of perceived or actual crises. EDWARDS, *supra* note 14, at 197. Traditional policies and institutions are deemed inadequate to address a particular crisis that arises and power and oversight are expanded. *Id.* When the crisis is over, the extension of power subsides a little, but never as much as it expanded. *Id.* Thus, “government power and authority ratchets up over time.” *Id.* In food safety, every perceived crisis leads to this ramp up in this power and regulatory expansion, but without much contraction. *See supra* Part II.C.3 (discussing the reaction to the fiction novel, *The Jungle*). Here, the market had already responded to what was perceived as unsafe food by major consumer drop in demand for the product. *Id.* The policies that arose from the Great Depression in the United States are one of the most significant examples of the tendency for a call to action with major unintended consequences that fall on those who call for it. ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 159 (Indep. Inst. 2012).

[E]very collectivist revolution rides in on a Trojan horse of “Emergency.” It was a tactic of Lenin, Hitler, and Mussolini. In the collectivist sweep over a dozen minor countries of Europe, it was the cry of the men striving to get on horseback. And “Emergency” became the justification of the subsequent steps. This technique of creating emergency is the greatest achievement that demagoguery attains. The invasion of New Deal Collectivism was introduced by this same Trojan Horse.

Id. at 159 (quoting President Herbert Hoover).

223. HAYEK, *supra* note 70, at 110.

224. *Id.* at 110-11.