# Milk, Ideology, and Law: Perfect Foods and Imperfect Regulation

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## INTRODUCTION

When advertisers in the 1990s were developing what would become the highly successful "got milk?" campaign, they struggled with the fact that milk, as a daily staple, was not a "very high-interest item in people's lives."[1] People at the time already "knew" that milk was good for them, and advertisements that highlighted the health benefits of milk did little to drive people to the udder.[2] Rather than trying to redefine what milk meant to the public, these advertisers instead capitalized on the "irreplaceability" of milk, and the resulting "got milk?" campaign was "an acknowledgement that milk is essential, and if you don't have it, then something is missing."[3]

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1. Victor Luckerson, *The Dairy Industry is Axing "Got Milk?,"* TIME (Feb. 24, 2014), http://time.com/9459/got-milk-campaign-ends-in-favor-of-milk-life/ [https://perma.cc/VYG6-E5HT].

2. Andrea S. Wiley, *Transforming Milk in a Global Economy*, 109 AM. ANTHRO. 666, 675 (2007).

3. Luckerson, *supra* note 1.

Milk has been an "essential" and "irreplaceable" part of the American table for over a century. Milk is a powerful symbol supported by equally powerful ideologies. How and why we drink milk, explains sociologist E. Melanie DuPuis, "has as much to do with the social relationships we share, and the way we think about these relationships, as it does with providing the body with nutrients."[4]

Milk is not alone. We are surrounded by food ideologies. Vegetarianism, Paleolithic dieting, organic eating, and localism are just a few of the ways in which people identify perfect ways of eating. Just like any other ideology, people's dietary preferences "communicate what is desirable and what is condemnable."[5] These food ideologies stem from "experience[s] as children and adults, the recommendations and practices of networks of friends and kin, expert advice, official propaganda, and commercial advertisements"[6] that influence the foods we ultimately decide to put in our bodies.[7]

At the macro level, food ideologies fuel food movements that, like any other social movement, set out to "change the structure of society or the distribution of society's resources."[8] These food movements have influenced the ways in which we eat. The organic food movement, for example, traces its roots to the countercultural movement against industrial agriculture.[9] The movement has been able to codify some of its proscriptions against pesticide use or genetically modified organisms into law.[10] Despite much disagreement over whether organic food provides the benefits that consumers seek,[11] the category has success-

4. E. MELANIE DUPUIS, NATURE'S PERFECT FOOD: HOW MILK BECAME AMERICA'S DRINK 4 (2002).

5. Marjaana Lindeman & Minna Sirelius, *Food Choice Ideologies: The Modern Manifestations of Normative and Humanist Views of the World*, 37 APPETITE 175, 175 (2001). *See also id.* at 183 (concluding that food choices may be ways in which "people express their philosophy of life").

6. ALAN WARDE, CONSUMPTION, FOOD & TASTE 3 (1997).

7. *See* TERENCE M. DOVEY, EATING BEHAVIOR (2010) (discussing how food choice at the individual food level is influenced by food ideologies).

8. *See* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 85 (2001).

9. *See* HARVEY BLATT, *Organic Food: As Nature Intended*, *in* AMERICA'S FOOD: WHAT YOU DON'T KNOW ABOUT WHAT YOU EAT 65, 65 (2008) ("Organic agriculture arose in the 1970s as a reaction to industrial farms that confine animals, regularly feed them antibiotics, and use large amounts of poisonous artificial pesticides and chemical fertilizers on crops.").

10. *See* U.S. DEP'T OF AGRIC., ORGANIC AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=organic-agriculture.html [https://perma.cc/MQH6-ZJ4Q] (last visited Feb. 21, 2016).

11. *See* Jim Chen, *Food and Superfood: Organic Labeling and the Triumph of Gay Science over Dismal and Natural Science in Agricultural Policy*, 48 IDAHO L. REV. 213, 222 (2012) ("A commitment to producing and consuming food according to organic ideals arises from little more than a philosophical or aesthetic sense that resort to chemical pesticides or fertilizers, to say nothing of genetically modified organisms, poses risks beyond the current ability of science to quantify."); Crystal Smith-Spangler et al., *Are Organic Foods Safer or Healthier Than Conventional Alternatives?: A Systemic Review*, 157 ANNALS INTERNAL MED. 348, 359 (2012) ("In summary, our comprehensive review of the published literature on the comparative health outcomes, nutrition, and safety of organic and conventional foods identified limited evidence for the superiority of organic foods."); Kenneth Chang, *Stanford Scientists Cast Doubt on Advantages of Organic Meat and Produce*, N.Y. TIMES (Sept. 3, 2012),

fully penetrated the mainstream as "[a]ll the major players in the retail food industry now have organic brands."[12]

Much has been written about how food-related interest groups, both public and private, influence the regulatory decision-making processes of legislatures and government agencies.[13] This Note suggests that understanding how and why food regulators act requires deeper study into how food ideologies and movements fit into the picture. Through a case study of the fresh cow's milk industry, this Note will show that food ideologies can have a powerful effect on how regulators engage with our food systems.

Milk represents just one of the many ways in which society has tried to perfect its diet.[14] Those who advocated for milk's proliferation had the best of intentions, but they were misguided. No single food is a panacea for society's ills, and the unquestioned governmental support of milk has had many unintended consequences over the years.[15]

This Note proceeds in three parts. Part I addresses the historical origins of milk's ideological perfection and how that ideology, combined with the unique characteristic of milk production, transformed government's role in supplying milk to the masses. Because ideology played a pivotal role in milk's proliferation, this Part suggests that a complete understanding of any food regulation requires study into what ideologies motivate the decisions of consumers, regulators, and public interest and industry groups. Part II analyzes how courts ratified milk's perfection and helped transform it into the industrial product we know today. It also shows that although courts have been reluctant to engage in ideological food fights, they inevitably do so anyway. Part III discusses the problems associated with food ideologies—primarily that food ideologies tend to oversell the benefits and overlook the harms posed by favoring certain foods. This Note concludes by suggesting that regulators should recognize that their decisions to favor milk and other perfect ways of eating are rooted in ideological considerations and ought to ask the critical questions that can help shine a light on the influences that create our food system.

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http://www.nytimes.com/2012/09/04/science/earth/study-questions-advantages-of-organic-meat-and-produce.html?_r=0 [https://perma.cc/9W6F-Y5SF].

12. BLATT, *supra* note 9, at 65.

13. *See* MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH (2013) (discussing the many ways in which the food industry uses political tools to influence the foods we eat); Michael Lipsky & Marc A. Thibodeau, *Domestic Food Policy in the United States*, 15 J. HEALTH POL. POL'Y & L. 319, 321–22, 337 (2008) (discussing how food programs have shifted towards agricultural interests instead of the nutritional interests of those in need).

14. *See infra* Part I.

15. *See infra* Part III.

## I. A HISTORY OF MILK CONSUMPTION

No understanding about the regulation of milk is complete without knowing why milk was considered to be the "most nearly perfect food."[16] Milk's story, and its ubiquity, shows what can happen when consumers, industry, and governments embrace an ideology of perfect eating. Ideology alone did not create the milk industry we know today—there were certainly economic and political factors at play,[17] and the dairy industry has played a supporting role in marketing the benefits of milk[18]—but industry greatly benefitted from an image of perfection that others created.[19]

Milk's rise to its central place on the American table was improbable.[20] Milk is certainly nutritiously abundant, providing calories, protein, and vitamins often lacking in the typical diet.[21] But milk became an industrial food because of its imperfections, not its perfection. Fresh milk can be dangerous, it is expensive to produce, and inconsistently available.[22] Governments seeking to prevent milk-related deaths had to pass tough criminal enforcement laws and mandatory safety regulations. Milk is resource intensive and seasonal fluctuation in supply requires farmers to regularly produce more than necessary to meet demand.[23] The inherent danger of milk, combined with the sheer economics and logistics of bringing milk to consumers, belies the idea that milk was ever a perfect food.

Nonetheless, consumer advocates, authors, scientists, politicians, and judges have at varying times embraced milk as an elemental necessity. Governments at both state and federal levels have played pivotal roles in the production and

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16. *See, e.g.*, DUPUIS, *supra* note 4, at 38 (quoting CHESTER L. ROADHOUSE & JAMES L. HENDERSON, THE MARKET MILK INDUSTRY (2d ed. 1950)).

17. *See* FED. MILK ORDER STUDY COMM., REPORT TO THE SECRETARY OF AGRICULTURE I-21–22 (Apr. 1962) (summarizing the purposes of federal milk marketing system), http://dairy.wisc.edu/pubPod/pubs/Nourse.pdf [https://perma.cc/U3R7-XHPL]; Daniel A. Farber, *Positive Theory As Normative Critique*, 68 S. CAL. L. REV. 1565, 1571 (1995) (applying interest group theory to explain continued support of the dairy industry). *See generally* Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989) [hereinafter Miller, *Public Choice*] (applying public choice theory to explain the rise of the dairy lobby).

18. *See, e.g.*, GYORGY SCRINIS, NUTRITIONISM: THE SCIENCE AND POLITICS OF DIETARY ADVICE 66 (2013). *But see* Miller, *Public Choice*, *supra* note 17, at 130 (arguing the dairy industry obtained political power "by drawing on a well-developed set of preexisting institutions"). Professor Miller's observations on the dairy industry are helpful, but butter—being less perishable than milk—did not face the same hurdles as the fresh fluid milk industry. *See infra* notes 51–59 and accompanying text.

19. *See infra* Section I.B; *see also* DUPUIS, *supra* note 4, at 20–21, 43.

20. Before milk, water and cider were the most common beverages on the American table. *See* DUPUIS, *supra* note 4, at 30–31.

21. *See* U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS 38 (2010), http://health.gov/dietaryguidelines/dga2010/dietaryguidelines2010.pdf [https://perma.cc/92ZX-8QS2] [hereinafter 2010 DIETARY GUIDELINES].

22. *See id.* at 160. Although "[m]ilk reform was part of a broader food safety and city sanitation movement," and pasteurization was effective in reducing foodborne illnesses, the hegemonic forces driving demand for milk ignored the harmful effects of the "white poison." *See id.* at 68, 81.

23. *Id.*

distribution of milk over the past 150 years.[24] This Part charts milk's path to perfection, and shows how consumer advocates, government, and industry worked together to create a system where milk was produced consistently, inexpensively, and safely for the demanding public.[25]

### A. MILK AS THE "PERFECT FOOD"

Before milk became a staple, it was "an extremely minor aspect of the human diet."[26] Our nation favored alcoholic cider over any other beverage during its early history.[27] Scholars attribute milk's rise to changing social and cultural norms and the efforts of public interest advocates to cultivate milk's image as a "perfect food."[28]

Greater demand for cow's milk began during the mid to late nineteenth century.[29] The country was rapidly industrializing, and the nation's citizens began to flock to its urban centers.[30] Mothers from all social classes began to shun breastfeeding and instead started to feed their children cow's milk.[31] Nutritional scientists of the time praised milk for containing "all the ingredients to sustain life."[32] However, much of what was sold as milk was in fact deadly "swill milk," a "thin, bluish fluid, ridden with bacteria," that contributed to the rise of infant mortality.[33]

For advocates of the time, it was the vices of urbanization, and not the inherent dangers of unpasteurized milk, that were killing children.[34] The influential *Essay on Milk* extolled the universality and nutritional completeness of milk.[35] With little science to go on, advocates such as Robert Hartley, "probably the country's first public consumer advocate,"[36] relied heavily on natural theol-

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24. For example, the federal government runs massive government programs that regulate the price of milk, *see generally* Lois Bonsal Osler, *An Overview of Federal Milk Marketing Orders*, 5 SAN JOAQUIN AGRIC. L. REV 67 (1995), and states have made attempts to protect the viability of their dairy industries, *see, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 190 (1994) (describing a Massachusetts milk assessment program that was designed to "preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health") (internal citation omitted).

25. *See infra* Section I.B.

26. DUPUIS, *supra* note 4, at 4; *see also* DEBORAH VALENZE, MILK: A LOCAL AND GLOBAL HISTORY 153–77 (2011).

27. DUPUIS, *supra* note 4, at 31.

28. *Id.* at 4.

29. *See* E. Melanie DuPuis, *The Body and the Country: A Political Ecology of Consumption*, *in* NEW FORMS OF CONSUMPTION: CONSUMERS, CULTURE, AND COMMODIFICATION 131, 133 (Mark Gottdiener ed., 2000) ("One hundred years ago, the idea of milk as an everyday drink for anyone older than twelve years of age was not part of the public dietary landscape.").

30. DUPUIS, *supra* note 4, at 43.

31. *See generally id.* at 46–66 (describing the changing social norms that led to the decrease in breastfeeding and the increase in consumption of cow's milk).

32. *Id.* at 19.

33. *Id.* at 18–19.

34. *Id.* at 21.

35. *Id.* at 25.

36. *Id.* at 21.

ogy to make the case that milk was "the most perfect of all elementary aliments," as well as nutritionally superior to all other foods.[37] He, and other advocates, envisioned a system where country farmers—untainted by the evils of the city—would supply safe, pure milk to needy urban centers.[38]

Although industry and the government subsequently adopted the mantle of promoting milk consumption,[39] milk's ubiquity and its origins as a perfect food were not the result of economic self-interest. Certainly, industry played its part through promotional campaigns that leveraged milk's perfection to stoke increasing demand.[40] But it was Hartley and other milk advocates who elevated milk's image as a perfect food,[41] not "capitalists manipulating public sentiment and choice."[42] This complicates the narrative that the political choices in our food system are about "government balanc[ing] corporate against public interests."[43] Ideology, promoted by people independent of industry, must also be taken into account.

### B. GOVERNMENT INTERVENTION

Milk's status as a necessary food was both a blessing and a curse. Demand grew sharply after the turn of the century,[44] and milk was one of the more lucrative farming businesses.[45] Yet the industry was unable to solve many of the logistical problems that kept pure, safe milk out of reach.[46] The solution to the rising demand and the "milk question"—how to achieve milk advocates' vision of pure milk—became the rallying cry for consumer advocates and public health officials in the late nineteenth and early twentieth centuries.[47] Although stakeholders proposed several alternative methods,[48] "consumers, mass-production capitalists, and intensive farmers" resorted to an industrial system to meet the growing demand for an inexpensive, consistent, and safe supply of

37. *Id.* at 30–32.

38. *Id.* at 34–35.

39. *See, e.g.*, *id.* at 112 (noting that the U.S. Department of Agriculture and other dairy interests recommended one pint a day for adults and up to a quart a day for children); 2010 DIETARY GUIDELINES, *supra* note 21, at 38 ("Recommended amounts are 3 cups per day of fat-free or low-fat milk and milk products for adults.").

40. *See* DUPUIS, *supra* note 4, at 120 ("Milk 'education' campaigns hammered home the benefits of milk to the point where the food became considered an essential in any diet.").

41. *Id.* at 37–38.

42. *Id.* at 20–21, 43.

43. *See, e.g.*, NESTLE, *supra* note 13, at 28.

44. *See* DuPuis, *supra* note 29, at 133 ("[T]he rise of milk drinking at the turn of the century is not simply a rise in *average* consumption but an expansion in the proportion of the population (the number of bodies) consuming milk.").

45. Comment, *Legislative Regulation of the New York Dairy Industry*, 42 YALE L.J. 1259, 1259 n.2 (1993) [hereinafter *Legislative Regulation*].

46. *See* Ronald F. Wright & Paul Huck, *Counting Cases About Milk, Our "Most Nearly Perfect" Food, 1860-1940*, 36 LAW & SOC'Y REV. 51, 58 (2002).

47. *See id.* at 57; *see also* DUPUIS, *supra* note 4, at 68, 74.

48. "Certified milk," a raw milk product that underwent extensive testing, was (and still is) favored by some advocates. DUPUIS, *supra* note 4, at 78–79.

milk.[49] This bargain hinged on strong governmental intervention[50] that effectively intertwined the interests of industry and government to solve the answer to the "milk question."

Milk, as a commodity, suffered from a variety of unique production difficulties that made it impossible for industry alone to provide an inexpensive, plentiful, and safe supply. First, milk was expensive to produce—the cost of a quart (before government intervention in the 1900s) was equivalent to around $7 today.[51] Transportation costs added on to what was already a labor-intensive product.[52] Compounded with health and safety regulation, milk became inaccessible to many families and children—precisely the group that consumer advocates sought to assist with readily available milk.[53]

Second, the dairy industry was incapable of collaborating on the scale necessary to provide a regular supply of fresh milk.[54] Cows do not produce milk at a rate consistent enough to meet daily demand.[55] A cow's milk production fluctuates depending on the time of year, peaking in the spring and bottoming out in the winter.[56] Farmers must have enough cows to meet consumer demand for fresh fluid milk at the lowest levels of production, and figure out what to do with the surpluses in flush months.[57] While cheese, butter, and condensed milk represented outlets for surplus,[58] the mere availability of surpluses allowed some distributors to take advantage of dairy farmers who had no alternative avenues to sell their milk, threatening the price stability throughout the entire

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49. *Id.* at 88–89.

50. In using the term "intervention," this Note does not imply that the government is either regulating or not regulating milk within a "free market." If the government chose not to pass milk regulations, then it would merely be privileging certain actors who were interested in keeping the status quo. For example, the smaller milk dealers who were more deftly able to deal with pricing fluctuations in *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934) or the filled milk dealers in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), who did not experience the same obstacles that the fresh fluid milk market experienced.

51. VALENZE, *supra* note 26, at 258.

52. *See id.*; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 289 n.13 (1932) (Brandeis, J., dissenting) (discussing the importance of ice in the dairy industry).

53. *See* DUPUIS, *supra* note 4, at 138–39; VALENZE, *supra* note 26, at 258–61. For a history of price fluctuations in the milk market, see generally ERIC M. ERBA & ANDREW M. NOVAKOVIC, CORNELL PROGRAM ON DAIRY MKTS. & POL'Y, THE EVOLUTION OF MILK PRICING AND GOVERNMENT INTERVENTION IN DAIRY MARKETS 1 (1995), http://dairy.wisc.edu/pubPod/pubs/EB9505.pdf [https://perma.cc/4Q6Q-6J4R]; James L. Guth, *Herbert Hoover, the U.S. Food Administration, and the Dairy Industry, 1917-1918*, 55 BUS. HIST. REV. 170 (1981).

54. *See Legislative Regulation*, *supra* note 45, at 1263; *see also* Nebbia v. New York, 291 U.S. 502, 517 (1934) ("The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control."). The Dairymen's League of New York alone had 100,000 members in 1916, and although they could present a powerful lobbying voice, *see* Guth, *supra* note 53, at 172, they could not coordinate production among themselves. DUPUIS, *supra* note 4, at 168. Even government attempts at coordination failed early on. *See* Guth, *supra* note 53, at 182.

55. *See* VALENZE, *supra* note 26, at 258.

56. *Id.*

57. *Legislative Regulation*, *supra* note 45, at 1261; *see also* DUPUIS, *supra* note 4, at 139 ("[The fluid milk industry] has to assume an obligation to provide an adequate supply at all times.").

58. *Legislative Regulation*, *supra* note 45, at 1261.

dairy industry.[59]

Finally, as urban demand for milk grew, so did the public concerns surrounding milk safety and adulteration.[60] "[T]he 'milk question' was among the most important public health issues of the late 19th and early 20th centuries in America."[61] Children were sickened or killed by milk that was poorly handled or adulterated.[62]

Solutions to these three problems materialized at different times in the first half of the twentieth century, but they all had one thing in common—strong governmental intervention that favored industrialization.[63] Health and safety regulations came first. State and local legislatures enacted some of the earliest regulatory criminal food-safety statutes to deal with rampant adulteration.[64] A consensus also started building around mandatory pasteurization. The New York legislature, for example, enacted pasteurization laws not only because they were politically feasible, but also because health officials thought that the ensuing consolidation of the dairy industry—a result of enormous capital requirements for pasteurization equipment—would lead to safer milk.[65]

In addition to ensuring safe milk, the government also had to regulate the supply of milk itself, a step that was far more controversial. The issue came to a boil in the Depression Era when rising demand abruptly stopped, and the dairy industry was left with too many cows and too much milk.[66] The stakes were high: as dairy-farmer protests turned violent,[67] consumer groups, producers, and milk dealers pressured state legislatures and Congress to directly intervene in controlling the price and supply of milk.[68] Lawmakers responded by passing laws, which, for the first time, would regulate the industry through price controls and direct payments to farmers.[69] These moves created a government "scaffolding that supported modern milk," a structure that survives to this day.[70]

The crises showed that milk could not survive on its image alone. The milk movement's vision of safe, plentiful, and consistently available supply required government intervention.[71] Government had seldom directly regulated the sup-

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59. DUPUIS, *supra* note 4, at 177; *see also Nebbia*, 291 U.S. at 518.

60. DUPUIS, *supra* note 4, at 70; *see also* Wright & Huck, *supra* note 46, at 58–59.

61. Wright & Huck, *supra* note 46, at 57.

62. *Id.* at 58–59.

63. DUPUIS, *supra* note 4, at 83.

64. Wright & Huck, *supra* note 46, at 61.

65. DUPUIS, *supra* note 4, at 80, 84.

66. *Legislative Regulation*, *supra* note 45, at 1264.

67. *See generally* Henry S. Manley, *Nebbia Plus Fifteen*, 13 ALB. L. REV. 11, 12 (1949) (discussing the history of the passage of legislation that established New York's Milk Control Board).

68. VALENZE, *supra* note 26, at 268–69 (outlining actions government took in response to farmer and consumer needs); Guth, *supra* note 53, at 185–86 ("The Food Administration intervened with greatest reluctance in milk price matters and only at the insistence of producers, dealers, and consumers.").

69. *See* VALENZE, *supra* note 26, at 268; Manley, *supra* note 67, at 12.

70. VALENZE, *supra* note 26, at 269.

71. *See* ERBA & NOVAKOVIC, *supra* note 53, at 6 ("Even before the Great Depression had its effects on milk prices, classified pricing plans were breaking down.").

ply of any food, and its new role regulating the price and availability of milk was to be vigorously challenged in the courts.[72] Despite this resistance, government and the dairy industry would become forever intertwined.[73]

The work of nineteenth century consumer advocates continues to influence milk consumption today. Industry and government have continued to cultivate milk's perfect image, essentially co-opting the message of preceding milk movements and molding them to the times. Into the New Deal Era, academics and industry groups like the National Dairy Council latched onto Hartley's description of milk as a source of "perfect food," and increased sales through the "intense nutritional marketing of milk."[74] This nutritional marketing continued into the 1960s and '70s, when industry rebranded milk as reduced-fat milk to counter the anti-fat sentiment of the times.[75] Today, in an era when specific nutrients and foods are thought to enhance one's health,[76] milk has once again rebranded itself as being rich in calcium and protein for strong bones and increased energy.[77] "MyPlate"—the government's latest food icon representing the ideal American diet—is a literal depiction of how milk continues to play a central role on the American table today.[78]

Why we eat certain foods is a complex question, but one worth exploring to understand why and how those foods are regulated. This Part has only scratched the surface of the many social and cultural factors that helped create the industrialized and heavily subsidized dairy system we have today. What is clear is that ideology played an important role in driving regulation.

Milk is not the only food whose production and consumption has been influenced by ideology. Foods have been banned out of fear throughout history.[79] The low-fat movements of the mid-'70s fundamentally transformed how the federal government doled out dietary advice, spawning a multi-billion dollar market for low-fat foods.[80] Even today, food ideologies such as the eat-local movement are wedging themselves into a massive farm bill.[81] This is not a

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72. *See infra* Section II.A.

73. *See* ERBA & NOVAKOVIC, *supra* note 53, at 6 ("Once involved in regulation of the dairy industry, political inertia effectively eliminated any possibility for a quick separation of the federal government from further commitments to the [dairy] industry.").

74. SCRINIS, *supra* note 18, at 66; *see also* DUPUIS, *supra* note 4, at 38.

75. *See* SCRINIS, *supra* note 18, at 76–77 (describing the public's preference for reduced-fat milk over whole milk products during an era where fatty foods were considered especially unhealthy).

76. *Id.* at 12.

77. *See* U.S. Dep't of Agric., *Nutrients and Health Benefits*, CHOOSE MY PLATE, http://www.choosemyplate.gov/dairy-nutrients-health [https://perma.cc/DE9H-M25X] (last updated June 26, 2015) [hereinafter CHOOSE MY PLATE].

78. Milk is represented by a blue glass of "dairy," and MyPlate recommends at least three cups of low-fat dairy every day. *See id.*

79. *See, e.g.*, Baylen J. Linnekin, *The Food Safety Fallacy: More Regulation Doesn't Necessarily Make Food Safer*, 4 NE. U. L.J. 89, 94–95 (2012) (discussing the origins of potato bans in France).

80. *See* SCRINIS, *supra* note 18, at 75–77.

81. U.S. DEP'T OF AGRIC., 2014 FARM BILL HIGHLIGHTS 2 (March, 2014), http://www.usda.gov/documents/usda-2014-farm-bill-highlights.pdf [https://perma.cc/ET6Q-KWG6] (highlighting programs supporting local agriculture in the 2014 farm bill).

normative critique of food ideologies and their impact on food systems. Food ideologies can have both positive and negative effects. Milk has helped nourish generations of children, but it has also imposed hidden costs on society.[82] What milk's history shows is that food ideologies exist and they influence how government regulates food. Those seeking to understand food regulation must also understand the social movements and ideologies that influence production and consumption.

## II. MILK IN THE COURTS

Judges were not immune from the influences of milk boosterism, and many "caught some of the enthusiasm of health advocates."[83] Judges from state courts[84] up to the Supreme Court often co-opted language from milk movements when describing the importance of milk.[85] Milk was also central to many Supreme Court cases that changed the nature of the regulatory state.[86]

Milk's presence on the docket was a reflection of, rather than a contributor to, milk's image. Milk was highly regulated because of the dangers it posed to public health[87] and because it could not be produced without governmental assistance.[88] In these early cases, the courts did no more than ratify milk's image as the legislature saw it. But this early reluctance to judge the validity of milk regulation has faded somewhat in the face of a different ideological undercurrent—industrialization. Courts will not pick and choose the foods that deserve government support, but they have nonetheless influenced the ways in which those foods are produced.

### A. DEFERRING TO MILK'S IMAGE

Milk's perfection, and the ideology surrounding it, was a symbolic driver of progressive change to constitutional doctrine. Milk was central to several important cases during the New Deal Era. Ensuring access to milk was one of the most pressing issues of the time.[89]

Although milk played a starring role throughout the Court's transformation during the New Deal, it goes too far to say that, as one judge put it, "[a] milk flood washed away the foundations of what seemed . . . firmly entrenched consti-

82. *See infra* Part III.

83. Wright & Huck, *supra* note 46, at 58.

84. For example, one judge described milk as "the food of foods. The felicity of the table hinges on milk." *Id.* (citation omitted).

85. *See infra* notes 111–19 and accompanying text.

86. *See* Wright & Huck, *supra* note 46, at 60–61 ("Many of the most famous Supreme Court cases from the early 20th century dealing with health and economic regulation were, in fact, milk cases."). *See generally* Jim Chen, *The Potable Constitution*, 15 CONST. COMMENT. 1 (1998) (listing the many ways in which milk cases have shaped constitutional discourse).

87. Wright & Huck, *supra* note 46, at 61 ("[M]ilk safety regulation was both more important and more typical as a subject for regulation between 1880 and 1930.").

88. *See supra* Section I.B.

89. *See supra* Part I.

tutional doctrine."[90] Rather, these milk cases reflect the deferential approach judges adopted towards economic legislation at the end of the *Lochner* Era. The Court was no longer going to impose its own understanding of what government can or should do with regard to the public interest.

Regulating milk safety was always within governments' police powers—the capacity of the states to regulate health, safety, morals, and general welfare. Pre-New Deal cases such *Hebe Co. v. Shaw*,[91] *Fairmont Creamery Co. v. Minnesota*,[92] and *New State Ice Co. v. Liebmann*[93] stood for the proposition that milk could be regulated for purity or public health, but not for public use or economic purposes. In *Hebe*, the Court held that states could ban the sale of a variant of milk, filled milk,[94] even though it was clearly distinguishable from milk and was a safe and wholesome product.[95] Because the regulation was based on purity, it was inconsequential to the Court that the law was likely passed with dairy lobby interests in mind.[96]

Following *Hebe,* the Court limited the government's ability to regulate milk for the sole purpose of public health. For example, in *Fairmont Creamery*, the Court struck down a Minnesota law banning the arbitrage of milk products because it was an infringement on the right of freedom of contract.[97] The Court took an even stronger stance in *New State Ice*, rebuking the government's efforts to create favored status for ice or any other product the government deemed to be produced in the public interest.[98]

In *New State Ice*, Oklahoma passed a statute that restricted the sale and production of ice, based on a licensing regime that limited the number of licensees to those that "are sufficient to meet the public needs."[99] Oklahoma was trying to limit competition in the ice market because they determined this would ensure the adequate supply of ice, an "indispensable" commodity.[100] The Court held that this regulation, although in the public interest, exceeded the police powers of the state, despite the fact that "the community is dependent upon and is interested in having maintained" an adequate supply of ice.[101] In

90. Queensboro Farm Products v. Wickard, 137 F.2d 969, 975 (2d. Cir. 1943).

91. 248 U.S. 297 (1919).

92. 274 U.S. 1 (1927).

93. 285 U.S. 262 (1932).

94. Filled milk is a condensed milk product derived from skimmed milk with the milk fat replaced with vegetable or coconut oil. At the time, milk fat was far more valuable than coconut oil, thus producers could lower the cost of milk by using fat substitutes. *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 401 [hereinafter, Miller, *True Story*].

95. *Hebe*, 248 U.S. at 303; *see also id.* at 306 (Day, J., dissenting) ("It is not evaporated milk, and makes no pretense of being such. It is a food compound consisting in part of condensed skimmed milk. It is so labeled in unmistakable words in large print on the can containing it.").

96. *See* Miller, *True Story*, *supra* note 94, at 404–05 (describing threats filled milk products posed to the dairy industry).

97. 274 U.S. at 11.

98. 285 U.S. 262.

99. *Id.* at 272.

100. *Id.* at 277.

101. *Id.*

dicta, Justice Sutherland noted that "the dairyman . . . may be subjected to appropriate regulations in the interest of the public health," but that he could not be regulated for the sake of "public use."[102] In short, it was unconstitutional for legislatures to favor certain foods because the public deemed them to be necessary.

After *New State Ice*, commentators debated whether exigencies of the Depression Era could ever justify intervention into regulating milk beyond public health justifications.[103] In arguing that milk should be seen as an exception to *New State Ice*'s broad holding, one commentator noted that the "elemental necessity of an adequate milk supply to the public health places the dairyman in a category" distinct from the run of other industries immune from economic regulation.[104] Thus, economic milk regulation could be justified as regulation for public welfare if it preserved the flow of milk to the cities.[105] Another commentator argued that the milk industry had all of the attributes of a public utility, and thus the government should be able to regulate it as such.[106] These commentators were right to question the strength of Sutherland's dairy dicta. But they were wrong to presume that milk was an exceptional case that required its own jurisprudence. The Court instead chose to alter its own role when regulating economic actors.

The Court in *Nebbia v. New York* reversed course only two years after it decided *New State Ice*.[107] Although the Court distinguished *New State Ice*,[108] it flatly rejected the notion that food production could only be regulated for public health. It also rejected commentators' suggestions that milk could be regulated as a public utility.[109] Instead, the Court broadly held that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose," thus shifting the ideological fights over food to legislative and regulatory fora.[110]

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102. *Id.* at 273, 277.

103. *See supra* Part I.

104. *Legislative Regulation*, *supra* note 45, at 1266–67.

105. *See id.* at 1267; *see also* People v. Perretta, 171 N.E. 72, 74 (N.Y. 1930) ("When the Legislature takes notice of the dependency of the city on the [dairy] farm . . . it may protect the farmer from fraud arising from the peculiar conditions under which milk is produced and sold.").

106. *See generally* Henry S. Manley, *Constitutionality of Regulating Milk as a Public Utility*, 18 CORNELL L. REV. 410 (1933) (detailing the reasons why complete regulation of the milk industry would be constitutional).

107. 291 U.S. 502 (1934).

108. *Id.* at 542 ("The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice.").

109. *Id.* at 531 ("We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility.").

110. *Id.* at 537. The concerns surrounding milk production themselves were so expansive that they allowed the Court's holding to encompass many other scenarios:

> If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropri-

Even though the Court adopted a more deferential posture towards the legislature, it nonetheless adopted the language of milk advocates in justifying its decision. Symbolically, milk was more palatable than ice, which two years earlier failed to accomplish a similar feat.[111] The Justices split 5–4 in *Nebbia*, but the Court unanimously adopted milk's perfect image. The majority stated that, "milk is an essential item of the diet," which needed to be "available as demanded by consumers every day in the year."[112] The dissent agreed, finding that milk was of "great importance as human food," a "vital food product," and a "necessity of life."[113] The Court continued to adopt the hyperbolic language of milk advocates in cases such as *United States v. Rock Royal Cooperative*, where the Court upheld the government's power to mandate minimum milk prices—"[s]o essential is it for [the] health [of] the consumer."[114]

The Court in *United States v. Carolene Products Co.* took an even bolder step towards ratifying milk's image.[115] Facially, this case appears to be similar to *Hebe*,[116] but the Court in *Carolene Products* upheld a ban on filled milk based on the superiority of milk, rather than its purity.[117] The Court described milk as a "valuable food of almost universal use," alternatively describing the defendant's filled milk as an "inferior" product.[118] On this basis, it deferred to legislative findings that "the use of filled milk as a substitute for pure milk is generally injurious to health, and facilitates fraud on the public."[119]

In the following decade, a Second Circuit judge, when passing upon the validity of a milk marketing order, mused that:

> The pressure of milk is indeed powerful. A milk flood washed away the foundations of what seemed the firmly entrenched constitutional doctrine that the legislature could regulate only business "affected with a public interest"; and the lactic tides have eroded another constitutional doctrine which more recently appeared to have been strongly established (i.e., that only within very

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> ate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public.

*Id.* at 538.

111. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

112. *Nebbia*, 291 U.S. at 516–17.

113. *Id.* at 542–43, 557 (McReynolds, J., dissenting).

114. 307 U.S. 533, 570 (1939).

115. 304 U.S. 144 (1938).

116. *See* 248 U.S. 297, 307 (1919).

117. 304 U.S. at 149–51 & n.3.

118. *Id.* at 149–50.

119. *Id.* In the less famous footnote 3 of *Carolene Products*, the Court explained: "There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet." *Id.* at 150 n.3. This argument was largely unfounded and filled milk was potentially superior to other products, as it "undoubtedly improved the national health," and was less expensive than fresh milk and safer to handle prior to widely available refrigeration. *See* Miller, *True Story*, *supra* note 94, at 400, 418–19.

> narrow limits can Congress delegate "legislative" powers), showing that what oil and chickens could not do milk could.[120]

The decision in *Queensboro Farm Products*—although it ignores the far bigger impact of Legal Realists and the increasingly desperate situation the regulators of the era found themselves in—acknowledges that milk was a powerful symbol at that time. But milk did not change constitutional doctrine. The judicial philosophy during the New Deal was a noticeable departure from the *Lochner* Era's propensity to "substitute [its] social and economic beliefs for the judgment of legislative bodies."[121] These milk cases where decided by a Court that was supposedly unconcerned with the "wisdom, need, or appropriateness of the legislation."[122]

Despite the Court's more general approach, milk was still an important symbol, and the Court was doing more than deferring to the legislature—it was adopting milk's perfect image as its own view. The Justices opined that milk was a "necessity of life," a "valuable food of almost universal use,"[123] and a product "essential" for the health of consumers.[124] Even as they deferred to legislatures, the courts were well equipped to acknowledge hidden economic and social ideologies of the time.[125] But when it came to milk, they saw no need to adopt a similarly critical posture.

Even if the Court had recognized the role milk's image played in creating what would become massive government programs, it would likely not have altered the outcome. There was a decided change from *New State Ice* to cases like *Nebbia*, *Rock Royal*, and *Carolene Products*. The Court was no longer willing to analyze how important a commodity was to the public, as it had done in *New State Ice*—it would leave the decision of whether to favor or disfavor certain foods to the legislature.

### B. IMPOSING INDUSTRIALIZED MILK

The Court did not take this consistent approach when it came to the industrialization of milk production. The Court essentially ratified milk as a necessity, but milk still had not transformed into the product we drink today. The industrialization of milk took decades and required complicity from all three branches of government. Throughout this transformation, not one branch of government questioned the premise for milk's proliferation as an industrial food, and, in

120. Queensboro Farm Prods. v. Wickard, 137 F.2d 969, 974–75 (2d Cir. 1943).

121. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

122. *Id.*

123. *Carolene Prods.*, 304 U.S. at 150.

124. United States v. Rock Royal Coop., 307 U.S. 533, 570 (1939).

125. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or *out of harmony with a particular school of thought.*") (emphasis added).

most cases, they encouraged it. Congress, executive branch agencies, and state governments continued to pass legislation and regulations that encouraged production, and the Court continued to entertain milk cases addressing the commerce clause[126] and pricing regulations[127]—although much of the litigation took place at the district and circuit levels.[128]

During this time, the Court continued to defer to legislative directives on milk, helping to define the boundaries of governmental intervention. But more was going on. Courts were inconsistently deferential when it came to how milk should be produced, and their decisions began to favor steps that would make milk into the industrial product we know today—a uniform, pasteurized, and abundantly available product.

Courts showed a lack of sympathy to producers who could not compete under the newly passed regulations. Post-*Nebbia*, New York passed laws that disadvantaged small milk dealers, but the Court, deferring to legislative judgment, determined that "[t]he small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction."[129] Likewise, the Second Circuit rejected a challenge to an order from the Secretary of Agriculture that rescinded a price premium for milk from Guernsey cows, a unique breed of cattle.[130] The Guernsey farmers alleged that the higher butterfat, Vitamin A content, and costs associated with the production of its milk warranted a higher price.[131] The court disagreed and deferred to the findings of the Secretary, denying the breeders relief.[132] In short, the courts were not going to stop the consolidation and homogenization of the milk industry.

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126. *See, e.g.*, Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943) (holding that a state does not violate the Constitution when it sets a minimum price for milk to be sold to the federal government within a state); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (holding the Congress's authority over milk pricing may extend to milk destined for intrastate commerce activity); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (holding a state may not attempt to control the price of milk in another state).

127. *See, e.g.*, H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939) (examining the voting procedures under the Agricultural Adjustment Act); *see also* Zuber v. Allen, 396 U.S. 168 (1969) (striking down geographical price adjustments); Brannan v. Stark, 342 U.S. 451 (1952) (striking down regulatory deductions that favored cooperative farmers).

128. *See, e.g.*, Mktg. Assistance Program, Inc. v. Bergland, 562 F.2d 1305 (D.C. Cir. 1977) (finding pricing orders were not arbitrary and capricious nor did the agency's cooperation with the majority milk cooperative constitute unlawful ex parte communication).

129. Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 171 (1934).

130. New York State Guernsey Breeders' Coop. v. Wickard, 141 F.2d 805, 808–09 (2d Cir. 1944).

131. *Id.* at 809.

132. *Id.* at 810.

> "Plaintiff also suggests that the consequence of the order must necessarily be that farmers cannot make as satisfactory a return with Guernsey as with Holstein cows, and that hence in time the use of the Guernsey breed, for which plaintiff has built up so extensive a demand, will decline, if not cease. But this seems to us a natural and perhaps inevitable consequence of regulation of the market."

*Id.*

The courts also helped to increase milk production. In *Stauber v. Shalala*, the plaintiffs challenged an FDA approval of synthetic recombinant bovine somatotrophin (rBST) for commercial use in dairy cattle.[133] Cows injected with rBST produce significantly larger quantities of milk and consume fewer resources than untreated cows, increasing overall efficiency per cow.[134] Plaintiffs specifically questioned the agency's determination that rBST milk was unadulterated, despite increased levels of potentially harmful substances in milk from treated cows.[135] The court found that none of the evidence on the administrative record showed that rBST was a risk to human health, nor did rBST milk express any different "performance characteristics or organoleptic properties" to warrant labeling under the federal Food, Drug, and Cosmetic Act.[136] As far as the court and the FDA were concerned, "there is no significant difference between milk from cows treated with [rBST] and milk from untreated cows."[137]

In contrast to the deference paid to the FDA in *Stauber*, a district court adopted a more hands-on approach to raw milk. The plaintiff in *Public Citizen v. Heckler* challenged Department of Health and Human Services (DHHS) inaction on a rule banning the interstate sale of raw milk, as well as an exemption for "certified" raw milk in the FDA's "standard of identity" for milk.[138] The court admonished DHHS for ignoring the "overwhelming evidence of the risks associated with the consumption of raw milk, both certified and non-certified."[139] Citing "extremely rare circumstances," the court ordered DHHS to promulgate a rule banning the interstate sale of raw milk.[140]

Although *Public Citizen* bucks the deferential trend, it is consistent if viewed through the lens of industrialization. As far back as the early twentieth century, regulators pushed an agenda of pasteurization with an eye towards centralizing the industry.[141] The ways in which raw milk was produced likewise did not conform to the industrial model.[142] That raw milk straight from the udder is considered less pure than pasteurized milk from cows injected with synthetic

133. 895 F. Supp. 1178, 1190–92 (W.D. Wisc. 1995).

134. *Id.* at 1182; *see also* Judith L. Capper et al., *The Environmental Impact of Recombinant Bovine Somatotropin (rbST) Use in Dairy Production*, 105 PROCS. NAT'L ACAD. SCI. 9668, 9668 (2008).

135. *Stauber*, 895 F. Supp at 1184, 1192–93 (plaintiffs were specifically concerned with antibiotic residues, somatic cell counts, and insulin growth factor); *see also* 21 U.S.C. §§ 343(a)(1), 321(n) (2012).

136. *Stauber*, 895 F. Supp at 1191–93.

137. *Id.* at 1186; *see also* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d. Cir. 1996).

138. 653 F. Supp 1229, 1231 (D.D.C. 1986); *see also* 38 Fed. Reg. 27924 (Oct. 10, 1973) (stayed in 39 Fed. Reg. 42351 (Dec. 5, 1974)).

139. *Heckler*, 653 F.Supp at 1238. The court passed on ruling on the stay for procedural reasons, but suggested that it would have overturned the exemption if it had been before the court. *Id.* at 1238 n.9.

140. *Id.* at 1241–42.

141. *See supra* note 65 and accompanying text.

142. *See* VALENZE, *supra* note 26, at 286 ("Posed against corporate giants, raw milk, fresh and unpasteurized—the ultimate anti-corporate drink—has become the touchstone of a new phase of a movement to promote natural food.").

hormones shows just how malleable a concept purity is and how the courts *do* enter into ideological debates over milk.

This foray into ideological food fights is no more apparent than in *International Dairy Foods Association v. Amestoy*,[143] where the Second Circuit came full circle to a style of food *Lochnerism* represented in *New State Ice*.[144] Unsatisfied with the FDA's rBST determination, Vermont passed a law in 1994 requiring the labeling of milk from cows treated with rBST.[145] In response to the law, large dairy producing associations filed a lawsuit challenging the constitutionality of Vermont's disclosure requirement.[146] The court did not defer to the legislature's determination that consumers ought to know about what is in their food.[147] Instead, it struck down the law, relying on the FDA's determination that rBST milk was no different than non-rBST milk.[148] Although the court in *International Dairy Foods* used the First Amendment rather than the Fourteenth to strike the law down, it was nonetheless imposing its own ideals on state legislative determinations, as the Court in *New State Ice* had. Whereas in *New State Ice*, the Court determined that ice was not vital enough to the public interest to regulate, the Court in *International Dairy Foods* determined that the presence of rBST was not important enough to mandate disclosure.

This tilt towards industrialization shows that courts do sometimes judge the "wisdom, need, or appropriateness of [food] legislation."[149] The courts played a pivotal role in first ensuring the survival of the milk industry and then shaping it into the image that we are familiar with today. These cases show that fresh, pure, pasteurized milk was considered normatively superior,[150] and that this milk was so essential to the public interest that governments could, and should, encourage an inexpensive,[151] plentiful,[152] and safe supply.[153] Moreover, although the courts have taken a hands-off approach when it comes to favoring or disfavoring certain foods, when it came to milk at least, they have weighed in on how foods should be produced.

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143. 92 F.3d 67 (2d Cir. 1996).

144. *See supra* notes 99–102 and accompanying text.

145. VT. STAT. ANN. tit. 6, § 2762 (West 2015).

146. 92 F.3d at 70.

147. *See id.* at 76 (Leval, J., dissenting) ("Nowhere does the majority opinion discuss or even mention the evidence or findings regarding the people of Vermont's concerns about human health, cow health, biotechnology, and the survival of small dairy farms.").

148. *Id.* at 73 ("Vermont could not justify the statute on the basis of 'real' harms.").

149. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); *see also supra* notes 125–30 and accompanying text.

150. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

151. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 517 (1934).

152. *See, e.g.*, United States v. Rock Royal Coop., 307 U.S. 533, 570 (1939).

153. *See, e.g.*, Public Citizen v. Heckler, 653 F. Supp 1229, 1231 (D.D.C. 1966).

From a well-intentioned ideal in the mid-nineteenth century[154] to the self-serving lobbying of today,[155] milk's image as the perfect food has ossified into government-sponsored ideology. Both federal and state governments serve as public relations specialists for the dairy industry. The government directly markets dairy products through Dairy Management Inc. (DMI), the U.S. Department of Agriculture's (USDA) advertisement wing.[156] Milk is the official state beverage for twenty-one of the twenty-eight states that have bothered to select one.[157] The government also continues to control dairy markets through pricing controls,[158] surplus controls,[159] and donation programs.[160]

In short, milk is one of the Government's favorite foods. As the next part will show, when government adopts a perfect way of eating, the results can be both beneficial and harmful.

## III. PERFECT MILK, IMPERFECT REGULATION

Whether a product of ideology or legislative inertia, milk advocates, the dairy industry, and the government continue to tout the nutritional benefits of milk. Today, the Dietary Guidelines for Americans recommends that all healthy adults consume at least three cups of low-fat or non-fat milk daily.[161] This Note has argued that ideology played a significant role in creating the milk system today.[162] This Part explores the consequences of governments co-opting milk's perfection.

In short, ideologies surrounding food can be powerful catalysts for change that potentially cause more problems than they solve. Gyorgy Scrinis has written about how nutritional ideologies, what he coins "nutritionism," can have harmful impacts on society.[163] Milk both preceded and embodied nutritionism—an ideology "characterized by a reductive *focus* on the nutrient composition of foods as the means for understanding their healthfulness, as well as by a

154. *See supra* Section I.A.

155. The dairy industry has a powerful presence on Capitol Hill and it is unlikely that any significant legislation adverse to its interests could be passed. *See, e.g.*, Alfred A. Gallegos, *To Guarantee or to Protect? Fifty Years of Dairy Subsidies*, 1 SAN JOAQUIN AGRIC. L. REV. 101, 105 (1991).

156. DAIRY MANAGEMENT INC., http://www.dairy.org/about-dmi [https://perma.cc/PUBS8-J88E] (last visited Dec. 18, 2014).

157. Ryan Valentin, *Milk and Other Intoxicating Choices: Official State Symbol Adoption*, 41 N. KY. L. REV. 1, 18 (2014).

158. *See* ERBA & NOVAKOVIC, *supra* note 53, at 14. For a history and explanation of federal milk marketing orders, see generally Osler, *supra* note 24.

159. *See* ERBA & NOVAKOVIC, *supra* note 53, at 10 n.8 ("The CCC purchasing mechanism indirectly establishes a price floor for milk used for manufacturing dairy products which, in turn, indirectly supports the price for all milk.").

160. Margin Protection Program for Dairy and Dairy Product Donation Program, 7 C.F.R. § 1430 (2014); *see also* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., 2014 FARM BILL FACT SHEET: DAIRY PRODUCT DONATION PROGRAM (2014).

161. *See* 2010 DIETARY GUIDELINES, *supra* note 21, at 38.

162. *See supra* Part I.

163. *See generally* SCRINIS, *supra* note 18.

reductive *interpretation* of the role of these nutrients in bodily health."[164] Nutritionism has "informed dietary advice, food labeling regulations, food engineering and marketing practices, and the public understanding of food."[165] The danger of nutritionism, according to Scrinis, is that it "conceals or overrides concerns with the production and processing quality of a food and its ingredients."[166]

The same is true when government privileges certain foods: it does so with the stated intention of conferring benefits in the public interest, but powerful ideologies (or the remnants of co-opted ideologies) can blind governments from perceiving the negative consequences of their decisions. Furthermore, privileging certain foods necessarily disadvantages other foods, thus foreclosing the possibility that those foods can confer those benefits more efficiently or with fewer negative consequences.

In the case of milk, one of government's stated intentions for supporting fresh milk has been to satisfy the nutritional needs of the public.[167] Milk is literally a nutritious product as it does provide an abundance of calories, protein, and vitamins per serving. But nutrition is not the public's sole interest. Public health, economic and social welfare, and environmental quality are among other interests that milk production implicates.[168] When these interests are added into the mix, it is not clear whether the proliferation of milk has served the public interest at large. By privileging milk, government has shut out the possibility that other sources can meet these needs more safely, efficiently, and without negative effects on society.

This is not to say that the milk system we have today is inferior to potential alternatives. The concept of public interest is itself contingent on a complex set of factors. But ideology can skew regulatory understanding of the public interest. This Part addresses three ways in which milk's perfection has encouraged regulatory imbalance. First, regulators have failed to acknowledge and account for the ideologies that have contributed to the current milk system, inadvertently obscuring real harms to the public interest they seek to serve. Second, ideology can cause government to align its own interests with that of the industry it is tasked to regulate, further obscuring what is best for the public. Finally, when ideology becomes embedded in the regulatory system, it may cause regulators to lose track of the original goals they sought to achieve.

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164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 150 n.3 (1938) ("There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet.").

168. *See infra* Section III.A.

### A. OBSCURING THE PUBLIC INTEREST

When the government gets into the business of privileging foods, it can become overly optimistic about the benefits of those foods it favors, while blinding itself to the burdens that the food's production and distribution may place on society. Regulators continue to zealously market milk,[169] but this zealotry obscures the threats milk poses to public health, the environment, minority groups, and animal welfare, among other issues.

This regulatory blindness belies the fact that milk was *never* the perfect food. At the dawn of its popularity it killed tens of thousands, and throughout its history it has required massive governmental intervention to succeed as a daily staple.[170] It certainly is nutritious in the technical sense, but it does not "contain[] all the elements necessary for life,"[171] and some scientists have questioned if milk "[accomplishes] *any* public health goals."[172] As the USDA continues to drive towards a cheap and plentiful supply,[173] it ignores a wealth of problems associated with copious milk production.

First, milk's contributions to public health are not always positive, especially now that the United States' food concerns have shifted from malnutrition to diet-related health issues.[174] The current science is conflicted as to milk's health benefits, if any.[175] At best, milk made an "unmistakable" contribution to human health during the twentieth century, but its *unique* contribution to public health has been described as marginal at best because the American diet has rarely lacked the nutrients that milk provides.[176]

At worst, milk is contributing to health decline among adults and children. A recent study attacks one of the pillars of milk consumption—that milk's calcium builds strong bones[177]—linking fluid milk consumption with higher rates of

169. NESTLE, *supra* note 13, at 79.

170. *See supra* Section I.B.

171. DUPUIS, *supra* note 4, at 34. For the lactose intolerant, milk has *more* than what is essential and is in fact detrimental.

172. NESTLE, *supra* note 13, at 79.

173. The Secretary of Agriculture's responsibilities include "reducing the price spread between the producer and the consumer," 7 U.S.C. § 1622(b) (2012), and "foster[ing] and assist[ing] in the development of new or expanded markets . . . and in the moving of larger quantities of agricultural products through the private marketing system to consumers in the United States and abroad." *Id.* § 1622(e).

174. *See, e.g.*, D.J. Wagstaff, *Public Health and Food Safety: A Historical Association*, 101 PUB. HEALTH REP. 624, 624 (1986) (summarizing that food safety regulation in the early twentieth century saved up to 1.8 million lives from nutritional deficiencies, infectious diseases, and food poisoning, but has largely plateaued when it comes to diet-based diseases); *see also* Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REP. 12, 12 (2000) (summarizing that diet-related diseases are a major public health concern into the twenty-first century).

175. NESTLE, *supra* note 13, at 79.

176. DUPUIS, *supra* note 4, at 115–17; *see also* NESTLE, *supra* note 13, at 79.

177. *See* CHOOSE MY PLATE, *supra* note 77.

mortality and, most surprisingly, an increased risk for bone fractures.[178] More commonly, milk has been linked to a variety of diseases,[179] and milk surpluses have contributed to increased caloric consumption in the American diet. Although per capita fresh milk consumption has declined by 27% since 1975, overall dairy consumption has increased by 20%, with cheese consumption almost doubling.[180] This is the direct result of the USDA's efforts to find a use for its surplus milk. Through Dairy Management, the USDA has worked with food companies to increase cheese consumption, which is one of the major reasons why the current American diet contains too much fat.[181]

Second, milk production creates large-scale environmental threats as dairy farming produces large amounts of methane and increases nutrient density in waterways that leads to harmful algae blooms.[182] Despite these threats, some states have seen environmental regulations on dairy production relaxed.[183] Furthermore, even when the courts do step in, agency efforts to correct these environmental harms largely fall short.[184] Several environmental studies disagree on how best to mitigate the impacts of milk production,[185] but few contemplate decreased milk production as an alternative.

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178. *See, e.g.*, Karl Michaëlsson et al., *Milk Intake and Risk of Mortality and Fractures in Women and Men: Cohort Studies*, 349 BRITISH MED. J. 1, 1 (Oct. 27, 2014), http://www.bmj.com/content/349/bmj.g6015 [https://perma.cc/NND3-MK9E]. These scientists speculate that a component of fresh fluid milk—which is not present in other dairy products such as yogurt or cheese—may be the cause of this surprising result. *Id.* at 2.

179. *See* Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1259–60 (2013) ("[O]ther studies establish a strong link between dairy consumption, particularly of saturated fats found in cheese and high-fat milk, and serious medical conditions, including increased risks of heart disease, prostate cancer, pancreatic cancer, breast cancer, ovarian cancer, diabetes, and multiple sclerosis." (citations omitted)).

180. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., DAIRY PRODUCTS: PER CAPITA CONSUMPTION, UNITED STATES, 1975-2014, http://www.ers.usda.gov/data-products/dairy-data.aspx [https://perma.cc/7Y2G-GLPZ] (last updated Dec. 28, 2015).

181. Michael Moss, *While Warning About Fat, U.S. Pushes Cheese Sales*, N.Y. TIMES (Nov. 6, 2010), http://www.nytimes.com/2010/11/07/us/07fat.html?_r=1.

182. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 9 (2008) [hereinafter CONCENTRATED ANIMAL FEEDING]. For further discussion on how milk and other agricultural commodities are privileged to create environmental harms, see generally J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

183. In 2012, for example, New York State decided to increase the cap on Concentrated Animal Feeding Operations (CAFO) from 200 to 300 milking cows. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Hosts First New York State Yogurt Summit (Aug. 15, 2012), https://www.governor.ny.gov/news/governor-cuomo-hosts-first-new-york-state-yogurt-summi [https://perma.cc/Z884-HQHM]; *see also* 35 N.Y. Reg. 24–28 (May 8, 2013); Verified Petition & Complaint at 3–6, Riverkeeper Inc. v. Martens, No. 4166-13 (N.Y. Sup. Ct. July 26, 2013).

184. *See, e.g.*, CONCENTRATED ANIMAL FEEDING, *supra* note 182, at 43–47. For an in-depth analysis of the EPA's CAFO rules, see generally Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697 (2004).

185. *See* J. L. Capper, R. A. Cady & D. E. Bauman, *The Environmental Impact of Dairy Production: 1944 Compared with 2007*, 87 J. ANIMAL SCI. 2160 (2009) (concluding that rBST use will decrease the environmental impact of dairying).

Third, the marketing of milk has had harmful effects on discrete minority groups. Milk drinking is a white-centric practice.[186] As Andrea Freeman argues, "[t]he USDA's efforts to reduce the high-fat milk surplus by selling it to fast food consumers impose health costs on Americans generally, but disproportionately harm low-income African Americans and Latinos who live in urban centers dominated by fast food restaurants."[187] "Food Oppression"—where market forces, government policy, and social, political, and economic factors combine to adversely affect the health and well-being of traditionally subordinated groups[188]—has had both historic and modern impacts on the status and well-being of minority groups in the United States.[189]

Fourth, dairy cattle welfare has declined considerably. Despite the United States' love for the dairy cow,[190] the species has suffered from increased pressure to produce more milk. Most dairy cattle that have been bred for high production can no longer reproduce on their own and they suffer from increased health problems and declining longevity.[191] For example, cows treated with rBST tend to suffer from higher levels of udder mastitis.[192] Activists argue that many cows are not happy, but rather suffer from inhumane conditions.[193]

The list is not exhaustive. The small dairy farmer, the original beneficiary of dairy regulations,[194] has suffered considerably as a result of government-driven industrialization.[195] Even the taste of milk has

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186. Freeman, *supra* note 179, at 1268 ("Early milk promoters associated the whiteness of milk with the putative purity of racial whiteness."). "Even the phrase 'lactose intolerance' reflects a cultural bias," as most non-whites lack the enzyme required to drink milk, suggesting that those who can drink milk are somehow superior. *Id.* at 1262.

187. *Id.* at 1252.

188. Andrea Freeman, Comment, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2245–47 (2007).

189. Freeman, *supra* note 179, at 1268; *see also* DUPUIS, *supra* note 4, at 117 ("Because milk was a food of northern white Europeans, the link was soon made between this food and white social dominance.").

190. *See* VALENZE, *supra* note 26, at 1–3.

191. *See generally* Pascal A. Oltenacu & Bo Algers, *Selection for Increased Production and the Welfare of Dairy Cows: Are New Breeding Goals Needed?*, 34 AMBIO 311 (2005) (discussing the welfare declines experienced by modern dairy cattle as a result of genetic breeding designed to increase productivity).

192. Stauber v. Shalala, 895 F. Supp. 1178, 1183 (W.D. Wis. 1995) ("Additionally, use of Posilac increases the risk of clinical and subclinical mastitis, a bacterial infection of the udder.").

193. *See* Donna Mo, Comment, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1321 (2005).

194. *See supra* Section I.B.

195. *See, e.g.*, John A. Cross, *Restructuring America's Dairy Farms*, 96 GEOGRAPHICAL REV. 1 (2006) (comparing the rapid decline of small dairy farms with the rise of farms with more than 500 cows and the latter dominating the market); Barry Estabrook, *A Tale of Two Dairies*, 10 GASTRONOMICA 48 (2010) (describing how pricing cycles have become more detrimental to farmers in the modern era); Charles Geisler & Thomas Lyson, *The Cumulative Impact of Dairy Industry Restructuring*, 41 BIOSCIENCE 560, 565 (1991) ("As agriculture in general evolves toward an industrialized system of hired managers and nonresident owners, the likelihood increases that economic vitality and social cohesion in rural communities will be lost . . . . There is little reason to believe these patterns of weakened local power and autonomy will bypass a restructured dairy industry.").

declined.[196]

The FDA and USDA have only recently considered any of these interests. In its controversial sustainability recommendations, the Dietary Guidelines Committee passingly suggested that milk consumption may lead to increased greenhouse gas emissions.[197] However, the Secretary of Agriculture has disavowed these sustainability recommendations,[198] essentially pursuing the status quo on dairy regulation.

### B. MILK AND GOVERNMENT POWER

When industry and government interests intertwine, state power follows. When the government took on the responsibility of providing plentiful and safe milk to the public, it never considered whether plentiful production was actually in the public's best interests—it merely assumed this fact.[199] This essentially provided milk with lobbies both inside and outside of government without any counterweight to keep industry self-interest in check.[200] The following are a few examples of how milk has wielded unchecked government power.

First, dairy industry actors have significant influence over how milk is priced.[201] This complex pricing system, however, excludes consumers from challenging the Department of Agriculture's milk-pricing decisions. In *Block v. Community Nutrition Institute*, consumers and a non-profit organization sought judicial review of the Secretary's milk pricing order.[202] The Court held that consumers were excluded from challenging these milk orders under the Agricultural Adjustment Act,[203] even though the orders were meant to serve consumer

196. *See* New York State Guernsey Breeders' Coop. v. Wickard, 141 F.2d 805, 810 (2d Cir. 1944) (holding that milk marketing orders only need consider objective components such as fat and protein in determining the value to be paid for milk and that any of its organoleptic properties need not be considered). As a result of this decision, Guernsey milk, prized for its golden color and rich flavor, has become a rarity in a sea of mass-produced Holstein milk. *See* SIDNEY L. SPAHR & GEORGE E. OPPERMAN, THE DAIRY COW TODAY: U.S. TRENDS, BREEDING, AND PROGRESS SINCE 1980 47 (noting the decline of the Guernsey breed).

197. *See* DIETARY GUIDELINES ADVISORY COMM., U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Food Sustainability and Safety*, *in* SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE 16 (2015) (acknowledging a study that "suggest[s] that increases in dairy to follow 2010 DGA recommendations contribute significantly to increased [greenhouse gas] emissions and counters the modeled benefits of decreased meat consumption"); Tenille Tracy, *Vilsack: Dietary Guidelines Are About Health, Not Environment*, WALL ST. J. (Mar. 11, 2015) ("A panel of nutrition experts generated controversy last month when it pressed the federal government to consider the environment when issuing new dietary guidelines later this year.").

198. *See id.* ("Agriculture Secretary Tom Vilsack suggested that . . . so-called sustainability issues fall outside the scope of the dietary guidelines.").

199. *See supra* Section I.B.

200. *See* Jeff Herman, *Saving U.S. Dietary Advice from Conflicts of Interest*, 65 FOOD & DRUG L.J. 285, 285–86 (2010).

201. *See generally* ERBA & NOVAKOVIC, *supra* note 53 (discussing the history and development of the milk pricing system).

202. 467 U.S. 340, 341 (1984).

203. *Id.*

interests.[204]

Agencies can also tax producers and use that money to speak as the government,[205] occasionally without regard to the laws that a sister-agency seeks to enforce. For example, DMI, the dairy marketing wing of the USDA, participated in a milk marketing campaign that claimed milk helps people lose weight.[206] Although the parties eventually withdrew their health claims after a public-interest group challenge,[207] it is troubling that agencies cannot police themselves when it comes to protecting consumers.

Government power can also be wielded maliciously against the public interest. This happened when President Nixon entered into a quid pro quo agreement with members of the dairy industry. In 1972, representatives of American Milk Producers, Inc. (AMPI) lobbied President Nixon to increase dairy pricing while a potential $2 million campaign contribution loomed in the background.[208] Shortly thereafter, the administration increased milk prices, AMPI transferred their donation to Nixon's account, and the price increase cost taxpayers $100 million.[209]

### C. BUREAUCRATIC TROUBLES

Finally, institutional inertia driven food ideology can lead to two problems: stale science and counter-productivity. Regulators may endorse consumption of foods based on trending, but potentially misguided, scientific studies of the time. Once a preference has been enacted into law—it can take decades to change that preference, if the change occurs at all. As our understanding of nutritional science has changed, the now entrenched dairy system, which was once seen as a "necessity of life,"[210] has prevented resources from being reallocated efficiently to respond to our scientific understanding. Milk is a good source of protein and calcium,[211] but recent studies show its elevated status over other protein and calcium-rich sources, such as beans or spinach, is unjustified. Yet, there are a number of complex forces at work that prevent any change in how the government favors the dairy industry. Since milk is expensive both from the point of view of government expenditures and societal costs, it means that milk's continued favored-status potentially prevents the efficient allocation of scarce resources.

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204. *Id.* at 347 ("To be sure, the general purpose sections of the Act allude to general consumer interests."); *see also* 7 U.S.C. § 602(2), (4) (2012).

205. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559–60 (2005) ("[C]ompelled funding of government speech does not alone raise First Amendment concerns.").

206. *See* Petition to Prevent False and Misleading Advertising from the Physicians Comm. for Responsible Med. to the FTC (Apr. 21, 2005).

207. Letter from FTC to Physicians Committee for Responsible Medicine (May 3, 2007).

208. RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 308–09 (2001).

209. *Id.* at 309–10.

210. Nebbia v. New York, 291 U.S. 502, 542–43, 557 (1934) (McReynolds, J., dissenting).

211. NESTLE, *supra* note 13, at 79.

A parallel problem occurs when one hand of the bureaucracy is acting in a way that is counterproductive to the other. Both the USDA's nutrition and marketing services appear to ignore one another when it comes to the USDA's overall mission. The Dietary Guidelines for Americans, created in conjunction with the Department of Health and Human Services, recommends daily consumption of low- or non-fat milk and directs consumers to abstain from eating high-fat dairy foods, such as cheese.[212] Yet, "nearly half of the milk supply goes to make about nine billion pounds of cheese and 1.5 billion gallons of frozen desserts—two-thirds of which is ice cream."[213] This is in part due to the actions of DMI, which vigorously promotes cheese use among restaurants and grocery store products.[214]

While a full-scale solution is beyond the scope of this Note, others have suggested ways in which our food regulators can become more mindful of the negative effects of their regulatory decisions. For example, one scholar has suggested adopting a "health in all policies" model that would require food regulators to consider how their decisions impact population health.[215] Others have suggested tying subsidies to specific policy goals.[216] Programs like these will require political will to institute, but they can have a profound effect on ensuring that policymakers consider more than the immediate needs of consumers and industry, or trending science, when deciding to favor particular foods.

## CONCLUSION

The food movements of today are not very different from those at the turn of the nineteenth century, and their vision for a food system is likewise bound by "power and ideology."[217] The case study of milk shows that food-based ideologies can be powerful forces of change in the way government addresses our food system.

Just like at the turn of the nineteenth century, we live in a time where there are as many perfect ways of eating as there are foods. Advocates supporting a "Paleolithic diet," "gluten-free" diet, or "raw food" diet swear by the benefits,

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212. *See* 2010 DIETARY GUIDELINES, *supra* note 21, at 38 (recommending "fat-free or low-fat milk and milk products" over cheese because they "provide[] the same nutrients with less solid fat and thus fewer calories . . . [and] can increase intake of potassium, vitamin A, and vitamin D and decrease intake of sodium, cholesterol, and saturated fatty acids.").

213. MICHELE SIMON, WHITEWASHED: HOW INDUSTRY AND GOVERNMENT PROMOTE DAIRY JUNK FOODS 4 (2014), http://www.eatdrinkpolitics.com/wp-content/uploads/SimonWhitewashedDairyReport.pdf [https://perma.cc/TQ2G-QU4T].

214. *See* Moss, *supra* note 181.

215. *See* Lindsay F. Wiley, *The U.S. Department of Agriculture as a Public Health Agency? A "Health in All Policies" Case Study*, 9 J. FOOD L. & POL'Y 621, 63 (2013).

216. Linda Breggin & D. Bruce Myers Jr., *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVTL. L. REV. 487 (2013) (suggesting that the government tie agricultural subsidies to environmental policy goals).

217. *See* DUPUIS, *supra* note 4, at 43.

just as Robert Hartley praised milk as nature's most perfect food. The news is rife with studies that extoll the benefits of individual foods such as chocolate, butter, acai, quinoa, or kale. The temptation is there to define perfect ways of eating that could lead, as was the case of milk, to imperfect results.

Organic food is a more recent example. It originated as a countercultural movement against "industrial farms that confine animals, regularly feed them antibiotics, and use large amounts of poisonous artificial pesticides and chemical fertilizers on crops."[218] The organic movement has done a great job of raising awareness on public health issues involved with pesticide use and other conventional methods of food production.[219] Yet organic food is now itself industrialized, with problems that parallel many of the issues milk faced. For example, the organic label, now similarly co-opted by industry, has moved towards weaker standards that allow for industrialized food production.[220] And although consumers of organic food consider themselves to be socially conscious, some have criticized the movement for ignoring poor conditions faced by migrant laborers working in organic fields.[221]

In the case of milk, nineteenth century ideologies supporting milk consumption continue to have an impact on our food systems to this day. There is nothing inherently wrong with a food system imbued with ideology; that is part of what makes our food system so diverse and interesting. It is only when these ideologies become entrenched and hide their pernicious effects that they become problematic. As Professor DuPuis puts it, "The problem with milk is not that it is bad for you, but that it has a whole institutional apparatus that has made it *the* celebrated food, when many other foods and many ways of eating are just as deserving."[222]

It may not be possible to completely dismantle these institutions, not without imposing other perfect ways of eating. Even imposing "science" on the problem imposes its own ideological baggage.[223] Thus, regulators will continue to adopt hidden ideologies, and courts—even when they act deferentially—will still be

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218. Blatt, *supra* note 9, at 65.

219. *See* David C. Holzman, *Organic Food Conclusions Don't Tell the Whole Story*, 120 ENVIR. HEALTH PERSPECTIVES A458 (2012), http://www.nytimes.com/roomfordebate/2012/09/10/is-organic-food-worth-the-expense [https://perma.cc/58ZP-W294] (discussing public health benefits of reduced pesticide use in organic farming). For further debate on the benefits of organic farming, see *Is Organic Farming Worth the Expense?*, N.Y. TIMES (Sept. 10, 2012), http://www.nytimes.com/roomfordebate/2012/09/10/is-organic-food-worth-the-expense [https://perma.cc/G8Q4-ZKHM].

220. *See, e.g.*, Julie Guthman, AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA 2–3 (2014) (arguing that as organic food has grown and industrialized, it "has replicated what it set out to oppose").

221. *See id.* at 51–53 (arguing that labor practices on organic farms are similar to their industrial counterparts).

222. DUPUIS, *supra* note 4, at 217.

223. SCRINIS, *supra* note 18, at 11 ("There can be no purely objective, paradigm-free—or for that matter, ideology-free—scientific knowledge and practices, since all scientific knowledge is necessarily an interpretation of the 'facts' or the evidence.").

importing their own notions of right and wrong when they deal with milk or other foods.

As for a solution, transparency will be no magic bullet, but it can go a long way towards mitigating the pernicious effects of food ideologies. Transparency has always been one of the goals in food-systems regulation.[224] If legislatures, regulators, and the public question our food systems, rather than accept them uncritically, then we may choose to change them. Questions such as "Why do we drink milk? Are there other ways to get nutrition? Who is benefiting from this milk system?" may be steps in the right direction as long as people are willing to ask those questions, and we are willing to listen.

This is especially true for today's food movements. As food becomes increasingly political, we must be wary of trying to define perfect ways of eating, understanding that food zealotry can cause more problems than it solves.

224. *See, e.g.*, Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11 (2015) (arguing that although transparency is the goal of U.S. food law, laws and regulators who enforce them often fall short of achieving this goal).

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