

“MARKET” REGULATION: CONFRONTING INDUSTRIAL AGRICULTURE’S FOOD SAFETY FAILURES

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Every new social relation begets a new type of wrongdoing—of sin, to use an old-fashioned word—and many years always elapse before society is able to turn this sin into a crime which can be effectively punished by law.

~President Theodore Roosevelt, 1906, following the passage of the Federal Meat Inspection Act and the Pure Food and Drug Act¹

We are a nation built on the strength of individual initiative. But there are certain things that we can’t do on our own. There are certain things that only a government can do. And one of those things is ensuring that the foods we eat . . . are safe and don’t cause us harm.

~President Barack Obama, 2009²

On November 6, 2008 the Government Accountability Office (GAO) released a list of “urgent issues” for President-Elect Barack Obama and the 111th Congress.³ In the midst of two wars and a serious economic downturn, the list highlighted familiar points of discussion: defense readiness and spending; Iraq, Afghanistan, and Pakistan; and oversight of American financial institutions.⁴ Surely, these issues were on the minds of voters as they pulled the lever, punched the ballot, or pressed the button on November 4th. However, one of the GAO’s urgent issues likely was not a consideration of the vast majority of voters who made their voices heard at the ballot box:⁵ “What are you afraid of? Terrorism? Cancer? Flying in an airplane? How about bacteria? If you are like most Americans, you probably are more afraid of dying from cancer than dying from diarrhea.”⁶

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1. PHILIP J. HILTS, PROTECTING AMERICA’S HEALTH: THE FDA, BUSINESS, AND ONE HUNDRED YEARS OF REGULATION 55 (2003) (quoting President Theodore Roosevelt).

2. PRESIDENT’S FOOD SAFETY WORKING GRP., U.S. DEP’T OF AGRIC., KEY FINDINGS (2009) [hereinafter KEY FINDINGS] (quoting President Barack Obama), available at http://www.foodsafetyworkinggroup.gov/FSWG_Key_Findings.pdf.

3. Press Release, U.S. Gov’t Accountability Office, GAO Lists Top “Urgent Issues” For Next President and Congress; Unveils New Transition Web Site (Nov. 6, 2008), available at <http://www.gao.gov/press/press-transition-release2008nov06.pdf>.

4. *Id.*

5. *See id.*

6. MICHELE MORRONE, POISONS ON OUR PLATES: THE REAL FOOD SAFETY PROBLEM IN THE UNITED STATES xiii (2008). Food safety is an issue that has come to the world’s attention, with at least 1.8 million deaths every year. *See generally* SAFE FOOD INT’L, WORLD

The safety of food is inherently a part of the debate over the health of our nation's citizens,⁷ and in the wake of continued foodborne illness outbreaks, voters and lawmakers are again taking notice of the quagmire that characterizes the oversight of our food supply.⁸ Just as horror stories about the meat packing industry spurred action from lawmakers in 1906 following the publication of Upton Sinclair's muckraking novel *The Jungle*,⁹ the recent parade of devastating headlines and family tragedies¹⁰ has created social outrage. Still, the effort to modernize food safety regulation has always been an uphill, and contentious, political battle.¹¹ Yet a culture of reform has emerged, owing in large part to the public's changing views on agriculture and an increased focus on food safety and public health.

One hundred years have passed since the enactment of the first food safety legislation—using law to punish the sins of industry—yet food safety remains as pressing a concern as ever. Over a century ago, Theodore Roosevelt—

HEALTH ORG., GUIDELINES FOR CONSUMER ORGANIZATIONS TO PROMOTE NATIONAL FOOD SAFETY SYSTEMS, available at http://safefoodinternational.org/guidelines_for_consumer_organizations.pdf.

7. See Bob Cesca, *We Can't Reform Health Care Without Reforming Food*, HUFFINGTON POST, Oct. 28, 2009, http://www.huffingtonpost.com/bob-cesca/we-cant-reform-health-car_b_337615.html. See also THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 10 (Andrew Kimbrell ed., 2002). See *infra* text accompanying footnote 25.

8. See Kristin Choo, *Hungry for Change*, A.B.A. J., Sept. 2009, at 56, 61.

9. UPTON SINCLAIR, *THE JUNGLE* (Harper & Brothers 1951) (1906). Sinclair admitted that he “aimed at the public's heart, and by accident . . . hit it in the stomach.” HILTS, *supra* note 1, at 51 (quoting Sinclair). Sinclair detailed the horrific conditions of industrial meatpacking plants:

There was never the least attention paid to what was cut up for sausage; there would come all the way back from Europe old sausage that had been rejected, and that was mouldy and white—it would be dosed with borax and glycerine, and dumped into the hoppers, and made over again for home consumption. There would be meat that had tumbled out on the floor, in the dirt and sawdust, where the workers had tramped and spit uncounted billions of consumption germs. There would be meat stored in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about on it. It was too dark in these storage places to see well, but a man could run his hand over these piles of meat and sweep off handfuls of the dried dung of rats. . . . This is no fairy story and no joke . . .

SINCLAIR, *supra*, at 135. President Roosevelt received hundreds of letters a week from concerned readers of *The Jungle*, ultimately spurring a response from the White House and Capitol Hill. HILTS, *supra* note 1, at 50-52.

10. See, e.g., Gardiner Harris & Pam Belluck, *New Look at Food Safety After Peanut Tainting*, N.Y. TIMES, Jan. 30, 2009, at A17; Lyndsey Layton, *This Woman Might Die From Eating Cookie Dough; Severe Case Gives Context to Issue of Food Safety*, WASH. POST, Sept. 1, 2009, at A1; Michael Moss, *The Burger That Shattered Her Life*, N.Y. TIMES, Oct. 4, 2009, at A1.

11. MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY* 34-35 (2d ed., 2010).

once staunch proponent of laissez faire government¹²—was challenged by union activist Samuel Gompers to visit working class tenements.¹³ Amidst the filth, he witnessed first hand the degradation that pure and unfettered capitalism had wrought on working class individuals of the time.¹⁴ With this experience, President Roosevelt acted on his personal philosophy of "combined enterprise and fairness" to address the growing safety concerns in "the most basic of trades—the sale of food and medicine."¹⁵ The quote delivered by President Roosevelt beginning this article encapsulates his reaction to the passage of two monumental food laws,¹⁶ recognizing that when it comes to ensuring a safe and wholesome food supply, federal government must protect citizens from the sins and greed of industry.¹⁷ In 2009, President Obama echoed this same sentiment, but the passage of time illustrates that lawmakers have failed to solve century old problems and to keep pace with an industrialized and centralized system of food production.

But what is meaningful reform of a food safety system that supplies what is consistently referred to as "the safest in the world"?¹⁸ Over the last six decades, there have been more than twenty calls for reorganization of our food safety bureaucracy¹⁹ and countless pleas for increased authority for the agencies charged with assuring safe food. This article recognizes that the new movement in local agriculture has created an environment whereby consumers can use their purchasing power to send a strong message to lawmakers about the state of American food production, and thus the safety of our food. This

12. See HILTS, *supra* note 1, at ix. Roosevelt espoused the notion that the improvement of the conditions suffered by citizens was "not to come from government action but from each individual's own efforts." *Id.* This is what Roosevelt considered living "the strenuous life." THEODORE ROOSEVELT, *The Strenuous Life*, in *THE STRENUOUS LIFE: ESSAYS AND ADDRESSES* 1 (1905).

I wish to preach, not the doctrine of ignoble ease, but the doctrine of the strenuous life, the life of toil and effort, of labor and strife; to preach that highest form of success which comes, not to the man who desires mere easy peace, but to the man who does not shrink from danger, from hardship, or from bitter toil, and who out of these wins the splendid ultimate triumph.

Id. But man need not brave the strife of kidney failure, cognitive problems, and paralysis simply due to consuming a hamburger at the family picnic. *Cf.* Moss, *supra* note 10 (exposing the hardships faced by Stephanie Smith after eating a tainted hamburger).

13. HILTS, *supra* note 1, at ix-x.

14. *Id.* at x.

15. *Id.* at xi.

16. See *infra* Part I.

17. HILTS, *supra* note 1, at 55.

18. Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 68 (2000). See also Choo, *supra* note 8, at 57; Neil Hamilton, Essay, *Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 11 (2004) [hereinafter *Democracy II*]; Michael T. Roberts, *Mandatory Recall Authority: A Sensible and Minimalist Approach to Improving Food Safety*, 59 FOOD & DRUG L.J. 563, 564 (2004); James T. O'Reilly, *Are We Cutting the GRAS? Food Safety Perceptions are Diminished by Dysfunctional Bureaucratic Silos*, 59 FOOD & DRUG L.J. 417, 417 (2004).

19. See Merrill & Francer, *supra* note 18, at 115-18.

article intends to provide a framework for reform built around prioritizing prevention, strengthening surveillance and enforcement, improving response and recovery, and increasing support of local food systems, designed to significantly transform and modernize our current food safety laws. Part I of this article provides important background concerning the current regulatory system, which is marred by conflicts and failed communication between fifteen federal agencies implementing more than thirty laws. Furthermore, it identifies the problems presented by industrial agriculture, which have only served to exacerbate the futility of century old laws lagging in the distant past. Part II outlines necessary regulatory reform focused on addressing the industrial model and centered on increased authority within the existing structure of our food safety bureaucracy. Finally, Part III describes the importance of lawmakers' consideration of the affect of proposed reform on local food systems and advocates an increase in the law's support and promotion of such systems to provide safe food for American dinner tables. As health care debates extend to what is on our plates, there should be only one public option: truly safe food.

I. BACKGROUND

To begin, it is necessary to define "food safety" for the purposes of this proposed framework for reform. When discussing food safety, what is meant is reducing incidents of foodborne illness contracted from microbiological pathogens, chemical additives, and environmental contaminants.²⁰ But, as Marion Nestle points out:

Safety is relative; it is not an inherent biological characteristic of food. A food may be safe for some people but not others, safe at one level of intake but not another, or safe at one point in time but not later. Instead, we can define a safe food as one that does not exceed an *acceptable* level of risk.²¹

20. *Id.* at 69. When discussing foodborne illness (or food poisoning) most people think of bacteria, like *Salmonella* or *e-Coli*, but non-bacterial sources are equally dangerous:

Pesticides can contaminate food through agricultural run-off into the water supply and by forming residues on raw agricultural commodities and in prepared foods. Drugs administered to livestock can leave residues in human food. Insect and rodent pests can infect foods in processing and storage plants. Natural contaminants, such as aflatoxin, occur naturally in some foods and may pose risks greater than any chemicals that require regulatory safety approval. Food allergens are ubiquitous and some pose serious risks to sensitive consumers. More recently, federal agencies have become concerned about possible bioterrorist attacks on the food supply.

Id. at 70 (internal citations omitted).

21. NESTLE, *supra* note 11, at 16 (emphasis in original).

It is helpful to address the issue of food safety through utilization of the “precautionary principle,” a look-before-you-leap approach, whereby one tests products before introduction into the marketplace.²² The precautionary principle recognizes that

[d]ecision-makers are constantly faced with the dilemma of balancing the freedoms and rights of individuals, industry and organisations with the need to reduce or eliminate the risk of adverse effects to the environment or to health. . . .

Whether or not to invoke the Precautionary Principle is a decision exercised where scientific information is insufficient, inconclusive, or uncertain and where there are indications that the possible effects on the environment, or human, animal or plant health may be potentially dangerous and inconsistent with the chosen level of protection. . . .

The appropriate response in a given situation is thus the result of an [sic] political decision, a function of the risk level that is “acceptable” to the society on which the risk is imposed.²³

For the purposes of this article, the main focus will be on applying this understanding of safety²⁴ to the microbiological pathogens that penetrate food during production from farm to fork.

A safe food supply has a clear correlation with public health, but also correlates to rising health care costs and to matters of economics. According to the Centers for Disease Control and Prevention, foodborne diseases affect seventy-six million people a year, resulting in 325,000 hospitalizations and 5,000 deaths annually.²⁵ The Economic Research Service (ERS) of the United States Department of Agriculture (USDA) estimates that the medical costs and loss of productivity due to time out of work and premature death or illnesses caused by *Salmonella* is \$2,646,413,401 per year, while the costs produced by *E. coli* related death and illness is \$478,381,766 per year.²⁶ “Safest in the world” or

22. *Id.* at 22.

23. COMM’N OF THE EUROPEAN COM’YS., COMMUNICATION FROM THE COMMISSION ON THE PRECAUTIONARY PRINCIPLE 8, 16 (2000), available at http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf. Industry hates discussion of the precautionary principle because they believe it is based on perception, whether that perception is true or not. NESTLE, *supra* note 11, at 24.

24. INT’L COMM’N ON THE FUTURE OF FOOD AND AGRIC., MANIFESTO ON THE FUTURE OF FOOD 5 (2003) [hereinafter MANIFESTO] (indicating that the precautionary principle should apply to all matters relating to food safety).

25. Paul S. Mead et al., *Food-Related Illness and Death in the United States*, 5 EMERGING INFECTIOUS DISEASES 607, 607 (1999), available at <http://www.cdc.gov/ncidod/eid/vol5no5/mead.htm>. “[T]he number who are killed annually by something they ate is roughly the same as the number of Americans who’ve been killed in Iraq and Afghanistan since 2003.” Eric Schlosser, Op-Ed., *Unsafe at Any Meal*, N.Y. TIMES, July 25, 2010, at WK. 8.

26. ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., *The Foodborne Illness Cost Calculator* (2009), <http://www.ers.usda.gov/data/foodborneillness/>.

not, these numbers are unacceptable. Though food safety has been recognized as a concern to be addressed by the federal government since 1906, early evolution of the laws and administrative structure make it clear to see why progress has been slow.

A. Constructing Chaos

The origins of food safety legislation can be credited to the muckraker journalism of the early 1900s and President Theodore Roosevelt's era of trust busting, both of which addressed the abuses within food production and distribution.²⁷ Outraged citizens began to recognize that lawmakers were financially motivated by giant companies, and the horrors illuminated by Sinclair's work of fiction detailing the working conditions in meatpacking plants, motivated President Roosevelt to back new laws.²⁸ In 1906, Congress enacted the Pure Food and Drug Act (PFDA)²⁹ and the Federal Meat Inspection Act (FMIA),³⁰ thereby delegating enforcement of food safety to the Department of Agriculture.³¹

The sale of adulterated food had been prohibited in Washington, D.C. since 1879, but it took Congress almost thirty years and 190 pieces of proposed legislation before the federal government assumed its role in assuring safe food.³² The FMIA, largely intact and unchanged to this day, created a system of federal inspections of cattle, sheep, pigs, and goats before and after slaughter.³³ Meat products that are found to be wholesome are labeled "[i]nspected and passed" and are free to be moved in interstate commerce, while unwholesome (and thus unlabeled) products are destroyed.³⁴ The main

27. O'Reilly, *supra* note 18, at 417-18. In fact, some scholars view early food legislation as a mere means of regulating competition and question whether such legislation actually served the public interest. *See generally* CLAYTON A. COPPIN & JACK HIGH, *THE POLITICS OF PURITY: HARVEY WASHINGTON WILEY AND THE ORIGINS OF FEDERAL FOOD POLICY* (1999). "[T]he regulation of food was aimed at the economics of the industry." *Id.* at 19.

28. HILTS, *supra* note 1, at xi, 50-52.

29. Pub. L. No. 59-384, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 et seq.).

30. Pub. L. No. 59-242, 34 Stat. 1256, 1260 (1907) (codified at 21 U.S.C. §§ 601-80 (1907)). The language of FMIA was originally included as a part of the Agricultural Appropriations Act of 1906. Dennis R. Johnson & Jolyda O. Swaim, *The Food Safety and Inspection Service's Lack of Statutory Authority to Suspend Inspection For Failure to Comply With HACCP Regulations*, 1 J. FOOD L. & POL'Y 337, 341 (2005).

31. Merrill & Francer, *supra* note 18, at 78.

32. *Id.* at 79.

33. 21 U.S.C. §§ 603-604. *See* HILTS, *supra* note 1, at 53. *See also* Johnson & Swaim, *supra* note 30, at 341 (discussing FMIA inspection provisions); Merrill & Francer, *supra* note 18, at 79 (discussing how the provisions of the FMIA are still relevant for inspectors today).

34. 21 U.S.C. § 607.

focus of the law was to control misbranded³⁵ and adulterated³⁶ meat products and to assure sanitary conditions of the production facilities.³⁷ Similarly, the PFDA prohibited the introduction of other adulterated foods into interstate commerce.³⁸ The only major change came in 1938 when Congress repealed the PFDA with the passage of the Federal Food, Drug, and Cosmetic Act (FDCA),³⁹ which prohibited the interstate transport of adulterated foods and authorized the Food and Drug Administration (FDA) to inspect facilities,⁴⁰ set tolerances for “poisonous or deleterious substance[s]” that are added, but not where unavoidable by good manufacturing practices, in food,⁴¹ and establish “reasonable standard[s] of quality.”⁴²

From the very beginning, by passing separate laws regulating meat and other food products and dividing responsibility among separate USDA units, Congress created a bifurcated system that foreshadowed the current confusion.⁴³ Due to the perception that assuring food safety did not comport with the USDA’s primary function of promoting agriculture, the chasm between the regulation of certain foods grew wider when the Food and Drug Administration was transferred to the Federal Security Agency, later to be consolidated in the Department of Health, Education, and Welfare—the current Department of Health and Human Services.⁴⁴ Today, the fragmentation has grown even more complex with no fundamental modernization in over a century, resulting in failed communication and devastating impacts on public health.⁴⁵ Currently four agencies stand at the center of the morass: (1) the USDA’s Food Safety and Inspection Service (FSIS); (2) the FDA’s Center for Food Safety and Applied Nutrition (CSFAN); (3) the Environmental Protection Agency’s (EPA) Office of Prevention, Pesticides, and Toxic Substances; and (4) the Centers for Disease Control’s (CDC) Food Safety Office.⁴⁶

35. An item is misbranded if its labeling (including the “inspected and passed” label) is false or misleading in any way. 21 U.S.C. § 601(n)(1).

36. A meat product is adulterated “if it bears or contains any poisonous or deleterious substance which may render it injurious to health.” 21 U.S.C. § 601(m)(1).

37. Johnson & Swaim, *supra* note 30, at 341.

38. Merrill & Francer, *supra* note 18, at 79.

39. 21 U.S.C. §§ 301-399b (2009).

40. *Id.* at § 374.

41. *Id.* at § 346.

42. *Id.* at § 341.

43. Choo, *supra* note 8, at 58; Merrill & Francer, *supra* note 18, at 78, 85.

44. Merrill & Francer, *supra* note 18, at 82-85. The separation of the regulation of meat from the regulation of other foods was a result of professional friction between Dr. Harvey Wiley, Chief of the Bureau of Chemistry and long time advocate of strong federal food regulation, and several USDA Secretaries who favored less regulation. *Id.* at 79-80.

45. TRUST FOR AMERICA’S HEALTH, FIXING FOOD SAFETY: PROTECTING AMERICA’S FOOD SUPPLY FROM FARM-TO-FORK 1-2 (2008) [hereinafter FIXING FOOD SAFETY], available at <http://healthyamericans.org/reports/foodsafety08/FoodSafety08.pdf>.

46. *Id.* at 3. The agencies’ duties are as follows: (1) the UDA is charged with regulating meat, poultry, and eggs; (2) the FDA oversees the safety of all other non-meat foods, with the exception of eggs; (3) the EPA registers pesticides and sets maximum levels for chemicals in our

Collectively, fifteen agencies oversee the safety of our food by administering over thirty related laws, while no single agency or voice has the ultimate responsibility or authority to make the decisions necessary to assure the American public that what we eat will not make us sick.⁴⁷ However, this staggering fragmentation is not the only problem; the history of food safety in this country has largely been reactionary, responding piecemeal to public outcries when the horror stories went to print.⁴⁸ Grossly inadequate resources for the prevention of foodborne illness and outdated laws and policies have essentially relegated agencies to the position of toothless bystanders.⁴⁹ Historically, “[t]he real issues at stake in regulation were market share, corporate profit, and bureaucratic growth. These issues, however, were hidden behind a cloak of rhetoric about the public interest.”⁵⁰ It is long past due that the rhetoric becomes reality; Congress must address and remedy the serious deficiencies in a food safety system that sickens a nation of eaters by properly balancing public health—as the first priority—with market impact. This requires lawmakers to scrutinize the current industrial food production, processing, and distribution system, characterized by large consolidated agribusinesses and factory farms, and to recognize the impact it has on the quality and safety of food.

B. Industrial Agriculture: Factory Farms and a Rise in Foodborne Illness

In the days since *The Jungle* and the monumental passage of the first food safety laws, agriculture and food processing and manufacturing have changed dramatically.⁵¹ In the last fifty years, our traditional American system of decentralized family farms has given way to a concentrated system controlled by fewer—and larger—producers.⁵² The industrial model has “streamline[d]

food; and (4) the CDC conducts surveillance and identification of foodborne illnesses in order to quickly assist in the identification of the outbreak’s source. *Id.* at 4.

47. *Id.* at 3.

48. Denis Stearns, *Preempting Food Safety: An Examination of USDA Rulemaking and Its E. coli O157:H7 Policy in Light of Estate of Kriefall ex rel. Kriefall v. Excel Corporation*, 1 J. FOOD L. & POL’Y 375, 388-89 (2005). See also Roger Roots, *A Muckraker’s Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2420 (2001).

49. See FIXING FOOD SAFETY, *supra* note 45, at 8.

50. COPPIN & HIGH, *supra* note 27, at 34.

51. MICHAEL F. JACOBSON ET AL., SAFE FOOD: EATING WISELY IN A RISKY WORLD xv (1991).

52. PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA, EXECUTIVE SUMMARY 1 (2008) [hereinafter PEW COMM’N], available at <http://www.ncifap.org/bin/s/a/PCIFAPSmry.pdf>. The model does not only affect the safety of our food supply, but also has deleterious effects on the environment and local communities and economies. See generally *id.* “The entire conversion from local small-scale food production for local communities, to large-scale export-oriented monocultural production has also brought the melancholy decline of the traditions, cultures, and cooperative pleasures and convivialities associated for centuries with community-based production and markets.” MANIFESTO, *supra* note 24, at 4.

the process of raising animals for food, including standardized feed for rapid weight gain and uniformity; genetic selection to accentuate traits, such as leanness, that create uniform meat products; and mechanization of feeding, watering, and other husbandry activities.”⁵³ The industrialization of agriculture and the concentration of food production, particularly poultry and livestock production, have contributed to the rise in microbial foodborne illness and have exacerbated the problems with existing food safety legislation.⁵⁴ But over the last few years an interesting political and social movement has emerged, as consumers are beginning to understand that cheap food produced in this manner has a cost:⁵⁵

It is impossible to discuss food without discussing agriculture. . . . [Everyone] should be aware of this, because the present situation in the world is the result of the history of Western agriculture (and the damage it has done to nature), an agriculture that has lost sight of some of the aims that are most important to anyone who cares about the quality of food.⁵⁶

Yet despite the evidence revealing the disaster created by industrial agriculture, it remains the model of agricultural growth in countries that attempt to emulate the west.⁵⁷ If not for any other reason, the failures of the model must be addressed in the name of food safety.

Perhaps the most devastating feature of the industrial system, in terms of food safety, is the concentrated animal feeding operation (CAFO), which has become the foundation of meat production in the United States.⁵⁸ Perhaps better described as “animal factories”⁵⁹ or “densely populated new animal cities,”⁶⁰ CAFOs produce cheap meat, but confine animals in “shockingly inhumane and overly crowded conditions, leading to widespread disease

53. PEW COMM’N, *supra* note 52, at 2. Slow food pioneer Carlo Petrini called for a common sense recognition that industry contradicts agriculture:

Intensive methods of production, both for plants and for animals, must be rejected. We do not need to increase production. We need to improve and “clean” it. We cannot demand more each year from the soil or from a cow, or expect a chicken to grow in half the time it would naturally do: they are not machines, they are *living things*, and their natural mechanism, if it breaks down, cannot be repaired like an industrial milling-machine.

CARLO PETRINI, *SLOW FOOD NATION: WHY OUR FOOD SHOULD BE GOOD, CLEAN, AND FAIR* 119 (2007) (emphasis in original).

54. NESTLE, *supra* note 11, at 42-43.

55. Michael Pollan, *The Food Movement, Rising*, N.Y. REV. OF BOOKS, June 10, 2010, <http://nybooks.com/articles/archives/2010/jun/10/food-movement-rising/>.

56. PETRINI, *supra* note 53, at 23-24.

57. *Id.* at 25.

58. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 67 (2006). *See also* FATAL HARVEST, *supra* note 7, at 12.

59. FATAL HARVEST, *supra* note 7, at 12.

60. POLLAN, *supra* note 58, at 67.

among animals and the creation of food-borne illnesses.”⁶¹ In these confined conditions, cattle are forced to sleep in their own accumulating manure, and when 400 cattle are slaughtered per hour some of the feces caked on the hides is bound to enter the food we eat.⁶² *E. coli* O157:57, an acid resistant strain of the bacteria that developed as a result of feeding corn to cattle on feedlots, is reportedly found in forty percent of cattle in CAFOs—passed via their feces into marketed beef.⁶³ The use—and abuse—of antibiotics in industrial agriculture, particularly of low-dose treatments for growth promotion and to help animals cope with these conditions, kills some bacteria, but not all.⁶⁴ The bacteria naturally resistant to the antibiotics survive and multiply, proliferating antibiotic-resistant bacteria that infect humans with untreatable diseases.⁶⁵ For example, researchers are looking toward factory farms as the cause of an even more virulent strain of MRSA, an antibiotic-resistant strain of *Staphylococcus* bacteria that causes dire problems in hospitals, where there is a similarly heavy use of antibiotics.⁶⁶

When these animals leave CAFOs, they are intermingled with animals originating from several states as they move along the path of production and processing.⁶⁷ One infected carcass can contaminate eight tons of ground beef, and a single lot of hamburger was once traced back to six different states and 443 individual animals.⁶⁸ Furthermore, many foodborne pathogens were not detected in meat until the late 1970s and the rise of industrialized meat production⁶⁹ and, unfortunately, *E. coli* and *Salmonella*, pathogens previously

61. FATAL HARVEST, *supra* note 7, at 12. “Already in their short history CAFOs have produced more than their share of environmental and health problems: polluted water and air, toxic wastes, novel and deadly pathogens.” POLLAN, *supra* note 58, at 67. See also JACOBSON ET AL., *supra* note 51, at 89-90. It is time for consumers to start asking what makes the price possible and to consider the impact of innovation. PETRINI, *supra* note 53, at 122-23.

62. POLLAN, *supra* note 58, at 81-82. The industry response to this fecal matter is the push for irradiation, but as Carol Tucker Forman once said, “After all, sterilized poop is still poop.” NESTLE, *supra* note 11, at 124. “The argument used to justify everything people find troubling about modern industrialized agriculture and food processing is cost and efficiency,” resulting in the irrational decisions like “promoting irradiation of the meat as the way to make the feces on it edible.” Neil D. Hamilton, Essay, *Food Democracy II: Revolution or Restoration?*, 1 J. FOOD L. & POL’Y 13, 36 (2005) [hereinafter *Democracy II*]. Some worry that the effects of irradiation on greater quantities of the American food supply have not been fully studied and the dangers not fully understood. See Michael Colby, *Nuclear Lunch: The Dangers and Unknowns of Food Irradiation*, in FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 161-65 (Andrew Kimbrell ed., 2002).

63. POLLAN, *supra* note 58, at 81-82. This effect in cattle can be reversed if the cow’s diet is switched from corn to grass or hay a few days before slaughter, reducing incidence of *E. coli* O157:H7 by eighty percent—a practice that industry finds impractical. *Id.*

64. NESTLE, *supra* note 11, at 45.

65. *Id.*

66. Michael Pollan, *Our Decrepit Food Factories*, N.Y. TIMES, Dec. 16, 2007 (Magazine), at 1.

67. NESTLE, *supra* note 11, at 44-45.

68. *Id.* at 45.

69. FATAL HARVEST, *supra* note 7, at 12.

associated with meat, have recently contaminated fruits and vegetables through exposure to tainted fertilizers and sewage on factory farms and through shipping.⁷⁰

The rise of foodborne illness traced to food products never before considered to present a problem, like fruits and vegetables, relates not only to the factory farm, but also to the system of centralized processing. The model of industrial agriculture has centralized food production in this country to such an extent that produce typically travels over 1,500 miles, and processed food items travel over 1,300 miles to reach our plates.⁷¹ "This centralization can facilitate the spread of disease because there is significant contact between livestock or crops, which can lead to a single infected animal or contaminated product causing widespread damage."⁷² Likewise, the spread of disease may be accelerated by the socialization of animals from various regions of the world.⁷³

Many who follow the food industry have made this connection to the large processing systems that have taken over food production in this country.⁷⁴ To some extent, the consumer can protect him or herself by being smart about choices and carefully storing and preparing food, but ultimately, as President Roosevelt believed, certain social relationships beget wrongdoing. "[F]ood companies operate just like any other businesses devoted to increasing sales and satisfying stockholders. One difference is that the food industry is unique in its universality: everyone eats."⁷⁵ It is because of this universality—that we

70. *Id.* See also CAROLINE SMITH DEWAAL & DAVID W. PLUNKETT, CTR. FOR SCI. IN THE PUB. INTEREST, BUILDING A MODERN FOOD SAFETY SYSTEM FOR FDA REGULATED FOODS 4 (2009), <http://www.cspinet.org/new/pdf/fswhitepaper.pdf>. To relate the outbreaks stemming from fruits and vegetables to the issue of fragmentation in our food safety oversight, consider that USDA inspectors visit farms to inspect cattle and poultry but do not inspect crops. *Id.* at 4-5. The FDA does not inspect a farm until an outbreak has occurred. *Id.* at 5.

71. Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45, 52 (2008).

72. FIXING FOOD SAFETY, *supra* note 45, at 14.

73. *Id.* "When the meat in a single hamburger patty comes from 10 different farms, the risk of eating a contaminated sandwich increases. When the spinach in a bag of RTE salad is shipped from California to New Jersey, the probability of eating an unsafe salad becomes greater than if the spinach was bought from a local farmer." MORRONE, *supra* note 6, at 124.

74. See, e.g., Helena Bottemiller, *How to Fix S.510: A Sustainable Ag Perspective*, FOOD SAFETY NEWS, Jan. 3, 2010, <http://www.foodsafetynews.com/2010/01/how-to-fix-s510-a-sustainable-ag-perspective/>.

75. NESTLE, *supra* note 11, at xiii. Wendell Berry sardonically summed up the American relationship with industrial food:

The food industrialists have by now persuaded millions of consumers to prefer food that is already prepared. They will grow, deliver, and cook your food for you and (just like your mother) beg you to eat it. That they do not yet offer to insert it, prechewed, into our mouth is only because they have found no profitable way to do so. We may rest assured that they would be glad to find such a way. The ideal industrial food consumer would be strapped to a table with a tube running from the food factory directly into his or her stomach.

WENDELL BERRY, *The Pleasures of Eating*, in WHAT ARE PEOPLE FOR? 145, 146 (1990).

commonly encounter food multiple times a day—that government must assure us that the food we eat is safe and will not cause us harm.

II. ANALYSIS: ADDRESSING THE PROBLEMS ON A PATH TO SAFER FOOD

The American consumer enters the supermarket, faced with an average of nearly 48,750 items lining the shelves,⁷⁶ and roams the aisles with a blind faith in the government to assure that what we eat is safe. Whether shopping for their families or for themselves, American eaters “expect quality and nutritional value without having to worry about whether food has been handled properly or whether it contains bacteria or viruses that can make us sick.”⁷⁷ But consumer faith is waning⁷⁸ in the face of yearly outbreaks, hospitalizations, and deaths.⁷⁹ The question then becomes how lawmakers can enter the morass of current food safety organization, sift through antiquated legislation, and emerge with a stronger public health centered system focused on “(1) prioritizing prevention; (2) strengthening surveillance and enforcement; and (3) improving response and recovery.”⁸⁰ It is my contention that the role of the burgeoning local food movement is essential to this process, and lawmakers must not hamper the mission and vision of small farmers and “locavores”⁸¹ in writing new legislation, but should consider the role of this new “food democracy”⁸² in assuring safe food. It is imperative that lawmakers, in balancing public and industry interests, not only set the standards to protect the food we eat but also hold industry accountable for

76. Food Marketing Inst., *Supermarket Facts: Industry Overview 2009*, http://www.fmi.org/facts_figs/?fuseaction=superfact.

77. KEY FINDINGS, *supra* note 2, at 1.

78. FIXING FOOD SAFETY, *supra* note 45, at 1. “A 2007 public opinion poll conducted by the Trust for America’s Health (TFAH) found that 67 percent of Americans are worried about food safety.” *Id.* (citation omitted).

79. For a sample list of national outbreaks and recalls linked to FDA regulated foods see DEWAAL & PLUNKETT, *supra* note 70, at 2. For a list of meat product recalls, see Food Safety and Inspection Service, FSIS Recalls (Oct. 25, 2010), http://www.fsis.usda.gov/FSIS_Recalls/Recall_Case_Archive/index.asp. Consumer interest and concern is generally aroused by often shocking and heartbreaking headlines. See, e.g., Gardiner Harris, *U.S. Food Safety No Longer Improving*, N.Y. TIMES, Apr. 10, 2009, at A12; Harris & Belluck, *supra* note 10; Layton, *supra* note 10; Moss, *supra* note 10.

80. PRESIDENT’S FOOD SAFETY WORKING GRP., U.S. DEP’T OF AGRIC., DELIVERING RESULTS (2009), http://www.foodsafetyworkinggroup.gov/FSWG_Fact_Sheet.pdf.

81. “Locavore” was the New Oxford American Dictionary’s 2007 word of the year, defined as a local resident who eats only food grown and/or produced within a 100-mile radius of his or her home. STEVE MARTINEZ ET AL., U.S. DEP’T OF AGRIC., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES 3 (2010), available at <http://www.ers.usda.gov/Publications/ERR97/ERR97.pdf> [hereinafter LOCAL FOOD SYSTEMS].

82. “Food democracy” is a phrase coined by Professor Neil Hamilton to define the movement to build a new American food system. See generally *Democracy I*, *supra* note 18. See also *Democracy II*, *supra* note 62, at 13.

meeting its public health obligations.⁸³ It is equally important that government and industry work together to avoid "the silo effect," wherein the development of safety systems is done so entirely within one sector or the other, because safe food requires the participation and cooperation of all parties involved.⁸⁴

Two troubles are interwoven in each of the principles listed above: (1) the lack of coordination and (2) inadequate funding. As aforementioned, the federal food safety bureaucracy is a maze of responsibility, which understandably makes it difficult for agencies to communicate and proceed along one common path. For example, the FDA regulates frozen pizza, but the USDA takes over if it is topped with two percent or more of meat or poultry.⁸⁵ Therefore, inspections at these facilities follow two different sets of guidelines issued by the FDA and the USDA.⁸⁶ Therein lies the rub: the USDA inspects facilities that make pepperoni on a daily basis and then inspects the plants that produce pepperoni pizza every day, whereas the FDA will inspect cheese pizza facilities once every ten years.⁸⁷ The difference is astounding, especially considering that certain frozen pepperoni pizza products—despite receiving more inspections than given to cheese pizza—were recalled in 2007 due to possible *E. coli* O157:H7 contamination.⁸⁸ Further examples illustrate this peculiar division, which has only grown more difficult to reconcile as food producers grew larger and fewer and engaged in more production of ready made food: (1) the USDA regulates hot dogs in pastry dough, but the FDA regulates hot dogs in rolls; (2) the USDA regulates corn dogs, but the FDA regulates bagel dogs; (3) the USDA regulates meat and poultry sandwiches with one piece of bread, but the FDA takes over if there are two pieces of bread; (4) the USDA regulates beans with more than 2% bacon, but the FDA regulates bean with any amount of pork.⁸⁹

Many argue that only by consolidating all food safety efforts under one federal agency and the leadership of one individual can we eliminate the inadequacies of this system.⁹⁰ The potential difficulties in executing such reorganization are clearly understood,⁹¹ but success has been achieved abroad,

83. FIXING FOOD SAFETY, *supra* note 45, at 2.

84. NAT'L ACAD. OF SCIENCES, MANAGING FOOD SAFETY PRACTICES FROM FARM TO TABLE: WORKSHOP SUMMARY 61 (2009) [hereinafter FOOD SAFETY PRACTICES].

85. FIXING FOOD SAFETY, *supra* note 45, at 9.

86. *Id.*

87. *Id.*

88. News Release, Food Safety Inspection Serv., U.S. Dep't Agric., Ohio Firm Recalls Frozen Meat Pizzas Due to Possible *E. coli* O157:H7 Contamination (Nov. 1, 2007), available at http://www.fsis.usda.gov/News_&_Events/Recall_049_2007_Release/index.aps.

89. NESTLE, *supra* note 11, at 57.

90. *See, e.g.*, INST. OF MED. & NAT'L RESEARCH COUNCIL, ENSURING SAFE FOOD FROM PRODUCTION TO CONSUMPTION (1998). There have been over twenty recommendations for consolidation and food safety reorganization dating back to the Hoover Commission in 1949, none of which have been a success. *See* Merrill & Francer, *supra* note 18, at 115-118.

91. An incredibly astute analysis of the potential problems with attempting consolidation is found in Merrill & Francer, *supra* note 18, at 163-70. For an argument that consolidation of the food safety activities of the FDA and the USDA into a single food agency

notably in the United Kingdom's establishment of a single Food Standards Agency in 1999.⁹² The best course in the US, however, will likely be a slower, yet meaningful transition toward consolidation,⁹³ by drafting legislation to grant new regulatory authority and providing commensurate funding to the agencies within the existing structure.

Inadequate funding and resources have been a consistent problem for the agencies charged with oversight, and with the passage of new laws, it would be irresponsible of Congress to not arm them with the appropriate resources to carry out their new authority. Studies show that eighty-five percent of reported foodborne illness outbreaks are associated with FDA regulated foods, compared to only fifteen percent associated with USDA regulated foods.⁹⁴ Despite the numbers, the food safety expenditures for the FDA for fiscal year 2009 were \$649 million, compared to the USDA's \$972 million.⁹⁵ According to a 2008 report by the FDA Science Board's Subcommittee on Science and Technology, due to underfunding the agency was forced to reduce inspections, exposing the public "to increasing risk from both imported and domestically produced foods."⁹⁶ In drafting new legislation, lawmakers must be keen to these past problems and understand that without appropriate funding, agencies will not be able to effectively focus on prevention or enforce new regulations. Recent proposals have suggested imposing registration fees for food production facilities,⁹⁷ but lawmakers should consider the effect that mandatory fees might have on small producers and scale it accordingly,

would compromise food security—or the dangers of intentional food contamination—see Stuart M. Pape et al., *Food Security Would be Compromised by Combining the Food and Drug Administration and the U.S. Department of Agriculture into a Single Food Agency*, 59 FOOD & DRUG L.J. 405 (2004).

92. DEWAAL & PLUNKETT, *supra* note 70, at 15. In the UK, foodborne illness declined eighteen percent in the first three years following the creation of the new agency, and public confidence in their food supply steadily rose. *Id.* See generally John Krebs, *Establishing a Single, Independent Food Standards Agency: The United Kingdom's Experience*, 59 FOOD & DRUG L.J. 387 (2004). See also FOOD STANDARDS AGENCY, <http://www.food.gov.uk/> (last visited Oct. 31, 2010) (the official website of the United Kingdom's Food Standards Agency).

93. "A fragmented, disempowered food safety program makes poor use of taxpayer dollars, and it imposes substantial economic and personal costs on people who experience preventable food-borne illness." TRUST FOR AMERICA'S HEALTH, KEEPING AMERICA'S FOOD SAFE 30 (2009), <http://healthyamericans.org/assets/files/2009FoodSafetyReport.pdf> [hereinafter KEEPING AMERICA'S FOOD SAFE].

94. FIXING FOOD SAFETY, *supra* note 45, at 5.

95. DEWAAL & PLUNKETT, *supra* note 70, at 4. Even though funding for the FDA's food safety activities has increased over the past several years, it has barely kept up with inflation, and the agency cannot be expected to adequately assure safe food. FIXING FOOD SAFETY, *supra* note 45, at 5.

96. KEEPING AMERICA'S FOOD SAFE, *supra* note 93, at 5.

97. FDA Food Safety Modernization Act, S.510, 111th Cong. § 743(a)(1) (2010).

including complete exemptions.⁹⁸ Adequate funding is necessary so that agencies are able to accomplish the principles that follow.

A. Prioritizing Prevention From Farm-to-Fork

Experts believe that most foodborne illnesses are preventable,⁹⁹ yet currently the FDA’s CFSAN and the USDA’s FSIS merely react to outbreaks of adulterated food after the tainted food has already caused illnesses and even deaths.¹⁰⁰ With current law “disproportionately focused on monitoring the end of production, instead of trying to detect and prevent problems throughout the entire production process,”¹⁰¹ it is no wonder that foodborne illness continues to threaten America’s health, both physically and financially.¹⁰² An effective shift in food safety oversight from reaction to prevention should be, above all else, “systematic (i.e., from farm to table); risk based (i.e., with set priorities and established risk management practices); and transparent and participatory.”¹⁰³

The shift to prevention has been underway for over a decade in the form of Hazard Analysis Critical Control Point (HACCP, pronounced “hassip”) requirements within the USDA and the FDA,¹⁰⁴ but has proven only a modest attempt at industry modernization due to the legal constraints and budget shortcomings of the agencies.¹⁰⁵ The goal through HACCP is to identify the

98. Another interesting potential source of funding is recouping the cost of foodborne illness outbreak investigations and prevention measures. David W. Babcock, *Recouping the Costs of Outbreak Investigations and Prevention*, J. ENVTL. HEALTH, Jan.-Feb. 2006, at 71. “In many cases, health agencies likely have a legal right to recoup expenses incurred in discharging their duty to protect the public.” *Id.* However, there is a fear that if public health agencies were to explore this option there would be reduced cooperation of food producers and providers in the early stages of outbreak investigation. *Id.* at 72.

99. FIXING FOOD SAFETY, *supra* note 45, at 1.

100. An example of this reactive structure is that the FDA cannot inspect on a farm unless there is an outbreak, yet leafy greens have been causing outbreaks of *E. coli* and *Salmonella* poisoning. DEWAAL & PLUNKETT, *supra* note 70, at 4-5. Prevention is not a novel idea, but every major call for reform recognizes that a focus on prevention—as opposed to reaction—is a major key to ensuring safe food. *See id.* at 5. *See also* FIXING FOOD SAFETY, *supra* note 45, at 2; FOOD SAFETY PRACTICES, *supra* note 84, at 67.

101. KEEPING AMERICA’S FOOD SAFE, *supra* note 93, at 2.

102. FIXING FOOD SAFETY, *supra* note 45, at 1.

103. FOOD SAFETY PRACTICES, *supra* note 84, at 3.

104. For a history on the difficulties in implementing HACCP, see NESTLE, *supra* note 11, 67-112.

105. FIXING FOOD SAFETY, *supra* note 45, at 9. “We feel these programs have been highly successful, but again recognize that further progress is and can be accomplished.” *Review of Current Issues in Food Safety: Hearing Before the H. Comm. on Agric.*, 111th Cong. 3 (2009) [hereinafter *Review of Current Issues in Food Safety*] (statement of Robert G. Reinhard on behalf of the National Turkey Federation). For information on HACCP from the USDA, see FOOD SAFETY RESEARCH INFO. OFFICE, U.S. DEP’T OF AGRIC., A FOCUS ON HAZARD ANALYSIS AND CRITICAL CONTROL POINT (HACCP), http://fsrio.nal.usda.gov/fsheet_pf.php?product_id=227 [hereinafter USDA HACCP]. For FDA’s suggestions for HACCP programs, see FOOD AND DRUG ADMIN., HAZARD ANALYSIS AND CRITICAL CONTROL POINTS (HAACP),

sources of potential food safety hazards, to assess whether there is an actual risk, and if so, to identify the steps necessary to prevent, eliminate, or reduce the hazard to “acceptable levels.”¹⁰⁶ The facility identifies the controls that can be used during the processing of the food and monitors those controls, all of which is subsequently documented to facilitate a review of the records rather than relying on the inspection of every product.¹⁰⁷ While HACCP systems are already required and implemented in certain food production facilities,¹⁰⁸ Congress should certainly require similar food safety hazard recognition and prevention systems for all types of food that systematically cover the process from farm to fork.¹⁰⁹ At a minimum, these programs can help the industry focus on “quality assurance and preventive” mechanisms¹¹⁰ since the regulatory agencies currently rely on end-product, reactive testing.¹¹¹ HACCP has been lauded by those in the industry who seek to keep the federal government out of prevention planning—aside from the general screening process¹¹²—yet the front pages of national newspapers beg a serious question: if HACCP is a panacea and industry is capably handling the problem, then why are outbreaks continuing to occur?¹¹³

While the goals of HACCP are noble and focused down the path to a safer food supply, the regulatory agencies are essentially powerless and passive under this self-policing system.¹¹⁴ Shortly after an *E. coli* O157:H7 outbreak in 2007, USDA inspectors found “serious problems” at fifty-five previously inspected meat processing plants that were not following their *own* HACCP

<http://www.fda.gov/Food/FoodSafety/HazardAnalysisCriticalControlPointsHACCP/default.htm>.

106. Johnson & Swaim, *supra* note 30, at 350.

107. *Id.*

108. The USDA mandated HACCP for meat and poultry products in 1996 and the FDA mandated HACCP for seafood in 1995 and juice in 2001. FIXING FOOD SAFETY, *supra* note 45, at 9.

109. SMITH DEWAAL & PLUNKETT, *supra* note 70, at 6. Certainly, exceptions will be established in certain circumstances.

110. *Id.*

111. USDA HACCP, *supra* note 105. *See also* DEWAAL & PLUNKETT, *supra* note 70, at 6.

112. “We feel these programs have been highly successful” and “have yielded significant and measurable successes.” *Review of Current Issues in Food Safety*, *supra* note 105 (statement of Robert G. Reinhard on behalf of the National Turkey Federation). “The proper role of government in a HACCP-based food safety system is to verify that companies have conducted a proper hazard analysis, identified the hazards reasonably likely to occur in their operation, and have developed and implemented an appropriate HACCP plan to control those hazards.” *Id.* (statement of J. Patrick Boyle, President and CEO, American Meat Institute), available at <http://agriculture.house.gov/testimony/111/h071609/Boyle.pdf>.

113. “Food scares have become as common as Midwestern tornadoes.” Harris & Belluck, *supra* note 10. Prior to publication, the most current recall beef products was January 14, 2011. For a list of all current recalls and alerts, see Food Safety & Inspection Serv., U.S. Dep’t of Agric., *Current Recalls and Alerts*, http://www.fsis.usda.gov/FSIS_Recalls/Open_Federal_Cases/index.asp.

114. Johnson & Swaim, *supra* note 30, at 351.

safety plans.¹¹⁵ A recent case is illustrative of why some critics have come up with an alternate meaning for the acronym: "Have A Cup of Coffee and Pray."¹¹⁶

In *Supreme Beef Processors, Inc. v. United States Department of Agriculture*,¹¹⁷ the United States Court of Appeals for the Fifth Circuit held that the USDA exceeded its statutory authority by instituting *Salmonella* performance standards as a means to determine the effectiveness of Supreme Beef's HACCP plan in controlling the level of pathogens in their beef.¹¹⁸ Essentially, the USDA prescribed a minimum level of *Salmonella* that should be in meat, and inspection would be denied if a facility failed to meet the standard on three consecutive tests.¹¹⁹ A denial of inspection services necessarily means that the product will not be stamped "inspected and passed,"¹²⁰ and federal law prohibits unstamped products from entering the stream of commerce.¹²¹ The penalty was essentially a death knell for processing.

After the third failed test,¹²² FSIS decided to suspend all inspections at Supreme Beef's plant and in response, Supreme Beef filed suit alleging that the USDA had overstepped its statutory authority under FMIA.¹²³ On an appeal by the USDA, the Fifth Circuit agreed with Supreme Beef and the District Court based on the plain language of FMIA.¹²⁴ "Supreme Beef did not contest the salmonella-level test results but argued, in essence, 'So what?'"¹²⁵ The government's argument was that the failure to pass these tests meant that the product the company intended to sell to consumers was "adulterated."¹²⁶ The Fifth Circuit disagreed that the product was adulterated and essentially held that the USDA could not regulate the characteristics of incoming raw meat and that the presence of infected meat in a plant or the increased likelihood of cross contamination did not indicate insanitary conditions under the statute.¹²⁷

115. Moss, *supra* note 10.

116. BARRY M. LEVENSON, *HABEAS CODFISH: REFLECTIONS ON FOOD AND THE LAW* 25 (2001).

117. 275 F.3d 432 (5th Cir. 2001).

118. *Id.* at 434. For another discussion on *Supreme Beef*, see generally Blake B. Johnson, Comment, *The Supreme Beef Case: An Opportunity to Rethink Federal Food Safety Regulation*, 16 LOY. CONSUMER L. REV. 159 (2004).

119. *Supreme Beef*, 275 F.3d at 435.

120. 21 U.S.C. § 608 (2009).

121. 21 U.S.C. § 610(c). See *supra* text accompanying footnotes 33-37.

122. *Supreme Beef*, 275 F.3d at 435-37. The USDA's *Salmonella* performance standard for raw ground beef was 7.5 percent, while, in the face of their own HACCP plan, Supreme Beef's levels of contamination for the first two tests were 47 percent and 20.8 percent. *Id.* at 435.

123. *Id.* at 436.

124. *Id.* at 443.

125. LEVENSON, *supra* note 116, at 27.

126. *Id.*

127. *Supreme Beef*, 275 F.3d at 439-40. See 21 U.S.C. § 601(m)(4). In the end, "the USDA got in the last word." LEVENSON, *supra* note 116, at 28. The USDA purchases about seventy percent of the ground beef used for school lunches and in response to the *Supreme Beef* decision required that all ground beef for school lunches be *Salmonella* free. *Id.* at 28-29. When

One writer wondered how a Supreme Beef representative would have answered this rhetorical question on the witness stand: “So, if every box of beef coming out of your plant tested positive for salmonella, the government would have to let you keep shipping it unless they could show some unsanitary condition that was the likely cause of the salmonella?”¹²⁸

The inadequacies of this self-regulating system are apparent,¹²⁹ but so are the inadequacies in the federal legislation that give the USDA and the FDA authority to oversee HACCP.¹³⁰ To put it bluntly, based on *Supreme Beef*, government agencies have no authority under existing law to suspend inspection, and therefore halt production, based on HACCP non-compliance or non-compliance with performance standards.¹³¹ One would see the program as “little more than an industry honor system” as the food industry claims to be doing their job while contaminated food continues to reach the market.¹³² Rather, lawmakers in Congress should provide the authority and should require the USDA and the FDA by statute to set mandatory performance standards that each HACCP system must attain,¹³³ with corresponding penalties for noncompliance.¹³⁴ The FDA’s continuous, yet

Supreme Beef failed to meet the standards, the government cancelled its contract with the meat company. *Id.*

128. LEVENSON, *supra* note 116, at 27.

129. For example, Marion Nestle visited a production plant that followed its HACCP plan “scrupulously.” NESTLE, *supra* note 11, at 87. The plan did not mention that products that were cooked must be *covered* while chilling, due to the fact that *Listeria* flourishes at cold temperatures, so the facility did not cover the products. *Id.* Within weeks, the company recalled thousands of pounds because some had been contaminated by *Listeria*. *Id.*

130. In an interview, John Munsell, a former operator of a small-scale meatpacking plant, said:

[W]hen the [USDA] required the industry to implement HACCP, the agency said that under the program the USDA’s role would be hands-off. That is an absolute disaster. The USDA cannot be hands-off. . . . [T]he USDA knowingly acquiesced its authority back to the industry. It’s an absolute disaster waiting to happen.

Helena Bottemiller, *Q&A With ‘Meatpacking Maverick’ Munsell*, FOOD SAFETY NEWS, Nov. 16, 2009, <http://www.foodsafetynews.com/2009/11/qa-with-meatpacking-maverick-munsell/>.

131. Johnson & Swaim, *supra* note 30, at 368.

132. Merrill & Francer, *supra* note 18, at 131.

133. DEWAAL & PLUNKETT, *supra* note 70, at 6. Robert Brackett of the Grocery Manufacturer’s Association disagrees, finding that food safety is an industry responsibility, regardless of regulations, and that agencies should provide incentives for cooperation. FOOD SAFETY PRACTICES, *supra* note 84, at 47. However, it is hard to see how this has worked in the past and seemingly would call for a brand new industry perspective.

134. One industry perspective calls for incentives, rather than disincentives, an argument that should not be easily dismissed: “We need more collaboration between industry and regulatory agencies so that appropriate risk management decisions can be made down the line rather than companies being afraid to reveal too much information because of the likelihood of facing a punitive action or having information shared with their competitors.” FOOD SAFETY PRACTICES, *supra* note 84, at 47.

voluntary, guidance¹³⁵ has clearly been insufficient to address food safety concerns, and it is clear that the necessary legal authority must be given to both the FDA and the USDA to mandate preventative measures. Specifically, there should be limits on the incidence of contamination and the levels of certain pathogens, like the USDA previously attempted to establish for *Salmonella*. Above all, these rigorous standards should be science-based and prescribed based on each specific food and determined with the food industry, which already possesses the information that can get the system on the right track.¹³⁶ From there, government inspectors must monitor and enforce the implementation of the HACCP programs, including end-product testing for pathogens. Under current HACCP based inspections, inspectors merely look at paperwork, and as one packing plant employee told Marion Nestle, “someone could be butchering a dog in front of [the inspectors], and they wouldn’t have a clue.”¹³⁷

If the pathogens cannot be kept out of food, then they must be killed.¹³⁸ Technology, such as irradiation,¹³⁹ can play a role in food safety, but the full risks must be studied and communicated to the public. Some studies maintain that “if half of all ground beef, poultry, and processed meats were irradiated, over 350 lives would be saved every year and more than 6,000 serious foodborne illnesses averted.”¹⁴⁰ Alternatively, others believe there are unknown dangers of irradiation and that the technology requires additional study.¹⁴¹ It is important to note, however, that technology like irradiation is not a “silver bullet,” and preventing contamination from the start should be

135. See PRODUCE SAFETY PROJECT, BREAKDOWN: LESSONS TO BE LEARNED FROM THE 2008 *SALMONELLA* SAINTPAUL OUTBREAK 3 (2008), available at <http://www.producesafetyproject.org/admin/assets/files/0015.pdf>.

136. *Hearing on Issues in Food Safety Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. 3 (2009) [hereinafter *Hearing on Issues in Food Safety*] (statement of Thomas E. Stenzel, President and CEO United Fresh Produce Association). For example, produce safety standards must be commodity-specific, based on scientific studies and “must be federally mandated with sufficient federal oversight of compliance in order to be most credible to consumers.” *Id.*

137. NESTLE, *supra* note 11, at 87.

138. See FOOD SAFETY PRACTICES, *supra* note 84, at 50. “Ideally, all products would have a kill step in their in-use containers with no further contamination subsequent to the kill step.” *Id.*

139. “Today, somewhere in the United States someone is biting into a hamburger that has been irradiated with the equivalent of 150 million chest X rays.” Colby, *supra* note 62, at 162.

140. FOOD SAFETY PRACTICES, *supra* note 84, at 84.

141. Colby, *supra* note 62, at 163. Rodney Leonard offered the public interest perspective:

“All irradiation will do is add partially decontaminated fecal matter to the American diet, a practice that is likely to cause food poisoning cases to skyrocket when bacteria develop the survival tactics to resist irradiation. All past efforts to “eradicate” microbial organisms . . . have succeeded only in creating new generations of super bugs, and irradiation will be no different. . . . *The solution to the food safety problem is to produce safe food.*”

NESTLE, *supra* note 11, at 126 (quoting Rodney Leonard) (alteration in original) (emphasis in original) (citation omitted).

the first priority.¹⁴² This is particularly important when dealing with food production that generally has no kill-step. “Food safety and consumer protection is ultimately the responsibility of industry” but our regulatory agencies must have the authority to oversee, guide, and hold it accountable.¹⁴³

Another huge gap to be filled by preventative policies concerns the growing importation of food products.¹⁴⁴ “The majority of U.S. food imports go straight to Americans’ plates without any domestic processing and related FDA oversight.”¹⁴⁵ In fact, less than one percent of imported food is inspected.¹⁴⁶ This is an unacceptable system. Unlike the USDA, the FDA has no authority to review or approve the food safety programs of exporting countries and rarely visits the facilities before we accept food at our ports.¹⁴⁷ It is imperative that the FDA has the authority to follow the same preventative measures abroad that we would mandate domestically. Exporting countries must be required to certify their preventative food safety programs with the FDA prior to export; just as meat exporting countries do with the USDA.¹⁴⁸ The same disciplinary measures that the FDA and the USDA take against domestic producers and processors may not be able to extend to foreign exporters, but certainly both government agencies should be able to withdraw certification when an imported food product is linked to an outbreak or if the foreign facilities fail to cooperate.¹⁴⁹

However, some argue that our regulatory agencies will never have enough resources to meet the demands of increasing imports. Former FDA Deputy Commissioner for Policy Michael Taylor has suggested “harnessing the expertise and efforts of the private sector and making a U.S.-based entity legally accountable for ensuring prevention.”¹⁵⁰ This is a particularly feasible argument, but the hurdle would certainly be getting the industry to help ensure import safety, when the safety of food produced domestically is in flux. However, when a loaf of bread is stamped “made in the U.S.” and marketed by U.S. industry, but is actually a global product comprised of ingredients that

142. FOOD SAFETY PRACTICES, *supra* note 84, at 84.

143. *Id.* at 47. *See also* DEWAAL & PLUNKETT, *supra* note 70, at 6.

144. FIXING FOOD SAFETY, *supra* note 45, at 6. Approximately fifteen percent of America’s food supply is imported, including sixty percent of fresh fruits and vegetables and seventy-five percent of seafood. *Id.*

145. *Id.*

146. SMITH DEWAAL & PLUNKETT, *supra* note 70, at 7. For an in depth investigation of the safety problems posed by imported food see U.S. GOV’T ACCOUNTABILITY OFFICE, FOOD SAFETY: AGENCIES NEED TO ADDRESS GAPS IN ENFORCEMENT AND COLLABORATION TO ENHANCE SAFETY OF IMPORTED FOOD (2009), <http://www.gao.gov/new.items/d09873.pdf>.

147. DEWAAL & PLUNKETT, *supra* note 70, at 8.

148. *Id.* at 7-8.

149. *Id.* at 8.

150. FIXING FOOD SAFETY, *supra* note 45, at 6.

come from a number of foreign countries,¹⁵¹ it only seems logical to hold the U.S. entity legally accountable while trying to iron out global agreements.

With new preventative measures in place, modern inspection practices must follow. It is essential to not only increase the frequency of inspections, but also to design inspections around implemented preventative systems, focus them on corresponding levels of risk to make the most of our resources, and increase information sharing between government and industry.

B. *Effective Enforcement and Strengthening Surveillance*

Currently, federal agencies have little enforcement authority, and existing surveillance can best be characterized as a safety net full of gaping holes.¹⁵² New federal laws must accomplish two priorities related to enforcement and surveillance: (1) increased inspection and (2) mandatory recall authority.

Under current HACCP systems, inspectors no longer work "shoulder-to-shoulder" in food processing and packing facilities, but rather look over the shoulder of the industry "as it tries to get it right."¹⁵³ While the shift from the command-and-control inspection model to the HACCP model may have attempted to put responsibility on the industry,¹⁵⁴ the system is largely subject to the same abuses that existed prior to any emphasis on prevention.¹⁵⁵ Industry self-policing has clearly not succeeded, and unlike the inspection mandate for manufacturers of drugs and medical devices, the FDA has no inspection mandate for food manufacturers.¹⁵⁶

For HACCP to truly be an effective system, the USDA and the FDA need to improve and increase inspections of plants. Recently, an executive associate in the USDA's food safety division said, "[e]very time we look, we find out that things are not what we hoped they would be."¹⁵⁷ Between August and October 2008, the USDA received industry complaints on a guideline that urged meat processors to test ingredients for contamination prior to grinding, arguing that it would stray from HACCP programs and return to command-and-control inspection.¹⁵⁸ Even within FSIS, there is the belief that it must "look at the entire industry, not just what is best for public health."¹⁵⁹ In terms of public health policy, this is unacceptable. Testing of ingredients for contamination should be mandated because of the speed and size of

151. FOOD SAFETY PRACTICES, *supra* note 84, at 44-45. That loaf of bread may contain: wheat gluten from France, Poland, Russia, the Netherlands, or Australia; honey from China, Vietnam, Uruguay, India, Canada, Mexico, or Argentina; calcium propionate from the Netherlands; guar gum from India; flour enrichments from China; beta-carotene from Switzerland; and vitamin D3 from China. *Id.* at 45.

152. DEWAAL & PLUNKETT, *supra* note 70, at 7.

153. Stearns, *supra* note 48, at 396.

154. *Id.* at 394.

155. Kerri E. Machado, Comment, "Unfit for Human Consumption": Why American Beef is Making Us Sick, 13 ALB. L.J. SCI. & TECH. 801, 816-17 (2003).

156. DEWAAL & PLUNKETT, *supra* note 70, at 6.

157. Moss, *supra* note 10.

158. *Id.*

159. *Id.*

processing facilities,¹⁶⁰ not just at the slaughterhouse level, in the case of meat, but through the entire production process and for all foods. Additionally, the shroud of secrecy¹⁶¹ must be removed, and all records of safety programs, testing statistics, and internal inspection findings must be disclosed to federal regulators so that all parties to food safety initiatives have the information necessary to keep tainted food away from American dinner tables.¹⁶²

Increased inspections are essential to ensure that the industry is following its HACCP systems, complying with mandatory performance standards, and testing at all points for contamination. While current law requires the USDA to inspect and approve all meat and poultry products, the FDA has no legal mandate for pre-market approval.¹⁶³ While the USDA inspects heavily at slaughterhouses and processing plants, it has no legal authority to act on the factory farm where most safety hazards originate.¹⁶⁴ Additionally, the USDA is acting on outdated inspection practices, including a two second visual inspection for each of eight billion chickens passing through processing facilities, a practice that surely does not address the problems of foodborne bacteria.¹⁶⁵ Both the FDA and the USDA should have a statutory mandate to create a modern risk-based system of inspections, based on each type of food and the processes used by individual plants.¹⁶⁶ New inspection programs should be comprehensive, applicable to both domestically produced and imported food, and the frequency based on the risk posed by the particular food.¹⁶⁷ Above all else, the agencies must follow through on any additional

160. Without government intervention, different players in the industrial system leverage one another in order to protect their own interests:

Unwritten agreements between some companies appear to stand in the way of ingredient testing. Many big slaughterhouses will sell only to grinders who agree not to test their shipments for *E. coli*, according to officials at two large grinding companies. Slaughterhouses fear that one grinder's discovery of *E. coli* will set off a recall of ingredients they sold to others.

Id. Logically, if testing were mandated at every step in the operation, such agreements would be moot.

161. "The meat industry maintains a level of secrecy that far exceeds that of nuclear power plants . . ." NICOLS FOX, SPOILED: WHY OUR FOOD IS MAKING US SICK AND WHAT WE CAN DO ABOUT IT 357 (1998).

162. "The food industry has adopted a self-protective measure that will keep certain risk information about potential poisonings and infections out of FDA's and the USDA's possession, and thereby keep it out of reach of the Freedom of Information Act." O'Reilly, *supra* note 18, at 419. Much of the practices of the meat industry are treated as trade secrets, which are guarded by federal inspectors, providing an illustration of the agency's "restrained approach to enforcement." Moss, *supra* note 10.

163. See DEWAAL & PLUNKETT, *supra* note 70, at 7.

164. FIXING FOOD SAFETY, *supra* note 45, at 8.

165. *Id.*

166. See DEWAAL & PLUNKETT, *supra* note 70, at 6-7.

167. *Id.* at 7.

oversight authority.¹⁶⁸ While they may continue to be looking over the shoulder of industry, Congress must assure that the agencies have the ability to see the whole picture and act against non-compliance.

Another contentious debate between regulators and the food industry has centered on mandatory recall authority.¹⁶⁹ It has been argued that the current system of voluntary recall is essentially mandatory, as market forces and the industry's desire to avoid liability compel recall.¹⁷⁰ Companies are not compelled by law to recall unsafe food and are not required to notify the regulatory agencies of a recall of potentially tainted food.¹⁷¹ As it stands, the USDA¹⁷² and the FDA conduct investigations into potential recalls and if the product is recalled, the agency will alert the public.¹⁷³ Proponents of voluntary recall see no problems with the existing system, but often the loss of precious time results in a much more widespread outbreak.¹⁷⁴ In response to an *E. coli* outbreak in spinach, the government simply told consumers not to eat spinach, and the FDA released its Guide to Minimize Food Safety Hazards of Fresh-Cut Fruits and Vegetables,¹⁷⁵ which made the agency sound uncertain and confused about its role in protecting public health:

[The Guide] reads as if the FDA is almost afraid to offend the produce industry by making them do specific things that would actually minimize the risk of microbiological contamination in fresh fruits and vegetables. The word "recommend" is used at least 130 times in the guidance; the word "may" is used 61 times, most of which mean "might"; the word "encourage" is used five times; the word "suggest" is used four times.¹⁷⁶

This lack of authority paints a picture of weak regulatory agencies that cannot adequately protect the public. Additionally, industry often passes the

168. Weeks before an *E. coli* tainted hamburger patty was made at a particular plant, federal inspectors found that the plant was violating its own HACCP plan, but imposed no penalty. See, e.g., Moss, *supra* note 10.

169. See PHYLLIS ENTIS, FOOD SAFETY: OLD HABITS, NEW PERSPECTIVES 124-25 (2007). Mandatory recall authority has been supported by farmers' organizations. *Hearing on Issues in Food Safety*, *supra* note 136 (statement of Kent Pepler, National Farmers Union).

170. Roberts, *supra* note 18, at 568.

171. *Id.*

172. For a position advocating mandatory recall authority for FSIS through the prism of Bovine Spongiform Encephalopathy outbreaks see Justine Hinderliter, Comment, *From Farm to Table: How This Little Piggy was Dragged Through the Market*, 40 U.S.F. L. REV. 739 (2006).

173. Roberts, *supra* note 18, at 568-70.

174. DEWAAL & PLUNKETT, *supra* note 70, at 10. If the company does not recall a product the FDA must seek an injunction through the courts, while mandatory recall authority would create a real threat to producers who do not issue a timely recall. *Id.* An example of a voluntary recall that resulted in wasted time, and arguably an increase in death and illness, is illustrated by the 1998 Sara Lee Corporation's recall of hot dogs, wherein the USDA relied on an announcement made by the producer that did not mention the full scope of the recall. Roberts, *supra* note 18, at 572. Subsequently, the USDA did not issue a press release until one month after it was confirmed that the contaminated meat could be fatal, resulting in twenty-one deaths and at least 100 illnesses. *Id.*

175. MORRONE, *supra* note 6, at 41.

176. *Id.* at 42.

buck—and the blame—to the consumer to properly prepare food to avoid foodborne illness, as recalls are only ordered once sickness is reported.¹⁷⁷ Professor Neil Hamilton refers to this tactic as treating “food as fear.”¹⁷⁸

Irradiate your meat, be sure and cook it well, wash and scrub your fruits and vegetables (even the raspberries), think twice about the chicken, do not lick the bowl or eat cake batter because the eggs are raw, do not cross-contaminate your cooking surfaces, be sure to disinfect your counters, and for heaven’s sake do not use that wooden cutting board!¹⁷⁹

Professor Hamilton goes on to admit that it is not wrong that government and industry make consumers aware of how to fight bacteria, but it is unnecessary to shift the blame and to “absolve the food processors and marketers whose practices and cost saving efficiency help sow the sources of many food safety concerns.”¹⁸⁰

In a sense, voluntary recall poses no real threat to industry but poses a very real threat to consumers. If industry believes that the existing voluntary system is essentially compulsory, why *not* make it a legal requirement? The government already has mandatory recall authority for nonfood products;¹⁸¹ “[a]re unsafe food products less of a public health concern than dangerous consumer and other nonfood products?”¹⁸² The benefits of mandatory recall authority far outweigh any disadvantage raised by the industry, and if the industry continues to voluntarily recall unsafe food products, there will be no need for the FDA or the USDA to step in and mandate one.¹⁸³ The benefits include: decreases in delay, a type of insurance policy against “bad apple” companies, protection against terrorist actions, increased consumer confidence, increases in scope and depth of recalls, and a reduction in industry liability.¹⁸⁴ When adulterated food slips through the system, agencies must effectively respond and identify the source of the bacteria for a timely and efficient recall. This requires the agencies to address their own inadequacies

177. *Id.* at 119-20. In October 2007, a woman found a rat’s head in a can of green beans, prompting an industry spokesperson to reply: “[T]here is no way that product could have hurt her. This rodent was rendered commercially sterile. We cook each can individually up to 265 degrees.” *Id.* at 117. The industry effectively shifted the responsibility to the consumer to choose whether to eat the rodent’s head, rather than assure that such things are not in the product from the start.

178. *Democracy II*, *supra* note 62, at 37.

179. *Id.*

180. *Id.*

181. *See, e.g.*, Consumer Protection Safety Act, 15 U.S.C. § 2064. Additionally, the Environmental Protection Agency can order the recall of a dangerous chemical. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003, 2021 (1976) (codified as amended at 15 U.S.C. §§ 2601-2671).

182. Roberts, *supra* note 18, at 577.

183. *See id.* at 580-82.

184. *Id.* at 580-81.

when it comes to communication with the industry, local and state governments, and consumers.

C. Improving Response and Recovery

In order to improve response and recovery once foodborne illness has been detected, all those involved in food safety must strive to increase communication, particularly between the industry and regulators, by breaking down the existing barriers.¹⁸⁵ "[T]oo many institutions involved with food safety are operating with a 'stovepipe' mentality and . . . there needs to be more communication and collaboration, particularly among institutions operating at different points along the farm-to-table continuum."¹⁸⁶ Trust is essential if regulators hope to utilize industry data, largely generated from HACCP analysis, to improve food safety.¹⁸⁷ At present, regulators and the industry meet only when there is already an outbreak of foodborne illness.¹⁸⁸

The problem with communication, however, does not only apply to the relationship between government agencies and industry. Communication among federal agencies is a product of fragmentation, affecting the timeliness and efficiency of communication regarding outbreaks.¹⁸⁹ Additionally, federal communication with local and state governments must be improved, especially when considering that the FDA has relied heavily on states to conduct inspections.¹⁹⁰ Legislative action in this area is essential if new legal mandates will provide federal agencies with increased authority over food safety. Such action should require that all collected data among the agencies at all levels of government be coordinated, assuring that data is accessible to all those involved, including industry.¹⁹¹ One example of inadequate communication is the Saint Paul *Salmonella* outbreak, in which the FDA and the CDC initially identified tomatoes as the contaminated source only later to discover that it was in fact traceable to jalapeno and serrano peppers.¹⁹² As a result of misidentification, the tomato industry was a "major casualty," as the industry in Florida alone lost more than \$100 million.¹⁹³

The remaining piece necessary in strengthening response and recovery to foodborne illness is a national traceability standards system.¹⁹⁴ It is often extremely difficult to trace a contaminated food product back to its original source,¹⁹⁵ but a national system implemented by the industry to help track

185. FOOD SAFETY PRACTICES, *supra* note 84, at 10.

186. *Id.* at 16.

187. *See id.*

188. *Id.* at 75.

189. FIXING FOOD SAFETY, *supra* note 45, at 10. Government agencies often face legal barriers to data sharing or simply do not want to share information they believe "to be their own." *Id.* *See also* FOOD SAFETY PRACTICES, *supra* note 84, at 75.

190. DEWAAL & PLUNKETT, *supra* note 70, at 7.

191. FIXING FOOD SAFETY, *supra* note 45, at 10.

192. PRODUCE SAFETY PROJECT, *supra* note 135, at 1.

193. *Id.*

194. KEY FINDINGS, *supra* note 2, at 3.

195. MORRONE, *supra* note 6, at 42.

each piece of produce or animal would allow regulatory agencies to conduct investigations quickly and thoroughly.¹⁹⁶ Members of the produce industry have made a commitment to such a program in the form of the Produce Traceability Initiative,¹⁹⁷ but the U.S. is “dramatically behind” other nations of the world in animal tracking systems.¹⁹⁸ After the *Bovine Spongiform Encephalopathy* (BSE)—or Mad Cow Disease—scare in 2003, lawmakers and consumers have once again called for a National Animal Identification System to track cattle from farms to the slaughterhouse.¹⁹⁹ Without the ability to identify the source of a foodborne illness, there is little incentive for industry to change its practices:

When consumers cannot trace an illness to any particular food or even be certain it was caused by food, food retailers and restaurateurs are not held accountable by their customers for selling pathogen-contaminated products and they, in turn, do not hold their wholesale suppliers accountable.

This lack of marketplace accountability for foodborne illness means that meat and poultry producers and processors have little incentive to incur costs for more than minimal pathogen and other hazard controls.²⁰⁰

The President’s Food Safety Working Group identified the establishment of a food tracing system to be an essential public health measure, as it will shorten the time between outbreak and recovery of the contaminated products.²⁰¹

The issue of food safety extends beyond creation of new laws, increased regulatory oversight of processing and production, and enforcement of standards and recalls; it extends to *how* our food is produced and where consumers choose to obtain their food. All of the aforementioned legislative and regulatory measures will help address the safety issues presented by industrial agriculture, but there is an additional tool lawmakers can utilize to assure safer food.

196. KEY FINDINGS, *supra* note 2, at 4.

197. *Hearing on Issues in Food Safety*, *supra* note 136 (statement of Thomas E. Stenzel, President and CEO United Fresh Produce Association).

198. FIXING FOOD SAFETY, *supra* note 45, at 14. In the case of tracking down the source of *E. coli* O157:H7, some experts suggest that the government needs to do more in terms of tracing outbreaks back to slaughterhouses, which “are the source of the problem.” Moss, *supra* note 10.

199. *Democracy II*, *supra* note 62, at 21.

200. Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6806 (proposed Feb. 3, 1995).

201. KEY FINDINGS, *supra* note 2, at 3.

III. THE LOCAL FOOD MOVEMENT

"[E]ating is an agricultural act," penned Wendell Berry.²⁰² Michael Pollan expanded on that proposition when he declared that eating is a "political act, too;"²⁰³ and with that political spirit, consumers are making their voices heard and voting against industrial agriculture by increasingly purchasing local food.²⁰⁴ The rise of industrial agriculture and food production has coincided with a rise in foodborne illness²⁰⁵ that cannot be ignored.²⁰⁶ While lawmakers must address these issues through new legislation and regulation described above, they must consider the local food movement as a great ally on the path to safer food.

Local food can be defined as a system of production and distribution that is done within a relatively short distance directly from producer (farmer) to consumer.²⁰⁷ However, a better definition can be provided by understanding the producer's and consumer's motivations for buying and selling local food:

202. BERRY, *supra* note 75, at 145. Berry continued:

Most eaters, however, are no longer aware that this is true. They think of food as an agricultural product, perhaps, but they do not think of themselves as participants in agriculture. They think of themselves as "consumers." If they think beyond that, they recognize that they are passive consumers. They buy what they want—or what they have been persuaded to want—within the limits of what they can get. They pay, mostly without protest, what they are charged. And they mostly ignore certain critical questions about the quality and the cost of what they are sold: How fresh is it? How pure or clean is it, how free of dangerous chemicals? How far was it transported, and what did transportation add to the cost? How much did manufacturing or packaging or advertising add to the cost? When the food product has been manufactured or "processed" or "precooked," how has that affected its quality or price or nutritional value?

Id. Much of this disconnection is perpetuated by the very nature of industrialized agriculture. *See* Coit, *supra* note 71, at 48-50. "The industrial model . . . 'demands that relationships among people and between people and nature be impartial, and thus impersonal. As a result, many people today have no meaningful understanding of where their food comes [from], and thus, no understanding of the ecological and social consequences of its production.'" *Id.* at 49 (quoting John Ikerd, *Eating Local: A Matter of Integrity*, presented at Sierra Club Farm Tour and the Alabama Sustainable Agriculture Network Field Day (June 18, 2005), available at <http://web.missouri.edu/~ikerdj/paprs/Alabama-Eat%20Local.htm>). With the increase in consumer purchasing of local food, there is evidence that this attitude may be changing.

203. POLLAN, *supra* note 58, at 11.

204. LOCAL FOOD SYSTEMS, *supra* note 81, at 5. Direct to consumer sales are a fast growing portion of U.S. agriculture, increasing by \$399 million, or 49%, from 2002-2007. *Id.* The number of farmers' markets rose to 5,274 in 2009, compared to the 1,755 in 1994. *Id.* at 7. In 1986, there were two community supported agriculture programs in the U.S., compared to an estimated 2,500 in 2010. *Id.* at 8. This increase is entirely consumer-driven.

205. FATAL HARVEST, *supra* note 7, at 12.

206. "Up to the mid-20th century . . . the vast majority of produce was grown and sold locally, creating few opportunities for pathogens to invade. This changed with the consolidation of the food industry, as small farmers and ranchers gave way to big food conglomerates using mass-production methods." Choo, *supra* note 8, at 59.

207. Coit, *supra* note 71, at 47. Some say that distance is 150 miles; some say it is 250 miles; and others say the distance of a day's drive of our homes. *Id.* *See also* LOCAL FOOD SYSTEMS, *supra* note 81, at 3.

“1) a sense of connection, 2) quality, 3) environmental impact, and 4) political and social support for a particular type of agriculture.”²⁰⁸ Local food is perhaps best understood as direct sales from farmers to consumers, from roadside stands to farmers’ markets and community supported agriculture (CSA) programs.²⁰⁹ Local food may generally be considered safer, as it is usually sold unprocessed, has come in contact with fewer hands and mechanization, and is so fresh that there are fewer concerns about storage and transportation.²¹⁰ This is not to say that unsafe food cannot be sold at farmers’ markets. Anyone can choose to take the shortcuts that lead to contamination and the spread of foodborne illness. But, by all accounts, when a farmer sells directly to a consumer, it builds a greater sense of community and a clear accountability for the safety of the product.

Industrialization produces a division in the minds of consumers between production and consumption, but “[b]ecause of various pressures, governments have learned to coerce from producers some grudging concern for the health and solvency of consumers. *No way has been found to coerce from consumers any consideration for the methods and sources of production.*”²¹¹ The first portion of this problem as it relates to food safety—largely that lawmakers must reevaluate and rewrite the laws that govern food safety oversight—has been addressed previously. The second issue relates to consumers, but the law still has an increasingly important role to play. Both industrial agriculture and the local food movement will need to co-exist, but “[t]he key democratic value at stake here is the ability to choose, which requires having alternatives between which to choose.”²¹²

Deindustrializing agriculture means rejecting a system. It is not just a question of introducing techniques different from the present ones such as small-scale production, organic farming, and biodynamics. . . . Deindustrializing agriculture requires a new relationship between man and nature, an approach

208. Coit, *supra* note 71, at 48.

209. *Id.* at 56. A CSA is “a form of mutual cooperation between farmers and consumers who come together to produce healthy food in a sustainable way.” Rebecca Spector, *Fully Integrated Food Systems: Regaining Connections Between Farmers and Consumers*, in THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 288, 292 (2002). The basic idea is that consumer members purchase a share in the farm’s operation at the beginning of each growing season—thereby helping absorb some of the cost of the producer—in return for a box of produce directly from the farmer each week. *Id.* While CSAs have largely supplied produce, the system has recently been expanded into providing meat. Wes Little, *Growing Local-Farm Movement Expanding to Meat*, CNN.COM, Aug. 5, 2009, <http://www.cnn.com/2009/LIVING/wayoflife/08/05/meat.farms/index.html?iref=allsearch>.

210. Neil D. Hamilton, *Farmers’ Markets: Rules Regulations and Opportunities*, THE NATIONAL AGRICULTURAL LAW CENTER 2 (2002) http://www.nationalaglawcenter.org/assets/articles/Hamilton_farmersmarkets.pdf.

211. Wendell Berry, *Hope*, in THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 317, 319 (2002) (emphasis added).

212. *Democracy II*, *supra* note 62, at 18.

which is more open to complexity and which draws on all the scientific tools, both modern and traditional, to evaluate the sustainability of a new model of production.²¹³

Certainly some consumers will choose the options created by industrial agriculture while others will likely choose local food as an alternative; it is essential that the alternative *functions* and is *supported* by policy makers.²¹⁴ "The important thing is that there be multiple food chains, so that when any one of them fails—when the oil runs out, when mad cow or other food-borne diseases become epidemic . . . —we'll still have a way to feed ourselves."²¹⁵

Foremost foodborne illness attorney William Marler, who represents victims of foodborne illness and advises companies on improving food safety, has said: "In 16 years, I've never had an outbreak linked to a farmers market."²¹⁶ Foodborne illness raises questions for consumers about the processing techniques of industrial agriculture,²¹⁷ and local food provides alternatives in a consumer market seeking safer and healthier food.²¹⁸ But laws have previously worked to hinder local food by forcing them into a paradigm of regulation designed for industrial practices.²¹⁹ In drafting new statutory authority and regulations regarding food safety, lawmakers must recognize the effects felt by local food producers while responding to the new consumer

213. PETRINI, *supra* note 53, at 121. While industrial production may still serve the world, Patrini argues it must fall in line with sustainability or agriculture will fail. *Id.* at 121-22.

214. *Id.* As Professor Hamilton questioned:

Can a food system stocked with only standardized products of a faceless industrialized farming and marketing system, one not able or willing to answer the most basic of our questions, provide us with effective choices? Can it provide the same effective choices as a food system offering an array of shopping options, from farmers' markets to natural food stores as well as grocers and big box mega-stores?

Democracy I, *supra* note 18, at 22.

215. POLLAN, *supra* note 58, at 261.

216. Choo, *supra* note 8, at 61.

217. Consider the Mad Cow scare. Mad Cow was being spread among cattle due to an industry practice of feeding rendered cow parts back to cows, which was finally made illegal by the FDA in 1997. POLLAN, *supra* note 58, at 75. The Mad Cow scare in late 2003 began when a cow from a Washington dairy tested positive for the disease; the cow was allegedly a "downer," meaning that the animal could not walk or stand on her own. *Democracy II*, *supra* note 62, at 19. The USDA banned the use of downer cows shortly after the episode. *Id.* at 21. "[T]he livestock industry long defended these practices, giving more weight to the small economic gain (such as feeding animal parts back to cattle) than to the possible risks to consumers." *Id.* at 25.

218. *See Democracy I*, *supra* note 18, at 25.

219. POLLAN, *supra* note 58, at 229. For example, federal regulations require every processing facility to have a private bathroom for use by USDA inspectors, favoring the larger facilities that have such resources. *Id.* Some argue in the case of meat and poultry production that regulations "assume that the animals being processed have been living in filth." *Id.* at 250. Farmer, author, and local food advocate Joel Salatin believes, in a truly libertarian manner, that government should completely remove itself from regulating local, traditional agriculture. *See generally* JOEL SALATIN, EVERYTHING I WANT TO DO IS ILLEGAL (2007).

market for non-industrial food.²²⁰ For example, mandatory registration fees and the implementation of HACCP plans—largely set and designed for mass producers—may drive up costs for small local growers and cripple their business,²²¹ forcing them to take the same cost cutting shortcuts that often result in unsafe food.²²² Local food approaches to food safety

represent innovations and alternatives to the mainstream food chain because, at the core, they have already implemented transparency and connection between the producer and the final consumer. As long as they provide safe food, these approaches should be given incentives, not barriers, to continue their growth by adding new entrepreneurs and expanding existing operations.²²³

More than assuring that new laws will not adversely affect the growth of local food, lawmakers can work to promote these new sources, including farmers' markets and CSAs. Recently, the Justice Department has announced that alongside the USDA, it will be exploring competition issues in agribusiness involving potential antitrust investigation and regulatory enforcement, which would open broader markets for local food producers and lead to greater choices for consumers.²²⁴ It is essential that lawmakers help expand the growth of farmers' markets and CSAs by providing greater incentives to produce food locally and providing consumers with the knowledge to buy food locally. Little federal law exists relating to local food, but the Farmer-to-Consumer Direct Marketing Act of 1976 (FCDMA) is one

220. See Neil D. Hamilton, *Greening our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 361-62 (1997).

221. See Choo, *supra* note 8, at 61.

222. See *The Issues: Food Safety*, SUSTAINABLE TABLE, (Sept. 2009), http://www.sustainabletable.org/issues/foodsafety/index_pf.html. Factory farms run at high speeds, designed to process the highest possible quantity, but as the rate of production increases, so does the rate of contamination. *Id.*

223. *Food Safety Enhancement Act of 2009, Hearing on H.R. 2749 Before H. Comm. on Agric.*, 111th Cong. 2 (2009) (statement of Nicholas Maravell, Maryland Organic Farmer).

224. Press Release, Dep't of Justice, Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry (Aug. 5, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/248797.pdf. Attorney General Eric Holder explained the Justice Department's position:

So we must ask, is today's agriculture industry suffering from a lack of free and fair competition in the marketplace? To answer this question, we must begin by examining what we know for sure. We know that a growing number of American farmers find it increasingly difficult to survive by doing what they've done for decades. And we've learned that some of them believe the competitive environment may be, at least in part, to blame.

Attorney General Eric Holder, Remarks at the Dep't of Justice and USDA Agric. Workshop (Mar. 12, 2010), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100312.html>.

avenue by which the federal government can address the local food movement’s role in assuring safe food.²²⁵

The purpose of the FCDMA is “the development and expansion of direct marketing of agricultural commodities from farmers to consumers.”²²⁶ The type of marketing the statute is meant to address is what falls under the umbrella of local food: roadside stands, CSAs, and farmers’ markets.²²⁷ Essentially, the FCDMA requires the Secretary of Agriculture to assist states in development of direct-to-consumer agriculture by providing funds for conferences, writing drafts of legislation that will help develop such marketing, and providing any technical service to aid in direct-to-consumer program establishment.²²⁸ The act specifically calls for the Secretary to implement the Farmers’ Market Promotion Program, which issues grants to “establish, expand, and promote farmers’ markets.”²²⁹

Similarly, the USDA’s Food and Nutrition Service administers two programs that promote local food consumption.²³⁰ The FCDMA created the Seniors Farmers’ Market Nutrition Program (SFMNP) “to provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, honey, and herbs from farmers’ markets, roadside stands, and community supported agriculture programs to low income seniors.”²³¹ Additionally, the Child Nutrition Act of 1966 authorized the WIC Farmers’ Market Nutrition Program (FMNP),²³² which targets women, infants, and children much like the SFMNP targets seniors.²³³ FMNP is authorized in forty-five States, territories, and Indian Tribal Organizations, who apply for funds and administer the program.²³⁴ These programs indicate Congress’ willingness to support local food.²³⁵ A greater effort has come from the current USDA, which has sought to educate consumers and local food producers about programs that are available to help them build local food systems, including the Community Facilities Program, the Business and Industry Guarantee Loan Program, the Value-Added Producer Grant Program (now the Value-Added Agricultural

225. 7 U.S.C. §§ 3001-3007 (2009).

226. 7 U.S.C. § 3001.

227. 7 U.S.C. § 3002.

228. 7 U.S.C. § 3004. Defining “farmers’ market” and accommodating direct to consumer marketing in these ways are largely state matters, often coming down to issues of zoning. *See* Hamilton, *supra* note 210, at 4. *See also* NAT’L POLICY & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, ESTABLISHING LAND USE PROTECTIONS FOR FARMERS’ MARKET (2009), <http://www.nplanonline.org/nplan/products/establishing-land-use-protections-farmers-markets>.

229. 7 U.S.C. § 3005.

230. LOCAL FOOD SYSTEMS, *supra* note 81, at 36.

231. 7 U.S.C. § 3007.

232. 42 U.S.C. § 1786(m) (2009).

233. 7 C.F.R. § 248.1.

234. LOCAL FOOD SYSTEMS, *supra* note 81, at 36.

235. Coit, *supra* note 71, at 66.

Market Development Program),²³⁶ and the Know Your Farmer Know Your Food initiative.²³⁷

Another important means by which government can encourage local food production and consumption is in farm-to-school programs. In most of these programs, schools purchase fresh produce directly from farmers, while in other programs schools sponsor garden projects or field trips as a portion of nutrition education.²³⁸ It is estimated that there were 2,051 such programs in 2009, with forty-one states having some kind of farm-to-school program.²³⁹ The USDA's Agricultural Marketing Service and Food and Nutrition Service have formed "Farm to School Tactical Teams" to help schools transition to purchasing local food.²⁴⁰ All of these government initiatives are helping to guarantee a safer food supply, but the source—direct farmer to consumer marketing by small farms—should not be hampered by overly burdensome regulation.

Ultimately, the federal government must recognize the important role that local food can play in supplying safe food and must educate consumers about these new choices. Increases in grants and consideration of how new federal statutes and regulations on food safety may adversely affect small producers are the primary ways in which lawmakers can support local food as a building block towards a solution to food safety problems.²⁴¹ As these local systems grow in number, lawyers and policy makers will be called upon to deal with new legal needs that are sure to arise and to help this new "food democracy"

236. Memorandum from U.S. Dep't of Agric. Deputy Secretary Kathleen A. Merrigan on Harnessing USDA Rural Development programs to support local and regional food systems (Aug. 26, 2009), <http://www.usda.gov/documents/KnowYourFarmerandRD.pdf>. The Value-Added Agricultural Market Development Program provides grants to farmers who add value to their products through processing or marketing. LOCAL FOOD SYSTEMS, *supra* note 81, at 38.

237. U.S. Dep't of Agric., Know Your Farmer, Know Your Food, <http://www.usda.gov/wps/portal/usda/knownyourfarmer?navid=KNOWYOURFARMER> (last visited Sept. 5, 2010). The Know Your Farmer Know Your Food program

is a USDA-wide effort to create new economic opportunities by better connecting consumers with local producers. It is also the start of a national conversation about the importance of understanding where your food comes from and how it gets to your plate. Today, there is too much distance between the average American and his or her farmer and [USDA is] marshalling resources from across USDA to help create the link between local production and local consumption.

Id.

238. LOCAL FOOD SYSTEMS, *supra* note 81, at 14.

239. *Id.* at 14-15.

240. *Id.* at 39.

241. "Costs and uncertainties related to food safety and processing regulations affect direct-to-consumer marketing activities across state, county, and municipal boundaries, especially on farm-production and post-harvest handling practices." *Id.* at 28.

compete with the industrial model.²⁴² The ultimate public health goal should always be a safe, nutritious, and sustainable food supply.

CONCLUSION

Food safety is of immense importance, as identified by the GAO and others, and “is a core public health issue” because “[a] precondition for health is having access to safe food.”²⁴³ Recent headlines, a committed Congress, and the local food movement may have finally coalesced to spark the fire necessary for meaningful reform of our food safety bureaucracy:

Peanut butter can kill you. And spinach. And maybe cookie dough. That’s what we’ve learned so far . . . as contaminated foods have claimed lives, caused permanent disabilities and sent thousands of Americans to emergency rooms. The toll has been immense for some time—on average, 5,000 lives are lost each year and 300,000 hospitalizations are required—but . . . outbreaks of salmonella linked to bad peanuts and the spread of *E. coli* bacteria on spinach garnered enough headlines to break a legislative logjam and maybe, just maybe, open the way for the most sweeping reform of the nation’s food safety system in fifty years.²⁴⁴

And finally, the logjam showed signs of weakness. During the research and writing of this article, S.510, the beleaguered FDA Food Safety Modernization Act²⁴⁵ sat in the Senate, gaining support from consumer organizations, public health groups, and industry associations,²⁴⁶ but looking as if it was going to find the same fate as all major food safety proposals of the previous decades. After inclusion of amendments proposed by Senator Jon Tester exempting small farms from certain requirements complicated the debate and cost the bill one of its original co-sponsors, Senator Saxby Chambliss, the future of the bill remained in the balance.²⁴⁷ But a major victory for public health came on November 30, 2010, when the FDA Food Safety Modernization Act cleared the Senate by a vote of 73-25,²⁴⁸ and with its signing,²⁴⁹ President Obama and

242. Hamilton, *supra* note 220, at 362.

243. *Hearing on Issues in Food Safety*, *supra* note 136 (statement of Margaret A. Hamburg, Commissioner of the Food and Drug Administration).

244. John Nichols, *Food Without Fear*, THE NATION, Sept. 21, 2009, at 5-6.

245. S.510, 111th Cong. (2010).

246. The bill received support from industry and consumer groups alike: American Frozen Food Institute, Grocery Manufacturers Association, United Fresh Produce Association, National Restaurant Association, Produce Marketing Association, General Mills, Kraft Foods North America, Consumers Union, Center for Science in the Public Interest, Food Marketing Institute, American Public Health Association, Center for Foodborne Illness Research and Prevention, Safe Tables Our Priority (STOP), and the Pew Charitable Trust, among others. *S.510: FDA Food Safety Modernization Act*, GOVTRACK.US (2010), <http://www.govtrack.us/congress/bill.xpd?bill=s111-510>.

247. Helena Bottemiller, *UPDATE: Food Safety Bill Clears Full Senate*, FOOD SAFETY NEWS, Nov. 30, 2010, <http://www.foodsafetynews.com/2010/11/s510-clears-key-vote-debate-to-resume-today/>.

248. *Id.* Yet, the story was not so neatly wrapped up. The Senate bill included a

Congress adopted “the first comprehensive overhaul” of the American food safety regime.²⁵⁰

However, this is an overhaul of a *single*, though integral, piece of the system described above. As the title implies, the bill focuses on modernizing and fixing the inadequacies of the FDA’s food safety function and does not address the system as a whole. The bill includes many of the proposals identified above: (1) mandatory HACCP programs for the FDA;²⁵¹ (2) performance standards;²⁵² (3) fees to raise funds;²⁵³ (4) refocusing inspections, including inspections of foreign facilities;²⁵⁴ (5) tracking and tracing projects;²⁵⁵ (6) mandatory recall authority;²⁵⁶ and (7) foreign verification systems, ensuring that foreign suppliers are providing the same level of protection as U.S. suppliers.²⁵⁷

By all accounts, the FDA Food Safety Modernization Act works toward the goals identified by this article and is surely a giant step toward a safer food supply. Fixing the FDA, it seems, is a precursor for further reform of our entire food safety bureaucracy—including reform of the USDA and potential consolidation of all food safety efforts. The bill even includes the amendments

provision that would allow the FDA to impose fees on food importers and on companies whose food is recalled, a revenue-raising measure that Article 1, Section 7 of the U.S. Constitution requires to be originated in the House. Helena Bottemiller, *Constitutional Slip Up Adds Uncertainty to S.510*, FOOD SAFETY NEWS, Dec. 02, 2010, <http://www.foodsafetynews.com/2010/12/future-of-s510-uncertain-due-to-constitutional-slip-up/>. The House had passed its version, H.R. 2749, in July 2009.

To overcome the Senate's procedural error, the House then appended S. 510 to the "Omnibus Spending Bill," essentially the 2011 budget. That bill was narrowly approved by a 212 to 206 vote, but when the Senate refused to take up the spending bill, the food safety legislation was left hanging

To get the food safety bill back to the House without the constitutional flaw, the Senate used H.R. 2751 as a vehicle, amending it with the language of S. 510. Ironically, H.R. 2751 was originally a House version of the "cash for clunkers" bill, a shell with just enough life in it for the Senate's purpose.

Dan Flynn, *Sunday Surprise: Senate Passes Food Safety Bill*, FOOD SAFETY NEWS, Dec. 20, 2010, <http://www.foodsafetynews.com/2010/12/sunday-surprise-senate-passes-food-safety-bill/>.

249. The subsequent House bill replaced S.510, passed the Senate, and was signed by President Obama on January 4, 2011. H.R. 2751, 111th Cong. (2011).

250. Caroline Smith DeWaal, *FDA Food Safety Modernization Act: Out of the Box*, FOOD SAFETY NEWS, Jan. 06, 2010, <http://www.foodsafetynews.com/2011/01/fda-food-safety-modernization-act-out-of-the-box/>.

251. H.R. 2751 § 103.

252. *Id.* at § 105.

253. *Id.* at § 107.

254. *Id.* at § 201.

255. *Id.* at § 204.

256. *Id.* at § 206.

257. H.R. 2751 § 301 (2011).

proposed by Senator Jon Tester, which exempt small farms—those with an adjusted gross income of less than \$500,000 or that sell produce directly to consumers—from HACCP, traceability, and recordkeeping requirements.²⁵⁸ The import of the amendments is recognition that a one-size-fits-all approach limits the goals of small farmers. Any future legislation should follow this model, supporting and not hindering the important efforts of local food:

All of the well-publicized incidents of contamination in recent years—whether in spinach, peppers, or peanuts—occurred in industrialized food supply chains that span national and even international boundaries. The food safety problems in this system can and should be addressed without harming the local food systems that provide an alternative for consumers.²⁵⁹

While this is a big first step to giving the regulatory agencies in our current, fragmented system the necessary authority and resources to achieve these goals, there are roadblocks ahead. The FDA must follow through with its new mandates, implementing regulations that track the suggestions made above. But the biggest hurdle is clear: money. “Representative Jack Kingston of Georgia, the ranking GOP member on the appropriations subcommittee that oversees the FDA, said the number of cases of food-borne illnesses in the country does not justify the \$1.4 billion the new law is estimated to cost over the first five years.”²⁶⁰ Mark McClellan, FDA Commissioner from 2002 through 2004, responded that it is “relatively easy to pass legislation [stating] that the FDA needs to do more things,” but asserted that it is “very hard to back that up with resources.”²⁶¹

Ultimately, much more is needed on the path to safer food. Overcoming budgetary concerns and eventually shifting focus to USDA reform are inevitable if government is to play the role envisioned by Presidents Roosevelt and Obama. Continued support of local food, as evidenced by the FDA Food Modernization Act, will demonstrate to consumers that there are choices beyond big-box superstores. Once the agencies are operating under the same legal mandates, with commensurate funding and manpower, perhaps the vision of consolidating U.S. food safety activities within one federal agency will be realized, and the missteps that lead to ongoing and unnecessary illness and death will be distant memories.

258. *Id.* at §§ 103, 204. In regard to the exemption from HACCP requirements, state health laws would govern instead. Form Letter to Senators from Farm and Ranch Freedom et al., May 25, 2010, <http://farmandranchfreedom.org/sff/Amend-S510-May-25.pdf>.

259. Margie MacDonald & Judith McGeary, *S.510 Food Safety Modernization Act: Healthy Local Foods Amendment—Sen. Jon Tester*, [http://smallholdersalliance.com/QA-Tester-Amendment-April-15%20\(2\).pdf](http://smallholdersalliance.com/QA-Tester-Amendment-April-15%20(2).pdf).

260. Lyndsey Layton, *Overhaul of Food Safety Laws Might not be to GOP's Taste*, WASH. POST, Dec. 25, 2010, at A.3.

261. *Id.* (quoting Mark McClellan).