Deregulation, Distrust, and Democracy: State and Local Action to Ensure Equitable Access to Healthy, Sustainably Produced Food

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Environmental, public health, alternative food, and food justice advocates are working together to achieve incremental agricultural subsidy and nutrition assistance reforms that increase access to fresh fruits and vegetables. When it comes to targeting food and beverage products for increased regulation and decreased consumption, however, the priorities of various food reform movements diverge. This article argues that foundational legal issues, including preemption of state and local authority to protect the public’s health and welfare, increasing First Amendment protection for commercial speech, and eroding judicial deference to legislative policy judgments, present a more promising avenue for collaboration across movements than discrete food reform priorities around issues like sugary drinks, genetic modification, or organics. Using the Vermont Genetically Modified Organism (GMO) Labeling Act litigation, the Kauai GMO Cultivation Ordinance litigation, the New York City Sugary Drinks Portion Rule litigation, and the Cleveland Trans Fat Ban litigation as case studies, I discuss the foundational legal challenges faced by diverse food reformers, even when their discrete reform priorities diverge. I also explore the broader implications of cooperation among groups that respond differently to the “irrationalities” (from the public health perspective) or “values” (from the environmental and alternative food perspective) that permeate public risk perception for democratic governance in the face of scientific uncertainty.

I. INTRODUCTION

Our food system—the food that’s available in stores, restaurants, schools, workplaces, and our homes; how it is produced and sold; how it is consumed and by whom—has crucial implications for our health and our environment. Converging food

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2 See generally BRUCE W. MARION, THE ORGANIZATION AND PERFORMANCE OF THE U.S. FOOD SYSTEM (1986) (discussing the impact that industrialization and internationalization of the food system in the United States has had on production and distribution of food).
reform movements are fostering coalitions among environmental, public health, alternative food, and food justice advocates who share an interest in equitable access to healthy, sustainably-produced food. Working together, these groups are increasing access to fresh fruits and vegetables through incremental agricultural subsidy and nutrition assistance reforms.  

When it comes to the food and beverage products targeted for increased regulation and decreased consumption, however, the priorities of the various food reform movements diverge. While public health advocates are seeking to reduce overconsumption of sugar, salt, and unhealthy fats, environmental and “alternative food” advocates are seeking to reduce our reliance on genetically modified (GM, otherwise known as genetically engineered) foods and our exposure to pesticides, herbicides, and chemically-processed ingredients. As one Internet meme puts it, “There are too many people counting calories, and not enough people counting chemicals.” Many public health advocates view measures that target “unnatural” production methods (involving genetic modification and synthetic herbicides and pesticides) as a distraction from more pressing concerns. Some food justice and alternative food advocates are seeking to deregulate unpasteurized dairy products and small-scale food production, adopting a libertarian perspective counter to the proactive government role that public health groups advocate. Moreover, the fetishization of “naturalness” and distrust of the mainstream scientific community evident among many alternative food advocates is the same wellspring from which opposition to public health priorities like vaccination, water fluoridation, and sunscreen use also flows.  

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1 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 61 (2013) (describing: (1) the emergence of coalitions among public health and environmental advocates, as well as among fruit and vegetable growers, during 2008 and 2012 Farm Bill negotiations; (2) the resulting gains for specialty crop subsidies; and (3) the significant, but ultimately inadequate, reform of commodity crop subsidies); Dan Charles, How ‘Double Bucks’ for Food Stamps Conquered Cape Cod, NPR (Nov. 10, 2014), http://www.npr.org/blogs/thesalt/2014/11/10/361803607/how-double-bucks-for-food-stamps-conquered-cape-cod (describing the emergence of local health departments, agricultural interests, and anti-poverty groups on interventions to increase the value of Supplemental Nutrition Assistance Program benefits when used to buy fruits and vegetables from local growers).  

2 Rachel Slocum, Whiteness, Space and Alternative Food Practice, 38 GEO FORUM 520, 522 (2007) ("Alternative food practices . . . advocate more ecologically sound and socially just farming methods, food marketing and distribution, and healthier food options across the US.").  

3 Christy Bridge, Another Weekend . . ., in the Gym #23, BLOGGER (Aug. 18, 2014 8:50AM), http://www.dinnerstories.co.uk/2014/08/another-weekend-in-gym-23.html (see image 1 within the blog post); see also Dotty Hagmier, Should We Be Counting Calories or Chemicals? MOMS IN CHARGE BLOG (Mar. 1, 2014), http://momsincharge.org/blog/should-we-be-counting-calories-or-chemicals (explaining that focusing on calorie counting is misleading, as chemical ingredients are a bigger problem for a healthy diet); Kayce Johnson, Stop Counting Calories and Start Counting Chemicals, ORGANIC FITNESS FACTORY (Mar. 24, 2014), http://www.organicfitnessfactory.com/#STOP-COUNTING-CALORIES-AND-START-COUNTING-CHEMICALS-6c2e9f798e8f68e9C9A469-0E95-782D-92E2D9E737 (suggesting that if there are ingredients that “your grandmother would not have used in her kitchen” in a given food product, then the body will not be able to break the substance down); Christina Sarich, Why You Should Stop Counting Calories and Start Counting Chemicals, NAT.SO’Y (July 16, 2014), http://naturalsociety.com/stop-counting-calories-start-counting-chemicals/ (arguing that chemicals such as heavy metals, BPA, aspartame, and phthalates, among others, turn the endocrine system into “a mosh pit at a car crash competition”).  

4 See Bridge, supra note 4; Hagmier, supra note 4; Johnson supra note 4; Sarich, supra note 4.  


This article argues that foundational legal issues, including preemption of state and local authority to protect the public’s health and welfare, increasing First Amendment protection for commercial speech, and eroding judicial deference to legislative policy judgments, present a more promising avenue for collaboration among food reform advocates than discrete priorities around issues like sugary drinks, genetic modification, or organics. In Part II, I describe four recent cases in which industry groups have challenged the authority of state and local governments to regulate the food system: Grocery Manufacturers Ass’n v. Sorrell (challenging Vermont’s disclosure mandate and advertising restrictions for packaged GM foods); Syngenta Seeds, Inc. v. Kauai (striking down Kauai’s reporting requirement for GM crop cultivation and buffer zone regulation for high-dose pesticide application); New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene (striking down New York City’s portion cap rule for sugary drinks sold in food service establishments); and City of Cleveland v. State (striking down a state law broadly preempting local government authority to ban trans fats and regulate food service establishments in other ways). In Part III, I draw on these case studies to discuss the foundational legal challenges faced by diverse food reformers, even when their discrete reform priorities diverge. I urge a collaborative response to the deregulatory toolkit being used by the food, beverage, and agriculture industries. I conclude in Part IV by exploring the broader implications of cooperation among groups with divergent perspectives on the mainstream scientific community for notions of democratic governance. Environmental and public health experts respond differently to the “irrationalities” (from the public health perspective) or “values” (from the environmental perspective) that permeate public risk perception. I suggest that each of these perspectives adds to our understanding of democratic governance in the face of scientific uncertainty and that greater discourse between the two could have benefits for both.

II. FOUR RECENT CASES

Our food system is hotly contested territory. In the midst of widespread concern about obesity-related disease and toxic exposures, manufacturers have flooded the market with products touted as “natural,” “organic,” and “GMO-free,” including many that are high in sugar, salt, and fat. Consumers are demanding more information about the food and beverage products they buy and the ways in which they are produced. At a time when federal regulation to protect the public’s health, consumers, and the environment has been stymied by legislative inaction and constraints on agency rulemaking, state and local governments have taken on a high-profile role in “regulating to the detriment of politically powerful industries and their allies for the conspiracy-theories (explaining that there are “common medical conspiracy theories,” revolving around vaccination, water fluoridation, and sunscreen use, among others).

7 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene (N.Y. Statewide Coal. III), 16 N.E.3d 538, 541 (N.Y. 2014).
9 See infra Part IV.
10 See infra note 22 and accompanying text (analyzing the polling results of the American public’s opinion on GM foods).
purpose of conferring diffuse benefits on the public.”

City, county, and state governments have become crucial innovators, particularly in areas such as tobacco control, obesity prevention, Genetically Modified Organisms (GMOs), and pesticide use. Industry groups are responding with increasingly sophisticated litigation and legislation strategies, using the First Amendment, Due Process, Equal Protection, federalism, and separation of powers constraints to challenge and preempt food system regulations. In this Part, I introduce four recent cases that illustrate the complexity of these issues.

A. VERMONT’S GMO DISCLOSURE MANDATE AND ADVERTISING RESTRICTIONS: GROCERY MANUFACTURERS ASSOCIATION V. SORRELL

A little more than forty years after the discovery of recombinant DNA and twenty years after the U.S. Food and Drug Association (FDA) first approved an additive used to produce GM foods, GM crops and foods are now ubiquitous. About 70-80% of foods purchased for home consumption and sold in restaurants contain at least one GM ingredient. About half of U.S. cropland was seeded with GM crops in 2013, including 93% of soybean acreage and 90% of corn acreage. In spite of, or perhaps because of, the dominant presence of GM products in our food system and repeated assurances from federal agencies that they are safe, the majority of Americans express concern about their safety and environmental impacts. In surveys, consumers overwhelmingly favor mandatory labeling of GM foods, though statewide ballot measures in California, Washington, Colorado, and Oregon have been unsuccessful.

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16 FDA Food Additives Permitted in Feed and Drinking Water of Animals, 21 C.F.R. § 573.130 (1994) (prescribing conditions under which aminoglycoside 3’-phosphotransferase II may be safely used as a food additive for the development of genetically modified cotton, oilseed rape, and tomatoes).

17 Grocery Manufacturers Association Position on GMOs, FACTS ABOUT GMOs, http://factsaboutgmos.org/disclosure-statement (last visited Apr. 20, 2015) (explaining that if a food contains corn or soy, it most likely contains genetically modified ingredients).


20 Allison Kopicki, Strong Support for Labeling Modified Foods, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html?_r=0 (indicating that 93% of Americans support labeling foods containing GMOs); see also U.S. Polls on GE Food Labeling, CTR. FOR FOOD SAFETY, http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/us-polls-on-ge-food-labeling# (last visited Apr. 20, 2015) (citing multiple polls that show support for mandatory labeling, ranging from 93% to 96%).

Proponents of genetic modification argue that GM products (ranging from bacteria that break up spilled oil to treatments for diabetes and malaria to high-beta-carotene rice that prevents nutrient deficiencies) have given scientists and policymakers new tools for feeding people, saving lives, and protecting the environment. Critics express concerns about health, environmental, and economic impacts. GM foods can introduce new allergens into the food system. GM crops may reduce growers' use of highly toxic herbicides in the short run (by increasing the effectiveness of less toxic alternatives like glyphosate), but in the long run they may simply speed up the development of weeds' resistance to less toxic herbicides. Reliance on GM crops reduces biodiversity. GM seeds contaminate non-GM crops, causing economic harm to growers who wish to certify their products as GM-free. The market dominance of GM seeds increases growers' economic dependence on a small number of seed manufacturers. More serious health concerns ranging from birth defects, to liver failure, to a wide range of cancers have been raised by GM critics, but are not supported by reputable scientific sources.

22 Commonly Asked Questions About the Food Safety of GMOs, MONSANTO, http://www.monsanto.com/newsviews/pages/food-safety.aspx#Q6 (last visited Apr. 20, 2015) (explaining that GM crops can improve the nutritional value of the crops and also increase crop yields, which in turn allows farmers to use less resources and pesticides).

22 Questions & Answers on Food from Genetically Engineered Plants, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/food/foodsciencesearch/biotechnology/ucm346030.htm (last updated July 22, 2014) (recognizing that there is a potential for allergens in GM foods and manufacturers are to evaluate whether any new material may potentially cause allergic reactions).

24 FERNANDEZ-CORNEJO ET AL., supra note 18, at 24-25 (describing how the benefits of herbicide-resistant GM crops are offset by glyphosate resistance).

25 Id. at 29 (highlighting how reduced diversity in weed management practices contributes to glyphosate resistance).

26 Christopher Doering, GMO Wheat Issue Intensifies, GREAT FALLS TRIB. (Oct. 26, 2014, 10:05 PM), http://www.greatfallstribune.com/story/news/local/2014/10/27/gmo-wheat-issue-intensifies/17985699/ (reporting the discovery of an unapproved type of GM wheat on a research field over ten years after the crop had been planted there).


29 For example, the Institute for Responsible Technology, the self-proclaimed "most comprehensive source of GMO health risk information on the web," features a series of links to health studies to support assertions of harm from GMOs. GMO Dangers, INST. FOR RESPONSIBLE TECH., http://www.responsibletechnology.org/gmo-dangers (last visited Apr. 20, 2015). Among these assertions are that GM corn damages the liver and kidney and that GM soy causes sterility. The claim that GM corn causes kidney and liver toxicity is supported by a ninety-day rat feeding study which has been criticized by the European Food Safety Authority’s Scientific Panel on Genetically Modified Organisms for many statistical flaws, ultimately the Panel concluded that the claims in the paper were not supported by the data. See id.; Joël Spiroux de Vendômos et al., A Comparison of the Effects of Three GM Corn Varieties on Mammalian Health, 5 INT. J. BIO. SCI. 706 (2009); EUROPEAN FOOD SAFETY AUTH., Minutes of the 55th Plenary Meeting of the Scientific Panel on Genetically Modified Organisms Held on 27-28 January 2010 in Parma, Italy 8 (Mar. 10, 2010), available at www.efsa.europa.eu/en/events/event/gmo100127-m.pdf. A similar study was subsequently retracted from the Food and Chemical Toxicology Journal due to the authors' definitive conclusions despite a small sample size and failure to exclude the high incidence of tumors in the Sprague-Dawley rat. See Retraction Notice to Long Term Toxicity of a Roundup Herbicide and a Roundup-Tolerant Genetically Modified Maize, 63 FOOD & CHEM. TOXICOLOGY 244 (2014); MICHAEL ANTONIOU ET AL., GLS BANK, GM SOY: SUSTAINABLE? RESPONSIBLE? 12 (2010) (articulating the risks of GM soy, including a multigenerational feeding study on hamsters which lost the ability to reproduce by the third generation). Cf. BRUCE CHASSY & GRAHAM BROOKES, ACADEMICS REVIEW, A CRITICAL ASSESSMENT OF
There is no federal statute specific to GMOs. Pursuant to the Coordinated Framework for Regulation of Biotechnology, which emphasizes that “regulatory oversight should focus on the characteristics and risks of the biotechnology product—not the process by which it is created,” federal agencies treat GM foods as equivalent to foods developed using traditional cross-breeding techniques. GMO producers are subject to generally applicable health, safety, and environmental statutes. The FDA has provided nonbinding guidance on voluntary labeling of GM foods, but has not imposed restrictions on genetic modification in food production. The U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) regulates planting and interstate transportation of GMOs that pose a plant pest risk. The U.S. Environmental Protection Administration (EPA) regulates GM plants that produce substances intended to control pests (called plant-incorporated
environmental assessments and environmental impact statements for federal actions or projects); Ctr. for agencies taking certain actions with regard to GMOs may be required to prepare unreasonable risk to human health or the environment); 40 C.F.R. provisions. James "trigger" provisions, which prevent them from going into effect until other jurisdictions have adopted similar provisions. Maine and Connecticut enacted earlier GM food labeling laws, but both of these laws include "trigger" provisions, which prevent them from going into effect until other jurisdictions have adopted similar provisions. Act 120 defines "food" as "food intended for human consumption," and defines "genetic engineering" as "a process by which a food is produced from an organism or organisms in which the genetic material has been changed through the application of: (A) in vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) techniques and the direct injection of nucleic acid into cells or organelles; or (B) fusion of cells (including protoplast fusion) or hybridization techniques that overcome natural physiological, reproductive, or recombination barriers, where the donor cells or protoplasts do not fall within the same taxonomic group, in a way that does not occur by natural multiplication or natural recombination." id. § 30-Ω(3); id. § 3042(4). Id. § 304(3) and (a)-(b). The labeling mandate would not apply to: (1) animal products that are merely processed with the use of GM animal feed; (2) products "grown, raised, or produced without the knowing or intentional use of food or seed produced with genetic engineering"; (3) processed food that merely includes processing aids or enzymes produced with genetic engineering; (4) alcoholic beverages; (5) processed food in which GM ingredients account for no more than 0.9% of the total weight of the processed food; (6) food not packaged for retail sale (including restaurant food and other foods prepared for immediate consumption); and (7) medical foods regulated as such by the FDA. id. § 3044.
words of similar import that would have a tendency to mislead a consumer."46
Violation of either provision would be punishable by civil fines of up to $1000 per
product, per day.47 Act 120 authorizes the Attorney General to adopt rules requiring
that mandated labels “include a disclaimer that the Food and Drug Administration does
not consider foods produced from genetic engineering to be materially different from
other foods” and to harmonize Vermont’s labeling requirements with those adopted by
other jurisdictions.48

In June 2014, the National Association of Manufacturers, the International Dairy
Foods Association, the Snack Food Association, and the Grocery Manufacturers
Association filed a complaint in federal court alleging that Act 120: (1) violates their
First Amendment right “to speak freely and the right to refrain from speaking at all”49
(2) violates the Fifth Amendment’s requirement that “state laws define prohibited
conduct with sufficient specificity” so as to afford regulated entities “reasonable
notice” and avoid subjecting them to “arbitrary enforcement of the laws”;50 (3) violates
the Commerce Clause’s implied prohibition on state regulation of interstate
commerce,51 and (4) is expressly or impliedly preempted by the Federal Food, Drug,
and Cosmetic Act (FFDCA), the Nutrition Labeling and Education Act (NLEA), the
Federal Meat Inspection Act, and the Poultry Products Inspection Act.52

As of this writing, the case was pending in the federal district court, with industry
groups, food reform advocates, and other state and local governments watching it
closely. GMO labeling legislation has been introduced in more than twenty
jurisdictions, including via voter referendum.53 Commentators have suggested that
labeling laws represent the best solution to the debate over the potential health risks of
GM foods and have argued that state and local labeling laws should be upheld in the
face of constitutional challenges.54

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46 Id. § 3043(c); see also Proposed Consumer Protection Rule 121, Labeling Foods Produced with
Genetic Engineering, at § 1.12 (defining “natural or any words of similar import” to mean nature, natural, or
naturally).
47 Id. § 121.04(e).
48 Id. § 3.
49 Id. at 17.
50 Id. at 18-20.
51 Id. at 20-21.
52 See CTR. FOR FOOD SAFETY, GE FOOD LABELING: STATES TAKE ACTION 1 (2014),
http://www.centerforfoodsafety.org/files/ge-state-labeling-fact-sheet-92014_02919.pdf (discussing how in
the first half of 2014, thirty-five bills were introduced in twenty states regarding GM labeling).
53 Laura Murphy et al., More Than Curiosity: The Constitutionality of State Labeling Requirements for
Genetically Engineered Foods, 38 VT. L. REV. 477, 480, 497-99 (2013) (concluding that state GMO labeling
laws should survive First Amendment challenges, particularly focusing on the Second Circuit’s decision
regarding growth hormone labeling on milk). The authors state that Central Hudson is not the proper
standard for GMO disclosure requirements because courts have stated that it should only apply to state
disclosure requirements that are only supported by “consumer curiosity” interests. Id. at 50. Instead, the
Zauderer test should be applied because it “applies to mandated, factual disclosures and a broad set of
legitimate state interests.” Id. at 522. Under Zauderer, a state would need to show: (1) its interest in
preventing consumer deception and protecting health; and (2) that the GMO disclosure is “reasonably
related” to that interest. Id. at 521. Once the state establishes this interest, courts should easily be able to find
that “labeling causes changes in human behavior” and conclude that the disclosure is reasonably related to
that interest. Id. (relying on a “common-sense” analysis), Matthew Rich, Note, The Debate over Genetically
Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice, 54 CASE
ingredients and concluding that these labels would not violate First Amendment interest and are the most
desirable regulatory solution to protect consumers). The author states that, while International Dairy Foods
Association v. Amestoy failed the second prong of the Central Hudson test, the case could have come out
The Act 120 case may also have implications for ongoing fraud litigation in the Northern District of California over the deceptive marketing of GM, organic, and conventional foods using terms like “natural.” Private parties have filed hundreds of suits in the so-called “food court” alleging deceptive marketing by food and beverage manufacturers and retailers. Many of the suits specifically target companies seeking to capitalize on consumers’ growing interest in “natural” products. For example, in Brazil v. Dole Food Co., the plaintiffs claimed that some of the defendant’s products (including smoothies and fruit packaged in syrup) are improperly marketed as “all natural,” “fresh,” “sugar-free,” “antioxidant,” and “low calorie.” In another case, Gitson v. Trader Joe’s, the plaintiffs allege that the defendant uses the term “evaporated cane juice” instead of “sugar” on products ranging from yogurt to enchilada sauce to make them seem healthier.

B. KAUAI’S GM CROP REPORTING AND PESTICIDE BUFFER ZONE ORDINANCE: SYNGENTA SEEDS, INC. V. KAUAI

Many of the concerns associated with GMOs focus on the production process, rather than on consumption. The process of developing new GM seeds involves heavy application of pesticides and herbicides. Thousands of GM field trials have taken place in the state of Hawaii, where growing conditions are good year-round. Concerns about biodiversity loss, crop contamination, and exposure to pesticides and herbicides have prompted local governments there to regulate GM producers.

In November 2013, the Council of the County of Kauai adopted Ordinance 960, which would require farms and agricultural companies to disclose the use of restricted-use pesticides or GMOs and create “pesticide buffer zones” to prohibit the use of restricted-use pesticides within specified distances from homes, roadways, and bodies differently had the state clearly stated its interest in protecting human and animal health. Id. at 905 (stating that Judge Leval indicated this in the majority opinion which ultimately held that consumer curiosity was not enough to sustain a mandatory disclosure on the label).

See, e.g., Cox v. Gruma Corp., No. 12-CV-6502, 2013 WL 3828800, at *1-2 (N.D. Cal. July 23, 2014) (dismissing with prejudice) (describing “all natural” claims on tortilla chips made from GMO corn); Kane v. Chobani, Inc., 973 F. Supp. 2d 1120, 1124 (N.D. Ca. 2014) (alleging that Chobani cannot label products made with added coloring as “all natural”). Manufacturers in these “natural” claim cases often advance a First Amendment argument as a defense; however, these claims are largely unsuccessful due to the application of the Zauderer standard for misleading commercial speech. Under Zauderer, the government’s interest in preventing consumer deception generally prevails over a manufacturer’s speech, when it can be demonstrated the speech is misleading.

See, e.g., Cox, 2013 WL 3828800, at *1-2 (describing “all natural” claims on tortilla chips made from GMO corn); Chobani, 973 F. Supp. 2d at 1124 (“all natural” claims regarding products made with added coloring); Parker v. J.M. Smucker Co., No. 13-0690, 2013 WL 4516156, at *1-2 (N.D. Cal. Aug. 23, 2013) (“all natural” claims on vegetable oil products derived from GM crops and were heavily processed).

Brazil v. Dole Food Co., 935 F. Supp. 2d 947, 966-67 (N.D. Cal. 2013) (granting defendants’ motion to dismiss without prejudice for a lack of sufficient particularity in the pleadings for claims subjected to the heightened fraud pleading requirement).


See infra notes 64-65 and accompanying text.
of water. The following month, the Council of the County of Hawai‘i adopted an ordinance prohibiting open-air cultivation, propagation, and development and testing of GM crops.

While preemption legislation targeting these ordinances was pending in the state legislature, four manufacturers of GMOs and pesticides brought suit against Kauai County to invalidate Ordinance 960, alleging that it: (1) was preempted by the Hawaii Pesticides Law, the Right to Farm Act, the State Planning Act, and the Agribusiness Development Corporation statute, as well as the Federal Insecticide, Fungicide, and Rodenticide Act, the Plant Protection Act, and the FFDCA, which the plaintiffs characterized as intentionally deregulatory; (2) violated the Due Process and Equal Protection rights of the companies; and (3) represented a regulatory taking requiring compensation. The complaint further alleged that the process by which the ordinance was adopted was improper under the state’s Open Meetings Law.

Four non-profit organizations, including the Center for Food Safety and the Pesticide Action Network of North America, intervened in support of the ordinance.

In Syngenta Seeds, Inc. v. County of Kauai, a federal district judge struck down Ordinance 960 on the ground that state agriculture laws (even in the absence of amendments targeting the ordinance, which failed to pass in the state legislature) vested regulatory authority over pesticides and potentially harmful plants with the state’s Board of Agriculture. The County and intervenor-defendant NGOs had argued that the absence of explicit reference to county authority in the relevant state agriculture laws indicated that the legislature did not intend for those laws to restrict counties’ broad authority to protect health, life, and property or their obligation to protect public trust resources under the state constitution. In rejecting this argument,
the district court adopted Dillon’s Rule to construe local government authority narrowly, and relied upon field preemption analysis. The court found that the Ordinance was not preempted by federal law. Having decided the case on preemption grounds, the court refrained from adjudicating the plaintiffs’ other constitutional claims. As of this writing, an appeal was pending in the Ninth Circuit. In November 2014, voters in Maui County approved a referendum that amends the county’s charter to impose a moratorium on cultivation of GMOs. Suits were immediately filed by the drafters of the initiative to ensure that the county enforces it and by Monsanto to prevent implementation.

C. NEW YORK CITY’S SUGARY DRINKS PORTION RULE: N.Y. STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE v. N.Y.C. DEPARTMENT OF HEALTH & MENTAL HYGIENE

Dietary composition is the leading risk factor contributing to disease burden in the United States. One-third of U.S. adults have high blood pressure and about 14% have high cholesterol—both major risk factors for chronic disease. More than 8% of Americans have been diagnosed with diabetes, with about half as many more estimated to be living with undiagnosed diabetes. Nearly 40% of U.S. adults have abnormal fasting glucose levels designating them as “pre-diabetic.” Two-thirds of adults and one-third of children have a body mass index above the healthy range, and 35% of adults, 20% of adolescents, 18% of 6-11 year olds, and 8% of 2-5 year olds are obese.

Until very recently, federal efforts in response to diet-related non-communicable disease threats were largely confined to raising awareness and encouraging physician-
patient counseling. After decades of minimal federal action to promote healthy eating, in 2009 Congress enacted The Healthy, Hunger-Free Kids Act (HHFKA) directing the USDA to establish more stringent nutrition standards for school meal programs and other foods available in participating schools. Meanwhile, USDA reformed its nutrition assistance program for Women, Infants, and Children (WIC) with health and nutrition goals in mind. By mid-2010, however, the political climate had shifted. A new federal tax on sugar-sweetened beverages was proposed as part of the Affordable Care Act (ACA), but the proposal was dropped after lobbying from the beverage industry. In the intervening years, the 2009 school food reforms have come under attack in Congress, and a calorie labeling rule for chain restaurant menus promulgated by the FDA pursuant to an ACA directive has languished amidst repeated delays attributed to lobbying by grocery stores, convenience stores, and pizza chains for exemptions and weaker penalties. Meanwhile, federal regulators have continued to ignore commentators’ calls for restrictions on food and beverage advertising, instead deferring to industry self-regulation.

Dismayed by the weak and ineffective federal response, several state and local governments have stepped into the fray, with New York City in the vanguard. New York City pioneered the first program to increase the value of Supplemental Nutrition Assistance Program (SNAP, better known as “food stamps”) benefits when used to purchase fresh fruits and vegetables at farmers’ markets in 2005, it was the first

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88 Healthy People 2010, the U.S. Department of Health and Human Service’s ten-year public health plan developed in 2000, included objectives aimed at expanding weight management programs offered through employers, encouraging medical weight loss counseling by primary care providers, reducing sources of unnecessary calories in school and restaurant meals, increasing nutrition labeling for food items, and improving access to community recreational facilities. But “[c]ompared to the tobacco objectives, the ... obesity objectives focused on results rather than publicly-directed strategies for obtaining those results. There were no calls for state legislation, for example. While the report recognized the growing importance of childhood obesity, governmental entities ... were not given any special responsibility to protect children from risky foods.” Mary Anne Bobinski, Health Disparities and the Law: Wrongs in Search of a Right, 29 AM. J. L. & MED. 363, 378 (2003).
90 See Victor Oliveira & Elizabeth Frazão, U.S. Dep’t of Agric., The WIC Program: Background, Trends, and Economic Issues, 2009 Edition iv-v (2009), http://www.ers.usda.gov/media/152924/wic.pdf (indicating that the USDA was concerned about health risks such as childhood obesity, and thus took steps such as changing food packages used in the WIC program in order to encourage healthier behavior in program participants).
92 See Nicholas Confessore, Lunch Money, N.Y. TIMES, Oct. 12, 2014, (Magazine), at 34 (discussing lobbying efforts to soften USDA regulations and the likelihood that Republican control of Congress will result in the HHFKA being “gutted”).
jurisdiction to adopt a calorie labeling mandate for chain restaurant menus in 200696 and the first to ban artificial trans-saturated fats in restaurant food in 2008.97 And in 2012, it intended to be the first to regulate portion sizes for sugary drinks.98 Flanked by public health experts at a table stacked with extra-large soda cups and sugar cubes (representing the huge amounts of added sugars they typically contain), Mayor Bloomberg announced a new proposal to limit the size of the containers in which food service establishments sell sugary drinks.99 By the time the New York City Board of Health (BOH) announced its intention to pass such a rule, industry-supported opposition groups were already mobilizing. The ensuing public debate was fierce.100

The Portion Rule provided that “[a] food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.”101 The choice of sixteen ounces was intended to balance health impacts with economic considerations, as that size is widely available and familiar to customers.102 The ordinance excluded retail stores and alcoholic beverages, because the City does not have clear jurisdiction over them.103 The State Department of Agriculture and Markets regulates New York City food retail stores (e.g., bodegas, supermarkets),104 while the State Liquor Authority regulates alcoholic beverages.105

The Rule was challenged by the New York Statewide Association of Hispanic Chambers of Commerce, the New York Korean-American Grocers Association, the local unit of the Soft Drink and Brewery Workers Union, the National Association of Theatre Owners of New York State, the American Beverage Association, and the American Restaurant Association.106 Although intense public discourse focused on

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96 N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health (NYSRA II), 556 F.3d 114, 120-22 (2d Cir. 2009) (upholding the second version of the city’s calorie labeling mandate in the face of preemption and constitutional challenges after the first version was struck down).
100 See, e.g., Michael M. Grynbaum, New York Plans to Ban Sale of Big Sizes of Sugary Drinks, N.Y. TIMES (May 30, 2012), http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html?pagewanted=all (“The New York City health department’s unhealthy obsession with attacking soft drinks is again pushing them over the top,” the [New York City Beverage Association] spokesman, Stefan Friedman, said. ‘It’s time for serious health professionals to move on and seek solutions that are going to actually curb obesity. These zealous proposals just distract from the hard work that needs to be done on this front.’”); News, NEW YORKERS FOR BEVERAGE CHOICES, http://nycbeveragechoices.com/news/ (last visited Apr. 20, 2015) (listing recent news articles regarding the struggle over regulating beverage choices in New York).
101 Portion Cap Rule, N.Y.C. HEALTH CODE, tit. 24, § 81.53(b) (2012). It defined a sugary drink as: non-alcoholic; sweetened with a caloric sweetener; containing more than twenty-five calories per eight fluid ounces, and not containing more than fifty percent milk or milk substitute. Id. § 81.53(3)(a)(1). Like other restaurant health code provisions, the Portion Cap Rule would have been enforced via inspections and fines, with a maximum penalty of $200 per inspection. Id. § 81.53(d).
102 See N.Y.C. Dep’t of Health and Mental Hygiene, supra note 99 (specifying that sixteen ounces would be the largest drink size allowed).
103 tit. 24, § 81.53(b).
104 See N.Y., AGRIC. & MKTS. LAW art. 2 § 16 (McKinney 2004) (detailing the responsibility of regulating the “production, transportation, storage, marketing and distribution of food” and ensuring against the sale of “unwholesome food”).
105 See generally N.Y. ALCO. BEV. CONT. LAW § 17 (McKinney 2011).
matters of liberty and paternalism, the suit raised predominantly administrative law questions.\(^{107}\)

In 2013, a state trial court judge invalidated the Rule, holding that the BOH had exceeded its delegated authority.\(^{108}\) Although the BOH “has very broad powers under the New York City Charter,” the judge reasoned the legislative intent was to grant the Board authority “to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious, and pestilent diseases.”\(^{109}\) Later, an intermediate appellate court reached the same result, but with a greater emphasis on the need to construe the BOH’s authority narrowly to avoid what would otherwise be an unconstitutional delegation of legislative authority.\(^{110}\)

Ultimately, the New York Court of Appeals agreed that the Portion Rule exceeded the scope of the BOH’s authority: “By choosing among competing policy goals, without any legislative delegation or guidance, the Board engaged in law-making and thus infringed upon the legislative jurisdiction of the City Council.”\(^{111}\) The court emphasized that “[a]n agency that adopts a regulation, such as the Portion Cap Rule or an outright prohibition of sugary beverages, that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics. That is policymaking, not rule-making.”\(^{112}\)

D. CLEVELAND’S TRANS FAT BAN: CLEVELAND V. OHIO

In 2010, Ohio enacted a preemption law (buried in a 5000-page budget measure) giving the state’s agriculture department “sole and exclusive authority . . . to regulate the provision of food nutrition information and consumer incentive items at food service operations.”\(^{113}\) These provisions were aimed at prohibiting local governments in Ohio from adopting calorie labeling mandates like New York City’s and nutritional guidelines for meals sold with kid-friendly incentive items (better known as a “Happy Meal Ordinance”) like those adopted by San Francisco and Santa Clara County.\(^{114}\) The Ohio preemption law also prohibited localities from enforcing food content bans and addressing “food-based health disparities.”\(^{115}\) Just months earlier, the City of Cleveland had banned artificial trans fats (an additive with no nutritional value linked to heart disease and obesity) in prepared foods sold in the city.\(^{116}\)

In City of Cleveland v. State, a state appellate court found the preemption statute unconstitutional because it attempted to limit “municipal home-rule.”\(^{117}\) Notably, the court distinguished the nutrition preemption law from an earlier Ohio statute preempting local firearm regulations, which was upheld by the Ohio Supreme Court in

\(^{107}\) Id. at 1.
\(^{108}\) Id. at 20.
\(^{109}\) Id. at 15.
\(^{111}\) N.Y. Statewide Coal. III, 16 N.E.3d 538, 541 (N.Y. 2014).
\(^{112}\) Id. at 548.
\(^{113}\) Ohio Rev. Code Ann. § 3717.53(B) (LexisNexis 2012).
\(^{114}\) See S. F., CAL., HEALTH CODE art. 18, § 471.2 (2010); Santa Clara, Cal., Code of Ordinances § A18-352 (2010).
\(^{116}\) Cleveland, Ohio, Health Code tit. 3 § 241.42 (2011).
\(^{117}\) Cleveland, 989 N.E.2d 1072, 1077 (Ohio Ct. App. 2013).
2010, on the rationale that the firearms regulation was part of a “statewide and comprehensive legislative enactment” whereas the “broad, flat ban by the General Assembly prohibiting municipalities from exercising their police powers” with regard to nutrition and food-based health disparities was not justified as part of comprehensive legislation regulating restaurant food.

The court noted that it was particularly concerned by the process by which the preemption provision was added to the general appropriations bill:

In response to the city of Cleveland’s trans-fats Ordinance, the Ohio Restaurant Association (ORA) sent an email to the Ohio Department of Agriculture with an attached legislative proposal. The email stated that the Ordinance was “exactly what we want to preempt with the attached amendment.” The email also stated that the amendment was “a high priority for Wendy’s, McDonalds and YUM! [the operator-licensor of Taco Bell, KFC and Pizza Hut]” According to the email, a senator had already been given a copy of ORA’s proposed legislation and would offer it in the Senate Finance Committee. Thus, the amendments were drafted on behalf of a special interest group with the specific purpose of snuffing out the Ordinance.

Such open acknowledgements by the courts of the role that industry lobbying plays in curtailing local government authority are rare.

III. TENSIONS AND OPPORTUNITIES

As the case studies in Part II illustrate, food law and policy are deeply contentious. Industry lobbying makes legislative and regulatory reforms difficult to adopt, and legal challenges often block or delay implementation. These challenges make collaboration among diverse groups with a shared interest in increasing equitable access to healthy, sustainably produced food essential. Recent experiences suggest that opportunities for cooperation on discrete food reform priorities may be limited to interventions aimed at increasing consumption of fresh fruits and vegetables through taxation and spending initiatives, without extending to other issues, like regulating GMOs, trans fats, and sugary drinks. There may, however, be significant untapped potential for collaboration on foundational legal issues like preemption, increasing First Amendment protection for commercial speech, and the erosion of judicial deference to legislative policy choices, which are all central to industry groups’ deregulatory toolkit.

A. FOOD REFORM PRIORITIES

Many commentators point to the emerging food justice movement as having “the potential to link different kinds of advocates, including those concerned with health, the environment, food quality, globalization, workers’ rights and working conditions, access to fresh and affordable food, and more sustainable land use.” Indeed, during 2002 Farm Bill negotiations, the “Eggplant Caucus” (made up of senators from states

\[118\] See generally City of Cleveland v. State, 942 N.E.2d 370 (Ohio 2010) (upholding a less restrictive statewide statute over a more restrictive city ordinance).

\[119\] Cleveland, 989 N.E.2d at 1081-82.

\[120\] Id. at 1085 (discussing a distinct challenge to the state preemption law as violating an anti-logrolling provision known as the “single subject rule”).

\[121\] ROBERT GOTTLEIB & ANUPAMA JOSHI, FOOD JUSTICE 5 (2010).
that produce specialty crops like eggplants\textsuperscript{122} and senators from states where voters are particularly interested in environmental conservation) pushed for fruit and vegetable subsidies and conservation programs as part of a more balanced farm bill and ultimately played an important role in the bill’s passage.\textsuperscript{123} “The ink was barely dry on the [2002 Farm Bill] when diverse interest groups began to form and ready themselves for serious lobbying” in anticipation of negotiations surrounding [the 2008 Farm Bill].\textsuperscript{124} In 2004, The Prevention Institute published \textit{Cultivating Common Ground: Linking Health and Sustainable Agriculture}, which identified opportunities and strategies for cross-sector advocacy with an emphasis on healthy eating alongside more traditional environmental health concerns like antibiotic resistance and occupational hazards for farm workers.\textsuperscript{125} These efforts coincided with growing awareness of obesity-related health problems, and experts across sectors began to link the farm subsidies to environmental and public health concerns.\textsuperscript{126} Starting in 2005 with the New York City Health Department’s pioneering program and culminating in the 2014 Farm Bill’s provision of $100 million for doubling SNAP benefit value for the purchase of fresh fruits and vegetables, health, environmental, anti-poverty, and local farming advocates have also combined forces to reform nutrition assistance programs.\textsuperscript{127}

The priorities of diverse food reform movements are not entirely synergistic, however. From the start, the emphasis among organic growers and environmental groups on the importance of organic farming methods has not been uniformly supported by public health advocates, many of whom are concerned about the cost, and therefore accessibility, of organic produce, as well as the growing number of calorie-dense organic foods with low nutritional value.\textsuperscript{128} As the \textit{Cultivating Common Ground} report noted, “even the organic food industry creates an ever-greater number of chips, high-caloric beverages, instant meals, and other processed foods.”\textsuperscript{129} As industrial food producers co-opted the organic movement, activists began to re-organize themselves into a loose “alternative food” movement, which Michael Pollan

\textsuperscript{122} Nonperishable grain and oilseed commodity crops (e.g., wheat, corn, sorghum, barley, oats, cotton, rice, and soybeans) enjoyed the most lucrative subsidies under the Farm Bill. 7 U.S.C. § 8713(b) (repealed 2014). Fruits and vegetables are considered “specialty crops” under existing law and do not receive the same benefits as commodity crops. \textit{Fresh Fruit, Hold the Insulin}, 306 SCI. AM. 12, 12 (2012).


described as being “unified as yet by little more than the recognition that industrial food production is in need of reform because its social/environmental/public health/animal welfare/gastronomic costs are too high.” Later, in response to concerns that the alternative food movement is elitist, some groups seeking to reform industrial food production evolved yet again to adopt a “food justice” framework, which “focuses on the barriers that low-income or otherwise marginalized groups face in realizing the goals of the broader food movement, such as access to fresh, unprocessed food.”

Equitable access to fresh, unprocessed food certainly is not bad for public health. But it is not enough, either. Increasing fruit and vegetable consumption does not counteract the harms associated with a high-calorie diet with lots of added sugars. Public health advocates have adopted strategies that push consumers toward “better for you” versions of the processed food and beverage products that dominate the American diet. The New York City Portion Rule, for example, creates a price differential that may push consumers toward “diet” and “zero calorie” sodas as an alternative to high-calorie drinks with added sugars. Meanwhile, consumers’ preference for “natural” ingredients has led major beverage manufacturers to promote “cane sugar” sodas. High fructose corn syrup may be associated with some additional health risks compared to cane sugar, but the “naturalness” of cane sugar (or “organic evaporated cane juice” for that matter) does not reduce its high caloric content or its contribution to diabetes and heart disease. Commentators emphasized that the Portion Rule would have applied equally to sodas and “natural” organic drinks like Honest Tea, as if the failure to distinguish between the two was irrational. Nevermind that Honest Tea is owned by Coca-Cola and the added sugars in its most

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131 Rebecca L. Goldberg, No Such Thing as a Free Lunch: Paternalism, Poverty, and Food Justice, 24 STAN. L. & POL’Y REV. 35, 49 (2013) (“[W]ith its focus on farmers’ markets and a do-it-yourself avoidance of processed food, many of the food movement’s goals do seem aimed at those with disposable income and disposable time.”).
132 Id.
133 See, e.g., Lisa Fickensher, Beverage Makers Sour on Sweetened-Drink Ban, CRAIN’S N.Y. BUS. (June 3, 2012, 12:01 AM), http://www.crainsnewyork.com/article/20120603/HOSPITALITYTOURISM/306039976/beverage-makers-sour-on-sweetened-drink-ban (quoting a restaurant industry source as saying, “[i]f the ban goes into effect, we’ll sell a lot of beverages with synthetic sweeteners, and our water sales will go up”).
136 See Fickensher, supra note 133 (“Soda may be the biggest target of the ban, but sweetened teas are also included. Honest Tea, for example, which is considered one of the healthier brands because of its low sugar content and organic ingredients, would not be able to sell its top product, Green Tea, in New York City if the ban is passed” because it contains twenty more calories per 16.9 ounce bottle than would be allowable under the Portion Rule.).
137 Lynne Kiesling, Bloomberg’s Bureaucratic “Big Gulp” Rule, More Unintended Costs, KNOWLEDGE PROBLEM (July 23, 2012), http://knowledgeproblem.com/2012/07/23/bureaucrats-big-gulp-rule-more-unintended-costs/ (discussing the application of the Portion Rule to Honest Tea’s most popular product, Green Tea, which contains thirty-five calories per eight ounce serving and is bottled in containers larger than sixteen ounces, assuming that the regulation would prompt the manufacturer to incur great expense to change the bottle size, rather than prompting a formulation change to lower the caloric content to twenty-five calories per eight ounce serving so that it would fall outside of the Portion Rule’s definition of “sugary drinks”).
popular product qualify it as a “sugary drink” with more than twenty-five calories per eight ounce serving.138

Many public health advocates see the anti-GMO and pro-organics movements as distractions from more pressing healthy eating priorities. Particularly in debates over school food, nutrition experts like Margo Wootan express concern about alternative food and food justice advocates’ insistence on local, organic, GMO- and hormone-free, “natural” ingredients:

“You can have full-fat cheese from a local farmer, and it’s still going to clog your arteries and give you heart disease,” she says. “Having the food be natural is nice, but a bigger threat to children’s health is making sure that there’s not too much salt and not too much saturated fat.” Banishing high-fructose corn syrup, Wootan says, is “a waste of time and money” — better to limit children’s total sugar intake. As for hormone-free milk, she says, most milk is hormone-free. “And if it isn’t, it’s not a health problem.”139

Wootan’s organization, the Center for Science in the Public Interest (CSPI), is a driving force behind calorie and trans fat labeling regulations, food advertising restrictions, nutritional standards for packaged foods and restaurant meals marketed to children, and school food reform.140 In addition to expressing skepticism about the health benefits of organic food production and hormone-free dairy production, CSPI is opposed to mandated labeling of GM foods.141 Citing the same concerns expressed by the plaintiffs in Grocery Manufacturers, CSPI Biotechnology Director Gregory Jaffe notes that GMO disclosure mandates could mislead consumers by “falsely implying] that food made without GE ingredients is safer or superior in some way.”142 CSPI has, however, urged federal regulators to rigorously guard against the environmental impacts of GMO production.143 Similarly, the Healthy and Sustainable Food Program at Harvard School of Public Health’s Center for Health and the Global Environment emphasizes environmental, rather than food safety, concerns, pointing out that GM foods “hold great promise that they may provide one of the solutions to help feed growing world populations. But there are also potentially large, and often not well

138 Kiesling, supra note 136.
140 See Highlights from 40 Years of Accomplishments, CTR. FOR SCI. IN THE PUB. INTEREST, https://www.cspinet.org/about/accomplishments.html (last visited Apr. 20, 2015).
142 id.
understood, risks from GM technologies—to the environment in general, and to biodiversity and the functioning of ecosystems in particular."

At its extreme, fetishization of naturalness prompts some alternative food advocates to promote "food libertarianism," arguing against regulations mandating pasteurization of dairy products and imposing food safety standards aimed at reducing exposure to life-threatening food-borne infections. Although they may personally eschew mass-produced sugary beverages and packaged snack food products, some alternative food advocates see public health-oriented soda taxes, bans on trans fats, and portion caps as threatening the liberty to eat and drink whatever and however one chooses. In a similar vein, some food justice advocates express deep skepticism about government’s role in ensuring equitable access to fresh produce. They “prefer to grow food on their own terms, without government involvement.”

The fetishization of naturalness has other negative consequences for public health. Ending vaccination, water fluoridation, and even sunscreen use are among the top priorities of many “natural health” companies. For-profit purveyors of “natural health products” like Mercola and Natural News feature “news reports” touting pseudoscientific studies on the benefits of natural eating and the ineffectiveness and harmfulness of pharmaceuticals, vaccines, and conventional medical and dental care while selling everything from nutritional supplements and protein powders to cupping therapy kits and tanning beds.

B. PREEMPTION OF STATE AND LOCAL AUTHORITY TO PROTECT THE PUBLIC’S HEALTH AND WELFARE

Leaving aside discrete food reform priorities, foundational legal issues like preemption of state and local authority may offer untapped opportunities for collaboration among public health, environmental, and food justice advocates. Local governments and the states have long exercised primary responsibility for protecting the public’s health, safety, and welfare. At a time when federal health and environmental measures face stiff opposition, pioneering state and local governments

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145 See Steve Holt, Food Activism’s Libertarian Streak, TAKEPART (May 22, 2012), http://www.takepart.com/article/2012/05/22/food-activisms-libertarian-streak ("Libertarian sentiments run throughout the food movement, from criticism of federal subsidies that unfairly favor certain commodities over others, to bans on certain food, to a general distrust of the link between the federal government and large food producers.").
146 Our Mission, KEEP FOOD LEGAL, http://www.keepfoodlegal.org/mission (last visited Apr. 20, 2015) ("[T]here are too many restrictions on our right to procure the foods we love, and . . . these restrictions are growing. At the local, state, and federal levels, elected officials and regulators have banned or are working to ban or severely restrict everything from traditional farm products (like raw milk and cheeses) and locavore-friendly farm practices (like on-farm animal slaughter and meat packaging), are seeking to prevent chefs from using common food ingredients (like salt, feta, and trans fats), and are looking to ban others from selling or even to share foods (with the homeless or with fellow consumers). ").
148 Id. at 208.
are stepping into the regulatory void. But their actions are subject to preemption, a fact which affected industries routinely exploit as a crucial component of their deregulatory strategy.

1. Federal Preemption

In 2014, Congressman Mike Pompeo of Kansas responded to calls for mandatory labeling of GM foods by introducing federal legislation.\textsuperscript{152} The industry-backed bill would have regulated the use of “GMO-free” labeling and prohibited state and local governments from mandating labeling for GMO foods.\textsuperscript{153} This strategy—sponsoring a bill with minimal regulatory impact and broad deregulatory impact—is common among industry groups seeking to avoid state and local regulation.\textsuperscript{154}

By authority of the Supremacy Clause, Congress may preempt state law, even if the state is acting squarely within its police powers.\textsuperscript{155} Taking a page from the tobacco industry,\textsuperscript{156} the food and beverage industry is using express and implied preemption to powerful effect. For example, the initial version of New York City’s restaurant menu calorie labeling mandate was struck down on the grounds that it was preempted by the federal Nutrition Labeling and Education Act of 1990 (NLEA).\textsuperscript{157} The Board of Health then retooled the regulation, which survived a preemption challenge under the NLEA.\textsuperscript{158} Several other state and local governments quickly adopted New York’s approach.\textsuperscript{159} Eventually, the restaurant industry, eager to trade the possibility of conflicting regulations at the state and local level for uniform federal requirements was willing to concede to a federal menu labeling law included in the Affordable Care Act, which would preempt most state and local efforts.\textsuperscript{160} As noted above, the federal provision is now tied up in implementation as industry groups fight for special

\textsuperscript{152} See Safe and Accurate Food Labeling Act of 2014, H.R. 4432, 113th Cong. (2014) (“A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to food produced from, containing, or consisting of a bioengineered organism, the labeling of natural foods, and for other purposes.”).

\textsuperscript{153} Id. §§ 104, 425.


\textsuperscript{155} See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001) (stating that Congress may preempt state police power if there is express or implied language in the “congressional enactment” authorizing congressional preemption or if there is “implication from the depth and breadth of a congressional scheme that occupies the legislative field”).

\textsuperscript{156} See e.g., id. (invalidating, on preemption grounds, a Massachusetts law aimed at preventing youth exposure to cigarette advertising); Cipollone v. Liggett Grp., Inc., 505 U.S. 504 (1992) (holding that some state failure-to-warn and fraudulent misrepresentation claims are preempted); Rowe v. N.H. Motor Transp. Ass’n, 552 U.S. 364 (2008) (invalidating, on preemption grounds, a Maine law aimed at preventing youth access to tobacco from the Internet and mail-order sales by requiring carriers to ensure that cigarettes were delivered only to adults).

\textsuperscript{157} N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health (NYSRA I), 509 F.Supp. 2d 351, 361-63 (S.D.N.Y. 2007) (holding that the 2006 version of the calorie labeling mandate, which required restaurants that had voluntarily provided calorie information in some form to post that information on their menus, sought to regulate nutrient content claims and was thus preempted by the NLEA).

\textsuperscript{158} NYSRA II, 556 F.3d 114 (2d Cir. 2009) (upholding the 2008 version of the calorie labeling mandate, which applied to chain restaurants regardless of whether they voluntarily made calorie information available in any form).

\textsuperscript{159} See, e.g., CAL. HEALTH & SAFETY CODE § 114094 (West 2012).

treatment and some local governments fight for exemptions to the preemption provision.  

The agriculture industry has had mixed results with federal preemption challenges. In *Syngenta Seeds*, the federal district judge held that federal law did not preempt the Kauai Ordinance. Similarly, in *Bates v. Dow Agrosciences*, the Supreme Court held that state law claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of the Texas Deceptive Trade Practice Act were not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. On the other hand, in *National Meat Association v. Harris*, the Court held that the Federal Meat Inspection Act expressly preempted a California law prohibiting the sale of meat or from nonambulatory “downer” animals for human consumption as applied to federally inspected swine slaughterhouses.

2. State Preemption of Local Government Authority

Local government actions are vulnerable to preemption by the state legislature, as well as federal preemption. As illustrated by the history of the Kauai Ordinance, industry groups often respond to innovative local measures by challenging the local law as preempted by existing state or federal law (and on other constitutional grounds) while simultaneously introducing new legislation at the state level (including in states where no local jurisdiction has expressed interest in following the vanguard) to clearly preempt local authority to regulate.

While it is undisputed that states have plenary authority to protect the health and welfare of the populace (subject to constitutional restraints, including via the Supremacy Clause), there is considerable disagreement over how much leeway should be given to local governments to address similar concerns. The scope of local government authority varies from state to state and is subject to judicial interpretation, as illustrated by the district court’s decision in *Syngenta v. Kauai*. Constitutional and statutory grants of authority to cities or counties determine the degree of autonomy, or “home rule,” over local affairs enjoyed by the local government. In the majority of states, at least some local government entities are granted considerable home rule, meaning that they have broad authority to regulate: for the protection of the public’s health, safety, welfare, and morals; to license; to tax; and to incur debt, subject only to the limitations imposed by the state and federal constitutions. Local governments that lack home rule perform the same basic functions, but their interventions must fall within specific grants of authority from the state, limiting their ability to pioneer new responses to pressing public problems.

As *Cleveland v. Ohio* illustrates, broad state preemption may run afoul of home rule, at least for localities whose home rule authority is established in the state

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166 See id. at 1124-27.
167 See, e.g., ILL. CONST. art. VII, § 6 (granting broad authority to local governments to “exercise any power and perform any function pertaining to . . . [local] government and affairs including . . . the power to regulate for the protection of the public health, safety, morals, and welfare . . . ”).
constitution. Another example is the 2006 opinion from the Colorado Supreme Court finding that the state’s broad statute preempting firearms regulation unconstitutionally infringed on Denver’s home rule authority. The Court reinstated the city’s ordinance prohibiting the carrying of firearms in city parks. State courts in New York and Pennsylvania have recently rejected state preemption of local authority to regulate the practice of hydraulic fracturing (a process by which natural gas is extracted from shale at great depth below ground level). On the other hand, Syngenta v. Kauai illustrates judicial use of Dillon’s Rule to construe statutory grants of authority to local governments (including broadly drafted home rule grants) as narrowly as possible.

Public health advocates know state preemption battles all too well. The strict construction of delegations to local governments was often used during the Sanitarian movement of the nineteenth century to block public health measures that judges regarded as unwarranted. More recently, in the hard-fought battles to adopt and implement anti-smoking regulations, preemptive legislation was typically introduced at the state level shortly after the adoption, or even consideration, of the first local ordinances banning smoking. In addition to the broad preemption law at issue in City of Cleveland v. State, Florida, Arizona, and other states have also passed preemption bills prohibiting local governments from regulating the use of toys and other giveaways to promote unhealthy fast food meals to children.

City of Cleveland v. State was an important victory for the public health authority of local governments, but the same reasoning would not apply in many other states.

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169 State v. City of Denver, 139 P.3d 635 (Colo. 2006).
170 Id.
172 See, e.g., Midwest Emp’rs Council, Inc. v. City of Omaha, 131 N.W.2d 609 (Neb. 1964) (holding, inter alia, that Omaha’s home rule charter did not fairly imply that the city had authority to enact an ordinance prohibiting employment discrimination on the basis of race, religious creed, color, national origin, or ancestry because a home rule charter must be “construed strictly in favor of the public and against the public officials of the charter city”).
173 Home rule is sometimes mistakenly contrasted with “Dillon’s Rule,” but the two doctrines can and do co-exist in the majority of states. Whereas home rule refers to the breadth or narrowness of the local government’s grant authority, Dillon’s Rule is a judicial rule of construction. Jesse J. Richardson, Jr. et al., Brookings Inst. Ctr. on Urban and Metrop. Policy, Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management 3-4 (2003). Under Dillon’s Rule, “a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.” Clark v. City of Des Moines, 19 Iowa 199 (1865). Under the competing “Cooley Doctrine” some state constitutions are understood to create an absolute right to local self-government, which cannot be abridged by the state legislature. Cooley’s view was that local governments pre-dated the formation of state governments and therefore should be treated as parallel to the state, rather than as creations of the state. People ex rel. Le Roy v. Hurlbut, 9 Am. Rep. 103 (Mich. 1871).
Public health advocates would do well to take note that the preemption proposals backed by GM producers go even farther than those deployed against tobacco control and anti-obesity regulations. In 2013, while Kauai and the County of Hawaii were considering GMO and pesticide legislation, a breathtakingly broad preemption bill was introduced in the Hawaii state legislature. State Senator Donovan Dela Cruz’s proposal would have amended the Hawaii state code section that grants each county government authority to pass legislation “deemed necessary to protect health, life, and property, and to preserve the order and security of . . . its inhabitants.” The bill would have removed “health” and “life” from that list.

Broad preemption does not always require an express choice by the legislature. In many cases, the judiciary implies preemption based on the mere existence of a state or federal regulatory scheme, including where that scheme is “intentionally deregulatory,” as the plaintiffs in Syngenta alleged federal GMO law to be. Notably, the federal district judge found that the state legislature intended to preempt local government enactments like Kauai’s ordinance, even though legislative efforts to enact preemption statutes specifically aimed at the Kauai ordinance (including a narrower pair of bills that would have revised Hawaii’s “Right to Farm” legislation by adding language to specifically bar local governments from enacting legislation prohibiting the use of “agricultural technology, modern livestock production, and ranching practices” that are legal under state and federal law) failed.

C. INCREASING FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH

The Grocery Manufacturers Association plaintiffs characterize Vermont’s mandate that they disclose genetic engineering on food labels as “compel[ling] manufacturers to use their labels to convey an opinion with which they disagree, namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.” They also allege that the labeling requirement imposes a content-based burden on protected speech, which should prompt heightened scrutiny. Although some public health advocates might not approve of Vermont’s GMO labeling mandate and advertising restrictions, the First Amendment issues raised by the Vermont statute are a major focus for public health lawyers, who should watch the case closely. Increasing First Amendment protection for commercial speech (and uncertainty regarding the evolving standards applied by the Supreme Court) has had an enormous impact on the development of public health law in recent years. Some suggest that the failure of advertising restrictions has prompted regulators to turn to product and retailer regulations, like the

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178 Id.
180 In January 2014, shortly after the Kauai and Hawaii County ordinances were adopted, somewhat less broad preemption bills were introduced in the state legislature. Identical bills introduced in the House and Senate would have revised Hawaii’s “Right to Farm” legislation by adding language to specifically bar local governments from enacting legislation prohibiting the use of “agricultural technology, modern livestock production, and ranching practices” that are legal under state and federal law. H.R. 2506, 27th Leg., Reg. Sess. (Haw. 2014); S. 3058, 27th Leg., Reg. Sess. (Haw. 2014). Both bills died in committee.
182 Id. (citing Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011)).
Ohio trans fat ban and New York City’s Sugary Drinks Portion Rule, that are more intrusive upon individual choice.\(^\text{184}\)

1. Advertising Restrictions

Prior to the mid-1970s, the Supreme Court held that commercial advertising, along with obscenity and libel\(^\text{185}\), was entirely unprotected by the First Amendment.\(^\text{186}\) When the Court first departed from this longstanding precedent, it continued to recognize the “common-sense” distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.\(^\text{187}\) In *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*,\(^\text{188}\) the Court adopted a four-part intermediate scrutiny test for establishing whether a restriction on commercial speech (such as Act 120’s prohibition on the use of the term “natural” to market GM foods and proposed restrictions on the marketing of unhealthy food and beverage products to children) violates the First Amendment. First, commercial speech is not protected by the First Amendment if it promotes unlawful activity or is false, deceptive, or misleading (Step 1). To regulate truthful advertising with regard to lawful activity, the government must have a “substantial” interest in regulating the speech (Step 2), and the regulation must “directly advance[] the governmental interest asserted” (Step 3) and must be no “more extensive than is necessary to serve” the stated governmental interest (Step 4).\(^\text{189}\)

Particularly with regard to public health regulation, commentators have noted that the Court appears to be applying Central Hudson in a way that closely approximates strict scrutiny.\(^\text{190}\) The Court has struck down regulations with public health significance in *Lorillard Tobacco Co. v. Reilly* (2001),\(^\text{191}\) *44 Liquormart, Inc. v. Rhode Island* (1996),\(^\text{192}\) *Rubin v. Coors* (1995),\(^\text{193}\) and *Thompson v. Western States Medical Center* (2002),\(^\text{194}\) and *Sorrell v. IMS Health Inc.* (2012).\(^\text{195}\) These regulations have typically faltered on the third and fourth prongs of the Central Hudson test, which focus on the closeness of fit between the government’s purpose and the regulation under attack, with the Court essentially applying the least-restrictive means test usually reserved for strict scrutiny analysis.\(^\text{196}\)

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\(^{186}\) Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”).


\(^{189}\) Id. at 566.


\(^{196}\) Rauer, *supra* note 190, at 703.
2. Disclosure Mandates

Because disclosure requirements (like the GMO labeling mandate or cigarette warning labels) "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech,"197 the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is suppressed. In Zauderer v. Office of Disciplinary Counsel, the Supreme Court held that laws requiring the disclosure of commercial information are constitutional as long as they are reasonably related to the state's asserted interest.198 The Court emphasized that commercial speakers have only a "minimal" interest in refusing to disclose "factual and noncontroversial" information about their products.199

In 2009, the Second Circuit applied the Zauderer standard to uphold New York's chain restaurant menu labeling mandate.200 Other courts, however, are beginning to signal that the lenient Zauderer standard might not apply to some warning labels and disclosure mandates. The circuit courts are split, for example, over whether Zauderer applies only when the government is seeking to prevent "deception of consumers" (the state interest at issue in Zauderer itself). This issue has enormous implications for warning labels—such as graphic warnings for cigarette packs—that are aimed at discouraging consumption of a harmful product.201

The Grocery Manufacturers Association plaintiffs attempt to restrict Zauderer further by asserting that the disclosures compelled by Act 120 (e.g., that the labeled product was "produced with genetic engineering") are "controversial"—presumably because there is controversy over the import of the disclosed statement.202 Similarly, their argument that Act 120 compels them to make statements with which they do not agree203 conflates the straightforward factual statement mandated by the law with the controversy over the import of the fact that is disclosed.

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198 Id. But see Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 146–47 (1994) (finding the exhaustive disclaimer required in certain accountant advertisements to be overbroad).
199 Zauderer, 471 U.S. at 651.
200 NYSRA II, 556 F.3d 114, 136 (2d Cir. 2009).
201 The 2012 circuit courts' decisions assessing proposed graphic warning labels for cigarette packs are split over the applicability of Zauderer. The Sixth Circuit, in a challenge to the 2009 Tobacco Control Act, applied Zauderer and upheld the statute's requirement of graphic warnings. The court found the warnings were needed to correct "decades-long deception by Tobacco Companies" and that "advertising promoting smoking deceives consumers if it does not warn consumers about tobacco's serious health risks." Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 502 (6th Cir. 2012). In a lawsuit challenging the FDA's final rule on graphic warning labels, the D.C. Circuit disagreed and invalidated the rule, holding that FDA's interest in requiring graphic warnings—disclosure of health and safety risks—was not, alone, sufficient justification. The court found that the agency had not shown the labels were needed to prevent deception, therefore the Zauderer test was inapplicable. In 2014, the D.C. Circuit expressly overruled this holding in an unrelated case, but the FDA had already withdrawn its proposed warnings to avoid Supreme Court review. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014) (finding that "Zauderer" characterization of the speaker's interest in opposing forced disclosure of [purely factual and uncontroversial] information as "minimal" seems inherently applicable beyond the problem of deception and expressly overruling previous holdings "limiting Zauderer to cases in which the government points to an interest in correcting deception . . ." (citing R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1295, 1214(2012)).
203 Id. at 14.
D. The Erosion of Judicial Deference to Legislative Policy Judgments

The Syngenta plaintiffs assert that the ordinance infringes upon their Equal Protection and Due Process rights under the federal and Hawaii state constitutions. These claims allege that the laws at issue fail to satisfy rational basis review. In their motion for summary judgment, the plaintiffs argued that (1) the pesticide provisions specifically targeted the plaintiffs rather than applying to all pesticide users, (2) the threshold amount of pesticides used to trigger the ordinance was arbitrary because it was not linked to proportions or the amount of harmful ingredients used, and (3) the GMO disclosure requirements served no legitimate purpose.

Similarly, the Statewide Coalition plaintiffs argued that the New York City Portion Rule was “laden with arbitrary exceptions.” The trial judge found that the rule was “fraught with arbitrary and capricious consequences,” pointing to exceptions for convenience stores, alcoholic beverages, and dairy drinks. The Grocery Manufacturers Association plaintiffs point to Act 120’s statutory exemptions for some products that include ingredients derived from GE plants, without specifically raising an Equal Protection challenge. Other food regulations are vulnerable to similar questions: Why artificial but not natural trans fats? Why prepared foods but not packaged foods, or vice versa?

These claims seem destined to fail, based on long-standing precedents applying rational basis review to legislative distinctions that do not amount to “suspect” classifications (limited to race, national origin, religion, and alienage) and infringements upon interests that do not amount to “fundamental” rights (i.e., those enumerated in the constitution, such as freedom of expression, as well as others recognized by the Supreme Court, such as privacy). There is no fundamental right to sell, purchase, or use particular products or services in particular configurations, whether we’re talking about GM foods, thirty-two ounce sodas containing more than twenty-two teaspoons of sugar, or large quantities of pesticides. Drawing a distinction between high-volume and low-volume pesticide users, or between food service establishments and other retailers who sell sugary drinks or packaged foods containing

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205 Id. (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).
206 Id. at 41-46.
210 See, e.g., Abigail Alliance for Better Access to Dev. Drugs v. Eschenbach, 495 F.3d 695 (D.C. Cir. 2007) (holding that terminally ill adult patients had no fundamental right protected by the Due Process Clause to have access to investigational drugs, after surveying the long history of safety and efficacy regulation of drugs for personal use); Lange-Kessler v. Dep’t of Educ., 109 F.3d 137 (2d Cir. 1997) (holding that the right to privacy does not encompass a woman’s right to choose a direct-entry midwife to assist during childbirth). See also Samuel R. Wiseman, Liberty of Palate, 65 ME. L. REV. 737, 744 (2013) (concluding that there is no constitutionally protected right to consume the foods of one’s choosing, based on “the long history of curtailment of food choice, and the lack of any constitutional protection or tradition of broadly protecting food rights . . .”). “[T]he Court declared decades ago its “abandonment of the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise.” In re Late Fee and Over-limits Fee Litig., 741 F.3d 1022, 1029 (9th Cir. 2014) (quoting Ferguson v. Skrupa, 372 U.S. 725, 731 (1963)); see also Michael J. Phillips, Another Look at Economic Substantive Due Process, 1987 Wis. L. REV. 265 (1987) (describing the rejection of constitutionally protected economic rights).
trans fats, does not amount to a suspect classification. As such, food regulations should be struck down by courts on the basis of manufacturers’ and retailers’ rights to Due Process and Equal Protection only if they are not rationally related to a legitimate government interest.  

Historically, courts have applied rational basis review in a way that defers to legislative judgments with regard to policy matters, and have given government actors broad leeway to take an incremental, under-inclusive approach to regulation. But recent Supreme Court and circuit court decisions have imposed more demanding standards on the defenders of government regulation, even in cases that are purportedly within the province of rational basis review. In the short term, courts are unlikely to use equal protection or due process rights to strike down anti-GMO or public health initiatives, particularly when other, less radical avenues are available (e.g., First Amendment, preemption). But over the long term, industry groups may have some realistic hope that courts will become more receptive to these arguments, which would represent a full return to Lochnerism.  

An argument made by the Grocery Manufacturer’s Association plaintiffs in the context of their First Amendment claim suggests another, more dramatic avenue that industry groups might use to invalidate economic regulations pursuant to a more demanding form of rational basis review. Even under the lesser protection afforded to commercial speech, they argue, Act 120 should fail because “the State’s interest in this mandate is not a governmental interest” at all: “In adopting Act 120, the State acted as a pass-through for advocates of controversial views that the State did not purport to endorse, and that are based on conjecture about ‘unintended consequences’ that the State did not bother to substantiate, or even investigate.” The plaintiffs draw a distinction between “consumer” interests and state interests, categorizing the former as “purely private.” This argument goes beyond the holding of the Second Circuit, in a case striking down a Vermont law mandating disclosure of the use of growth in dairy production, that consumer curiosity is not a substantial governmental interest. If accepted, the plaintiffs’ argument would amount to a determination that the state has no legitimate interest in ensuring that consumers have access to information that they deem relevant because that interest is not a governmental interest at all. The suggestion that when the state acts as a “pass-through” for voter interests it does not act in its governmental capacity is bold and (fortunately) unsupported by law. But the effort

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215 Id. at 11 (citing the findings and statement of purpose of Act 120).
216 Id. at 16.
217 See Int’l Dairy Foods Ass’n, 92 F.3d at 73 (holding that “strong consumer interest and the public’s ‘right to know’—in contrast to ‘health and safety concerns’—are ‘insufficient to justify compromising protected constitutional rights’”).
218 In addition to citing Int’l Dairy Foods Ass’n, the plaintiffs quote the Supreme Court’s use of the term “governmental interest” in IMS Health. Plaintiff’s Proposed Amended Complaint for Declaratory and Injunctive Relief, supra note 214, at 15. By adding emphasis to the word “governmental,” the plaintiffs imply that IMS Health supports the idea that an interest may be deemed non-governmental, but in fact, IMS Health, like Int’l Dairy Foods Ass’n, focused on the substantiality of the governmental interest, not its governmental nature.
to characterize a problem as “private” and thus not within the legitimate province of governmental concern has proven to be quite compelling in a range of public health contexts.\(^{219}\)

III. DEMOCRACY AND EXPERTISE AT THE INTERSECTION OF LAW AND SCIENCE

Public health, food justice, alternative food, and environmental advocates would do well to highlight the deeply counter-majoritarian impulse behind the legal arguments that industry groups use to challenge food reform regulations. My suggestion that these groups, which are characterized by divergent perspectives on the mainstream scientific community and the public perception of risk, should collaborate on foundational legal issues like preemption and the appropriate scope of judicial review, which raise important and difficult questions about the appropriate roles for democracy and expertise at the intersection of law and science. How much should the judiciary defer to legislative decisions about uncertain health and environmental risks? Should the purported First Amendment, Due Process, Equal Protection rights of regulated industries trigger judicial review that demands firm scientific evidence that their conduct creates a definite risk and that the challenged regulation will effectively and substantially reduce that risk? Or should the concerns that animate the populace be sufficient to justify precautionary regulation, even when expert assessments do not support those concerns or the interventions the public supports to address them? As risk perception expert Paul Slovic cautions, “there is wisdom as well as error in public attitudes and perceptions.”\(^{220}\)

A. EXPERTISE VERSUS DEMOCRATIC REPRESENTATION IN AGENCY DECISION-MAKING

Statewide Coalition highlighted the tensions between expertise-driven regulation and democratic representation. Some advocates insist that the legitimacy and authority of agencies “should derive . . . from their . . . expertise and freedom from industry capture, not their democratic bona fides.”\(^{221}\) Under this view, agencies should have broader discretion to act within their sphere of expertise. Other advocates, however, conceive of public health action primarily as a manifestation of the democratic process: communities working together to create healthier living conditions.\(^{222}\) Certainly, “laws that emerge from a democratic process [may be] more secure than equally paternalistic administrative regulations.”\(^{223}\) Yet, the question persists: should the executive branch, based on greater expertise, be given leeway to intervene when


\(^{222}\) See Lindsay F. Wiley et al., Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility, 41 J.L. MED. & ETHICS (SPECIAL ISSUE) 88 (2013).

politics prevent legislative action? Or does executive overreach risk public backlash? Still others argue that the comparative advantage of local agencies is speed, not science:

Local executives can act quickly to launch a quick policy experiment in a limited geographic area. The science justifying these experiments should follow rather than precede the local policy . . . Yes, there is a danger that some local experiments will misfire . . . [b]ut the alternative might be that we remain locked in a status quo in which no one does anything, because the executive actors are bogged down by a judicially created quagmire of process and non-delegation canons, while the legislative actors are stuck in the gridlock of partisan acrimony and fear of risk-taking. A nation locked into such dreary regulatory uniformity by judicial demands for detailed legislative delegations of power cannot generate the data necessary to determine whether further legislation is a good idea. The likely result is a vicious circle of court-induced Catch-22: Courts suppress local experiments citing lack of high-quality data, but those local experiments are precisely the data needed for scientific expertise to determine the effects of those local policies.225

The legal basis of the Statewide Coalition decision’s insistence that legislatures, rather than administrative agencies, are the appropriate body to “wrestle with complex value judgments concerning personal autonomy and economics” was rooted in New York’s atypically stringent non-delegation doctrine.226 Nonetheless, as a matter of political accountability and transparency, it is an admonition that public health and environmental groups should take to heart. And critics of the Portion Rule should note that these arguments ring equally true with regard to the role of the judiciary.

B. UNCERTAINTY AND PRECAUTION

With regard to public health interventions, especially in the areas of tobacco control and healthy eating, the primary evidentiary hurdle relates to the likely impact of challenged regulations.227 Comparatively, with regard to GMO regulation, the primary evidentiary hurdle relates to the seriousness of the risks that challenged regulations seek to address.228 During debate over the Hawaii County ordinance, for

225 Hills, supra note 221.
example, “[c]ritics of GMOs insisted that such crops might cause cancer, birth deformities, tumors, sterility and even widespread devastation,”229 but these dramatic risks are not borne out by respected scientific evidence.

Anti-GMO interventions adopt a strongly precautionary stance that should resonate with public health groups even if the prioritization of GMO regulation does not sit well with them.230 In the face of uncertainty, should governments step in to control the risks, at least in limited ways? Although the evidence that diets high in calories, sugar, salt, and fat negatively impact health is on sounder footing than the evidence that GMOs cause direct harm to human health, public health advocates would do well to remember that the evidence base for many promising healthy eating and tobacco control interventions is vulnerable to attack. For many complex problems, it may take decades before the epidemiological evidence clearly supports a comprehensive solution. In such cases, government actors must rely upon the evidence before them in developing an initial, albeit incremental and under-inclusive, response. Critically, such first regulatory steps often serve as a “laboratory” for researchers and regulators, furnishing important evidence that can be used to guide subsequent steps and, in some cases, comprehensive regulation.231

C. RISK PERCEPTION

Increased coordination among health, food, and environmental advocacy groups also raises interesting questions about the different approaches to risk perception taken by environmental law and public health law experts. Pointing to the psychological literature on risk perception, Doug Kysar, who compellingly champions the legitimacy of governmental interest in regulating GMOs to effectuate consumer preferences,232 challenges sterile cost-benefit analysis on the grounds that “individual responses to even actuarially identical risks vary dramatically based on the risks’ qualitative characteristics.”233 In the place of an expert-driven assessment of the value that should be placed on a statistical life, Kysar advocates for policy choices “premised on social values, explicitly discussed and mediated through democratic decision-making processes.”234 This approach would vaunt “the virtues of collective problem solving [by] consider[ing] the reasonableness of ends in relation to the sacrifices we must make to achieve them.”235 Harkening back to the “messy, pluralistic, and pragmatic” approach of the 1970s,236 before environmental protection “came to be disciplined by

232 See generally Kysar, supra note 36.
233 DOUGLAS A. KYSAR, REGULATING FROM NOWHERE 112 (2010).
234 Id. at 114.
236 KYSAR, supra note 233, at 3.
the insights of sound science and economic reasoning."  

In contrast, public health law experts generally adopt a far more skeptical—even authoritarian—stance toward public risk perception. Cognitive biases cause people to make choices about tobacco, food, and alcohol consumption; how they drive; how they store firearms in their homes; and a whole host of other matters that do not reflect rational self-interest. Industries marketing harmful products exploit these biases deftly, and public health advocates often see their role as the champion of rational risk perception: urging consumers to see that the greatest threats to the health and safety of their families are mundane but grossly underestimated risks like heart disease and car crashes rather than exotic and grossly overestimated risks like Ebola and birth defects caused by consumption of trace amounts of pesticides in non-organic produce.

The stance of various public health-oriented food reform advocates on GM food labeling provides insight into how they navigate the tension between expertise-driven reforms and democratic recognition of consumer values. While CSPI has opposed labeling mandates on the grounds that labeling might reinforce the mistaken notion that non-GM foods are safer, the American Public Health Association (APHA) has taken a different stance. Its 2001 resolution in support of mandated labeling of GM foods largely elides the food safety concerns expressed by many anti-GMO advocates in favor of focusing on honoring consumers’ desire for accurate information. The resolution emphasizes that that “opposition to labeling based on findings that genetically modified food products are safe discounts issues of consumer choice and bioethical concerns,” and that “food labeling makes possible a range of legitimate consumer interests ranging from a desire to avoid allergic reactions to the opportunity to exercise informed buying decisions.”

The long-standing struggle of public health experts to combat widespread misperception about health, safety, and environmental risks will make it challenging for them to adopt the pro-democratic, collective problem-solving approach that I and others have advocated is the best path forward from industry-fueled “nanny state” criticisms. Public health advocates could take a page from environmentalists in this regard. As Kysar puts it: “[E]nvironmental law must form part of the social glue that binds a political community together in pursuit of long-term and uncertain goals. To serve that function, in turn, laws must have continuity with the concepts, values, and discourses expressed by real people.” The same could be said of public health law, which prominent advocates are seeking to recast as the product of communities coming together to achieve collectively what they cannot achieve individually.

337 Id. at 1.
338 Id. at 2.
343 KYSAR, supra note 233, at x.