

Journal of  
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**-POLICY-**

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### **Foreward**

This issue introduces a new format to the Journal of Food Law and Policy. Like many law reviews, we have primarily focused on publishing legal articles, which, by tradition, and now definition, are lengthy. As one guide for foreign scholars explains, law review articles “are generally between thirty and 150 pages, with as many as 500 to 600 footnotes.”<sup>1</sup> They are also prone to suffer from what *Garner’s Dictionary of Legal Usage* refers to as “law reviewese,” a “stilted, jargonistic writing style. . .lacking in personality or individual idiom.”<sup>2</sup>

JFLP has resisted law reviewese from its inception, seeking to serve as an intelligent *and* intelligible forum for policymakers, practitioners, and academics from a wide range of fields, in addition to legal scholars. This issue contains two articles that represent the best of the accessible and incisive scholarship we are trying to foster. The first, Jay Mitchell’s *Farmers Market Rules and Policies: Content and Design Suggestions*, is informed by the author’s years of experience with the subject and will immediately be useful to many of our readers. The second, Jacob Coleman’s *ALDF v. Otter: What Does It Mean for Other State’s “Ag-Gag” Laws?*, is a compelling and concise discussion of the state of ag-gag litigation. It is also the winner of the Arent Fox / Dale Bumpers Excellence in Writing Award which is awarded to the Journal of Food Law and Policy Staff

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1. David B. McGinty, *Writing for a Student-Edited U.S. Law Review: A Guide for Non-U.S. and ESL Legal Scholars*, 7 N.Y. CITY L. REV 39 (2004).  
<http://academicworks.cuny.edu/clr/vol7/iss1/3>

2. BRYAN GARNER, *Garner’s Dictionary of Legal Usage*, OXFORD U. PRESS, (2001).

Editor with the best student written article of all Journal of Food Law and Policy candidates during their candidacy year.

After Donald Trump's victory last November, we put out a call for brief essays examining what happened, what's likely to happen, and what policymakers and advocates can do to keep pushing forward. The response was extraordinary. We received thought provoking submissions on a number of important topics, including antitrust, trade policy, food safety, and labor, among others. Instead of running a standard issue comprised of legal articles—with essays as an accompaniment—we decided to reverse the format and devote the bulk of this issue to these essays. The result is a penetrating and timely look at the state of food law and policy from some of the field's most accomplished scholars, practitioners, and advocates.





## **A Call to Action: The New Academy of Food Law & Policy**

**Emily M. Broad Leib\* & Susan A. Schneider\*\***

For several decades, consumer interest in food and the system that produces it has been on the rise. This interest has more recently coalesced into a broad-based food movement that combines a diverse set of advocates.<sup>1</sup> The 1970s and 1980s can be viewed as the beginning of this movement when concerns were raised about the rise in industrialized farming, environmental degradation from agriculture, the increase of ultra-processed foods, and the “fast food” approach to eating. Leading voices were educators such as Joan Dye Gussow; authors, including Frances Moore Lappe, Wendell Berry, and Carlo Petrini; and chefs such as Alice Waters. Others soon joined the ranks of those focused on food.

Law schools did not play a dominant role in the food movement until the early 2000’s. Since that time, however, they have helped to provide critical analysis of the role that law plays in shaping the food system. A 2014 article, *Food Law & Policy: The Fertile Field’s Origins & First Decade*, chronicles how law professors reacted to the food movement and created the new discipline of Food Law and Policy, building largely on the pre-existing fields of Food and Drug Law and Agricultural Law. Today, a Food Law & Policy class is taught in many law schools across the country. In addition, Food Law & Policy clinics provide experiential opportunities and LL.M. programs provide

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\* Emily M. Broad Leib is an Assistant Clinical Professor of Law and Director of the Harvard Food Law and Policy Clinic, and Deputy Director of the Harvard Law School Center for Health Law and Policy Innovation.

\*\* Susan A. Schneider is the William H. Enfield Professor of Law and the Director of the LL.M. Program in Agricultural and Food Law at the University of Arkansas School of Law. Professors Broad Leib and Schneider serve as co-chairs of the Board of Trustees of the Academy of Food Law & Policy.

1. Susan A. Schneider, *Moving in Opposite Directions? Exploring Trends in Consumer Demand and Agricultural Production*, 43 MITCHELL-HAMLIN L. REV. (forthcoming 2017).

attorneys with specialized training. Student interest is visible in the rising number of student food law societies and student-led conferences addressing topics across the food system.<sup>2</sup>

While Food Law & Policy courses vary significantly, each emphasizes the important role that law plays in framing the food system. Food safety, food labeling, and the approval of food and drugs for the livestock industry are among the areas regulated by the Food and Drug Administration under the Food, Drug, and Cosmetic Act,<sup>3</sup> whereas food safety for most meat and poultry products is regulated by the U.S. Department of Agriculture.<sup>4</sup> The pesticides used on food crops are regulated by the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act,<sup>5</sup> and the treatment of farmworkers, food production workers, and restaurant workers are governed by various provisions of federal and state labor laws.<sup>6</sup> In addition, the Farm Bill has a profound impact on the crops that are grown, the agricultural practices used, and the research undertaken, as well as funding some of the major nutrition programs.<sup>7</sup> The Clean Water Act regulates emissions of pollutants into the nation's waterways, though it exempts many agricultural practices from regulation and imposes only minimal requirements on industrialized animal operations.<sup>8</sup> According to the Government Accountability Office (GAO), fifteen different federal agencies administer at least thirty federal laws relate to food safety alone, and many more agencies and laws impact the full breadth of the food system.<sup>9</sup>

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2. Baylen J. Linnekin & Emily M. Broad Leib, *Food Law and Policy: The Fertile Field's Origins & First Decade*, WIS. L. REV. 557 (2014).

3. 21 U.S.C. §§ 301-399h (2012).

4. The Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (2012), regulates the safety and labeling of most meat products; The Poultry Products Inspection Act, 21 U.S.C. §§ 451-472 (2012), regulates the safety and labeling of poultry products. Note as well that the Egg Products Inspection Act, 21 U.S.C. § 1031-1056 (2012), gives the USDA the authority for the regulation of the safety of liquid, frozen, and dried egg products.

5. 7 U.S.C. §§ 136-136y (2012).

6. *See, e.g.*, 29 U.S.C. § 203 (2012); 29 U.S.C. § 213(b) (2012); and 29 U.S.C. §§ 1801-1864 (2012).

7. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

8. The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2012).

9. U.S. Gov't Accountability Office, GAO-15-290, High Risk Series: An Update 262 (Feb. 2015), <http://www.gao.gov/assets/670/668415.pdf>.

Each of these laws is complex, with both intended and unintended consequences on food. Legal expertise is critical to interpreting, challenging or demanding enforcement of existing laws. It is also critical to the proper drafting of new statutes and regulations that, either intentionally or unintentionally, shape our food system. As the Trump administration and the Republican-controlled Congress deliver promised changes to these laws and adopt policies that impact our food system, the law professors who teach and write in the area of food law & policy will be uniquely qualified to analyze and debate the legal issues presented.

Assisting with these efforts is the Academy of Food Law & Policy. This new academic membership association was launched in 2016 to:

- 1) Engage and connect teachers and students interested in Food Law and Policy;
- 2) Facilitate research, scholarship, collaboration, and collegiality in Food Law and Policy;
- 3) Encourage teaching and experiential learning opportunities in Food Law & Policy; and
- 4) Foster the next generation of Food Law and Policy leaders.

The Academy seeks to support local, regional, national, and international collaboration and to promote teaching and engagement in Food Law & Policy issues through workshops and shared resources. By building a strong network, the Academy will provide the opportunity for sharing ideas, knowledge, and research.<sup>10</sup>

A diverse group of thirteen law schools signed on as Founding Institutional Members of the Academy.<sup>11</sup> Seventy-

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10. The Academy of Food Law & Policy, <http://www.AcademyFLP.org>.

11. Academic sponsors who are designated as Founding Institutional Members are the University of Arkansas School of Law; Berkeley Law, University of California;

three law professors joined as Founding Members.<sup>12</sup> The founding Board of Trustees includes food law and policy leaders from across the country.<sup>13</sup> The Academy was incorporated in the State of Arkansas, with its first administrative home at the University of Arkansas School of Law.<sup>14</sup> Section 501(c)(3) non-profit status was attained.

The legal issues presented throughout the food system are significant, and they are increasing in complexity and consequence. They affect the quantity, quality, accessibility, affordability, and the very character of the food we eat as well as the environment from which food is produced. The Trump administration has promised “change” and this change will undoubtedly affect the food system in a variety of ways. Engagement in teaching and writing in this area has grown throughout the legal academy, and students have demonstrated interest in studying and eventually practicing law in this area. The Academy of Food Law & Policy can bring together a wide range of expertise to analyze these issues and then respond to proposed changes.

The Board of Trustees encourages interested professors to join with us. For information on becoming a member, visit the Academy’s website at [AcademyFLP.org](http://AcademyFLP.org)

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University of California, Los Angeles (UCLA); Drake University Law School; Harvard Law School; Elizabeth Haub School of Law (Pace University); North-West University (Potchefstroom Campus), South Africa; The University of Oklahoma College of Law; Vermont Law School; West Virginia College of Law; the Environmental Law Program at the University of Hawaii (William S. Richardson School of Law); Yale Law School, and the School of Law at National Chiao Tung University. The Academy of Food Law & Policy, Academic Sponsors, <http://www.AcademyFLP.org>.

12. The Academy of Food Law & Policy, <http://www.AcademyFLP.org>.

13. The Members of the Founding Board of Trustees for the Academy are Emily Broad Leib, Harvard Law School; Peter Barton Hutt, Covington and Burling (Adjunct Faculty, Harvard Law School); Neil Hamilton, Drake University Law School; Baylen Linnekin, George Mason Law School; Michael Roberts, UCLA School of Law; Susan Schneider, University of Arkansas School of Law; and Margaret Sova McCabe, University of New Hampshire School of Law. The Academy of Food Law & Policy, Board of Trustees, <http://www.AcademyFLP.org>.

14. The location is fitting, as the University of Arkansas School of Law was first to offer a “Food Law & Policy” class in its LL.M. Program in Agricultural & Food Law, following the lead of its visiting professor, Neil Hamilton who taught Food and the Law at Drake University Law School. Linnekin & Broad Leib, *supra* note 3 at 590.

## Myth Making in the Heartland – Did Agriculture Elect the New President?

Professor Neil D. Hamilton\*

The power of self-deception is very strong. For most of us, we experience self-deception when we look in the mirror and don't see the extra pounds winter inactivity has added. The same capacity for self-deception, and its first cousin – hearing only what you want to – are common in our political process. Both are evident in the way key players in farming and agriculture politics have treated the outcome of the recent presidential election. One common belief throughout agriculture and rural America is those citizens took a leading role in electing our new President.<sup>1</sup> A second feature is the willingness to overlook – or perhaps, a refusal to believe – he would follow through on campaign promises that threaten the economic prosperity of U.S. agriculture. Most notable are two oft repeated promises. One, is to reject multi-lateral trade agreements that are so critical to exports of U.S. farm products. The second is to pursue punitive immigration enforcement so to put at risk millions of undocumented workers who fuel our farm and food sectors.<sup>2</sup> Only time will tell whether the potential for damage reflected in these policy stances is realized. Should American feel the adverse affects of these positions, no one should be surprised.

The idea that agriculture communities won the election for the new president has been repeated and echoed by farm leaders

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\* Neil D. Hamilton is a professor of law and the director of the Agricultural Law Center at Drake University Law School in Des Moines, Iowa. He joined the Drake faculty in 1983 after teaching two years in Fayetteville, Arkansas in the Agricultural Law LLM Program. He has been engaged in the national development of farm and food policy issues for over 30 years with the goal of developing a more sustainable and just food democracy.

1. See, e.g., Jane Wells, *Farmers to Trump: You Owe Us*, CNBC (Dec. 5, 2016), <http://www.cnbc.com/2016/12/05/farmers-to-trump-you-owe-us.html>.

2. See, e.g., Caitlin Dickerson & Jennifer Medina, *California Farmers Backed Trump, but Now Fear Losing Field Workers*, N. Y. TIMES (Feb. 9, 2017), [https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html?\\_r=0](https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html?_r=0).

and political pundits every since the votes were counted. But before the ink gets too dry on this assertion – or before it becomes irrefutable for those with buyers remorse - it may be helpful to examine the validity of this claim. First, most farmers and agricultural groups in the Midwest already identified as Republican. Thus, they can't really be viewed as the voters whose movement made the difference in the election results. Even if there were such a "movement", given the relatively small number of farmers, it would not have supplied the winning margins President Trump received.

Second, it may well be true that a significant shift in rural voting did secure swing states such as Iowa, Wisconsin and Michigan for the President.<sup>3</sup> But even so, it is hard to accept the notion that "agricultural" issues were of much importance to most rural voters. For farm groups, key issues in the campaign were familiar ones - the evil "death tax," also known as inheritance taxes; the feared "Waters of the U.S. Rule" or WOTUS, which clarifies where EPA jurisdiction stops and state law controls as it concerns the Clean Water Act; and support for the agriculture "safety net" - the billions in subsidized crop insurance and income support payments made primarily to Midwestern grain farmers. For the majority of rural and small town residents working low wage jobs and worrying if their factory might be the next to close, none of these "farm" issues have had much resonance. Instead, an explanation for the strong showing for the President in rural America can more likely be found in the mix of social and economic issues. For example, the President, among other politicians, have utilized so-called "values" issues to illuminate perceived, but often imaginary, fault lines separating liberal elites and urban dwellers from the hard working, but less educated workers and families in rural America. Your ability to actually find these differences may be a function of how much you want to believe they really exist.

The truth is neither party nor presidential candidates had a significant farm or rural policy favorable to the agriculture

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3. See Danielle Kurtzleben, *Rural Voters Played a Big Part in Helping Trump Defeat Clinton*, NPR (Nov. 14, 2016), <http://www.npr.org/2016/11/14/501727150/rural-voters-played-a-big-part-in-helping-trump-defeat-clinton>.

electorate. The extent of the Republican campaign's agricultural policy was limited to simple phrases – such as, “I love farmers more” – along with claims to defend agriculture from critics and to free it from burdensome regulations that weigh it down. But the reality is most of agriculture, especially Midwest commodity production, is largely unregulated – regardless of what farmers like to believe. The two key issues championed by groups like the American Farm Bureau Federation and parroted on the campaign trail – WOTUS and the death tax - are manufactured controversies of minor significance. The WOTUS “battle” was contrived by the AFBF as a way to demonize the EPA and oppose regulatory efforts to address clean water. However, any objective study shows that the rule had essentially no impact on farmers in states like Iowa. Agriculture is largely exempt from the Clean Water Act and the allegations of costly new permitting requirements don't withstand scrutiny because they don't apply to land already subject to federal jurisdiction. Even so, this did not prevent the opponents of WOTUS from staging a very effective multi-year misinformation campaign by legions of politicians. Their goal was achieved as one of the first actions of the new Administration which ordered a reversal of the EPA rule.<sup>4</sup> However, only time will tell if the claimed prosperity will result.

As for the death tax, only a very small number America's families are actually subject to it. In fact, it was estimated to be around only 11,000 families in 2015.<sup>5</sup> Of these families, even a smaller proportion are farmers or owners of farmland. Even for those families, only minimal estate planning is required as they can use existing tax exemptions, business structures, and special valuations to avoid taxation on tens of millions of dollars in the value of their farmland. Truth be told, it may be as hard to find an Iowa farm family who has “lost the farm” to pay the estate

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4. See Coral Davenport, *Trump Plans to Begin E.P.A. Rollback with Order on Clean Water*, N. Y. TIMES, (Feb. 28, 2017), <http://www.nytimes.com/2017/02/28/us/politics/trump-epa-clean-water-climate-change.html>.

5. See Brian J. O'Connor, *Once Again, the Estate Tax May Die*, N. Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/18/your-money/taxes/once-again-the-estate-tax-may-die.html>.

tax as it is to find a farmer who has ever met someone who works for the EPA.

As for the Democrats' campaign and the departing Obama Administration, neither did much to build on the significant work done over the last 8 years to strengthen rural America and support a broader, healthier food system. Even with record net farm income and growing farm exports, little was done to take any credit. As a result, most farm votes went to Donald Trump – as they historically tend to do. How many of the new rural homeowners, whose loans were made possible with USDA financing, or the farmers who benefited from USDA's grants creating new opportunities in farming and food processing, showed any awareness or gratitude in the voting booth? How many of the farmers who benefitted from the years of record net farm income attributed their profits to the policies of the Obama Administration?. How many of the 20 million newly insured individuals – many of whom live in rural America – voted for the candidate who promised to repeal the law that provided them insurance? How many workers in Rural America could benefit from increasing the minimum wage (perhaps the single most important policy tool to address the poverty at the root of many rural ills) supported a candidate who opposes the change?

The irony is while President Trump's agricultural supporters were satisfied claiming progress on secondary issues like WOTUS and the death tax, they seemed to overlook the real threats in other policy stances made by the President. Attacks on trade agreements like NAFTA and Trans-Pacific Trade pact<sup>6</sup>, threats to key export buyers like China and Mexico<sup>7</sup>, and plans to deport millions of undocumented workers supporting the food and agriculture sector all pose greater risks than any existing regulation. In further irony, one cherished policy is worshiped

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6. See, e.g., Donnelle Eller, *Iowa Could Lose Big If Trump Moves Lead to Trade War, Experts Say*, DES MOINES REG. (Jan. 23, 2017), <http://www.desmoinesregister.com/story/money/agriculture/2017/01/23/iowa-could-lose-big-if-trump-moves-lead-trade-war-experts-say/96946684/>.

7. See, e.g., Paul Davidson, *Mexican Retaliation Could Hurt Corn Farmers*, USA TODAY (Feb. 21, 2017), <https://www.usatoday.com/story/money/business/2017/02/20/mexican-retaliation-could-hurt-corn-farmers/98008070/>.



above all others in farm circles – the Renewable Fuel Standard (“RFS”). The RFS creates a market for 15 billion gallons of ethanol, which is produced mostly from corn. Historically, the agriculture electorate has supported expanding the RFS and treated this policy as a political litmus test for candidates. However, the RFS may now be threatened by the new Administration and its appointees. While farm groups embraced the EPA nominee for suing to stop WOTUS when he was the Attorney General of Oklahoma, his ardent opposition to the RFS seemed to draw less attention. Appointing a Texas oil supporter and RFS apostate to head the Department of Energy along with an oil executive as Secretary of State, should make any RFS supporter nervous.<sup>8</sup>

So if traditional farm issues no longer glue rural society together, what is happening to the social fabric in rural states? The reality for agriculture and many rural communities in the Midwest is a rapidly widening rural class divide.<sup>9</sup> Helping drive the divide are structural changes, such as a decline in the number of farms, an increase in the average farm size, and shifts in land tenure with more of it titled to absentee owners (now called “non-operator landowners or NOLO’s). Today the wealth reflected in owning farmland is often held by people who live elsewhere or, otherwise, is concentrated in large farms. Said differently, wealth does not flow through Main Street businesses of local towns like it once did. Rural workers, even those not dependent on agriculture, are left with low wages and little opportunity for wealth creation, which is vital to changing opportunities of a family’s next generation.

I am a child of agriculture who benefited greatly from the wealth in family farmland purchased over a century ago. I have

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8. See, e.g., Jennifer A. Dlouhy & Mario Parker, *Trump Said to Consider Biofuel Plan Between Icahn, ETHANOL GROUP*,” BLOOMBERG (Feb. 27, 2017); see Rick Santorum, *Trump Will Stand Strong for RFS, Rural America*, DES MOINES REG. (Mar. 12, 2017), <http://www.desmoinesregister.com/story/opinion/columnists/2017/03/11/santorum-trump-stand-strong-rfs-rural-america/98961524/>.

9. See generally Laura Miller, *White Trash: The 400-Year Untold History of Class in America*, SLATE (last visited Apr. 9, 2017), [http://www.slate.com/articles/arts/books/2016/06/white\\_trash\\_the\\_400\\_year\\_untold\\_history\\_of\\_class\\_in\\_america\\_by\\_nancy\\_isenberg.html](http://www.slate.com/articles/arts/books/2016/06/white_trash_the_400_year_untold_history_of_class_in_america_by_nancy_isenberg.html).

observed firsthand the social dangers we create if the historic benefits of widely dispersed land ownership disappear or become unattainable for new farm families. The segmentation of farm communities into “haves and have-nots” is not limited to just land ownership, but is also reflected in shifts in livestock production. Today production contracts are used for raising most of the swine and poultry owned by vertically integrated companies like Tyson and Smithfield. These lopsided legal agreements place contract growers in largely “custodial” roles with comparable incomes, while the profits go to shareholders living elsewhere. As a bonus, any social and environmental problems associated with livestock production, such as waste disposal and labor issues from slaughter facilities, are left for the rural communities to deal with.

Unfortunately, these structural shifts - in land tenure, farm consolidation and livestock production - are often facilitated by public programs such as farm income support, crop insurance, the RFS, and farm lending practices. In addition, the environmental impact of these shifts should not be ignored. Their collective effect is to keep the nation’s foot on the accelerator of crop production, with the effects reflected today in crop surpluses, lower grain prices, reduced farm income, and falling land prices.<sup>10</sup> On many farms, the causalities of the economic downturn affected soil conservation, water quality and land stewardship. The need to maximize production in the hope of securing larger yields will make up for low prices which can lead to harsher farming conditions. Of course, this decision is an easy one when the real landowner is not the farmer. In recent years, the growing demand for corn has led farmers to convert millions of acres of grassland and other fragile habitats to crop production.<sup>11</sup> As a result, declining farm income has left little money to invest in soil conservation or water quality like buffer strips or cover crops. Even when public cost sharing may help

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10. See, e.g., Jesse Newman & Patrick McGroarty, *The Next American Farm Bust Is Upon Us*, WALL ST. J. (Feb. 9, 2017), <https://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488>.

11. See, e.g., Scott Farber et al., *Plowed Under: How Crop Subsidies Contribute to Massive Habitat Losses*, ENV’T WORKING GROUP (Feb. 2012), <http://www.defenders.org/sites/default/files/publications/plowed-under-how-crop-subsidies-contribute-to-massive-habitat-loss.pdf>.

off-set the costs of conservation, many tenants have little incentive to invest money on land owned by someone else.

If agriculture wants to believe it was responsible for electing the new President, hopefully it can expect new, enlightened ideas to help address its needs. Unfortunately, the early indicators of the new President's policies are not advantageous to many in the agriculture community who helped elect him.

The Secretary of Agriculture position remained unfilled longer than any other cabinet post and a candidate was not named until two days before the inauguration.<sup>12</sup> By mid-March, the nominee's paperwork and ethics fillings had yet to be provided so the Senate could begin confirmation hearings.<sup>13</sup> It took over six weeks after the election before a USDA "landing team" was created to help transition the department to the new Administration. As spring approaches, the transition at USDA has slowed even more. The USDA only has 100,000 employees, even though it manages over ¼ of the nation's land and helps insure we have plenty to eat – so what is the rush? The good news for agriculture is the new EPA head has been confirmed and has made it clear climate change – if such a thing even exists - is not being caused by human activity and will not be an issue receiving any support under the new administration.<sup>14</sup> This is the reality. Too bad it isn't the myth.

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12. See, Chris Mooney & John Wagner, *Trump Picks Sonny Perdue for Agriculture Secretary*, WASH. POST (Jan. 19, 2017), [https://www.washingtonpost.com/politics/trump-picks-sonny-perdue-for-agriculture-secretary/2017/01/18/a26abbc0-ddec-11e6-ad42-f3375f271c9c\\_story.html?utm\\_term=.9a81ddb79d5a](https://www.washingtonpost.com/politics/trump-picks-sonny-perdue-for-agriculture-secretary/2017/01/18/a26abbc0-ddec-11e6-ad42-f3375f271c9c_story.html?utm_term=.9a81ddb79d5a); see, e.g., Mary Clare Jalonick, *6 Weeks Later, Senators Question Delay on Ag Secretary Pick*, DES MOINES REG. (Mar. 3, 2017), <http://www.desmoinesregister.com/story/money/agriculture/2017/03/02/us-agriculture-secretary-senators-question-delay/98648936/>.

13. See Eric Lipton & Steve Elder, *Ethical Lapses Trail Nominee for Agriculture*, N. Y. TIMES (Mar. 9, 2017), <http://newsdiffs.org/article-history/www.nytimes.com/2017/03/08/us/politics/sonny-perdue-georgia.html>.

14. See *Chief of E.P.A. Bucks Studies About Climate*, N. Y. TIMES (Mar. 10, 2017), <http://newsdiffs.org/diff/1365147/1365210/www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html>.

## The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History

Nathan A. Rosenberg\* & Bryce Wilson Stucki\*\*

After Donald Trump's surprise victory over Hillary Clinton, commentators and journalists turned their attention to rural America, where Trump won three times as many votes as his opponent, in order to understand what had just happened.<sup>1</sup> They wrote about forgotten places: small towns populated by opioid addicts,<sup>2</sup> dying Rust Belt cities with abandoned factories at their centers,<sup>3</sup> and mountain hamlets populated by xenophobes and racists.<sup>4</sup> These writers described a conservatism so total and inexplicable it seemed part of the landscape.

Yet the history of rural America reveals a different story. From the 1890s to the 1930s, rural Americans played a vital role in radical leftist politics.<sup>5</sup> Over the decades, some of those

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1. Helena Bottemiller Evich, *Revenge of the Rural Voter*, POLITICO (Nov. 13, 2016), <http://www.politico.com/story/2016/11/hillary-clinton-rural-voters-trump-231266>.

2. E.g., Zoë Carpenter, *Did the Opioid Epidemic Help Trump Win?*, THE NATION (Dec. 7, 2016), <https://www.thenation.com/article/did-the-opioid-epidemic-help-donald-trump-win/>.

3. E.g., Brian Mann, *Rural America Supported Trump, But Will His Policies Support Them?*, NPR (Feb. 6, 2017), <http://www.npr.org/2017/02/06/512037502/rural-america-supported-trump-but-will-his-policies-support-them>.

4. E.g., Kevin Baker, *Bluxit: A Modest Proposal for Separating Blue States from Red*, PEW RESEARCH CENTER: FACT TANK (Mar. 9, 2017), <https://newrepublic.com/article/140948/bluxit-blue-states-exit-trump-red-america>.

5. See generally, e.g., JIM BISSETT, *AGRARIAN SOCIALISM IN AMERICA* (Red River Books ed. 2002) (analyzing the farmer-fueled rise of the most electorally successful Socialist organization in the nation); David Brody, *On the Failure of U.S. Radical Politics: A Farmer-Labor Analysis*, 22 INDUS. REL. 141 (1983) (contending that the farmer-labor alliance played a central role in early 20<sup>th</sup> Century radical politics); LAWRENCE GOODWYN, *DEMOCRATIC PROMISE* (1976) (arguing that the Populist movement was an agrarian revolt against the corporate state); Eric Foner, *Why Is There No Socialism in the United States?*, 17 HIST. WORKSHOP 53, 71 (1984) (explaining that the Socialist party's strength in the

people chose to leave, but more of them were driven out due to policy—agricultural policy, in particular. Republicans and Democrats, alike, have supported laws that favor corporate agriculture, which continue to drive small farmers out of business and depopulate the countryside. While specialists know this history well, the public tends to know a folk history, written by figures associated with contemporary food movements.

This folk history rests on several key myths, which cover different periods of modern history from the New Deal to the present. We challenge these myths, not to attack particular authors or engage in pedantry, but to reveal the causes and extent of the suffering endured by rural families in the 20<sup>th</sup> century, which in turn, decimated the populist left. A reconsideration of the history of agricultural policy will help food-system reformers develop a more radical—and more effective—vision for rural America.

### **Myth: The New Deal Was for Small Farmers**

A number of writers in the folk-history tradition have interpreted New Deal farm bills and the Agricultural Adjustment Act—the era’s signature law—as designed to help small-scale farmers and the poor, with the unintended consequence of inaugurating our current crop-subsidy system. New Deal farm “programs were specifically tailored to assist sharecroppers and the rural poor,” writes Daniel Imhoff;<sup>6</sup> “the 1933 Farm Bill was designed to save small farming in America,” writes Bill Eubanks;<sup>7</sup> “small landholders,” writes Marion Nestle, “grew

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United States was rooted in an “unusual amalgam” of constituencies, including small farmers, rather than in factory workers). Although Marxists sometimes dismissed farmers as members of the petit bourgeois, socialist organizations in the United States were generally more ideologically flexible, in no small part due to the activism of farmers. As Harrison George put it to fellow Communists in 1932, “The impoverished farmers are on the march. We cannot order them to retreat, even if we desired.” Harrison George, *Causes and Meaning of the Farmers’ Strike and Our Tasks as Communists*, 11 *THE COMMUNIST* 918, 931 (1932).

6. DANIEL IMHOFF, *FOOD FIGHT: THE CITIZEN’S GUIDE TO THE NEXT FARM BILL* 40 (2d ed. 2012).

7. William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars*, 28 *STAN. ENVTL. L.J.* 213, 217

dependent on support programs . . . and began to view them as entitlements.”<sup>8</sup>

While crop subsidies were an important part of the New Deal, these writers misrepresent the class politics that decided FDR’s agricultural agenda. Historians and economists have reached an overwhelming consensus that the New Deal farm bills were designed to aid large farmers and succeeded in doing so: The Agricultural Adjustment Administration (AAA) “accelerated the increasing concentration of land,” writes Pete Daniel. “Obviously, large landowners reaped most of the federal money.”<sup>9</sup> An aide to Henry Wallace, then the secretary of agriculture, later said the AAA was “militantly for the larger farmers.”<sup>10</sup> Those farmers benefitted tremendously: government payments increased from 3 percent of net farm income in 1929 to 31 percent by 1940<sup>11</sup> and farmers’ incomes doubled in the 1930s.<sup>12</sup> These funds went mostly to large-scale operations.<sup>13</sup>

Meanwhile, farmers, tenants, and sharecroppers were “shoved aside in the rush toward bigger units, more tractors, and less men per acre.”<sup>14</sup> From 1930 to 1950, the number of farmers declined by 14 percent, with a 37 percent decline for black farmers.<sup>15</sup> Between 1930 and 1945, white tenants and croppers declined by 37 percent and black tenants and croppers by 32 percent.<sup>16</sup> More catastrophic losses were to follow, as the government remained “militantly for the larger farmers” on through the present.

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(2009).

8. Marion Nestle, *Utopian Dream: A New Farm Bill*, *DISSENT*, Spring 2012, at 15.

9. PETE DANIEL, *BREAKING THE LAND* 170 (1985).

10. *Id.* at 105.

11. E.C. PASOUR, JR., *AGRICULTURE AND THE STATE* 77 tbl.7.1 (1990).

12. KATHYRN S. OLMSTED, *RIGHT OUT OF CALIFORNIA* 29 (2015).

13. *See, e.g.*, DANIEL, *supra* note 9, at 170-173; GILBERT FITE, *COTTON FIELDS NO MORE* 139 (1984); CHARLES KENNETH ROBERTS, *THE FARM SECURITY ADMINISTRATION AND RURAL REHABILITATION IN THE SOUTH* ix, 29 (2015).

14. Farm Security Administration official John H. Caufield quoted in ROBERTS, *supra* note 13, at xx, discussing conditions in Texas.

15. BRUCE J. REYNOLDS, U.S. DEP’T OF AGRIC., *RURAL BUS. COOP. SERV.*, RBS RES. REP. 194, *BLACK FARMERS IN AMERICA, 1865-2000* 24 tbl.3 (2015).

16. GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH* 245 (1997).

### **Myth: Black Farmers Left the South to Find Better Jobs**

Most accounts treat black migration out of the South after the New Deal as a voluntary and profitable move. “Millions of poor farmers,” writes Robert Paarlberg in *Food Politics*, “left the land [to take] higher paying jobs in urban industry.”<sup>17</sup> The legal scholar Jim Chen called this migration a “liberating moment” that allowed rural black Southerners to escape to the urban north, away from “the dreariness of their former lives on the farm.”<sup>18</sup> He concluded, “[t]he jobs were there, the wages were better, and black America was ready to move.”<sup>19</sup>

In reality, historians have established that white Southern leaders encouraged mechanization and co-opted policy in order to pressure blacks to leave. With the backing of the U.S. Department of Agriculture (USDA), large farmers cut costs and drove small farmers out of business, while local USDA agents discriminated against black farmers on a systematic basis: by 1920, there were 925,000 black farmers, and by 1970, 90 percent of them were gone.<sup>20</sup> Some of these farmers left for better opportunities, but more were forced out in one of the “largest government-impelled population movements in all our history.”<sup>21</sup> When they reached the cities, they entered a white-dominated society where they were treated as inferiors,<sup>22</sup> and “an economy that had relatively little use for them,”<sup>23</sup> with black unemployment rates between 10 and 15 percent “as early as

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17. ROBERT PAARLBERG, *FOOD POLITICS: WHAT EVERYONE NEEDS TO KNOW* 102 (2d ed. 2013).

18. Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1303-1305 (1995).

19. *Id.* at 1305.

20. PETE DANIEL, *DISPOSSESSION* 6 (2013).

21. Donald H. Grubbs, *Lessons of the New Deal, in THE PEOPLE'S LAND* 19, 20 (Peter Barnes ed. 1975).

22. See, e.g., JASON SOKOL, *ALL EYERS ARE UPON US* (2014); KAREN R. MILLER, *MANAGING INEQUALITY* (2014).

23. WRIGHT, *supra* note 16, at 247.

1950”<sup>24</sup> and “up to 30 percent,” in several major cities, a decade later.<sup>25</sup>

As the civil rights movement gathered steam, assaults on black farmers intensified. By the 1950s, “any program for small, poverty-ridden farmers in the South became entangled with the civil rights movement.”<sup>26</sup> The founder of the Citizens’ Council drew up a plan to remove 200,000 African-Americans from Mississippi by 1966 through “the tractor, the mechanical cotton picker . . . and the decline of the small independent farmers.”<sup>27</sup> As government-funded mechanization continued apace, “tens of thousands” of poor farmers were forced out of agriculture: they eked out an existence in the hinterlands, in shacks, without “food or adequate medical care.”<sup>28</sup> Black farmers who held onto their land used their independence to support civil rights workers, which often made them targets for lynch mobs and local elites.<sup>29</sup> Throughout the South, USDA agents withheld loans black farmers needed to operate—amid other discrimination—which continued after the Civil Rights Act.<sup>30</sup> From 1959 to 1969, black farmers declined by over two thirds, almost triple the rate of white farmers.<sup>31</sup> The story of black

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24. *Id.* at 246.

25. Michael Munk, *Revolution on the Farm*, 14 MONTHLY REV. 538, 547 (1963).

26. FITE, *supra* note 13, at 218.

27. BAYARD RUSTIN, *Fear in the Delta*, in TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN 66, 74 (Devon W. Carbado & Donald Weise eds., 2015).

28. FITE, *supra* note 13, at 219.

29. *See, e.g.*, AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK 59-63, 73-76, 99-105, 160 (2013). When Bob Moses, a Student Nonviolent Coordinating Committee (SNCC) leader, began his first voting drives in Mississippi, he stayed with E.W. Steptoe, a landowner in Amite County. Steptoe was the local NAACP chapter president and secured Moses space to teach voter registration classes in a one-room church. According to Akinyele Umoja, “Many SNCC workers depended on the protection of and were inspired by Black farmers like Steptoe.” *Id.* at 60. Another landowner and NAACP member, Herbert Lee, sometimes drove Moses around Amite County. A member of the state legislature, E.H. Hurst, murdered Lee, for his work with Moses. *Id.* at 63.

30. DANIEL, *supra* note 20. USDA agents not only withheld loans, they also denied crop allotments and a slew of other services to black farmers, while funneling money and offering expertise to white ones. *Id.* The agency also overlooked fraud and abuse in elections for its powerful county committees, which ensured they were dominated by white elites, who similarly manipulated, and often refused, acreage allotments and loans to black farmers and poor whites. *Id.*

31. REYNOLDS, *supra* note 15.



farmers is so thoroughly omitted from the folk history that, in 2014, a writer for *Modern Farmer* claimed “there are more minority farmers than ever before,”<sup>32</sup> when there were almost six times as many black farmers in 1920<sup>33</sup> as there were minority farmers—total—in the latest census.<sup>34</sup>

### Myth: Earl Butz Was A Pivotal Figure

That Earl Butz, secretary of agriculture under Richard Nixon and Gerald Ford, was fired for a racist joke, may help explain why Michael Pollan has described him as the architect behind America’s industrialized food system. Many writers lead their accounts with remarks on Butz’s character, repeat his admonitions that farmers “plant fence row to fence row” and “get big or get out,”<sup>35</sup> then summarize how he dismantled New Deal supply management systems and encouraged maximum production; introduced direct payments; and displaced small farmers.<sup>36</sup> One group of writers argues that Nixon’s USDA, under Butz, was responsible for “the last fundamental shift in agricultural policies.”<sup>37</sup> Butz “[helped] shift the food chain onto a foundation of cheap corn,” writes Pollan.<sup>38</sup> Nestle claims that he “encouraged farmers to produce as much food as possible.”<sup>39</sup> Butz “forever transformed . . . the rural landscape once healthfully dotted by profitable small farms,” contends Bill

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32. Andrew Jenner, *5 Things You Need to Know from the New Farm Census*, MOD. FARMER (Feb. 20, 2014), <http://modernfarmer.com/2014/02/6-things-need-know-new-farm-census/>.

33. REYNOLDS, *supra* note 15.

34. See U.S. DEP’T OF AGRIC., NAT’L AGRIC. STAT. SERV., 2012 CENSUS OF AGRICULTURE: U.S. NATIONAL LEVEL DATA 63 tbl.61 (2014).

35. See, e.g., Marion Nestle, *Today’s “Eat More” Environment: The Role of the Food Industry*, in *A PLACE AT THE TABLE* 95, 102 (Peter Pringle ed. 2013); Tom Philpott, *A Reflection on the Lasting Legacy of 1970s USDA Secretary Earl Butz*, GRIST (Feb. 8, 2008) <http://grist.org/article/the-butz-stops-here/>; MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 51-52 (2006).

36. Nestle, Philpott, & POLLAN, *supra* note 35.

37. Mark Bittman, Michael Pollan, Ricardo Salvador, & Olivier De Schutter, *A National Food Policy for the 21st Century*, MEDIUM (Oct. 6, 2016), <https://medium.com/food-is-the-new-internet/a-national-food-policy-for-the-21st-century-7d323ee7c65f>.

38. POLLAN, *supra* note 35, at 51.

39. Marion Nestle, *In Memorium: Earl Butz*, FOOD POLITICS (Feb. 12, 2008), <http://www.foodpolitics.com/2008/02/in-memorium-earl-butz/>.

Eubanks.<sup>40</sup>

Butz inaugurated almost none of the programs his critics say he did: they began under earlier USDA chiefs, who had sided with big farmers since the New Deal. Ezra Taft Benson, not Butz, ended production controls for corn, in 1959,<sup>41</sup> and was the first to urge farmers to “get big or get out.”<sup>42</sup> Kennedy severely weakened supply management with a farm bill that made programs voluntary for every commodity except wheat.<sup>43</sup> Johnson bragged that his bill would drop prices “to the lowest possible cost” and that he would deal with “farm surplus and supply management” through increased exports, which he expected to grow by “50 percent” in a decade.<sup>44</sup> Johnson’s law also introduced direct payments to farmers, which lasted through the 1980s.<sup>45</sup>

Butz’s farm bill was “the logical extension of the acts of 1965 and 1970,” according to former USDA chief economist and Kennedy adviser Willard Cochrane.<sup>46</sup> When that bill passed, monoculture had already taken hold. A series of contemporaneous studies found that fencerow-to-fencerow agriculture had been dominant in the Midwest long before Butz entered office.<sup>47</sup> As Wendell Berry, who inspired Pollan’s food

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40. Eubanks, *supra* note 7, at 225.

41. Richard Ort, *New Methods, New Law Hike Corn Surplus*, CHI. TRIB., July 22, 1959, at 5; MILTON H. ERICKSEN & KEITH COLLINS, U.S. DEP’T OF AGRIC., ECON. RES. SERV., EFFECTIVENESS OF ACREAGE REDUCTION PROGRAMS 167 (1985).

42. JAMES E. SHEROW, THE GRASSLANDS OF THE UNITED STATES: AN ENVIRONMENTAL HISTORY 139 (2007)

43. Jon Lauck, *After Deregulation: Constructing Agricultural Policy in the Age of “Freedom to Farm,”* 5 DRAKE J. AGRIC. L. 3, 17 (2000).

44. President Lyndon Johnson, Statement by the President Upon Signing the Food and Agriculture Act of 1965 (Nov. 4, 1965); see also James N. Giglio, *New Frontier Agricultural Policy: The Commodity Side, 1961-1963*, 61 AGRIC. HISTORY 53, 69 (1987) (“By 1965 the Johnson administration. . .focused on expanding exports as *the* way to deal with problems of farm surplus and low income.”)

45. Giglio, *supra* note 44, at 70.

46. WILLARD COCHRANE & MARY E. RYAN, AMERICAN FARM POLICY, 1948-1973, at 84 (1976).

47. See Robert I. Papendick, Lloyd F. Elliott, & Robert B Dahlgren, *Environmental Consequences of Modern Production Agriculture: How Can Alternative Agriculture Address These Issues and Concerns?*, 1 AM. J. ALT. AGRIC. 3 (1986) (summarizing early research on modern farming practices and wildlife habitat); Melvin Taylor, Carl Wolfe, &

journalism,<sup>48</sup> writes, “Butz’s tenure in the Department of Agriculture, and even his influence, are matters far more transient than the power and values of those whose interests he represented.”<sup>49</sup>

### Myth: The Farm Crisis Began in the 1980s

Journalists treat the 1980s farm crisis as if it were the “deepest rural crisis since the Great Depression.”<sup>50</sup> Hollywood saw it that way: studios released two films about the crisis in 1984.<sup>51</sup> A group of musicians held the first Farm Aid concert the next year.<sup>52</sup> The public believed then, as journalists report now, that, prior to the 1980s, even farmers “on small parcels of land . . . could make a reasonably good living.”<sup>53</sup>

What makes this story so strange is that the decline was significantly slower in the 1980s than in previous decades.<sup>54</sup>

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William Baxter, *Land-Use Change and Ring-Necked Pheasants in Nebraska*, 6 WILDLIFE SOC’Y BULL. 226 (1978) (documenting the rapid spread of fencerow-to-fencerow monoculture in Nebraska after 1964); D. Russell Vance, *Changes in Land Use and Wildlife Populations in Southeastern Illinois*, 4 WILDLIFE SOC’Y BULL. 11 (1976) (finding that wildlife habitat had been virtually eliminated from southeastern Illinois farms by 1974). As the environmental and agricultural historian James Sherow put it, “the big fallout of the ‘get big or get out’ mindset occurred during the Eisenhower, Kennedy and Johnson Administrations.” SHEROW, *supra* note 42.

48. Joe Fassler, *The Wendell Berry Sentence that Inspired Michael Pollan’s Food Obsession*, THE ATLANTIC (Apr. 23, 2013), <https://www.theatlantic.com/entertainment/archive/2013/04/the-wendell-berry-sentence-that-inspired-michael-pollans-food-obsession/275209/>.

49. WENDELL BERRY, *THE UNSETTLING OF AMERICA* v (Counterpoint 1996) (1977)

50. Philpott, *supra* note 35.

51. These were *Country* and *The River*. *Places in the Heart* also came out that year, but was set in the Depression era. Associated Press, *Lange, Spacek, Fonda: 3 Hollywood Actresses Relate Farmers’ Plight*, L.A. TIMES, May 6, 1985, [http://articles.latimes.com/1985-05-06/news/mn-4387\\_1\\_jane-fonda](http://articles.latimes.com/1985-05-06/news/mn-4387_1_jane-fonda).

52. *Farm Aid: A Concert for America*, FARM AID, <https://www.farmaid.org/issues/industrial-agriculture/farm-aid-thirty-years-of-action-for-family-farmers/> (last visited May 12, 2017).

53. Siena Chrisman, *Want to Understand Trump’s Rise? Head to the Farm*, CIVIL EATS (Oct. 27, 2016), <http://civileats.com/2016/10/27/want-to-understand-trumps-rise-head-to-the-farm/>

54. There was a 13.9 percent decline in white farmers from 1982 to 1992 (and only 6.6 percent from 1982 to 1987), versus 16.2 percent from 1969 to 1978, 23.3 percent from 1959 to 1969, and 28.7 percent from 1950 to 1959. The same general trends were evident for black farmers, but their rates were much higher. See REYNOLDS, *supra* note 15. A 2004

There was a difference, however: a wealthier class of farmers was affected. A group of sociologists who interviewed a representative sample of Iowa farm operators during the crisis found that “persons most at risk of forced displacement from farming are found to be younger, better educated, and large-scale operators.”<sup>55</sup> Wealthier farmers had been much more likely to take out large loans to expand their operations in the 1970s. As a result, when the Federal Reserve suddenly curtailed inflation in 1979, these farmers were hit hard by astronomical interest rates.<sup>56</sup>

The farm crisis itself was real: families were forcibly and tragically displaced from their farms during the 1980s; the myth-making begins when writers portray it as a starting point. Numerous families lost their farms prior to the 1980s, often at higher rates, yet their displacement was not perceived as a catastrophe, since they came from marginalized populations. By treating the farm crisis as an aberration, these writers conceal this larger tragedy and the decades of policy-making that caused it.

### **Myth: Land Consolidation Was Inevitable**

Between 1930 and 1992, the number of white farmers fell by 65 percent and black farmers by 98 percent,<sup>57</sup> as farms became larger, almost all of them owned by white men.<sup>58</sup> Willard Cochrane ascribes these changes to a “technological

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USDA study concluded “that the 1982-86 farm financial crisis did not affect exit rates much.” JEROME M. STAM & BRUCE L. DIXON, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., AIB-788, FARMER BANKRUPTCIES AND FARM EXITS IN THE UNITED STATES, 1899-2002, at 25 (2004).

55. Gordon Bultena, Paul Lasley, & Jack Geller, *The Farm Crisis: Patterns and Impacts of Financial Distress among Iowa Farm Families*, 51 RURAL SOCIOLOGY, 436, 436 (1986).

56. See NEAL HARL, THE FARM DEBT CRISIS OF THE 1980S 13-17 (1990), for a summary of the economic factors contributing to the crisis. Black and female farmers also struggled during the decade—between 1982 and 1987, they were 15 percent and 13 percent more likely to exit than whites and men, respectively—but their misfortunes were less visible. ROBERT A. HOPPE & PENNI KORB, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., ERR-21, UNDERSTANDING U.S. FARM EXITS 17 (2006).

57. See REYNOLDS, *supra* note 15.

58. See U.S. DEP’T OF AGRIC., NAT’L AGRIC. STATISTICS SERV., 2012 CENSUS OF AGRICULTURE: FARM TYPOLOGY 9 tbl.1 (2015).

revolution”;<sup>59</sup> Jim Chen writes that “technology inexorably increases farm size”;<sup>60</sup> Laurie Ristino and Gabriela Steier attribute consolidation to “efficiencies of economies of scale,” the “adoption of tractors . . . and combines,” and “the Green Revolution.”<sup>61</sup> These writers share a—sometimes unstated—belief in autonomous technological “forces,” part of a discourse of technological determinism rooted in conservative ideology.<sup>62</sup>

Experts agree that neither economies of scale nor technology give large-scale farms an edge over smaller ones.<sup>63</sup> In 2013, USDA researchers surveyed the literature and concluded that “most economists are skeptical that scale economies usefully explain increased farm sizes.”<sup>64</sup> Similarly, technology itself does not inherently—or as the USDA researchers put it, “explicitly”—benefit owners of large-scale farms.<sup>65</sup> What technology does is allow farmers to substitute capital for labor, enabling those with sufficient capital to reduce labor costs.<sup>66</sup> As a result, labor-saving technology can lead to land consolidation when combined with policies that provide commercial farms with easy access to capital, while withholding it from smaller ones, as happened in the United States.<sup>67</sup>

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59. WILLARD COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE* 352 (2d ed.1993).

60. Jim Chen, *The American Ideology*, 48 *VAND. L. REV.* 809, 852 (1995).

61. Laurie Ristino and Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 *COLUM. J. ENVTL. L.* 59, 84 (2016).

62. See Shane Hamilton, *Agribusiness, The Family Farm, and the Politics of Technological Determinism in the Post-World War II United States*, 55 *TECH. & CULTURE* 560 (2014).

63. See, e.g., JAMES M. MCDONALD, PENNI KORB, & ROBERT A. HOPPE, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., ERR-152, *FARM SIZE AND THE ORGANIZATION OF U.S. CROP FARMING* 22 (2013); Yoav Kislev & Willis Peterson, *Prices, Technology, and Farm Size*, 90 *J. POL. ECON.* 578, 586 (1982) (explaining that economies of scale are “not generally supported by the empirical record”).

64. MCDONALD, KORB, & HOPPE, *supra* note 63.

65. *Id.* at 22-23. See also Interview by Mark Snead with James MacDonald, Chief, Structure, Tech., & Productivity Branch, U.S. Dep’t of Agric., in Kansas City, Mo. (June 9, 2010).

66. MCDONALD, KORB, & HOPPE, *supra* note 63, at 22-23.

67. As *Monthly Review* observed in 1956:

What is behind this great rush to concentration and centralization in American agriculture? It won’t do to repeat pat phrases about science and technology. Science does not apply itself, and technology does not introduce itself. These are functions of individuals, groups,

Since before the New Deal, agricultural planners had advocated for consolidating farmland and mechanizing agriculture.<sup>68</sup> An advisor under Eisenhower coined the term “agribusiness” to describe the vertically integrated, corporate structures policymakers hoped would come to dominate the production, distribution, and marketing of farm products.<sup>69</sup> While agribusiness proponents believed technology would force small farmers out of business on its own, they advanced policies that favored large-scale producers anyway. Then, as now, government policy that favored large-scale farmers forced modest growers out of business.

### Policy Makes Politics

While conservatives have consistently pushed more aggressive, pro-agribusiness policies, liberals have often responded with pro-agribusiness policies of their own, even when that meant undermining their own natural allies: small and mid-sized farmers, farmworkers, rural minority populations, and the small, independent businesses they support. The Democrats’ approach to agricultural policy has been so perplexing that academics have developed a rich literature, in the field of policy feedback, to understand it. Policy feedback is the study of the ways, as Theda Skocpol recently described it, “in which policy fights and outcomes at one point in time set up, or close off, future possibilities.”<sup>70</sup>

Researchers in policy studies have paid special attention to the Democrats’ relationship with the American Farm Bureau Federation, a conservative interest group that rose to power with

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and institutions; and in capitalist society they are functions that can be performed only by those who have the necessary capital at their disposal.

*Capitalism and Agriculture*, 8 MONTHLY REV. 1, 6 (1956).

68. See DANIEL, *supra* note 20, at 9-10.

69. HAMILTON, *supra* note 62, at 560-561.

70. Theda Skocpol, *A Guide to Rebuilding the Democratic Party, from the Ground Up*, VOX (Jan. 5., 2017),

<http://www.vox.com/the-big-idea/2017/1/5/14176156/rebuild-democratic-party-dnc-strategy>.

federal help.<sup>71</sup> The Farm Bureau “grew out of the movement for improved farming methods,” pushed by businessmen, scientists, and, “especially,” USDA.<sup>72</sup> The group “eagerly recruited commercial farmers” and was “not at all inclined to expand beyond that constituency.”<sup>73</sup> From the beginning it styled itself as a bulwark against government intervention and leftist populism: James Howard, the first president of the Farm Bureau, claimed that he stood “as a rock against radicalism.”<sup>74</sup>

As New Deal negotiations began, the Farm Bureau pursued the interests of white, Southern planters, and liberals made significant concessions to them, out of expediency. One of the most significant was “predominant influence” over the administration of the AAA, which the Farm Bureau used to favor large producers and consolidate its power. The group’s membership increased six-fold between 1933 and 1945, as it lobbied for large growers at the expense of smaller farmers.<sup>75</sup> As Mancur Olson concluded in his widely cited study of interest groups, “the Farm Bureau was created by the government.”<sup>76</sup>

From that point on, the Farm Bureau played an expanding role in farm policy, using its increasing power to not only push out small farmers but to oppose progressive legislation at every opportunity. The Farm Bureau, among other things, helped pass

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71. See, e.g., KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA’S NEW DEAL* (1995); THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979); GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971). The political scientist Paul Pierson notes in his classic work on policy feedback, *When Effect Becomes Cause*, “The Farm Bureau’s development has been widely linked to policy feedback, even by scholars not inclined to emphasize the independent role of government activity.” Paul Pierson, *When Effect Becomes Cause*, 45 *WORLD POL.* 595, 600 n.5 (1993).

72. Brody, *supra* note 5, at 146.

73. *Id.* at 160.

74. SAMUEL R. BERGER, *DOLLAR HARVEST* 93 (1971). David F. Houston, secretary of agriculture under Wilson, urged farmers to join local chapters, where they could fight to “stop bolshevism.” *Id.*

75. Robert L. Tantz, *Membership of General Farmers’ Organizations, United States, 1874-1960* 38 *AGRIC. HIST.* 143, 147 tbl.1 (1964).

76. OLSON, *supra* note 71, at 149.

the anti-union Taft-Hartley Act in 1947,<sup>77</sup> sought to repeal the federal income tax in the 1950s,<sup>78</sup> bitterly fought Medicare in the 1960s,<sup>79</sup> opposed the Equal Rights Amendment in the 1980s,<sup>80</sup> lobbied against health care reform in the 1990s,<sup>81</sup> and boasted of killing the Waxman-Markey climate bill during Obama's first term.<sup>82</sup> Today, the Farm Bureau continues to oppose a wide swathe of progressive legislation,<sup>83</sup> as do its state branches, which often hold conservative positions on social issues such as abortion, gay rights, and medical marijuana.<sup>84</sup> Nonetheless, Tom Vilsack, secretary of agriculture under Obama, is a member of the Farm Bureau and repeatedly spoke at its annual conference during his term.<sup>85</sup> His commitment went beyond words: Vilsack pushed the rapid growth of the federal

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77. SHEILA D. COLLINS & GERTRUDE SCHAFFNER GOLDBERG, *WHEN GOVERNMENT HELPED* 133 (2013).

78. Berger, *supra* note 74, at 150.

79. *Id.* at 173.

80. Letter from John C. Datt, Dir., American Farm Bureau Federation Washington Office, to Senator Orrin Hatch (May 20, 1983) (on file with authors).

81. Richard Orr, *18% of Rural America Has Little or No Health Insurance, USDA Says*, CHI. TRIB., FEB. 7, 1994.

82. CHRIS CLAYTON, *THE ELEPHANT IN THE CORNFIELD: THE POLITICS OF AGRICULTURE AND CLIMATE CHANGE* loc. 59 (2015) (ebook).

83. The Farm Bureau's 2016 list of policy resolutions ran longer than 200 pages and expressed, among other conservative positions, the organization's opposition to Medicare expansion, universal health care, government-funded high-speed rail, "efforts to remove references to Christmas," gay marriage, and "special privileges to those that participate in alternative lifestyles." AMER. FARM BUREAU FED'N, *FARM BUREAU POLICIES FOR 2016*, at 16, 33, 35-36, 40 (2016).

84. The Missouri Farm Bureau declared in 2017, *inter alia*, its opposition to the use of "religious legal code"—a euphemistic phrase for Sharia law—in American courts, more stringent gun control laws, and a federal minimum wage, while supporting "right-to-work" legislation, harsher penalties for drug infractions, and a constitutional amendment requiring a balanced federal budget. MO. FARM BUREAU, *2017 POLICY BOOK: FACING THE ISSUES* 76-79, 81, 87 (2017). *See also* Joseph Gerth, *Dozens Protest as Farm Bureau Defends Stance*, COURIER-J., Aug. 25, 2016 (describing protests against the Kentucky Farm Bureau for its "stance on issues including gay rights, union rights, and abortion rights"); *Arkansans Against Legalized Marijuana*, ARK. FARM BUREAU (Aug. 31, 2016), <http://www.arfb.com/news/2016/aug/31/podcast-arkansans-against-legalized-marijuana/> (advocating against a medical marijuana ballot initiative).

85. *E.g.*, Press Release, U.S. Dep't of Agric., Remarks of Agriculture Secretary Tom Vilsack to 94<sup>th</sup> Annual Meeting of the Farm Bureau Federation (Jan. 14, 2013) (on file with authors); Press Release, U.S. Dep't of Agric., USDA Secretary Tom Vilsack Addresses American Farm Bureau Convention (Jan. 13, 2014) (on file with authors); Press Release, Am. Farm Bureau Fed'n, *A Conversation with Tom and Bob: Farm Bureau Town Hall Meeting* (Jan. 11, 2015) (on file with authors).



crop insurance program,<sup>86</sup> which sends millions of dollars to the Farm Bureau each year,<sup>87</sup> while hurting smaller farms and the environment.<sup>88</sup>

Vilsack is one in a line of Democratic politicians that have supported conservative policies that undermine their own party. Democrats must develop and articulate an alternative—and progressive—rural policy. Rather than funneling cash to large-scale farmers and corporations, Democrats should support workers and small-scale businesses. Rather than displacing poor and marginalized rural people, the party must empower them. As history has shown, to do otherwise would not only be disastrous for the party, but for the nation as a whole.

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86. See, e.g., Press Release, U.S. Dep't of Agric., Remarks of Agriculture Secretary Tom Vilsack to 94<sup>th</sup> Annual Meeting of the Farm Bureau Federation (Jan. 14, 2013) (on file with authors) (statement of Secretary Vilsack) (“[The farm] bill must start with the commitment . . . [to] a strong and viable crop insurance program. . . .”); Press Release, Nat'l Crop Ins. Serv., USDA Secretary Kicks off International Crop Insurance Conference (Sept. 28, 2015) (on file with authors); O. Kay Henderson, *Departing Vilsack Offering Farm Bill Suggestions*, RADIO IOWA, Jan. 2, 2017 (“Vilsack is urging groups in the farm sector to be more vocal advocates of federal crop insurance subsidiesFalse”)

87. See, e.g., FOOD & WATER WATCH, *THE FARM BUREAU'S BILLIONS: THE VOICE OF FARMERS OR AGRIBUSINESS?* 2 (2010), [https://www.foodandwaterwatch.org/sites/default/files/farm\\_bureau\\_billions\\_fs\\_july\\_2010.pdf](https://www.foodandwaterwatch.org/sites/default/files/farm_bureau_billions_fs_july_2010.pdf); Ian T. Shearn, *Whose Side is the American Farm Bureau On?*, THE NATION (July 16, 2012), <https://www.thenation.com/article/whose-side-american-farm-bureau/>; LAND STEWARDSHIP PROJECT, *CROP INSURANCE—HOW A SAFETY NET BECAME A FARM POLICY DISASTER* (2014).

88. See, e.g., MICHAEL DUFFY, CTR. FOR RURAL AFF., *IMPACT OF CROP INSURANCE ON LAND VALUES* (2016); ANNA WEIR SCHECHINGER & CRAIG COX, *IS FEDERAL CROP INSURANCE LEADING TO ANOTHER DUST BOWL?* (2017); Anna Weir Schechinger, *How Crop Insurance Makes Landowners and Big Growers Grow Richer—And Hurts Other Farmers*, ENVTL. WORKING GROUP: AGMAG (Apr. 7, 2016), <http://www.ewg.org/agmag/2016/04/how-crop-insurance-makes-landowners-and-big-growers-rich-and-hurts-other-farmers>; LAND STEWARDSHIP PROJECT, *CROP INSURANCE ENSURES THE BIG GET BIGGER* (2014); DANIEL SUMNER & CARL ZULAUF, COUNCIL ON FOOD, AGRIC. & RES. ECON., *ECONOMIC & ENVIRONMENTAL EFFECTS OF AGRICULTURAL INSURANCE PROGRAMS* (2012).

## **Food and More: Expanding the Movement for the Trump Era**

*It's time to apply the energy of the food movement to preserving our democracy*

**Mark Bittman, Michael Pollan, Olivier De Schutter and Ricardo Salvador**

If the recent election had an upside, it's this: It demonstrated that the good food movement is real. Four jurisdictions—Boulder, Oakland, San Francisco, and Albany (California)—approved taxes on soda, which will benefit both public health and public finances. (Two days later, lawmakers in Cook County, Illinois, also approved a soda tax, becoming the largest jurisdiction to do so).<sup>1</sup>

In Oklahoma, an initiative to shield animal factory farms from regulation was defeated. Massachusetts voters passed a measure outlawing the sale of products from animals raised inhumanely. And four states voted to raise their minimum wage above the anemic \$7.25/hour federal standard.<sup>2</sup>

Meanwhile, the national reality has turned Orwellian: In a matter of days we will have an attorney general who is hostile to civil rights, an EPA chief who doesn't believe in climate change

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1. This article originally appeared in *Civil Eats* on January 16, 2107.

2. Hal Dardick, *Cook County Soda Pop Tax Approved with Preckwinkle Breaking Tie Vote*, CHI. TRIBUNE Nov. 11, 2016, <http://www.chicagotribune.com/news/local/politics/ct-cook-county-soda-pop-tax-vote-met-1111-20161110-story.html>; Bruce Y. Lee, *5 More Locations Pass Soda Taxes: What's Next for Big Soda?*, FORBES Nov. 14, 2016, <https://www.forbes.com/sites/brucelee/2016/11/14/5-more-locations-pass-soda-taxes-whats-next-for-big-soda/#371c70e5ed19>; *Massachusetts Minimum Size Requirements for Farm Animal Containment, Question 3 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Massachusetts\\_Minimum\\_Size\\_Requirements\\_for\\_Farm\\_Animal\\_Containment,\\_Question\\_3\\_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3_(2016)); *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Oklahoma\\_Right\\_to\\_Farm\\_Amendment,\\_State\\_Question\\_777\\_\(2016\)](https://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_(2016)); Jeanne Sahadi, *4 States Just Voted to Hike Their Minimum Wage*, CNNMONEY Nov. 9, 2016, <http://money.cnn.com/2016/11/09/pf/minimum-wage-state-elections/>.

or environmental protection, a Health and Human Services Secretary hostile to public support for health care, an anti-worker Labor Secretary, and an anti-democracy Congress which will rubber stamp an increasingly anti-individual rights Supreme Court. Not to mention a president who evinces little respect for democratic institutions and is already regarded the world over as, shall we say, *sui generis*.<sup>3</sup>

As of today, the president-elect has yet to nominate an agriculture secretary, but the food movement is rightly aghast at the agriculture transition team, which promised to “defend American agriculture against its critics, particularly those who have never grown or produced anything beyond a backyard tomato plant.” This nonsense is premised on the assumption that “American agriculture” is limited to the large industrial variety and that advocating that public investment serve the public interest is a bad thing. Yet the majority of farmers are clearly not being served by the current system, and the only sector of the food industry that’s actually growing today is the one that produces good food.<sup>4</sup>

How can the food movement best navigate this treacherous new environment? Two years ago, we outlined the need for a national food policy, a critical yardstick in determining whether legislation helps or harms farmers, eaters, the land, animals, and more. This remains an important long-term goal, but right now the most pressing work is to join forces with other progressive groups in a more immediate cause: protecting the disadvantaged and defending democracy. So it is the recent minimum wage victories, spurred by the Fight for \$15—an alliance of workers, labor unionists (specifically, the Service Employees International Union), immigrants’ and women’s rights advocates, and the Food Chain Workers Alliance—that should point the way forward.<sup>5</sup>

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3. See *Trump’s Cabinet Nominees*, CNN Mar. 2, 2017, <http://www.cnn.com/interactive/2016/11/politics/new-cabinet/>.

4. Beth Kowitz, *Special Report: The War on Big Food*, FORTUNE May 21, 2015, <http://fortune.com/2015/05/21/the-war-on-big-food/>; Ian Kullgren, *Trump Team’s Ag Talking Points*, POLITICO Nov. 14, 2016, <http://www.politico.com/tipsheets/morning-agriculture/2016/11/trump-teams-ag-talking-points-217390>.

5. Mark Bittman et al., Opinion, *How a National Food Policy Could Save Millions of*

Some say that food is a non-partisan issue. Yet, like all movements that aim to secure the rights and improve the lives of “ordinary” (that is, non-wealthy) people, it’s a fight for progressive values. Health care, education, a strong safety net, concern over climate change and the environment, income inequality and equal rights for everyone should be non-partisan issues, since making progress on each improves the lot of the community as a whole. That not everyone shares these aspirations is what makes the struggle for good food for all so high-stakes.

Activists fighting these battles seek to expand on the egalitarian vision animating our Republic, despite its flaws and its contradictions. (After all, this country was founded by white male landholders and slave-owners, almost exclusively for their own benefit, despite some flowery language suggesting otherwise.) But the most important result of the national election is the blow that will be dealt to progressive issues by the new president and his plutocrat allies, as they demonstrate that their main interest is to retain power at all costs. The scale and intensity of the extraction and exploitation economy is about to be redoubled.

As people who care not only about food but related progressive issues, our task should be to join together to actively resist efforts to roll back the public protections we have gained, and in favor of the social justice issues we will continue to fight for. This means that important but parochial food issues, such as the labeling of GMOs or the formulation of national nutritional standards, are bound to be overshadowed as the larger fight for social justice becomes more urgent.<sup>6</sup>

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*American Lives*, WASH. POST Nov. 7, 2014, [https://www.washingtonpost.com/opinions/how-a-national-food-policy-could-save-millions-of-american-lives/2014/11/07/89c55e16-637f-11e4-836c-83bc4f26eb67\\_story.html?utm\\_term=.527d8afa91f5](https://www.washingtonpost.com/opinions/how-a-national-food-policy-could-save-millions-of-american-lives/2014/11/07/89c55e16-637f-11e4-836c-83bc4f26eb67_story.html?utm_term=.527d8afa91f5); Ben Spielberg & Jared Bernstein, *Thankful for the Fight for \$15*, WASH. POST Nov. 24, 2016, [https://www.washingtonpost.com/posteverything/wp/2016/11/24/thankful-for-the-fight-for-15/?utm\\_term=.1775be2587ea](https://www.washingtonpost.com/posteverything/wp/2016/11/24/thankful-for-the-fight-for-15/?utm_term=.1775be2587ea).

6. Mark Bittman, Opinion, *G.M.O. Labeling Law Could Stir a Revolution*, N.Y. TIMES Sept. 2, 2016, [https://www.nytimes.com/2016/09/02/opinion/gmo-labeling-law-could-stir-a-revolution.html?\\_r=0](https://www.nytimes.com/2016/09/02/opinion/gmo-labeling-law-could-stir-a-revolution.html?_r=0); Elizabeth Grossman, *Shaping the 2015 Dietary Guidelines: A Timeline*, CIV. EATS Jan. 8, 2016, <http://civileats.com/2016/01/08/shaping->

Of course we want real food to be available to everyone. That means challenging misdirected government subsidies, monoculture farming, and all that stems from this. The Farm Bill will be up for renewal during the next administration. We must fight to guarantee that it serves the interests of *all* farmers—not just big ones—as well as workers and eaters, especially the working poor and children who receive vital nutrition assistance from programs like the supplemental nutrition assistance program (SNAP), the Women, Infant, and Children program (WIC), and school lunch. (The latter two programs fall under the Child Nutrition Act, which is up for re-authorization and has been targeted for deep cuts by the Republican leadership.)<sup>7</sup>

But fighting for real food is part of the larger fight against inequality and racism, since poor diets disproportionately affect economically marginalized and politically disenfranchised populations. Similarly, we want agriculture to be regenerative, but this requires joining in the climate struggle, which in turns means fighting the corn ethanol mandate, the official policy of using of some of our richest farmland to produce raw materials for fuel and for foodlike substances that undermine public health, especially among the poor.<sup>8</sup>

Conversely, the climate movement should recognize that Big Food is a prime generator of heat-trapping gases, and that the movement toward growing and eating more plant-based and sustainably farmed foods could significantly reduce the

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the-2015-dietary-guidelines-a-timeline/.

7. Bettina Elias Siegel, *There Will Be No School Food Bill by the End of the Year*, CIV. EATS Dec. 7, 2016, <http://civileats.com/2016/12/07/there-will-be-no-school-food-bill-by-the-end-of-the-year/>.

8. Coral Davenport, *Ethanol Mandate, a Boon to Iowa Alone, Faces Rising Resistance*, N.Y. TIMES Jan 31, 2016, [https://www.nytimes.com/2016/02/01/us/politics/ethanol-mandate-a-boon-to-iowa-alone-faces-rising-resistance.html?\\_r=0](https://www.nytimes.com/2016/02/01/us/politics/ethanol-mandate-a-boon-to-iowa-alone-faces-rising-resistance.html?_r=0); Olivier De Schutter & Emile Frison, *Modern Agriculture Cultivates Climate Change – We Must Nurture Biodiversity*, THE GUARDIAN Jan. 9, 2017, [https://www.theguardian.com/global-development/2017/jan/09/modern-agriculture-cultivates-climate-change-nurture-biodiversity-olivier-de-schutter-emile-frison?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/global-development/2017/jan/09/modern-agriculture-cultivates-climate-change-nurture-biodiversity-olivier-de-schutter-emile-frison?CMP=Share_iOSApp_Other); *Why Low-Income and Food Insecure People are Vulnerable to Poor Nutrition and Obesity*, FOOD RES. & ACTION CTR, <http://www.frac.org/obesity-health/low-income-food-insecure-people-vulnerable-poor-nutrition-obesity> (last visited Apr. 20, 2017).

production of those gases, while regenerative agriculture, by transforming soil into carbon sinks, has the potential to remove them from the atmosphere.<sup>9</sup>

Natural allies are everywhere. The most important work we can do now is to resist the authoritarian assault on democracy, prevent global catastrophe, and nurture civil society (including the burgeoning alternative food economy), even as we redouble our efforts to make the federal government accountable to everyone, not just the rich and influential.

Food aside, this means fighting for renewable energy, security for women's health clinics, eliminating violence against African Americans, higher wages and other policies that protect the poor, and treating immigrants as our equals. (To come full circle, the labor provided by immigrants is indispensable in bringing food to our table; without their labor, we'd all starve, and quickly.) The food movement should be involved in all of these struggles, especially as this administration begins to deliver on its promises to attack the very same issues and principles.

You can't fix agriculture without addressing immigration and labor or without rethinking energy policies; you can't improve diets without reducing income inequality, which in turn requires unqualified equal rights for women and minorities; you can't encourage people to cook more at home without questioning gender roles or the double or triple shifts that poor parents often must accept to make ends meet; you can't fully change the role of women without tackling the future of work, childcare, and education; you can't address climate change without challenging the power of corporations and their control over the state—and, not so incidentally, without challenging Big Food. The fight for healthy diets is part and parcel of these other struggles, and it will be won or lost alongside them.

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9. Sonja J. Vermeulen et al., *Climate Change and Food Systems*, 37 ANN. REV. OF ENV'T & RESOURCES 195 (2012); Elizabeth Grossman, *Eating Less Meat Could Save up to \$31 Trillion (and Many Lives)*, CIV. EATS Mar. 21, 2016, <http://civileats.com/2016/03/21/eating-less-meat-could-save-up-to-31-trillion/>.

It's all connected; the common threads are justice, fairness, and respect. "Sustainable" is a word that we must now apply to democracy itself: a nation built on perpetuating injustice and the exploitation of people and nature doesn't qualify. And a "sustainable food system" cannot exist inside an unsustainable political and economic system.

We stand with the majority of Americans who are on the side of justice, fairness, and the scientific pursuit of truth, and who believe it's up to us to build the country we want to live in. The catastrophe of the presidential election results cannot be negated by isolated blips of progress, but these do exist. More than two million low-wage workers stand to benefit from the poverty-fighting ballot initiatives passed in Arizona, Colorado, Maine, and Washington. The food chain pays the lowest hourly median wage to frontline workers — many of whom are women and people of color — compared to workers in all other industries.<sup>10</sup>

The fact that there aren't more examples demonstrates, perhaps, that food, labor, climate advocates, the pro-diversity and anti-inequality forces and so on, are weaker for our lack of unity—not a new problem for progressives. On local, state, and even occasionally federal levels, good things happen all the time; they would happen much more frequently if the ranks of demonstrators for reproductive rights, for example, were swelled by Food Chain Alliance activists, and if members of the Young Farmers Coalition turned out to support Black Lives Matter. And vice versa. That's why it's important that all these groups link arms and march together this week, whether in Washington or locally.

We need victories anywhere we can get 'em, and it's important to recognize that even small ones can have a long reach. Consider this one popular food movement proposal: Doubling the value of food stamps at farmers' markets, as many municipalities have done. It helps local economies, farmers, and

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10. Lisa Baertlein & Nandita Bose, *Minimum Wage Hikes in Four States Show Path for Labor Under Trump*, REUTERS Nov. 9, 2016, <http://www.reuters.com/article/us-usa-election-wages-idUSKBN1343Q1>.

poor people, many of whom are minorities and/or women and/or underpaid workers. We can count a half-dozen alliances that have already begun to form around that one “food issue.”<sup>11</sup>

Similarly, achieving security for immigrants raises wages for everyone; increases purchasing power and economic activity; insures a safer food supply; builds real community; reduces wasteful law enforcement efforts; advances the struggle for better education and health care; and even builds support for public transportation, an issue important to climate advocates. Examples like these are many.

In recent years the food movement has drawn a bright line between the interests of a rapidly declining sector of agribusiness and the broader interests of the nation, including the majority of its farmers, workers, and eaters. Similarly, climate advocates are showing the way to fight the entrenched interests of a fossil fuel industry in decline. And all of us, emphatically in common cause with all those who have been historically excluded and often persecuted—women, people of color, immigrants, the poor, the LGBTQ community—share an interest in resisting the plutocracy’s ever-increasing power.

It is not so much confrontational as pragmatic to say that it really is us against that plutocracy and its apologists. Mature social movements (including those on the right) recognize that it’s always a struggle to get what you want. As progressives, it is not enough to say that the current arrangements are doomed and that a better world is possible. We must work for it. To paraphrase an old proverb, the best time to unite was before the election; the second best time is now.

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11. Tim Carman, *Farm Bill Contains Farmers Market Program that Food Advocates for Poor See as Hopeful*, WASH. POST Jan. 30, 2014, [https://www.washingtonpost.com/lifestyle/food/farm-bill-contains-farmers-market-program-that-food-advocates-for-poor-see-as-hopeful/2014/01/30/b86c9b74-89e3-11e3-833c-33098f9e5267\\_story.html?utm\\_term=.8bbcaf06fb7f](https://www.washingtonpost.com/lifestyle/food/farm-bill-contains-farmers-market-program-that-food-advocates-for-poor-see-as-hopeful/2014/01/30/b86c9b74-89e3-11e3-833c-33098f9e5267_story.html?utm_term=.8bbcaf06fb7f).



## **After the White House Garden: Food Justice in the Age of Trump**

**Garrett M. Broad\***

### **Introduction: The White House Garden and the Good Food Movement**

In October of 2016, one month before Donald Trump won a surprise victory in the United States Electoral College, First Lady Michelle Obama announced a number of measures to protect and maintain her famed White House vegetable garden. Initially constructed back in 2009, the garden had been expanded to include a larger seating area and a prominent new archway, as a combination of wood, stone, steel, and cement materials were used to reinforce the construction. Together with \$2.5 million in newly secured private funding, as well as an upkeep agreement with the National Park Service, the developments strongly suggested (although did not guarantee) that the garden would remain a permanent fixture of the White House grounds. “I take great pride in knowing that this little garden will live on as a symbol of the hopes and dreams we all hold of growing a healthier nation for our children,” Mrs. Obama was quoted as saying.<sup>1</sup>

In many ways, the White House garden encapsulated central debates that occupied the “good food movement” throughout the course of the Obama administration. In its early

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1. Helena Bottemiller Evich, *Michelle Obama sets her garden in stone*, POLITICO (Oct. 5, 2016), <http://www.politico.com/story/2016/10/michelle-obama-garden-changes-white-house-229204>.

days, the garden's establishment proved an exciting rally cry for alternative food advocates, many of whom expected it would kickstart a broader conversation about the health and sustainability of our food system. Writing an open letter to the next "Farmer in Chief" prior to the 2008 election, prominent food journalist Michael Pollan specifically called for the creation of a White House garden, which he hoped would inspire the planting of school and home Victory Gardens and offer "a way to enlist Americans, in body as well as mind, in the work of feeding themselves and changing the food system."<sup>2</sup>

At the same time, the garden also became a flashpoint for conservative backlash against the so-called "nanny state" tendencies of the Obama years. This was particularly the case after Michelle Obama launched the "Let's Move!" initiative to combat childhood obesity, along with her related forays into improving school nutrition standards. As the Texas Congressman Ted Poe argued when he introduced a bill that pushed back against USDA school food regulations: "The federal food police need to stay out of our schools."<sup>3</sup>

And from yet another perspective, for many urban food movement activists who described their work in the language of food *justice*, the White House garden proved a source of deep ambivalence. Its symbolic power seemed to offer a vote of confidence for the types of non-profit, community-based programs they had been operating for years – using agriculture and cooking to promote community health and build grassroots power in historically marginalized low-income neighborhoods and communities of color. As time progressed, however, a skeptical cynicism set in for many food justice advocates, as the grassroots authenticity and overall efficacy of the Obama-led initiatives were called into question. Did these programs really

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2. Michael Pollan, *Farmer in Chief*, N.Y. TIMES (Oct. 9, 2008), <http://www.nytimes.com/2008/10/12/magazine/12policy-t.html>.

3. See e.g. Christopher Beam, *Organic Panic*, SLATE (June 4, 2009), [www.slate.com/articles/news\\_and\\_politics/politics/2009/06/organic\\_panic.html](http://www.slate.com/articles/news_and_politics/politics/2009/06/organic_panic.html); Peter Sullivan, *Bill to keep 'federal food police' out of schools introduced*, THE HILL (Feb. 13, 2015), <http://thehill.com/policy/healthcare/232744-gop-lawmaker-keep-food-police-off-school-bake-sales>.

promote systemic change, or did they actually encourage a style of individualized thinking that blamed victims of food injustice for their own predicament?<sup>4</sup> Did the Obama administration really offer a challenge to the corporate food industry, or did it instead offer an example of neoliberal corporate co-optation at its worst?<sup>5</sup> Did garden-based learning programs across the country truly tackle the structural economic and environmental barriers at the root of nutritional inequity, or did they distract from the real work of building effective social movements and enacting progressive policy change?

To return to the steel and cement reinforcements at the White House garden – what exactly was cemented in place, to be (hopefully) protected from the potentially undermining influence of the new fast-food aficionado in chief?

### **Community Based Food Justice**

In terms of acute threats to public health, it is clear that the Trump administration could do significant damage by violating basic civil liberties, as well as by creating large holes in the existing (if inadequate) social safety net. Specifically, these issues may arise through initiatives that include cutting food assistance and nutrition programs, reducing affordable health care access, and punishing immigrant families, in addition to efforts that reshape regulations in a way that hinders food safety, weakens labor rights, and diminishes the ecological sustainability and resilience of the food system.<sup>6</sup> Forceful and timely responses to these threats must be undertaken in the years ahead, and there are a host of anti-poverty, immigrant rights, environmental, labor and other advocacy groups that must be

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4. SEE JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM* 2-5 (2011).

5. Justin Sean Myers and Joshua Sbicca, *Bridging Good Food and Good Jobs: From Secession to Confrontation Within Alternative Food Movement Politics*, 61 *GEOFORUM* 17-26 (2015); Michael Pollan, *Big Food Strikes Back*, *THE N.Y. TIMES* (Oct. 5, 2016), [http://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html?\\_r=0](http://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html?_r=0).

6. See Nevin Cohen et al., *Food Justice in the Trump Age: Priorities for NYC Advocates*, CUNY URBAN FOOD POL'Y INST. (Dec. 10, 2016), [www.cunyurbanfoodpolicy.org/news/2016/12/12/food-justice-in-the-trump-age-priorities-for-nyc-advocates](http://www.cunyurbanfoodpolicy.org/news/2016/12/12/food-justice-in-the-trump-age-priorities-for-nyc-advocates).

supported in their efforts.

If the “good food movement” is to play a productive role in this resistance, it is my contention that the insights and organizing perspectives of the community-based food justice movement should be a driving force. Over the course of at least the last decade, this loosely networked constellation of activists, organizations and programs has championed many of the same general strategies that are popular in the broader food movement – from building gardens, to providing nutrition education, to improving access to healthy foods in under-resourced urban neighborhoods. What sets the community-based food justice approach apart, however, is its more incisive focus on racial and economic inequality; its commitment to building programmatic leadership from within low-income communities of color; its development of partnerships with allied social justice movements across the urban-rural divide; and its broader theory of change that highlights food’s potential as a strategic entry point for building grassroots power, catalyzing community development, and effecting social change.<sup>7</sup>

The good news for those activists who use food as a platform for community organizing is that there will remain opportunities to persist. This partly emerges from the fact that federal support for community food programs has never been particularly strong. The USDA’s Community Food Projects Competitive Grant Program, for instance, has been providing grants to non-profits for entrepreneurial community food and planning initiatives since 1996, and has given out an average of \$5 million annually since 2012.<sup>8</sup> Similarly, the Healthy Food Financing Initiative was created by the Obama administration to improve healthy food access in under-resourced neighborhoods and is now run jointly by the USDA, Treasury, and Health and Human Services. In 2016, the initiative awarded approximately

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7. *SEE GARRETT BROAD, MORE THAN JUST FOOD: FOOD JUSTICE AND COMMUNITY CHANGE* (2016); *See Madsen, Cultivating Food Justice: Race, class, and Sustainability* MIT (2011), <https://mitpress.mit.edu/books/cultivating-food-justice>.

8. Community Food Projects Competitive Grant Program, USDA (2016), <https://nifa.usda.gov/program/community-food-projects-competitive-grant-program-cfpcgp>.

\$7.4 million in new grants to 11 different projects.<sup>9</sup> In recent years, a number of small federal grants have also come through the Environmental Protection Agency, generally awarded to community food projects that demonstrate a connection to climate change mitigation and education.<sup>10</sup>

Early returns from the Trump administration suggest that these types of programs could be on the chopping block and it is unlikely that any new programs in this vein will be developed. Though major cuts would present a significant setback to local organizers, there remains a possibility that some community food projects could be spared from a Trump administration purge. This shred of optimism emerges from the fact that community food projects tend to reflect a long-standing bipartisan consensus in the United States that valorizes the possibility of community-based action to overcome inequality of outcome. Indeed, many conservatives who decry federal intervention on school nutrition standards actually like the idea of entrepreneurial efforts that improve local nutrition environments. For food justice advocates, the opportunity to work at the local level is aligned with their preferred style of participatory organizing and community problem-solving. This is not to say that conservatives agree with the community organizer's worldview, the latter of which highlights how the legacy and ongoing reality of racialized economic discrimination makes certain communities subject to generations of food and environmental injustice. But a good number of those community organizers – as well as their local constituents – have some paradoxical commonalities with limited government conservatives, having long ago given up on the dream that the federal government would one day intervene to fully remedy their predicament. In the past, social justice activists have found creative ways to navigate these contradictory community

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9. Office of Community Services, *Healthy Food Financing Initiative*, HHS (2017), <https://www.acf.hhs.gov/ocs/programs/community-economic-development/healthy-food-financing>.

10. See *Environmental Justice Grants, Funding and Technical Assistance*, EPA (2017), <https://www.epa.gov/environmentaljustice/environmental-justice-grants-funding-and-technical-assistance>

dynamics and they are likely to continue to do so in the future.<sup>11</sup>

The local community remains limited, of course, as a site for political and economic change. For this reason, community-based food activism has often been critiqued from the left, especially by those who argue that too much time and money has been spent developing cooking and gardening projects that are relatively superficial and frequently administered by affluent whites from outside of the community. Yet, the community's enduring ability to serve as a space for experimentation, relationship-building, and consciousness-raising suggests that it should not be dismissed outright, but rather cultivated to perform at the best of its potential. The question for the community-based food justice movement, in the age of Trump and beyond, is how can it best make progress toward its social transformation goals?

### **Recommendations for Strategic Action**

Grassroots people-power remains a hallmark of the community-based food justice approach, but the ability to pay living wages to educators and organizers, to provide incentives for youth participants, and to build community institutions that contribute to local economic development are all central to sustaining that grassroots power for the long-term. Especially in the face of a hostile federal government, those committed to food justice must work hard to develop and expand projects and programs that are fiscally sound in their approach, as well as demonstrably effective with respect to achieving their educational, organizing, and advocacy goals.

Community-based food justice activists compete for a limited pool of fiscal resources, a pool that is not always allocated on the basis of organizational merit or community need. The resources available to support non-profits in this domain generally come from three main areas – 1) public funding, including modest federal support, state and municipal grants, and through partnerships with public universities; 2)

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11. See Broad, *supra* note 7.

private funding, including from foundations, corporations, private universities, and individual donors; and 3) through self-generated revenue, commonly derived via the establishment of food-focused social enterprises under a non-profit structure. Often following the example of Michelle Obama and the impassioned calls of garden advocates like Michael Pollan and Alice Waters, recent years have seen a significant amount of money spent to create food and garden-based programs in schools and community spaces across the nation. After a season or two of harvest, however, many of them go fallow, perhaps due to a lack of long-term administrative and financial support, or due to a lack of integration into the culture of the community in which they were established.<sup>12</sup>

The takeaway is that community-based food justice organizers and their supporters in law and policy must proactively articulate and demonstrate what makes for successful programs, and then communicate that message to funders, donors, and policymakers at multiple levels of society and government. This means embracing a culture of process and goal-oriented evaluation – bolstered by participatory partnerships with allied professionals and researchers – and from there, having a willingness to shift aspects of strategy when research suggests they could be more effective. There are many opportunities, for instance, for community food practitioners to embrace new technological innovations that could improve their agricultural productivity, including those that are integrated into urban design and architecture.<sup>13</sup> There are also significant opportunities to encourage social innovations that improve economic viability, particularly efforts that lead to community acquisition of land and property in the face of encroaching real estate development and gentrification.<sup>14</sup> Equitable partnerships

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12. See Kate Gardner Burt et al., *The GREEN Tool For Well-Integrated School Gardens*, LAURIE M. TISCH CENTER FOR FOOD, EDUCATION & POL'Y AT THE PROGRAM IN NUTRITION (2016), <https://www.tc.columbia.edu/media/media-library-2014/centers/tisch-center/GREEN-Tool-Research-Brief.pdf>.

13. Kathrin Specht, et al. *Urban Agriculture of the Future: An Overview of Sustainability Aspects of Food Production in and on Buildings*, AGRICULTURE AND HUMAN VALUES 33, 34 (2014), <http://link.springer.com/article/10.1007/s10460-013-9448-4>.

14. See Nathan McClintock, *Radical, Reformist, and Garden-Variety Neoliberal:*

between community activists and outside collaborators can build community capacity and prevent stagnation across these domains.

On a related note, organizers and their supporters must also have the courage to point out why some food-based programs are more deserving of support than others. Today, many of the best-funded community food projects are not situated in communities that suffer from food injustice at all, as lower-income communities for whom food is more likely to serve a vital nutritional and organizing need struggle to gain recognition. This is part of a problem that extends well beyond food injustice, as a recent report from the National Committee for Responsive Philanthropy points out: “Philanthropic funding for the people who need it most has lagged behind booming assets, and foundations have continued to avoid strategies that have the greatest potential to change the status quo.”<sup>15</sup> Across the social justice landscape, more funding is needed that directly benefits underserved communities, addresses root causes, and provides more dollars as general support and multi-year funding.<sup>16</sup> My own research into this topic points to several key principles that make for effective food justice programs: strong food justice initiatives fundamentally reflect and are shaped by the needs and interests of community members, have clear plans for fiscal and organizational sustainability, and are guided by a vision of social change that connects food injustice to a broader analysis of inequality in America.

On this final point, the years ahead necessitate significant coalition-building and collaborative action between food justice advocates and other movement actors fighting for progressive change. Here again, it is vital to reiterate the power of food as an

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*Coming to Terms with Urban Agriculture's Contradictions*, LOCAL ENVIRONMENT 147-71 (2014),

[http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1090&context=usp\\_fac](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1090&context=usp_fac) : see also KRISTIN REYNOLDS AND NEVIN COHEN, BEYOND THE KALE: URBAN AGRICULTURE AND SOCIAL JUSTICE ACTIVISM IN NEW YORK CITY, GEOGRAPHIES OF JUSTICE AND SOCIAL TRANSFORMATION 8-9, 29-32 (2016).

15. Ryan Schlegal, *Pennies for Progress: A Decade of Boom for Philanthropy, a Bust for Social Justice*, NAT'L COMM. FOR RESPONSIVE PHILANTHROPY 3 (2016).

16. *Id.*



organizing tool – its centrality to our health and ecology, as well as its universal connection to culture and community, gives food activists a unique ability to incorporate their concerns into the work of others. To be specific, community food advocates can help affordable housing advocates integrate gardens into design efforts, rally food service workers around a living wage, and coordinate with those seeking protection for the immigrants who play such vital roles in the food system. Indeed, one could argue that the best healthy food policies are actually progressive housing, labor, and immigration policies, which can open up the time and financial resources for families and communities to pursue healthier relationships with food. Further, state and municipal programs and policies in these areas can serve as a testing ground that could be scaled up if future federal administrations are more responsive to social justice concerns.<sup>17</sup> In the years ahead, only an integrated approach – one that combines grassroots advocacy, policy development, and broader movement building – will be able to turn these aspirations into reality.

## Conclusion

Following President Trump's victory, a collectively authored editorial by good food advocates Michael Pollan, Mark Bittman, Olivier De Schutter, and Ricardo Salvador argued that it was time to expand the consciousness of the food movement. The most important work food activists could do, they argued, was to get involved in urgent social justice struggles: "(F)ighting for real food is part of the larger fight against inequality and racism," they wrote, adding, "[n]atural allies are everywhere."<sup>18</sup> While it was heartening to hear this much-needed appeal to social justice solidarity, nothing in that call to action was particularly new. For years and even decades, community-based food justice activists have been engaged in exactly these types of

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17. Emily M. Broad Leib, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 322-23 (2013).

18. Mark Bittman et al., *Food And More: Expanding The Movement For The Trump Era*, CIVIL EATS (Jan. 16, 2017), <http://civileats.com/2017/01/16/food-and-more-expanding-the-movement-for-the-trump-era/>.

social justice coalitions, and have been calling for the broader food movement to see food as a tool for social transformation – not as a magic cure-all for health disparities or environmental injustice. Through it all, these activists have understood that the power of the food justice movement was never centered in the White House garden, supportive as that symbolic action might be. Moving forward, it should be those food justice activists who are at the forefront of the food movement’s response to President Trump – building authentic social justice partnerships, developing sustainable and effective models for community-based programming, and articulating a future vision for a more just food system.

## **Food Justice in the Trump Age: Priorities for Urban Food Advocates**

**By Nevin Cohen,\* Janet Poppendieck\*\* & Nicholas Freudenberg\*\*\***

Every constituency – regardless of political ideology – must analyze the effects of the election of Republican majorities in Congress and Donald J. Trump as President of the United States. This is particularly true for advocates involved in eliminating food insecurity and hunger, fighting malnutrition and health inequality, and ensuring sustainable and fair urban food systems with high quality jobs. Anticipating the new administration’s efforts that may undermine food justice enables advocates, researchers, and policy makers to choose priorities and forge strategic partnerships. Three broad areas require particular attention.

### **Maintaining Federal Food Assistance**

Federal food assistance programs, from school food policies to SNAP, are crucial lifelines for many and contribute

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significantly to urban economies. As Table 1 shows, SNAP alone adds billions of dollars of economic activity in major US cities.

Table 1. Annual Economic Impacts of SNAP Benefits in Select US Cities

County (City)	Average Monthly SNAP Benefit/ Person, 2015*	Number of SNAP Recipients 2014**	Annual SNAP Benefits	Economic Impact with 1.79 multiplier***
Cook (Chicago)	\$134.78	1,032,885	\$1,670,546,884	\$2,990,278,922
Harris (Houston)	\$117.80	612,045	\$865,186,812	\$1,548,684,393
Miami-Dade (Miami)	\$129.66	694,758	\$1,080,987,867	\$1,934,968,283
Maricopa (Phoenix)	\$121.71	609,476	\$890,151,888	\$1,593,371,879
New York City	\$138.38	1,749,111	\$2,904,503,762	\$5,199,061,734

\* <http://kff.org/other/state-indicator/avg-monthly-food-stamp-benefits>

\*\* United States Census. 2017. Small Area Income and Poverty Estimates. County SNAP Benefits Recipients. Accessed at <https://www.census.gov/did/www/saipe/data/model/tables.htm>

\*\*\* Hanson, Kenneth. The Food Assistance National Input-Output Multiplier (FANIOM) Model and Stimulus Effects of SNAP. ERR-103. U.S. Dept. of Agriculture, Econ. Res. Serv. October 2010.

In New York City, for example, approximately 1.7 million people receive SNAP; 1.1 million children consume 850,000 federally subsidized school meals daily<sup>1</sup>; approximately 300,000

participate in WIC,<sup>2</sup> which provides nutritious foods for pregnant and lactating women, infants, and children; senior centers serve 7.5 million meals annually; and another 4.5 million meals are delivered to homebound seniors and people with disabilities.<sup>3</sup> Despite the importance of these public food benefits, the following Republican policy proposals put them at risk.

### *Block Granting Food Entitlement Programs*

Block granting, in which states receive fixed allocations of federal funds and wide latitude to spend them, would end the entitlement status of SNAP and school meals.<sup>4</sup> Entitlements create individual rights to benefits, which are currently funded so that all who qualify can participate without waiting lists or enrollment caps. In addition, the programs expand along with needs, a policy Republicans have tried to reverse since the Reagan administration.<sup>5</sup> Block grants would allow states to restrict eligibility and require Congressional approval of specific funding levels, putting the programs in cost-cutting crosshairs. While Senate Agriculture Committee Chair Pat Roberts has expressed opposition to block granting SNAP,<sup>6</sup> House Speaker Paul Ryan favors block grants and has already called for cutting

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(2016), <http://www1.nyc.gov/site/foodpolicy/about/food-metrics-report.page>

2. Rosa Goldensohn, *Bodegas say benefits cutback would put them out of business*, CRAIN'S (Nov. 15, 2015), <http://www.crainsnewyork.com/article/20151115/SMALLBIZ/151119904/bodegas-say-benefits-cutback-would-burn-them-to-the-women-infants-children-program>.

3. Kevin Concannon, *New Snap Pilot Provides Grocery Delivery for Homebound Disabled, Elderly*. USDA BLOG (Sept. 20, 2016, 10:00 AM), <http://blogs.usda.gov/2016/09/30/new-snap-pilot-provides-grocery-delivery-for-homebound-disabled-elderly/>.

4. Dottie Rosenbaum & Brynne Keith-Jennings, *House 2017 Budget Plan Would Slash SNAP by More Than \$150 Billion Over Ten Years*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 21, 2016), <http://www.cbpp.org/research/food-assistance/house-2017-2017-budget-plan-would-slash-snap-by-more-than-150-billion-over-ten>.

5. Sheflai Luthra, *The skinny on block grants-the heart of the GOP's Medicaid Plan*, CNN: MONEY (Feb. 2, 2017), <http://money.cnn.com/2017/02/02/news/economy/mediciad-block-grants-gop/> (discussing longtime Republican aversion to entitlement programs such as Medicaid).

6. Kate Sims, *Highlights from the 2017 National Anti-Hunger Policy Conference* (April 14, 2017), <http://frac.org/blog/highlights-2017-national-anti-hunger-policy-conference>

SNAP by \$23 billion over two years.<sup>7</sup> In the 1990s, block granting welfare led to severe cutbacks in cash public assistance,<sup>8</sup> and SNAP and school food would likely suffer a similar fate. Countering these efforts must be a priority.

### *Decoupling SNAP from the Farm Bill*

A second threat is the Republican Party's<sup>9</sup> desire to separate SNAP from the Farm Bill and remove its administration from the Department of Agriculture. Since the 1960s, food assistance has been included in the farm bill as part of a package that ensured rural support for nutrition programs in exchange for urban lawmakers' support for commodity price supports. The result of this alliance benefitted both constituencies.<sup>10</sup> Breaking the rural-urban link reduces political support and makes it an easier fiscal target. This should be opposed by food advocates.

### *Reversing School Food Progress*

Trump's election contributed to the Republicans' failure to agree on the Child Nutrition Reauthorization (CNR) Act, which in their view increased the chances of reversing the school food nutrition gains from the Obama administration. The failed legislation included pilot testing a school food block grant. Without a veto threat from President Trump, Congress may try to block grant the entire program. Congress may also scale back the Community Eligibility Provision (CEP), which permits schools with at least 40% of students directly certified for free

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7. Stephanie Akin, *GOP Wants to Cut \$23 Billion from Food Stamps*, ROLL CALL (May 13, 2016, 11:09 AM), <http://www.rollcall.com/news/policy/gop-budget-plan-cut-23-billion-food-stamps>.

8. Kenneth Finegold, Laura Wherry & Stephanie Schardin, *Block Grants: Historical Overview and Lessons Learned 2* (The Urban Institute, Series A, No. A-63, Apr. 21, 2004), [http://webarchive.urban.org/UploadedPDF/310991\\_A-63.pdf](http://webarchive.urban.org/UploadedPDF/310991_A-63.pdf).

9. John Barrasso, *Republican Platform 2016*, Committee on Arrangements for the 2016 Republican Nat'l Convention (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) (last visited Feb. 16, 2017).

10. Weldon V. Barton, *Food, Agriculture, and Administrative Adaptation to Political Change*, 36(2) PUBLIC ADM. REV. 148, 148-54 (2017).

school meals to feed all of the students for free. The CEP ultimately reduces stigma for low-income students, increases participation in the lunch program, and cuts paperwork for schools.<sup>11</sup> The House proposed raising the CEP threshold from 40% to 60%, which would remove this progressive option from thousands of schools in large, urban school districts, including many that have already implemented it.<sup>12</sup> In addition, on May 1, 2017, the Secretary of Agriculture issued a proclamation reversing several of the recently implemented improved nutrition standards established under the Healthy Hunger Free Kids Act. Specifically, he gave states the option to allow their schools to serve items with fewer whole grains than currently permitted, stopped the clock on sodium reduction targets, and added sweetened, flavored 1% fat milk to the list of acceptable milk choices.<sup>13</sup> Many cities, such as New York, have adopted more stringent school lunch standards,<sup>14</sup> and while school districts are unlikely to return to deep fat fryers, weakening the federal standards will undermine efforts by school districts to use their purchasing power to get manufacturers to create healthier food options for schools and other government food programs. Advocates will need to increase their efforts to pressure the new administration to maintain the integrity of the CNR.

### *Inhibiting Immigrant Access*

President Trump's proposals and rhetoric during the campaign have increased uncertainty about the future of undocumented immigrants residing in the United States. Studies of local immigration policies have shown that aggressive

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11. FNS Directive AG-3198-D-11-0074, Community Eligibility Provision Evaluation, (U.S.D.A. 2014).

12. Improving Child Nutrition and Education Act of 2016, H.R. 5003 114<sup>th</sup> Cong. § 105(a)(2) (2016).

13. USDA, Office of the Secretary. *USDA Commitment to School Meals*. A Proclamation By the Secretary of Agriculture of the United States of America. May 1, 2017. <https://www.usda.gov/sites/default/files/documents/secretary-perdue-child-nutrition-proclamation.pdf>

14. *Letter from Debbi Beauvais, New York School Nutrition Assoc. Pres., New York School Nutrition Assoc., to U.S. Department of Agriculture, New York School Nutrition Association Response To The USDA Competitive Foods Interim Final Regulation*, <http://www.nyschoolnutrition.org/regulations> (last visited Feb. 16, 2017).

enforcement deters many immigrants, including those with appropriate documentation, from applying for social services such as federal food benefits like SNAP or free school lunch.<sup>15</sup> Groups that help immigrants obtain these benefits have already reported a decline in enrollment, and decisions to un-enroll, among their clients.<sup>16</sup> Fear of deportation also increases social isolation and reduces mobility among immigrants. Further, actual deportation financially disadvantages family members left behind, resulting in an increase in food insecurity. Approximately 39 “sanctuary” cities and 364 counties have committed to protecting immigrants by limiting cooperation with federal immigration officials.<sup>17</sup> New York State’s Attorney General issued guidance to local jurisdictions on methods that law enforcement agencies can use to limit their involvement in federal immigration enforcement.<sup>18</sup> These commitments by local government and recent federal court decisions to protect immigrants may quell fears and prevent deportation, but additional efforts to reach out to immigrant communities will be critical to ensure their health and wellbeing. Reducing immigrants’ access to food benefits, health care, police protection, workplace health and safety regulation and other vital services could set the stage for significant deteriorations in health in all communities, not only those with large numbers of immigrants.

### *Affordable Care Act Repeal*

The House failed in March 2017, and again in April 2017, to pass the American Health Care Act, yet the Administration and Congress remain committed to replacing the Affordable

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15. Stephanie Potochnick et al., *Local Level Immigration Enforcement and Food Insecurity Risk Among Hispanic Immigrant Families with Children: National Level Evidence*, J. OF IMMIGR. AND MINORITY HEALTH 1, 1-8 (2016).

16. Anne Lowrey, *Trump’s Anti-Immigrant Policies are Scaring Eligible Families Away from the Safety Net*. The Atlantic. March 24, 2017.  
<https://www.theatlantic.com/business/archive/2017/03/trump-safety-net-latino-families/520779/>

17. Jasmine C. Lee et al., *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), [https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?\\_r=0](https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?_r=0).

18. N.Y. ATT’Y GEN. OFFICE, GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS (Jan. 2017).



Care Act (ACA) in whole or in part. Any changes that reduce health insurance would have significant effects on nutrition and non-communicable diseases (NCDs). The uninsured may not routinely receive preventive care to identify risks, such as excessive weight, high blood sugar or high blood pressure, and other diet-related health effects. Fewer people will be treated for diseases like diabetes and heart disease, resulting in increased morbidity and mortality. Communities of color that already suffer from excessive rates of diet-related diseases will experience these burdens disproportionately. Thus, nutrition advocates must now also be ACA advocates.

### Countering Industry Deregulation

Candidate Trump campaigned against food industry regulations proposing, at one point, to cut the “FDA food police.”<sup>19</sup> As President, he has substantial authority to affect food safety by appointing the heads and setting the budgets of the following agencies:

- the Food and Drug Administration (FDA), which ensures the safety of substances added to food, regulates food processing, packaging, and labeling; prevents foodborne illness; sets rules for food contaminants<sup>20</sup>;
- the US Department of Agriculture (USDA), which inspects all meat, poultry, and egg products<sup>21</sup>; and
- the Federal Communications Commission (FCC), which regulates advertising, including food advertising to children.<sup>22</sup>

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19. See Lydia Wheeler, *Trump Floats Rolling Back Food Safety Regulations*, THE HILL (Aug. 15, 2016 1:03 PM), <http://thehill.com/regulation/healthcare/296152-trump-says-he-would-eliminate-food-safety-regulations>.

20. See 21 U.S.C. § 393(b) (2012); see also *What We Do*, FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited Feb. 15, 2017).

21. See *About FSIS*, DEPARTMENT OF AGRICULTURE, <https://www.fsis.usda.gov/wps/portal/i/informational/aboutfsis> (last visited Feb. 15, 2017).

22. Leigh Gantner, *Food Advertising Policy in the United States*, CORNELL, 7-8,

The effects of the president's plan to roll back food industry regulations—which one observer described as “putting a fox in every hen house”—will depend on the extent to which Congress pushes back. Push back seems unlikely given the zeal with which Congress has overturned Obama regulations and the recent decision by the House to pass H.R. 5, the Regulatory Accountability Act, which will stymie regulation through new requirements for cost-benefit analysis and the use of least-cost rulemaking.<sup>23</sup> Moreover, the new Secretary of Agriculture, Sonny Perdue, a former fertilizer salesman and governor of Georgia, has suggested that the USDA may make the needs of big growers, rather than eaters, its priority.<sup>24</sup> The stakes for cities, where diet-related diseases are the leading causes of death and principal drivers of health inequalities and expenditures, are substantial.

### *Nutritional Standards*

The Obama Administration achieved modest improvements in creating a healthier food supply as Michele Obama pressured the food industry to change product formulations and the way food is marketed to children. The food industry is now seeking to reverse these gains. For example, the Grocery Manufacturers Association and food trade associations recently urged Health and Human Services Secretary Thomas Price to delay changes to the Nutrition Facts label that would require disclosure of added sugar, and in his confirmation hearing FDA nominee Scott Gottlieb suggested he was open to such a delay.<sup>25</sup> FDA has already delayed implementation of calorie labeling on restaurant menus by one year “to consider how we might further reduce the regulatory burden or increase flexibility while continuing to

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[https://cip.cornell.edu/DPubs/Repository/1.0/Disseminate?view=body&id=pdf\\_1&handle=dns.gfs/1200428167](https://cip.cornell.edu/DPubs/Repository/1.0/Disseminate?view=body&id=pdf_1&handle=dns.gfs/1200428167).

23. See H.R. 5, Regulatory Accountability Act of 2017.

<https://www.congress.gov/bill/115th-congress/house-bill/5/text>

24. Julie Hirschfeld Davis & Maggie Haberman, *Sonny Perdue is Trump's Choice for Agriculture Secretary*, N. Y. TIMES (Jan. 18, 2017),

<https://www.nytimes.com/2017/01/18/us/politics/sonny-perdue-agriculture-secretary.html>.

25. See Center for Science in the Public Interest, April 5, 2017.

<https://cspinet.org/news/food-industry-urges-delay-nutrition-facts-label-20170405>

achieve our regulatory objectives.”<sup>26</sup> Absent White House pressure, food advocates, along with state and local health departments, will need to step up their efforts to improve the nutritional quality of the food supply. There is precedent for cities taking the lead: New York banned trans-fat, required calorie labeling, and recently imposed salt warnings on restaurant menus. Other cities, including Chicago, Philadelphia and San Francisco<sup>27</sup> have imposed taxes on sugary beverages to reduce their consumption. These successes illustrate the potential for advocates, allied with city officials, to advance local policies that eventually can influence national policies as well as shift the marketplace.

### *Food Safety*

Cities are vulnerable to President Trump’s interest in deregulating the food industry, particularly on issues like food safety. While city health departments inspect food service establishments, enforcement of national and global food safety rules can prevent large foodborne disease outbreaks. By monitoring these outbreaks over the next four years, state and local health departments, university-based researchers, and food safety advocates can assess the health effects of relaxed federal regulation and enforcement. In turn, they can then demonstrate the need for stricter national monitoring and enforcement. In addition to preventing contaminated food from reaching consumers, state and local governments will have to be vigilant on issues such as adulteration, fraudulent nutrition claims, and other food safety concerns. State Attorneys General can step up if federal agencies step back. New York State Attorney General Eric Schneiderman previously forced changes in the practices of the largely unregulated dietary supplement industry and the retailers who sell them.<sup>28</sup> By joining forces, states can pressure

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26. U.S. Department of Health and Human Services. Food and Drug Administration 21 CFR Parts 11 and 101 [Docket No. FDA-2011-F-0172] RIN 0910-ZA48. Scheduled publication date May 4, 2017. Accessed at <https://www.federalregister.gov/documents/2017/05/04/2017-09029/food-labeling-nutrition-labeling-of-standard-menu-items-in-restaurants-and-similar-retail-food>

27. Mike Esterl(9 November 2016). *Soda Taxes Approved in Four Cities, Vote Looms in Chicago’s Cook County*. WALL STREET JOURNAL.

28. Anahad O’Connor, *New York Attorney General Targets Supplements at Major*

the food industry to change harmful production and marketing practices.

### *Labor Rights*

Though most are low-wage, food jobs have been among the economy's fastest growing occupational sector since the great recession.<sup>29</sup> President Trump's replacement of his first Labor Secretary nominee, fast-food restaurant CEO and minimum wage opponent Andrew Puzder, with more moderate Alexander Acosta suggests that the administration may not aggressively undermine efforts to improve the conditions of low-wage food workers, yet the President's proposed 21% cut in the Department of Labor's budget may hurt enforcement efforts. Organized labor and worker rights advocates will need to be vigilant in the coming years to ensure that existing labor standards are upheld and not reversed. A national movement, called *Fight for Fifteen*, has been successful at raising the minimum wage to \$15 an hour for fast food workers in major cities.<sup>30</sup> Four states and 20 municipalities have also adopted paid sick leave requirements<sup>31</sup> and cities have developed other policies and programs that benefit food workers, suggesting that, for the foreseeable future, efforts to create good food jobs will remain at the state and local levels.

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*Retailers*, N. Y. TIMES (Feb. 3, 2015),  
<https://well.blogs.nytimes.com/2015/02/03/new-york-attorney-general-targets-supplements-at-major-retailers/>.

29. Trefis Team, *How the Fast Casual Segment is Gaining Market Share in the Restaurant Industry*, FORBES (June 23, 2014),  
<http://www.forbes.com/sites/greatspeculations/2014/06/23/how-the-fast-casual-segment-is-gaining-market-share-in-the-restaurant-industry/#5153c2961d48>.

30. Shin, Laura, *Fight for a \$15 Minimum Wage Spreads to New Industries, 190 Cities*, FORBES (Dec. 4, 2012),  
<http://www.forbes.com/sites/laurashin/2014/12/04/fight-for-a-15-minimum-wage-spreads-to-new-industries-190-cities/#21e0fa685473>.

31. Gehrke et al., *Patchwork for Rapidly Expanding Paid Sick Leave Laws Presents Challenges for Employers*, 42 EMP'T RELATIONS TODAY (Jan. 13, 2016),  
<http://onlinelibrary.wiley.com/doi/10.1002/ert.21541/pdf>.

### Sustaining Regional Food Systems

The President's proposed 2018 budget contains a 21% cut to USDA's discretionary spending.<sup>32</sup> If cuts to the USDA target Obama administration efforts to help small and mid-size farmers, like "Know Your Farmer, Know Your Food," farm-to-school programs, and support for farmer's markets and other direct marketing efforts, they will make it more expensive for cities to source regional produce for municipal programs and to sustain regional agricultural economies. But these reversals would be minor in comparison to the existential threat of President Trump's denial of climate change, his pledge to withdraw support from international climate treaties, and his plan to intensify fossil fuel production.

President Trump's appointment of Scott Pruitt, Oklahoma's attorney general, to head the Environmental Protection Agency, indicates that the White House will continue to undo environmental regulations and executive orders adopted by former President Obama. It is no coincidence that Pruitt has ties to coal and gas companies and has led legal challenges to the Obama administration's Clean Power Plan,<sup>33</sup> which requires states to curb greenhouse gas emissions from power plants. The adverse effects of climate change on agriculture and food security are well established.<sup>34</sup> The impacts on regional food systems will also be significant. For example, climate change-induced variations in precipitation and temperature will disrupt

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32. US Office of Management and Budget. 2017. *America First: A Budget Blueprint to Make America Great Again*. Washington DC: OMB. Accessed at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf) on April 30, 2017

33. Meyer, Robinson, *Trump's EPA Pick is Skeptical of More Than Just Climate Change*, THE ATLANTIC (last visited Mar. 2, 2017), <https://www.theatlantic.com/science/archive/2016/12/trumps-epa-pick-is-skeptical-of-more-than-just-climate-change/509960/>.

34. EPA, *Climate Impacts on Agriculture and Food Supply*, EPA (Oct. 6, 2016), <https://www.epa.gov/climate-impacts/climate-impacts-agriculture-and-food-supply>.

regional agriculture, along with food prices.<sup>35</sup> Further, shifts in pest and weed populations due to warming may affect farm productivity and encourage the aggressive use of pesticides and herbicides. Pruitt's recent decision to reject a proposed ban on chlorpyrifos, a pesticide that EPA scientists found hazardous to farm workers and young children, suggests that administration policies may increase health risks to farmworkers and consumers.

The Trump administration's reluctance to mitigate greenhouse gas emissions will ultimately threaten coastal cities, and as Superstorm Sandy demonstrated in New York City, urban food systems are particularly vulnerable. The risks include not only the flooding of distribution facilities but also damage to the electrical grid, transportation systems, and retail infrastructure that disrupt supply chains and leave vulnerable residents without access to adequate food and water. With a White House committed to increasing fossil fuel production and reducing efficiency standards, thus increasing carbon emissions, these consequences will be much larger.

President Trump's appointment of Rick Perry to head the Energy Department and U.S. Representative Ryan Zinke to head Interior suggest the administration will look to dramatically expand domestic energy production. In addition to the effects on the climate, a more direct risk to food production will come from efforts to support hydraulic fracturing ("fracking") that have threatened groundwater in agricultural regions. Currently, New York State, along with Vermont, has banned fracking,<sup>i</sup> but many other agricultural areas may be affected by increased fracking and pollution from expanded petrochemical production. Food advocates must ally with environmental advocates and state governments to keep political pressure on the Administration to reduce greenhouse gas emissions, address climate change, and support the transition to renewable energy.

### **Strategies to Move Forward**

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35. *Id.*

Advocates concerned about the changes in Washington are considering many strategies. Some that deserve particular attention include:

1. Developing state level initiatives as foundations for national change four years from now. For example, new alliances to protect and grow local and regional food systems could become models and eventually influence national food policy. The success of several state and local referenda or ballot initiatives to tax soda and increase minimum wages in November 2016 shows the potential of enlisting voter support on food-related issues.

2. Mobilizing state and local elected officials to stand up to President Trump and Congress by fighting for policies that protect urban food systems. Food activists should communicate what we expect from elected officials and consider how to support them when they resist harmful changes. State Attorneys General can open new legal routes for reducing harmful food industry practices. On the issues of climate change and gun violence, mayors from around the nation have educated voters and other policy makers and articulated alternatives to conservative positions. Progressive mayors have an opportunity to organize to defend SNAP and school food, expand immigrant access to food benefits, and develop other food policies that create healthier cities.

3. Developing new and deeper alliances with groups working on other related issues such as climate change, farmland protection, immigrant inclusion and living wages to increase the reach and power of those with a common agenda opposing the changes espoused by President Trump and the Republican congressional leadership. Finding unlikely allies in the private sector may also open new policy possibilities.

4. Documenting and speaking out on the harm done by new policies that roll back food benefits, deregulate the food industry, or put food workers at risk. Academic institutions have a particularly important role to play in tracking these changes to provide evidence to inform elected officials and advocates of

policy consequences, convening both the “usual suspects” and new constituencies to analyze and advocate for improvements to food environments and nutritional health, and mobilize constituencies before extensive harm is done.

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## **Fomenting Democracy: The Case for Federal – Local Cooperation**

**Marilyn Sinkewicz\*, Jess Gilbert\*\* & Calvin Head\*\*\***

### **Introduction**

Rural America is usually seen as the most conservative part of the United States and, in general, this is correct, Witness the vote for Donald Trump in the recent presidential election. Rural areas, however, are not homogenous. Particularly in bi- or multi-race/ethnic regions, there are sharp differences in political values and voting patterns. The rural South offers a case in point. This article highlights an African American community in the Mississippi Delta formed around the crucial but divisive issues of land, food, and democracy. The meaning of “democracy” here refers not only to voting for public representatives—important as that is—but, perhaps even more crucial, to the redistribution of political and economic power and resources from elites to middle- and lower-income people. This kind of democracy demands that those affected by a decision should have some say in its making.

Today Mileston, Mississippi, a hamlet in Holmes County, boasts a successful vegetable production and marketing cooperative of black farmers that includes a youth-in-agriculture project. Its success grows out of the past eighty years during which the Mileston community has stood as a bastion of black-

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owned farmland and grass-roots activism. Through the two most reformist episodes in modern American history, the New Deal of the 1930s and the War on Poverty of the 1960s, Mileston partnered with the federal government to bring about land reform and community development. Together they created new institutions that spurred local capacity-building and citizen empowerment. This process culminated in Mileston's position at the forefront of the civil rights movement in Mississippi. More recently, the Obama Administration provided significant material and symbolic resources to the Mileston Cooperative and its youth project. These initiatives continue to bolster well-being and life-chances in the immediate area and the region. But how will this democratizing federal-local partnership fare under the new Trump Administration? Will it thrive? Can it be scaled up to other communities? Or will it struggle even to survive?

### **The Mileston Youth-in-Agriculture Project**

The Mileston youth-in-agriculture project consists of several interrelated parts: ready access to land, technology, markets, and local knowledge; plenty of young people eager to work, learn, and grow; a nurturing community and inspired leadership with a history of success; and recent support from the U.S. Department of Agriculture (USDA).

First is the land base. Due to its distinctive history, summarized in the next section, the Mileston community contains a critical mass of high-quality farm land owned by resident African American farmers. The cooperative members own 3,000 acres although, at present, only a small portion is devoted to the youth project. The members contribute agricultural knowledge, equipment, and hoop-houses as well as the ground needed for garden plots. As with any business, markets are critical. The youth project sells to a wide range of buyers: senior citizens and locals in the Women, Infants, and Children (WIC) program who benefit from fresh, healthy vegetables; local supermarkets; high-end restaurants in Jackson; food giants such as Sysco and Walmart; and a food hub named Up in Farms.

Like youth everywhere, Mileston's teenagers need and seek adult mentoring, productive activities, workforce skills, and access to employment. The high-value produce venture engages over thirty high school students, with many more waiting to join as soon as the operation can expand. The youngsters are involved in all aspects of the commercial vegetable business: soil preparation, planting, transplanting from hoop-houses to fields, weeding, watering, pest-control, harvesting, machine-repair, packaging, marketing, distribution, and accounting.<sup>1</sup> In addition, they learn the USDA guidelines for organic certification as well as certification in Good Agricultural Practices. Young people also operate a cold-storage and food-packaging facility, certified with official Good Handling Practices. The structure was built with local funds and the USDA contributed the equipment.

Their engagement with hands-on training in large-scale vegetable production and management allows Mileston youth to earn money and acquire job skills and knowledge about sustainable agriculture.<sup>2</sup> Recently a Mileston Co-op teenager so impressed the USDA certifiers that they invited him to Atlanta to teach other producers about the relevant processes and guidelines. Moreover, the young participants have developed expansive visions of their personal futures. Unlike many of their peers, they are strikingly ambitious. For instance, one fifteen year old plans to become a plant scientist. When Mileston teenagers speak to other community groups about their knowledge, experiences, and dreams, audiences are rapt and inevitably desirous to provide such opportunities for their own young people.

On the federal side, the Obama Administration made important contributions to Mileston. First, Lady Michelle Obama and her organic vegetable garden on the White House lawn were meaningful icons for young black growers. Programmatically, the USDA under President Obama expanded the previous Bush initiative that advanced farmers' markets and nutrition for low-income people. These public policies enabled

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1. Habiba Alcindor, *Mississippi Growing*, THE NATION, Sept. 21, 2009, at 31-32.

2. Habiba Alcindor, *Mississippi Growing*, THE NATION, Sept. 21, 2009, at 31-32.

folks in the area to enjoy fresh, high-quality fruits and vegetables while also improving the bottom line for the youth enterprise. Additionally, the Secretary of Agriculture makes many appointments to agency positions at the state level, and the views of those who fill these posts directly affect local communities. For example, the Administration appointed Curt Readus to lead the Mississippi Natural Resources Conservation Service. State Conservationist Readus set aside \$3 million to assist limited-resource vegetable growers with irrigation, hoop-houses, cover crops, plastic mulch, and crop rotation. Fourteen Mileston Co-op farmers now participate in this federal-state partnership which, for the first time (under Mr. Readus), devoted funds to specialty crops like vegetables instead of directing them all to large rice producers. This, again, provided positive repercussions and opportunities for the youth project. Lastly, to insure that its county offices were actually carrying out such policy goals, the USDA monitored implementation at the local level. Here is another programmatic innovation for the federal agency, one that significantly benefitted minority growers. In sum, the partnership between the federal government and the Mileston youth-in-agriculture project is an exemplary model of community development and more—democratization on the ground.

### **Mileston's Deep History of Democratic Community Development**

As mentioned earlier, the Mileston Cooperative that sustains the youth-in-agriculture project has a remarkable history. It begins with President Franklin D. Roosevelt's New Deal land-reform experiments that established one hundred new rural communities. The federal government assisted sharecroppers and tenant farmers to become landowning farmers. Thirteen of these community developments were all-black, including Mileston. In 1936, the Resettlement Administration (RA) purchased 9,400 acres of high-quality ground south of Tchula, Mississippi, and 110 black landless farm families moved onto homesteads averaging 75 acres in size. Each family secured long-term government loans to buy their farm, which included necessities such as a modest new

house, barn, privy, water well, chicken coop, smokehouse, farm implements, varied livestock, and household goods. In Mileston, the RA also built public facilities including a school, cotton gin, health clinic, and cooperative store that doubled as a community center. The new landowners added their own churches.<sup>3</sup>

Resettlement Communities like Mileston incorporated two key yet controversial features, cooperativism and technical assistance. The Farm Security Administration (FSA), which soon absorbed the RA, worked with the farmers to organize numerous enterprises structured as co-ops: gins, dairies, sawmills, orchards, handicrafts, wood lots, livestock breeding, medical associations, and marketing, just to name a few. Each project claimed two full-time professionals, who were usually African Americans. An agricultural supervisor worked with the farmers to advance diversified production, scientific practices, and general knowledge; a home economist taught nutrition, gardening, child care, and canning. These cooperative and educational activities themselves became “schools of democracy” and experiments in group problem-solving—lessons that proved to be useful in the future. However, not everyone approved of such democratization. In 1943, an anti-New Deal Congress gutted the FSA and demanded liquidation of the community projects.<sup>4</sup>

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3. SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* (1968); MICHAEL R. GREY, *NEW DEAL MEDICINE: THE RURAL HEALTH PROGRAMS OF THE FARM SECURITY ADMINISTRATION* (2002); Jess Gilbert, *Democratizing States and the Use of History*, 74 *RURAL SOC.* 3 (2009); Jess Gilbert & Spencer D. Wood, Paper Presentation at the Annual Meeting of the Rural Sociological Society: Experiments in Land Reform and Racial Justice: The New Deal State and Local African-Americans Remake Civil Society in the Rural South, 1935-2004 (Aug. 2004); Spencer D. Wood, *The Roots of Black Power: Land, Civil Society, and the State in the Mississippi Delta, 1935-1968* (2006) (unpublished Ph.D. dissertation, University of Wisconsin-Madison).

4. SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* 365-404 (1968); PAUL K. CONKIN, *TOMORROW A NEW WORLD: THE NEW DEAL COMMUNITY PROGRAM* 186-233 (1959); DONALD HOLLEY, *UNCLE SAM'S FARMERS: THE NEW DEAL COMMUNITIES IN THE LOWER MISSISSIPPI VALLEY* 122-37, 261-78 (1975); Jess Gilbert, *Democratizing States and the Use of History*, 74 *RURAL SOC.* 3, 3-24 (2009); Jess Gilbert & Spencer D. Wood, Paper Presentation at the Annual Meeting of the Rural Sociological Society: Experiments in Land Reform and Racial Justice: The New Deal State and Local African-Americans Remake Civil Society in the Rural South, 1935-2004 (Aug. 2004); Spencer D. Wood, *The Roots of Black Power: Land, Civil Society, and the State in the Mississippi Delta, 1935-1968* (2006) (unpublished Ph.D. dissertation, University of Wisconsin Madison).

Despite federal withdrawal, Mileston and the other Resettlement Communities flourished during the post-World War II period and throughout the 1960s as well. Practically all the children graduated from the project high school (taught by black teachers), and a surprisingly high number attended college and beyond. In fact, they became some of the first African American educators, doctors, and lawyers in the area.

Further, Mileston played a pivotal role in the emerging civil rights movement, at no small peril to residents' lives and livelihoods. In the 1960s, the farm families housed workers from the Student Nonviolent Organizing Committee (SNCC), led demonstrations in the county seat and state capital, became the first blacks to register to vote, challenged the agricultural establishment, and organized the state's strongest chapter of the anti-racist Mississippi Freedom Democratic Party. Not only did some Mileston farmers run for political office, but the community helped elect the first African American since Reconstruction to the Mississippi legislature.

Through President Lyndon Johnson's War on Poverty, the Mileston community significantly expanded its institution-building with new resources such as a health center and new programs such as Head Start. Notably, the mother of Calvin Head, the founder/director of the youth-in-agriculture project, led the Head Start program in Mileston for decades. Thus we see that the original New Deal Resettlement Community Program has evolved into today's co-op and its youth-in-agriculture project—the rich legacy of the democratizing partnership between the federal government and local citizen-farmers.<sup>5</sup>

### **Prospects under the Trump Administration**

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5. Lester M. Salamon, *The Time Dimension in Policy Evaluation: The Case of the New Deal Land-Reform Experiments*, 27 *PUB. POL'Y* 129, 129–83 (1979); Jess Gilbert & Spencer D. Wood, Paper Presentation at the Annual Meeting of the Rural Sociological Society: Experiments in Land Reform and Racial Justice: The New Deal State and Local African-Americans Remake Civil Society in the Rural South, 1935-2004 (Aug. 2004); Spencer D. Wood, *The Roots of Black Power: Land, Civil Society, and the State in the Mississippi Delta, 1935-1968* (2006) (unpublished Ph.D. dissertation, University of Wisconsin Madison).

The New Deal Resettlement Community Program, the 1960s War on Poverty, and Obama's agriculture and community development policies underscore the profound ways that government can deepen and even foment democracy. This happens when the state provides transformative assistance to under-resourced communities. Such social action is simply beyond the capacity of the private sector. Even so, some today reject the notion that government can help democratize communities.

Policy history shows that conservatives have advanced particular programs for the poor. For example, several of the Obama Administration's initiatives were clearly extensions of Bush-era policies that supported farmers' markets and improved nutrition for low-income groups. Currently, a central tenet of President Trump's agenda is the creation and retention of jobs for U.S. citizens. The Mileston project certainly excels in job training, and its young participants are acquiring skills that make them attractive to employers and colleges. The continuation and even expansion of such programs should be eminently endorsable.

However, the Mileston project directs our attention to a policy vision that is largely absent from President Trump's discourse on support for a middle class under duress. Will such evidence convince the new administration that the government is uniquely positioned to furnish poor people and communities with the benefits that many others already enjoy? It is not a matter of acting on or reforming those on the margins. Rather, the government's job is to ensure that all people are free to be engaged citizens in a functioning democracy. We know that it can happen because it has. This is a vision that the Trump Administration should embrace, one that provides equitable access to power and resources for poor citizens so that they can join the vaunted middle class.

## Possibilities for Farm Policy in a Trump Era

Stephen Carpenter\* & Kirsten Valentine Cadieux\*\*

A federal farm policy should, as has been the case at least since the Great Depression, focus on three things: (1) providing nutritious and affordable food; (2) producing food sustainably and in a way that regenerates the environment; and (3) providing a decent living for those that raise food and ensuring equity in the opportunities to engage and succeed in farming. This essay suggests ways that farm policy might further these goals while remaining relatively consistent with what we understand to be the priorities of the President.

There are aspects of the President's quasi-populist ideology and of the sentiments that supported his election that might provide an opening for interesting farm policies.<sup>1</sup> We take that ideology, for the purposes of this essay, to hinge on three principles. First, government regulates business too much.<sup>2</sup> As a candidate, President Trump mentioned Environmental Protection Agency rulemaking with the Clean Water Act as an example of unwarranted government interference.<sup>3</sup> A Trump Administration agricultural policy, it seems likely, will not

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1. For the original farmer populism from which the term emerges, see LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978).

2. See Trump-Pence: Make America Great Again: Regulations, <https://www.donaldjtrump.com/policies/regulations/>.

3. See Sara Jerome, *Trump, Clinton Debate Water Rule*, WATER ONLINE (Sept. 30, 2016), <http://www.wateronline.com/doc/trump-clinton-debate-water-rule-0001>; and Sarah Jerome, *WOTUS is "Doomed" Under Trump, Experts Say*, WATER ONLINE (November 28, 2016),

<http://www.wateronline.com/doc/wotus-doomed-under-trump-experts-say-0001>. The rule can be found at 80 Fed. Reg. 30,754, Department of Defense, Department of Army, Corps of Engineers and Environmental Protection Agency, Clean Water Rule: Definition of "Waters of the United State," Final Rule (to be codified at 33 C.F.R part 328, 40 C.F.R. parts 110, 112, 116, 230, 232, 300, 302, 402) (June 29, 2015) and discussed from the EPA point of view in detail in EPA, Clean Water Rule, <https://www.epa.gov/cleanwaterrule>.



embrace additional regulation of agriculture. Second, restriction of undocumented immigration will be a priority.<sup>4</sup> Whether or not a 2000 mile border wall is fully constructed, let us assume that the Administration will attempt to radically reduce the number of undocumented immigrants in the United States. Third, the Administration seems likely to step away from the principles of what has come to be called “free trade” that tend to undergird American trade agreements. As a candidate, the President was adamant that the country’s approach to trade should be reformed in ways that would be less favorable to cross-border movement of goods and capital.<sup>5</sup> Each of these ideological premises, and possible ways that agricultural policy might be formed to be consistent with them, are discussed below.

First, the effort to unravel the regulation of agriculture is one that many in the agribusiness world will find appealing. In actuality, however, there is little evidence that environmental or other regulation thwarts the farm community in any significant way. Regarding the environment, in particular, there is no doubting that farming causes pollution in waterways, that agriculture is a significant source of greenhouse gas emissions, and that markets will not remedy these problems.<sup>6</sup> These are economic externalities of a classic nature and farmers who voluntarily seek to limit runoff or greenhouse gases are

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4. See Miriam Valverde, *Politifact Sheet: Donald Trump’s Immigration Plan*, POLITIFACT (Nov. 9, 2016), <http://www.politifact.com/truth-o-meter/article/2016/nov/09/politifact-sheet-donald-trumps-immigration-plan/>.

5. See Trump-Pence: Make America Great Again: Trade, <https://www.donaldjtrump.com/policies/trade/>.

6. Environmental consequences of agriculture are summarized in JASON W. CLAY, *WORLD AGRICULTURE AND THE ENVIRONMENT: A COMMODITY BY COMMODITY GUIDE TO IMPACTS AND PRACTICES* (2004) and Erin M. Tegtmeier & Michael D. Duffy, *External Costs of Agricultural Production in the United States*, 2 INT’L L. J. AGRIC. SUSTAINABILITY 1 (2004). A classic law review discussion is J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law* 29(2-3) ECOLOGICAL L.Q. 1 (2000). Agriculture as creating economic externalities is discussed in James Stephen Carpenter, *Farm Chemicals Soil Erosion, and Sustainable Agriculture*, 13 STAN. ENVTL. L.J. 190 (1994). An estimate putting agriculture as the source of about 8 percent of all United States greenhouse gas emissions is Greenhouse Gas Emissions, *Sources of Greenhouse Gas Emissions*, EPA (last updated Feb. 14, 2017), <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>.

generally penalized for their efforts by the market.<sup>7</sup> We can expect the Administration, however, to limit regulatory efforts for the next four years. There is another way, however, for environmental problems to be taken into account. The President has not seemed hostile to farm programs in general, although no evidence has been provided that he has any familiarity with what the programs entail. Still, suppose these programs were doubled in cost, to say 40 billion dollars annually, and the programs were focused on conservation benefits.<sup>8</sup> We know a great deal about ways to limit the environmental consequences from farming,<sup>9</sup> for example, and about the possibility of capturing carbon in agriculture soils.<sup>10</sup> If we moved farm program spending into something more conservation oriented,<sup>11</sup> like the poorly funded

7. J.J. LAFFONT, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS, EXTERNALITIES* (2D ED. 2008).

8. Current spending on farm and conservation programs is in the area of 20 billion dollars per year. Early farm bill estimates for farm and conservation programs for 2014-2018 were about 19 billion dollars per year. See U.S. DEP'T OF AGRIC. ECON. RES. SERV. *Projected Spending Under the 2014 Farm Bill* (19 percent of 489 billion over five years), <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/projected-spending-under-the-2014-farm-bill/>. . The 2016 USDA budget authority is about 19 billion for farm and commodity programs, conservation and forestry. *USDA Fiscal Year Budget Summary and Annual Performance Plan 1-3* (conservation, forestry, farm and commodity programs are 21 percent of 148 billion), <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/projected-spending-under-the-2014-farm-bill/http://www.obpa.usda.gov/budsum/fy16budsum.pdf>. Accounting for inflation, the cost in current dollars going back to 2000 is roughly 20 billion dollars per year. RENEE JOHNSON AND JIM MONKE, *WHAT IS THE FARM BILL*, CONGRESSIONAL RESEARCH SERVICE (2016)(estimating from figure 3), <https://fas.org/sgp/crs/misc/RS22131.pdf>. Some estimates are higher. For 25 billion dollars per year, see CHRIS EDWARDS, *AGRICULTURAL SUBSIDIES*, CATO INSTITUTE 1 (2016), <https://www.downsizinggovernment.org/agriculture/subsidies>. By including all programs at least partially intended to benefit farmers, some economists argue that the cost of farm programs is much higher. For a claim that U.S. farm subsidies totaled more than 100 billion dollars a year as of the mid 2000s, see E. WESLY F. PETERSON, *A BILLION DOLLARS A DAY: ECONOMICS AND POLITICS OF AGRICULTURAL SUBSIDIES* (2009).

9. *TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS IN THE 21ST CENTURY*, NAT'L RESEARCH COUNCIL (2010), <http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Systems-Ag-Report-Brief.pdf>. Basic knowledge on these matters is longstanding. See *ALTERNATIVE AGRICULTURE*, NAT'L RESEARCH COUNCIL (1989).

10. For a broad view see, Rattan Lal et al, *Soil Carbon Sequestration to Mitigate Climate Change*, 123 (1-2) *GEODERMA* 1 (2004); and for the beginning of an effort to calculate the various ways that farming adds and subtracts from greenhouse gasses, see W.R. Teague et al., *The Role of Ruminants in Reducing Agriculture's Carbon Footprint in North America* 71 *J. SOIL AND WATER CONSERVATION* 156, 156 (2016).

11. Work exploring a beginning point includes Jonathan Coppess, *The Next Farm Bill May Present Opportunities for Hybrid Farm-Conservation Policies*, 31(4) *CHOICES*

Conservation Stewardship Program,<sup>12</sup> and spent enough money to ensure that the vast majority of farmers did not exit the program, the benefits for the environment could be profound and relatively inexpensive. One could imagine, as well, crop insurance programs that rewarded, rather than penalized, diversified farms, soil building crop rotations, and dispersion of livestock onto many farms, rather than concentrating them in massive numbers on a relatively small number of farms.<sup>13</sup> The Administration could rightly claim that it was achieving substantial environmental benefits without resorting to

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(2016); M. Eve et al, *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory*, U.S. DEP'T OF AGRIC. OFFICE OF THE CHIEF ECONOMIST TECHNICAL BULLETIN NO. 1939 in Marlen Eve et al., *Quantifying Greenhouse Gas Fluxes in Agriculture and Forestry: Methods for Entity-Scale Inventory*, U.S. DEP'T OF AGRIC. (July 2014), [https://www.usda.gov/oce/climate\\_change/Quantifying\\_GHG/USDATB1939\\_07072014.pdf](https://www.usda.gov/oce/climate_change/Quantifying_GHG/USDATB1939_07072014.pdf); [https://www.usda.gov/oce/climate\\_change/Quantifying\\_GHG/USDATB1939\\_07072014.pdf](https://www.usda.gov/oce/climate_change/Quantifying_GHG/USDATB1939_07072014.pdf); Roger Claassen, *Green Payments: Can Conservation and Commodity Programs be Combined?*, AMBER WAVES (March 2012); Roger Classen et al, *Integrating Commodity and Conservation Programs: Design Options and Outcome*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. REPORT NO. 44 (2007); Roger Classen and Mitch Morehard, *Greening Income Support and Supporting Green*, U.S. DEP'T OF AGRIC. ECON. RES. SERV., ECONOMIC BRIEF 1 (2006).

12. The Conservation Stewardship Program (CSP) is an especially interesting already existing option. See Conservation Stewardship Program, *Rewarding Farmers for Adopting and Managing Advanced Conservations System*, NAT'L SUSTAINABLE AGRICULTURE COALITION (2016),

<http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/conservation-stewardship-program/>;

<http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/conservation-stewardship-program/>. USDA summarizes it this way:

supports ongoing and new conservation efforts for producers who meet stewardship requirements on working agricultural and forest lands. Farmers and ranchers must demonstrate a high level of stewardship to be eligible for the program and must agree to further improve environment performance over the life of the CSP contract (up to 10 years). Participants receive financial assistance for adopting new conservation practices and for stewardship, based on previously adopted practices and the ongoing maintenance of those practices.

U.S. DEP'T OF AGRIC., *Background Conservation Spending Seeks To Improve Environmental Performance in Agriculture*, <https://www.ers.usda.gov/topics/natural-resources-environment/conservation-programs/background/>.

13. See generally, U.S. DEP'T OF AGRIC., FCIC-18160, WHOLE-FARM REVENUE PROTECTION PILOT HANDBOOK (2016) (exemplifying the viability of such a program). As a long term matter, policies could begin to embrace agro-ecological principles. See, e.g., STEPHEN R. GLEISSMAN, *AGROECOLOGY: THE ECOLOGY OF SUSTAINABLE FOOD SYSTEMS* (2d ed. 2006); JUDY SOULE & JOHN PIPER, *FARMING IN NATURE'S IMAGE: AN ECOLOGICAL APPROACH TO AGRICULTURE* (2d ed. 1991).

regulation. In order to minimize the spending, tightened payment limitations in farm programs would save a bit of money.<sup>14</sup>

The President and his advisors have surely been stung by charges of racism and sexism.<sup>15</sup> Discrimination at USDA has

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14. Payment limitation rules attempt to cap the farm program payments that one person can receive and to make some high-income farmers not eligible for some payments, potentially enabling the immediate reallocation of a significant amount of funding to conservation and equity measures. At present, these limitations are quite ineffective, a remarkable achievement given that the USDA Handbook discussion on the topic exceeds hundreds of pages. See U.S. DEP'T OF AGRIC. FARM SERVICE AGENCY, Payment Limitation, and Average Gross Income – Agricultural Act of 2014, [https://www.fsa.usda.gov/Internet/FSA\\_File/5-pl\\_r00\\_a03.pdf](https://www.fsa.usda.gov/Internet/FSA_File/5-pl_r00_a03.pdf); C. Zulauf et al, *2014 Farm Bill Decisions: Payment Limits and Adjusted Gross Income Eligibility*, 157(4) FARMDOC DAILY (2014), <http://farmdocdaily.illinois.edu/2014/08/2014-farm-bill-decisions-payment-limits-adjusted-income.html>; NSAC, *Final Actively Engaged Rule Preserves Unlimited Subsidies for the Biggest Farms* (2015), <http://sustainableagriculture.net/blog/final-actively-engaged-rule/>; and Ron Durst, *Effects of Reducing the Income Cap on Eligibility for Farm Program Payments*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (2007). See generally, U.S. DEP'T OF AGRIC., 5-PL, PAYMENT ELIGIBILITY, PAYMENT LIMITATION, AND AVERAGE ADJUSTED GROSS INCOME – AGRICULTURAL ACT OF 2014 (2016) (exemplifying the ineffectiveness of payment limitations given its vast discussion in the USDA's handbook). See also, JIM MONKE, CONG. RESEARCH SERV., RS21493, PAYMENT LIMITS FOR FARM COMMODITY PROGRAMS: ISSUES AND PROPOSALS (2008) (describing the basic issues). See generally, Ron Durst & Robert Williams, *Farm Bill Income Cap for Program Payment Eligibility Affects Few Farms*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (Sept. 2007), <https://www.ers.gov/amber-waves/2016/august/farm-bill-income-cap-for-program-payment-eligibility-affects-few-farms/>.

15. Among the many discussion along these lines are Dana Milbank, *Donald Trump is a Bigot and A Racist*, WASH. POST (December 1, 2015) at [https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist/2015/12/01/a2a47b96-9872-11e5-8917653b65c809eb\\_story.html](https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist/2015/12/01/a2a47b96-9872-11e5-8917653b65c809eb_story.html); Lydia O'Connor and Daniel Marans, *Here are 13 Examples of Donald Trump Being a Racist*, HUFFINGTON POST (October 10, 2016) [http://www.huffingtonpost.com/entry/donald-trump-racist-examples\\_us\\_56d47177e4b03260bf777e83](http://www.huffingtonpost.com/entry/donald-trump-racist-examples_us_56d47177e4b03260bf777e83). For the implication that these accusations trouble Trump, see Mark Fischer, *Donald Trump: 'I am the least racist person'* WASH. POST (October 16, 2016) at: [https://www.washingtonpost.com/politics/donald-trump-i-am-the-least-racist-person/2016/06/10/eac7874c-2f3a-11e6-9de3-6e6e7a14000c\\_story.html](https://www.washingtonpost.com/politics/donald-trump-i-am-the-least-racist-person/2016/06/10/eac7874c-2f3a-11e6-9de3-6e6e7a14000c_story.html); Caitlin Yilek, *Trump: 'Nobody has more respect for women than me'* *The Hill* (March 26, 2016) at: <http://thehill.com/blogs/ballot-box/presidential-races/274374-trump-nobody-has-more-respect-for-women-than-me>; See, Dana Milbank, *Donald Trump is a Bigot and a Racist*, WASH. POST (Dec. 1, 2015), [https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist-examples\\_us\\_56d47177e4b03260bf777e83](https://www.washingtonpost.com/opinions/donald-trump-is-a-bigot-and-a-racist-examples_us_56d47177e4b03260bf777e83); Mark Fischer, *Donald Trump: 'I am the least racist person'*, WASH. POST (Oct. 16, 2016), <https://www.washingtonpost.com/politics/donald-trump-i-am-the-least-racist-person/2016/06/10/eac7874c-2f3a-11e6-9de3->

been longstanding; thwarted opportunity for many, and costing the government billions in litigation.<sup>16</sup> As the Administration ramps up voluntary conservation aspects of farm programs, it could also, at relatively little cost, emphasize civil rights enforcement at USDA as a priority in the increased spending. An aggressive effort to ensure equal opportunity in farming would be one way the Administration could legitimately claim to be promoting social justice and opportunity.

Second, we can assume that the Administration will aim to reduce radically the number of undocumented immigrants in the country. A brief review: there are probably more than 10 million such immigrants.<sup>17</sup> Hundreds of thousands, probably more than one million, work on a farm for some part of the year.<sup>18</sup> Although most farms hire no wage labor and, consequently, do not hire undocumented immigrants, relatively few farms, many of which are quite large, are significantly concentrated in certain sectors of agriculture. This is especially true in the fruits, vegetables, and nursery and greenhouse crops sectors, all of which use a great deal of wage labor and undocumented labor.<sup>19</sup>

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6e6ea14000c\_story.html?utm\_term=.65f6c5db24a5.

16. See generally, Stephen Carpenter, *An Overview of USDA Discrimination Cases*, 17 DRAKE J. AGRIC. L. 1 (2012).

17. See, Michael Hoefler et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, DEP'T OF HOMELAND SECURITY (MAR. 2012), [https://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

18. See, U.S. DEP'T OF AGRIC., *Immigration and the Rural Workforce* (last updated Feb. 3, 2017). According to USDA, in 2012, about 1.1 million hired farmworkers were employed on U.S. farms, according to the Farm Labor Survey of USDA's National Agricultural Statistics Service (NASS). Immigration and the Rural Workforce This number has held fairly steady over the past five years. USDA, ERS, *Immigration and the Rural Workforce*, at <https://www.ers.usda.gov/topics/in-the-news/immigration-and-the-rural-workforce.aspx>; see also, Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. CTR. (Apr. 14, 2009), For nongovernmental survey data, see Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center 14 (2009) at <http://www.pewhispanic.org/files/reports/107.pdf>. (4 percent of 8.3 million undocumented workers, total undocumented immigrants number 11.2 million). About half of all hired farm workers over the past 15 years were undocumented. Id. at 1.

19. U.S. DEP'T OF AGRIC., AC-12-A-51, 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 12 (2012). About 30 percent of all farms hire wage labor. USDA, Nat'l Agric. Stat. Serv. *Census of Agriculture* page 12, table 4, [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/) (about 566,000 farms, out of about 2.1 million, hired labor). Farmers spent about 27 billion dollars on farm labor in 2012. A total of about 8000 farms, about .4 percent of all

Powerful agribusiness leaders must find Trump's immigration rhetoric alarming. While not saying so straightforwardly, the parts of agriculture that use immigrant labor seem reasonably comfortable with the current system. Labor that is cheap, powerless, and illegal has had an appeal for Big Agriculture.<sup>20</sup>

From a social justice perspective, it is far from clear what an appropriate policy for immigrant labor in agriculture might be.<sup>21</sup> It cannot escape one's attention, however, that farmworkers are typically Latino, and that, historically, immigration policy in the United States has hinged at almost every turn on the race of the immigrants in question. Put differently, limiting the number of immigrants that work on farms can undermine aspects of equality and justice by targeting Latinos.<sup>22</sup> Historically and at present, an agriculture based mainly on the household labor of family farms, which rely minimally on wage labor, is more egalitarian, and involves less exploitation than large farms that employ poorly paid wage labor.<sup>23</sup> Because industrial agriculture offers little hope for a

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farms, spent 13 billion dollars on farm labor. *Id.* Looked at from a different angle, about 32 percent of total hours worked on farms are hired or contract labor. Robert A. Hoppe, STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT, 2014 EDITION STRUCTURE AND FINANCES, at 11, table 1. By the middle 2000s, the largest farms—literally the largest two percent – averaged 2.5 million in gross farm revenue, earned \$600,000 per year in farm profit, accounted for nearly half of all farm production, and relied overwhelmingly on hired labor. Robert A. Hoppe et al, MILLION DOLLAR FARMS IN THE NEW CENTURY, at 29, table 11(rely on hired labor); at 9, figure 4 (48 percent of production); at 3 (less than two percent of all farms); at 24, table 10 (\$2.5 million revenue, \$600,000 profit) (2008). While hired labor and contractors account for about 17 percent of all variable production expenses for agriculture as a whole. For vegetables, the proportion is 35 percent; for nursery products, 46 percent; and for fruit 48, percent. Zahniser, at 1.

20. Gerald P. Lopez, *Don't We Like Them Illegal*, 45 U. CAL. DAVIS L.R. 1711, 1718 (2012).

21. For the question of how we might conceptualize equitable land, labor, and exchange, see Rachel Slocum, Kirsten Valentine Cadieux, and Renata Blumberg, *Solidarity, Space and Race: Toward Geographies of Agrifood Justice*, 9 SPATIAL JUSTICE (2016), [https://www.jssj.org/wp-content/uploads/2016/02/JSSJ9\\_01\\_ENG.pdf](https://www.jssj.org/wp-content/uploads/2016/02/JSSJ9_01_ENG.pdf).

22. For the case that immigration policy has relied on constitutionally impermissible racial criteria see Liav Orgad and Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection 120 Years After the Chinese Exclusion Case*, 26(2) CONSTITUTIONAL COMMENTARY 787 (2010). For a vivid example of how this has worked in practice, see Malissia Lennox, *Refugees, Racism and Reparations: A Critique of the United States' Haitian Immigration Policy*, 60 STANFORD L. R. 687 (1993).

23. At least two caveats need to be made about family farming. First, our understanding of what constitutes a family has changed substantially over the last several

relatively egalitarian countryside, a more just agriculture would almost inevitably require more and smaller farms, but it would also demand an equal opportunity for everyone to take a place on those farms. A farm policy that sought to reduce wage labor in general by focusing sharply on Latino workers is unacceptable. A policy that encourages poor immigrants from Latin America to marginally better their situations through the massive expansion of industrial agriculture seems also not desirable. Fundamental questions about the role of national borders and international mobility are not addressed here. The question, for the purposes of this essay, is how we might proceed if we take as a given the assumption that the federal government will reduce substantially the number of undocumented immigrants in the country.

The economic effects for agriculture would certainly be complicated, and in some ways unpredictable if, say, half of all undocumented workers were no longer available to United States employers.<sup>24</sup> The social dislocation and hardship for the immigrants themselves under such a scenario would likely be enormous, especially if the policy was in part based on mass

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years. The point here is not to privilege one form of household arrangement over another, or to minimize the inequalities within farm and other families. It is instead, to argue on behalf of a household and commons based economic structure and to oppose wage labor and plantation labor for farming – the two primary alternatives historically in the United States. For this history see Max J. Pfeffer, *Social Origins of Three Systems of Farm Production in the United States* 48(4) RURAL SOC. 540 (1983). Second, a system of family farming is worth defending because, in addition to raising food, it can be the basis for a thriving, humane community and can produce in relative harmony with nature. See John Ikerd, *Family Farms of North America*, (Food and Agriculture Org., Working Paper No. 152, 2016), [http://www.ipc-undp.org/pub/eng/WP152\\_Family\\_farms\\_of\\_North\\_America.pdf](http://www.ipc-undp.org/pub/eng/WP152_Family_farms_of_North_America.pdf). A case for family farming can also be found in STEPHEN CARPENTER, THE RELEVANCE OF FAMILY FARMING TODAY, 11-16 (2006), [http://www.flaginc.org/wp-content/uploads/2013/03/CLE\\_SC.pdf](http://www.flaginc.org/wp-content/uploads/2013/03/CLE_SC.pdf). See also MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 78-103 (1990).

24. This scenario is discussed in STEPHEN ZAHNISER ET AL., THE POTENTIAL IMPACT OF CHANGES IN IMMIGRATION POLICY ON U.S. AGRICULTURE AND THE MARKET FOR HIRED FARM LABOR 26 (2012), <https://www.ers.usda.gov/publications/pub-details/?pubid=44983>. Cf. LINDA FOR ANALYSIS ON SEVERAL PARTICULAR CROPS REGARDING SIGNIFICANT REDUCTIONS OF UNDOCUMENTED LABOR SEE, LINDA CALVIN AND PHILIP MARTIN, THE U.S. PRODUCE INDUSTRY AND LABOR FACING THE FUTURE IN A GLOBAL ECONOMY (2010), [https://www.ers.usda.gov/webdocs/publications/err106/8069\\_err106.pdf](https://www.ers.usda.gov/webdocs/publications/err106/8069_err106.pdf).

round-up and deportation of undocumented workers. Families would be fractured. “Dreamers,” people with no living memory of being in another country, would suddenly be deported.<sup>25</sup> Illegal immigration for the desperate would become more dangerous. It is not clear that the Administration will have the stomach for the humanitarian issues raised, the popular resistance that mass deportations would trigger, or perhaps most importantly for the Administration, the vigorous resistance that significant immigration restriction of any kind would engender with Big Agriculture.

Suppose, however, that the Administration proceeds. One of the worst possible scenarios consistent with draconian reductions in illegal immigration, and the one that would be favored by Capitol Hill agribusiness lobbyists, would be to allow farm workers into the country legally with no right to stay, no path to citizenship, no rights as workers, poor living conditions, and very low pay. Further, to the extent that part of the point of President Trump’s opposition to undocumented immigration is that it takes economic opportunities from citizens and legal immigrants, a significant “guest worker” or bracero program would undermine the entire point of restricting undocumented immigration. Capitol Hill agribusiness lobbyists, who are sure farm workers should not be paid overtime, have the right to organize, or receive a minimum wage will surely argue that agriculture requires an underclass of labor to succeed and, thus, will likely attempt to craft an exploitative exception to the main immigration policy.

Suppose, however, a strategy is launched for keeping undocumented immigrants from making it over the border while simultaneously increasing efforts to deport those without papers. It will be a struggle. Those seeking to escape from poverty by working in the United States will not be easily deterred. To the extent restriction is effective, we could expect a number of tangled results for agriculture. As with the minimum wage and

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25. RUTH SPENCER, *THE DREAMERS’ DREAMS: YOUNG IMMIGRANTS TELL THEIR STORIES* (July 12, 2012), <https://www.theguardian.com/world/interactive/2012/jul/12/dreamers-dreams-young-immigrants-interactive>.



other policies that affect low-wage workers, the effects would be complicated in some respects and would evolve over time pay. As a baseline, we know that certain foods would be more expensive to produce. Some farms, over time, would adopt more technology as a substitute for labor, concentrating more farming where funding for such technology was available. Some farms relying on cheap labor would become far less profitable but still make a successful adjustment. In some instances, a shift in farm size could occur without extraordinary difficulty. For example, the dairy industry long existed without massive dairies using extremely cheap wage labor, and could do so again. Some farms would shift less labor-intensive crops. Prime farmland in California would not suddenly go unfarmed, but farming would change. Some operations would be unable to adjust and would, after a time, move to a place with cheaper labor. Some food now grown in the United States, as a result, would soon be imported.

From a social justice perspective, if the Administration has the stomach to actually massively restrict immigration, it could also take several steps to make the effort more humane. First, it could refine the policy by taking into account family connections, longevity in the country, and other factors, in forming policies. Second, a policy that gradually reduces the immigration of undocumented workers – as opposed to mass deportations of those already here – seems likely to lessen social disruption and suffering. Third, more effective barriers to undocumented immigration could be accompanied by significant increases in efforts to establish historically disenfranchised farm laborers as actual farmers. There would be some cost, but many, many legal immigrants and their families would love a chance to farm in the United States and would be capable of doing so with minimal assistance.<sup>26</sup>

What the Administration should not do, however, is listen

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26. For a sense of the potential here see, for example, *Stories from the Field, Empowering Latino Farmers*, NSAC (Apr. 18, 2016), <http://sustainableagriculture.net/blog/latino-farmers-2501-profile/> and the activities of the National Latino Farmers and Ranchers Trade Association, <http://hispanicdigitalmediaconsultinginc.com/NLFRTA/index.html>.

mainly to agribusiness interests and combine immigration restrictions with a policy of “guest workers” or some other scheme that would minimally change the current labor force. If part of the point of restricting illegal immigration is to increase the economic opportunities for those in the country legally, a bracero-like program would offer no real change and reducing immigration would merely serve as a symbolic gesture.

Third, the Administration seems likely to rely less on the magic of free trade as enforced by trade agreements. This proposal also must alarm agribusiness. About 15 to 20 percent of the country’s agricultural products are exported.<sup>27</sup> Interestingly, across the world, the most contentious aspects of negotiation and the implementation of trade agreements have been agricultural policy.<sup>28</sup> The United States has made access to foreign markets a center point of its trade agreement negotiation strategy.<sup>29</sup> Other countries, anxious to protect their own longstanding rural cultures, often resist trade agreements that mandate the import of foreign-grown food. The Japanese, for example, are famous for protecting their very small-scale rice farmers from American imports.<sup>30</sup> If the Administration seeks to unwind trade agreements, NAFTA and WTO, for example, opportunities for American agriculture exports will be reduced. Imports of food, however, will also be restricted. For goods that are truly not available here, imports will be possible, one would

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27. *Export Share of Productions*, USDA (2017), <https://www.ers.usda.gov/topics/international-markets-trade/us-agricultural-trade/export-share-of-production/>.

28. See Tim Josling, *Why Trade Negotiations Still Matter to U.S. Agriculture*, CHOICES (2009), <http://www.choicesmagazine.org/UserFiles/file/PI6.pdf>. See also Tim Josling, *Agricultural Trade Disputes in the WTO*, FRONTIER OF ECONOMICS AND GLOBALIZATION (2009), [http://fsi.stanford.edu/sites/default/files/Agricultural\\_Trade\\_Disputes\\_in\\_the\\_WTO.pdf](http://fsi.stanford.edu/sites/default/files/Agricultural_Trade_Disputes_in_the_WTO.pdf).

29. An enthusiastic account of the result of trade agreements for exports is USDA, FOREIGN AGRICULTURE SERVICE, FREE TRADE AGREEMENT AND U.S. AGRICULTURE (2016), [https://www.fas.usda.gov/sites/default/files/2016-06/2016-06\\_iatr\\_ftas.pdf](https://www.fas.usda.gov/sites/default/files/2016-06/2016-06_iatr_ftas.pdf).

30. For a discussion of the cultural meaning of rice and rice imports in Japan, see Gianne Simone, *The Future of Rice Farming in Japan*, JAPAN TIMES (Jan. 29, 2016), <http://www.japantimes.co.jp/life/2016/01/29/food/the-future-of-rice-farming-in-japan/#.WlFSVrDmrcs>. For an unsympathetic view of Japan’s efforts to limit the import of rice, see, CHANDLER H. UDO, JAPANESE RICE PROTECTIONISM: A CHALLENGE FOR THE DEVELOPMENT OF AGRICULTURAL TRADE LAWS, 31(1) BOSTON COLLEGE INT’L AND COMPARATIVE L. R. 169 (2008).

assume, but they will be more costly. In the Western Hemisphere, there is an odd coupling of two central Trump issues – immigration and trade agreements. Left-wing critics of NAFTA, for example, have long emphasized that American exports of corn to Mexico undermined small scale Mexican corn production and led to massive undocumented immigration from the Mexican countryside to the United States.<sup>31</sup> Such dislocation might in part be reversed with a revision of NAFTA and the draw of the United States as a work destination would lessen. Further, reduced United States efforts to export, for example, cotton, would help small-scale producers in the rest of the world.<sup>32</sup> The trade aspects of the new Administration are in some ways quite hard to anticipate. It is not clear what the President means by a better “deal” on trade. One would suspect that the President does not yet realize that the devilish details of these agreements often center on agriculture. There is an opportunity as trade is reconfigured to reshape trade policy in a way that does not place forcing farm exports onto the rest of the world as a high priority. This approach will be highly unpopular with agricultural exporters, but if the Administration approached the issue this way, it would be of benefit to millions of small-scale producers abroad, would likely be appreciated by our trade partners, and might generate leverage for the Administration as it negotiates other trade matters of concern.

There are reasons that the Republican Establishment was made nervous by presidential candidate Donald J. Trump. While promises to reduce government regulation is a standard Republican issue, and a common aim for parts of American agriculture, candidate Trump’s emphasis on two other issues—immigration and trade agreements—part ways with established policy, and in particular with established farm policy, of the last several decades. These issues seem important to the President and seem to have been a significant basis for his political

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31. See generally BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN IMMIGRATION* (2010).

32. Julian M. Alston et al., *Impacts of Reductions in US Cotton Subsidies on West African Cotton Producers* OXFAM AMERICA (2007), <https://www.oxfamamerica.org/static/oa3/files/paying-the-price.pdf>; Roger Thurow and Scott Killmean, WALL STREET J., *U.S. Subsidies Create Cotton Glut That Hurts Foreign Cotton Farms* (June 26, 2002) <https://www.wsj.com/articles/SB1025050239742827480>.

support.<sup>33</sup> The point here is not to minimize any other factor that may have played an important role in the election. It is instead to suggest that for President Trump and his supporters, the issues of immigration and trade seem not likely to fall by the wayside. For agriculture and everyone else, there will be important consequences based on how the questions of immigration and trade are resolved. Some who have vigorously opposed President Trump from the left will withdraw from all political cooperation with the Administration.<sup>34</sup> Others will engage the Administration on issues of common concern.<sup>35</sup> As Karl Marx once wrote about the political choices one must make in the face of the rise of a charismatic and powerful leader, “Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already.”<sup>36</sup>

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33. Immigration and trade appear to be important for the President. Understanding the precise reasons people vote and why they pick one candidate over another – perhaps, particularly in this election—is a precarious business. At a minimum, however, exit polls suggest that trade and immigration were important issues for Trump voters. Trump voters, for example, tended to think trade takes away jobs, that illegal immigrants should be deported and that a wall should be built on the Mexican border. Jon Huang et al., *Election 2016: Exits Polls*, N. Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/interactive/2016/11/08/us/politics/election-exit-polls.html>. See also Jeffrey Anderson, *Trump Won on the Issues*, REAL CLEAR POLITICS (Nov. 18, 2016), [http://www.realclearpolitics.com/articles/2016/11/18/trump\\_won\\_on\\_the\\_issues\\_132383.html](http://www.realclearpolitics.com/articles/2016/11/18/trump_won_on_the_issues_132383.html);

Gerald F. Seib, *Trade, Not Immigrants, May Have Been Key Motivator of Donald Trump's Voters*, WALL STREET J. (November 10, 2016), <https://www.wsj.com/articles/trade-not-immigrants-may-be-key-motivator-of-donald-trumps-voters-1478813590>. See, as well, Carroll Doherty, Pew Research Center, *5 Facts About Trump Supporters' Views of Immigration* (August 25, 2016) at <http://www.pewresearch.org/fact-tank/2016/08/25/5-facts-about-trump-supporters-views-of-immigration/>; Rasmussen Reports, *Most Support Trump's Call for Immigration Restrictions, Screening Test*, (August 19, 2016) at [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/august\\_2016/most\\_support\\_trump\\_s\\_call\\_for\\_immigration\\_restrictions\\_screening\\_test](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/august_2016/most_support_trump_s_call_for_immigration_restrictions_screening_test).

34. Randall Kenney, *The Case for Resistance: There is No Common Ground to be Had with the Trump Administration*, AMERICAN PROSPECT (Dec. 16, 2016), <http://prospect.org/article/case-resistance>.

35. Bryce Covert, *The Trump Economic Policy Plan That Could Work*, THINK PROGRESS (Mar. 30, 2016), <https://thinkprogress.org/the-trump-economic-policy-plank-that-could-work-a37a851dba98#jg1nnwedn>.

36. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 1* (1852) (trans. Saul K. Padover) (1972).

The Trump Administration may abandon immigration and trade as key issues, or it may push them and fail to achieve significant change. It is possible, however, that the Administration will have success on these fronts. If so, there is a populist wiggle room for a farm policy that minimizes dislocation and suffering in immigration policy and develops some sound and interesting farm policies that promote the production of abundant and nutritious food, protect the environment, and further some forms of justice and equality in agriculture.

## Antitrust in Food and Farming Under President Trump

Leah Douglas\*

The American food and farm economy has become extremely consolidated over the last several decades. Four companies control<sup>1</sup> about 80% of beef slaughter, 65% of pork slaughter, and over 50% of chicken processing markets. Anheuser-Busch InBev controls over 50% of the beer consumed in the U.S, even after its divestiture of MillerCoors. Seeds and agrochemicals are controlled by just a handful of firms, and three pending mega-mergers in that sector promise to shrink the number of major global players to four.

Consolidation has devastated many farming and rural communities by driving hundreds of thousands of independent farmers off the land. The rise of factory farming and consolidated animal feeding operations has led to the pollution<sup>2</sup> of air, soil, and waterways. Workers in the food supply chain face low wages and dangerous working conditions, as a recent Oxfam America report<sup>3</sup> details. A wave of mergers has displaced wealth from rural communities and sent it to coastal cities<sup>4</sup> or abroad.

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1. HOWARD, PHILLIP H. CONCENTRATION AND POWER IN THE FOOD SYSTEM: WHO CONTROLS WHAT WE EAT? (2016).

2. Christina Cooke, *North Carolina's Factory Farms Produce 15,000 Olympic Pools Worth of Waste Each Year*, CIVIL EATS (June 28, 2016), <http://civileats.com/2016/06/28/north-carolinas-cafos-produce-15000-olympic-size-pools-worth-of-waste/>.

3. *Lives on the Line*, OXFAM AMERICA 19, 19-34 (Oct. 26, 2015), <https://www.oxfamamerica.org/publications/lives-on-the-line/>.

4. Brian Feldman, *The Real Reason Middle America Should Be Angry*, WASH. MONTHLY (Mar. 2016), <http://washingtonmonthly.com/magazine/maraprmay-2016/the-real-reason-middle-america-should-be-angry/>.

The rise of monopolistic corporate power and control over our food system was not inevitable. On the contrary, we can trace it largely to weak antitrust enforcement by the federal government. Since Ronald Reagan took power in 1981, every administration has embraced an extreme laissez faire approach to regulation. During this period, antitrust regulations have only rarely been used to protect the open markets of farmers and ranchers.

There are many reasons why rural Americans voted in such strong numbers for Donald Trump last November. One of the most important of these reasons was that many of America's farmers and ranchers, as well as those who depend on America's rural economy, believed that the Obama Administration had largely failed to defend rural livelihoods and markets over the last eight years. For many, the distrust of the Democratic Party went back to pro-corporate policies put in place by the Clinton Administration in the 1990s. To understand how to address crucial food policy issues in the age of Trump, we must understand the pro-corporate policies of the last quarter century, a large share of which were adopted by Democratic presidents.

### **How Did We Get Here?**

In 2008, candidates Barack Obama and Joe Biden published a 13-page<sup>5</sup> platform titled *Real Leadership for Rural America*. In it, the two then-senators declared that rural Americans had “not been well-served” by federal policymakers. Under an Obama Administration, they pledged that “misguided” policies would give way to coordinated local and federal efforts to improve the lives and wellbeing of rural communities.

Candidates Obama and Biden promised a better quality of life and an increase in economic opportunity for many. In addition, they promised to “strengthen anti-monopoly laws” and “make sure that farm programs were designed to help family farmers, as opposed to large, vertically integrated corporate

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5. Obama for America, *Real Leadership for Rural America*, 1 (Oct. 16, 2007), <http://sustainableagriculture.net/wp-content/uploads/2015/04/RuralPlanFactSheet-1.pdf>.

agribusiness.”<sup>6</sup> They promised farmers greater access to markets along with more transparency and more control over their own lives.

Early on, President Obama actually tried to deliver on these promises. In 2010, the Department of Justice and the Department of Agriculture hosted<sup>7</sup> a series of listening sessions around the country to hear from farmers about how consolidation affected their ability to make a living. Ranchers reported that meatpackers were exerting great power over their regional economies, which pushed down market prices. Packing plant workers reported receiving lower and lower wages. Chicken farmers reported being paid through an opaque “tournament system,”<sup>8</sup> in which they and their neighbors competed in a zero-sum battle for wages.

In response, Obama’s Agriculture Secretary Tom Vilsack pledged to write rules that would empower the Grain Inspection, Packers, and Stockyards Administration (GIPSA), a body within the USDA meant to enforce the Packers and Stockyards Act (PSA), to fight against the abusive practices of consolidated meatpackers. The PSA was passed in 1921, and was meant to uphold competition in the meat industry. GIPSA was formed in 1994 with the intention of protecting open markets in agriculture, though it had been found<sup>9</sup> to be suppressing investigations into the very companies it was meant to regulate.

The GIPSA rules, then, would mark a new chapter in antitrust enforcement in agriculture.

However, Secretary Vilsack delayed publication of the rules for more than five years, until the last month he was in office. This left too little time for the Obama Administration to get the rules fully implemented. President Trump’s team has yet to implement the rules.

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6. *Id.* at 2.

7. Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (Nov. 2012), <http://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/>

8. *Id.*

9. *Id.*



In addition to that disappointment, farmers saw the Obama Administration back down on Country of Origin Labeling (COOL), which was designed to let consumers know where their meat was raised. The Obama team did so under pressure from the WTO. The retreat on COOL deprived independent ranchers of a crucial tool necessary to maintain a competitive edge in an international beef market increasingly dominated by multinational corporations.

Farmers also saw the Obama Justice Department and Federal Trade Commission fail to address continued consolidation of corporate power in the food system. For example, the Administration allowed mega-deals between Kraft and Heinz, Ahold and Delhaize, JBS's acquisition of Cargill's pork business, and Bayer's pending acquisition of Monsanto – only one of three enormous proposed deals in the agrochemical sector. Each of these mergers displaced jobs and further closed off markets available to rural producers.

### **Trump, So Far**

For much of the Obama Administration, the crisis in rural America was masked by high prices of grains, livestock, and land. By the time Donald Trump took office in January, however, rural Americans and particularly farming communities were facing another economic crisis<sup>10</sup> marked by falling prices for grains, livestock, milk and land. Indeed, many ranches and dairy farms are likely to shutter this year as the effects of several unprofitable seasons pile up.

President Trump hasn't revealed much about his stances on food policies, nor has he spoken about how consolidation might be affecting the agricultural economy. However, we can glean some information from his actions thus far and particularly from his appointments. The signs indicate that Trump is on track to take a bad situation and make it worse.

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10. Jesse Newman & Patrick McGroarty, *The Next American Farm Bust is Upon Us*, WALL ST. J. (Feb. 8, 2017), <https://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488>.

President Trump's Secretary of Agriculture, Sonny Perdue, is perhaps the clearest indication of how his administration will support corporate agricultural interests. During his time as governor of Georgia, Perdue was an ally to the state's large poultry industry. Though not related to the Perdue chicken empire, as governor, Perdue did support expansion<sup>11</sup> for multiple poultry giants. His alliance with Big Chicken has earned him rousing support<sup>12</sup> from the National Chicken Council, the board that represents entrenched interests in the poultry industry. Critics have also pointed to Perdue's campaign donations from Monsanto and Coca-Cola as indications that his agriculture policy will serve the interests of corporate players.

Another indicator is President Trump's appointments in the realm of trade policy. On the campaign trail, President Trump spoke of the need to protect American industry from imports and off-shoring. In office, however, one of his first actions was to name Terry Branstad, the former governor of Iowa, as his ambassador to China. While in office, Branstad's largest donor<sup>13</sup> was the head of a major pork and ethanol production company in Iowa that has interests in Brazil.

Similarly, on banking and finance, candidate Trump often echoed the language of Democratic candidates like Bernie Sanders and attacked Wall Street predators. Since taking office, however, he has elevated<sup>14</sup> Goldman Sachs executives Steven

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11. Press Release, Gov. Sonny Perdue, *Perdue Farms Plans Major Expansion in Georgia*, (July 14, 2005), [http://sonnyperdue.georgia.gov/00/press/detail/0,2668,78006749\\_79688147\\_93050140,00.html](http://sonnyperdue.georgia.gov/00/press/detail/0,2668,78006749_79688147_93050140,00.html).

12. Press Release, National Chicken Council, *NCC Statement on Former Georgia Governor Sonny Perdue's Nomination for Secretary of Agriculture* (Jan. 18, 2017), <http://www.nationalchickencouncil.org/ncc-statement-on-former-georgia-governor-sonny-perdues-nomination-for-usda-secretary/>.

13. Tom Philpott, *Trump Just Wrapped Up a Nice Double Gift to the Meat Industry*, MOTHER JONES Dec. 8, 2016), <http://www.motherjones.com/environment/2016/12/trump-just-wrapped-nice-double-gift-meat-industry>.

14. Matt Porzio, *Trump Appointments Signal Shift on Mega-Mergers, Antitrust Enforcement*, FORBES (Jan. 17, 2017), <https://www.forbes.com/sites/mattporzio/2017/01/17/trump-appointments-signal-shift-on-mega-mergers-antitrust-enforcement/#577d4c396d57>.

Mnuchin and Gary Cohn to run the Treasury and to serve as his most senior advisor on economic issues.

President Trump has yet to name any antitrust regulators, so his philosophy remains unclear. The President has, however, found a key transition advisor in Josh Wright, director of the Global Antitrust Institute and former commissioner for the Federal Trade Commission. Mr. Wright has strongly promoted consolidation and recently supported a proposed merger between Sysco and US Foods before it was blocked by a federal judge in 2015. Further, President Trump's nominee for the Supreme Court, Neil Gorsuch, has a track record<sup>15</sup> of supporting big business and concentrated power over competitive and open markets.

In his one action since the election that concerns antitrust and the rural economy, Donald Trump showed no qualms about signaling approval for a giant merger in exchange for vague promises regarding jobs. On January 17, just days before taking office, President-Elect Trump held a closed-door meeting with executives from agrochemical giants Bayer and Monsanto. The two companies are seeking approval for their \$66 billion merger. After the meeting, Bayer promised the merger would create 3,000 American jobs, despite the fact that there is little evidence that mega-mergers of this size ever result in the creation of new jobs. To the contrary, mergers of this size tend to result in job loss.

### **What Could Trump Do?**

If President Trump does in fact decide to take on consolidation and monopolization and treat each as central economic issues, there are several food policies he could adopt that would demonstrate a real commitment to rural and agricultural communities.

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15. Zephyr Teachout, *Neil Gorsuch Sides With Big Business, Big Donors, and Big Bosses*, WASH. POST (Feb. 21, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/21/neil-gorsuch-always-sides-with-big-business-big-donors-and-big-bosses/>.

### 1. *Kill the Checkoff Tax*

Checkoff tax programs are designed ostensibly to promote the consumption of certain farm commodities by subsidizing research and marketing. Checkoffs, which are administered by the Department of Agriculture, now cover more than 20 different farm products including beef, pork, cotton, soy, and eggs.<sup>16</sup> About \$750 million is collected annually in checkoff taxes.<sup>17</sup>

Over the years, however, several checkoff programs have been accused of misdirecting funds for political activity. In 2015, a Federal Office of Information Act request led to the discovery that executives of the American Egg Board, which oversees the egg checkoff tax, had planned to take down a vegan mayonnaise company they saw as a threat. In 2016, the Ranchers-Cattlemen Action Legal Fund sued<sup>18</sup> Montana's beef checkoff program, alleging that it promotes only conventional beef and not beef produced by smaller-scale, more sustainable growers. Similarly, checkoff taxes have been used<sup>19</sup> to promote the interests of big corporate producers rather than independent farmers.

In July 2016, Senators Cory Booker (D-NJ) and Mike Lee (R-UT) introduced legislation to reform the national checkoff program. The Commodity Checkoff Program Improvement Act would prohibit the Department of Agriculture from contracting with organizations that engage in political activity to run checkoff programs. It would also ban checkoff programs from engaging in anti-competitive behavior and would require more

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16. Gary Williams, et al., *Overview: Commodity Checkoff Programs*, CHOICES, 2<sup>nd</sup> Quarter 2006, at 53, <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf>.

17. Chanjin Chung, et al., *Producer Support for Checkoff Programs: The Case of Beef*, CHOICES, 2<sup>nd</sup> Quarter 2006, at 79, <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf> (stating that the majority of the \$750 million collected annually through mandatory checkoff programs has been invested in generic advertising and promotional programs).

18. Complaint at 3-5, *Ranchers-Cattlemen Action Legal Fund v. Tom Vilsack*, No. 4:16-cv-00041-BMM-JTJ, (U.S. District Court for the District of Montana, May 2, 2016).

19. Sid Mahanta, *Big Beef*, WASH. MONTHLY (Jan. 2014), <http://washingtonmonthly.com/magazine/janfeb-2014/big-beef/>.

transparency around the spending of checkoff funds. These reforms would, among other things, take away the power of corporate meatpackers to use mandatory tax funds for their personal benefit.

President Trump could support this legislation and push for further checkoff reform to rein in what has been turned into a slush fund for corporate meatpackers.

### *2. Protect the Farmer from Unfair Contracts and Manipulation*

As noted above, one of the early actions the Obama Administration took to address consolidation in agriculture was to commit to using GIPSA to fight against unfair contracts and other abusive practices from meatpackers. But Congress, after extensive lobbying from corporate meatpackers, repeatedly blocked funding to GIPSA in a series of appropriations bills. It took a scathing segment by late-night host John Oliver to shame Congress into funding GIPSA in 2016. And it was only in December 2016, in the waning hours of his tenure, that Secretary Vilsack actually published the rules. The rules are still in limbo, however, due to President Trump's early action to freeze federal regulations.

President Trump could approve the Farmer Fair Practices Rules and push Congress to continue to fund GIPSA's implementation of the PSA. These actions would demonstrate a commitment to the rural economy and show support from the President to the to standing up for the rural communities who helped elect him.

### *3. Prohibit Meatpackers from Owning Land and Animals*

For much of the 20<sup>th</sup> century, state level laws across America prohibited slaughterhouses from owning animals and land. Those laws, called "packer bans,"<sup>20</sup> aimed to ensure that

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20. Leah Douglas, *The Last State Standing Against Corporate Farming Weighs a Change*, FORTUNE (Mar. 24, 2015), <http://fortune.com/2015/03/24/nebraska-hog-farming-packer-ban/>.

farmers would have access to fair and open markets without having to compete with herds owned by the meatpackers themselves. Direct ownership allows these companies to regulate supplies and prices, and ultimately to cut independent ranchers off from the market.

Beginning in the early 2000s, however, those laws were steadily overturned due to lobbying and political influence of giant meatpackers. In one recent instance, lawmakers in Nebraska voted to overturn the state's packer ban, a 15-year-old law that prevents corporations from owning land and livestock in the state. Nebraska was only the latest in a series<sup>21</sup> of efforts to overturn such legislation, which at one time existed in nearly every major agricultural state. One of the main backers of that effort is the pork processor Smithfield Foods, which is now owned by the Chinese company WH Group.

In late 2016, Senator Chuck Grassley (R-IA) introduced<sup>22</sup> legislation that would ban meatpackers anywhere in the United States from owning animals. A national packer ban would limit the power of meatpackers to own their entire supply chain, and thereby protect competitive markets for farmers. President Trump, by supporting this legislation, would demonstrate to his supporters that he will seriously work to loosen the grasp of the monopolistic meatpackers on rural farmers and communities.

#### *4. Let Eaters Know Where Their Meat Comes From*

Consumers have come to expect transparency about the origins of many products. Take clothing, where every garment contains a tag that tells you where your shirt or pants were made. From 2009 to 2015, consumers were granted this transparency when it came to knowing where their meat had been grown and slaughtered.

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21. Leah Douglas, *Nebraska's Livestock Market Faces Death by Big Meat Lobbying*, FORTUNE (Feb. 5, 2016), <http://fortune.com/2016/02/05/nebraska-livestock-market/>.

22. Press Release, Senator Chuck Grassley, Grassley Presses for Ban on Packer Ownership of Livestock, (May 11, 2016), <http://www.grassley.senate.gov/news/news-releases/grassley-presses-ban-packer-ownership-livestock>.

Country of Origin Labeling (COOL) went into effect for meat products in 2009. Independent American ranchers and farmers broadly supported COOL because they saw an advantage by being able to market and advertise American-raised meat.

But the large-scale corporate processors that dominate the U.S. meat industry all operate in multiple countries. Thus, it should come to no surprise, that these companies have lobbied both inside and outside the United States to overturn the COOL law. In 2015, the WTO decided in favor<sup>23</sup> of a lawsuit brought by Canada and Mexico that alleged the labeling put those countries' meats at a disadvantage in the American market. The Obama Administration opted not to challenge the WTO decision, despite President Obama's strong endorsement of COOL during his candidacy.

President Trump should seek to reinstate COOL, thereby shoring up domestic producers and American-grown meat. Bringing COOL back would equip independent ranchers with a tool to maintain a competitive edge against monopolistic meatpackers.

## **Conclusion**

A majority of rural Americans voted for Donald Trump last November hoping for a president who would deliver on promises of economic renewal and prosperity. Without addressing how monopolistic corporate power is devastating the rural economy, Trump has little hope of demonstrating his commitment to those voters.

President Trump has ample opportunity to live up to his promises to help independent farmers and ranchers. Thus far, however, he has shown little indication as to whether he intends to take on the concentrations of power that threaten America's

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23. Linda Wheeler, *WTO Shoots Down US Meat-Labeling Rule*, THE HILL (May 18, 2015), <http://thehill.com/regulation/242385-wto-rules-against-us-appeal-to-keep-country-of-origin-labeling-rule>.

rural communities. His appointment of a pro-corporate Secretary of Agriculture and reliance on advisers whose pro-big business ideologies are well known suggest President Trump will only double-down on the lax antitrust regulation of the Obama years.

In the near term, this will harm independent farmers and ranchers by squeezing their wages and restricting their market access, perhaps to the point of bankruptcy for some. In the longer term, it may well mean that political discontent in America's heartland will not only continue – but grow more extreme.



## Will the Trump Administration Support Farmers Facing FSMA Compliance?

Sophia Kruszewski\*

As President Trump settles into the White House, the fate of many victories that sustainable food and farm advocates have achieved over the last Administration, and indeed the last several decades, rests in the balance. And although President Trump rode in on a wave of rural voters, significant questions and concerns remain regarding how farmers will fare under this new Administration and its policies. In at least one arena, however, a decidedly anti-regulatory Administration with a platform focused on reducing costs for small businesses could ultimately benefit America's family farmers by addressing two severe and costly deficiencies in new regulations promulgated under the Food Safety Modernization Act (FSMA).<sup>1</sup>

President Obama signed FSMA into law in early 2011 and, since early 2013, the Food and Drug Administration (FDA) has been busy finalizing regulations that affect significant portions of the supply chain.<sup>2</sup> Throughout the legislative and regulatory processes that led to these final regulations, many concerns were raised regarding the impacts of these regulations on small farms and food businesses, beginning and socially disadvantaged farmers, conservation and organic practices, and local and regional food system development.<sup>3</sup> The FDA finalized two of

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1. *See generally* FDA Food Safety Modernization Act, Pub. L. No. 111-353, 21 Stat. 3885 (codified as amended in scattered sections of 21 U.S.C) (2011).

2. *See* FDA Food Safety Modernization Act, FOOD AND DRUG ADMIN., <http://www.fda.gov/Food/GuidanceRegulation/FSMA/default.htm> (last updated Jan. 31, 2017).

3. *See e.g.*, David Pierson, FDA Revises New Food Safety Rules After Farmers Object, L.A. TIMES (Dec. 19, 2013), <http://articles.latimes.com/2013/dec/19/business/la-fi-mo-fda-delay-20131220>; Tom Philpott, 4 Foods That Could Disappear If New Food Safety Rules Pass, MOTHER JONES (Nov. 6, 2013), <http://www.motherjones.com/tom-philpott/2013/11/will-new-food-safety-law-small-farms-organic-FSMA>; David Pierson, FDA Plans to Revise Landmark Food Safety Law, L.A. TIMES (Sept. 19, 2014), <http://www.latimes.com/business/la-fi-fda-food-safety-20140919->

the key regulations most relevant to farmers – the Produce Safety Rule and the Preventive Controls for Human Food Rule – in September and November, 2015, respectively.<sup>4</sup>

Though the rules largely adhere to Congress' mandate that FSMA regulations be flexible, scale-appropriate, and both science- and risk-based,<sup>5</sup> two aspects of the regulations in particular stand out as contrary to these requirements: the Produce Safety Rule's irrigation water standard and the Preventive Controls Rule's onsite audit requirement. Each of these provisions stand to significantly increase the costs of compliance for farmers, with costs disproportionately shouldered by the smallest and most vulnerable operations.

At this point, one can only speculate as to how the new Administration will approach food safety. President Trump's newly-appointed head of the Department of Health and Human Services, Rep. Tom Price (R-GA), voted against FSMA's passage.<sup>6</sup> Policy documents released and then withdrawn during the campaign spoke of how a Trump Administration would do away with the FDA "food police" and limit "inspection overkill."<sup>7</sup> While those policy statements disappeared prior to

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story.html; Dan Charles, Organic Farmers Bash FDA Restrictions on Manure Use, NAT'L PUB. RADIO (Nov. 21, 2013), <http://www.npr.org/sections/thesalt/2013/11/21/246386290/organic-farmers-bash-fda-restrictions-on-manure-use>; Evan Halper, Planned Food Safety Rules Rile Organic Farmers, L.A. TIMES (Feb. 22, 2014), <http://articles.latimes.com/2014/feb/22/nation/la-na-food-safety-20140223>; Carolyn Lochhead, Food Safety Act Sows Anger With Small Farmers, S.F. GATE (Nov. 24, 2013), <http://www.sfgate.com/science/article/Food-safety-act-sows-anger-with-small-farmers-5006768.php>

4. See generally Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food, 80 Fed. Reg. 55907 (Sept. 17, 2015) ("Preventive Controls Rule"); See generally Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 80 Fed. Reg. 74353 (Nov. 27, 2015) ("Produce Safety Rule").

5. See 21 U.S.C. §§ 350h(a)(3)(1)(A), h(b)(1), h(c)(1)(B), h(c)(1)(D); 21 U.S.C. §§ 350g(n)(1)(A), g(n)(3)(A), g(n)(3)(C).

6. Helena Bottemiller Evich, Checking out Price's record on food policy, POLITICO (Nov. 30, 2016), <http://www.politico.com/tipsheets/morning-agriculture/2016/11/checking-out-prices-record-on-food-policy-217626>.

7. Helena Bottemiller Evich, Trump Calls for Eliminating FDA Food Safety Regs, POLITICOPRO (Sept. 15, 2016), <https://www.politicopro.com/agriculture/whiteboard/2016/09/trump-calls-for-eliminating->

the election,<sup>8</sup> and President Trump has since made no indication that he wishes to repeal FSMA or withdraw the new food safety rules,<sup>9</sup> a significant opportunity remains to revisit these regulatory provisions that are so onerous for farmers and so clearly contrary to FSMA's mandate.

### *1. Revise the Irrigation Water Standard*

FSMA directs the FDA to establish “minimum science-based standards . . . based on known food safety risks” for raw fruits and vegetables<sup>10</sup> and “provide sufficient flexibility to be applicable to various types of entities engaged in production and harvesting of fruits and vegetables . . . including small businesses and entities that sell directly to consumers, and be appropriate to the scale and diversity of the production and harvesting of such commodities.”<sup>11</sup> While many of the provisions in the Produce Safety Rule meet these requirements for a flexible, risk- and science-based approach, the agricultural water quality standard fails to satisfy these requirements, resulting in a standard that is overly prescriptive and costly for farmers.

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fda-food-safety-regs-077149.

8. *Id.*

9. The President's recent Executive Order “Promoting Agriculture and Prosperity in Rural America” does create an Interagency Task Force directed to “identify legislative, regulatory, and policy changes” that may need to be made to “ensure that regulations and policies implementing Federal food safety laws are based on science and account for the unique circumstances of farms and ranches,” among others. Exec. Order No. 13790 82 Fed. Reg. 19613, 20237–8 (April 28, 2017). This is likely to be focused more on modifications than outright repeals, however, as evidenced by the remarks of Special Assistant to the President for Agriculture, Trade, and Food Assistance Ray Starling, during a press briefing prior to the signing of the Executive Order. Ray Starling, *On-the-Record Press Briefing on the President's Exec. Order Promoting Agric. and Rural Prosperity*, April 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/04/24/record-press-briefing-presidents-executive-order-promoting-agriculture>. When asked about specific policies that the Executive Order might target, Starling pointed out FSMA implementation, noting that “for the first time over the course of this administration, FDA will be responsible for—farm regulation with regard to things like water and soil additives. And so there's a lot of talk and concern in the ag community that we make sure those regulations, as they are being created and promulgated, that they recognize the difference in small farms and big farms, the difference in water sources, the difference in terms of application so that one size does not fit all.” *Id.*

10. 21 U.S.C. § 350h(b)(1).

11. 21 U.S.C. § 350h(a)(1)(A).

The FDA uses the Environmental Protection Agency's (EPA) recreational water quality standard as the basis for its irrigation water standard.<sup>12</sup> Yet, the EPA standard was not designed to consider the hazards posed by exposure to irrigation water from consuming fresh produce; routes of infection and pathogen mortality rates differ, as do the hazards associated with recreational water use and consuming fresh produce. The FDA has acknowledged the mismatch,<sup>13</sup> as well as the fact that its approach does not account for differences in risk associated with irrigation practices for different commodities.<sup>14</sup> Despite these severe limitations and the lack of science regarding epidemiological data correlated to irrigation water, farmers will now be held, without scientific justification, to the EPA's recreational water quality standard for their irrigation water.<sup>15</sup>

To date, the FDA has maintained that it is appropriate to generalize illness rates from recreational use to agricultural use, insinuating that the industry is to blame for the lack of consensus as to appropriate alternatives.<sup>16</sup> But it is unrealistic to expect the public to provide the appropriate microbial standard given the clear lack of scientific data on the subject. The FDA has a mandate to establish risk- and science-based standards and, while there is science supporting the EPA's standard *as it relates to recreational water*, that same science should be assessed for its relevance to the risks posed by agricultural water. If a risk assessment is necessary to determine the appropriateness of applying the best available science for recreational water to agricultural water, then FSMA requires the FDA to ensure that such a risk assessment is performed. These standards mark the

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12. See 80 Fed. Reg. 74440.

13. *Id.* ("We agree that the RWQC (which are based on data collected from recreational waters), in and of themselves, do not sufficiently reflect the circumstances associated with agricultural water used in produce production."); see also 78 Fed. Reg. 3563. ([A]dverse health outcomes as a consequence of immersion while swimming in contaminated water may be different from those as a result of eating produce irrigated with contaminated water.").

14. 79 Fed. Reg. 58443.

15. *Id.* ("The EPA analysis supporting the RWQC, while not perfect for our purposes, was developed using the necessary scientific rigor and describes illness rates due to incidental ingestion that can be generalized across different bodies of water.").

16. See 79 Fed. Reg. 58443.

first time the FDA will be imposing specific regulatory requirements on farms that grow covered produce. Simply put, a “this is the best we have” approach does not provide adequate assurance or protection to the farmers who must bear the associated costs.

Notably, during the rulemaking process, the FDA acknowledged that insufficient science and potential adverse impacts on the industry limited its ability to finalize a standard related to the use of biological soil amendments of animal origin.<sup>17</sup> Rather than finalizing an inappropriate standard lacking a sufficient basis in science or a proper risk assessment, the FDA deferred the final standard altogether. Instead, the FDA is currently gathering new data and conducting a risk assessment to properly account for variations in region, commodity, and agro-ecological practices that could meaningfully impact the final standard.<sup>18</sup> Similarly, the FDA should come up with a process for developing the science necessary to support an appropriate agricultural water standard.

In addition to an inappropriate microbial water quality standard, the mandated testing frequency is not risk-based. In the original proposed Produce Safety Rule, the FDA acknowledged that testing “frequency should reflect the risk” posed by a water source, and should be “dependent upon the results of an assessment of the risks posed by your agricultural water system.”<sup>19</sup> In practice, however, the agency’s approach requires all farmers to adhere to a complicated and overly prescriptive testing regime that does not account for variations in critical risk factors such as climate, location, farming system, and water source. Ultimately, this approach requires farmers to excessively and unnecessarily test water at a significant cost and without a sufficient correlation to food safety.

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17. 80 Fed. Reg. 74663.

18. Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Supplemental Notice of Proposed Rulemaking, 79 Fed. Reg. 58434, 58460 (Sept. 29, 2014).

19. Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Proposed Rule, 78 Fed. Reg. 3504, 3560 (Jan. 16, 2013).

For a farmer whose water is consistently below the standard, or for a farmer whose water consistently tests above the standard, the requirement to repeatedly test the water provides no additional food safety benefit. The rule not only fails to recognize the highly variable natural of many water sources, but also that the quality of water from these sources is often outside the farmer's control. As a result, this testing regime requires farmers to shoulder the burden of a problem for which they are not directly responsible, and over which they may have little to no control. Increasing the number of tests a farmer must take will not improve upstream water quality nor will it increase food safety. Rather, it will only increase costs.

The FDA's Final Regulatory Impact Analysis estimates that the costs of the water inspection, testing, treatment, and recordkeeping requirements alone will average \$1,006 annually for very small farms, \$1,273 for small farms, and \$1,869 for large farms.<sup>20</sup> Yet, these figures do not consider fees associated with shipping and testing water samples, lost labor, or the time it will take to understand the complex calculations farmers are expected to do with their water test results. An owner-operator farm in a rural area may spend three to five hours, or more, in the car driving round-trip to a certified lab to have a sample tested. That is time lost working the farm. For farmers in more remote areas, it can be particularly difficult and expensive to access certified labs to test samples.

This overly prescriptive approach is out of sync with the rest of the Produce Safety Rule and is, without question, the most challenging aspect of the rule for farmers to comprehend and implement. In addition, this approach fails to meet FSMA's risk-based mandate. If the Trump Administration is truly committed to reducing regulatory burdens on small businesses, particularly farmers, and to improving economic prosperity in rural areas, then it will seize this opportunity to protect farmers from this unfunded mandate by withdrawing and then re-

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20. FOOD & DRUG ADMIN., FINAL REGULATORY IMPACT ANALYSIS, FINAL REGULATORY FLEXIBILITY ANALYSIS, AND UNFUNDED MANDATES REFORM ACT ANALYSIS FOR THE STANDARDS FOR THE GROWING, HARVESTING, PACKING, AND HOLDING OF PRODUCE FOR HUMAN CONSUMPTION (2015) at Table 20, Table 27.

proposing a revised water standard sufficiently grounded in science and risk.

Notably, early in 2017, current acting FDA Commissioner Stephen Ostroff signaled that the agency is willing to take a second look at the standard, speaking to a room full of state agriculture secretaries and commissioners.<sup>21</sup> In March, the agency followed up with a public statement confirming their intention to reconsider the standard based on “feedback that the FDA has received [] that some of these standards, which include numerical criteria for pre-harvest microbial water quality, may be too complex to understand, translate, and implement.”<sup>22</sup> At this point, further details have not been provided regarding the extent of potential revisions or the process that the FDA will use in revisiting the water standard; however, this shift in thinking should not be underestimated.

## *2. Avoid Over-reliance on Third Party Audits*

Supplier audits are an increasingly common practice in the marketplace. However, industry<sup>23</sup> and consumer<sup>24</sup> groups alike caution against equating audits with inspections or over-emphasizing audits as indicators of food safety compliance. Audits are also costly – in time and labor – particularly for smaller farming operations and food businesses. Indeed, it was in recognition of these concerns<sup>25</sup> that Congress included clear

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21. Helena Bottemiller Evich, FDA to Revisit Produce Water Standards, POLITICOPRO, February 1, 2017, <https://www.politicopro.com/agriculture/story/2017/02/fda-to-revisit-produce-water-standards-146644>.

22. FOOD & DRUG ADMIN., FDA CONSIDERING SIMPLIFYING AGRICULTURAL WATER STANDARDS, March 20, 2017, available at <https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm546089.htm>.

23. Bob Whitaker, Food Safety Audits: Do We Have the System Backwards?, FOOD SAFETY NEWS (March 30, 2015), <http://www.foodsafetynews.com/2015/03/food-safety-audits-do-we-have-the-system-backward/#.WJCWbJLfQgU>.

24. Dan Flynn, Third-party Auditor Certification: Not the Only Tool in the Toolkit, FOOD SAFETY NEWS (June 6, 2016), <http://www.foodsafetynews.com/2016/06/127208/#.WJCVXZLfQgV>.

25. See Bennet Flags Concerns About FSMA Farm Audits, POLITICOPRO (Aug. 31, 2015), <https://www.politicopro.com/agriculture/whiteboard/2015/08/sen-bennet-flags-concerns->



language in FSMA that prohibits the FDA from requiring regulated entities<sup>26</sup> to hire third parties to identify, implement, certify, or audit entities to ensure compliance with new regulations for food facilities and produce farms.<sup>27</sup>

Despite the clear statutory prohibition against audits, the FDA included audits as a required supplier verification method in certain circumstances in the Preventive Controls Rules.<sup>28</sup> Further, the FDA continues to emphasize that “reliable” audits are essential to its compliance strategy for produce farms.<sup>29</sup> This doublespeak, combined with pressures from buyers to obtain third-party food safety certifications under the misunderstanding that FSMA somehow requires it, is forcing farmers to bear costs of implementing FSMA that Congress never intended them to carry.

The FDA’s final regulatory impact analysis for the Preventive Controls Rule estimated the costs of this provision on farms. Considering the audit, travel time, opportunity costs, and corrective actions needed, the average audit will cost a very small farm \$5,699; a small farm \$7,474; and a large farm \$8,921.<sup>30</sup> That figure is *in addition to* other costs the farm will

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about-fsma-farm-audits-059721.

26. 21 U.S.C. 350g(n)(3)(D) (under the Produce Rule, the regulated entities to which this protection applies are “businesses” covered under the rule – e.g. covered produce farms); 21 U.S.C. 350h(c)(1)(E) (under the Preventive Controls rule, the regulated entities protected by this provision are “facilities,” which could include farms that are mixed-type facilities, in addition to traditional food facilities).

27. 21 U.S.C. § 350g(n)(3)(C)-(D); (FDA’s rules must also be flexible, and minimize the number of separate standards that apply to separate foods); 21 U.S.C. § 350h(c)(1)(E).

28. 21 C.F.R. § 117.435 (Both the Preventive Controls Rule for Human Food and the rule for Animal Food contain supply chain programs and the audit requirement. This article is focused only on the Human Food rule).

29. 80 Fed. Reg. 74521 (“Thus, as a complement to State and FDA inspections of farms, we intend to leverage the conduct of reliable third-party farm audits by USDA and others, as well as compliance with marketing agreements, with a goal of annual verification of farms that must comply with the rule.”).

30. FOOD & DRUG ADMIN., PART 117. FSMA FINAL RULEMAKING FOR CURRENT GOOD MANUFACTURING PRACTICE AND HAZARD ANALYSIS AND RISK-BASED PREVENTIVE CONTROLS FOR HUMAN FOOD: FINAL REGULATORY IMPACT ANALYSIS, FINAL REGULATORY FLEXIBILITY ANALYSIS, FINAL UNFUNDED MANDATES REFORM ACT ANALYSIS, AND FINAL PAPERWORK REDUCTION ACT ANALYSIS (2015), Table 35 at 110-11.



incur to comply with the Produce Safety Rule or Preventive Controls Rule. And while the FDA estimates that only 5% of covered farms would be required to be audited pursuant to the supply chain program requirements,<sup>31</sup> the reality is that this statutory provision, coupled with the agency's stated reliance on third party audits for Produce Safety Rule compliance, means that third party audits will become the default standard. By requiring an audit under any circumstances, this provision violates Congress' express prohibition against audits as well as its intent to minimize costs and burdens on small farms.

The Trump Administration has an opportunity to prevent this outcome and demonstrate its support for America's farmers. Specifically, by directing the FDA to review and redraft the Preventive Controls Rule's supply chain program, the Administration can ensure conformity with FSMA's statutory intent that no farm or food facility be required to obtain an audit to certify compliance with the law. One option is to withdraw the supply chain program from the final rule and instead issue it as guidance. Regardless, an outreach campaign is necessary to inform the regulated industry, particularly buyers and other food facilities, about what the Preventive Controls Rules do and do not require regarding supplier verification. This is necessary in order to avoid the unintended burdens of a *de facto* audit requirement, particularly on small-scale producers.

Of course, third-party certification systems have a role to play. The U.S. Department of Agriculture's (USDA) GAP/GHP food safety certification program is a prime example of a farmer-friendly certification option. In fact, USDA has recently expanded and modified their approach to these audits to meet the needs of food hubs, farmer cooperatives, and other multi-owner local-food businesses.<sup>32</sup> As a businessman who ran on a platform of supporting small business owners, President Trump

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31. *Id.*

32. Press Release, U.S. Dep't. of Agric., USDA Announces New GroupGAP Program for the Produce Industry, Helping Smaller Producers Reach New Markets (April 4, 2016), <https://www.ams.usda.gov/press-release/usda-announces-new-groupgap-program-produce-industry-helping-smaller-producers-reach>.

must appreciate the innovative ways in which industry can address regulatory gaps. Thus, if the FDA is relying on third party audits due to concerns about resource allocation,<sup>33</sup> it would seem that the President would find favor in an alternative means by which smaller operations could verify compliance. For example, self- and second-party assessments can provide valuable information on a farmer's comprehension of food safety risks and responsibilities. Accessible and widely available training and educational opportunities – tailored to the unique needs and attributes of farms and food enterprises of varying types and sizes – would build capacity among producers, promote a deeper understanding of risk management practices, and encourage compliance among newly-regulated entities. This is particularly needed at the farm level, where many operations are facing both market and regulatory pressures to demonstrate compliance with food safety standards. For many, this is their first time dealing with complex, regulatory processes.

By expanding education and outreach, and using self and second-party assessments in conjunction with farmer-focused third-party systems, we can create a food safety system that builds both consumer trust and farmer buy-in. Neither the public nor farmers should be short-changed by a food safety system that relies on questionable, expensive third-party audits – particularly when Congress has made it clear that the costs of these new regulations should not be disproportionately carried by farmers. Addressing these issues would be quite consistent with Candidate Trump's campaign, but whether and to what extent President Trump's Administration takes them on remains to be seen.

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33. FDA, Operational Strategy for Implementing the FDA Food Safety Modernization Act (FSMA), U.S. FOOD & DRUG ADMIN. (Mar. 2, 2014), <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm395105.htm>. (“Another reality shaping FDA's approach to produce safety is that there is no reasonable expectation FDA will have the resources to make routine on-farm inspection a major source of accountability for compliance with produce safety standards. For this reason, FDA's implementation of produce safety standards will entail a broad, collaborative effort to foster awareness and compliance through guidance, education, and technical assistance, coupled with accountability for compliance from multiple public and private sources, including FDA and partner agencies, USDA audits, marketing agreements, and private audits required by commercial purchasers.”).

## Farming and Eating

Margot J. Pollans\*

“The cities have not made the country. On the contrary, the country has compelled cities. Without the former the latter could not exist. Without farmers there could be no cities.”<sup>1</sup>

The infrastructure of food in modern society—refrigeration, food processing, transportation—and the global scale of the “hinterland” obscure the complex, mutually dependent relationship between cities and rural lands. Links remain, however. Most cities no longer rely on proximate rural lands for their food supply. They do depend, however, on distant agricultural lands where, despite a recent upsurge in urban agriculture, the vast majority of food is produced. Likewise, farmlands remain dependent on urban areas—where the vast majority of food customers live.

This interdependence generates a strong mutual interest between urban and agricultural communities. The long-term viability of the agricultural sector is essential both for rural livelihoods and for sustenance. Threats to this viability include climate change-induced extreme weather (including drought, flooding, heat waves, freezes, etc.), invasive species, declining soil health, and loss of pollinators, among others.<sup>2</sup>

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1. WILLIAM CRONON, *NATURE’S METROPOLIS*, 97 (1991) (quoting a Chicago resident from 1893).

2. See Sonja J. Vermeulen et al., *Climate Change and Food Systems*, 37 *ANNUAL REV. ENVIRON. RESOUR.* 195, 202-08 (2012) (providing a survey of literature evaluating potential consequences of climate change for agriculture); Olivier de Schutter, *Agroecology and the Right to Food*, Report presented at the 16th Session of the United Nations Human Rights Council [A/HRC/16/49] at 3 (concluding that “increasing food production to meet future needs, while necessary, is not sufficient. . . . [S]hort-term gains will be offset by long-term losses if it leads to further degradation of ecosystems, threatening future ability

Modern food production practices create a second direct link between urban and rural areas. As I have discussed elsewhere, farming practices generate environmental harms that impose a direct cost on both urban and rural populations.<sup>3</sup> Drinking water is the best example of this.<sup>4</sup> All across the country, agricultural pollution such as arsenic, nitrates, and microbial contaminants migrate from fields and feedlots into source water for municipal water supplies and private wells. This contamination threatens public health and drives up drinking water costs.<sup>5</sup> The weight of these externalities is also borne by agricultural communities, including farm workers, farm owners and operators, and other members of rural communities.<sup>6</sup> These two threads—shared dependence on agricultural productivity and shared weight of agriculture’s externalities—remind us that the food system is a connected whole.

Despite these common threads, the dominant perception in the United States today is that urban and rural agricultural interests are in opposition and are possibly even mutually exclusive. This perception is false. This essay argues that the “us versus them” rhetoric that dominates food and agriculture policy today drives a wedge between farmers and food consumers. Together, farmers and food consumers could form a powerful coalition to challenge the true obstacle to sustainable and equitable food production: concentration of market and political

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to maintain current levels of production”).

3. Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195 (2016).

4. But it is not the only example. Others include contribution to smog in urban and rural areas. See, e.g., Nate Berg, *Why Does California’s Central Valley Have Such Bad Air Pollution*, CITY LAB (Sept. 28, 2011), <http://www.citylab.com/weather/2011/09/behind-pollution-californias-central-valley/207/>; Agriculture also makes significant contributions to global greenhouse gas emissions, totaling around eight percent in the U.S. EPA, Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015, at 5-1 (Feb. 15, 2017), [https://www.epa.gov/sites/production/files/2017-02/documents/2017\\_complete\\_report.pdf](https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf); Sonja J. Vermeulen, Bruce M. Campbell, & John S.I. Ingram, *Climate Change and Food Systems*, 37 ANNU. REV. ENVIRON. RESOUR. 195 (2012).

5. Pollans, *supra* note 3, at 1221-23.

6. Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations*, UNION OF CONCERNED SCIENTISTS, 5 (April 2008), [https://www.organicconsumers.org/sites/default/files/cafos\\_uncovered.pdf](https://www.organicconsumers.org/sites/default/files/cafos_uncovered.pdf).

power elsewhere along the food chain.<sup>7</sup>

Even within the food movement, demonization of the agriculture industry is common. In the last decade, the food movement has identified concerns with a long list of production-side food system problems—the prevalence of unhealthy processed foods and their public health impacts, especially among children; exploitative labor practices throughout the supply chain; inhumane animal welfare practices; genetic modification; and a host of environmental problems that result from extensive monoculture.<sup>8</sup> Using a combination of market pressure and political advocacy, various fronts of the food movement have achieved commitments for reduced use of animal antibiotics, better living conditions for pigs and chickens, mandatory composting, soda taxes, and much more.<sup>9</sup> As consumer focus on food has increased, environmental organizations have also entered the fray, launching food and agriculture programs that seek to address agricultural pollution.<sup>10</sup>

The food movement's best-known leaders have reflected this critical attitude toward the food industry. For example, in an op-ed in the *New York Times*, Mark Bittman wrote: "Many food

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7. This includes the agricultural input (pesticides, seeds, fertilizer, farm equipment), food distribution and processing, food retail, and restaurant sectors.

8. Michael Pollan, *Food Movement, Rising*, N.Y. BOOKS (June 10, 2010), <http://www.nybooks.com/articles/2010/06/10/food-movement-rising/>.

9. Jennifer Hackett, *Subway Joins Other Fast-Food Giants to Cut Back on Antibiotics*, SCIENTIFIC AMERICAN, (Oct. 28, 2015), <https://www.scientificamerican.com/article/subway-joins-other-fast-food-giants-to-cut-back-on-antibiotics/>; Cal. Health & Safety Code § 25990 (Deering 2016) (animal living conditions); Prevention of Farm Animal Cruelty Act, 2016 Mass. Acts 333; Mandatory Recycling and Composting Ordinance, S.F., Cal. Ordinance 100-09 (June 9, 2009); 310 Mass. Code Regs. 19.017(3) (2016) (food waste ban); Philadelphia, PA, Code § 19-4100 (2016) (soda tax); Oakland, Cal., Ordinance 86161 (May 3, 2016) (soda tax).

10. Peter Lehner, *Fixing Our Broken Food System*, EARTHJUSTICE BLOG (Mar. 25, 2016), <http://earthjustice.org/blog/2016-march/fixing-our-broken-food-system>. Sierra Club, NRDC, and other environmental organizations have all started agriculture programs in the last ten years. One of Sierra Club's program, Fair Table, supports a transition to agricultural methods that maximize biodiversity and preserve natural resources. See Sierra Club, *Fair Table*, SIERRA CLUB, <http://www.sierraclub.org/fair-table> (last accessed Feb. 27, 2017). For a comprehensive list of Sierra Club's agriculture and food policies and practice guidelines, see Sierra Club, *Agriculture and Food*, SIERRA CLUB, <http://www.sierraclub.org/policy/agriculture/food> (Feb. 28, 2015).

production workers labor in difficult, even deplorable, conditions, and animals are produced as if they were widgets. It would be hard to devise a more wasteful, damaging, unsustainable system.”<sup>11</sup> In that same newspaper, Michael Pollan recently commented: “What ideas does Big Food have? One, basically: ‘If you leave us alone and pay no attention to how we do it, we can produce vast amounts of acceptable food incredibly cheaply.’”<sup>12</sup> Dan Barber, another leading food movement voice, recently called monoculture reprehensible.<sup>13</sup> According to the food movement narrative, industrial farming is responsible for many of our food system’s ailments.<sup>14</sup>

Although the criticism is typically aimed at “big food,” it often paints with a broad brush.<sup>15</sup> This makes it easy for “big food” advocates to characterize the food movement as anti-farmer. As John Collison of the Oklahoma Farm Bureau, explained, “We’re the ones that raise millions and millions of animals every single day, and take care of them. They’re our livelihood. We’re not going to treat our business badly.”<sup>16</sup> During the 2012 Farm Bill reauthorization process, then-House Agriculture Committee Chairman Congressman Frank Lucas, R-Okla., echoed this sentiment in stating his opposition to coupling conservation requirements to eligibility for crop insurance: “Farmers and ranchers are the best possible stewards of their

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11. Mark Bittman, *A Food Manifesto for the Future*, N.Y. TIMES (Feb. 1, 2011), <http://opinionator.blogs.nytimes.com/2011/02/01/a-food-manifesto-for-the-future/>.

12. Michael Pollan, *Big Food Strikes Back: Why did the Obamas Fail to Take on Corporate Agriculture?*, N.Y. TIMES (Oct. 5, 2016), [https://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html?\\_r=0](https://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html?_r=0).

13. Author’s notes from the talk (Dec. 9, 2016). Monoculture is defined as “the cultivation or growth of a single crop or organism especially on agricultural or forest land.” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/monoculture>.

14. See, e.g., Wes Jackson, Letter in LETTERS TO A YOUNG FARMER: ON FOOD FARMING, AND OUR FUTURE (MARTHA HODGKINS, ED. 2017) (describing the logic of farming in an industrial society, focusing on yield, technology, and industrialization).

15. “Big food” refers to the highly concentrated segments of the food industry, including food processors, distributors, and retailers.

16. Logan Layden, *Oklahoma ‘Right to Farm’ Push About More Than Agricultural Practices*, KGOU (Feb. 26, 2015), <http://kgou.org/post/oklahoma-right-farm-push-about-more-agricultural-practices>.

land. They are already successfully using conservation practices to protect our natural resources.”<sup>17</sup> Given these defensive responses to food movement rhetoric, it is not surprising many farmers—only a very small percentage of whom could reasonably be characterized as “big food” insiders<sup>18</sup>—find the movement offensive.

The Trump administration has not only further politicized this divide, but also has picked a side. The Trump-Pence campaign adopted and sharpened the existing urban versus rural, environment versus farmer, us versus them rhetoric, going so far as to accuse the EPA of “doing all [it] can to take [farmers’] land, [] profits, and [] livelihood.”<sup>19</sup> A list of talking points, obtained by Politico during the campaign, included the following statements:

- “The Trump-Pence Secretary of Agriculture will defend American Agriculture against its critics, particularly those who have never grown or produced anything beyond a backyard tomato plant.”
- “The Trump-Pence administration will use the best available science to determine appropriate

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17. Press Release, House Committee on Agriculture, Lucas Applauds American Farm Bureau’s Opposition to Linking Conservation Compliance to Crop Insurance (Oct. 9, 2013), <http://agriculture.house.gov/news/documentsingle.aspx?DocumentID=1228>. See also Kip Tom, Food Tank Panel, <https://www.youtube.com/watch?v=QR6ptMyh8FM>, (starting at 19:17: “Our family has been on the farm since 1837, and I’ve got 8 generations behind me farming, and it is important to them to protect that resource as anybody, because we want to have them for future generations.”)

18. USDA, *Family Farms are the Focus of New Agriculture Census Data*, (March 17, 2015), <https://www.usda.gov/wps/portal/usda/usdahome?contentid=2015/03/0066.xml> (noting ninety-seven percent of farms are family owned).

19. Talking Points, Document on File with the Author. Perhaps the epitome of the urban versus rural entrenchment is the post-election dialogue on such sites as Breitbart News, minimizing the significance of the split between the electoral college and the popular vote by pointing to the fact that Hillary Clinton won primarily in “elite coastal counties” whereas Donald Trump won “by a landslide in the heartland.” Michael Patrick Leahy, “Donald Trump Won 7.5 Million Popular Vote Landslide in the Heartland,” *Breitbart News* (Nov. 15, 2016), <http://www.breitbart.com/big-government/2016/11/15/donald-trump-won-7-5-million-popular-vote-landslide-mainstream-america/>.

regulations for the food and agriculture sector; agriculture will NOT be regulated based upon the latest trend on social media.”<sup>20</sup>

- “The Trump-Pence Administration will be an active participant in writing a new and better Farm Bill and delivering it on time! Our farmers deserve a good farm bill written by those who are thankful for our remarkable food system in this country.”<sup>21</sup>

These campaign positions suggest three things. First, they reject the premise that our food system may be in need of reform. Focusing on the metrics of food safety, food prices, and production levels, our food system is indeed “remarkable.”<sup>22</sup> Putting these metrics front and center makes it harder to justify development of environmental and public health regulations, which might undercut success along all of these metrics.<sup>23</sup> Second, they advocate limiting decisionmaking to those involved with food production. By narrowly defining the stakeholders in the food and agriculture policy debate, this language preferences certain kinds of issues—production costs and regulatory burdens—over others, such as agricultural externalities and food consumption-related concerns. Finally, and relatedly, they prioritize “big food” interests. In addition to the promise to protect development and use of biotechnology, the talking points also promise to reduce corporate taxation rates, a promise that holds value not for farmers, but for food processors, distributors, retailers, and agriculture input manufacturers.<sup>24</sup>

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20. Although this talking point does not explicitly mention genetic engineering, it is almost certainly intended to support that practice.

21. Talking Points for National Advisory Committee for Agriculture and Rural Issues, Trump/Pence Campaign (document on file with author).

22. According to Wang, et al., *Agricultural Productivity Growth in the United States: Measurement, Trends, and Drivers*, USDA Economic Research Report 189, 5 (July 2015), “U.S. Agricultural Output has more than doubled (up 156 percent) since 1948.”

23. *But see* Margot Pollans & Emily Broad Leib, *Defining Food Safety for the 21<sup>st</sup> Century* (draft on file with author) (arguing that environmental protection is itself a critical element of food safety).

24. Early Trump Administration policies have not been all good for “big food”; immigration crack downs, shifts in trade policy, and proposed cuts to farm safety net



These trends have continued into the early days of the Trump Administration. It has delayed Obama-era consumer-oriented laws such as restaurant menu-labeling requirements and organic animal-welfare standards.<sup>25</sup> Despite promises to support farmers and prioritize rural economic development, the administration has sought budget cuts for rural programs at every opportunity,<sup>26</sup> and the Secretary of Agriculture has proposed restructuring the USDA to remove the Rural Development Mission Area.<sup>27</sup> It has also shown a propensity to side with industry in nearly all of its policy positions, and so far and agriculture is no different.<sup>28</sup> It is not likely the Trump

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programs including crop insurance all threaten the cheap inputs on which big food relies.

25. Interim Final Rule; Extension of Compliance Date, Food & Drug Admin., 82 Fed. Reg. 20,825 (May 4, 2017) (extending compliance deadline for menu nutrition labels by one year); Final Rule; Delay of Effective Date, Agriculture Marketing Service, 82 Fed. Reg. 9967 (Feb. 9, 2017) (delaying effective date of organic livestock and poultry rule by six months to give agency additional time to consider the policy).

26. Helena Bottemiller Evich, “Ag Gets Dismissed by Trump Budget,” *Politico Morning Agriculture Report* (May 24, 2017), <http://www.politico.com/tipsheets/morning-agriculture/2017/05/24/ag-gets-dismissed-by-trump-220482>

(describing big cuts in President Trump’s proposed budget to USDA staff, supplemental nutrition assistance, farmworker training, and nonpoint source pollution mitigation); Helena Bottemiller Evich et al., “Trump Wants Cuts to USDA, FDA 2017 Funding,” *Politico Morning Agriculture Report* (March 28, 2017), <http://www.politico.com/tipsheets/morning-agriculture/2017/03/trump-wants-cuts-to-usda-fda-2017-funding-219458>

(describing proposed cuts to rural business loan programs among others).

27. Nat’l Sustainable Agriculture Coalition, “USDA Trades Away Rural Development,” *NSAC Blog*, (May 12, 2017),

<http://sustainableagriculture.net/blog/trading-away-rural-development/> (arguing that eliminating the mission area is a “demotion”).

28. Take, as evidence of this thus far, President Trump’s nomination of Sonny Perdue as Secretary of Agriculture. When Perdue served as Georgia’s governor, he “supported factory farm expansion . . . and opposed air quality regulation.” Ricardo J. Salvador & Nora Gilbert, *Sonny Perdue Vows to Make American Agriculture Great Again—but for Whom?*, THE GUARDIAN (Jan. 29, 2017),

<https://www.theguardian.com/sustainable-business/2017/jan/29/sonny-perdue-agriculture-secretary-farming-american-agribusiness>; . He has also expressed skepticism of climate change. Id. Given his track record, it is not surprising that many industry groups have been supportive of his nomination. Bartholomew Sullivan, *Industry Groups Mostly Positive to Perdue Nomination*, USA TODAY, (Jan. 19, 2017),

<http://www.usatoday.com/story/news/politics/2017/01/19/industry-groups-mostly-positive-perdue-nomination/96795034/>; Nikolai Kuznetsov, *The Next Agriculture Secretary Could Be Great for Agribusiness*, FORBES, (Feb. 10, 2017), <http://www.forbes.com/sites/nikolaikuznetsov/2017/02/10/the-next-agriculture-secretary->

administration will lead the charge to reframe the food and farming debates towards recognition of the shared interests of farmers and eaters.

Separated by political allegiances and public rhetoric, neither farmers nor consumers are well positioned to facilitate systemic change. While food movement advocates call on farmers to select different crops and to change their farming practices, these calls typically ignore or downplay the scope and scale of transition costs. For a farmer shifting from one crop to another, transaction costs might include significant capital investment in different types of equipment and acquisition of technical knowledge.<sup>29</sup> Some transitions may take several growing seasons, resulting in multiple years of lost profits.<sup>30</sup> Adoption of more environmentally-friendly farming practices might also require new spending, such as capital investment or retraining, or result in lost profit associated with practices such as fallowing fields. Many farmers are hesitant to shift to new crops because they may lack viable access to markets for those new crops.<sup>31</sup> Many farmers also enter into production contracts with aggregators, processors and retailers.<sup>32</sup> These contracts often “create pressures on producers to deliver standardized

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could-be-great-for-agribusinesses/#52e5e4c31e79.

29. Joysee M. Rodriguez, et al., *Barriers to Adoption of Sustainable Agriculture Practices: Change Agent Perspectives*, 24 RENEWABLE AGRIC. & FOOD SYSTEMS 60, 61-62 (2009) (cataloguing various barriers to transition).

30. *Id.*

31. Tamar Haspel, *Monocrops: They're A Problem, But Farmers Aren't The Ones Who Can Solve It*, WASH. POST, (May 9, 2014), [https://www.washingtonpost.com/lifestyle/food/monocrops-theyre-a-problem-but-farmers-arent-the-ones-who-can-solve-it/2014/05/09/8bfc186e-d6f8-11e3-8a78-8fe50322a72c\\_story.html?utm\\_term=.e62976916d98](https://www.washingtonpost.com/lifestyle/food/monocrops-theyre-a-problem-but-farmers-arent-the-ones-who-can-solve-it/2014/05/09/8bfc186e-d6f8-11e3-8a78-8fe50322a72c_story.html?utm_term=.e62976916d98) (last visited Feb. 9, 2017); Committee on Twenty-First Century Systems Agriculture, *Toward Sustainable Agricultural Systems in the 21st Century*, NATIONAL RESEARCH COUNCIL 271-74 (2010), <http://www.nap.edu/catalog/12832/toward-sustainable-agricultural-systems-in-the-21st-century> (describing how consolidation in food processing and retail may hinder access to markets and transitions to sustainability on farms).

32. See, e.g., Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397 (1995); James MacDonald, *Trends in Agricultural Contracts*, 30(3) CHOICES 1, 3 (2015) (production contracts cover about 35% of all agricultural products by value); James MacDonald et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, Econ. Res. Serv. Agric. Econ. Rep. No. 837, v (Nov. 2004).

products and varieties to meet specified standards.”<sup>33</sup> To meet those standards, farmers are sometimes “force[d] . . . to use production practices . . . that might not be suited to local ecological conditions.”<sup>34</sup> As a result, such contracts “might create disincentives for the use of some farming practices that could enhance sustainability.”<sup>35</sup>

Exacerbating these structural barriers is the fact that farming is a tough business. Farm income is highly volatile.<sup>36</sup> A large percentage of farm households supplement farm income with off-farm income; average farm income represents only 15% of farm household income.<sup>37</sup> Even among farms with gross sales over \$250,000, which account for 82% of value of U.S. farm production, off-farm income represents 25% of total household income.<sup>38</sup> Both small and medium-sized farms—which constitute the vast majority of farms—often operate at very low or negative profit margins.<sup>39</sup> For these farms even small regulatory burdens can be the difference between economic viability and failure.<sup>40</sup> Low operating profit margins are a barrier

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33. Committee on Twenty-First Century Systems Agriculture, *supra* note 31, at 275.

34. *Id.*

35. *Id.*

36. Nigel Key, Daniel Prager, & Christopher Burns, “Farm Households Experience High Levels of Income Volatility,” *Amber Waves* (Feb. 22, 2017), <https://www.ers.usda.gov/amber-waves/2017/januaryfebruary/farm-households-experience-high-levels-of-income-volatility/> (finding that income on commercial farms grossing over \$350,000 fluctuated within a range of \$110,000 between 1999 and 2004). Median household income on farms was \$76,725 in 2015. Principal farm operator household finances, by ERS farm typology, 2015, [https://www.ers.usda.gov/webdocs/DataFiles/Farm\\_Household\\_Income\\_and\\_Characteristics\\_\\_17977/table02.xls?v=42704](https://www.ers.usda.gov/webdocs/DataFiles/Farm_Household_Income_and_Characteristics__17977/table02.xls?v=42704). But household income of farm families exceeds household income of non-farm families most of the time. Dept. of Agric., Envtl. and Dev. Econs., *Farm Policy Background: Income of U.S. Farm vs. Nonfarm Population*, FARMDAILY (July 3, 2013), <http://farmdocdaily.illinois.edu/pdf/fdd030713.pdf>

37. *Id.* “While not commonly discussed, it appears that an important prerequisite for farming in the 21st Century in the U.S. is to have a second (or more) source of income not from the farm. Nonfarm income not only increases total household income but also is an important risk management strategy.” *Id.*

38. *Id.* On these farms, average household income is \$205,215.

39. 41.6 % of midsize farms, with gross cash farm income between \$350,000 and \$999,999, operate in the profit margin “critical zone.” Robert Hoppe, *Profit Margin Increases with Farm Size*, AMBER WAVES (Feb. 2, 2015), For various types of small farms, the number ranges from 55.8% to 76.2%.. *Id.*

40. U.S. FOOD & DRUG ADMIN., ANALYSIS OF ECONOMIC IMPACTS—

to both regulatory compliance and voluntary change. Profit margins tend to be low because farmers often cannot raise prices to match increased production costs. Indeed, as a result of extreme concentration among buyers (food distributors, processors, and retailers) farmers often face near-monopsony situations—with only one or a handful of potential buyers, farmers must sell at whatever price and terms of purchase are offered to them.<sup>41</sup>

In recent years, progressive policy makers have focused attention on these structural barriers, developing a variety of mechanisms designed to shift power from processors, distributors, and retailers back to growers and to help growers overcome transition barriers. At the state and local level, lawmakers and advocates have supported the opening of food hubs, which help smaller farmers access markets from which they would otherwise be excluded.<sup>42</sup> At the federal level, in December 2009, the USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) finalized rules “establishing basic standards of fairness and equity in contracting in the

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STANDARDS FOR THE GROWING, HARVESTING, PACKING AND HOLDING OF PRODUCE FOR HUMAN CONSUMPTION 318 (2013),

<http://www.fda.gov/downloads/Food/FoodSafety/FSMA/UCM334116.pdf> (explaining that “FDA believes farm operators are likely to make behavioral adjustments that would alleviate the impact of a regulation on their net returns. Farm operators may decide to increase their off-farm income (that is, income coming from a source other than the farm, for example, if the farm operator has an additional occupation) in or order to provide more total income to the farm operation).

41. See Robert J. Myers et al., *A Century of Research on Agricultural Markets*, 92 AM. J. AGRIC. ECON. 376, 378 (2010) (explaining the effects of competition and consolidation at the processing level on farm economies).

42. James Barham et al., *Regional Food Hub Resource Guide* 29, 34-39 (April 2012),

<https://www.ams.usda.gov/sites/default/files/media/Regional%20Food%20Hub%20Resource%20Guide.pdf> (describing funding federal programs that provided financial support for food hubs). The USDA defines a food hub as “a centrally located facility with a business management structure facilitating the aggregation, storage, processing, distribution, and/or marketing of locally/regionally produced food products.” Jim Barham, *Getting to Scale With Regional Food Hubs*, USDA Blog (Dec. 14, 2010, 3:20 PM), <http://blogs.usda.gov/2010/12/14/getting-to-scale-with-regional-food-hubs/>.

Similarly, federal and state farm to institution programs help match growers with institutional purchasers such as schools, prisons, and hospitals, and provide those institutions incentives to purchase directly from farms.

poultry industry.”<sup>43</sup> In December 2016, the GIPSA proposed additional rules that seek to correct a serious power imbalance between poultry processors—typically large corporations—and poultry producers—typically small and medium sized farmers.<sup>44</sup> Similarly, USDA conservation programs, particularly those such as the organic crosswalk program, provide growers funding to adopt more sustainable farming practices. Conservation programs cover some direct transition costs.<sup>45</sup> Although these programs are growing in number and reach, they remain limited in scope.

On the food consumption side, consumers face similar limitations on their ability to influence systemic change. Collectively, consumers can be a powerful market force. Individual consumers, however, face structural barriers that impede their ability to make sustainable choices. These barriers hinder consumers’ ability to effect change.<sup>46</sup> Such barriers include physical access to sustainable products,<sup>47</sup> affordability of sustainable products,<sup>48</sup> and availability of information about

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43. GIPSA, Questions and Answers for Poultry Final Rule, [https://www.gipsa.usda.gov/psp/poultry/poultry\\_rule\\_QA.pdf](https://www.gipsa.usda.gov/psp/poultry/poultry_rule_QA.pdf); Poultry Contracts, Initiation, Performance, and Termination, 74 Fed. Reg. 63,271 (Dec. 3, 2009) (to be codified at 9 C.F.R. pt. 201), <https://www.gipsa.usda.gov/federalregister/fr09/12-3-09.pdf>.

44. See Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92,703 (proposed Dec. 20, 2016) (to be codified at 9 C.F.R. pt. 201).

45. Nat. Resources Conservation Serv., Conservation Stewardship Program’s Contribution to Organic Transitioning – The Organic Crosswalk 1 (2012), [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1047037.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1047037.pdf); see also 16 U.S.C. § 3838g(g).

46. See generally Michael Maniates, *Individualization: Plant a Tree, Buy a Bike, Save the World?*, CONFRONTING CONSUMPTION (THOMAS PRINCEN, MICHAEL MANIATES, & KEN CONCA, EDS. 2002).

47. Particularly in rural areas, where consumer options may be extremely limited, consumers have few choices. See Ken Peattie, *Green Consumption: Behavior and Norms*, 35 ANN. REV. OF ENV’T. & RESOURCES 195 (2010), <http://www.annualreviews.org/doi/full/10.1146/annurev-environ-032609-094328#> (citing studies of localized green consumption behaviors that reveal barriers to sustainable consumption in rural areas).

48. For instance, a 2010 study by the USDA’s Economic Research Service found price premiums for organic foods ranging from seven percent to eighty-two percent. Andrea Carlson, *Investigating Retail Price Premiums for Organic Foods*, Amber Waves (May 24, 2016), <https://www.ers.usda.gov/amber-waves/2016/may/investigating-retail-price-premiums-for-organic-foods/>; *Organic Agriculture FAQ: Why is Organic Food More*

sustainability.<sup>49</sup> Although labeling and marketing campaigns have achieved some important successes, particularly related to animal welfare and animal antibiotics use, these successes are narrow in scope. Ultimately, relying on consumers to solve the problems of the food system puts an unfair and unrealistic burden on them to change aspects of their lives that are beyond their control.<sup>50</sup>

Even when organized into coherent movements, neither farmers nor consumers have the power, acting independently from each other, to reshape food systems. Yet both are legitimate stakeholders in food policy debates. They have well-aligned interests in preserving the viability of the food supply and reducing the agricultural externalities that threaten our collective health and well-being. Indeed, many farmers strive to make good environmental choices, even if they do not use the word “environmental” to describe those choices.<sup>51</sup> For most

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*Expensive than Conventional Food?*, Food and Agriculture Organization of the United Nations, <http://www.fao.org/organicag/oa-faq/oa-faq5/en/> (last visited Feb. 12, 2017), (listing reasons why organic food is more expensive than the conventional variety). Affordability is also a serious problem for food system workers (including farm workers, food prep workers, and food retail workers) who make up one sixth of the nation’s workforce and are, on average more food insecure. Food Chain Workers Alliance, *The Hands That Feed Us: Challenges and Opportunities for Workers Along the Food Chain 20* (June 6, 2012), <http://foodchainworkers.org/wp-content/uploads/2012/06/Hands-That-Feed-Us-Report.pdf>.

49. Information serves as a barrier to sustainable decision making not just because consumers do not have access to all of the relevant information necessary to make informed choices but also because consumers do not have the tools necessary to weigh the numerous variables to compare the relative sustainability of various products.

50. Margot J. Pollans, *The Labeling Shortcut*, SLATE (May 5, 2016), [http://www.slate.com/articles/health\\_and\\_science/science/2016/05/the\\_fda\\_s\\_quest\\_to\\_define\\_natural\\_won\\_t\\_give\\_us\\_better\\_food.html](http://www.slate.com/articles/health_and_science/science/2016/05/the_fda_s_quest_to_define_natural_won_t_give_us_better_food.html). This is not to say that consumers should bear no responsibility for the food system, but perhaps that responsibility is better exercised at the ballot box than at the grocery store. Big food interests have invested considerably lobbying dollars into forwarding the personal responsibility and freedom of choice narratives that underlies the consumer-choice oriented model of food system change.

51. Hiroko Tabuchi, *In America’s Heartland, Discussing Climate Change Without Saying ‘Climate Change*, N. Y. TIMES (Jan. 28, 2017), [https://www.nytimes.com/2017/01/28/business/energy-environment/navigating-climate-change-in-americas-heartland.html?\\_r=0](https://www.nytimes.com/2017/01/28/business/energy-environment/navigating-climate-change-in-americas-heartland.html?_r=0). Farming is, after all, an exercise in conservation. In the first half of the nineteenth century, east coast farmers facing soil exhaustion had a choice: move west in search of new land or farm differently, farm better. This characterization of the choice takes the perspective of an American farmer in the Early

farmers, however, anti-regulatory organizations such as the Farm Bureau continue to offer a more appealing narrative than pro-regulatory consumer and environmental organizations.

“Big food” benefits from the splintering of constituencies. These companies know that farmers are not powerful enough to drive a new policy landscape. Recognizing that consumers are more powerful, “big food” interests have worked to characterize them as anti-farmer—a savvy, if cynical, misdirection that distracts from the real source of food system problems.

It is time to form a coalition comprised of farmers, food consumers, and environmentalists.<sup>52</sup> This coalition must be strong enough to embrace not just the New Wave farmers who have already positioned themselves as an alternative to big food, but also the “conventional” farmers who, for lack of any sensible alternative, have allied themselves with “big food.”<sup>53</sup> This coalition should be sensitive to the challenges of farming

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Republic. Of course, there was not actually “new” land, there was simply Native American territory that had not previously been farmed using European agronomy and husbandry practices. On the choice between conservation and emigration west. See STEVEN STOLL, *LARDING THE LEAN EARTH: SOIL AND SOCIETY IN NINETEENTH-CENTURY AMERICA* 19-25 (2002). We face the same choice today, except there is no “new” land left.

52. There is one context, in the modern era, in which farm and urban interest have historically aligned to fight for policy at the federal level: hunger and food cost. This single-issue alliance has perpetuated the myth the food price is the primary cause of hunger and that keeping food prices low is the primary solution. This narrative makes it harder to solve the poverty problems that cause hunger and to address any of the externalities of agriculture. See, e.g., Ian Kullgren, *FLOTUS Digs in on Future of White House Garden, Let's Move!*, POLITICO (Oct. 6, 2016), <http://www.politico.com/tipsheets/morning-agriculture/2016/10/flotus-digs-in-on-future-of-white-house-garden-lets-move-216714> (juxtaposing my critique with the position of the Farm Bureau). As an example of this concern, see USDA response to EPA 2008 Advance Notice of Proposed Rulemaking regarding use of the Clean Air Act to regulate greenhouse gas emissions; USDA argued that “if EPA were to exercise the full suite of the Clean Air Act regulatory programs outlined in the draft ANPR, we believe that input costs and regulatory burden would increase significantly, driving up the price of food and driving down the domestic food supply.” EPA, *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44354, 44376 (Jul. 30, 2008). The USDA’s response did not consider the value of benefits resulting from reducing agriculture’s greenhouse gas footprint (including those accruing to farmers themselves).

53. This alliance serves the interests of big food, and, in fact, some have argued that “agribusiness and its boosters intentionally portray their interests as the interests of ‘American agriculture.’” Salvador & Gilbert, *supra* note 26.

and sustainable transitions, but it must also recognize food consumers as legitimate stakeholders in food production policy whose interests extend beyond keeping food cheap.

One potential focus for such an alliance could include investment in infrastructure designed to overcome structural barriers facing both producers and consumers. This includes not only physical infrastructure such as food hubs, rural broadband, and seed banks, but also information infrastructure such as farmer and consumer training programs and support infrastructure such as access to adequate legal services and childcare. Pilot programs already exist in all of these areas, but their capacity is limited.

This coalition has more to offer farmers than does “big food” because it promises something more meaningful than insulating farmers from regulation. Instead, it offers to reduce the power of the food processors, retailers, and distributors who currently hold farmers captive. Working together, farmers and consumers can share in the value that “big food” has monopolized. The coalition would serve as a counterpoint to the corporate food interests that currently govern the terms of our food regulatory system and policy debates. Farming and eating go hand in hand. Our agriculture policy should reflect that.



## Eating is not Political Action

Joshua Galperin,\* Graham Downey\*\*  
& D. Lee Miller\*\*\*

There seems to be near universal desire to achieve the benefits of collective political action. That desire, however, does not extend to actual governance.<sup>1</sup> As a result, politics—in the United States at least—is a series of promises that we can have our cakes and eat them too.

We want affordable and accessible health insurance, for instance, but not the mandate to purchase insurance that experts say is necessary to make it accessible and affordable.<sup>2</sup> This tension between desirable ends and the compromises we must make to get there is a difficult challenge for policymakers. Put simply, it is much easier for Americans to agree on what they want than on the sacrifices necessary to get there. Nowhere is this goal-tactic chasm more challenging than at the intersection of food and the environment.

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1. See WOLFGANG STREECK, *HOW WILL CAPITALISM END?* (2016) (especially Chapter 3 “Citizens as Consumers” on the rising appeal of being a “consumer” of government services rather than meeting the demands of being a “citizen” engaged in compromise).

2. See Richard Gonzales, *Only 26 Percent Of Americans Support Full Repeal Of Obamacare, Poll Finds*, NPR (Dec. 2, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/02/504068263/kaiser-poll-only-26-of-americans-support-full-repeal-of-obamacare> (“Overall, the survey finds that some key provisions of Obamacare are very popular among Democrats and Republicans. For example, 85 percent favor keeping young adults on their parents’ insurance plan until age 26. Sixty-nine percent like the prohibitions on insurance companies denying coverage based on pre-existing conditions. The most unpopular feature of Obamacare? Only 35 percent favor the individual mandate requiring all people to sign up for health insurance or pay a fine.”).

Agricultural and environmental imagery pervade the American cultural narrative. Picture pristine waters flowing through purple mountains majesty above the fruited plains where the solitary farmer toils, his red barn on the horizon.<sup>3</sup> Food, agriculture and the environment inspire core, distinct, American mythologies but they are also closely intertwined.<sup>4</sup> Food production demands environmental inputs, and a healthy environment requires thoughtful food production.<sup>5</sup> Humans, of course, need both to survive and thrive.<sup>6</sup>

Between their cultural significance and their necessity for survival, food and the environment demand special attention in policymaking, particularly where they overlap. Unfortunately, this nexus has primarily been subject to passive advocacy unyoked from values and explicit goals.

As the goal-tactic policymaking chasm has widened, one common strategy to bridge the gap is passive policy.<sup>7</sup> Passive policy is largely premised on a belief that government should be value-neutral. Individuals can define the “good life,” but government has no say in the matter; government may only protect individuals’ right to pursue values through market-mediated transactions.<sup>8</sup> At best, this passive neutrality provides

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3. *America the Beautiful*, LIBRARY OF CONGRESS, <https://www.loc.gov/item/ihas,200000001/> (last visited Mar. 27, 2017).

4. E.g., JEDEDIAH PURDY, *AFTER NATURE* (2015); Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. (forthcoming); 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 (2010).

5. See, e.g., Richard White, *Are You an Environmentalist or Do You Work for a Living?: Work and Nature*, in UNCOMMON GROUND 171, 174 (William Cronon, ed., 1996).

6. See William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars*, 28 STAN. ENVTL. L.J. 213 (2009).

7. E.g., Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENVTL. L. (forthcoming 2017) (describing a new environmental regime that would reduce regulatory burden and increase business choice for the purpose, in part, of generating greater compromise); Fredric D. Krupp, *New Environmentalism Factors in Economic Needs*, WALL ST. J. (Nov. 20, 1986), <https://www.wsj.com/articles/SB117269353475022375> (proposing a third state environmentalism that eschews the ideological underpinnings of traditional environmental protection).

8. E.g., Douglas R. Williams, *Environmental Law and Democratic Legitimacy*, 4

information to foster markets in which participants make individual choices that emerge into accidental action.<sup>9</sup> Proponents of this paradigm argue that better information allows consumer-citizens to make decisions in pursuit of their true needs and desires, while the cumulative force of consumer behavior leads to industry practices that reflect consumer preferences.<sup>10</sup> Critics note that it undermines democratic legitimacy by enshrining the status quo and weighting preferences according to wealth rather than individual political agency – promoting a world of one dollar, one vote.<sup>11</sup>

Given the express, longstanding, and physically essential role of food and the environment, such blind neutrality makes little sense for government and even less sense for advocates. Yet this strategy has become commonplace.

Instead of neutral, passive policy, the special role of both food and the environment demands thoughtful, assertive, intentional policymaking. More importantly, it demands thoughtful, assertive, intentional advocacy. Otherwise, policymakers will feel too little pressure to bridge the goal-tactic chasm on their own initiative. Assertive advocacy, and the assertive policy it generates, will allow the public, through votes and voices, as citizens and democratic participants, to direct lawmakers to create intentional, goal-oriented policy using tactics that are robust and lasting.

The next Part of this essay will further describe the distinctive place and unique importance of food and the environment to our culture and physical wellbeing. Part III will survey the types of policy that are prevalent in today's political

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DUKE ENVTL. L. & POL'Y F. 1, 1-2 (1994).

9. E.g., Jason J. Czarnezki & Katherine Fielder, *The Neoliberal Turn in Environmental Regulation*, 2016 UTAH L. REV. 1, 1-2 (2016); ZYGMUNT BAUMAN, *LIQUID MODERNITY* (2000) (markets are like "swarms" of insects they appear to have direction and cohesion but lack purpose). See also DAVID SINGH GREWAL, *NETWORK POWER* 2, 2-3 (2008).

10. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 3, 5-6 (2014).

11. See Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 978 (2012).

climate. Part IV is a plea to give robust, assertive policymaking a chance. This final part will describe some of the policy strategies that rise to meet the challenge of supporting the intricate food and environmental systems on which we rely.

## II. Passivity or Intent: Affirmative Advocacy for Food and the Environment

There is growing awareness that food and the environment do not just overlap. Rather, they are fundamentally intertwined and, thus, policy is needed to jointly foster healthy food and healthy environments.<sup>12</sup> Aldo Leopold and Wendell Berry, among others, argue that by eating we become responsible for the environmental consequences of our choices.<sup>13</sup> Michael Pollan calls eating “a political act.”<sup>14</sup> But an act is not an answer. By eating we become responsible for the way our actions impact food and environmental systems, but choices about what we eat are not sufficient to realize that responsibility. Eating inevitably connects us to farmers and their land, but it does not provide a mechanism for coming to political understandings about how food should be grown or how land should be used.

Chicken production, just one example of the important physical link between food and the environment, reveals the deep political responsibility that eating creates but does not resolve.

When we eat chicken, and 95 percent of us do, we can be almost certain that chicken was produced by one of a handful of giant agribusinesses.<sup>15</sup> These agribusinesses, called integrators, control 97 percent of all U.S.-raised chickens, and in 2014 the

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12. See, e.g., MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* 4 (2006).

13. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949); WENDELL BERRY, *THE UNSETTLING OF AMERICA* (1977); but cf. PAUL B. THOMPSON, *THE SPIRIT OF THE SOIL* 90, 90-93 (1995) (for a critical summary of these and similar views).

14. Joe Fassler, *The Wendell Berry Sentence that Inspired Michael Pollan's Food Obsession*, *THE ATLANTIC* (Apr. 23, 2013), <https://www.theatlantic.com/entertainment/archive/2013/04/the-wendell-berry-sentence-that-inspired-michael-pollans-food-obsession/275209/>.

15. CHRISTOPHER LEONARD, *THE MEAT RACKET* 3 (2014).

top two integrators alone controlled more than 40 percent.<sup>16</sup> The integrator's business model produces extremely cheap and plentiful chicken by shifting risk to farmers, rural communities, and the environment.<sup>17</sup> Integrators do not own chicken barns, employ or make long-term commitments to the farmer, take responsibility for birds that die on the farm, or handle the birds' manure and its significant water pollution implications.<sup>18</sup>

Dispersed widely enough, chicken manure can be a useful fertilizer, but when concentrated, it becomes a toxic pollutant.<sup>19</sup> For example, when poultry production first concentrated on the Delmarva Peninsula, run-off from poultry farms nearly destroyed the Chesapeake Bay watershed.<sup>20</sup> The poultry industry's rampant pollution happens largely unchecked due in part to agriculture's exemption from many environmental laws.<sup>21</sup> Even when the poultry industry is subject to pollution controls, integrators evade legal responsibility by shifting the burden of waste management to individual farmers who are rarely paid by the integrator for waste management costs.<sup>22</sup> Because these individual farmers are usually heavily indebted, they are also judgment proof, making enforcement nearly

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16. James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA ERS, EIB 126 at 4 (June 2014) [hereinafter *Broiler Production*].

17. C. Robert Taylor & David A. Domina, *Restoring Economic Health to Contract Poultry Production*, 4 (May 2010), <http://www.dominalaw.com/documents/Restoring-Economic-Health-to-Contract-Poultry-Production.pdf>.

18. Farmers Legal Action Group, *Assessing the Impact of Integrator Practices on Contract Poultry Growers* 106 (Sept. 2001), <http://www.flaginc.org/publication/assessing-the-impact-of-integrator-practices-on-contract-poultry-growers/> (finding that all integrator contracts make farmers responsible for dead birds, and all make the farmer responsible for waste, though some accomplish that by omission since farmers must remove litter before they can receive a new flock).

19. The Pew Charitable Trusts, *The Business of Broilers* 19, 19-20 (Dec. 2013), <http://www.pewtrusts.org/en/research-and-analysis/reports/2013/12/20/the-business-of-broilers-hidden-costs-of-putting-a-chicken-on-every-grill> [hereinafter *The Business of Broilers*].

20. *Broiler Production*, *supra* note 16, at 23; *The Business of Broilers*, *supra* note 19, at 20.

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

22. *Unleashing America's Prosperity to Create Jobs and Increase Wages*, DONALDJTRUMP.COM (Aug. 8, 2016), <https://www.donaldjtrump.com/press-releases/unleashing-americas-prosperity-to-create-jobs-and-increase-wages>.

impossible and ultimately shifting the burden to the public and environment.<sup>23</sup>

This is a clear political problem that spans health, environment, economic independence, the farming and agricultural culture, the legal rules around business entities, bankruptcy, and much more. Consumer choices alone—food choices alone—cannot change the structure of this industry. Eating will not solve these problems.

### **III. Compromise Is A Practical Necessity, Not An Advocacy Goal**

For at least three decades, environmental policy makers have settled for passive policy, attempting tweaks and value-neutral compromise rather than reaffirming the shared values that birthed modern environmentalism.<sup>24</sup> For environmentalism, passive advocacy has had too little substantive success in addressing dynamic environmental problems.<sup>25</sup> Nor is passivity even a useful tool for achieving compromise since it fails to stake a values claim against which to compromise. The lesson from the environmental experience of the last three or four decades is that we must make assertive demands in order to motivate real democratic participation and to build—albeit slowly—the cultural foundation for more effective, lasting, and meaningful policy.

It is obvious to us that the rush towards passive or “neutral” policy, as opposed to articulating core values and finding workable compromises, has become the norm in food policy just as it is for traditional environmental policy.

Consider that the highest profile battle in food policy over

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23. *The Business of Broilers*, *supra* note 19, at 1.

24. Joshua Galperin, *Thirty Years of Third Stage Environmentalism*, HUFFINGTON POST (Nov. 28, 2016), [http://www.huffingtonpost.com/entry/thirty-years-of-third-stage-environmentalism\\_us\\_583c7fc5e4b037ba5d6ae4ad](http://www.huffingtonpost.com/entry/thirty-years-of-third-stage-environmentalism_us_583c7fc5e4b037ba5d6ae4ad).

25. Joshua Galperin, *'Desperate environmentalism' won't save the planet*, L.A. TIMES (Oct. 29, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-galperin-environmental-desperation-20151029-story.html>

the past several years concerned mandatory labeling of foodstuffs produced with genetically modified organisms (GMOs). The advocates who dominated the anti-GMO movement consistently marshaled their unverified claims<sup>26</sup> that GMOs present (or could present) a food safety risk, and called for policy that is quintessentially passive: a label. Labels allow consumers to exercise their individual preferences, avoiding perceived risks to individual health. Labels do little to nothing to address the actual, population-level risks of GMOs, such as consolidation of the seed industry and the rise of increasingly herbicide-resistant weeds.<sup>27</sup> Addressing these concerns requires more than a label; it requires new antitrust regulations backed by forceful arguments concerning sovereignty and corporate power.<sup>28</sup>

Similarly, government efforts to substitute passive consumer choice mechanisms for democratic governance in the federal Dietary Guidelines has proven inadequate. Updated every five years on the advice of an advisory committee populated with riders of the revolving door,<sup>29</sup> and overseen by a department whose main objective is promotion of American agriculture,<sup>30</sup> the guidelines have routinely ignored advances in dietary science beginning with the inaugural guidelines published in 1980.<sup>31</sup> These guidelines have aligned with the U.S.'s assertive, goal-oriented policy that produces maximum calories as cheaply as possible; they add only a passive policy

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26. David H. Freedman, *The Truth About Genetically Modified Food*, SCI. AM., <https://www.scientificamerican.com/article/the-truth-about-genetically-modified-food/>

27. David A. Mortensen et al., *Navigating a Critical Juncture for Sustainable Weed Management*, 62 AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES 75 (2012), <http://www.bioone.org/doi/2bs110.1525/bio.2012.62.1.12>.

28. 2015-2016 & 2016-2017 Boards of the Yale Food Law Society, *An Open Letter to the People*, MEDIUM (Mar. 25, 2016), <https://medium.com/@gpdowney/an-open-letter-to-the-people-87268f9e41bf#.cuqsk55r>.

29. Markham Heid, *Experts Say Lobbying Skewed the U.S. Dietary Guidelines*, TIME (Jan. 8, 2016), <http://time.com/4130043/lobbying-politics-dietary-guidelines/>

30. Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?*, 87 THE MILBANK Q. 259, 276 (2009) (“While working to promote healthy eating, the USDA at the same time has as its main objective the promotion of American agriculture (selling more food), so one goal typically prevails over the other when the two conflict.”).

31. Nina Teicholz, *The Scientific Report Guiding the US Dietary Guidelines: Is It Scientific?*, BMJ (Sept. 23, 2015), <http://www.bmj.com/content/351/bmj.h4962>

that tepidly admonishes citizen-consumers not to overeat.<sup>32</sup> Although the most recent guidelines update increasingly recognizes the benefits of fruits and vegetables,<sup>33</sup> given the history it should be no surprise then that two-thirds of Americans are overweight or obese.<sup>34</sup>

When passive policy looks beyond consumer choice, it often lands just barely beyond, on voluntary incentives. To take a single example, the Conservation Reserve Program (CRP) makes yearly rental payments to producers that take environmentally sensitive land out of agricultural production for 10-15 year periods.<sup>35</sup> It may seem obvious that producers should not be planting on “environmentally sensitive land” to begin with, especially given market conditions characterized by oversupply and prices below production costs. Further, the undesirability of this land for crop production raises serious questions of CRP’s effectiveness—or “additionality”—given that farmers may not have otherwise used the reserved land.<sup>36</sup> More troubling, once CRP contracts expire the producer is free to put the land back in to production, which can immediately negate any environmental benefits from the preceding decade.<sup>37</sup> Despite its shortcomings, advocates like the Environmental Defense Fund and the Nature Conservancy have praised this as a “win-win” strategy.<sup>38</sup> Such praise undermines efforts to create

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32. See JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE AND THE LIMITS OF CAPITALISM* 94-96 UNIVERSITY OF CALIFORNIA PRESS (2011).

33. U.S. Dept. of Health and Human Services and U.S. Dept. of Agriculture, *2015-2020 Dietary Guidelines For Americans*, 8<sup>TH</sup> Edition, Key Recommendations, (Dec. 2015), <https://health.gov/dietaryguidelines/2015/guidelines/chapter-1/key-recommendations/>

34. U.S. Dept. of Health and Human Services, *Overweight and Obesity Statistics* (Oct. 2012), <http://www.niddk.nih.gov/health-information/health-statistics/Pages/overweight-obesity-statistics.aspx>; KM Flegal et al., *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999-2010*, 307 JAMA 491 (2012).

35. USDA, *Conservation Reserve Program*, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/index> (last visited Feb. 28, 2017).

36. See Erik Lichtenberg, *Conservation, the Farm Bill, and U.S. Agri-Environmental Policy*, 29 CHOICES, no. 3, 2014, [http://www.choicesmagazine.org/UserFiles/file/cmsarticle\\_385.pdf](http://www.choicesmagazine.org/UserFiles/file/cmsarticle_385.pdf).

37. Nat'l Wildlife Fed'n, *Maintaining the Benefits of Expiring CRP*, <https://www.nwf.org/What-We-Do/Protect-Habitat/Healthy-Forests-and-Farms/Farm-Bill/Farm-Bill-Success-Stories/Success-Expiring-CRP.aspx> (last visited Apr. 10, 2017).

38. Env'tl. Def. Fund, *USDA Conservation Reserve Program Initiative Praised by Conservation Group* (Mar. 2, 2012),



more assertive solutions. If CRP is a “win,” there is little reason to strive for more effective policy.

Ironically, CRP is modeled off successful and goal-oriented post-war policies designed to control supply and keep prices high enough to support farmer livelihoods. These policies were successful because they meaningfully regulated—as opposed to merely incentivizing—behavior and directly addressed an explicit goal of limiting production.

Finding shared goals, making them explicit, and developing a meaningful policy to accomplish them is indeed difficult, but it becomes impossible when even advocates refuse to name the values that drive them and fail to commit forcefully to the tactics necessary to achieve their goals. Only when advocates embrace the values that make food and the environment such central parts of the American story can advocacy live up to the essential demands of the food and environment nexus.

#### **IV. Assertive Policy Advocacy Is A Commitment To Inclusive Democracy, Not A Promise of More Regulation**

The fabled picture of food and the environment does not arise by chance. It arises because each is important culturally and physically. Given their essentiality, we must demand more intentionality. Further, we must demand policies not only because they are possible, but also because they are thoughtful, effective, goal oriented, and purposeful. While the current trajectory and political climate do not bode well for this assertive policy, there are a few examples that can give us hope and direction moving forward.

The Whole Farm Revenue Protection (WFRP) program, for instance, is a pilot program designed to meet the 2014 farm bill requirement that USDA develop a “Whole Farm Diversified Risk Management Insurance Plan.”<sup>39</sup> It came about after more

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<https://www.edf.org/news/usda-conservation-initiative-praised>; Kris Johnson, *A Benefit of the Conservation Reserve Program: Paying Farmers to Grow Clean Water*, COOL GREEN SCIENCE, THE NATURE CONSERVANCY (Jul. 1, 2016), <http://blog.nature.org/science/2016/07/01/a-benefit-of-the-conservation-reserve-program-paying-farmers-to-grow-clean-water/>.

39. See generally Agricultural Act Of 2014, Pub. L. No. 113-79, 128 Stat 649 (codified in scattered sections of 7 U.S.C.).

than a decade of demands, primarily from the National Sustainable Agriculture Coalition and its members, to create a risk management program responsive to the needs of diversified operations.<sup>40</sup> These operations tend to be smaller and often lack access to the subsidies available to large commodity producers.<sup>41</sup> In contrast to prevailing risk management programs, the WFRP program embodies values-driven policymaking that cracks a door to more ambitious reforms within agricultural risk management. As a result of the program, new and smaller-scale farmers face reduced administrative requirements, receive increased subsidies,<sup>42</sup> and subsidy rates rise along with on-farm crop diversity.<sup>43</sup> Thus, WFRP's very terms recognize that public support for agricultural risk planning can progressively benefit small and beginning farmers to support rural livelihoods and communities, while—by supporting small, diversified, often organic farms—aggressively valuing agro-ecological production that enhances natural resources and promotes public health.<sup>44</sup> These are shared cultural values and we do ourselves no favors by pretending they are not valid political goals.

Sometimes these shared values are already obvious. Other times leadership can help develop those values. For example, over the last eight years food served in schools has profoundly changed for millions of children. These changes were made possible, in large part, by the moral leadership of First Lady Michelle Obama.<sup>45</sup> In the 2010 Healthy Hunger-Free Kids Act,

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40. See Nat'l Sustainable Agric. Coal., *Whole Farm Revenue Protection for Diversified Farms* (Sept. 2016), 40 See Nat'l Sustainable Agric. Coal., *Whole Farm Revenue Protection for Diversified Farms* (Sept. 2016), <http://sustainableagriculture.net/publications/grassrootsguide/credit-crop-insurance/whole-farm-revenue-protection-for-diversified-farms/>.

41. *Id.*

42. USDA FED. CROP INS. CORP., *WHOLE-FARM REVENUE PROTECTION PILOT HANDBOOK 39* (FCIC 18160, 2016), [http://www.rma.usda.gov/handbooks/18000/2016/16\\_18160-1h.pdf](http://www.rma.usda.gov/handbooks/18000/2016/16_18160-1h.pdf).

43. USDA Risk Mgmt. Agency, *Whole-Farm Revenue Protection* (Apr. 2016), <http://www.rma.usda.gov/pubs/rme/wfrpfactsheet.pdf> (last visited Apr. 10, 2017).

44. UN Human Rights Council, *Report Submitted by the Special Rapporteur On the Right to Food, Oliver De Schutter* 6 (Dec. 20, 2010), [http://www.srfood.org/images/stories/pdf/officialreports/20110308\\_a-hrc-1649\\_agroecology\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20110308_a-hrc-1649_agroecology_en.pdf).

45. Helena B. Eivich & Darren Samuelsohn, *The Great FLOTUS Food Fight*,

the First Lady helped establish new nutritional goals and provided needed money to improve kitchen facilities.<sup>46</sup> One of the most significant changes was the Community Eligibility Provision.<sup>47</sup> “Community Eligibility” means that schools with high rates of poverty can provide free lunch to all students.<sup>48</sup> By streamlining the process of reimbursement, Community Eligibility solves two major problems. First, it de-stigmatizes free lunch – ensuring that students who need the meal will be able to freely participate.<sup>49</sup> For another, it reduces the paperwork burden for poor students, their schools and families.<sup>50</sup> In the past, and potentially the future if Congress rolls back the rule, a child may be denied food because they forgot to bring in their paperwork. Or, a teenager might prefer to go hungry rather than enduring the embarrassment of being seen in the free breakfast line. Community Eligibility is not only important because it is more efficient (though it is), but because of the basic principle that all children deserve food.<sup>51</sup> If the provision is to survive the coming years it will need to be defended on moral grounds. Of course, the same is true for a healthy food system across the board.

## V. Conclusion

Balancing achievability and desirability does not mean finding a place in the middle. It means balancing what is immediately doable while actively trying to change what is possible. The current of policy advocacy and policymaking in food and the environment is pulling decidedly towards

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POLITICO (March 17, 2016), <http://www.politico.com/agenda/story/2016/03/michelle-obama-healthy-eating-school-lunch-food-policy-000066> (describing both the ups and downs of the First Lady’s fight for reform).

46. Healthy, Hunger Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (codified in scattered sections of 42 U.S.C.)

47. *Id.* § 104 (“Eliminating individual applications through community eligibility”).

48. USDA Food and Nutrition Service, *School Meals: Community Eligibility Provision*, <https://www.fns.usda.gov/school-meals/community-eligibility-provision> (last visited Feb. 23, 2017).

49. Food Research & Action Center, *Community Eligibility*, <http://frac.org/community-eligibility> (last visited Feb. 23, 2017).

50. *Id.*

51. Jane Black, *Revenge of the Lunch Lady*, HUFFINGTON POST HIGHLINE (Feb. 9, 2017), <http://highline.huffingtonpost.com/articles/en/school-lunch/>.

immediacy. Were immediacy—and the passivity it demands—leading to great achievements, there would be little to critique about the current. Unfortunately, as the examples in Part III demonstrate, we have achieved too little progress to give political or substantive credit to passivity.

Thankfully, there is hope in intent. Whether looking at the nation's foundational environmental laws, the grand scale of its early food and agriculture policies, or the various models identified in Part IV, developing policy that reflects and shapes cultural values, clearly articulates goals, and seeks to shape values moving forward can become a reality.

For many progressive advocates, of course, we are ignoring something essential: The election of President Trump and a Congress that is openly hostile towards progressive policy and environmental protection.<sup>52</sup> While implementing passive policy may seem like the only imaginable achievement in the short term, pursuing values-free positions will only weaken progressive causes. We must strive for more. If there is anything we can learn from President Trump's campaign, it is that speaking in plain terms about core values (as reprehensible as his are) can change what is politically possible. Without boldly speaking about our own goals, even when we are sure they will not be enacted tomorrow, we will be unable to write a new American mythology.

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52. E.g., Devin Henry & Timothy Cama, *Pruitt Confirmation Sets Stage for Trump EPA Assault*, THE HILL (Feb. 20, 2017), <http://thehill.com/policy/energy-environment/320176-pruitt-confirmation-sets-stage-for-trump-epa-assault>.

## **Organic Agriculture Under the Trump Administration**

**Marne Coit\***

### **Introduction**

This essay will examine the implications of the policies of the Trump administration on the regulations promulgated under the Organic Foods Production Act (OFPA) known as the National Organic Program (NOP). Since the inception of the organic standards, advocates have been wary that they will be weakened. Even as other spheres of food and agriculture have enjoyed heightened public awareness and support under the Obama administration, the previously high standards for organic regulation and oversight have been eroded. Given Donald Trump's call to roll back environmental standards generally and decrease federal regulations, overall, it seems likely federal support of organic agriculture will be decreased.

The only path to continued support of organic farming may be the extent to which it is emerging as a high dollar industry. However, this is inherently problematic. Over the past few years, there has been a negative correlation between larger agribusinesses entering the organic market and the erosion of the organic standards. Examples include the NOP's 2013 decision to change the review process for substances allowed for use in organic production, seemingly done in violation of the Administrative Procedures Act. In addition, there is concern about the integrity of the process by which members are appointed to the National Organic Standards Board (NOSB). It seems likely that a Trump administration will continue down the

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path of supporting larger agribusinesses – to the detriment of not only smaller, more sustainable farms and businesses, but possibly to the organic regulations themselves.

### **Trump’s Position/Policies on Food and Agriculture**

To start, it must be stated outright that the conclusions drawn here are based largely on supposition. That is to say, in order to discern what organic agriculture may look like under the Trump administration, one must piece together a variety of factors without being able to point to direct statements or positions specifically on this topic. The reason for this is that Donald Trump has not made food, agriculture or farming pivotal issues of his platform. These topics simply have not been given the focused attention, thought and policy analysis that they deserve. In fact, Trump only made one speech, in August of 2016 in Des Moines, Iowa, in which he mentioned farm policy during the Presidential campaign.<sup>1</sup> This is surprisingly little for such an important topic. Agriculture and agriculture-related industries contributed \$985 billion to the U.S. gross domestic product (GDP) in 2014<sup>2</sup> Agriculture is, after all, one of those rare industries that does, in fact, impact everyone in the country, from farmers to consumers. Even so, this is the only time farm policy generally was discussed. There has been even less focus on organic agriculture in particular. As a result, what we about Trump’s position on organic agriculture must be gleaned from looking to other, less direct factors.

First, since certification of organic agriculture is regulated by the United States Department of Agriculture (USDA), a federal agency, under the authority of the OFPA, we can look at Trump’s actions thus far regarding the scope of authority of federal agencies. While campaigning for office, he made it clear that he intended to cut back the reach of federal regulations.<sup>3</sup>

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1. Helena B. Evich, *What Trump Win Means for Agriculture*, POLITICO (Nov. 9, 2016), <http://www.politico.com/tipsheets/morning-agriculture/2016/11/what-trump-win-means-for-agriculture-217319>.

2. *Ag and Food Sectors and the Economy*, USDA, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy.aspx> (last updated Apr. 25, 2017).

3. Laura Entis, *Trump Demands Federal Agencies Cut Two Regulations for Every*

Upon taking office, he acted on this quickly, signing an executive order titled “Reducing Regulation and Controlling Regulatory Costs” on January 30, 2017.<sup>4</sup> Also known as the “2-for-1” order, it compels federal agencies to eliminate two regulations for every new regulation issued.<sup>5</sup> The specifics of how this mandate operates is beyond the scope of this essay. It is sufficient to say that if one of Trump’s main objectives is to mandate the indiscriminate reduction in federal regulations, there is no reason to believe that the regulations that make up the National Organic Program would fall outside of this mandate. In other words, it puts organic certification at risk.

The heart of the NOP is a carefully crafted set of regulations. Specifically, “[t]he National Organic Program (NOP) develops the rules & regulations for the production, handling, labeling, and enforcement of all USDA organic products. This process, referred to as rulemaking, involves input from the National Organic Standards Board (a Federal Advisory Committee made up of fifteen members of the public) and the public.”<sup>6</sup> If the goal of the administration is to reduce regulation, then a national certification program such as the NOP is inherently at risk. This concern is amplified even more if one looks at some of the issues that have plagued the NOP in the recent past.

On the surface, the organic sector in the United States (U.S.) looks to be thriving. “USDA does not have official statistics on U.S. organic retail sales, but information is available from industry sources. U.S. sales of organic products were an estimated \$28.4 billion in 2012—over 4 percent of total food sales—and will reach an estimated \$35 [in the next two years], according to the *Nutrition Business Journal*.”<sup>7</sup>

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*New One*, FORTUNE (Jan. 30, 2017), <http://fortune.com/2017/01/30/trump-regulation-executive-order/>.

4. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

5. *Id.*

6. *Organic Regulations*, USDA, <https://www.ams.usda.gov/rules-regulations/organic> (last visited Apr. 30, 2017).

7. *Organic Market Overview*, USDA, <https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview/> (last updated Apr. 4, 2017).

“Consumer demand for organically produced goods continues to show double-digit growth, providing market incentives for U.S. farmers across a broad range of products. Organic products are now available in nearly 20,000 natural food stores and nearly 3 out of 4 conventional grocery stores.”<sup>8</sup> Consumers prefer organically produced food because of their concerns regarding health, the environment, and animal welfare, and they show a willingness to pay the price premiums established in the marketplace. Organic products have shifted from being a lifestyle choice for a small share of consumers to being consumed at least occasionally by a majority of Americans. National surveys conducted by the Hartman Group and Food Marketing Institute during the early 2000s found that two-thirds of surveyed shoppers bought organically grown foods.”<sup>9</sup>

Consumers affirmed these facts in 2015 spending \$43.3 billion in that year alone.<sup>10</sup> In addition, as is evidenced by the past three Farm Bills, there has been a steadily increasing amount of financial and government support for organic research and programs.<sup>11</sup>

Despite this growth (or, perhaps as a result of it), there are serious concerns about the integrity of the program. Since its inception, organic advocates have been concerned that, over time, the standards would be watered down, and that they would be changed to cater to the needs of larger, more corporate agricultural operations, moving the standards away from their original intent. Two issues in particular have arisen that point in this direction. The first issue is a procedural change related to

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8. *Id.*

9. *Id.*

10. Press Release, Statement from Agriculture Secretary Tom Vilsack on the Organic Trade Association Report (May 19, 2016).

11. *Organic Provisions in the 2014 Farm Act*, USDA  
<https://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-provisions-in-the-2014-farm-act/> (last updated Apr. 4, 2017).



substances that are permitted in organic agriculture. The second issue is about the composition of the National Organic Standards Board (NOSB) and the way in which members are placed on this 15-member advisory board.

The first issue is the procedural change that impacts substances on the National List of Allowed and Prohibited Substances (the National List) under what is known as the sunset provision.<sup>12</sup> One of the tasks of the NOP is to provide a list of substances that are permitted to be used in the production of certified organic crops and products. “The National List of Allowed and Prohibited Substances identifies the synthetic substances that may be used and the nonsynthetic (natural) substances that may not be used in organic crop and livestock production. Additionally, it identifies a limited number of non-organic substances that may be used in or on processed organic products. In general, synthetic substances are prohibited for crop and livestock production unless specifically allowed whereas non-synthetic substances are allowed for crop and livestock production unless specifically prohibited.”<sup>13</sup> Organic farmers follow what is on the National List closely, lest they risk losing their organic certification.

When the NOP first went into effect in 2000, the procedure was that substances on the National List came up for review every five years. In order to stay on the National List, an individual substance would come up for review, at which time there would have to be an affirmative vote by 2/3 of the National Organic Standards Board (NOSB). If the substance did not reach the requisite vote, it would be removed from the National List.

In 2013, an abrupt change was made to this procedure.<sup>14</sup> On September 13, 2013, NOP Deputy Administrator Miles McEvoy announced that, upon review, if it was determined that a substance no longer met the required criteria, then a 2/3 vote of

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12. 7 U.S.C. § 6517 (2012).

13. *The National List*, USDA

<https://www.ams.usda.gov/rules-regulations/organic/national-list>  
(last visited Apr. 30, 2017).

14. *Id.*

the NOSB would be required to remove it from the List.<sup>1516</sup> In other words, substances now stay on the National List unless action is taken to affirmatively remove them. This essentially, makes it more difficult to remove substances once they are on the National List.

There is concern that such a change diminishes the authority of the NOSB and, additionally, opens the door to a growing list of “allowed” substances, both of which will be detrimental to the integrity of the organic standards in the long run. The Consumer Reports National Research Center states that this change is one among other “questionable practices” in organic regulation.<sup>17</sup> This shift also appears to be at odds with consumer perception and preference for certified organic products. “Consumer Reports has long opposed the proliferation of exemptions and says that their renewed listing does not represent what consumers expect from the organic label.” According to a public opinion poll conducted by Consumer Reports, “[a]n overwhelming percentage of consumers (84 percent) think the use of artificial ingredients in organic products should be discontinued, if not reviewed, after 5 years; few consumers (15 percent) endorse continued use of the artificial ingredient without review.”<sup>18</sup> The change to the sunset provision also caused alarm to two legislators who helped to craft the organic standards originally, Sen. Patrick Leahy (D-VT) and Rep. Peter DeFazio (D-OR). They said that it “turns the sunset policy of the Organic Foods Production Act on its head” and is “in conflict with both the letter and the intent of the statute.”<sup>19</sup> Concern about this change to procedure was grave enough to prompt a lawsuit by organic stakeholder groups in April of 2015.<sup>20</sup> The case is still pending.

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15. *Id.*

16. *Sunset Review Process*, USDA

<https://www.ams.usda.gov/rules-regulations/organic/nosb/sunset-review> (last visited Apr. 30, 2017).

17. Dan Flynn, *Survey: Consumers Might Read Organic Label Differently Than Organic Standards Board*, FOOD SAFETY NEWS (Apr. 29, 2014), <http://www.foodsafetynews.com/2014/04/consumers-might-read-organic-label-differently-than-organic-standards-board/#.WMSs7hiZOu4>.

18. *Id.*

19. *Id.*

20. Gene Summerlin, *Lawsuit Challenges USDA Changes to Sunset Provisions of*

The second issue is how members are placed onto the NOSB, which is authorized under the national Organic Food Production Act (OFPA) to be an advisory board to the NOP. One of the main purposes of the NOSB is to make recommendations to the Secretary of Agriculture, with a particular focus on reviewing materials and making recommendations about the National List.

The statute sets out the composition of the advisory board to include fifteen members. In addition, the statute specifically dictates that the backgrounds of members, be as follows: “four organic farmers/growers, three environmental/resource conservationists, three consumer/ public interest representatives, two organic handlers/processors, one retailer, one scientist (toxicology, ecology or biochemistry), and one USDA accredited certifying agent.”<sup>21</sup> At issue is who is being appointed to these positions and whether they may have potential conflicts.

For example, in December 2005, Katrina Heinze, an executive from General Mills, was appointed as a consumer representative. “The outcry over her appointment by advocates and independent organic consumers was so intense that she resigned in February 2006 – but rejoined the board late that year after Mr. Johanns appointed her to the seat designated by law for an expert in toxicology, ecology or biochemistry. During her second stint on the board, which ended last December, critics said they were shocked when she did not recuse herself from the vote to add DHA to the list, since its manufacturer sometimes uses technology licensed from General Mills in making it.”<sup>22</sup>

More recently, an issue has been raised regarding two of the appointments for the farmer/grower category. On its face, it seems that someone who is actively farming would fill this position. Instead, executives who were working for

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*Organic Rules*, HUSCH BLACKWELL (Apr. 8, 2015), <http://www.organicaglaw.com/2015/04/lawsuit-challenges-usda-changes-to-sunset-provisions-of-organic-rules/>.

21. *Id.*

22. Stephanie Strom, *Has Organic Been Oversized?*, N.Y. TIMES (July 7, 2012), <http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html>.

agribusinesses were appointed. The first is Carmela Beck, National Organic Program Supervisor and Organic Certification Grower Liason for Driscoll's, an organic berry producer. Ms. Beck was appointed in 2011.<sup>23</sup> The second is Ashley Swaffer, who was appointed in 2014. She was the Director of Special Projects at Arkansas Egg Company.<sup>24</sup>

In a lawsuit filed by the Cornucopia Institute, the plaintiff alleges that “two of the board’s four farmer seats are occupied by full-time agribusiness executives, rather than farmers. Congress explicitly reserved four seats on the board for individuals who ‘own or operate’ organic farms.” Under a FOIA request, Cornucopia received applications for these NOSB positions. The documents “revealed that neither Carmela Beck (a full-time Driscoll’s employee) nor Ashley Swaffar (then a full-time employee of Arkansas Egg) provided any documentary evidence indicating that they owned or managed an organic farm.”<sup>25</sup> This suit is also still pending.

How these suits are decided will determine the path of the organic standards into the future. Further, their disposition will dictate the level of integrity and transparency that the program will have as it moves forward.

### Conclusion

In conclusion, there is very little to suggest that organic agriculture will fare well under a Trump administration. Despite the ever-increasing public interest and support, there is no indication that this sector of agriculture will receive the same level of consideration as it did from the previous administration. By all accounts, organic agriculture – and sustainable agriculture in general – was supported by and thrived during the previous administration. Even so, there are serious issues with the organic

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23. *USDA Appoints New Members to the National Organic Standards Board*, USDA <https://www.ams.usda.gov/press-release/usda-appoints-new-members-national-organic-standards-board> (last visited Apr. 30, 2017).

24. *Id.*

25. *Organic Farmer and Sunset Lawsuits Update*, CORNUCOPIA INSTITUTE (Jan. 18, 2017), <https://www.cornucopia.org/2017/01/organic-farmer-sunset-lawsuits-update/>.

certification program and the direction it is currently headed in. Given that these issues, discussed above, occurred during a time when organic agriculture and research was supported by the administration, and given that there is little indication that the current administration places a high priority on agriculture and farming in general, never mind the organic sector in particular, there is no reason to believe that it will be supported by the new administration. If anything, it could be considered a favorable outcome if the organic standards remain at the status quo. At worst, there could potentially be a dismantling of the certification standards.

## Implementing the National Bioengineered Food Disclosure Standard

Lesley K. McAllister\*

Although controversial since their introduction in the 1990s, bioengineered foods are a major part of our food supply.<sup>1</sup> Bioengineered food (“GE Food” or “GMOs”) refers to plant and animal food products created with the use of genetic engineering (“GE”), wherein DNA from different species are combined to achieve desirable genetic characteristics in a way that would not occur naturally.<sup>2</sup> Over the past 15 years, GE crops in the US have increased from 3.6 to 173 million planted acres as of 2013.<sup>3</sup> In 2012, 93% of all US soybean, 95% of all upland cotton, and 88% of all corn acres were planted with GE seed varieties.<sup>4</sup> According to a recent survey conducted by the Grocery Manufacturers Associations, 70-80% of packaged foods contain GMOs, including soup, milk, cereal, soda, fruit juice, and baby food.<sup>5</sup>

For many years, environmentalists, consumer groups and others have argued that GE food should be labeled. In May 2014, Vermont passed Act 120, which made it the first state in the country to set a date mandating producers to label any genetically engineered food.<sup>6</sup> Maine<sup>7</sup> and Connecticut<sup>8</sup> have also

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1. See Warren Leary, *F.D.A. Approves Altered Tomato That Will Remain Fresh Longer*, N. Y. TIMES (May 19, 1994), <http://www.nytimes.com/1994/05/19/us/fda-approves-altered-tomato-that-will-remain-fresh-longer.html>.

2. See THE NAT’L ACAD. OF SCIS., ENG’G., AND MED., GENETICALLY ENGINEERED CROPS: EXPERIENCES AND PROSPECTS 58 USDA (2016), <http://www.fda.gov/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/>.

3. See Tadlock Cowan, *Agricultural Biotechnology: Background, Regulation, and Policy Issues*, CONG. RES. REP. RL-32809 (July 20, 2015).

4. *Id.* at 2.

5. See Richard Sexton & Steven Sexton, *Stand Up for GMO Foods by Labeling Them*, WALL ST. J. (Jun. 20, 2016), <http://www.wsj.com/articles/stand-up-for-gmo-foods-by-labeling-them-1466465085>.

6. See VT. CODE R. S121 (2016).

passed labeling laws while California, among other states, have widely debated the issue and proposed legislation<sup>9</sup>

The specter of a “patchwork” of different state labeling laws prompted the food industry to seek the passage of a federal GE labeling law. In July 2016, just after Vermont’s labeling law went into effect, Congress passed the National Bioengineered Food Disclosure Standard.<sup>10</sup> It requires GE food to be labeled in a form chosen by the manufacturer which may be “a text, symbol, or electronic or digital link.”<sup>11</sup> Small manufacturers may instead use a telephone number while restaurants and very small manufacturers are exempt from the law altogether.<sup>12</sup> The new law immediately preempts all state GE food labeling initiatives and it gives the U.S. Department of Agriculture (“USDA”) two years to develop implementing regulations.<sup>13</sup>

This essay provides commentary and analysis of the law and suggestions for how it should be implemented by the Trump administration’s USDA. The law’s strengths and weaknesses are identified and discussed. The essay argues that the weaknesses can be largely remedied through clarifying regulations, but warns of the present risk of a “regulatory blockade” due to the law’s preemptive power.

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7. Steve Mistler, *LePage Signs Bill to Label Genetically Modified Food*, THE PORTLAND PRESS (Jan. 9, 2014), [http://www.pressherald.com/2014/01/09/lepage\\_signs\\_maine\\_gmo\\_labeling\\_bill/](http://www.pressherald.com/2014/01/09/lepage_signs_maine_gmo_labeling_bill/).

8. See Mark Pazniokas, *Vermont Prompts Fresh Look at Connecticut’s GMO Labeling*, THE CT MIRROR (Apr. 1, 2016), <http://ctmirror.org/2016/04/01/vermont-prompts-fresh-look-connecticuts-gmo-labeling/>.

9. Lynne Peebles, *Prop 37 GMO Labeling Law Defeated By Corporate Dollars and Deception*, *Proponents Say*, HUFFINGTON POST (Nov. 7, 2012), [http://www.huffingtonpost.com/2012/11/07/proposition-37-gmo-labeling\\_n\\_2090112.html](http://www.huffingtonpost.com/2012/11/07/proposition-37-gmo-labeling_n_2090112.html)

10. See Dan Charles, *Senate Passes a GMO Labeling Bill That the Food Industry Likes*, NPR (July 8, 2016), <http://www.npr.org/sections/thesalt/2016/07/08/485145450/senate-passes-a-gmo-labeling-bill-that-the-food-industry-likes>; See Jenny Hopkinson, *The Next GMO-labeling Battleground: USDA*, (Jul. 20, 2016), <http://www.politico.com/story/2016/07/gmo-labeling-fight-heads-to-usda-225874>.

11. 7 U.S.C. § 1639(b)(2)(D) (2016).

12. 7 U.S.C. § 1639(b)(2)(F)-(G) (2016).

13. See Mary Clare Jalonick, *Senators Reach Deal on GMO Labeling*, ASSOCIATED PRESS (June 23, 2016), <http://bigstory.ap.org/article/88dde8b8f40a47b7b50f60ceff198849/senators-reach-deal-gmo-labeling>.

### What's Right about the Law?

There are several issues the federal law got right. For one, given the interstate nature of our food system, a federal law is certainly appropriate. In addition, the legislation delegates the implementation of the law to USDA, which is also necessary. Finally, the new law will facilitate international trade, particularly in the countries that also require such labeling.

#### *Federal Scope of Labeling*

The passage of the federal law was motivated by the fact that several states had passed laws that required labeling. The federal law explicitly provides for preemption of these state laws.<sup>14</sup> Assuming the federal agency takes action, this is both reasonable and appropriate as food labeling law should be national in scope. Our food easily travels across state boundaries and consumers throughout the country have a strong interest in knowing more about the food they purchase and consume. For consumers and producers alike, it is more efficient to have one labeling system for the whole country rather than different state labeling systems.

However, in the absence of a federal law requiring GM labeling, states had begun establishing their own labeling systems. Vermont's, passed in 2013, was the most complete. It required a label on any food sold in Vermont that is "entirely or partially produced with genetic engineering."<sup>15</sup> Connecticut and Maine also passed laws mandating GMO labeling, but they included implementation criteria that were conditional on neighboring states passing similar legislation.<sup>16</sup> In any event, these statutes and others<sup>17</sup> are preempted by the new federal law.

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14. See 7 U.S.C. § 1639(b)(2)(E) (2016).

15. VT. STAT. ANN. §§3041-3048.

16. *New Vermont GMO Labeling Law Fuels Debate*, KELLER AND HECKMAN LLP (July 15, 2014), <https://www.khlaw.com/New-Vermont-GMO-Labeling-Law-Fuels-Debate>.

17. Andrew Pollack, *Genetically Engineered Salmon Approved for Consumption*, N.Y. TIMES (Nov. 19, 2015), [https://www.nytimes.com/2015/11/20/business/genetically-engineered-salmon-approved-for-consumption.html?\\_r=0](https://www.nytimes.com/2015/11/20/business/genetically-engineered-salmon-approved-for-consumption.html?_r=0).



### *Delegation to USDA*

The federal law gives implementation authority to USDA to establish a system to disclose whether a food contains “genetic material that has been modified through bio-engineering.”<sup>18</sup> USDA’s Agricultural Marketing Service (AMS) is tasked with writing regulations within two years.<sup>19</sup> It is also required to conduct a study of the “technological concerns relating to using electronic means of disclosure” within a year.

Congress might have instead designated the Food and Drug Administration (FDA) as the implementing agency. Since the 1990s, the FDA has used its authority under the FDA to regulate GE food in multiple ways. For example, it conducted “consultations” for over 150 GE plants such as corn, soybeans, canola, and cantaloupe, which had been genetically engineered to have a variety of beneficial traits. Some of these traits include pest, virus, and herbicide resistance, increased fertility or protein content, and altered ripening color.<sup>20</sup> Further, in November 2015, FDA approved the first animal-based GE food, AquaBounty’s genetically-modified Atlantic salmon.<sup>21</sup> That month, it also issued guidance for industry regarding the voluntary labeling of GE food.<sup>22</sup>

The USDA, however, is arguably better equipped to design and implement a labeling regime for GE food. Most importantly, the USDA’s AMS has successfully administered the labeling system of the National Organics Program (NOP) for

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18. 7 U.S.C. § 1639(1) (2016).

19. *Id.*

20. *Biotechnology Consultations on Food from GE Plant Varieties*, USDA (last updated Dec. 14, 2016), [http://www.accessdata.fda.gov/scripts/fdcc/index.cfm?set=Biocon&sort=FDA\\_Letter\\_Dt&order=DESC&startrow=1&type=basic&search](http://www.accessdata.fda.gov/scripts/fdcc/index.cfm?set=Biocon&sort=FDA_Letter_Dt&order=DESC&startrow=1&type=basic&search).

21. *Aqua Advantage Salmon*, USDA (last updated Apr. 7, 2016), <https://www.fda.gov/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/ucm280853.htm>.

22. *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants*, USDA (Nov. 2015), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm>.

nearly twenty years. Pursuant to the authority granted to the agency by the Organic Foods Production Act of 1990, it promulgated the regulations and published the guidance documents that have enabled the sector to grow more than three-fold, in excess of over \$40 billion in sales, in 2015.<sup>23</sup>

Moreover, in the case of both organic and GE food, scientific research suggests they are safe and without negative impacts on human health. A recent report from the National Academy of Sciences, Engineering, and Medicine concluded that there was “no substantiated evidence of a difference in risks to human health between currently commercialized genetically engineered (GE) crops and conventionally bred crops. . .”<sup>24</sup> As such, GE food labeling—like organic food labeling—is not a matter of regulating food safety.

Even so, consumers still want to know how their food is produced. Americans overwhelmingly support the labeling of GE food. A Consumer Reports poll conducted in 2014 found that 92% of U.S. consumers believe that GE food should be labeled. Other polls conducted in the past decade reinforce the fact that Americans overwhelmingly support food labeling.<sup>25</sup> Further, political support for GE labeling is bipartisan as peoples’ reasons for backing the idea is wide-ranging, whether it concern environmental harm or the morality of genetic modification.

Labeling is an appropriate regulatory response for GE food. It simply confirms the presence of GMOs in a food product. What it does not do is present a judgment as to its nutritional benefit or lack thereof. Given USDA’s experience administering the NOP, it is arguably the most appropriate agency to

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23. *U.S. Organic Sales Post New Record of \$43.3 Billion in 2015*, ORGANIC TRADE ORGANIZATION (May 19, 2016), <https://www.ota.com/news/press-releases/19031>.

24. *Distinction Between Genetic Engineering and Conventional Plant Breeding Becoming Less Clear, Says New Report on GE Crops*, NAT’L ACADEMIES OF SCIENCES, ENG’G, AND MEDICINE (May 17, 2016), <http://www.nationalacademies.org/onpinews/newsitem.aspx?RecordID=23395>.

25. *U.S. Polls on GE Food Labeling*, CENTER FOR FOOD SAFETY (last visited Feb. 28, 2017), <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/us-polls-on-ge-food-labeling>.

implement this law.

### *Conformity with other Countries*

Passage of the NBFDS brings the US into greater conformity with GE labeling frameworks utilized around the world. Sixty-four countries including the member nations of the European Union, Russia, China, Brazil, Australia, Turkey and South Africa, require labeling of GE food.<sup>26</sup> Meanwhile, in the US, advocates have fought for decades for a labeling law.

The US's lack of labeling has caused problems in international trade. In June 2016, Brazil refused to import US grains that could not be ensured to be GMO-free.<sup>27</sup> Earlier that year, the Brazilian government fined Nestle and PepsiCo for concealing the presence of GMOs in their products.<sup>28</sup> With a mandatory labeling requirement in the US, international trade problems like these should become less common and it is likely international demand for US food exports would grow.

### **What's Wrong with the Law?**

The NBFDS also has several notable weaknesses. Though a short law – barely 5 pages in length – the legislation was fast-tracked by Congress, thereby foregoing the usual Congressional hearings, testimony, recorded feedback from proponents and opponents, and amendments. In contrast, the GE labeling law passed by the state of Vermont held over 50 hearings and over 130 testimonies by witnesses were given.<sup>29</sup> Primary weaknesses of the federal law include uncertainty around the definition of

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26. *Int'l Labeling Laws*, CENTER FOR FOOD SAFETY (last visited Feb. 28, 2017), <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/international-labeling-laws>.

27. Tatiana Freitas, *GMO Concerns Stop Brazil Chicken Producers Buying U.S. Corn*, BLOOMBERG (June 8, 2016), <https://www.bloomberg.com/news/articles/2016-06-08/gmo-concerns-stop-brazil-chicken-producers-buying-u-s-corn>.

28. Lorraine Chow, *Nestle, Pepsi Fined for Concealing GMOs as Campbell Soup Announces Voluntary Label*, ECOWATCH (Jan. 8, 2016), <http://www.ecowatch.com/nestle-pepsi-fined-for-concealing-gmos-as-campbell-soup-announces-volu-1882146296.html>.

29. NAT'L SEA GRANT COLLEGE PROGRAM AMENDMENTS ACT OF 2015: HEARING ON S. 4850 114TH CONG. 2 (2016) (Stmt. of Sen. Patrick Leahy of Vermont).

“GE food,” lack of specificity in the form of labeling, and underdeveloped enforcement provisions.

*Uncertainty in the Definition of GE Food*

An all-important question in regulatory law is who is subject to the regulation and who is not. The answer is often found by considering the definitions presented in the law itself. In the NBFDS, Congress defined the term “bioengineered food” to be food that contains genetic material that has been modified through in-vitro recombinant DNA (rDNA) techniques and “for which modification could not otherwise be obtained through conventional breeding or found in nature.”<sup>30</sup> The question for the USDA – and eventually the courts – will be what food falls within the definition and which food does not.

While the Vermont law also defined genetic engineering in terms of the scientific process that produces the mutation, it not only includes just rDNA techniques but also the “fusion of cells.” As such, it might include foods not covered by the federal law. More significantly, the scope of the federal law may be limited by specifying that the modified genetic material must be “contained” in the food itself. In many European countries and China, a GM food is a food that consists of, contains, or is produced from genetically modified organisms.<sup>31</sup> As raised by Senator Patrick Leahy in a statement released before the legislation was passed, “[t]his definition would exclude a wide variety of highly processed foods, from soybean oil to corn oil, corn syrup to sugar beets, and an array of other products that do not possess the actual genetic material after they have been processed.”<sup>32</sup>

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30. 7 U.S.C. § 1639(1)(b) (2016).

31. 2003 O.J. (L 268) 1 (China follows the definition of Europe); see Yu Zhuang & Wenxuan Yu, *Improving the Enforceability of Genetically Modified Food Labeling Law in China with Lessons for the European Union*, 14 VT. J. ENV'T L. 465 (2013).

32. Press Release, Full Statement Of Senator Patrick Leahy (D-Vt.) On The Senate's Hasty Attempt To Preempt State Laws And Thwart A Consumer's Right To Know (July 7, 2016) (on file at <https://www.leahy.senate.gov/press/full-statement-of-senator-patrick-leahy-d-vt-on-the-senates-hasty-attempt-to-preempt-state-laws-and-thwart-a-consumers-right-to-know>; see also Congress Passes Legislation Mandating a National Bioengineered Food Disclosure Standard: Five Things You Need to Know, SIDLEY (July 21, 2016), <http://www.sidley.com/news/07-21-2016-environmental-update> .

*Lack of Specificity about the Form of Disclosure*

The law does not determine the form in which the GE content of food will be disclosed. The form it takes is critical because if it is deemed confusing or unclear, the law's presumptive objective of informing consumers will be undermined. Unlike other national and subnational labeling laws, the federal law gives manufacturers three options: "a text, symbol, or electronic or digital link."<sup>33</sup>

Because there are options, U.S. consumers will have to learn to recognize several types of labels rather than just one. The Vermont law, in contrast, requires one of three similar phrases to be stated on the package in "clear and conspicuous" text: "produced with genetic engineering," "partially produced with genetic engineering," or "may be produced with genetic engineering."<sup>34</sup> The EU labeling law similarly requires an on-package text label statement that reads: "This product contains genetically modified organisms [or the names of the organisms]."<sup>35</sup> Brazil requires a symbol, namely a black "T" within a black-bordered yellow-filled triangle (where the "T" stands for "transgenicos").<sup>36</sup>

Moreover, the third option, which refers to what the industry calls a "Quick Response (QR) code" may equate to no disclosure at all for many consumers. To be read at the point of purchase, this option would require consumers have a scanning device and know how to use it. According to a survey conducted in July 2016, only four in ten Americans said that it is either somewhat or very likely that they would use their mobile phones or in-store scanners to learn whether a product contained

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33. Nat'l Bioengineered Food Disclosure Standard Act, Publ. L. No. 114-216 § 293(b)(2)(d), 130 Stat. 834 (2016).

34. VT. STAT. ANN. TIT.9, § 3043(b)(1)-(3) (West 2016).

35. *Genetically Modified Organisms – Traceability and Labeling: Summary of Legislation*, EUR-LEX (Apr. 18, 2016), <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32003R1830>.

36. *Restrictions on Genetically Modified Organisms: Brazil*, LIBRARY OF CONGRESS (June 6, 2015), <http://www.loc.gov/law/help/restrictions-on-gmos/brazil.php>.

GE food.<sup>37</sup> Responding to critics of this option, Congress directed the USDA to conduct the aforementioned study of technological concerns year and authorized it to provide “additional and comparable options to access the bioengineering disclosure.”<sup>38</sup>

### *Absence of an Enforcement Regime*

The federal law does not create a strong enforcement mechanism for the new labeling scheme. In the few paragraphs of the law dedicated to enforcement, it provides that it is contrary to the law for a person to knowingly fail to make a disclosure required by the law. It further provides that manufacturers must maintain records that demonstrate compliance with the law.<sup>39</sup> Finally, the law sets forth the possibility of an audit to be conducted by USDA, which must include notice and a hearing on the results and, afterwards, that the summary of such audit be made public.<sup>40</sup>

This enforcement approach falls far short of that used by the USDA in the NOP. For example, the Organic Foods Production Act of 1990 states that a person who misuses the label can be fined up to \$10,000 and that a false statement relating to the Act can incur criminal liability.<sup>41</sup> Thus, while USDA may be authorized to audit companies, the law does not give the agency the authority to fine them or to pull to noncompliant products from the shelves.<sup>42</sup>

Further, the producers of food labeled as organic must hire a third-party certification firm accredited by the USDA to certify that the food is compliant with the organic label.<sup>43</sup> The

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37. *Will Consumers Use QR Codes to Learn About Genetically Modified Food?*, ANNENBERG PUBLIC POLICY CENTER (Aug. 3, 2016), <http://www.annenbergpublicpolicycenter.org/will-consumers-use-qr-codes-to-learn-whether-food-is-genetically-modified/>.

38. 7 U.S.C. § 1639(b)-(c) (LexisNexis 2017).

39. *Id.* at (g).

40. *Id.*

41. 7 U.S.C. § 6519(c)(1) (LexisNexis 2016); *see also* 7 U.S.C. § 6519(c)(2); *see also* 18 U.S.C. § 1001 (LexisNexis 2011).

42. 7 U.S.C. § 1639(b)-(g) (LexisNexis 2017).

43. Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICHIGAN J. OF

certifying agents conduct inspection as necessary to verify compliance with regulatory requirements and may suspend or revoke the organic certification of producers found to be out of compliance.<sup>44</sup> In contrast, it appears that GE labeling requires only a self-declaration by a company, without need for any third-party evaluation.

It is possible that other enforcement approaches may help fill this void. For example, the FDA may retain existing authority to regulate “truthful and misleading” claims on food labels.<sup>45</sup> Also, state consumer protection laws could potentially be applied by state enforcement authorities. Support is provided by the law’s statement that nothing in the law or its regulations “shall be construed to preempt any remedy created by a State or Federal Statutory or common law right.”

### **Looking Ahead to USDA Regulations**

The law requires that implementing regulations be published within two years or by July of 2018.<sup>46</sup> The USDA has an opportunity to write regulations that resolve important uncertainties and strengthen the implementation of the law. First, the USDA must clarify the definition of “bioengineered food.” In doing so, the USDA should consider what it is consumers want to know. The USDA reportedly indicated, before the legislation was passed, that the agency interpreted the language of the bill to confer on the USDA broad authority to label GE food. Specifically, the agency would include “all traditional gene modification products which have come through the USDA approval process, such as GE corn, soybeans, sugar, and canola products on the market today, as well as products developed using gene editing techniques.” It seems likely that US consumers would prefer a broad interpretation over a narrow one.

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ENVMT’L AND ADMIN. LAW, 291, 360 (2014).

44. *Id.*; 7 CFR § 205.403-205.406 (West 2012).

45. 21 U.S.C. § 343 (West 2012).

46. See generally Jay Sjerven, *Food Industry Considers President Trump’s Regulation Freeze*, FOOD BUSINESS (Feb. 21, 2017), <http://www.foodbusinessnews.net/Opinion/JaySjerven?Food-industry-considers-president-trumps-regulation-freeze.aspx?CCK=/>.

The USDA also needs to develop regulations that further specify the form of disclosure. The USDA should ensure that the disclosure is clear and accessible to all consumers. In terms of enforcement, it is possible that the USDA could add a third-party verification system modeled after the NOP. While most existing third party verification systems have been created by law, others find their origin in federal regulations.<sup>47</sup>

While not perfect, the law has some promise: it is a federal law; the USDA has expertise in establishing the consumer-tested NOP labeling program; and it brings US law into greater accord with the law of other countries on the issue of GE food labeling. Now it is critical that USDA write the regulations to clarify the law and set it up for effective implementation. The Disclosure Standard itself is required to be established within two years of the passage of the law. But as of early 2017, it was rumored that USDA still did not have the funding needed to undertake the study of technological concerns that is required within one year after the passage of the Act.<sup>48</sup> On the campaign trail in Iowa, Trump said he opposed efforts to require mandatory labeling of GE foods.<sup>49</sup>

The present risk is regulatory blockade by preemption. The federal law was passed to preempt state laws like Vermont's. Now consumers throughout the national confront a regulatory blockade.<sup>50</sup> States cannot regulate because they are preempted, and signs point to potentially long delays from USDA. Citizens will eventually be able to sue the USDA for missing its statutory deadlines and the courts could force regulatory action, but under this scenario, implementing regulations are years away. Given the law's preemption of several hard-won state laws, the federal

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47. See McAllister, *supra* note 43 at 329-30.

48. Marc Heller, *Budget Woes Delay GMO Law*, E&E News reporter (Jan. 9, 2017) <http://www.eenews.net/greenwire/2017/01/09/stories/1060048037>.

49. Glenn S. Kerner, *Food for Thought: The Federal GMO Labeling Law*, Food Safety Magazine (Feb. March, 2017) <http://www.foodsafetymagazine.com/magazine-archive1/februarymarch-2017/food-for-thought-the-federal-gmo-labeling-law/>

50. Cf. John Upton, Salon, *Preemption nation: Trump, Congress could halt state action on climate*, (Jan. 11, 2017), [http://www.salon.com/2017/01/11/preemption-nation-trump-congress-could-halt-state-action-on-climate\\_partner/](http://www.salon.com/2017/01/11/preemption-nation-trump-congress-could-halt-state-action-on-climate_partner/)



government now owes the public robust and prompt regulations that ensures that we know when we are purchasing and consuming genetically engineered food.

## **Trump's New Trade Policy: Risks for North American Food and Farms**

**Karen Hansen Kuhn\***

President Trump began his administration with a series of actions apparently designed to satisfy campaign promises to supporters and antagonize nearly everyone else. They include a series of statements and actions on the renegotiation of the North American Free Trade Agreement (NAFTA). NAFTA was a bad deal, he says,<sup>1</sup> and as a consummate dealmaker, he will tear up the existing agreement and get America a better deal. At one point, he declared that it should be retitled the North American Free and Fair Trade Agreement (NAFAFTA!), although what he means by fair, and how that would play out for farmers and rural communities in the three countries involved in the agreement is far from clear.

Unsurprisingly, President Trump's January executive order to build a wall between the United States and Mexico incited the worst political crisis between the two countries in decades. That action, along with the notion that a tax on Mexican imports (and U.S. consumers) could pay for the barrier, willfully ignores the reality of declining livelihoods and increasing inequality. This is particularly and especially true in rural areas.

While the exact nature of the NAFTA renegotiation will only become clear as talks unfold, the initial proposals are simplistic, blunt instruments to fix complex problems. In the

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1. Maggie Sevens, *Trump Pins NAFTA, 'Worst Trade Deal Ever,' On Clinton*, POLITICO (Sept. 26, 2016), <http://www.politicso.com/story/2016/09/trump-clinton-come-out-swinging-over-nafta-228712>.

case of NAFTA, much of the focus appears to be on the trade balance. Trade flows among the United States, Canada, and Mexico have quadrupled since the agreement began.<sup>2</sup> That means goods – and investments – are flowing back and forth across borders to create complex supply chains. Take the example of meat production. U.S. corn and soy exports to Mexico have soared, as has domestic and foreign investment in industrial-scale beef production. Many of those animals are then brought back to the U.S. for finishing and slaughter. U.S. beef production has also increased, using the same cheap feeds, much of which is exported to Mexico and other countries.<sup>3</sup>

According to a superficial explanation, U.S. farmers must be relatively better at producing animal feed and cattle than their Mexican counterparts. Consumers should benefit from lower prices, so it would seem that all must be well. However, if you look more closely at that rosy picture, the festering dysfunctions come into view. U.S. exports to Mexico of cheap corn quadrupled in the wake of NAFTA. Millions of Mexican farmers lost their land and were driven from their communities to seek work in cities throughout Mexico and the United States. Consumption of cheap meat, highly processed foods, and dairy products spiked in Mexico, too, resulting in dramatic increases in obesity rates.<sup>4</sup>

On the U.S. side, oft-repeated assertions that increasing exports would save the farm have turned out to be flatly wrong. More specifically, this assertion is wrong for family farmers and entirely advantageous for agribusinesses. Any way you look at it, corporate concentration in U.S. agriculture has increased dramatically over the last two decades as companies nimbly shift various aspects of production around the world, protected

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2. Economic Research Service, *Foreign Agricultural Trade of the United States (FATUS): Calendar Year*, USDA (last updated Nov. 4, 2016), <https://www.ers.usda.gov/data-products/foreign-agricultural-trade-of-the-united-states-fatus/calendar-year/>.

3. Joseph Glauber, *Likely Effects of a Trade War for US Agriculture? Sad!*, IFPRI (Jan. 31, 2017), <http://www.ifpri.org/blog/likely-effects-trade-war-us-agriculture-sad>.

4. Clark et al., *Exporting Obesity: US Farm and Trade Policy and the Transformation of the Mexican Consumer Food Environment*, *INT'L J. OF OCCUPATIONAL AND ENV'T HEALTH*, 18(1) 53, 53–64 (2012).

by trade rules on tariffs, food safety, intellectual property rights, and investment. University of Missouri researcher Mary Hendrickson has calculated the share of a given agricultural sector controlled by just four companies. That ratio has increased dramatically since NAFTA's inception. In the case of beef slaughtering, it increased from 69 percent in 1990 to 82 percent in 2011, with Cargill, Tyson, JBS, and National Beef controlling the vast majority of the sector.<sup>5</sup> As a result, farmers and ranchers on both sides of the border lose bargaining power, further depressing their livelihoods.

Untangling this mess so that trade rules actually contribute to rural economies and healthier food and farm systems will require a lot more than the blunt instruments of raising tariffs or inane suggestions to ban immigrant workers.<sup>6</sup> On the other hand, the complexity of trade rules proposed in deals like the Trans Pacific Partnership (TPP) shouldn't mask the clear intentions behind those rules. Although Robert Lighthizer, Trump's nominee for U.S. trade representative, has been critical of past trade deals, many top administration posts have been filled with proponents of the TPP. Initial drafts of the administration's objectives for the NAFTA renegotiations leaked in March included many proposals lifted directly from the TPP, indicating persistent pressure to continue with business as usual trade proposals.<sup>7</sup>

Trump claims that NAFTA and other existing trade deals have failed. They haven't for their proponents. The rules were specifically designed to help big, global firms remove regulations and programs that might limit their profits, whether in the U.S. or internationally. The entirely foreseeable increases

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5. Mary Hendrickson, *The Dynamic State of Agriculture and Food: Possibilities for Rural Development?*, University of Missouri at the Farm Credit Administration Symposium on Consolidation in the Farm Credit System (Feb. 19, 2014), <https://www.fca.gov/Download/Symposium14/hendrickson19feb2014.pdf>.

6. Steve Suppan, *Undocumented Farmworkers and the U.S. Agribusiness Economic Model*, IATP (Dec. 19, 2016), <https://www.iatp.org/blog/201612/undocumented-farmworkers-and-the-us-agribusiness-economic-model>.

7. Alex Lawson, *Trump's NAFTA Plan Hews Closely To TPP Model*, Law360.com, (March 30, 2017) <https://www.law360.com/articles/907981/trump-s-nafta-plan-hews-closely-to-tpp-model>

in income inequality and environmental degradation were not mere accidents. Rather, the deal's proponents simply saw those effects as unavoidable and even unimportant.

The real story of recent changes in the trade debate is that organizations representing workers, faith communities, the environment, public health, and family farms stood up and said no, translating trade-speak into plain language. Terms like "Investor State Dispute Settlement," for example, sound vaguely benign. But this mechanism in trade deals like NAFTA sets up unaccountable private tribunals of trade lawyers to enable companies to extract hundreds of millions of dollars from governments over public interest regulations such as cigarette labels, controls on toxic wastes from gold mines, or the recent corporate lawsuit challenging the rejection of the Keystone XL pipeline.<sup>8</sup> Simply put, these agreements were never about "free" trade.

### **New Rules for NAFTA**

So if the new administration were serious about righting the wrongs of NAFTA, a first reasonable step would be to open up the process to include consultations with affected communities, including farmers and workers in the U.S., Canada, and Mexico. In a statement on a better approach to NAFTA, Rudy Arredondo of the National Latino Farmers and Ranchers Association said:

"Rural communities and farm, ranch and farmworker organizations must be at the table for these negotiations. Since NAFTA, we have witnessed the collapse of rural economies in our nation and those of our neighbors. Any renegotiation of NAFTA must support trade policies and investments that rebuild our agricultural base and food systems."<sup>9</sup>

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8. Johnson et al., *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (May 2015), <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf>.

9. Press Release, *U.S.-Mexico Relations Should be Based on Fair Trade, Not*

In addition, renegotiation could also eliminate some of the worst aspects of current trade deals, starting with Investor State Dispute Settlement. There is no reason such disputes cannot be resolved under existing national judicial systems.

There is a very real danger that any efforts to renegotiate NAFTA could make it much worse, for food and farm systems alike, if negotiators rely on new proposals from other failed trade deals. Article 18.83 of TPP, on Intellectual Property Rights, would require countries to ratify the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on March 19, 1991 (known as UPOV91). That convention tightens agribusiness controls over seeds and plant varieties. Mexico has ratified a previous version of the treaty that allowed family farmers to save and share protected seeds. Concerted local campaigns have so far prevented the Mexican Senate from ratifying the 1991 version, or from enacting laws to implement it, but the country was under considerable pressure to ratify the law during the TPP debate.

Similarly, “innovations” on regulatory cooperation in the stalled Transatlantic Trade and Investment Partnership (TTIP) would undermine local efforts to ban toxic chemicals. That proposal would establish a supranational review committee to review public interest laws, potentially including state and local laws on food labels, food safety, and pesticides. Any such law (or, in some iterations, legislative proposals) would be subject to extensive cost-benefit analysis and other legal hurdles that could well prevent their enactment.<sup>10</sup> While the TTIP appears to be on hold, the approach seems consistent with President Trump’s orders to eliminate “burdensome” regulations.

If, in fact, we want better deals, we need new rules. U.S. groups including the National Family Farm Coalition, Rural

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*Xenophobia*, IATP (Jan. 27, 2017), <https://www.iatp.org/documents/farm-food-groups-call-for-new-way-on-nafta>.

10. Center for International Environmental Law, *Preempting the Public Interest: How TTIP Will Limit US States’ Public Health and Environmental Protections*, CIEL (Sept. 2015), [http://www.ciel.org/wp-content/uploads/2015/09/CIEL\\_Preempting-Public-Interest\\_22Sept2015.pdf](http://www.ciel.org/wp-content/uploads/2015/09/CIEL_Preempting-Public-Interest_22Sept2015.pdf).

Coalition, National Farmers Union, Western Organization of Resource Councils, Food & Water Watch, and the Institute for Agriculture and Trade Policy have come together to discuss what should be on the agenda if NAFTA were to be replaced with a new agreement whose goal is to increase living standards across all three countries. These conversations are happening in Mexico and Canada as well.

It's hard to be optimistic that NAFTA renegotiations will go well. A key early indication will be whether the Trump administration continues the current practice of secretive negotiations among corporate advisors or if it begins with a thorough, open, and democratic assessment of NAFTA that involves both rural and urban communities, including farmers. If the agreement includes provisions related to agriculture, the overall goal should be to support fair and sustainable rural economies and food supplies.

### **A Better Deal for Farmers and Consumers**

Trade and farm policy go hand in hand. Both should ensure that farmers are paid fairly for their crops and livestock. The current U.S. Farm Bill is almost entirely geared at growth in international exports as a means of increasing incomes for farmers. This approach, however, has dramatically failed, with farmers now experiencing the fourth consecutive year of low prices. Discussions on the Farm Bill will likely heat up in 2017, but in the meantime, the U.S. should stop trying to dismantle other countries' efforts to support their farming communities. These issues are mainly being debated at the World Trade Organization. However, honest discussions with NAFTA partners on more sensible approaches for food reserves or any efforts to minimize dramatic swings in prices or supplies would be a welcome step.

The U.S. could also press its NAFTA partners to abandon their challenges to Country of Origin Labeling for meat. A pledge to take on this issue appeared in early drafts of Trump's

NAFTA plans, but seems to have been discarded for now.<sup>11</sup> Canada and Mexico won a WTO challenge of a U.S. program that required the same kinds of disclosure typically required for fruits and vegetables. A survey commissioned by the Consumer Federation of America found that 90 percent of Americans want to know where their meat is from.<sup>12</sup> Accurate information is an essential component of well-functioning markets. Current trade rules prioritize trade flows over a consumer's right to know what's in their food. That simply has to stop.

It's easier to see what needs to be removed from current trade policy than to see how the trade rules themselves can proactively help advance food security and rural livelihoods. Most of the reforms that need to happen in our food system – whether in a community, a nation, or on the global scale – must start with local conditions and priorities. This will become increasingly clear as climate change destabilizes weather, disrupting global supply chains and making massive, single-crop production more vulnerable. A recent study co-authored by an MIT economist found that increasing crop diversity within countries is likely to be much more important in confronting climate change than relying on trade to make up for declining productivity.<sup>13</sup> The idea that we should build up from what farmers know about their soil, weather, and local markets to feed their families and their nations is at the center of the global movement for food sovereignty. Trade policy should support that process, not create new obstacles.

It is impossible to know now whether President Trump's campaign promise to renegotiate NAFTA will result in any substantial improvements. Further, there are plenty of reasons to question what the three governments might eventually decide to do. Even so, however, there is also no reason for the same

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11. Jenny Hopkinson, *Return of COOL Not Cool at All*, POLITICO (Nov. 21, 2016), <http://www.politico.com/tipsheets/morning-agriculture/2016/11/return-of-cool-not-cool-at-all-217512>.

12. Press Release, Consumer Federation of America, *Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat*, (May 15, 2013), <http://www.consumerfed.org/pdfs/CFA-COOL-poll-press-release-May-2013.pdf>.

13. Peter Dizikes, *Grow Your Own Way*, MIT NEWS OFFICE (Nov. 20, 2015), <http://news.mit.edu/2015/trade-not-help-fight-farming-failures-1120>.



civil society movements that defeated the TPP to allow other interests to set the agenda on NAFTA.

## **Food Labor and the Trump Administration: A Grim Prognosis**

**Erik Loomis\***

The Obama administration did not make fundamental changes to the American food system nor did it radically transform the conditions for labor organizing. The administration did, however, achieve small, meaningful changes for food workers. Despite initial hopes that President Obama would name a reformer as Secretary of Agriculture to create a more sustainable food system, Tom Vilsack was a choice that changed little. On the other hand, the Obama Administration's choice of Tom Perez as Secretary of Labor for its second term led to a series of Labor Department regulations that improved the lives of food workers. For example, the May 2016 executive order that raised the overtime exemption threshold from \$23,660 to \$47,476 means large numbers of restaurant workers would receive overtime pay or receive pay raises to bring them over the threshold. It worth noting, however, that a federal judge has blocked its implementation.<sup>1</sup>

The impact of Donald Trump on food labor remains to be seen but early signs are less than promising. His choices as Secretary of Agriculture, former Georgia governor Sonny Perdue, and his first choice as Secretary of Labor, Andy Puzder, the CEO of CEK Restaurants, which owns fast food chains Hardee's and Carl's Jr., are both strong opponents of worker rights. While Puzder's opponents forced his withdrawal,

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1. Ryan Sutton, *Obama's New Overtime Rules Will Give Restaurant Workers Much-Deserved Raises*, EATER (May 18, 2016), <http://www.eater.com/2016/5/18/11696664/obama-overtime-labor-laws>; The Time Editorial Board, *Obama Should Quickly Appeal Court Ruling Stopping New Overtime Rules*, LOS ANGELES TIMES (Nov. 24, 2016), <http://www.latimes.com/opinion/editorials/la-ed-obama-labor-department-overtime-courts-20161123-story.html>.

Trump's second choice, Alexander Acosta has displayed no evidence that he will continue Obama's advances on food worker rights. We face a strong likelihood for the repeal of Obama era regulations and a grim chance for any new rules that would protect workers.

The likely appointment of dozens of pro-business, anti-worker judges to the federal courts, including the recently confirmed Neil Gorsuch to the Supreme Court, will go far to shape the Trump administration's legacy for food workers. We can expect an increase in state level "ag-gag" bills with Trump-appointed judges unlikely to overturn them. Designed by agribusiness to criminalize animal rights activists from entering in their plants and taking secret footage to expose animal abuse, ag-gag laws make such conduct illegal without the consent of its owner. The poor treatment of animals is intricately connected to the poor treatment of workers, as meatpackers, butchers, and other laborers in the meat industry work in the same dangerous conditions for low pay and without union protections. Moreover, while specifically targeted at animal rights activists, the criminalization of knowledge could easily be applied to any undercover investigations of workplaces in the food industry. Seven agricultural states have passed versions of these bills, including Idaho and North Carolina. In 2015, a judge struck down the Idaho law and activists have challenged other states' laws.<sup>2</sup> But supporting these sorts of laws is precisely the pro-business regulatory climate that the Trump administration has touted itself as providing and it is highly likely that its appointed judges, including Gorsuch, will look favorably on ag-gag laws.

Ensuring that regulatory agencies do not function as needed is another likely outcome of the new administration that will

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2. Lindsay Abrams, *Idaho Passes Industry-Backed 'Ag-Gag' Bill*, SALON (Feb. 28, 2014), [http://www.salon.com/2014/02/28/idaho\\_passes\\_industry\\_backed\\_ag\\_gag\\_bill/](http://www.salon.com/2014/02/28/idaho_passes_industry_backed_ag_gag_bill/); Peter Moskowitz, *Idaho Gov. Signs 'Ag Gag' Bill Into Law*, AL JAZEERA AMERICA (Feb. 28, 2014), <http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-aggagbillintolaw.html>; Luke Runyon, *Citing the Idaho Decision, Activists Turn Their Ire to North Carolina's Ag-Gag*, KUNC (Jan. 13, 2016), <http://www.kunc.org/post/citing-idaho-decision-activists-turn-their-ire-north-carolina-s-ag-gag#stream/0>.

directly affect food workers. One expected and profound change for food labor is a weakened Occupational Safety and Health Agency. The agency is already underfunded and lacking the resources to inspect the nation's workplaces with consistency. OSHA's protections for workers flies in the face of the anti-regulation atmosphere of the billionaires with which Trump has staffed his Cabinet and the ideologues he is appointing to various agencies. To date, Trump has not nominated an OSHA director, but weakening OSHA whistleblower protections, lowering violation fines, and repealing Obama's executive orders on workplace safety is a top priority of Republicans and there is little reason to believe that President Trump will not act upon these principles.<sup>3</sup>

Trump's white ethno-nationalism makes predicting his impact on migrating workers and mobile capitalism more difficult. While the vast majority of domestic meat production happens in the United States, outside of fish, processed food production has increasingly left the U.S. for Mexico and Asia. Kellogg's 2013 lockout of its Memphis cereal factory in an effort to crush its union and move most of its production to a Mexican factory is indicative of how anti-labor and food politics are interconnected.<sup>4</sup> Trump's bluster about outsourcing belies the administration's close relationship with much of corporate America. It's unlikely that major changes on this front take place in the next four years, particularly with Congressional Republicans highly unlikely to pass tariffs on imported goods, even if Trump wants them.

Moreover, Trump's controversial border wall plan will do little to stem Latin American migrants from arriving in the United States. Farmers will still demand low-wage workers to pick fruit and vegetables. Some of that could come from expanded guest worker programs, by which companies import

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3. Sydney Smith, *Transitioning to a Trump Administration: What It Could Mean for the Department of Labor and OSHA*, EHS TODAY (Nov. 10, 2016), <http://ehstoday.com/msha/transitioning-trump-administration-what-it-could-mean-department-labor-and-osh-0>.

4. Steve Payne, *Kellogg's Delivers Memphis a Slap in the Face*, LABOR NOTES (Jan. 20, 2014), <http://labornotes.org/2014/01/kelloggs-delivers-memphis-slap-face>.

foreign workers overseas on short-term contracts with little in the way of worker rights. Trump's anti-labor regulatory regime will provide more incentive to companies like the chocolate maker Hershey, which took advantage of a student program to force foreign exchange students to labor in its Palmyra, Pennsylvania plant, which only ended when the students struck and attracted attention to their cause. Hershey received a \$143,000 fine for this blatant exploitation, hardly enough to convince other corporations that such practices are not worth it.<sup>5</sup>

Immigrants also make up a large percentage of the labor in meatpacking plants. Once unionized in cities such as Chicago, meat companies moved those factories to the rural Midwest and South over the past half-century where unions are non-existent, undocumented labor predominates, and where working conditions are reminiscent of what Upton Sinclair described in his 1906 novel *The Jungle*.<sup>6</sup> A 2005 Human Rights Watch detailed the massive violations of worker rights in the meatpacking plants and little has changed in the past decade.<sup>7</sup> The Trump administration will almost certainly support the packers in keeping the plants deregulated, but the impact upon those companies in the face of large-scale crackdown on undocumented food workers would be significant.

One thing that is nearly certain is that the Obama administration's emphasis to hold fast food companies accountable for workers in their franchised stores will end.<sup>8</sup> Many of those jobs will likely be automated in the next four

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5. Dave Jamieson, *Hershey Student Guest Workers Win \$200,000 in Back Pay After Claims of Abusive Conditions*, HUFFINGTON POST (Nov. 14, 2012), [http://www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers\\_n\\_2131914.html](http://www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers_n_2131914.html).

6. Shane Hamilton, TRUCKING COUNTRY: THE ROAD TO AMERICA'S WAL-MART ECONOMY 10 (William Chafe et al. 2008).

7. See generally Eric Schlosser, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (New York: Harper Collins, 2002); see also Lance Compa, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (New York: Human Rights Watch, 2005).

8. Lydia DePillis, *Meet the Government Guys Standing Up for Franchise Workers and Contractors*, WASHINGTON POST (Mar. 9, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/03/09/meet-the-government-guys-standing-up-for-franchise-workers-and-contractors/?utm\\_term=.ec7113cb70c7](https://www.washingtonpost.com/news/wonk/wp/2016/03/09/meet-the-government-guys-standing-up-for-franchise-workers-and-contractors/?utm_term=.ec7113cb70c7).

years. Andy Puzder has talked about replacing his fast food employees with robots in response to rising wages in fast food. Unions have strongly criticized this suggestion. Even though Puzder was not confirmed as Secretary of Labor, the rapid growth of automation in fast food will likely expand unemployment among low-wage workers.<sup>9</sup> Researchers have suggested that 47 percent of American jobs could be automated in coming decades and the industrial food system is a major sector that would be affected in everything from driving to canning and meatpacking to ordering in restaurants.<sup>10</sup> The push for self-driving vehicles comes largely from the trucking industry, who have millions of employees moving food around the country. Eliminating these jobs would increase corporate profit while ending what is in many states the largest single employer of males. One report estimates a potential loss of 1.7 million trucking jobs in the next decade, devastating one of the last well-paid options for working-class employment.<sup>11</sup>

Food workers have led the fight for raising the minimum wage in the last several years. Bolstered by fast food workers' Fight for \$15 movement to demand a \$15 an hour minimum wage, even voters in conservative states such as Arkansas and Nebraska have approved increases in the minimum wage in recent years, though nowhere near the \$15 hourly wage that many are demanding. Puzder Acosta, and other Trump nominees however, have long opposed raising minimum wages in the fast food industry and have denounced the Obama administration's sick leave policies for federal contractors which includes food service workers in federal buildings. As AFL-CIO president Richard Trumka has stated, Puzder is "a man whose business record is defined by fighting against working people."<sup>12</sup> Such a

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9. Tonya Garcia, *Trump Labor Secretary Pick Andy Puzder Talked about Replacing Workers with Robots*, MARKETWATCH (Dec. 10, 2016), <http://www.marketwatch.com/story/trump-labor-secretary-pick-andy-puzder-talked-about-replacing-workers-with-robots-2016-12-08>.

10. See generally CARL BENEDIKT FREY & MICHAEL A. OSBORNE, *THE FUTURE OF EMPLOYMENT: HOW SUSCEPTIBLE ARE JOBS TO COMPUTERISATION* (Oxford: Oxford Martin Programme on Technology and Employment, 2013).

11. Natalie Kitroeff, *Robots Could Replace 1.7 Million American Truckers in the Next Decade*, L. A. TIMES (Sept. 25, 2016), <http://www.latimes.com/projects/la-fi-automated-trucks-labor-20160924/>.

12. Noam Scheiber, *Trump's Labor Pick, Andrew Puzder, Is Critic of Minimum*

record sums up most of Trump appointees' position on workers and their rights in the workplace.

Ultimately, the most profound impact of the Trump administration toward food labor is the larger anti-union legislation he will sign should it get to his desk. A national right-to-work bill has already been proposed by House Republicans. Unions such as the United Food and Commercial Workers have already struggled to unionize the food industry in the face of massive anti-union propaganda, intimidation, and regulatory capture in the Department of Labor. With right-to-work, successful union organizing of food workers will become near, if not entirely, impossible. The Senate filibuster, which Republicans could end at any time, may be the last thing food workers have between the Trump administration and their ability to win a union contract. Food companies, including Walmart and Whole Foods, already engage in union-busting activities, with the former closing a store in Quebec after its workers formed a union in 2004 and the latter firing drivers who voted to join the Teamsters in 2006.<sup>13</sup> Such activities will only become more universal in the Trump administration. The expected attack on union rights has already convinced the Service Employee International Union (SEIU) to reduce its budget by 30 percent. Given the enormous financial support the SEIU has given workers' movements, such as the Fight for \$15, there will likely be a rapid reduction in support for such movements, especially those that have used union funds for its cause yet have failed to secure any major, determinative victories.<sup>14</sup>

### Reforming the most exploitative parts of the food labor

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*Wage Increases*, N. Y. TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/us/politics/andrew-puzder-labor-secretary-trump.html>.

13. Bryce Covert, *Walmart Penalized for Closing Store Just After It Unionized*, THINK PROGRESS (June 30, 2014), <https://thinkprogress.org/walmart-penalized-for-closing-store-just-after-it-unionized-70945f29e349#.am7qx02pt>; Josh Harkinson, *Are Starbucks and Whole Foods Union Busters?*, MOTHER JONES (Apr. 6, 2009), <http://www.motherjones.com/politics/2009/04/are-starbucks-and-whole-foods-union-busting>.

14. Mallory Shelbourne, *SEIU Plans 30 Percent Budget Cut during Trump Admin.*, THE HILL (Dec. 27, 2016), <http://thehill.com/regulation/311910-seiu-plans-30-budget-cuts-in-wake-of-trump-win>.

system will likely be impossible for the next four years. This is especially true on the global labor exploitation that is inherent within American food consumption. The Los Angeles Times' devastating expose' on Mexican tomato farmers located just over the U.S. border has demonstrated in disturbing detail the horrendous working conditions of laborers producing for the American marketplace. In addition, it suggests the need to regulate the operations of American food supply chains internationally.<sup>15</sup> Recent Obama administration decisions that could lay the groundwork for improving working conditions throughout global food supply chains are threatened. This is especially true in regard to the new seafood importation standards that force any importer of seafood to the United States to meet American standards of marine mammal bycatch.<sup>16</sup> Undercover journalism in recent years exposing slave labor in the global fishing industry led President Obama to sign legislation banning the import of American fish caught by forced labor in southeast Asia, although the enforcement mechanisms remain vague.<sup>17</sup> Building upon these rules in a Trump administration is highly unlikely. Seeking to create regulations that would lead to a race to the top in labor conditions should be a top priority for those working on food law, despite the reality of the next four years.<sup>18</sup>

Overall, the Trump administration has grave implications for food workers. An aggressively anti-union and anti-regulatory stance likely means that standards for food workers will not only fail to improve the industry, but possibly set it back by decades.

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15. Richard Marosi, *Hardship on Mexico's Farms, A Bounty for U.S. Tables*, LOS ANGELES TIMES (Dec. 7, 2014), <http://graphics.latimes.com/product-of-mexico-labor/>; Richard Marosi, *Desperate Workers on a Mexican Mega-Farm: 'They Treated Us Like Slaves,'* L. A. TIMES (Dec. 10, 2014), <http://graphics.latimes.com/product-of-mexico-labor>.

16. Matt Burgess & Rob Williams, *New US Seafood Rule Shows Global Trade and Conservation Can Work Together*, THE CONVERSATION (Jan. 10, 2017), <https://theconversation.com/new-us-seafood-rule-shows-global-trade-and-conservation-can-work-together-70903>.

17. Ian Urbina, *Sea Slaves': The Human Misery that Feeds Pets and Livestock*, N. Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>.

18. ERIK LOOMIS, OUT OF SIGHT: THE LONG AND DISTURBING STORY OF CORPORATIONS OUTSOURCING CATASTROPHE 11 (2015).



Food workers have led the resistance to labor exploitation for years and will continue to do so. By placing those concerns central in our overall resistance to the administration, we can work to ensure greater justice for food labor the next time Democrats take power.

**An Interview with Outgoing Secretary of Agriculture  
Tom Vilsack: Reflections on His Legacy & Challenges  
Facing a New Era in American Agriculture Policy**

**Lauren Manning\***

**Introduction**

Former USDA Secretary Tom Vilsack served for eight years as President Obama’s Secretary of Agriculture. Secretary Vilsack’s eight-year legacy witnessed many diverse and significant events impacting food and agriculture. From the piquing of consumers’ curiosity and the momentous rise of the good food movement to the increasing attention surrounding agriculture’s impact on the environment. During those eight years, the U.S. food system was both praised for its efficiency and criticized for promoting an unhealthy diet and spawning environmental problems. Secretary Vilsack is generally credited as walking deftly between the two worlds. He famously referred to conventional agriculture and organic agriculture as like his two sons—different from one another, but loved the same.

In October 2008, prominent food policy journalist Michael Pollan penned an open letter to Secretary Vilsack discussing the current state of food policy and outlining a proposed agenda for reforming the US food system.<sup>1</sup> Pollan’s letter, entitled *Farmer in Chief*, centered on one goal: “. . .we need to wean the American food system off its heavy 20<sup>th</sup>-century diet of fossil fuel and put it back on a diet of contemporary sunshine.” In

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\* Lauren Manning is a food and agriculture lawyer based in Fayetteville, Arkansas. She joined the LL.M. Program in Agricultural and Food Law and the University of Arkansas School of Law after four years in private practice. Manning interviewed former Secretary Vilsack as a means of capturing his thoughts on his administration’s accomplishments as well as food law and policy in the Trump era. This article is based on that interview and on the Exit Memo provided to President Obama at the end of his presidency.

1. Michael Pollan, *Farmer in Chief*, *New York Times* (Oct. 9, 2008) available at <http://www.nytimes.com/2008/10/12/magazine/12policy-t.html>.

Pollan's vision, the Secretary of Agriculture would promote a healthful diet that considers the quality and diversity of food and foster policies that promote resiliency, safety, and security in our food supply. Monocultures would be converted back to polycultures, where animal agriculture, specialty crop production, and commodity crop production happened synergistically instead of compartmentally and food production returns to a regionalized system.

Although neither President Obama nor Secretary Vilsack adopted Pollan's proposed agenda, advancements were made in nutrition policy, rural development, small scale agriculture, and beginning farmer initiatives during the Obama administration. School lunches came to be judged not just by calorie count, but by nutrition value; "Know Your Farmer, Know Your Food" was created; and small, sustainable farms were at least provided with a seat at the table.

The following interview with Secretary Vilsack was designed to capture his personal reflections on his legacy and to identify what he views as the greatest challenges facing the future of American agriculture. It explores Secretary Vilsack's view of the incoming Trump administration and what it could do for American agriculture. Vilsack was close to the Democratic nominee, former Secretary of State Hillary Clinton, and was even considered to be a strong candidate for her vice-presidential pick. As an attorney, he is qualified to address not only the policy implications but the underlying legal issues that will be impacted by the new President's administration.

The transcript of the interview follows, interspersed with excerpts from his final exit memo to former President Obama.

### **Transcript**

#### ***Lauren Manning:***

On behalf of the University of Arkansas School of Law and the Agricultural and Food Law LL.M, program, I'd like to thank you for taking the time to share your thoughts on your tenure as

the Secretary of Agriculture and for this wonderful opportunity to reflect on some of the key developments during that time. I'm going to start by asking you about one of the cornerstones of your administration. Although there were many focuses during your tenure, one of the most pervasive themes was rural development. You focused on increasing connectivity in rural economies, home financing programs, substance abuse programs, and more. Looking back, how did these rural development programs impact agriculture and agribusiness?

***Tom Vilsack:***

When you look at a family farming operation in this country, those operations that are not large-scale commercial operations that sell more than \$350,000 in sales, those that sell less than that, one thing that was fairly obvious is that those operations were very dependent on outside income; that either the farmer, himself or herself, or their spouse or other family member had off-farm income to help supplement the farm income that allowed them to maintain the farming operation. So, anything having to do with creating new and better and more diverse economic opportunity is a direct benefit to those operations because it continues to provide employment opportunities that are critically important to maintaining the farm, and so many of the investments were made to make sure that those opportunities exist.

Secondly, as we looked at the long-term future for rural America, it was obvious to me that we needed to replace the extraction economy of the past with a sustainable economy of the future. That involved establishing local and regional food systems and jobs connected to that, to the supply chain that involved expanded opportunities in conservation and the contracting work that is done by small contracting firms in terms of conservation practices, and establishing bio-based manufacturing opportunities, whether it's biofuel or biochemicals or biomaterials made from agricultural products providing additional market opportunities for farm families. And all of that we contributed and invested in in record amounts during the Obama administration to help begin to create the

foundation for a new sustainable economy that I think over the long haul will provide more opportunity and more income and the ability to stem the population loss that rural America had experienced for a number of years.

*Many of the programs targeting rural development were administered through the White House Rural Council, which former President Obama established by Executive Order on June 9, 2011.<sup>2</sup> These programs included cooperative services, community facilities, home financing programs, electric and telecommunications expansion initiatives, and environmental support programs.<sup>3</sup> The Local Food Promotion Program and Farmers Market Promotion Program, both administered through the Agriculture Marketing Service, also offered opportunities to spur local food system growth in rural areas.*

*In a 2016 Rural America At a Glance publication, the USDA reported that unemployment rates had fallen to levels that were unprecedented since before the Great Recession.<sup>4</sup> The report also indicates that rural household incomes were generally increasing, as well as labor force participation and median earnings.*

*In his Exit Memo, Secretary Vilsack encouraged the continuation of the White House Rural Council.<sup>5</sup> Specifically, the memo underscores the importance of continuing to reduce barriers to federal programs and resources, help rural communities leverage local assets, and to allocate federal resources to the areas that need them the most.<sup>6</sup>*

***Lauren Manning:***

In the same vein, your administration was dedicated to

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2. Executive Order 13575 - Establishment of the White House Rural Council, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/06/09/executive-order-13575-establishment-white-house-rural-council>.

3. See <https://www.rd.usda.gov/programs-services/all-programs>

4. See USDA Rural America at a Glance 2016 Edition, available at [https://www.ers.usda.gov/webdocs/publications/eib162/eib162\\_forprinting.pdf?v=42684](https://www.ers.usda.gov/webdocs/publications/eib162/eib162_forprinting.pdf?v=42684)

5. Exit Memo, p. 14

6. Exit Memo, p. 14

supporting and creating new opportunities for beginning farmers, including young folks from farming backgrounds and people of all ages who are new to farming. Why were beginning farmers a priority for your administration, and what do you consider to be some of the most successful policies you implemented to advance their interests?

***Tom Vilsack:***

Well, it's really a matter of survival here. If you take a look at the average age of an American producer, it's 58 and continuing to age fairly rapidly, and we had three times the number of producers over the age of 65 than under the age of 35. That's not a prescription for long-term survival of what we like to think of as a diverse agricultural opportunity in America, so it was important for us to recognize that. It was also important for us to recognize that both traditional and nontraditional folks in the farming business were considering a farming opportunity. We were seeing more women interested in farming. We were seeing people of color interested in farming. We were seeing returning veterans who had rural backgrounds interested in agricultural opportunities.

So, one of the first things we did was to create a micro loan program that was designed to provide some startup money at a reasonable rate with less paperwork and a requirement that didn't require that you have some long-term experience in the agricultural field to be able to apply for those micro loans, and we saw great interest in those micro loans. We then made the determination that it was important to look at ways in which we could incentivize conservation programs for beginning farmers. Many of those farmers weren't in a position to provide as much cost share as we normally require from a more mature farming operation in order to utilize the NRCS programs, so we provided some flexibility on cost share for beginning farmers.

We created a slightly less expensive crop insurance and risk management set of tools for beginning farmers to make it a little bit easier. And in a very small way, but we think an important beginning, we looked for ways in which we could

potentially create access to land, whether it's the transition program with CRP or whether it was, as we were closing antiquated labs, working with land grant universities, as we do with Florida A&M. We add as a condition of transferring the land and the lab facilities to Florida A&M a requirement that they utilize those lands to facilitate beginning farmers. So, all that was designed to send a message that we're open for business, that we wanted people to consider farming as an option, whether they were fortunate enough to be part of a farm family or whether they were just simply interested in getting into the business. We wanted to make it as easy as we could.

Obviously that work has to continue, and I think there are going to have to continue to be very creative ways to encourage beginning farmers. I think one that one of the big issues that we looked at, we don't necessarily have all of the answers to it, but we recognize that there was going to be a tremendous transfer of land taking place over the next ten to 15 years as these aging farming families basically get out of the business, and the question is how are we going to facilitate the transfer of that land potentially to younger farmers. And I think as the country begins a debate on tax policy, it may be a good time to focus not just on the estate taxes, as often the case, but to focus on the income tax and the ability to unlock some of the land that's been held by absentee landowners for a considerable period of time that has appreciated in value and can potentially result in fairly significant tax payments if transferred today, but once the landowner dies, their estate gets a stepped-up basis and their heirs are able to sell it without any tax liability. So I think it's important for us to have those kind of conversations.

***Lauren Manning:***

And what's one thing that lawyers can do in private practice or through nonprofits to help beginning farmers?

***Tom Vilsack:***

Well, the first thing would be to familiarize yourself with the USDA website for beginning farmers because it contains a

very good template, a very good set of resources so that beginning farmers can be directed to the right programs, the right USDA programs to get started. I think also for lawyers to recognize that farming doesn't necessarily have to be limited to a rural area, that there is now urban farming operations that are being developed and we have a very comprehensive—or USDA has a very comprehensive website for urban farming as well. So lawyers could be very familiar with those websites, very familiar with the tools and programs identified in those websites and direct their clients to utilize and assist their clients in utilizing those programs.

*Indeed, the 2012 Census of Agriculture reported the average age of the American farmer as 58.3 years, reflecting a steady increasing trend from an average age of 50.5 years-old in 1982. It also reports that only 14 percent of principal farm operators are women and only 30 percent of total operators.<sup>7</sup> Regarding minorities, the Census concluded that “[a]ll categories of minority-operated farms increased between 2007 and 2012,” with Hispanic-owned farms increasing 21 percent.*

*Current statistics regarding farmland tenure underscore Secretary Vilsack's concerns regarding land access for beginning farmers and an impending mass transfer of wealth. Regarding tenure, the USDA's 2014 Tenure, Ownership, and Transition of Agricultural Land Survey (TOTAL) indicated that 39 percent of farmland acres in the U.S. are leased and that the average age of a farmland lease landlord is 66.5 years. Thirteen percent of these landowners identified as farmers, while 87 percent identified as non-operators. Additionally, 45 percent of landlords reported that they have never farmed.<sup>8</sup>*

*Since the microloan program's inception in January 2013,*

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7. See 2012 Census Highlights Farm Demographics – U.S. Farmers by Gender, Age, Race, Ethnicity, and More, available at [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Highlights/Farm\\_Demographics/](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Farm_Demographics/)

8. 2012 Census of Agriculture Highlights Farmland Ownership and tenure ACH 12-27/September 2015, available at [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Highlights/TOTAL/TOTAL\\_Highlights.pdf](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/TOTAL/TOTAL_Highlights.pdf)



*the USDA has issued over 21,000 microloans and reports that 70 percent of those financings involved beginning farmers.*<sup>9</sup>

***Lauren Manning:***

Switching gears a bit, during the eight years that you were at the helm of the USDA we saw a shift in the role that consumers play when it comes to shaping food policy. We saw this with GMO food labeling, with the demand for more local food and the recent increase in awareness about food safety. From your perspective, what was the catalyst for this shift? And based on what you saw during your administration, how might consumers continue to impact the ongoing dialogue about food policy?

***Tom Vilsack:***

Well, I suspect that there are a number of reasons for why there was greater focus. One, certainly not necessarily the only reason, I think is that people were looking on the marketing side, on the retail and production side, looking for either a value-added opportunity or a way to distinguish their product from a competitor's product. And I think that the rise in social media and the ability of individuals to easily start a conversation that can go viral and can impact a substantial number of people relatively inexpensively. It's not like you have to buy a 60-second ad at the Super Bowl to impact lots of folks. You can just simply set up a blog and, you know, the next thing you know, you've got a number of followers and they are listening to what you have to say and thinking about what you have to say.

I think the millennial generation in particular is utilizing food as sort of a connector. I think my generation used music as a connector and as a community builder, and I think this millennial generation is using food. That's why you've got a lot of millennials meeting up in restaurants and taking pictures of what they're eating and letting folks know about what they enjoy and what they don't enjoy. That's why you've got the

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9. Exit Memo, p. 5.

establishment of companies like Blue Apron and others that are delivering potentially ready-to-cook meals to make it easy for folks. So there's a lot going on. The Food Channel. I mean, there's just an awful lot of activity in this space, and I think it's a good thing because it's helping to reconnect people with their food and it's helping to potentially reconnect them with the people that produce their food. And I hope over the long haul it creates a better appreciation for the hard work and the risk that people take in producing food in this country.

I would add one caution, however. I think that with the speed of social media that there are times when the demands that are being made by consumers may be outpacing the capacity of producers and the capacity of the industry to meet those demands, and because there's such fierce competition in food, people are anxious to make the latest and greatest commitment to try to maintain market share or try to gain market share.

I think we need a better system, and I don't know what that system is, but a better system that would allow us to thoughtfully approach what consumers' needs and demands are to make sure that consumers understand and appreciate that there are costs associated with what they're requesting, and making sure that they are prepared to pay more for their food on a general proposition if the producers and processors adopt many of the steps that people want to see. And I've been using the example of cage-free eggs where over a hundred organizations, businesses, entities, make commitments to commit to cage-free eggs. No one stopped to ask the question, well, how many layers is that going to take and how long is it going to take for the industry to change and what's the cost associated with that and what assurances do those who are going to incur those costs, what assurances do they have that they're going to get money back or that they're going to be able to make a profit. And I think there's now real concern in that space that perhaps there is not as much demand on the retail side for that as some might have thought, and that's making it more difficult for producers to make the change that some consumers want. You'll pay a penny or two more for an Egg McMuffin, but when you pay 50 cents, 75 cents, a dollar per carton more for eggs when

you go to the grocery store, that's the question that I don't think often gets asked and answered in a thoughtful way in these conversations, so that could potentially slow the process down over time.

*Several studies have reflected a growing interest among consumers in learning about where their food comes from, how it is produced, and what it contains.<sup>10</sup> During Secretary Vilsack's tenure, several states voted on ballot initiatives that sought to provide increased protections for farm animals. The use of battery cages for laying hens, gestation crates for hogs, and veal crates in the dairy industry were the primary targets. Currently, California, Massachusetts, Michigan, and Ohio have enacted laws that prohibit use of all three of these confinement practices, while a handful of other states have enacted prohibitions against either one or two of them.<sup>11</sup> According to a*

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10. 2016 U.S. Grocery Shopper Trends Survey, The Food Marketing Institute, available at <http://www.fmi.org/docs/default-source/webinars/fmi-2016-us-grocery-shopper-trends-overview-webinar5ce7030324aa67249237ff0000c12749.pdf?sfvrsn=2>. The survey is used extensively by the retail grocery industry.

11. California  
[https://ballotpedia.org/California\\_Proposition\\_2,\\_Standards\\_for\\_Confining\\_Farm\\_Animals\\_\(2008\);](https://ballotpedia.org/California_Proposition_2,_Standards_for_Confining_Farm_Animals_(2008);)  
 Massachusetts  
[https://ballotpedia.org/Massachusetts\\_Minimum\\_Size\\_Requirements\\_for\\_Farm\\_Animal\\_Containment,\\_Question\\_3\\_\(2016\);](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3_(2016);)  
 Michigan  
[http://www.legislature.mi.gov/\(S\(wkt4d3jk13zxcbnl4avsmue3\)\)/mileg.aspx?page=GetObject&objectname=mcl-287-746;](http://www.legislature.mi.gov/(S(wkt4d3jk13zxcbnl4avsmue3))/mileg.aspx?page=GetObject&objectname=mcl-287-746;)  
 Ohio  
<http://codes.ohio.gov/oac/901%3A12>.  
 Arizona  
<http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/13/02910-07.htm&Title=13&DocType=ARS;>  
 Colorado  
<http://www.lexisnexis.com/hottopics/colorado/?app=00075&view=full&interface=1&docinfo=off&searchtype=get&search=C.R.S.+35-50.5-102;>  
 Florida  
<http://www.leg.state.fl.us/statutes/index.cfm?submenu=3#A10S21;>  
 Maine  
<http://legislature.maine.gov/statutes/7/title7sec4020.html;>  
 Oregon  
<https://www.oregonlaws.org/ors/600.150;>  
 Rhode Island  
<http://webserver.rilin.state.ri.us/Statutes/TITLE4/4-1.1/4-1.1-3.HTM;>

*number of studies, increasing the minimum space requirements for livestock translates to increased production costs for producers. One study from the University of California Agricultural Issues Center estimated that the non-traditional cage-free systems increase the cost of production by at least 20 percent.*<sup>12</sup>

***Lauren Manning:***

Over the course of your administration the USDA implemented two farm bills. Given your unique insight and experience in this area, in your view what does it take to successfully execute each farm bill? And as Congress begins working on the 2018 farm bill, what key issues or most impactful components are under consideration?

***Tom Vilsack:***

Oh, my heavens. Well, I think first of all, it's going to be important to have a farm bill, and that's by no means a given. And I think in order to make sure that there is a congress capable of passing what I refer to as a food, farm and jobs bill because it's a lot more than just a farm bill, there has to continue to be, in my view, a continued coalition between the nutrition community, the conservation community, the research community, the farming community, the rural development community and the forestry community and the trade community, all of which make up components of a farm bill, and so it's going to be important for that coalition to be retained and to strengthen.

Secondly, there are obviously going to be things that have to be addressed, but before the discussion gets serious, I hope it doesn't start the way the previous farm bill started, which is focusing on saving money as opposed to meeting need. I think it's incredibly important that we define the needs that exist in

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Washington <http://app.leg.wa.gov/RCW/default.aspx?cite=69.25.065>.

12. Sumner, et al, Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California, University of California Agricultural Issues Center, July 2008, <http://aic.ucdavis.edu/publications/eggs/egginitiative.pdf>

rural America that is serviced by a food, farm and jobs bill, and be able to define what that need is before we start talking about what the federal budget might be able to contribute to that need. Because if you start talking about cutting money initially, if that's your first objective, then basically you begin pitting all of those competing interests against one another in a farm bill and you basically fracture the coalition and you make it harder to get a bill through the process. I think if you create a dialogue about what the need is, you can then begin to challenge all of us to be creative, whether it's in government or outside of government, to figure out creative ways to meet that need and leverage resources.

I think we saw an example of that with the Regional Conservation Partnership Program that essentially said, look, we're going to put money aside, we're going to put CSP acres aside, EQIP money aside, and we're going to try to leverage that into more outside the federal government resources committed to conservation, and we saw a two-for-one advantage from that kind of approach. So, I think if you define the need and challenge folks to be creative about how to meet the need, you're going to get a lot more done and you're going to keep the coalition together and you're going to make it easier for the politicians to get a bill through the process.

In terms of implementing it, first and foremost, the USDA needs a secretary and it needs undersecretaries and it needs administrators and it needs to set up a system, as we had, that basically creates the expectation that it will be implemented in a thoughtful, considerate, and efficient way. And if you set up a task force as we did, oversee that on a weekly basis and to funnel decisions through the secretary that have to be done in a very orderly fashion and efficient fashion, you can get the bill and the rules implemented. I'm not sure in this new environment though, when it is required to eliminate two rules for every new rule that you institute, I'm not sure how that's going to work with a new food, farm and jobs bill because you have to have a lot of rules that are written in implementing a bill and if you have to eliminate two for every one that you introduce, I'm not sure what rules we're going to be eliminating at USDA. I don't

know whether it's going to be food safety rules or conservation rules or risk management rules or farm service agency rules. I'm not quite sure what rules are not beneficial to the farming community at USDA. And so, I think it's going to be very interesting to see how that unfolds, and I think we'll probably get a glimpse of that when the GMO labeling bill, the rules for that come in to play. There are going to be many rules associated with that, and the question is what rule are you eliminating in order to comply with the executive order.

*Passed every five years, the omnibus Farm Bill comprises trillions of dollars in programs and financing for American agriculture. President Trump nominated Sonny Perdue, former Georgia governor and state senator, to lead the USDA, representing his final cabinet pick. Although Perdue's senate confirmation hearing was completed on March 23, 2017, as of April 17, 2017, a vote on Perdue's nomination had yet to be scheduled.*

*On January 30, 2017, President Donald Trump signed Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs.<sup>13</sup> On July 29, 2016, former President Obama signed the National Bioengineered Food Disclosure Standard into law, which requires foods containing certain bioengineered ingredients to provide a disclosure on the product label, constituting historic shifts in both food labeling and agriculture biotechnology. The statute requires the Secretary of Agriculture to promulgate rules enforcing its provisions within two years from the date of enactment, a timeline that has been called into question given the rapidly shifting regulatory climate.*

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13. See Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs  
EXECUTIVE ORDER, REDUCING REGULATION AND CONTROLLING REGULATORY COSTS, (Jan. 30, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

***Lauren Manning:***

Your administration also addressed discrimination in agriculture in many ways, including the Intern to Career Program and improving access to credit for minority farmers. In your view and based on your insight, what are some of the continued challenges that minority farmers face and how can lawyers be advocates for advancing the rights of minority farmers?

***Tom Vilsack:***

Well, I think it's important for lawyers to know what the rules are and to work with their clients to make sure that they follow the rules and comply with the rules. I think it's going to be a lot easier to get things through the system and I think people are going to be able to have documentation that they may request for assistance and help because of the new receipt requirement. So I don't think we're going to have quite the problems we've had in the past where people walk into an office, don't get the help that they need and have a hard time documenting that they, in fact, requested help. I think lawyers knowing what the rules are will also have an easier time because we've changed the county committee system a little bit to make sure that there's representation of—that the county committees reflect the diversity of the producers that they represent by having minority members of those committees either elected or selected, and it will be interesting to see whether the new secretary will continue that process. I hope he does. But, you know, I think it's a slightly different world. I think there's—lawyers also, I think, have a responsibility to explain to producers if they're not successful, when there is a legitimate reason for them not to be successful that they aren't successful. They just can't assume that every time they aren't successful it's because of discrimination. I think there are times and circumstances where credit histories may not be what they need to be or repayment capacity may not be there, and I think you can do a service to your client by not only fighting hard for them, but also explaining why they didn't get the help that they thought they were entitled to, and it wasn't anything to do with

color of their skin or their culture or whatever. It just had to do with this is the way financial decisions are made.

*In his Exit Memo, Secretary Vilsack describes the USDA circa 2009 as “marred by decades of systemic discrimination.”<sup>14</sup> Since then, the USDA has resolved over 23,000 claims, as well as established a consolidated claims procedure for Hispanic and women farmers and ranchers.<sup>15</sup> The agency also engaged in practices that would extend financing opportunities to underserve communities, with annual ending doubling from \$380 million in 2008 to nearly \$830 million in 2015.<sup>16</sup>*

***Lauren Manning:***

As you transition into your new role leading the U.S. Dairy Export Council and focusing more exclusively on international trade issues, what’s your view of the current international trade landscape and what would you like to achieve?

***Tom Vilsack:***

Well, I think it’s uncertain right now. I think comments from the administration, the lack of people in place, secretary of agriculture, for example, make it an unclear and sometimes conflicting situation which creates uncertainty. It’s one of the reasons why I’ll be traveling to Mexico next week, to sort of make sure that Mexican producers and business leaders and government leaders understand how important the dairy industry and our relationship with Mexico is to the dairy industry here in the U.S., and how we work collaboratively together to grow the industry in Mexico as well. You know, I’m concerned that the lack of clarity, the lack of certainty as to what the policies are, the quick actions that have been taken on agreements that were years in the making, has created an opportunity for our competitors to fill the void and could potentially impact and affect business development in the future and trade opportunities in the future. I think the administration has an opportunity, in

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14. Exit Memo, p. 11.

15. Exit Memo, p. 11.

16. Exit Memo, p. 11.



dairy, for example, as they talk about NAFTA, there are areas of NAFTA that can be strengthened and where the deal can be fairer to the U.S., and that's certainly true in dairy and with Canada. Canada's market is very close, from our perspective. But at the same time, there's a terrific opportunity in Mexico that we've developed over the years and we don't want to do anything that would make it more difficult to continue that progress.

*President Trump's prompt withdrawal from the Trans-Pacific Partnership drew sharp criticism from many agriculture groups, with some reports estimating that the withdrawal could cost American farmers a \$4.4 billion annual revenue opportunity. For some in the agriculture industry, however, the withdrawal was a welcome move based primarily on concerns regarding how the agreement would impact American workers.<sup>17</sup> The president has made several comments regarding his intention to renegotiate NAFTA, a 1994 trade agreement between Canada, Mexico, and the U.S. Reports in March 2017 indicated that Trump's administration was preparing two executive orders that would set an aggressive trade reform package into motion, but no such orders have surfaced.<sup>18</sup>*

***Lauren Manning:***

Looking out into the future, based on what you saw during your tenure at the USDA and based on your experience now, what do you view as the biggest challenges facing American agriculture during the next decade, and how can lawyers play an active role in addressing those challenges for farmers?

***Tom Vilsack:***

Well, I think we've talked a little bit about the aging nature

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17. Jonnathan Hettinger, Trump's pull-out of TPP deal prompts criticism, anger from ag industry, Midwest Center for Investigative Reporting, Jan. 23, 2017, available at <http://investigatamidwest.org/2017/01/23/trumps-pull-out-of-tpp-deal-prompts-criticism-anger-from-ag-industry/>.

18. Ylan Mui, Trump plans two new trade-related executive orders: senior official, CNBC, Mar. 28, 2017, available at <http://www.cnbc.com/2017/03/28/nafta-and-trump-president-plans-two-new-executive-orders.html>.

of the farming population and I think that creates a circumstance and a challenge, and I think lawyers, through estate planning, through working with their farmer clients, can think about ways in which their farmer clients could utilize existing programs, whether it's the CRP transition program to benefit a beginning farmer, to mentor a beginning farmer, to create a circumstance that if there's an opportunity for land transfer, to facilitate that. I think lawyers are sort of a good bridge between representing that older farming client and creating new opportunities for the new client. I think lawyers on both ends of that transaction have an opportunity.

You know, I think estate planning is particularly important and I think lawyers have a voice in the political process and they need to use that voice to make sure that policymakers understand what could change with reference to the income tax system that might make it easier for people to consider transferring land while they're alive to beginning farmers. It could be a discounted tax rate, it could be a carryover basis, it could be a variety of things that could encourage the transfer of existing land that's been held by people that's appreciated a significant amount, to transfer it to a beginning farmer with some kind of tax incentive, in addition to looking at the estate tax.

*The White House Office of Management and Budget's 2018 spending blueprint allocated \$17.9 billion in funding for the USDA, down \$4.7 billion from its 2017 funding allotment.<sup>19</sup> This marks a 21 percent reduction in funding, with most of the cuts targeting programs that are considered discretionary spending.<sup>20</sup> This includes rural development, food safety, conservation support, international food assistance, and research grants.<sup>21</sup> Mandatory spending programs like SNAP and*

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19. See America First: A Budget Blueprint to Make America Great Again, Office of Management and Budget, available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf).

20. See America First: A Budget Blueprint to Make America Great Again, Office of Management and Budget, available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf).

21. See America First: A Budget Blueprint to Make America Great Again, Office of

*crop subsidies were not targeted in the budget proposal.*<sup>22</sup>

*Rural voters played a significant role in electing President Trump, with one report indicating that 62 percent of voters cast a vote in his favor and only 34 percent for democratic candidate Hillary Clinton.*<sup>23</sup> *It comes as some surprise, therefore, that the drastic proposed funding cuts target many of the programs that exist solely to boost rural economies, help rural dwellers obtain financing, and to improve rural life come as a surprise.*

*During the first few weeks of his administration, President Trump has garnered both criticism and accolades from the agricultural community. Of primary concern to many agribusinesses was President Trump's controversial Executive Order placing temporary moratoriums on immigration and calling for an overhaul of the country's immigration policies.*<sup>24</sup> *In California's Central Valley, where many agricultural operations depend on undocumented workers, the future smacks of uncertainty.*<sup>25</sup>

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**Lauren Manning:**

Thank you very much. Again, on behalf of the University

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Management and Budget, available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf).

22. See America First: A Budget Blueprint to Make America Great Again, Office of Management and Budget, available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf).

23. Danielle Kurtzleben, Rural Voters Played a Big Part in Helping Trump Defeat Clinton, NPR, Nov. 14, 2016, available at <http://www.npr.org/2016/11/14/501737150/rural-voters-played-a-big-part-in-helping-trump-defeat-clinton>.

24. Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States, Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

25. Caitlin Dickerson and Jennifer Medina, California's Farmers Backed Trump but Now Fear Losing Field Workers, *The New York Times*, Feb. 9, 2017, available at [https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html?\\_r=0](https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html?_r=0).

of Arkansas School of Law and the LL.M. program, this has been a wonderful opportunity and we appreciate the unique opportunity to hear about your insight, and wish you all the best.

*Tom Vilsack:*

Thank you.

## **FARMERS MARKET RULES AND POLICIES: CONTENT AND DESIGN SUGGESTIONS**

**(FROM A LAWYER)**

**Jay A. Mitchell\***

Farmers market rules and policies can get a lot done for a market. They can set out what products can be sold at the market, how vendors are selected, what's expected of vendors from growing practices to signage to paperwork, and how vendors are disciplined or removed from the market.

Rules and policies can do more. They can describe a market's history and philosophy, educate consumers, signal compliance with regulatory requirements, and reinforce tax-exempt status or organizational form. Rules can also operate as contracts, with meaningful legal protection and risk management value.

One consequence of this functionality is that rules and policy documents can get pretty long. The landscape gets even more complex when the rules are accompanied by separate vendor applications, hold harmless agreements, and membership materials, and the market has a website providing additional information. All this can put a quite a reading burden on a vendor, and quite a management burden on a market.

This article is about ways to both maximize the value to a market of its rules and minimize the load on the user. The article:

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\* Professor of Law and Director, Organizations and Transaction Clinic, Stanford Law School. The clinic regularly represents Northern California farmers markets on rules documents and other matters. The author wishes to thank these clients, and the students who worked with them, for the opportunity to learn about market operations and regulation. The author also wishes to thank Maya Spitzer, Jamie Renner, and Aurora Moses for their assistance in the preparation of this article.

- identifies good things the rules can do;
- includes recommendations for rules content, with a focus on market operations, branding, compliance, and legal liability;
- suggests ways to improve vendor understanding of the rules and consumer and community understanding of the market;
- offers ideas for how to improve the protective value of the rules;
- includes suggestions for ensuring consistency across rules, applications, and other market materials;
- provides recommendations about document organization, format, and writing style; and
- calls out areas where discussion with legal counsel may be particularly useful.

The article is addressed to market operators and to lawyers and others who may help markets develop rules, policies, website copy, and related materials.

*Rules content: introductory section*

The introductory section of the rules is a place for a market to tell its story. It's a useful platform for educating the community and establishing context for market decision-making. Some suggestions:

1. *History and Philosophy.* The organization can describe its mission, history, and operating philosophy. For example, it can set out its commitment to local growers, small-scale farming, organic production, urban ag, nutrition education, and the like. From a legal perspective, these descriptions are useful in that they convey background information for rules content and application.
2. *Business Structure.* For a market operated by a tax-exempt organization, the introduction provides a

vehicle for describing and reinforcing the basis for its tax status. If you're a market set up as a 501(c)(3) charity, for example, you can call out your educational mission and activities, or your role in community building. If you're a market organized as a membership organization, you can highlight the relationship between membership requirements and market participation.

3. *Legal Environment.* The introduction provides an opportunity to note key legal requirements applicable to markets generally. A California operator, for example, may want to set out the basic principles of the extensive regulatory framework applicable to certified farmers markets in the state. That serves an educational function, conveys commitment to compliance with the rules, provides a way to incorporate statutory requirements and terminology if desired, and, as with the mission and philosophy discussion, sets context for the rules.

#### *Rules content: operations*

The heart of the rules are the provisions regarding market operations: admission, renewal, fees, stall assignments, inspections, conduct, termination, and so on. These provisions can vary widely by market; this section touches on several topics of more general applicability.

1. *Admissions.* Do your best to set out criteria and preferences for admissions decisions. Some criteria may apply to all applicants and others may apply only to certain types of vendors; if that's the case, break them out into separate sections and be as clear as you can be. Be sure, though, to give the board and management discretion in making admissions decisions.
2. *Renewal.* Pay close attention to renewal matters. If market participation is limited to a single year or

season and annual renewal required, be crystal-clear about that, and state that renewal is never guaranteed. Call out factors that you take into account in making renewal decisions. Those could include rules compliance, consistent attendance, satisfactory stall and farm inspections, absence of consumer complaints, employee product knowledge, and so on. Use the rules to establish a basis for defending a non-renewal decision.

3. *Vendor Tenure.* Even if the rules are clear about renewal requirements, it may, as a practical matter, be hard to remove a longtime vendor that no longer fits the market profile or philosophy. Think about possible transition measures. You might, for example, include a provision that allows you to admit such vendors to a particular market only, limit their market days, or create a wind-down period by advising the vendor that it will not be eligible for admission after a set number of additional seasons.
4. *Change of Ownership.* Consider addressing what happens if there is a change of ownership of a vendor. If it's okay for the new owner to keep selling, be clear that it's subject to the same product limitations and other terms applicable to the prior owner, and that it will have to apply on its own for the next market season.
5. *Attendance and Cancellation.* Be clear about attendance requirements, cancellation lead-times, and the consequence of vendor failure to show up or show up on time. You'll also want to be clear that you make decisions about market operations during inclement weather, not the vendor, and that you reserve the right to adjust market days and hours.
6. *Reselling.* Be sure to set out the rules about vendor reselling. If it is prohibited by law or by your



policy, say so, say it explicitly, and say it more than once.

7. *Fees, Fines, and Late Payments.* State stall fees and disciplinary fines in easy-to-find, easy-to-follow tables, and address what happens if a vendor is late with payments.
8. *Stalls.* Make clear that a vendor can't switch, transfer, or "sublet" its stall space without your approval. If you reserve the right to move vendor stalls, make that clear, too. Set out your requirements relating to vendor-provided tents and equipment, signage, cleanliness, aisle clearance, and display quality.
9. *Pricing.* Set out your policies on pricing and selling activities: no collusion with other vendors, whether or not bargaining with consumers is permitted, permissibility of pre- and post-market selling, accurate signage, and so on.
10. *Inspections.* If you do stall or farm inspections, call them out in the rules, and provide for the vendor's explicit consent and cooperation. Reserve the right to obtain and review vendor permits, licenses, and insurance policies upon reasonable request.
11. *Conduct.* Be clear about vendor and consumer conduct expectations. These provisions could address harassment, vendor courtesy and honesty, noise, smoking, alcohol and marijuana use, firearms, and even the use of bicycles and skateboards in the market.
12. *Animals.* Consider including rules about the presence of vendor and consumer dogs and other animals at the market.
13. *Political and Community Activities.* Markets often

set aside space for community groups, political activists, and others to set up tables and engage in outreach activities. If you do, describe your policies about access to the space and permitted activities, including not impeding traffic flow, use of amplification equipment, signage, and conduct.

14. *Employees and Volunteers.* Make clear that the vendor or community group is responsible for not only its behavior but also its employees, family members, and volunteers acting on its behalf.
15. *Discipline Flexibility.* Give yourself flexibility in the discipline and termination provisions. Make clear that the market has discretion in responding to rules non-compliance. You might list possible responses: giving warnings, closing the stall for the balance of the market day, limiting product offerings, conditioning future participation on modification of current practice, issuing fines, suspending the vendor or multiple days, terminating selling privileges, and even permanently disqualifying the vendor from market participation. You want discretion, and you want strong tools in your pocket
16. *Serious Violations.* Consider identifying violations that can lead to immediate expulsion. Those might include a vendor selling products it didn't grow, misrepresenting products as organic or local, and engaging in violent or threatening behavior. You really want a strong tool in those cases.
17. *Fair Process.* At the same time, provide for a fair process. You may want to permit vendors to appeal suspension and termination decisions to the market's board of directors. Consider setting out specific procedure rules for such appeals; for example, you might require the vendor to submit a written petition within X days after the disciplinary

action, and give the vendor an opportunity to appear in front of the board or relevant committee. And be as clear as you can about those procedures.

*Rules content: branding and marketing*

The rules and related documents are platforms for communicating and protecting your brand. You should take advantage. Here are three ideas:

1. *Brand.* A market may have a logo. If so, include a provision in the rules that (depending on your policy) either bars vendors from using the logo or grants a license for such use in vendor marketing activities. Be sure to address it, either way.
2. *License.* If you allow use, make clear that the license is effective only for so long as the vendor is approved and participating in the market. Be clear that the vendor can only use the logo in the form you provide. These provisions reflect trademark law considerations—you want to affirmatively protect your brand.
3. *Media Release.* On the flip side, include a provision that gives you the right to use and disclose vendor names, logos, images, and stories in your own marketing activities. You'll want this media release to expressly cover multiple communications vehicles: website, social media, posters, brochures, and so on. You'll also want to make clear that you can use a particular photo or the like without first getting the vendor's approval, and that the vendor has no entitlement to ownership or compensation for such use. This is an area where you might want an attorney to draft or review your language.

*Rules content: legal compliance*

The rules provide a platform for both effecting and

signaling compliance with regulatory and other external requirements. They can help you not only get it right but also make visible your commitment to compliance. Suggestions:

1. *Market Compliance.* Be sure the rules reflect legal requirements, especially regulatory and contractual obligations relating to you and your operation of the market. Those requirements may relate to all sorts of things, including rules content, permitted product sales, market layout and activities, sampling, parking, fire safety, prepared food packaging and utensils, bags, recycling, information collection and reporting, vendor termination, nutrition assistance programs, wine and beer sales, and other matters.
2. *Vendor Compliance.* You'll want to include provisions requiring compliance by vendors with both laws applicable to market activities generally (where vendor non-compliance could get you in trouble) and specifically to them. Make clear that compliance is their responsibility, not yours, even if you've provided information or technical assistance. Be explicit that non-compliance with law is a violation of the rules.
3. *Site Lease.* Think about whether anything in your lease or license for the market site should be captured in the rules. That could range from prohibited activities to information you need to collect from vendors to be reported to the landlord.
4. *Insurance.* Consider whether anything in your insurance policies should be reflected in the rules. For example, you may want to think about whether your carriers want you to obtain specific indemnities or other terms from vendors, or to limit use of propane tanks and the like. (Think about creating your own risk management checklist to help you monitor compliance and document your diligence.)

5. *Boards and Conflicts of Interest.* Market rules often set out a core decision making role for the board of directors of the operator. Boards approve changes in the rules, set stall fees and other policies, and make decisions about disciplinary actions. The board of a market operator may include vendors, market staff, or owners of nearby businesses. If so, then the organization may want to consider whether its conflict of interest policy effectively addresses the conflicts (or at least awkwardness) that may surface in dealing with fees, disciplinary matters, and other situations arising under the rules. It may make sense to add a provision to the policy specifically dealing with that issue. That action should help facilitate resolution of the question, shore up the decision-making mechanism created under the rules, and signal to regulators your sensitivity to conflicts concerns. If you have a lawyer on your board, you might ask for his or her help here, or talk with your regular counsel.

*Rules content: legal liability*

Rules, if set up properly, can serve as contracts, and contracts can provide powerful benefits for a market. Some ideas:

1. *Legal Support.* As you'll see from the discussion in this section, this is an area where support from an attorney is particularly important and useful. You'll want to talk about both substance — what protections are available to you and workable in your context and your state — and about how best to put in place those protections — in the rules, in separate agreements or releases, or otherwise, and with the right language.
2. *Standard Provisions.* There are lots of traditional contract tools that are useful in market rules. These boilerplate provisions— those clauses at the end of

a contract called “entire agreement,” “amendment,” “severability,” “third party beneficiary,” and so on — are often full of legalese, but they’re worth considering for inclusion in the rules or other market materials.

3. *Indemnification.* Markets routinely ask vendors to make indemnification or hold harmless promises. These obligations require the vendor to protect the operator from claims made by third parties against the operator as a result of the vendor’s conduct. Be sure to think about the types of claims covered by the indemnity, and about the value of calling out claims of particular concern. Those might include, say, regulatory compliance or food safety. And be sure the language includes a promise by the vendor to “defend” as well as indemnify you, to establish a basis for demanding legal representation as well as payment of judgments or fines.
4. *Liability Limitations.* To limit liability, consider including explicit liability limitation provisions. You could disclaim types of damages. You could try to cap your exposure to stall fees paid during the relevant market year. You can try broad waivers and releases of claims. You can make clear that you don’t refund fees to vendors who are suspended or terminated. You can provide that you have no liability for an unexpected event that closes the market for a day (or permanently), such as loss of the site or a “force majeure” or “act of God” circumstance.
5. *Consents.* To limit liability, consider including express consents by vendors. For example, if this is your policy, you can state that you may tell regulators about vendor non-compliance, or that you reserve the right to tell other markets about farm inspection results or disciplinary decisions, and obtain the vendors’ advance consent to such

disclosure. That should reduce the risk of a vendor later prevailing on a claim about these communications. And, as noted, you'll for sure want to obtain vendors' consent to use of their names and images in your marketing materials.

6. *Acknowledgments.* To limit liability, consider including acknowledgments by vendors. For example, you can have vendors acknowledge that you made no guarantees about sales or traffic, and that vendors aren't relying on you for business advice or legal compliance.
7. *Rules Interpretation.* You might include other provisions that concern the rules themselves. For example, you might want an "entire agreement" clause, which makes clear that there are no representations or promises outside of the rules and specifically-identified related documents. You can provide that the rules are the primary document that controls if there are inconsistencies between the rules and, say, the application form or website. You can provide that the rules can't be amended except in writing, that a waiver of non-compliance is not a free pass forever, and that the rules aren't intended to give legal rights to anyone (such as a consumer or vendor employee) other than the operator and the vendors.
8. *Dispute Resolution.* You can include provisions intended to shape how formal disputes play out. You can provide for an internal appeals process in matters involving fines, suspensions, or termination, and obtain an agreement that the process is final and binding. You can provide that legal disputes will be resolved in specific local courts — so the vendor, not you, has to travel. You can provide that the loser pays the other party's legal fees. You can include a dispute resolution clause, which provides for mediation or arbitration in lieu of a lawsuit.

9. *Specificity*. The key here is refining these standard contract provisions to fit the context. The more specific-to-market-matters you can be, the better. There's no guarantee that a court will enforce any contract provision in every circumstance, but that doesn't mean it's not worth including it; its presence may give you a better shot at heading off the claim or litigation earlier in the process.
10. *Tone*. That all said, you'll also want to think about tone. Some markets may resist including hard-core, largely one-sided contract provisions in their market rules. That's understandable, in that markets, in a real sense, exist to support farmers and other vendors. The countervailing point of view is that markets can't carry out that function without even-handedness, predictability, cost control, and good risk management, which is what this stuff is all about.
11. *Vendor Signature*. Finally, and needless to say, be sure the vendor signs something that confirms acceptance of the rules. That could be an application, a participation agreement, or another document. You'll want the signature, and you'll want to be sure the agreement is signed by the right person. If, for example, the vendor operates as an LLC, you'll want the entity to sign, and you'll want to be sure the names on the various documents—permits, licenses, insurance policies, applications, and contract — line up. And, if you use legal documents in addition to the rules (such as a separate indemnification agreement), be sure to get it signed, too, and in the same manner. No reason to create any potential openings for a challenge, and you want to be sure, from a contract enforceability point of view, that the right person has agreed and is on the hook.



*Rules content: consistency with other market materials*

Markets often have vendor documents in addition to the core rules. You're well-advised to pay attention to consistency across the multiple documents as well as your website content. Some observations:

1. *Related Materials.* Market operators often use vendor applications (which may vary by type of vendor), participation agreements, separate hold harmless contracts, procedures for nutrition assistance programs, and so on. There's also often relevant eligibility, application process, and other information on the website. And, as noted below, markets organized as membership organizations may have bylaws that cover vendor admission and rights. This is all on top of a big market rules document.
2. *Consistency.* With all these materials, it's easy for discrepancies to develop over time. That can create confusion, plus provide an opening for a disgruntled vendor. So, when you're updating your rules, be sure to review and update the other materials as well. Watch for consistency in content, terminology, and style, and think about opportunities to reinforce the key rules. Attention here will help you present a tight, harmonized set of terms and disclosures to vendors, to regulators, to courts, and to the public.
3. *Rules as Key Document.* Be sure to make clear that the core rules document is the primary document governing the vendor relationship and market operations; the materials should make clear that the rules "control" in case of inconsistencies. As noted above, you can include such a provision in the legal language at the end, and you can add a small-print sentence to that effect in vendor applications and the like.

4. *Separate Signed Documents.* If you use a separate participation agreement or other document to be signed by approved vendors, consider also using it as a vehicle for highlighting hot button provisions in the market rules. You may, for example, want to call out “sell what you grow” requirements, the facts that non-compliance can lead to termination and that admission is for a limited period with no guarantee of renewal, and the indemnification and liability limitation provisions. These disclosures strengthen your case that a vendor had knowledge of the rules, and voluntarily signed up.
5. *Cheat Sheets.* Another way to reinforce the rules, as well as provide practical help to your vendors, is to give them cheat sheets that reflect the rules. You might have a one-page “what to bring on a market day” piece, or a checklist for set-up and clean-up requirements. You might create one-pagers for each type of product (produce, meat, eggs, nursery etc) that summarizes unique production, packaging, documentation, and signage requirements for the product. Just watch out for consistency with the rules document and, as noted above, be sure to review the cheat sheets when you update the rules.
6. *Membership Organizations.* Markets that are organized as corporations with members need to deal with an additional consistency challenge. They have articles, bylaws, and sometimes separate membership agreements, and they operate under state laws that govern member admission and termination. As a result, if vendors are members, then the organization needs to make sure the whole package hangs together. That can get pretty complicated, so it’s worth sorting through in a methodical way, and making sure the corporate documents and the market documents square up.

*Rules design: organization, format, and writing style*

Thoughtful organizational, formatting, and writing style choices help the user to navigate and understand the document. It's worth the investment, and it's mostly common sense; you don't need to be a graphic designer. Several recommendations:

1. *Buckets.* There is a lot of content in the rules. Breaking up content helps with readability and navigation. Divide it up into separate, sensibly-grouped, plainly-labeled buckets: application process, production requirements, fees, and so on.
2. *Sequencing.* Organize those buckets into a logical sequence. For example, consider a chronological approach to market operations, beginning with a market overview and then marching right through vendor admission, market set-up, signage, product labeling, selling activities, health and safety, conduct, inspections, clean-up, reporting, and termination.
3. *Business Up Front.* Put the market operations information in the front and the discipline, liability, dispute resolution and other more legal provisions in the back. The likelihood of relevance of those provisions is a lot lower than that for the admissions, signage, and other operational terms, and legal stuff up front can set the wrong tone.
4. *Short and Plainspoken.* Try to focus each paragraph on a single topic. Write in short paragraphs and sentences. Use plain language. Defined terms and statutory citations are useful (especially when dealing with multiple categories of vendors) but try to minimize their use; real people don't talk that way.
5. *Table of Contents.* Include a table of contents. Let

the reader know, up front, what's in the document, and how it's organized. Be sure the TOC calls out any exhibits, too; that will help the reader find what it needs. Think about taking advantage of the function in Microsoft Word that automatically creates and updates TOCs.

6. *Numbers and Captions.* Number and caption each section and sub-section. Numbers give users an easy way to refer back to specific rules. Clear captions help users understand what a given section covers and help guide the reader along. Captions for sub-sections are useful for navigating long, multi-part text such as a disciplinary process provision.
7. *Tables.* Use tables, as much as you can, to present information. For example, you can use tables to set out fee and fine schedules, required documents, and differences (days, vendor profiles etc) at different market locations. It's a lot easier to find a number in a table than if it's buried in text.
8. *Rules Attachments.* Put technical detail in attachments or exhibits to the rules, not text. For example, if you require different documents or insurance coverages for different types of vendors, or if you charge different stall fees to different types of vendors, put those requirements in a separate attachment. There's no reason a produce grower should have to plow through the special rules relating to eggs or nursery. Attachments make it easier for the reader to find the relevant information, and make it easier for you to update the content over time.
9. *Branding.* Finally, while you're at it, take advantage of the opportunity to reflect your brand throughout all the documents, website, and marketing collateral. Logos, typeface, general look-and-feel. . . all of that makes a difference in building your

brand.

### *Conclusion*

Farmers market rules can get a lot of business and legal work done for a market. At the same time, they can grow to be lengthy and technical in nature, and it's easy for inconsistencies to develop over time, both in the rules document itself and in respect of related applications, websites, and other market materials. This isn't great from vendor, brand, or legal protection points of view.

The good news is that awareness of functionality, of the work the rules can do, can help a market get the most out its core operating document. Making a habit of paying attention to the entire document set and website, not just the rules, can help head off confusion. And modest investments in design and writing, along with targeted consultation with counsel, can markedly improve document accessibility, use, updating, and legal utility.

**ALDF v. Otter: What does it mean for other State’s  
“Ag-gag” Laws?**

**Jacob Coleman\***

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I. INTRODUCTION

Upton Sinclair famously commented about his 1906 novel

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\* Jacob Coleman is a 2017 graduate of the University of Arkansas School of Law. Jacob would like to thank Professor Susan Schneider for lending her knowledge and providing advice in the drafting of this article and the Food Law Editorial Board for guiding this article through the publishing process.

*The Jungle*, which was based on his undercover investigation of the inhumane conditions of Chicago's slaughterhouse workers, that he "aimed at the public's heart, and by accident I hit it in the stomach."<sup>1</sup> The public was far more disgusted by the way their food was being handled, rather than the conditions of the workers.<sup>2</sup> Today, similarly, animal rights activists are looking to draw attention to the inhumane treatment of animals by conducting undercover investigations to expose animal abuse and mistreatment.<sup>3</sup> However, these activists are being met with state laws criminalizing undercover investigation at agricultural facilities, also known as "ag-gag laws."<sup>4</sup> Many of these state laws would have exposed Sinclair and his groundbreaking investigation of the meat packing industry to criminal liability.<sup>5</sup> And while animal rights activists may be looking to aim for the public's hearts with their investigation, the response by agricultural interest groups may very well be creating a constitutional free speech issue.

In 2012, Mercy for Animals released a film by undercover investigators, showing Idaho dairy farm workers abusing cows.<sup>6</sup> The video showed the workers repeatedly beating, kicking, and jumping on cows, as well as dragging one cow across the floor by a chain attached to its neck.<sup>7</sup> Idaho charged the workers with

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1. Upton Sinclair, *What Life Means to Me*, 41 *COSMOPOLITAN MAGAZINE* 591, 594 (1906) available at <http://dlib.nyu.edu/undercover/sites/dlib.nyu.edu.undercover/files/documents/uploads/editors/WhatLifeMeansToMe.pdf>.

2. Adam Cohen, *100 Years Later, the Food Industry Is Still the 'The Jungle'*, *NEW YORK TIMES* (Jan. 2, 2007) <http://www.nytimes.com/2007/01/02/opinion/02tue4.html>.

3. Jesse Paul, *Colorado authorities investigating dairy cow abuse video; worker fired*, *DENVER POST* (Jun. 11, 2015), [http://www.denverpost.com/news/ci\\_28295679/colorado-authorities-investigating-dairy-plant-abuse-video-workers](http://www.denverpost.com/news/ci_28295679/colorado-authorities-investigating-dairy-plant-abuse-video-workers).

4. Richard A. Oppel Jr., *Taping of Farm Cruelty Is Becoming the Crime*, *NEW YORK TIMES* (Apr. 6 2013), <http://www.nytimes.com/2013/04/07/us/taping-of-farm-cruelty-is-becoming-the-crime.html>.

5. See IDAHO CODE ANN. § 18-70-42 (West 2015).

6. Arin Greenwood, *Court Says No To Gagging Those Who Reveal Farm Animal Abuse*, *HUFFINGTON POST* (Aug. 4, 2015), [http://www.huffingtonpost.com/entry/idaho-ag-gag-law\\_55c0b399e4b06363d5a35543](http://www.huffingtonpost.com/entry/idaho-ag-gag-law_55c0b399e4b06363d5a35543).

7. Lorene D. Park J.D., *Criminalizing whistleblower activity in 'ag gag' law violated free speech ad equal protection rights*, *EMPLOYMENTLAWDAILY.COM*, <http://www.employmentlawdaily.com/index.php/news/criminalizing-whistleblower-activity-in-agricultural-industry-violated-free-speech-and-equal-protection-rights/> (last

misdeemeanors of animal cruelty.<sup>8</sup> Instead of looking to curb future animal abuse, Idaho responded by passing a law in 2014, drafted by the Idaho Dairymen's Association,<sup>9</sup> criminalizing unauthorized video recordings at agricultural production facilities, as well as obtaining employment by misrepresentation.<sup>10</sup>

In the recent U.S. District Court case, *Animal Legal Defense Fund v. Otter*, an Idaho judge struck down Idaho's law.<sup>11</sup> This is the first instance a federal court has struck down an "ag-gag law."<sup>12</sup> The court found that Idaho's law violated both the constitutional rights to free speech and equal protection.<sup>13</sup> They reasoned it violated free speech because the law criminalized a form of protected speech, and was both a content-based and viewpoint based-discrimination.<sup>14</sup> The court also determined that the Idaho statute violated equal protection because it created a distinction between whistleblowers in the agricultural industry to those of other industries, and was enacted with a discriminatory purpose.<sup>15</sup>

*ALDF v. Otter* establishes a strong precedent that casts doubt upon many similar laws in other states. Currently, Montana, Utah, North Dakota, Missouri, Kansas, Iowa and Wyoming have laws in place that in one or another criminalizes undercover investigations of agricultural facilities.<sup>16</sup>

North Carolina has also passed a bill that will be effective

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visited Nov. 2 2015).

8. Rebecca Boone, *Dairy workers accused of beating, stomping cows in video*, ASSOCIATED PRESS (Oct. 10, 2012), <http://www.kboi2.com/news/local/Idaho-Dairy-Cows-Mercy-Animals-173483161.html>.

9. Luke Runyon, *Judge Strikes Down Idaho 'Ag-Gag' Law, Raising Questions For Other States*, NPR.ORG (Aug. 4, 2015), <http://www.npr.org/sections/thesalt/2015/08/04/429345939/idaho-strikes-down-ag-gag-law-raising-questions-for-other-states>.

10. IDAHO CODE ANN. § 18-70-42

11. *Animal Legal Def. Fund v. Otter*, No. 1:14-cv-00104-BLW, 2015 WL 4623943 at \*4 (D. Idaho 2015)

12. Dan Flynn, *Federal Judge in Boise Strikes Down Idaho's New 'Ag-Gag' Law*, FOOD SAFETY NEWS (Aug. 4, 2015), [http://www.foodsafetynews.com/2015/08/federal-judge-in-boise-strikes-down-idahos-new-ag-gag-law/#.VhA7r\\_1VhBc](http://www.foodsafetynews.com/2015/08/federal-judge-in-boise-strikes-down-idahos-new-ag-gag-law/#.VhA7r_1VhBc).

13. *Otter*, 2015 WL 4623943 at \*4.

14. *Id.*

15. *Id.*

16. *Ag-Gag Legislation by State*, ASPCA.ORG, <https://www.aspc.org/animal-protection/public-policy/ag-gag-legislation-state> (last visited Mar. 15 2016).



January 1, 2016, providing for the civil recovery of damages by an employer when any employee makes an audiovisual recording and uses that recording to breach the employee's duty of loyalty to the employer.<sup>17</sup> Notably, this bill is not specific to the agricultural industry.<sup>18</sup> North Carolina, along with Wyoming,<sup>19</sup> have established the newest trend in prohibiting undercover recording by restricting it on any private property, regardless of industry. Compared to its predecessors, these broad bans to data collection present a different kind of problem to those seeking to challenge these laws.

Part I of this analysis describes the laws or proposed laws which seek to prevent undercover investigation of animal production facilities. Part II further unpacks the *Otter* ruling. Part III applies and evaluates the cases ruling and reasoning to other state's statutes to determine how they would fare under such analysis. Part IV explores and evaluates the law surrounding the broad data collection bans in North Carolina.

## II. HISTORY OF "AG-GAG" LAWS

"Ag-gag laws" come in many different forms, but all generally aimed at preventing undercover investigators from making audiovisual recordings at agricultural facilities. This section explores how the efforts to limit undercover investigation on agricultural facilities have changed overtime.

### A. *The First Wave: No Recording Statutes – Kansas, North Dakota, and Montana*

In 1990, Kansas became the first state to pass a law criminalizing undercover recording at animal facilities.<sup>20</sup> The

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17. H.R. Res. 405 2015-2016 Leg. (N.C. 2015).

18. *Id.*

19. WYO. STAT. ANN. §6-3-414(a) (West 2015). (“(a) A person is guilty of trespassing to collect resource data if he: (i) enters onto open land for the purpose of collecting resource data, and (ii) does not have: (A) An ownership interest in the real property. . . ; or (B) Written or verbal permission from the owner [ . . . ].”).

20. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015) (“(c) NO person shall without the effective consent the owner and with intent to damage the enterprise conducted at the animal facility: (4) enter an animal facility to take pictures by photograph, video camera or

statute requires there be “intent to damage the enterprise conducted at the animal facility.”<sup>21</sup> Montana’s 1991 statute also incorporated this language.<sup>22</sup> In addition to requiring intent to damage, Montana further limited the scope of its statute by also requiring “intent to commit criminal defamation.”<sup>23</sup> Montana’s defamation standard provides that if “the defamatory matter is true” or “consist[s] of fair comment made in good faith with respect to a person participating in matters of public concern” then the speech is justified.<sup>24</sup> These two intent requirements make Montana’s statute the narrowest in terms of heightened intent requirements.<sup>25</sup>

North Dakota’s 1991 statute requires no such intent for their ag-gag act.<sup>26</sup> It plainly criminalizes the unauthorized use or attempted use of recording equipment, without regard to the intent or what is being recorded.<sup>27</sup> Thus, anyone who records anything on an animal facility in North Dakota and is not part of governmental agency carrying out their duties, or has not obtained the consent of the owner, is guilty of a class B misdemeanor.<sup>28</sup> Violators may be subject to a max of 30 days in prison or a fine of \$1500, or both.<sup>29</sup> In practice, a person could be prosecuted for taking a photo of oneself in the break room of an animal facility, or any other number of innocuous circumstances. However, no one has ever prosecuted under any of these three states’ laws.<sup>30</sup>

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by any other means[.]”).

21. *Id.*

22. MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

23. *Id.*

24. MONT. CODE ANN. § 45-8-212(3)(a), (e) (West 2015).

25. Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and The Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL’Y 31, 34 (2015).

26. See N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).

27. *Id.* (“No person with the effective consent of the owner. . .6. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment”).

28. N.D. CENT. CODE ANN. § 12.1-21.1-04 (West 2015).

29. N.D. CENT. CODE ANN. § 12.1-32-01 (West 2015).

30. Reid, *supra* note 25, at 37.

B. *The Second Wave: Forbidding Misrepresentations – Utah, Idaho, Iowa*

“Ag-gag” legislation did not re-emerge again until 2012 when Iowa and Utah passed legislation criminalizing agricultural interference.<sup>31</sup> Idaho followed suit by passing its own in 2014.<sup>32</sup> These laws made it a crime to lie to obtain access to an agricultural facility.<sup>33</sup>

Iowa forbids both “obtain[ing] access to an agricultural operation under false pretenses” and knowingly making a false statement as part of a job application with an intent to commit an act not authorized by the owner.<sup>34</sup> Thus, Iowa’s ag-gag law takes a different route from the earlier laws as it does not specifically target audiovisual recording, only lying to gain access to the facility. Utah and Idaho took it a step further by not only including Iowa’s language criminalizing misrepresentations to gain employment or access, but also prohibited unauthorized audiovisual recording similar to the first wave statutes.<sup>35</sup> The combination of these provides agricultural production facilities with two layers of protection. On the front end, it deters animal rights activists from applying for jobs for the purpose of going undercover, as they could be subject to criminal liability if the activists are questioned about their affiliation with animal rights groups and they conceal such affiliation. Regardless, if activists

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31. Matthew Shea, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-gag Laws*, 48 Colum. J. OF L. & SOC. PROBS. 337,

32. See IDAHO CODE ANN. § 18-70-42 (West 2015).

33. Shea, *supra* note 31.

34. IDAHO CODE ANN. § 18-7042 (West 2015). (“1. A person is guilty of agricultural facility fraud if the person willfully does any of the following: a. Obtains access to an agricultural facility by false pretenses. b. Makes a false statement or representation as part of an application agreement. . . if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.”).

35. See IDAHO CODE ANN. §18-7042 (West 2015) (“(1) A person commits the crime of interference with agricultural production if the person knowingly: . . . (c) Obtains employment with an agricultural by . . . misrepresentation with the intent to cause economic injury to facility’s operations. . . [.]”); UTAH CODE ANN. § 76-6-112(2) (West 2015) (“(2) A person is guilty of agricultural operation interference if the person: (a) without consent from the owner. . .records an image [or sound] from the agricultural operation by leaving a recording device. . .(b) obtains access to an agricultural facility under false pretenses[.]”).

are employed, whether under false pretenses or not, they are still prohibited from filming. This combination likely makes Utah and Idaho's ag-gag laws two of the strictest in the nation.

*C. The Third Wave: Rapid Reporting – Missouri*

Laws forbidding recording or lying to gain access to agricultural facilities have recently fallen out of favor.<sup>36</sup> Many states proposed ag-gag bills in 2013, but they failed to become law.<sup>37</sup> Animal activists were successful in rallying public opinion and creating a large and diverse coalition to help defeat ag-gag laws behind a simple message: “if there is nothing to hide, why ban the cameras?”<sup>38</sup> Additionally, lawmakers themselves raised concerns as to the constitutionality of agricultural protectionist laws.<sup>39</sup> In response, legislatures have attempted to pass statutes requiring rapid reporting of any instance of animal abuse. The laws do not explicitly forbid unauthorized recording of animal abuse, but instead require that any recorded animal abuse be reported to the appropriate agency, usually within a 24 to 48 hour timeframe.<sup>40</sup> This would seem to be a good middle ground solution for both parties. However, the effect is that it becomes next to impossible to establish a pattern of abuse or neglect, and it enables an agricultural facilities to say that a particular occurrence of abuse was just a one-time problem.<sup>41</sup>

Missouri's ag-gag law illustrates rapid reporting statutes. Missouri's law provides that when anyone makes a digital recording of a farm animal being abused, there is duty to submit it to a law enforcement agency within 24 hours.<sup>42</sup> Additionally, it mandates that the recording may not be edited or manipulated

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36. Shea, *supra* note 31, at 346-47

37. Reid, *supra* note 25, at 40.

38. Shea, *supra* note 31, at 349-50

39. *Id.* at 351-352

40. See MO ANN. STAT. 578.013 (West 2015) (“1. Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect...such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording.”).

41. Reid, *supra* note 25

42. MO ANN. STAT. 578.013 (West 2015)

in any way.<sup>43</sup> Other states which have attempted to enact rapid reporting bills include Nebraska, California, Tennessee, North Carolina, New Hampshire, and Arizona.<sup>44</sup>

*D. The Fourth Wave: Broad Restrictions to Data Collection – North Carolina, Wyoming*

The latest trend in agricultural protectionist legislation is difficult to categorize as such, as it affects far more than the agricultural industry. North Carolina’s “Property Protection Act” was passed over Governor Pat McCrory’s veto on June 3, 2015.<sup>45</sup> Its purpose is to provide for the recovery of damages for exceeding the scope of authorized access to property.<sup>46</sup> Damages can be recovered when,

An employee who intentionally enters the nonpublic areas of an employer’s premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer’s premises and uses the recording to breach the person’s duty of loyalty to the employer.<sup>47</sup>

Under this language, it appears that any employee could be subject to civil liability for recording at their place of employment. The bill does not identify any particular industry, so it appears to be a blanket ban.<sup>48</sup> Lawmakers assert that it will not prevent whistleblowers from reporting illegal activity.<sup>49</sup> However, Governor McCrory and other opponents of the bill believe there is no such adequate protection for honest employees who uncover illegal activity.<sup>50</sup> Activists have criticized the act as just being a way to disguise an ag-gag bill,<sup>51</sup>

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43. *Id.*

44. Shea, *supra* note 31, at 356-61

45. Mark Binker & Laura Leslie, *Lawmakers override McCrory veto on controversial ‘ag-gag’ bill*, WRAL.com (Jun. 3, 2015), <http://www.wral.com/lawmakers-override-mccrory-veto-on-controversial-private-property-bill/14687952/>

46. H.R. Res. 405 2015-2016 Leg. (N.C. 2015).

47. *Id.*

48. *See Id.*

49. Binker & Leslie, *supra* note 45.

50. *Id.*

51. Rob Verger, *North Carolina’s Ag-Gag Law Might Be the Worst in the Nation*,

and it is worth noting that North Carolina is the second largest hog producer in the United States, totaling about \$2.9 billion dollars in sales.<sup>52</sup> There is also concern that this bill will also chill abuse reporting in veteran treatment centers, child care facilities, and nursing homes.<sup>53</sup>

Wyoming's statute, which became effective March 5, 2015,<sup>54</sup> is similarly broad in its language. Wyoming makes it unlawful to collect resource data on private open land.<sup>55</sup> Open land is defined as "land outside the exterior boundaries of an incorporated city, town, [or] subdivision."<sup>56</sup> While not specifically mentioning the agricultural industry, the areas being protected are rural unincorporated areas where farms and factory farms are likely to be. In addition to the concerns of animal welfare groups, environmental groups also take issue with the law, as it precludes them from collecting environmental data on water pollution.<sup>57</sup>

### III. EVALUATING ALDF V. OTTER

Idaho's "ag-gag" law prohibits recording at agricultural production, as well as using misrepresentation to gain employment at such facilities.<sup>58</sup> It reads in pertinent part:

A person commits the crime of interference with agricultural production if the person knowingly: . . . obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations; [or] enters an

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VICE NEWS (Jun. 9 2015), <https://news.vice.com/article/north-carolinas-ag-gag-law-might-be-the-worst-in-the-nation>.

52. 2012 *Census Highlights*, UNITED STATES DEPARTMENT OF AGRICULTURE, [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Highlights/Hog\\_and\\_Pig\\_Farming/](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Hog_and_Pig_Farming/) (last updated Mar. 19, 2015).

53. Verger, *supra* note 51.

54. See WYO. STAT. ANN. § 6-3-414 (West 2015).

55. WYO. STAT. ANN. § 6-3-414(b) (West 2015) ("A person is guilty of unlawfully collecting resource data if he enter onto private openland and collects resource data without: (i) [a]n ownership interest. . .or (ii) [w]ritten or verbal permission of the owner. . . [.]").

56. WYO. STAT. ANN. § 6-3-414(d)(ii) (West 2015).

57. Natasha Geiling, *Wyoming Made It Illegal to Take A Photo of A Polluted Stream. Now They're Being Sued For It.*, THINKPROGRESS.ORG (Oct. 1 2015), <http://thinkprogress.org/climate/2015/10/01/3707798/wyoming-data-trespass-lawsuit/>

58. IDAHO CODE ANN. §18-7042(1)(c-d) (West 2015).

agricultural facility. . . and without owner's express consent. . . makes audio or video recording of the conduct of an agricultural facilities' operations[.]<sup>59</sup>

Chief Judge B. Lynn Winmill issued his opinion in *ALDF v. Otter* on August 3, 2015, holding that the law violates the right to free speech and equal protection.<sup>60</sup> The ruling deals a significant blow to the agricultural interest groups that advance these laws by asserting that they violate very important constitutional protections.

#### *A. First Amendment Violation*

Typically, a First Amendment challenge proceeds in three steps.<sup>61</sup> First, it must be determined whether the speech is protected under the First Amendment.<sup>62</sup> Next, it must be determined what standards of review apply to the alleged suppression of speech.<sup>63</sup> Finally, the court must assess whether the government's justifications for restricting speech satisfy the applicable standard of review.<sup>64</sup> This section follows this dichotomy and breaks down the ruling into its constitutional principles, so that its reasoning may be applied to different states' laws.

#### *B. Protected Speech*

The court addressed whether §18-7042 criminalizes protected speech.<sup>65</sup> Previously, the determined it did in a ruling on an earlier motion to dismiss.<sup>66</sup> The court found the statute prohibited protected speech in two ways.<sup>67</sup> First, it forbade using misrepresentations to gain employment with agricultural facilities.<sup>68</sup> Second, it prohibited unauthorized audiovisual

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59. *Id.*

60. Otter, 2015 WL 4623943 at \*4.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009 (D. Idaho 2015) [hereinafter "Motion to Dismiss"].

67. See IDAHO CODE ANN. §18-7042 (West 2015).

68. *Id.*

recording of an agricultural production facilities' operations.<sup>69</sup> The court held that both of these were protected expressions under the framework of the First Amendment.<sup>70</sup>

### *Lying to Gain Employment*

In *US v. Alvarez*, the Court struck down the Stolen Valor Act,<sup>71</sup> which made it a crime to lie about receiving military medals.<sup>72</sup> The Court found that the Stolen Valor Act constituted a ban on speech without regard to any kind of material harm or advantage.<sup>73</sup> “Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power.”<sup>74</sup> Specifically, it would “endorse government’s authority to compile a list of subjects about which false statements are punishable” akin to Oceania’s Ministry of Truth from George Orwell’s novel *1984*.<sup>75</sup> However, the Court explained that “false claims made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the government may restrict speech without affronting the First Amendment.”<sup>76</sup>

The Idaho District Court held that 18-4072 is similar to the Stolen Valor Act in that it merely prohibits speech without regard to the causal link to the harm.<sup>77</sup> The State argued that there is no direct harm from an undercover investigator’s misrepresentations to gain access to the agricultural facility.<sup>78</sup> The court disagreed. Instead, the harm that might arise would be from the publication of a false story about the agricultural facility.<sup>79</sup> The court held that this is not the type of direct

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69. *Id.*

70. Otter, 2015 WL 4623943 at \*5, 9.

71. *Id.*

72. *U.S. v. Alvarez*, 132 S. Ct. 2537, 2539 (2012).

73. *Id.* at 2547-48.

74. *Id.*

75. *Id.*

76. *Id.*

77. Otter, 2015 WL 4623943 at \*5-6.

78. *Id.*

79. *Id.*



material harm that *Alvarez* contemplates.<sup>80</sup> Nor is it the type of material advantage envisioned in *Alvarez*, as the undercover investigators were not seeking the material gain from employment, but rather the purposes of their misrepresentation was to uncover animal abuse and other unsafe practices.<sup>81</sup> The courts asserted that this is the type of speech First Amendment seeks to protect, as it exposes misconduct to the public and facilitates dialogue on issues of public interest.<sup>82</sup>

The State further argued that the misrepresentation is unprotected because it prohibited conduct, not speech.<sup>83</sup> The court ruled that no reading of the statute permits this view, as misrepresentations cannot be construed to mean anything except a form of speech, and any interpretation it only forbids trespass and conversion is plainly erroneous from a statutory interpretation view.<sup>84</sup>

Thus, the court finds that these misrepresentations are entitled to some First Amendment protection.<sup>85</sup> The primary focus of this analysis was whether a material benefit or harm arose from the lie. It would be difficult to argue that employment has no material benefits, as employees are compensated at the very least. But, the court seems to believe that because these employment benefits are merely incidental to animal rights activist's actual goal of uncovering potential animal abuse it is not the type of harm the Supreme Court was concerned about, as in *Alvarez*.

#### *Prohibiting Audiovisual Recordings*

The court also found the ban on audiovisual recording to be a regulation of protected speech.<sup>86</sup> The State argued that the ban is a regulation of conduct that does not affect speech.<sup>87</sup> The court disagreed because prohibiting recording would have the

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80. *Id.* at 6.

81. *Id.* at 6.

82. *Id.* at 6.

83. Motion to Dismiss, 44 F. Supp. 3d at 1021-22.

84. *Id.* at 1021.

85. *Id.*

86. *Id.* at 1023.

87. *Id.* at 1023.

same effect as a ban on the publication of agricultural videos.<sup>88</sup> Making an audiovisual recording is a corollary right to the dissemination of such message, and is therefore protected under First Amendment.<sup>89</sup>

### *Laws of General Applicability*

The State argued that §18-7042 was not subject to the First Amendment because it applied broadly, not just to individuals conducting undercover investigations.<sup>90</sup> In other words, it is a law of general applicability.<sup>91</sup> The State relied on the Supreme Court's decision in *Cohen v. Cowles Media Co.* to make this argument.<sup>92</sup> In *Cohen*, the Court held that the First Amendment did not prohibit a confidential source from recovering damages from a publisher revealing his identity when publisher had made a promise of confidentiality.<sup>93</sup> The Court reasoned that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>94</sup>

The Idaho District Court distinguished §18-7042 from facts of the *Cohen* case.<sup>95</sup> First, *Cohen* involved promissory estoppel, a common tort claim applied equally to all citizens.<sup>96</sup> Thus, the Court in *Cohen* was simply refusing to provide an exception in a generally applicable law.<sup>97</sup> However, the court in *Otter* asserted that §18-7042 targeted undercover investigators who intend to publish videos critical of the agricultural industry.<sup>98</sup> Such laws "are always subject to at least some degree of heightened First Amendment scrutiny."<sup>99</sup> The legislative record reflects that it was not meant to be generally applicable, but rather targeted

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88. *Id.* at 1023

89. Motion to Dismiss, 44 F. Supp. 3d at 1023.

90. *Id.* at 1019.

91. *Id.* at 1019.

92. *Id.*

93. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

94. *Id.* at 669

95. Motion to Dismiss, 44 F. Supp. 3d at 1019-20.

96. *Id.*

97. *See Id.*

98. *Id.* at 1020.

99. *Id.* at 1020 (citing *Turner Broad. Sys. v. Fed. Commc'ns Comm'n.*, 512 U.S. 622 at 640 (1994)).

animal rights groups. Idaho State Senator Patrick likened the animal rights investigators to “marauding invaders centuries ago who swarmed into foreign territory and destroyed crops to starve foes into submission,” and in defending the §18-7042, stated he that “[t]his is the way you combat your enemies.”<sup>100</sup> Undercover investigators were also referred to as “terrorists,” “extremists,” and “vigilantes.”<sup>101</sup>

The court held that the statute also differs from *Cohen* because only compensatory damages were sought in that case.<sup>102</sup> A violation of §18-7042 could result in either monetary damages or state-imposed criminal sanctions, or both.<sup>103</sup> The court held that the criminal sanctions place the statute out of *Cohen* analysis, and under the purview of *Smith v. Daily Mail Publishing Co.*<sup>104</sup> In *Smith*, the Supreme Court held that a state cannot make it a crime to publish lawfully obtained, truthful material about a matter of public significance, “absent a need to further a state interest of the highest order.”<sup>105</sup>

Further, the *Otter* court stated that even if the law were generally applicable that it does not mean it automatically escape First Amendment scrutiny.<sup>106</sup> A law prohibiting demonstrations, for example, would not exempt it from First Amendment analysis simply because it applies to everyone.<sup>107</sup> Thus, the court finds that §18-7042 is not a general law of applicability.

### *Strict Scrutiny Applies*

Having determined that both the misrepresentation provision and the audiovisual recording provision prohibit speech protected by the First Amendment, the court turned to what level of scrutiny to apply.<sup>108</sup> The court held that strict

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100. Otter, 2015 WL 4623943 at \*2.

101. *Id.*

102. Motion to Dismiss, 44 F. Supp. 3d at 1020.

103. *Id.*

104. *Id.*

105. *Id.* (citing *Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97, 99 (1979)).

106. *Id.*

107. *Id.*

108. *See* Motion to Dismiss, 44 F. Supp. 3d at 1023.

scrutiny applies because §18-7042 is both a content and viewpoint restriction of speech.<sup>109</sup>

States may regulate protected speech, but generally any regulation must be content neutral.<sup>110</sup> “A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas or if the regulation, by its very terms, singles out particular content for differential treatment.”<sup>111</sup> The court held that, on its face, §18-7042 targeted one type of speech, specifically “the conduct of an agricultural production facility’s operations.”<sup>112</sup> It created a prohibition differentiating filming an agricultural production facility’s operations from all other types of speech on agricultural production facilities that it leaves unburdened.<sup>113</sup> Thus, the statute discriminated based on the content of the speech.<sup>114</sup>

The court further evidenced that the statute was content-based by pointing to the legislative history and the restitution provision.<sup>115</sup> The record is rife with instances of legislators referring to animal rights activists in menacing terms, such as “terrorists,” “extremists,” “vigilantes,” and “marauding invaders.”<sup>116</sup> These statements suggest that the law was enacted with the specific purpose of targeting animal rights activists, and thus serves the legislative purpose of silencing animal rights activists’ speech. Further, the restitution provision, which provides for double the loss for any violation of the statute, also reinforces the content ruling.<sup>117</sup> Effectively, the only way to violate the audiovisual recording part of the statute and be liable for damages would be to publish a video critical of the agricultural production facility.<sup>118</sup> Ironically, the more successful that video is in animating public opinion against the facility, the more the activist will be punished.<sup>119</sup> Likewise, it

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109. *Id.* at 1023-24.

110. *Id.*

111. *Id.* at 1023 (citing *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009)).

112. *Id.* at 1023.

113. *Id.*

114. Motion to Dismiss, 44 F. Supp. 3d at 1023.

115. *Id.* at 1024.

116. *Id.* at 1024

117. *Id.* at 1024

118. *Id.* at 1024

119. *Id.* at 1024

permits a facility owner to recover damages for defamation, without proving the constitutional defamation standards.<sup>120</sup>

The court also holds that §18-7042 is a viewpoint-based discrimination because, in effect, it privileges speech that is supportive of the agricultural industry.<sup>121</sup> It allows job applicants who make misrepresentations with the goal of praising the agricultural facility to skate by unpunished, while penalizing those that wish to expose abusive or unsafe conditions at the facility.<sup>122</sup> A person with the goal of praising the facility cannot be punished by definition under the “double the loss” provision. Additionally, since the law prohibits only unauthorized filming, an owner is far more likely to permit filming that portrays the facility in a positive light, rather than a negative.<sup>123</sup> Therefore, because §18-7042 discriminates between speech based upon both content and viewpoint, it is subject to strict scrutiny under the First Amendment.<sup>124</sup>

The law appears to be inescapably a regulation of content and viewpoint. It overtly targets animal rights groups’ message, as clearly evidenced by the legislative history, and the means in which they convey that message.

#### *Fails Strict Scrutiny*

The court ruled that §18-7042 cannot survive strict scrutiny.<sup>125</sup> “Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest.”<sup>126</sup> The proffered state interest in *Otter* was protecting personal privacy and private property, which the court does not find to be enough.<sup>127</sup> The court reasoned that agricultural production facilities are already heavily regulated, and are subject to numerous regulations governing food and

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120. Motion to Dismiss, 44 F. Supp. 3d at 1024.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Otter*, 2015 WL 4623943 at \*9.

126. *Id.* (citing *Turner*, 501 U.S. at 680).

127. *Id.*

animal safety.<sup>128</sup> And given the public's strong interest in the safety of food production, the court did not see fit to afford the industry extra protection from public scrutiny.<sup>129</sup>

Even if this was a compelling interest, the court does not find §18-7042 to be narrowly tailored.<sup>130</sup> The court pointed to laws already in place that make it illegal to trespass and steal property, as well as laws against fraud and defamation for any false statements made about them.<sup>131</sup> The court did not see a need for agricultural production facilities to be afforded extra protection when it would burden free speech.<sup>132</sup> The court expressed concern that §18-7042 not only targets animal rights activists, but also fails to protect diligent and trusted longtime employees.<sup>133</sup> If such an employee were to witness and film abuse or safety violations, they would face jail time and owe twice the economic loss the owner suffers, even if the video is completely accurate.<sup>134</sup> This circumvents defamation law and whistleblowing statutes by punishing employees for publishing true and accurate recordings on matters of public concern.<sup>135</sup> Because of this, the court saw a disconnect between the statute and the State's interest in protecting personal privacy and private property.<sup>136</sup> Further, the court did not see a reason why counter speech would not be an effective method of refuting a negative recording taken at an animal agricultural production facility.<sup>137</sup> Thus, the court found that §18-7042 fails strict scrutiny, and is therefore unconstitutional under the First Amendment.<sup>138</sup>

### *Equal Protection Violation*

The court also found that §18-7042 violates the Equal Protection Clause of the Fourteenth Amendment for many of the

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128. *Id.* at 10.

129. *Id.* at 10.

130. *Id.* at 10.

131. Otter, 2015 WL 4623943 at \*10.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 11.

137. Otter, 2015 WL 4623943 at \*11.

138. *Id.*

same reasons it violated the First Amendment freedom of speech provision.<sup>139</sup>

Again, the court did not observe and the State did not provide a reason why existing laws against trespass, fraud, and defamation cannot adequately protect the interests of agricultural production facilities.<sup>140</sup> The existence of these laws “necessarily casts doubt upon the proposition that [§18-7042] could have rationally been intended to prevent those very same abuses,” particularly where such action is out of desire to harm a politically unpopular group.<sup>141</sup> The State argues that agricultural facilities deserve more protection because they are a major part of Idaho’s economy, and are often targets of undercover investigations.<sup>142</sup> The court found this logic to be unconvincing, as larger industries do not deserve more protection than smaller industries and there is not a legitimate government interest in protecting a powerful industry, which produces the public’s food supply, from public scrutiny.<sup>143</sup> Because there was not a legitimate reason for §18-7042, the *Otter* court held that it could not even pass rational basis review.<sup>144</sup>

The State argued that §18-7042 cannot violate the Equal Protection Clause because it did not create an impermissible classification.<sup>145</sup> An improper classification may be created in three ways: showing the law discriminates on its face; showing that the law is applied in a discriminatory manner; or by showing that the law was enacted with discriminatory purpose.<sup>146</sup> The court found that law discriminates both on its face and by its purpose.<sup>147</sup> §18-7042 discriminates on its face because it discriminates between whistleblowers in the agricultural industry and whistleblowers in other industries.<sup>148</sup> It discriminated in its purpose because it was enacted with the

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139. *Id.* at 12.

140. *Id.* at 12.

141. *Id.* at 12-13 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533-34 (1973)).

142. *Id.* at 12.

143. *Otter*, 2015 WL 4623943 at \*12.

144. *Id.*

145. *Id.* at 13.

146. *Id.* at 13 (citing *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988)).

147. *Id.* at 13.

148. *Id.* at 13.

discriminatory to silence animal rights activists who conduct undercover investigations in the agricultural industry.<sup>149</sup>

The court also emphasized that when a state discriminates based on the exercise of fundamental right, strict scrutiny may apply.<sup>150</sup> §18-7042 discriminated based on the content of speech.<sup>151</sup> “Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, and deny use to those wishing to express less favored or more controversial views.”<sup>152</sup> Thus, §18-7042 cannot stand under the Equal Protection Clause because it classifies activities protected by the First Amendment based on content.<sup>153</sup> The *Otter* court did not explicitly hold that strict scrutiny applied, likely because it was unnecessary as they held the statute was not even permissible under rational basis. Clearly, the district court wanted to send a strong message that it believes such laws are highly unconstitutional and are bad policy. It plainly does this by ruling §18-7042 cannot even pass the minimal burden of rational basis review.

In sum, the *Otter* held that §18-7042 violates both the First and Fourteenth Amendments. The case is currently on appeal to the 9th Circuit.<sup>154</sup> If upheld, this challenge could establish significant precedent to challenge “ag-gag” laws in other states. Regardless of the outcome, *Otter*’s reasoning could still have implications in other jurisdictions. The following section explores that possibility.

#### IV. APPLYING THE RULING

The ruling in *Otter* casts doubt up on many states’ “ag-gag” laws, particularly those that criminalize misrepresentations to gain access and audiovisual recordings on agricultural facilities, as the Idaho law did. However, applying the *Otter* decision to

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149. *Otter*, 2015 WL 4623943 at \*13; *See supra* note 108 and accompanying text.

150. *Otter*, 2015 WL 4623943 at \*13 (citing *City of Cleburne, TX. v. Cleburne Living Center*, 473 U.S. 432, 440).

151. *See supra* notes 102-111 and accompanying text.

152. *Otter*, 2015 WL 4623943 at \*13 (citing *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

153. *Id.* at 14.

154. *ALDF et al. v. Wasden*, No. 15-35950 (9th Cir. filed Dec. 14, 2015).



“ag-gag” laws requiring rapid reporting or are broad ban type statutes is not as straightforward because they are fundamentally different from the earlier ag-gag laws.

#### A. *No Recording Statutes*

The *Otter* ruling applies fairly significantly to states’ statutes forbidding audiovisual recording on agricultural production facilities, as the overturned Idaho statute also explicitly banned recording.<sup>155</sup> However, a key difference between the first wave states’ statutes is that Idaho’s statute forbids both unauthorized audiovisual recording on, and lying to gain access to, agricultural production facilities<sup>156</sup>, whereas the first wave of ag-gag statutes, only forbid unauthorized audiovisual recording.<sup>157</sup> Additionally, the first wave statutes vary from each other and the Idaho statute as to the level of intent required for a violation.<sup>158</sup>

#### *Montana, Kansas*

Montana’s statute makes it a crime “to enter an animal facility to take pictures by photograph, video, camera, or other means with the intent to commit criminal defamation” without the authorization of the owner and with intent to damage the enterprise.<sup>159</sup> Under the *Otter* ruling and reasoning, Montana’s statute is closer to being content neutral, but is still likely viewpoint-based discrimination. Unlike Idaho’s statute, Montana’s statute does not limit its scope to the “agricultural facilities’ operations,”<sup>160</sup> but rather it extends to all audiovisual recordings on the facility.<sup>161</sup> This was a major point of contention for the court because it differentiates based on the content of speech by forbidding audiovisual recording of only

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155. IDAHO CODE ANN. §18-7042 (West 2015).

156. *Id.*

157. *See supra* notes 19-28 and accompanying text.

158. *See* IDAHO CODE ANN. §18-7042 (West 2015); *supra* notes 19-28 and accompanying text.

159. MONT. CODE ANN. § 81-30-103(3)(e) (West 2015)

160. IDAHO CODE ANN. §18-7042(d) (West 2015).

161. *See* MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

certain areas of agricultural production facilities.<sup>162</sup> However, Montana's statute similarly bases recovery on the amount of damages that occur,<sup>163</sup> which would likely be the result of a negative publication.<sup>164</sup> Thus, Montana's statute is a content-based discrimination in that regard.

Montana's statute would likely be viewpoint discrimination under *Otter*, because it specifically punishes speech that is unpraiseworthy of an agricultural facility due to its intent to damage language. Meanwhile, it leaves unpunished speech that would praise the facility and its practices.<sup>165</sup> Indeed, similar to *Otter*, the owner has the right to approve any recording, and it is unlikely that an owner would approve of an audiovisual recording that portrays the facility in a negative light.<sup>166</sup> The statute by its term cannot simply be applied to someone who would portray the facility in a positive light; it could only apply to someone with the intent to damage the facility. Arguably that is the point a defamation suit, to stop untruthful, negative view of a person or entity. It is harder to argue that defamation applies to an unaltered, unfabricated audiovisual recording. Thus, the statute would likely be subject to strict scrutiny under the framework First Amendment because it differentiates between positive and negative viewpoints.

The Kansas statute excludes the criminal defamation standard present in the Montana statute, but includes the same "intent damage the enterprise" language.<sup>167</sup> It similarly does not single out a type of recording forbidden on agricultural facilities.<sup>168</sup> The listed violation level, a class A, nonperson misdemeanor, has been repealed,<sup>169</sup> but the punishment was formerly no more than a year in jail or a fine not exceeding \$2500, or both.<sup>170</sup> So, the punishment was not based upon the amount of damages caused and would not be affected, at least

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162. See supra notes 102-6 and accompanying text.

163. See MONT. CODE ANN. § 81-30-104 (West 2015).

164. See supra notes 109-10 and accompanying text.

165. See MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

166. See supra note 114 and accompanying text.

167. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015); MONT. CODE ANN. § 81-30-103(2)(e) (West 2015).

168. KAN. STAT. ANN. § 47-1827(c)(4) (West 2015).

169. KAN. STAT. ANN. § 21-4502 (West 2015).

170. KAN. STAT. ANN. § 21-4503a available at

[http://law.justia.com/codes/kansas/2006/chapter21/statute\\_11828.html](http://law.justia.com/codes/kansas/2006/chapter21/statute_11828.html).

from statutory view, by the amount of damages resulting from a publication. This makes the Kansas' statute fairly content neutral under the analysis of *Otter*. Yet, the intent to damage language, likely makes this statute a viewpoint-based discrimination for the same reasons it did for Montana's statute.<sup>171</sup> Thus, Kansas' statute would likely be subject to strict scrutiny.

### *North Dakota*

The North Dakota statute is more akin to the Idaho statute in that neither requires a specific intent.<sup>172</sup> Idaho does have the broader intent language by requiring that person knowingly violated statute, however, the North Dakota statute is completely devoid of intent language,<sup>173</sup> making it look more like a strict-liability offense.

North Dakota's statute is not likely a content-based restriction. It does not single out any particular part of agricultural production facilities; it appears to be a ban on all unauthorized recording.<sup>174</sup> The punishment is not based on restitution for the damages that would flow from a negative publication, instead the listed punishment level is a class B misdemeanor,<sup>175</sup> which is punishable by a maximum penalty of thirty-day imprisonment, a fine \$1500, or both.<sup>176</sup> Thus, the statute appears to be content neutral.

North Dakota's statute may also be viewpoint neutral. It does not appear to differentiate between positive and negative viewpoints through its punishments, as the Idaho statute.<sup>177</sup> It does not limit enforcement to only those with intent to damage as the Montana and Kansas statutes do either.<sup>178</sup> However, it still allows the owner to authorize what may and may not be

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171. See *supra* text accompanying note 158.

172. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).

173. *Id.*; IDAHO CODE ANN. § 18-7042 (West 2015).

174. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).

175. N.D. CENT. CODE ANN. § 12.1-21.1-04 (West 2015).

176. N.D. CENT. CODE ANN. § 12.1-32.01(6) (West 2015).

177. *Supra* notes 112-14 and accompanying text.

178. *Supra* notes 158-63 and accompanying text.

recorded.<sup>179</sup> The court in *Otter* was concerned with turning agricultural facility owners into “state-backed” censors,<sup>180</sup> but it is unclear if this factor alone is enough to make it a viewpoint discrimination. It relies on the reasonable assumption that an agricultural facility owner would not approve of recordings which would portray a facility in a negative light.<sup>181</sup> Thus, North Dakota’s statute seems to be the closest in avoiding strict scrutiny as to the free speech challenge among the first wave of ag-gag laws.

### B. Statutes Criminalizing Misrepresentation

The Idaho statute overturned in *Otter* was part of the second wave of ag-gag laws, along with Iowa and Utah that included a provision criminalizing misrepresentations to gain access to agricultural facilities.<sup>182</sup> Iowa’s statute focuses only on misrepresentations used to gain access to agricultural production facilities, whether part of an employment application or otherwise.<sup>183</sup> However, Utah and Idaho not only make it a crime to make a misrepresentation to gain access to an agricultural production facility, but also to make an audiovisual recording on the premises.<sup>184</sup> The constitutionality of the Iowa and Utah’s statutes depends largely upon whether misrepresentations are protected speech. The *Otter* court found the “misrepresentation to gain employment” provision of the Idaho statute to be protected speech because the misrepresentation is not linked to the envisioned direct harm done by it, or the material advantage gained.<sup>185</sup>

Indeed, the same analysis used in *Otter* can apply to Iowa and Utah’s statutes. The material harm would not arise from an animal investigator lying to gain employment.<sup>186</sup> Rather, the harm would be from the publication of those recordings, which

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179. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 2015).

180. *Otter*, 2015 WL 4623943 at \*9.

181. *See id.*

182. *Supra* notes 29-33 and accompanying text.

183. *See* IOWA CODE ANN. § 717A.3A. (West 2015)

184. *See* IDAHO CODE ANN. § 18-7042 (West 2015); UTAH CODE ANN. § 76-6-112(2) (West 2015).

185. *See supra* notes 66-80 and accompanying text.

186. *See supra* notes 66-80 and accompanying text.

the *Otter* court argues, is not the direct type of material harm required to prohibit speech.<sup>187</sup> The court in *Otter* argues that the material gain is different in these cases from the type in *Alvarez*, where it was stated that false claims “made to secure money or other valuable consideration, say offers of employment,” are not protected.<sup>188</sup> The court states that what is sought and obtained by animal rights activists’ misrepresentations is being able to record, undercover, at animal production facilities, not the material gains of employment.<sup>189</sup> Given the indirectness of the harm and gain, Iowa and Utah’s statutes likely criminalize protected speech similar to the *Idaho* statute.

However, Iowa and Utah’s statutes are likely closer to avoiding strict scrutiny because their punishments are not linked to the damages a negative publication would cause like the Idaho statute did with language providing for an award “twice the value of the damage resulting from a violation.”<sup>190</sup> A violation of the Utah and the Iowa code would only result in a fine and/or prison time.<sup>191</sup> This means a violation would not discriminate between the content of a message. Any unauthorized recording would be equally punishable. Thus, it is likely a content neutral law. The only possible viewpoint discrimination would be that it allows the owner to authorize what recording is permissible, and again it is unlikely that he would authorize any recording that portrays the facility in a negative light. It is unclear whether this alone could establish a viewpoint-discrimination argument, therefore Utah and Iowa may be able to avoid strict scrutiny based on the logic of the *Otter* ruling.

### C. Rapid Reporting Statutes

It is difficult to compare rapid reporting statutes to the Idaho statute or any of the other first or second wave “ag-gag” statutes because they are so fundamentally different in the way

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187. See *supra* notes 66-80 and accompanying text.

188. *Otter*, 2015 WL 4623943 at \*6.

189. *Id.*

190. IDAHO CODE ANN. § 18-7042(4) (West 2015).

191. IOWA CODE ANN. 903.1 (West 2015); UTAH CODE ANN. § 76-3-204 (West 2015); UTAH CODE ANN. § 76-3-301 (West 2015).

they attempt to limit recording at agricultural facilities. Indeed, laws which impose a duty to report are exceedingly rare, usually only reserved for serious felonies such as child abuse.<sup>192</sup> Missouri's statute provides that when "[anyone] makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect. . . [there is] a duty to submit such videotape or digital recording with twenty-four hours."<sup>193</sup> No such provision expressly prohibiting audiovisual recordings or lying to gain access to agricultural facilities is present.<sup>194</sup> As such, the constitutional free speech analysis of *Otter* does not significantly apply.

However, rapid reporting statutes may be vulnerable to an Equal Protection claim because it singles out the agricultural industry for special protection and treatment. As such, the statute may create an improper classification on its face, by providing a protection to an industry which others do not enjoy. However, it is unclear whether a court would apply any increased level of scrutiny. Animal investigators are not considered a suspect class. The only argument for would be that it is discriminated based on the exercise of fundamental right, as was argued in *Otter*.<sup>195</sup>

Rapid reporting statutes prevent animal investigators from compiling a record of evidence because the statute requires that they report the first instance of abuse almost immediately, likely outing themselves as an investigator because the agency receiving the recording will undoubtedly contact the facility about the violation. This makes it next to impossible to establish a pattern of abuse.<sup>196</sup> Agricultural facility owners will not face tough consequences, as they probably will only be fined small amounts or have to fire some employees.<sup>197</sup> There will not be large economic penalties that act as deterrents as there have been with the higher profile investigations.<sup>198</sup> Thus, the agricultural industry is shielded in that regard where as other industries may not be. The agricultural industry is subject to more public

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192. Shea, *supra* note 31, at 364.

193. MO ANN. STAT. 578.013 (West 2015).

194. *Id.*

195. *Supra* notes 150-153 and accompanying text

196. Shea, *supra* note 31, at 339.

197. Shea, *supra* note 31, at 364.

198. Shea, *supra* note 31, at 364.

scrutiny than other industries, but as the court points out in *Otter*, this does not mean it should be offered more protection, as food production is a matter of public interest.<sup>199</sup> Even so, rapid reporting statutes appear to be the closest type of “ag-gag” law that can avoid strict scrutiny.

#### D. *Broad Bans to Data Collection*

North Carolina’s statute, which became effective on January 1, 2016,<sup>200</sup> illustrates the new trend in limiting undercover investigative reporting. Undercover investigations of North Carolina’s agricultural and food industry have had a major impact in the recent past.<sup>201</sup> Famously, in 1992, two undercover reporters working for ABC posed as employees at Food Lion supermarkets in North Carolina.<sup>202</sup> The reporters secretly recorded unsanitary food handling practices, and later used the footage in a broadcast report on *PrimeTime Live*.<sup>203</sup> The Fourth Circuit found that the reporters breached their duty of loyalty to Food Lion by surreptitiously filming these practices with adverse intent to serve another employer.<sup>204</sup> More recently, in 2012, an undercover investigator exposed animal abuse on a Butterball turkey farm, resulting in six workers being charged in addition to a state worker who tipped off the facility before it was raided by authorities.<sup>205</sup> Butterball accounts for about twenty percent of the turkey production in the US.<sup>206</sup> Seemingly in response to the Butterball investigation, a bill was introduced in 2013 in the North Carolina Senate, which criminalized lying to gain access and audiovisual recording at any employer’s

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199. *Supra* note 133-134 and accompanying text.

200. N.C. GEN. STAT. ANN. § 99A-2 (West 2015).

201. See Greg Toppo, *N.C. poultry worker arrested after video shows him stomping, throwing chickens*, USA TODAY (Dec. 9, 2015) <http://www.usatoday.com/story/news/2015/12/09/mercy-for-animals-north-carolina-chicken-processing-abuse/77049796/>.

202. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

203. *Id.*

204. *Id.* at 516.

205. Cindy Galli, *Butterball Workers Arrested on Animal Cruelty Charges*, ABC NEWS (Feb. 16, 2012) <http://abcnews.go.com/Blotter/butterball-workers-arrested-animal-cruelty-charges/story?id=15637180>.

206. *Id.*

facility.<sup>207</sup> This bill was not passed by adjournment of the 2013 session, effectively defeating the bill.<sup>208</sup> It is against this backdrop that North Carolina's property protection act came to pass.

North Carolina's property protection act prohibits an employee from intentionally entering nonpublic areas for a reason "other than seeking or holding employment", and then without authorization, "recording images or sounds occurring in the premises", and using those sounds to breach the person's duty of loyalty to the employer.<sup>209</sup> This provision seeks to limit undercover investigations by those who have taken a job to record images, as their intent will always to some degree be related to their investigation. Representative John Szoka, a primary sponsor of the bill, stated that it protects whistleblowers, but at the same time targets employees who are hired under false pretenses, and seek to record breaking their duty of loyalty to the employer.<sup>210</sup>

Setting aside undercover investigators, it is very unclear how this law protects whistleblowers. There seems to be two possibilities: the intent language<sup>211</sup> and the protections vaguely pointing to other areas of law.<sup>212</sup> First, the intent language may protect employee whistleblower when the recording pertains to the employee's job, as employees undoubtedly have reason to enter nonpublic areas when it pertains to their job. However, it does not necessarily follow that this would always protect the employee. An employee could become aware of an illegal act his employer is doing in a different area, not a part of employee's job. If the employee wanted to expose this, it appears he could be liable under the statute. Second, the statute vaguely states that that it does not diminish protections provided to employees under "Article 21 of Chapter 95 or Article 14 of

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207. S. Res. 648, 2012-2013 Legis. (N.C. 2013).

208. Bydan Flynn, *2013 Legislative Season Ends with 'Ag-Gag' Bills Defeated in 11 States*, FOOD SAFETY NEWS (July 30, 2013) <http://www.foodsafetynews.com/2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/#.Vp7N1CorKhc>.

209. N.C. GEN. STAT. ANN. § 99A-2(b)(2) (West 2015).

210. NC House debate 4-22-2015 at 1:17:20 available at <http://www.ncleg.net/DocumentSites/HouseDocuments/2015-2016%20Session/Audio%20Archives/2015/04-22-2015.mp3>.

211. N.C. GEN. STAT. ANN. § 99A-2(b)(2) (West 2015).

212. N.C. GEN. STAT. ANN. § 99A-2(e) (West 2015).



Chapter 126 of the General Statutes, nor may any party who is covered by these articles be liable under this section.”<sup>213</sup> Article 14 of Chapter 126 of the General Statutes refers to whistleblowing in the public matters, and has nothing to do with cases of private enterprise whistleblowing.<sup>214</sup> Article 21 of Chapter 95 lists a number of types of employees whom may not be discriminated against if they do certain acts or have certain characteristics , meaning they cannot be fired or other employment action be taken bases upon those acts or characteristics. However, none of these preclude an employee being sued for whistleblowing.<sup>215</sup>

When read with the last part of the vague exceptions section, “nor may any party who is covered by these articles be liable under this section” this becomes even more baffling. Take for example, NC ST § 95-28.1 listed under Article 21 of Chapter 95.<sup>216</sup> NC ST § 95-28.1 provides that employers shall not discriminate making employment decisions on account of the fact a person possesses the sickle cell trait. So, since this “covers” people with the sickle cell trait, it appears that people with sickle cell anemia could not be found liable under North Carolina’s property protection act, and could conceivably do any undercover investigation they desired without repercussion. Leaving aside this anecdote, it emphasizes that parts of this bill are poorly conceived.

A few key points which played a part in overturning Idaho’s ag-gag law in *Otter* are also present in North Carolina’s property protection act. First, the punishment of the North Carolina’s act is based upon how much damage is caused to the business, as the remedy it provides for is compensatory damages.<sup>217</sup> Much like Idaho’s law,<sup>218</sup> the only conceivable way to damage and thus owe compensatory damages to a business is by recording something on the premises critical of the business somehow injuring the business’ reputation and costing it money. A video praising a business would not cost them money, or

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213. *Id.*

214. *See* N.C. GEN. STAT. ANN. § 126-14 (West 2015).

215. *See* N.C. GEN. STAT. ANN. § 95-21-241 (West 2015).

216. *Id.*

217. N.C. GEN. STAT. ANN. § 99A-2(d)(2) (West 2015).

218. *See supra* notes 113-14 and accompanying text.

trigger compensatory damages in any conceivable way. Therefore, this is a viewpoint discrimination because through its punishment it permits one view while silencing another. Viewpoint discrimination is subject to the most exacting scrutiny, and is rarely permissible.

Second, while not explicit in the text of the statute, there is ample external evidence that suggests that the statute was enacted with purpose of protecting the agricultural industry. The biggest piece of evidence would simply be the environment that gave rise to the bill.<sup>219</sup> Governor McCrory in his veto message was concerned that bill did not give adequate protection to “honest employees,” but remarked that undercover investigation was indeed a problem in the agricultural industry in particular.<sup>220</sup>

North Carolina’s property protection act is likely subject to strict scrutiny under the reasoning of the *Otter* ruling because the damages are based upon the publication being negative, and there is ample evidence to suggest that this is a veiled attempt at targeting animal rights activists.

## V. CONCLUSION

Rapid reporting statutes and content and viewpoint neutral recording ban statutes, like that in North Dakota, appear to be closest to avoiding strict scrutiny under the *Otter* ruling. However, both may be vulnerable to equal protection claims because they single out the agricultural industry for protection, while others are not. Yet, it would be difficult to apply anything except rational basis review, as there is not likely a suspect class being discriminated against. The *Otter* court only applied rational basis review, but argued it could apply strict scrutiny if the statute was discriminated based on a fundamental right.<sup>221</sup> For states pondering implementing “ag-gag” statutes, these would probably be the safest for the states to avoid them being challenged.

But, as a policy matter, states should not implement these laws. They are too much of an onerous burden on the right to

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219. See supra notes 191-199 and accompanying text.

220. Pat McCrory, *McCrory Veto Message*, (May 29, 2015), available at <http://www.ncleg.net/Sessions/2015/h405Veto/letter.pdf>.

221. Supra notes 139-53 and accompanying text.

free speech, not only of animal rights activists, but news gathering in general. The public relies on reporters and their ability investigate to inform them of potential wrongdoings. An industry that serves public needs, such as the agricultural industry, particularly should not be shielded from the public eye.

The reasons that give rise to “ag-gag” laws are not completely unreasonable. It is no doubt a burden for the industry to be subject to investigation and public scrutiny. And realistically, animal slaughter is a messy and often brutal process even when properly done. Yet, this should not preclude the industry from public scrutiny and investigation. These investigations continually turn up instances of animal cruelty and abuse, which are in fact crimes. It is difficult to reconcile why an industry should be immune not only from public scrutiny, but from prosecution under laws they have been demonstrated to frequently break. And even beyond animal cruelty, an industry that produces food for the public should not be entirely shielded from it for any number of health concerns. What should logically arise from these investigations is more transparency, but instead the public is seeing far less.

