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April, 2013

Combating Obesity with a Right to Nutrition

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Combating Obesity with a Right to Nutrition

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Domestic and international law have, in different ways, recognized a human right to food since the twentieth century. The original reason for this recognition was the need to alleviate a particular type of food insecurity—“traditional” hunger, as manifested in conditions like malnutrition and underweight. The current public-health crisis of obesity, however, demands a reconsideration of this right. The food environment in the United States today is awash in high-calorie, low-nutrient food products that are often cheaper, on a relative basis, than more nutritious foods, leading to the overconsumption of the former by much of the American population. Merely ensuring a minimum level of food provision for the nation’s residents, therefore, no longer serves public health effectively. Rather, the right to food should be reoriented toward a right to nutrition, focusing on the relative nutritional quality of foods and increasing access to more nutritious foods. This right should also embrace some form of protection from the marketing and selling of foods likely to cause obesity, particularly for vulnerable segments of the population like children.

This Article demonstrates how a right to nutrition might be operationalized in the domestic legal system. In doing so, it uses a broader meaning of “right” than is common in American jurisprudence, which traditionally conceives of rights as constitutionally based and judicially enforced. After rejecting the possibility of a right to nutrition as a positive constitutional right, the Article offers four other models by which a right to nutrition might emerge: namely, as an indirect constitutional right; as a common law concern; through the public-utility paradigm; and as a matter of legislative grace. Borrowing from the implementation of other nonconstitutional positive rights, like the right to housing, the Article shows how a right to nutrition might be viable in each of these settings, and how these models are highly interdependent. The Article concludes with thoughts on how comparative institutional susceptibility to food-industry influence may affect the ability of different governmental actors to promote nutrition.

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“I have the audacity to believe that peoples everywhere can have three meals a day for their bodies”¹

“We have accepted, so to speak, a second Bill of Rights Among these are . . . [t]he right to earn enough to provide adequate food”²

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1. Martin Luther King, Jr., Nobel Peace Prize Acceptance Speech (Dec. 10, 1964), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance.htm.

2. Franklin D. Roosevelt, President, Message on the State of the Union (Jan. 11, 1944), *in* 1944–45 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1950).

INTRODUCTION

Once considered a minor social problem, obesity is now a public-health epidemic. A third of American adults are obese, and an additional third are overweight.³ Among children, obesity rates have tripled;⁴ for six- to eleven-year olds, for instance, the rate has grown from 6.5% in 1980 to nearly 20%.⁵ Left unchecked, the epidemic could devastate Americans' health and the nation's economy. Increased obesity has already lowered productivity among workers and added billions of dollars to national health-care costs.⁶ The trend has even begun to harm national security, with the armed services unable to find a sufficient number of recruits who can meet its standards of physical fitness.⁷ Legislators and policymakers haltingly have begun to pay attention to obesity in recent years, and so too must lawyers, law professors, and judges.

This Article focuses on one especially important causal agent of obesity: nutrition, or lack thereof. Although the causes of obesity are numerous, any serious public-health campaign to reduce obesity must improve the nutritional content of the American diet. To do so, the nation's food environment, which is saturated with high-calorie, low-nutrient products and, in some places, lacking in more nutritious options, must change. The related problems of access to nutritious food and inundation by low-nutrient foods are most acute in so-called "food deserts"⁸ and "food swamps,"⁹ which predominate in minority and

3. Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999–2008*, 303 JAMA 235, 235 (2010).

4. *Childhood Obesity Facts*, CTNS FOR DISEASE CONTROL & PREVENTION (CDC), <http://www.cdc.gov/obesity/data/childhood.html> (last updated Jan. 11, 2013).

5. Cynthia L. Ogden et al., *Prevalence of High Body Mass Index in US Children and Adolescents, 2007–2008*, 303 JAMA 242, 244–45 (2010).

6. See, e.g., Helena W. Rodbard et al., *Impact of Obesity on Work Productivity and Role Disability in Individuals with and at Risk for Diabetes Mellitus*, 23 AM. J. HEALTH PROMOTION 353, 358 (2009) ("This study supports previous findings showing an inverse relationship between [body-mass index] and work productivity."); see also *infra* notes 74–75.

7. See generally John Cawley & Johanna Catherine Maclean, *Unfit for Service: The Implications of Rising Obesity for U.S. Military Recruitment* (Nat'l Bureau of Econ. Research, Working Paper No. 16408, 2010), <http://www.nber.org/papers/w16408.pdf>.

8. The term is often traced to a 2006 study defining "food deserts" as "large geographic areas with no or distant grocery stores." See MARI GALLAGHER RESEARCH & CONSULTING GRP., *GOOD FOOD: EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO* 6 (2006), http://www.mari-gallagher.com/site_media/dynamic/project_files/Chicago_Food_Desert_Report.pdf [hereinafter GALLAGHER, CHICAGO]; see also, Joel Stein, *Instant Gratification*, TIME, May 7, 2012, <http://www.time.com/time/printout/0,8816,2113162,00.html> (referring to Gallagher as having "invented the term"). Gallagher, however, claims that the term originated earlier in the United Kingdom. MARI GALLAGHER RESEARCH & CONSULTING GRP., *DETROIT PROJECT TECHNICAL APPENDIX* 7 (2007), http://marigallagher.com/site_media/dynamic/project_files/2_DetApp-AuthCommAckOnly.pdf [hereinafter GALLAGHER, DETROIT] ("We also wish to emphasize that we did not coin the term food desert; it originated over a decade ago with researchers in the UK studying similar issues.").

9. This term is attributed to Professor Donald Rose of Tulane University. See U.S. DEP'T OF AGRIC., *ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES* 56 n.32 (2009), http://ers.usda.gov/media/242675/ap036_1_.pdf [hereinafter USDA FOOD DESERT REPORT].

low-income areas.¹⁰ These areas, however, are microcosms of the larger nutritional challenges facing the entire nation.

With awareness of the obesity crisis sharpening in the last decade, government and public-health officials have proposed or adopted numerous ideas for combating obesity, with certain proposals focused on “irrigating” food deserts or “draining” food swamps. Legal scholars have contributed to this discussion by assessing the obesity epidemic and offering some solutions. Much of the legal literature focuses on individual policy recommendations¹¹ or the potential clash of specific strategies with constitutional doctrines like preemption¹² and takings.¹³ This Article seeks to push the conversation in a new direction by presenting access to healthy, nourishing food (and concomitantly, protection from unhealthy food) as a “right.” Drawing on past doctrine and policy that recognizes a “right to food,” this Article explains why merely ensuring the provision of food in the form of a minimum number of calories per person is insufficient in an era of overconsumption. To the extent that the law has recognized a right to food, this Article argues that the right needs to be reoriented toward *nutrition* in light of the obesity crisis. The Article then sketches how a right to nutrition might be operationalized in four different ways: the “indirect constitutional,” “common law concern,” “public utility,” and “legislative grace” models of rights. These models are more mutually reinforcing than they are exclusive. Collectively, they can provide a legal framework to which policy-makers, courts, and scholars may turn to build legal support for public-health strategies that aim to reduce obesity.

Part I offers a brief historical account of domestic and international recognition of a right to food, demonstrating that this recognition has failed to adequately consider the perils of overconsumption of high-calorie, low-nutrient

10. In this sense, the fight against obesity presents an issue of social, economic, and racial justice on a scale similar to environmental justice. See generally EDUARDO LAO RHODES, *ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM* (2003).

11. E.g., Nareissa Smith, *Eatin' Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197 (2009) (proposing federal legislation to improve the food retail environment to combat obesity and arguing that it would be valid under the Commerce Clause); Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403 (2007) (proposing a complex regulatory or legislative regime that gives private firms incentives to produce and sell more nutritious foods).

12. E.g., Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89 (2011).

13. E.g., Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 54 (2010) (“If the government attempted to require corner stores to allocate a number of shelves . . . to fresh fruits and vegetables, corner stores could potentially challenge the government’s action as a taking requiring just compensation.”). A few scholars have more broadly assessed law’s role in obesity prevention. E.g., Barbara L. Atwell, *Obesity, Public Health, and the Food Supply*, 4 IND. HEALTH L. REV. 3 (2007) (offering legislative proposals to improve the food supply); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) (using social psychology to criticize legal doctrine’s—as well as news media’s and political culture’s—“dispositionist” approach to obesity).

foods. Part II then lays out the obesity problem and explains why access to healthy, nourishing food—and protection from unhealthy, low-nutrient food—are crucial to combating obesity. Part II demonstrates how market and government forces combined to create the nation's unhealthy food environment and why the market alone is unlikely, without significant changes in government policy, to solve the problem. Part II then connects modern concerns about obesity to more traditional concerns about hunger, and demonstrates how both obesity and hunger fall under the ambit of “food insecurity.”

Having established historical and empirical premises in Parts I and II, Part III lays out the contours of my use of the term “right.” It begins with the traditional conception of “right” in American law—that of a constitutionally based, judicially enforced guarantee—and asks whether this model is viable in the context of nutrition, perhaps at the state level. Part III concludes that the history of limited judicial recognition and enforcement of constitutionally grounded “positive rights” at the federal and state levels poses a serious challenge to the viability of such a “right” to nutrition. Part IV then lays out other, less traditional—yet more viable—ways in which a “right to nutrition” might be operationalized, with “right” taking on the broader, positivist meaning of any individual or group claim to resources (or entitlement to protection) that is recognized even indirectly by any source of law.

Section IV.A presents the indirect constitutional rights approach. Under this model, the right to nutrition is not an affirmative, constitutionally grounded right but rather a norm or value that significantly affects adjudication of related constitutional issues. Drawing on Lawrence Sager's notion of “underenforced constitutional norms,” section IV.A explains how such an indirect constitutional “right” can still have substantial legal effect, particularly when coupled with aggressive legislative action, as section IV.D details. Section IV.B argues for recognizing a right to nutrition as a significant “common law concern” that, like an indirect constitutional right, affects the adjudication of common law or other nonconstitutional legal disputes. As section IV.B will show, there are numerous common law doctrines that might be applied differently in light of a right to nutrition, including property doctrines like real covenants and torts doctrines like negligence and nuisance.

Building on section IV.B, section IV.C argues for using the paradigm of public utility law to promote a right to nutrition. Just as other necessities of modern living have been provided through the public utility model—such as water, electricity, natural gas, sewage, and waste disposal—so too might the sale of nutritious food be regulated as a public or quasi-public utility. In fleshing out this proposal, the section looks to the banking and housing markets, which, although not traditional utilities, have been regulated by courts and legislatures like public utilities in some ways. The section explains how consumers can develop a reliance interest in the provision of essential goods and services like nutritious food, and how a public utility approach might protect this interest.

Finally, section IV.D discusses the “legislative grace” model of rights creation and provision. As the section will show, the American public considers many entitlements or freedoms to be among the panoply of the most important “rights” despite their mere statutory—as opposed to constitutional—basis. Some of these rights, like the right to Social Security, for instance, have become so ingrained in the political culture that Cass Sunstein, for one, has argued that their abolition is almost unimaginable.¹⁴ Although Sunstein’s confidence in the political system’s protection of certain rights may be subject to question, his argument nonetheless shows that rights that are merely statutory can be both important and long lasting. Indeed, in the context of food, federal assistance for food purchasing through food stamps and related programs, as described in Part I, has now existed for half a century. It is possible, therefore, that other efforts to bolster nutrition may achieve similar status over time. Moreover, the prevalence and strength of statutory or legislative grace rights often influence the rights models discussed in the other sections.

I. THE RIGHT TO FOOD AS ANTECEDENT TO A RIGHT TO NUTRITION

The call for a right to nutrition, or something like it, is not entirely new, either in the domestic or international spheres. Hunger has plagued the United States since its birth, as it has all of mankind throughout history.¹⁵ In America, hunger was a common condition among slaves;¹⁶ slaveholders cared little about the long-term health consequences of slave children’s poor nutrition.¹⁷ Among free persons in the eighteenth and nineteenth centuries, hunger primarily affected the poor, many of whom received ineffective assistance from a hodgepodge of governmental and charitable organizations.¹⁸ The Industrial Revolution of the late nineteenth century, while raising the overall standard of living for the American public, also resulted in massive income inequality¹⁹ and more concentrated poverty.²⁰ Nonetheless, the nation’s primarily laissez-faire attitude toward poverty and hunger persisted until the Great Depression, at which point the federal government became more directly involved in hunger-relief programs

14. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62 (2004).

15. *E.g.*, *Genesis* 43:1 (“[T]he famine was heavy upon all the land.”). See generally HUNGER IN HISTORY: FOOD SHORTAGE, POVERTY, AND DEPRIVATION (Lucile F. Newman ed., 1995).

16. Calvin Schermerhorn, *The Everyday Life of Enslaved People in the Antebellum South*, 23 *ORG. AM. HISTORIANS MAG. HIST.*, Apr. 2009, at 31, 34 (2009) (noting that “enslaved people were perennially hungry”).

17. Richard H. Steckel, *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity*, 46 *J. ECON. HIST.* 721, 733 (1986) (discussing “poor” childhood diet of slaves and slaveholders’ callous indifference to investing in their nutrition).

18. Marion Nestle, *Hunger in America: A Matter of Policy*, 66 *SOC. RES.* 257, 266–67 (1999).

19. *Id.* at 266.

20. See RUSSELL M. LAWSON & BENJAMIN A. LAWSON, *POVERTY IN AMERICA: AN ENCYCLOPEDIA*, at xvii (2008).

amid widespread unemployment and poverty.²¹

President Franklin D. Roosevelt (“FDR”) wholeheartedly embraced the notion of social and economic “rights” to supplement the political rights guaranteed by the federal Constitution. Toward the end of his presidency, in 1944, FDR called on Congress to enact a “Second Bill of Rights” for the American people²² that would include the “right to earn enough to provide adequate food”²³ Although FDR’s Second Bill of Rights was in some ways unrealized, his presidency made real progress toward ensuring economic rights for Americans. With respect to food specifically, FDR’s administration executed the first significant federal effort to combat hunger—a pilot food-stamp program that sought to redistribute surplus food to millions in need.²⁴ Although the program was discontinued in 1943,²⁵ the New Deal more permanently succeeded in establishing Social Security for the elderly and a federally funded welfare program for the needy, later known as Aid to Families with Dependent Children (AFDC), each of which provided cash assistance that could be spent on necessities such as food.²⁶

Around the same time FDR articulated the need for the federal government to protect socioeconomic rights, international law began to recognize a right to food. The United Nations’ 1948 Universal Declaration of Human Rights declared that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.”²⁷ Subsequent United Nations declarations and resolutions echoed this pledge.²⁸ Later international agreements—the International Covenant on Economic and Social Rights,²⁹ the Convention on the Elimination of All Forms of Discrimination

21. See Nestle, *supra* note 18, at 271.

22. See Roosevelt, *supra* note 2, at 41.

23. *Id.* FDR also endorsed “freedom from want” as one of his four universal freedoms three years earlier. Franklin D. Roosevelt, President, Message on the State of the Union (Jan. 6, 1941), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, 672 (Samuel I. Rosenman ed., 1950).

24. See DENNIS ROTH, FOOD STAMPS: 1932–1977: FROM PROVISIONAL AND PILOT PROGRAMS TO PERMANENT POLICY 4–7; <http://www.nal.usda.gov/ric/ricpubs/foodstamps.pdf> (last visited Oct. 17, 2012); Patti S. Landers, *The Food Stamp Program: History, Nutrition, Education, and Impact*, 107 J. AM. DIETETIC ASS’N 1945, 1946 (2007); Nestle, *supra* note 18, at 271.

25. ROTH, *supra* note 24, at 6; see also JANET POPPENDIECK, BREADLINES KNEE-DEEP IN WHEAT: FOOD ASSISTANCE IN THE GREAT DEPRESSION 241–42 (1986).

26. Social Security Act of 1935, ch. 531, 49 Stat. 620 (establishing federal old-age assistance program (Title II), and a program of aid to dependent children to be administered by states (Title IV)). The Title IV program was renamed AFDC by the Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104(a)(3), 76 Stat. 172, 185.

27. G.A. Res. 217 (III) A, art. 25(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

28. See, e.g., G.A. Res. 66/158, U.N. Doc. A/RES/66/158 (Mar. 27, 2012) (“Reaffirming also all previous resolutions and decisions on the right to food adopted within the framework of the United Nations.”); G.A. Res. 3348 (XXIX), U.N. Doc. A/RES/29/3348 (Dec. 17, 1974) (endorsing the World Food Conference’s *Universal Declaration of the Eradication of Hunger and Malnutrition*, U.N. Doc. E/CONF.65/20 chap. I (Nov. 16, 1974), which proclaimed that “[e]very man, woman and child has the inalienable right to be free from hunger and malnutrition”).

29. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11, ¶ 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49, 50 (Dec. 16, 1966)

Against Women,³⁰ and the Convention on the Rights of the Child³¹—expressly embraced a right to food or nutrition, albeit in varying forms. The effect of this international legal recognition of a right to food has been quite limited within the United States, however. The various United Nations resolutions constitute only nonbinding “soft law,”³² and although the three agreements have all been signed by the United States, none has been consented to by the Senate.³³ Even if ratified, any of these treaties would likely need implementing legislation to be effective.³⁴ Hence, international law’s movement toward recognizing a right to food or nutrition has had only a rhetorical—and perhaps persuasive—effect on domestic law.

On the domestic front, federal efforts to boost food distribution resumed in the early 1960s with the reintroduction of a pilot food-stamp program.³⁵ Congress made the program permanent as part of President Lyndon Baines Johnson’s War on Poverty in 1964 by passing the Food Stamp Act.³⁶ While the Act aimed to ensure “adequate nutrition and appetizing diets for millions of Americans,”³⁷ its political fortunes were boosted by the agricultural industry’s supporters in Congress.³⁸ In addition to food stamps, now formally called the Supplemental Nutrition Assistance Program (“SNAP”), two other significant federal programs aimed to fulfill at least part of FDR’s vision of socioeconomic

(“recogniz[ing] the right of everyone to an adequate standard of living for himself and his family, including adequate food”).

30. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 12, ¶ 2, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193, 196 (Dec. 18, 1979) (“States Parties shall ensure to women . . . adequate nutrition during pregnancy and lactation.”).

31. Convention on the Rights of the Child, G.A. Res. 44/25, art. 24, ¶ 2(c), U.N. Doc. A/RES/44/25, at 169–70 (Nov. 20, 1989) (“States Parties . . . shall take appropriate measures . . . [t]o combat disease and malnutrition . . . through the provision of adequate nutritious foods.”).

32. Even if these soft-law instruments nonetheless constitute customary international law, they offer a relatively weak foundation for a right to food in the United States. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–27 (2010) (reviewing the distinction between “hard” and “soft” international law).

33. *Ratification of International Human Rights Treaties—USA*, UNIV. MINN. HUMAN RIGHTS LIBRARY, <http://www.umn.edu/humanrts/research/ratification-USA.html> (last visited Nov. 21, 2012). The instruments may still serve as persuasive authority in state or federal courts. See, e.g., Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN. ST. L. REV. 1051, 1072 (2011) (concluding that many state courts are “receptive to soft-law claims based on treaty law, whether ratified or unratified”).

34. See Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 LAW & INEQ. 119, 142–43 (2010) (“[H]uman rights treaties have long been considered to be non-self-executing.”).

35. Congress reauthorized the program in 1959, see Act of Sept. 21, 1959, Pub. L. No. 86-341, §§ 11–13, 73 Stat. 606, 608–09, but it was not implemented until 1961. See Landers, *supra* note 24, at 1946–47.

36. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011–2036a (2006 & Supp. V 2011)).

37. C.P. Trussell, *Congress Clears Food-Stamp Plan for the Needy*, N.Y. TIMES, Aug. 12, 1964, at 52 (quoting Representative Leonor Kretzer Sullivan).

38. ROTH, *supra* note 25, at 7 (describing “[f]arm-bloc” support for the food stamp program’s enactment).

rights in the context of food: the National School Lunch Program (“NSLP”) and the Women, Infants, and Children (“WIC”) service. The NSLP dates to 1946,³⁹ although earlier programs at the local, state, and federal levels aimed to provide food to children while in school.⁴⁰ Congress centralized coordination of the school lunch program in the Department of Agriculture (“USDA”) in 1966 through the Child Nutrition Act, which recognized “the demonstrated relationship between food and good nutrition and the capacity of children to develop and learn.”⁴¹ Congress first adopted WIC as a pilot program in 1972, and it has been a permanent program since 1975.⁴² WIC aims to meet the special needs of pregnant women, infants, and young children who might otherwise not benefit from food stamps or NSLP.⁴³

The SNAP, WIC, and NSLP reflect a federal commitment to providing minimum levels of food as a statutory right. While other federal efforts, like nutrition-education campaigns, food product and facility inspection, and consumer-labeling requirements, reflect at least a nominal federal concern for Americans’ nutrition,⁴⁴ the major food-aid programs have focused on providing food or the means of purchasing it, without caring much about what type of food is purchased. For instance, although nutrition was an avowed aim, the initial Food Stamp Act allowed funds to be used for “any food or food product for human consumption,” with the limited exceptions of alcoholic beverages, tobacco, and, in a nod to domestic farming interests, imported foods.⁴⁵ In 1977, Congress first mandated that stores authorized to accept food stamps sell a

39. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 231 (1946).

40. GORDON W. GUNDERSON, THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND AND DEVELOPMENT 7–27 (2003) www.fns.usda.gov/end/lunch/AboutLunch/NSLP-Program%20History.pdf; SUSAN LEVINE, SCHOOL LUNCH POLITICS: THE SURPRISING HISTORY OF AMERICA’S FAVORITE WELFARE PROGRAM 42–53 (2008).

41. Child Nutrition Act of 1966, § 2, Pub. L. No. 89-642, 80 Stat. 885, 885 (codified as amended at 42 U.S.C. §§ 1751–1770 (2006 & Supp. V 2011)). The 1966 Act authorized a pilot school breakfast program, *see id.* § 4, which was extended in 1968. *See* Act of May 8, 1968 § 5, Pub. L. No. 90-302, 82 Stat. 117, 119 (1968); *see also* LEVINE, *supra* note 40, at 153 (noting that “the free School Breakfast Program” was placed “on permanent authorization” in 1975).

42. *See* NAT’L RESEARCH COUNCIL, MAKING POLICIES FOR CHILDREN: A STUDY OF THE FEDERAL PROCESS 17–20 (Cheryl D. Hayes ed., 1982), http://www.nap.edu/openbook.php?record_id=75&page=17 (explaining the history of the WIC program). WIC was preceded by the Supplemental Food Program for pregnant women and hungry babies begun in the 1960s. *Id.* at 15–16.

43. *See* ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., FOOD ASSISTANCE & NUTRITION RESEARCH REPORT No. 27, THE WIC PROGRAM: BACKGROUND, TRENDS, AND ISSUES 7 (2002), http://www.ers.usda.gov/media/327957/fanrr27_1_.pdf (noting that “the available food assistance programs” before WIC “were not meeting the special needs of pregnant women and infants”).

44. The food-stamp program, for instance, has included a nutrition education component since 1981. *See* Landers, *supra* note 24, at 1948.

45. *See* Food Stamp Act of 1964, Pub. L. No. 88-525, § 3(b), 78 Stat. 703 (defining eligible “food” to be purchased under program). The original legislation required that recipient “household[s]” have “cooking facilities,” § 3(e), 78 Stat. at 703, a requirement that Congress eliminated in 1977. *See* Food Stamp Act of 1977, Pub. L. No. 95-113, tit. XIII, § 1301, 91 Stat. 958, 960 (creating a new definition in section 3(i) of the 1964 Act) (codified as amended at 7 U.S.C. § 2012(n) (2006 & Supp. V 2011)).

substantial amount of “staple foods” like fresh produce and dairy.⁴⁶ This provision, however, does not require that retailers provide “staple foods” of a minimum level of quality;⁴⁷ nor does it mandate that SNAP recipients actually buy “staple foods.”⁴⁸ Indeed, by taking a hands-off approach to what recipients actually eat, SNAP is not effectively promoting nutritious diets and may in fact promote obesity.⁴⁹

Like SNAP, the widely used NSLP and WIC programs⁵⁰ have been criticized for causing obesity due to lax nutritional standards,⁵¹ although WIC in particular imposes significantly more restrictions on what may be bought with

46. Food Stamp Act of 1977 § 1301, 91 Stat. 960 (defining eligible “retail food store”). Congress has since tweaked the definition of store eligibility but still requires staple foods. *See* 7 U.S.C. § 2012(p) (2006 & Supp. V 2011) (defining eligible “retail food store” as one that *either* has fifty percent or more of its total sales in “staple foods,” *or* one that offers a variety of staple foods on a continuing basis).

47. *See* Smith, *supra* note 11, at 237 & n.215.

48. Pursuant to section 4141 of the Food, Conservation, and Energy Act of 2008 (“the Farm Bill”), Pub. L. No. 110-246, 122 Stat. 1651 (enacting section 17(k) of the Food and Nutrition Act of 2008, 7 U.S.C. § 2026(k) (2006 & Supp. V 2011), to allow for pilot projects to “provide incentives at the point of purchase to encourage households participating in the supplemental nutrition assistance program to purchase fruits, vegetables, or other healthful foods”), the USDA has authorized a Health Incentives Pilot program in Hampden County, Massachusetts, that compensates SNAP participants at a higher rate for fruit and vegetable purchases. Press Release, USDA, USDA Selects Massachusetts to Test Ground-Breaking Nutrition Pilot Program (Aug. 19, 2010), http://www.fns.usda.gov/cga/press_releases/2010/0413.htm; *see also* *Healthy Incentives Pilot*, USDA, <http://www.fns.usda.gov/snap/hip/> (last modified Apr. 4, 2011). Whether this pilot program, which ends by April 2013, *see* *Healthy Incentives Pilot—Timeline*, USDA, <http://www.fns.usda.gov/snap/hip/timeline.htm> (last modified Apr. 4, 2011), will result in any long-term changes to SNAP remains to be seen.

49. Although the evidence is mixed, at least some studies have confirmed a positive association between SNAP participation and obesity. *E.g.*, Cindy W. Leung et al., *Low-Income Supplemental Nutrition Assistance Program Participation Is Related to Adiposity and Metabolic Risk Factors*, 95 AM. J. CLINICAL NUTRITION 17 (2012).

50. In fiscal year 2011, SNAP served 45 million people, OFFICE OF RESEARCH & ANALYSIS, FOOD & NUTRITION SERV., USDA, BUILDING A HEALTHY AMERICA: A PROFILE OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 1 (2012), <http://www.fns.usda.gov/ora/MENU/published/SNAP/FILES/Other/BuildingHealthyAmerica.pdf>; WIC served almost 9 million people, *WIC Participation and Costs*, USDA, <http://www.fns.usda.gov/pd/wisummary.htm> (last updated Sept. 28, 2012); and NSLP provided free lunches to more than 18 million children and reduced-price lunches to almost 3 million children. *See National School Lunch Program: Participation and Lunches Served*, USDA, <http://www.fns.usda.gov/pd/slsummar.htm> (last updated Feb. 6, 2013). These numbers likely include significant overlap among participants.

51. *E.g.*, LEVINE, *supra* note 40, *passim* (observing that children’s nutrition has often taken a back seat to agricultural and other interests in NSLP); Daniel L. Millimet et al., *School Nutrition Programs and the Incidence of Childhood Obesity*, 45 J. HUM. RESOURCES 640 (2010) (concluding that participation in NSLP exacerbates obesity but that participation in a school breakfast program does not); Jennifer A. Nelson et al., MHR A PULSE STUDY, June 2002, *Childhood Obesity in a New York City WIC Population*, available at http://www.healthsolutions.org/documents/pulse/PulseStudy_Vol_1_Num_3.pdf (finding that “[a] significant proportion of young children enrolled in a New York City WIC Program are overweight or at risk of overweight”). *But see* MICHELE VER PLOEG, ECON. RESEARCH SERV., USDA, ECON. BRIEF NO. 13, WIC AND THE BATTLE AGAINST CHILDHOOD OVERWEIGHT 3 (2009), <http://www.ers.usda.gov/media/147764/eb13.pdf> (concluding that WIC is not a “major cause” of childhood obesity, but the research cannot “ascribe (or deny) causal links between WIC participation and overweight status”).

benefits than SNAP.⁵² In 2010, Congress enacted legislation designed to boost nutrition in the NSLP,⁵³ although Congress has since weakened the legislation by depriving the USDA of authority to limit the serving of certain foods of lower nutritional value.⁵⁴ The failure of SNAP, WIC, and NSLP programs to prevent, or at least not to exacerbate, obesity demonstrates that while the problems of traditional hunger remain, the obesity epidemic requires new thinking about “food insecurity” writ large.⁵⁵ Even the poorest Americans can often obtain plenty of food, but it is a plenty of malnourishing calories. Although counterintuitive, researchers have found that obesity and hunger often coexist in the most vulnerable populations; indeed, that obesity is a *symptom* of hunger.⁵⁶ Hunger, defined variously as “the uneasy or painful sensation caused by a lack of food” or “the recurrent and involuntary lack of access to food,”⁵⁷ has long been recognized as a problem because it could lead to malnutrition, which traditionally manifested itself through conditions like underweight and stunted growth.⁵⁸ In today’s food environment, the malnutrition associated with hunger—or “food insecurity”—may manifest itself in the guise of obesity because low-nutrient, high-calorie options are often the most affordable and

52. FOOD & NUTRITION SERV., USDA, WIC FOOD PACKAGES—REGULATORY REQUIREMENTS FOR WIC-ELIGIBLE FOODS, <http://www.fns.usda.gov/wic/benefitsandservices/foodpkrgs.htm> (last updated Feb. 17, 2012).

53. See The Healthy, Hunger-Free Kids Act of 2010 Pub. L. 111-296, §§ 201–210, 124 Stat. 3183, 3214–16 (codified at 42 U.S.C. §§ 1753(b), 1758, & 1758b); see also Lauren Kaplin, *A National Strategy To Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL’Y 347, 367–79 (2011) (discussing changes to school lunch program mandated by the Act).

54. In particular, Congress preempted the USDA from issuing rules that would have limited the serving of potatoes and pizzas in school lunches, and slowed down USDA plans to limit sodium in school lunches. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 4 div. A., §§ 743, 746, 125 Stat. 522, 589 (2011); see also *Misguided Moves Thwart Healthier School Lunch*, HARVARD SCHOOL OF PUBLIC HEALTH, THE NUTRITION SOURCE, <http://www.hsph.harvard.edu/nutritionsource/nutrition-news/misguided-lunch-move-on-potatoes/index.html> (last visited Aug. 13, 2012). Also in response to political pressure, the USDA recently rescinded rules that placed daily and weekly limits on the quantity of meats and grains that could be included in school lunches. See Mary Clare Jalonick, *USDA To Allow More Meat, Grains in School Lunches*, YAHOO! NEWS (Dec. 8, 2012), <http://news.yahoo.com/usda-allow-more-meat-grains-school-lunches-184431563.html>.

55. The opposite of food insecurity, “food security,” has been defined by the United Nations as, “hav[ing] physical, social and economic access to sufficient, safe and nutritious food that meets . . . needs and food preferences for an active and healthy life.” U.N. FOOD & AGRIC. ORG., *THE STATE OF FOOD INSECURITY IN THE WORLD*, 2001, at 49 (2002).

56. See Sam Dolnick, *The Obesity-Hunger Paradox*, N.Y. TIMES, (Mar. 12, 2010), <http://www.nytimes.com/2010/03/14/nyregion/14hunger.html> (discussing the “Bronx Paradox,” whereby areas of the borough have both high rates of hunger and high rates of obesity); *Relationship Between Hunger and Overweight or Obesity*, FOOD RESEARCH & ACTION CTR., <http://frac.org/initiatives/hunger-and-obesity/are-hunger-and-obesity-related/obesity> (last visited Nov. 20, 2012) (noting that, despite “mixed” data, there is the “strongest and most consistent” evidence of a relationship between food insecurity and obesity among women and a “significant association” among children and adolescents).

57. NAT’L RESEARCH COUNCIL, *FOOD INSECURITY AND HUNGER IN THE UNITED STATES: AN ASSESSMENT OF THE MEASURE 47* (Gooloo S. Wunderlich & Janet L. Norwood eds., 2006), available at http://download.nap.edu/cart/download.cgi?&record_id=11578 (surveying different definitions of hunger).

58. MICHELLE MCGUIRE & KATHY A. BEERMAN, *NUTRITIONAL SCIENCES: FROM FUNDAMENTALS TO FOOD* 608 (2007).

convenient options, particularly to persons of a lower income demographic.⁵⁹ A modern effort to battle food insecurity, therefore, must focus on the quality and accessibility of nutritious food rather than merely any food. Ensuring the material means to purchase some food regardless of nutritional content, as FDR and Martin Luther King, Jr., urged, is insufficient.⁶⁰ What is needed is not a right to food per se, but a right to nutrition.

II. THE FOOD ENVIRONMENT AND THE OBESITY CRISIS

The explanation for obesity on an individual level is, in a scientific sense, quite simple: consumption of calories (units of energy) outpaces expenditure of calories through physical activity. As a social phenomenon, however, the reasons for the recent rise in obesity are quite complex. Human beings evolved to consume energy-dense foods in an environment where sustenance was difficult to obtain and famine was a constant threat.⁶¹ Today, residents of developed and developing countries are often surrounded by high-calorie, low-nutrient foods that can be obtained cheaply due to the mechanization of agriculture.⁶² In the United States, government subsidies for certain mass-farmed agricultural products like corn have created a surfeit of high-calorie products, such as sweetened soft drinks and meat products, that use corn-based derivatives.⁶³ Due to subsidies, these processed food products are often cheaper for consumers than healthier, higher nutrient foods that are less likely to cause obesity.⁶⁴ A multibillion-dollar food industry profits from selling these relatively cheap, processed foodstuffs to the American public.⁶⁵ While the food industry's size no doubt reflects public demand for its products to some degree, the industry also creates demand through expensive advertising campaigns that often target children.⁶⁶ As a result of its enormity and profitability, the processed food industry is politically powerful, exercising significant sway over government

59. Lauren M. Dinour et al., *The Food Insecurity–Obesity Paradox: A Review of the Literature and the Role Food Stamps May Play*, 107 J. AM. DIETETIC ASS'N 1952 (2007).

60. See *supra* notes 1–2.

61. See David H. Freedman, *How To Fix the Obesity Crisis*, SCI. AM., Feb. 2011, at 40, 42.

62. FRANCO SASSI, ORG. FOR ECON. COOPERATION & DEV., *OBESITY AND THE ECONOMICS OF PREVENTION: FIT NOT FAT* 31, 107–09 (2010).

63. See MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* 15–119 (2006); *KING CORN* (Mosaic Films 2007).

64. See, e.g., Mark Bittman, Op-Ed, *Bad Food? Tax It, and Subsidize Vegetables*, N.Y. TIMES (July 23, 2011), <http://www.nytimes.com/2011/07/24/opinion/sunday/24bittman.html?pagewanted=all> (demonstrating that the prices of fruits and vegetables have become more expensive at a much faster rate than carbonated beverages).

65. See PLUNKETT'S FOOD INDUSTRY ALMANAC 2012, at 8 (Jack W. Plunkett ed., 2012) (“The U.S. retail food and beverage industry, including restaurants, is about a \$1.5 trillion industry.”); POLLAN, *supra* note 63, at 85–99 (describing processed food industry).

66. See Jennifer L. Harris & Samantha K. Graff, *Protecting Children from Harmful Food Marketing: Options for Local Government To Make a Difference*, PREVENTING CHRONIC DISEASE, Sept. 2011, http://www.cdc.gov/pcd/issues/2011/sep/pdf/10_0272.pdf (describing food marketing that targets children).

decisions regarding food policy.⁶⁷

In addition to the increased availability of high-calorie, low-nutrient food, in recent decades other dramatic changes in behavior, not all of which relate to food consumption, have contributed to the obesity epidemic. Americans eat substantially more food that is prepared outside the home, which is higher in calories, sugar, and salt.⁶⁸ They also lead lives that are generally more sedentary than those of previous generations.⁶⁹ Any serious effort to reduce obesity must address these multitudinous causes of the epidemic as well as other practices, like increased breastfeeding, that are associated with lower rates of the condition. This Article, however, focuses on ensuring consumer access to nutritious food and protection from unhealthy food because improving the national diet is a necessary, even if not sufficient, component of reducing the national incidence of obesity.⁷⁰

A. OBESITY'S DISPROPORTIONATE TOLL

Since 1980, adult obesity rates in the United States have doubled from fifteen to thirty percent, while childhood obesity rates have almost tripled in the same time period.⁷¹ Associated with these increased rates of obesity are significant increases in diseases and conditions like type-2 diabetes, heart disease, hypertension, cancer, arthritis, Alzheimer's disease, dementia, and infant mortality.⁷² Due to the particularly high increase in youth obesity, the current generation of

67. See Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 *MILBANK Q.* 259, 263 (2009) (describing the industry's lobbying machinery).

68. See David M. Cutler et al., *Why Have Americans Become More Obese?*, 17 *J. ECON. PERSP.* 93, 105–07 (2003) (discussing the dramatic reduction in time spent on home meal preparation since the 1960s); Joanne F. Guthrie et al., *Role of Food Prepared Away from Home in the American Diet, 1977–78 Versus 1994–96: Changes and Consequences*, 34 *J. NUTRITION EDUC. & BEHAV.* 140 (2002) (concluding that food prepared outside the home is of lower nutritional quality than homemade food); Alice H. Lichtenstein & David S. Ludwig, *Bring Back Home Economics Education*, 303 *JAMA* 1857 (2010) (arguing that cooking skills have declined since schools stopped teaching home economics); Jennifer M. Poti & Barry M. Popkin, *Trends in Energy Intake Among U.S. Children by Eating Location and Food Source, 1977–2006*, 111 *J. AM. DIETETIC ASS'N* 1156 (2011) (discussing effects of increased youth consumption of food prepared outside the home).

69. See Timothy S. Church et al., *Trends Over 5 Decades in U.S. Occupation-Related Physical Activity and Their Associations with Obesity*, *PLoS ONE* (May 2011), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0019657> (finding a significant reduction in occupation-related energy expenditure in the last fifty years); PEDESTRIAN & BICYCLE INFO. CTR., *SAFE ROUTES TO SCHOOL GUIDE 1–3* (noting significant decline in percentage of school children who walk or cycle to school from 1969 to 2009). *But see* Herman Pontzer et al., *Hunter–Gatherer Energetics and Human Obesity*, *PLoS ONE* (July 2012), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0040503> (arguing that modern lifestyles are no more sedentary than our hunter–gatherer forebears' and, therefore, other factors like diet must explain recent increases in obesity).

70. *Accord Atwell*, *supra* note 13, at 17 (“[T]he causes of obesity are not limited to the food supply. . . . Even so, part of the solution for combating obesity will include addressing the food supply by creating easier and more affordable access to healthier foods.”).

71. TRUST FOR AMERICA'S HEALTH, *F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA*, 2008, at 5 (5th ed. 2008), <http://healthyamericans.org/reports/obesity2008/Obesity2008Report.pdf>.

72. *Id.*

American children is on track to live shorter, less healthy lives than their parents.⁷³ Obesity also poses serious challenges to the nation's economy by costing employers billions of dollars annually in health care expenditures, lost worker productivity, and workers' compensation claims.⁷⁴ Government expenditures on health care through Medicare, Medicaid, and other social programs, already rising at a rate that far outpaces inflation, are significantly higher and will only increase further due to rising obesity rates.⁷⁵ Because obesity affects self-esteem, which in turn affects academic performance, rising youth obesity rates may negatively impact American students' academic achievement and competitiveness in a global economy.⁷⁶ Even national security is threatened: obesity is the lead cause of a substantial rise in medical rejections of potential military recruits.⁷⁷

The social and economic impact of obesity would be disturbing enough if it was spread evenly throughout the population, but in fact obesity disproportionately affects certain demographic groups. Although obesity was mainly a "disease of affluence" for centuries after the beginning of civilization,⁷⁸ it is now more prevalent among poorer segments of the population in developed countries like the United States,⁷⁹ a trend that is particularly pronounced among children.⁸⁰ In terms of race and ethnicity, obesity rates for African-Americans, Hispanics, and Native Americans are higher than those for whites,⁸¹ a trend that is also more pronounced in some subgroups of children.⁸² For the poor

73. *Id.*

74. *Id.* at 5, 34.

75. See, e.g., Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFF. 822, 828–30 (2009).

76. See JAMES B. HUNT, JR., INST. FOR EDUC. LEADERSHIP & POLICY, CHILDHOOD OBESITY AND ACADEMIC OUTCOMES (2008), http://www.hunt-institute.org/elements/media/files/Hunt_Obesity_Memo.pdf.

77. John M. Shalikhvili & Hugh Shelton, Op-Ed, *The Latest National Security Threat: Obesity*, WASH. POST, Apr. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042903669.html>; see also Cawley & Maclean, *supra* note 7.

78. See J. Josh Snodgrass et al., *The Emergence of Obesity Among Indigenous Siberians*, 25 J. PHYSIOLOGICAL ANTHROPOLOGY 75, 75 (2006).

79. Interestingly, the "obesity gap" between rich and poor has actually narrowed since the 1970s, while the overall obesity rate has skyrocketed. See Nidhi Maheshwari et al., *Obesity Prevalence Increasing 3 Times Faster in High Than Low Income Groups: National Health and Nutrition Examination Surveys 1971 to 2002*, 111 CIRCULATION 190 (reviewing data).

80. See, e.g., Susan H. Babey et al., *Income Disparities in Obesity Trends Among California Adolescents*, 100 AM. J. PUB. HEALTH 2149 (2010) (concluding that income disparity in obesity prevalence among California teens doubled between 2001 and 2007); *id.* at 2152 (citing a study showing that obesity prevalence among adolescents increased most rapidly among the poor between 1971 and 2004).

81. L. Pan et al., *Differences in Prevalence of Obesity Among Black, White, and Hispanic Adults—United States, 2006–2008*, 58 MORBIDITY & MORTALITY WKLY. REP. 740, 741 tbl.1 (2009) (noting that obesity rates in the 2006–2008 time span were 35.7% for African-Americans, 28.7% for Hispanics, and 23.7% for non-Hispanic whites).

82. For example, as compared to their white counterparts, African-American adolescent girls and Native American children are twice as likely to be obese (29.2% to 14.5%, and 31% to 16%, respectively). CYNTHIA OGDEN ET AL., PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, TRENDS 1963–1965 THROUGH 2007–2008, at 2 (2010), <http://www.cdc.gov/nchs/data/hestat/>

and certain minority groups, the disproportionate prevalence of obesity is compounded by other social determinants of bad health, a condition known as “deprivation amplification.”⁸³ These include barriers to obtaining health care,⁸⁴ as well as the stress of poverty and discrimination,⁸⁵ and living in areas with more crime⁸⁶ and pollution.⁸⁷ Obesity, therefore, compounds these other health risks, resulting in a disproportionate share of related conditions like diabetes, heart disease, and stroke among certain lower income and minority populations.⁸⁸

In addition to skewing toward certain racial, ethnic, and income groups, the obesity epidemic has affected certain parts of the United States more than others. Although obesity rates have risen over the last few decades in every single state,⁸⁹ a contiguous swath of the country ranging from Appalachia to some Midwestern states (including Michigan and Ohio) and down into the mid-South and the Deep South has become the most obese geographical section of the country.⁹⁰ Some researchers refer to this area as the “fat belt,” and offer a variety of explanations for its high rate of obesity. To some degree, the prevalence of obesity in this area reflects socioeconomic and racial demographics; many of these states are relatively poor and have large African-American populations.⁹¹ Besides poverty and race, other explanations for the “fat belt” include the lack of public transportation, automobile-centered residential development, and fattening regional cuisines.⁹²

obesity_child_07_08/obesity_child_07_08.pdf; WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 5 (2010), http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf. For Mexican-American adolescent boys, the obesity rate is 26.8% as opposed to 16.7% for whites. OGDEN ET AL., *supra*, at 2.

83. E.g., Helena Guilhermina Nogueira, *Deprivation Amplification and Health Promoting Resources in the Context of a Poor Country*, 70 SOC. SCI. & MED. 1391 (2010).

84. See generally HENRY J. KAISER FAMILY FOUND., KEY FACTS: RACE, ETHNICITY & MEDICAL CARE (2007).

85. KATHRYN COLLINS ET AL., UNDERSTANDING THE IMPACT OF TRAUMA AND URBAN POVERTY ON FAMILY SYSTEMS: RISKS, RESILIENCE AND INTERVENTIONS (2010), http://www.nctsn.org/sites/default/files/assets/pdfs/understanding_the_impact_of_trauma.pdf (reviewing literature on the subject).

86. See Catherine E. Ross & John Mirowsky, *Neighborhood Disadvantage, Disorder, and Health*, 42 J. HEALTH & SOC. BEHAV. 258 (2001).

87. See RHODES, *supra* note 10.

88. See George A. Mensah et al., *State of Disparities in Cardiovascular Health in the United States*, 111 CIRCULATION 1233 (2005).

89. See CDC, *Overweight and Obesity*, <http://www.cdc.gov/obesity/data/adult.html> (last updated Aug. 13, 2012).

90. *Id.* (listing obesity rates by state as of 2010).

91. Compare *id.*, with U.S. Census Bureau, *Black or African-American Population Alone, Percent—July 2008*, <http://www.census.gov/compendia/statab/2012/ranks/rank06.html> (last visited Nov. 29, 2012) (listing states’ black population by percentage), and U.S. Census Bureau, *Persons Below Poverty Level, 2008*, <http://www.census.gov/compendia/statab/2012/ranks/rank34.html> (last visited Nov. 29, 2012) (listing poverty rate by state by percentage).

92. Claire Suddath, *Why Are Southerners So Fat?*, TIME, July 9, 2009, <http://www.time.com/time/health/article/0,8599,1909406,00.html>.

B. THE LIMITS OF THE FREE-MARKET PARADIGM

According to classical economic theory, “free” markets are presumed to best promote the general welfare by allocating goods efficiently. For a number of reasons, however, the free-market paradigm does not and cannot accurately describe the market for food in the United States. The free-market paradigm assumes that consumers are well-informed and capable of making “rational” decisions that promote their best interests. A fundamental premise of free-market economics is that suppliers sell their products for a price that allows them to recoup their marginal costs. Through the pricing mechanism, a reasonably competitive market is supposed to ensure that an optimal number of a particular good is produced and sold. The American food market’s pricing mechanism, however, currently tilts heavily toward the sale of more high-calorie, low-nutrient food due to heavy federal subsidies for corn, which in turn leads to a surfeit of corn-based ingredients (including the sweetener high-fructose corn syrup) that are common in products like soft drinks.⁹³ Given that demand for most food products is at least somewhat elastic, these lower prices lead to more consumption of unhealthy food products.⁹⁴

In addition to the distorting power of federal subsidies, the current market underprices many high-calorie, low-nutrient—or “obesogenic”⁹⁵—foods due to the externalities such foods impose on the rest of society. Because the costs of obesity’s effects—such as lost worker productivity and increased health care needs—are spread across society in a variety of ways, consumers of obesogenic products do not internalize the full costs of consumption, allowing for consumption far beyond the optimal level. One way to reduce this overconsumption (and correct the externalities) is to raise the price of certain foods through taxes, the withdrawal of subsidies, or some other mechanism.⁹⁶ An alternative way to cure these externalities would be to make the obese pay more for the costs of their condition, perhaps through increased health insurance premiums and deductibles. Although some small steps toward forcing the obese to internalize more costs of their condition, at least in the health realm, might be possible and are currently being tested by some employers and insurers,⁹⁷ wholesale changes would raise a number of difficulties. As a practical matter, charging different

93. See ALICIA HARVIE & TIMOTHY A. WISE, TUFTS UNIV. GLOBAL DEV. & ENVTL. INST., POLICY BRIEF No. 09-01, SWEETENING THE POT: IMPLICIT SUBSIDIES TO CORN SWEETENERS AND THE U.S. OBESITY EPIDEMIC (2009), <http://www.ase.tufts.edu/gdae/Pubs/rp/PB09-01SweeteningPotFeb09.pdf>.

94. The mass substitution of high-fructose corn syrup for sugar in the early 1980s is the main reason for the decline in the inflation-adjusted price of soda. See Bittman, *supra* note 64. The food industry has also incorporated corn-based products of dubious nutritional value, like corn starch, into other foods. See POLLAN, *supra* note 63, at 85–99.

95. “Obesogenic” denotes obesity-causing. See, e.g., Michelle M. Mello, *Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role*, 35 J. HEALTH POL. POL’Y & L. 227, 228 (2010).

96. E.g., Bittman, *supra* note 64 (proposing increased taxes on soda).

97. E.g., Jilian Mincer, *Insight: Firms To Charge Smokers, Obese More for Healthcare*, REUTERS, Oct. 30, 2011, <http://www.reuters.com/article/2011/10/30/us-penalties-idUSTRE79T2S220111030>.

insurance rates for people of different body-mass indexes or eating habits can increase administrative costs for insurers. In addition, such moves may be politically unpopular as a matter of social justice. If Medicaid, for instance, were to provide less generous benefits for obesity-related conditions like diabetes as a means of encouraging healthier eating habits, many citizens might find the inevitable human suffering unacceptable.

Moreover, it is not at all clear that restructured long-term incentives would have much of an effect on either people's eating habits or on their ultimate weight. For some individuals, obesity is influenced by genetic factors.⁹⁸ More importantly, the model of the "rational" consumer who can appropriately consider the long-term consequences of short-term decisions, while always an unrealistic ideal, is particularly ill-suited to the food context. Even if consumers were fully "rational" in their eating choices, they often lack the information—such as calorie content and other nutritional information—necessary to make an informed choice.⁹⁹ Consumers are frequently unaware of the disparity in nutrition between different food items and the effects of these disparities over time. Efforts to reduce this information asymmetry, such as by requiring more prominent calorie disclosures at fast-food restaurants, are underway, but any such efforts must compete with the multimillion-dollar media campaigns of the fast-food industry, which downplay the nutritional risks of consuming their products.¹⁰⁰ Moreover, even if these informational asymmetries can be reduced, many Americans lack the knowledge, means, and time to purchase the necessary foods to prepare a nutritious meal. Hence, any successful effort to promote nutrition must include a serious public-education component.

Even if consumers were more fully informed, they are likely to have "time-inconsistent preferences" when it comes to food and weight. They may desire to maintain a healthy weight in the long term but nonetheless eat obesogenic food in the short term.¹⁰¹ Scientific research has demonstrated that it is quite difficult for people to resist cravings for obesogenic foods given the evolutionary and biological reasons for such cravings.¹⁰² Further, the choice of which foods to consume and how much of them is not made in a vacuum based on "rational" consideration of long-term consequences, but rather it is influenced substantially by context. Portion sizes, for instance, influence the quantity of food

98. Absent any widespread and recent mutation, genetics is an unsatisfactory explanation for obesity's rise *in the aggregate*, even if it helps explain why some persons are more susceptible to obesity than others at a fixed point in time. See Benforado et al., *supra* note 13, at 1738.

99. See *infra* note 320 and accompanying text.

100. Benforado et al., *supra* note 13, at 1700–02; Harris & Graff, *supra* note 66.

101. See John Cawley, *An Economic Framework for Understanding Physical Activity and Eating Behaviors*, 27 AM. J. PREVENTATIVE MED. 117 (2004).

102. See Tara Parker-Pope, *When Fatty Feasts Are Driven by Automatic Pilot*, N.Y. TIMES WELL BLOG (July 11, 2011), <http://well.blogs.nytimes.com/2011/07/11/when-fatty-feasts-are-driven-by-automatic-pilot/> (discussing research).

people eat,¹⁰³ just as the relative ease and availability of nutritious versus nonnutritious options influence people's choice of food.¹⁰⁴ Understanding these human frailties, the purveyors of low-nutrient, energy-dense foods manipulate their store locations, product offerings, and advertising campaigns to take full advantage.¹⁰⁵ The free-market paradigm of the "rational" consumer making informed choices in a way that best promotes the social welfare is thus particularly ill-suited to the food context.

C. THE EXAMPLE OF FOOD DESERTS AND SWAMPS

The limits of the free-market paradigm are most accentuated in certain geographic areas—often referred to as "food deserts"—that lack convenient access to relatively nutritious foods like fruits, vegetables, low-fat milk, and lean meats.¹⁰⁶ Many, if not most, food deserts are perhaps more accurately called "food swamps" because the void created by the absence of mainstream grocers is frequently filled by fast-food chains, takeout restaurants, and "corner stores" that sell a high proportion of obesogenic items like fried foods, candy, processed snack foods, and soft drinks.¹⁰⁷ Public-health professionals and policymakers have increasingly focused on these areas, operating under the premise that the localized food environment significantly affects the food consumption patterns of the residents, especially those with mobility constraints like not owning a private vehicle. Less access to healthier foods like fresh fruits and vegetables has been linked to lower consumption thereof, which in turn is linked to higher rates of obesity.¹⁰⁸ Other studies have demonstrated that the increased prevalence of fast-food restaurants and other low-nutrition retailers in a concentrated geographic area is positively correlated to increased consumption of such products by residents, which is also associated with higher rates of obesity.¹⁰⁹

Exactly which areas qualify as food deserts is currently the subject of much

103. Brian Wansink et al., *Bottomless Bowls: Why Visual Cues of Portion Size May Influence Intake*, 13 OBESITY RES. 93 (2005).

104. Benforado et al., *supra* note 13, at 1698–99; D. A. Cohen & S. H. Babey, *Contextual Influences on Eating Behaviours: Heuristic Processing and Dietary Choices*, 13 OBESITY REVS. 766, 776 (2012) ("The ubiquity of less healthful choices can overwhelm and undermine cognitive, deliberate decision-making."); Deborah A. Cohen & Thomas A. Farley, *Eating as an Automatic Behavior*, PREVENTING CHRONIC DISEASE, May 2008, http://www.cdc.gov/pcd/issues/2008/jan/pdf/07_0046.pdf.

105. Deborah A. Cohen, *Neurophysiological Pathways to Obesity: Below Awareness and Beyond Individual Control*, 57 DIABETES 1768, 1772 (2008) ("People overconsume in response to environmental cues and they lack insight into the extent to which their food choices and eating behaviors are being manipulated by sophisticated advertising and marketing techniques.").

106. *See supra* note 8.

107. *See* Donald Rose et al., *Deserts in New Orleans?: Illustrations of Urban Food Access and Implications for Policy* 16 (Feb. 2009), http://www.npc.umich.edu/news/events/food-access/rose_et_al.pdf (unpublished conference paper) ("[S]uggest[ing] that a more useful metaphor . . . is 'food swamps' rather than food deserts."); *see also* USDA FOOD DESERT REPORT, *supra* note 9.

108. *See* Rose et al., *supra* note 107, at 4 (citing "wave of studies associating dietary outcomes to proximity to supermarkets"); USDA FOOD DESERT REPORT, *supra* note 9, at 78–79.

109. Rose et al., *supra* note 107, at 15–16.

debate because detailed research in this area is still in its infancy¹¹⁰ and the numbers vary greatly depending on the specific criteria used to define a food desert.¹¹¹ Cruder studies rely solely on distance from residences to a supermarket, while more sophisticated studies take into account other factors that affect the accessibility of nutritious food, like transportation options, crime, and the substitutability of nontraditional grocery retailers, as well as the prevalence of resident characteristics affecting mobility, like physical disabilities and family obligations.¹¹² Despite the definitional ambiguities, it appears reasonably clear that reliable and affordable access to nutritious food is a problem for a significant percentage of the population, particularly lower income and minority groups.¹¹³

With respect to food deserts and swamps specifically, classical economics might predict that if more residents demanded more fruits and vegetables, a profit could be made selling such products, and private enterprise should swoop in and fill the void.¹¹⁴ Similarly, classical economics would explain the predomination of fast food in certain areas as a response to residents' preferences.¹¹⁵ In addition to the generally applicable reasons why the market narrative is unsatisfying in the food context,¹¹⁶ more specific reasons apply in the food desert and swamp settings. First, there is some evidence of constraints on supply that prevent the market from responding to potential consumer preferences. Large grocers may shy away from certain low-income (often urban) areas due to poor infrastructure, inhospitable zoning, crime, traffic patterns, and the difficulty of assembling the necessary parcels of land for the standard store

110. See USDA FOOD DESERT REPORT, *supra* note 19, at 40.

111. For instance, one study found that the percentage of New Orleans's population living in a food desert ranged from 17% to 87% depending on the criteria used. See Rose et al., *supra* note 107, at 10.

112. See Kathryn M. Neckerman et al., Measuring Food Access in Urban Areas 5–10 (2009), http://www.npc.umich.edu/news/events/food-access/neckerman_et_al.pdf (unpublished conference paper) (“Straight-line distance offers a simple approximation of travel burden, but spatial accessibility is affected by individual/household and neighborhood characteristics beyond simple distance.”). Quality, price, and variety of foods offered are also important factors in consumption decisions, but only a handful of studies have assessed them. *Id.* at 12–13.

113. See Julie Beaulac et al., *A Systematic Review of Food Deserts, 1966–2007*, PREVENTING CHRONIC DISEASE, July 2009, http://www.cdc.gov/pcd/issues/2009/jul/pdf/08_0163.pdf (reviewing thirty-four studies and concluding that “Americans living in low-income and minority areas tend to have poor access to healthy food”). A number of studies have observed significant disparities in food accessibility and price within specific metropolitan areas. *E.g.*, GALLAGHER, CHICAGO, *supra* note 8; GALLAGHER, DETROIT, *supra* note 8 (Detroit); Neckerman et al., *supra* note 112 (New York City), Rose et al., *supra* note 107 (New Orleans). Within certain cities, some minority groups fare better than others. See, *e.g.*, Neckerman et al., *supra* note 112, at 19 (finding that in New York City, “predominantly Latino, Asian, or foreign-born” neighborhoods “fare relatively well” compared to “majority-black” areas).

114. Marianne Bitler & Steven J. Haider, *An Economic View of Food Deserts in the United States*, 30 J. POL'Y ANALYSIS MGMT. 153, 159 (2011) (“[R]etail outlets should try to locate in places where other retail outlets are not locating . . .”).

115. See Benforado et al., *supra* note 13, at 1694–1712 (noting that fast-food companies rely on narrative of “free choice” while simultaneously locating stores in areas with more captive populations).

116. See *supra* section II.B.

lot size.¹¹⁷ In addition, some commentators have suspected that grocery chains engage in discriminatory redlining similar to the practices that have been attributed to banks and real estate developers.¹¹⁸ Further, with respect to food swamps in particular, fast-food restaurants benefit disproportionately from government aid, such as guaranteed loans from the federal Small Business Administration (SBA),¹¹⁹ as well as a favorable regulatory regime in which labor is cheap, fungible, and need not be provided benefits like health insurance or retirement contributions.¹²⁰

Even if food deserts and swamps result from the market merely satisfying residential consumers' preferences, there are independent policy and normative reasons to reject such a market outcome. If such environments lead to worse diets, these diets, and their associated health outcomes, negatively affect the rest of society in a number of ways, as explained above. Putting aside externalities, some have speculated that lower income Americans eat less nutritious diets because they value their future less than higher income Americans.¹²¹ If this is true, there are legitimate reasons to be concerned about allowing the market to honor such preferences, particularly when poverty is unevenly distributed on other demographic bases like race. Also, it is likely that such preferences result, at least in part, from uneven initial distributions of wealth that there is no good reason to perpetuate.¹²²

It bears noting that some recent research has questioned the degree to which the local-food environment influences consumption patterns. Specifically, two recent studies found that proximity to supermarkets does not reduce obesity, and that proximity to fast food does not increase it.¹²³ While further research is

117. See Bitler & Haider, *supra* note 114, at 168–69.

118. See USDA FOOD DESERT REPORT, *supra* note 9, at 86.

119. See ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 101–02 (2001) (“For more than three decades the fast food industry has used the [SBA] to finance new restaurants.”); *Franchise Systems Using SBA Financing*, FRANDATA, http://www.frandata.com/products/samples/20060929_SBA_financing_A_Profile.pdf (last visited Apr. 23, 2012) (listing fast-food restaurants as the industry most frequently using SBA financing).

120. See SCHLOSSER, *supra* note 119, at 67–88 (explaining industry practices); see also Steven Greenhouse, *In Drive To Unionize, Fast-Food Workers Walk Off the Job*, N.Y. TIMES, Nov. 28, 2012, <http://www.nytimes.com/2012/11/29/nyregion/drive-to-unionize-fast-food-workers-opens-in-ny.html> (describing complaints of low pay for fast-food employees). Indeed, unlike fast-food restaurants, grocery stores have reasonably high rates of worker unionization. See RUTH MILKMAN & LAURA BRASLOW, THE STATE OF THE UNIONS 2011, at 14 tbl.3 (2011), http://www.urbanresearch.org/about/docs/lmis_pubs/state_of_the_unions_2011_release_hires.pdf (noting unionization rate for retail grocery stores of 19.8% during the 2003 to 2011 time frame).

121. Bitler & Haider, *supra* note 114, at 156.

122. See, e.g., Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 686 (1980).

123. Ruopeng An & Roland Sturm, *School and Residential Neighborhood Food Environment and Diet Among California Youth*, 42 AM. J. PREVENTATIVE MED. 129, 134 (2012); Helen Lee, *The Role of Local Food Availability in Explaining Obesity Risk Among Young School-Aged Children*, 74 SOC. SCI. & MED. 1193, 1199–1200 (2012). A handful of other recent studies concluded that increased access to fresh produce did not increase residents' purchases thereof, but that such purchases were negatively affected by fast-food proximity. See Janne Boone-Heinonen et al., *Fast Food Restaurants and Food*

needed, these skeptical studies are limited in key ways: they relied on crude measures of food access (simple distance), and they did not consider the *quality*, *variety*, or *prices* of the products offered by supermarkets in these areas.¹²⁴ Moreover, the studies did not question the notion that *income* influences diet and health, regardless of geographic location. For this Article's purposes, it is not particularly important to ascertain the precise extent to which localized food deserts and swamps are a problem, for any such areas are a synecdoche for the food environment nationally. While millions of Americans—perhaps the majority—generally enjoy relatively easy and affordable access to nutritious food when they consciously seek out such products, they too live in a food environment in which unhealthy foods are ever present, incessantly marketed, and priced at a deceptively low level, thus influencing consumption choices. If food deserts and swamps are simply the areas in which residents experience this constrained choice, or “imperfect autonomy,” most acutely,¹²⁵ the rest of America is hardly an oasis of nutrition. Moreover, even if the food-desert skeptics are right that eating patterns are affected more by factors like macro food pricing and the psychology of food-purchase patterns than access to healthy foods,¹²⁶ any national strategy to combat obesity will require ensuring sufficient access to healthy foods in addition to addressing other causes of obesity.¹²⁷

Stores, 171 ARCHIVES INTERNAL MED. 1162 (2011); Steven Cummins et al., *Large Scale Food Retailing as an Intervention for Diet and Health: Quasi-experimental Evaluation of a Natural Experiment*, 59 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1035 (2005) (studying a neighborhood in Scotland); Yoosun Park et al., *Neighbourhood Immigrant Acculturation and Diet Among Hispanic Female Residents of New York City*, 14 PUB. HEALTH NUTRITION 1593 (2011). These studies echo the skepticism of food deserts but reiterate the concern with food swamps. Accord Rose et al., *supra* note 107, at 15–16 (“[T]he extensive amount of energy-dense offerings available at [fast-food restaurants] may in fact inundate, or swamp out, what relatively few healthy choices there are.”).

124. See Mari Gallagher, *Response to “Studies Question Pairing of Food Deserts and Obesity”* (Apr. 18, 2012), http://www.marigallagher.com/site_media/dynamic/project_files/RESPONSE_NYT_FOODDESERTS-OBESITY.pdf (noting that “[n]ot all grocery stores identified by the[] databases [used by the studies] are equal, and many are not even grocery stores at all”); see also Bitler & Haider, *supra* note 114, at 167 (noting the importance of price in studying food deserts and that few studies analyze it); *id.* at 161 (noting that many food-desert studies rely on “broad industry classifications” of retail food outlets, thereby ignoring potential heterogeneity in offerings across supermarkets); Karen M. Jetter & Diana L. Cassady, *The Availability and Cost of Healthier Food Alternatives*, 30 AM. J. PREVENTATIVE MED. 38, 42 (2006) (observing that small grocery stores in low-income areas tend to stock discount brands with poorer nutritional quality); Neckerman et al., *supra* note 112, at 13 (noting that supermarkets are more likely to stock low-quality produce in low-income neighborhoods).

The authors of the “skeptical” studies recognize other limitations on their findings. *E.g.*, An & Sturm, *supra* note 123, at 130 (noting that height and weight were self-reported and that business listings used might be inaccurate).

125. See Benforado et al., *supra* note 13, at 1798 (arguing that the law should recognize “imperfect autonomy” in certain settings).

126. See Lee, *supra* note 123, at 1201.

127. See Gallagher, *supra* note 124 (noting that “[h]ealthy food access is a necessary and important foundation” for reducing obesity but that education, culture, cost, and preference are also important factors that must be addressed).

III. RIGHTS: DEFINITIONS, ASSUMPTIONS, AND THE “TRADITIONAL” APPROACH

In making the case for a right to nutrition, it is essential to clarify how this Article uses the term “right.” Despite the rich jurisprudential literature on rights, many academic papers assume that a “right” must be constitutionally based and judicially enforceable. This is only one, very narrow meaning of the term “right,” and I do not limit myself thereto. Rather, this Article uses “right” to mean any individual or group claim to resources or entitlement to protection that is recognized, even indirectly, by law. Under this definition, for instance, one’s claim to protection from common law nuisances, even if not constitutionally protected, can be considered a “right,” at least until the applicable law changes.¹²⁸ Similarly, an individual’s entitlement to receive food stamps, premised on Congress’s statutory establishment of criteria for their receipt and appropriation of funding for the program, is a “right” unless and until Congress changes the program.¹²⁹ As such, this Article’s use of the term “right” is decidedly positivistic. The aim here is not to establish nutrition as a pre- or extra-legal “natural right,” but to articulate the methods by which the legal system might recognize a right to nutrition.

Although the foundational argument for a right to food is largely beyond the scope of this Article, it helps to understand the case in brief. Food is a necessity of human existence. Without food to sustain the human body, the exercise of other rights, like the right to free speech or the free exercise of religion, would be impossible. While food was traditionally a predicate for good health, the consumption of many widely available foods now can contribute significantly to obesity. A focus on nutrition rather than food recognizes this new reality and is capable of incorporating the possibility that *protection from certain foods* and the *promotion of the consumption of certain foods over others* may be as important to human health and well-being as the provision of a minimum level of food. To be sure, some may question whether “right” is the appropriate appellation to affix to these goals.¹³⁰ Given the importance of the interest, however, “right” is as appropriate in the context of nutrition as it is in the contexts of housing and health care, two essential material predicates for a good life that are frequently described and fought for as “rights.”¹³¹

Recognition of a right to nutrition can *enhance* individuals’ autonomy to

128. *E.g.*, *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 640, 642 (Idaho 2004) (upholding statute immunizing grass farmers from nuisance liability for burning grass).

129. *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 861 (2001) (discussing “statutory rights”).

130. *See, e.g.*, MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (criticizing overuse of the term “right” in American legal and political discourse).

131. *E.g.*, Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275 (2009); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993); Maria Foscarinis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447 (2006); Tamara Friesen, *The Right to Health Care*, 9 HEALTH L.J. 205

make healthier choices. Consumer decisions are not made in a vacuum; rather, they are significantly influenced by environmental factors like the accessibility and price of different foods, information, advertising, and cultural heritage.¹³² Under current conditions, even individuals who want to eat healthier foods may have a relatively difficult time doing so. Moreover, individuals are often unaware of the full consequences of their decisions. Most people would prefer to maintain a healthy weight, but many people fail to comprehend the long-term consequences of a steady stream of short-term consumption choices.¹³³ Many of the efforts designed to bolster nutrition seek to bridge this gap, and make it easier for individuals to connect their short-term decisions to their long-term desires.¹³⁴

Operationally, this Article opts for a broad definition of “right” for two reasons. First, as will be explained in more depth below, the likelihood of establishing a right to nutrition that is constitutionally based and judicially enforced, under either the federal or state constitutions is very slim. Second, some of the most popular and dearly rights in American society are nonconstitutional.¹³⁵ Although these rights are constantly subject to political debate and repeal, constitutional rights are not permanent either. Constitutional rights can be eliminated by amendment, and they can be narrowed significantly by judicial interpretation.

A. THE RIGHT TO NUTRITION AS A POTENTIAL POSITIVE RIGHT

Like other socioeconomic rights, such as a right to housing or adequate medical care, the right to nutrition is a “positive right.” While the term defies easy definition, a positive right is one that imposes an affirmative obligation on government, in contrast to a negative right, which prohibits the government from taking certain actions against individuals.¹³⁶ Most of the well-known rights protected by the U.S. Constitution—for example, freedom of speech, press, and religion, and the protection of private property from government seizure without just compensation—are classically negative in that they prevent governmental action of a particular type.¹³⁷ Unlike many other, more recently

(2001); Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CALIF. L. REV. 1151 (2007).

132. Benforado et al., *supra* note 13, at 1698.

133. See Cawley, *supra* note 101, at 122.

134. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

135. See SUNSTEIN, *supra* note 14, at 61–62 (referring to rights like Social Security and the right to be free from private discrimination as “constitutive commitments”).

136. See, e.g., Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1462–64 (2010) (same); Cross, *supra* note 129, at 866 (defining “positive rights”).

137. E.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (noting that the Constitution “is a charter of negative rather than positive liberties”).

drafted constitutions,¹³⁸ the U.S. Constitution does not explicitly protect positive, socioeconomic rights like those to housing, education, employment, medical care, or nutrition. Although some scholars have challenged the distinction between positive and negative rights,¹³⁹ this Article will simply accept that there is such a distinction. By requiring the government to provide certain resources—say, a minimum amount of food at a minimum level of quality—or by requiring the government to take action against private parties,¹⁴⁰ a right to nutrition would lie safely on the positive end of the spectrum of constitutional rights.¹⁴¹ One component of a right to nutrition might be considered negative: individual protection from the government’s promotion of unhealthy foods through subsidization and marketing. On its own, however, this component is insufficient to transform a right to nutrition into a negative right.

1. Positive Right to Nutrition Under the Federal Constitution?

With a handful of exceptions, the federal courts have consistently interpreted the U.S. Constitution to protect only negative rights. For a time, however, it appeared that the U.S. Supreme Court was moving toward interpreting the Fourteenth Amendment as guaranteeing some minimum level of socioeconomic rights. In the late 1960s and early 1970s, the Court issued a series of decisions protecting welfare benefits and access to health care for the poor.¹⁴² Prominent academics like Frank Michelman charted a doctrinal path for constitutionally based, judicially enforced welfare rights.¹⁴³ Cass Sunstein argues that had it not been for Richard Nixon’s razor-thin defeat of Hubert Humphrey in the 1968 presidential election, and the influence of Nixon’s subsequent four Supreme Court appointments on constitutional doctrine, Michelman’s vision would have been fulfilled.¹⁴⁴

Whether Sunstein is correct is impossible to know. What is clear is that

138. *E.g.*, S. AFR. CONST., 1996, §§ 26, 27, 29 (guaranteeing rights to housing, health care, food, water, social security, and education); *see also* Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT’L L.J. 285 (2004).

139. *E.g.*, David A. Sklansky, *Quasi-affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230 (2002) (referring to some rights as “quasi-affirmative” because they require the government to expend resources); *see also* Cross, *supra* note 129, at 864–66 (reviewing criticism of distinction).

140. *Accord* Cross, *supra* note 129, at 872–73 (categorizing the Thirteenth Amendment as a positive right because it requires the government to take action against private parties).

141. Usman, *supra* note 136, at 1462–63 (describing the positive–negative rights distinction as “a continuum”).

142. *See, e.g.*, *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974) (invalidating statute requiring minimum time in residence to receive medical care at county expense); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring evidentiary hearing before deprivation of welfare benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating time-in-residence requirement for welfare recipients).

143. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *see also* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

144. SUNSTEIN, *supra* note 14, at 153.

beginning in the early 1970s, the Supreme Court beat a hasty retreat from recognizing constitutional socioeconomic rights.¹⁴⁵ In 1989, the Court solidified this approach in *DeShaney v. Winnebago County Department of Social Services* when it declared that the Fourteenth Amendment's Due Process Clause was a mere "limitation on the State's power to act," not "a guarantee of certain minimal levels of safety and security."¹⁴⁶ In the more than two decades since, the Court has shown no signs of revisiting its general aversion to recognizing federal constitutional positive rights.¹⁴⁷ Thus, for all intents and purposes, socioeconomic rights as judicially enforceable and constitutionally grounded are a dead letter at the federal level.¹⁴⁸ This is not to say that the push for such rights based on the Constitution's existing text may never rise again, and a constitutional amendment that expressly protected socioeconomic rights would obviously be a game changer.¹⁴⁹ Current political realities, however, make any such seismic constitutional changes highly unlikely, so a judicially enforceable, positive right to nutrition premised on the federal Constitution is a nullity for the foreseeable future.¹⁵⁰

2. Positive Right to Nutrition Under State Constitutions?

Unlike the federal Constitution, state constitutions expressly protect positive rights. Every state constitution guarantees a free public education.¹⁵¹ Other positive (or arguably positive) rights enshrined in some state constitutions include support for the needy,¹⁵² support for the physically and mentally challenged,¹⁵³ the right to unionize,¹⁵⁴ the right to a clean environment,¹⁵⁵

145. *E.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to recognize right to an education as a "fundamental" constitutional right).

146. 489 U.S. 189, 195 (1989).

147. *E.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (rejecting assertion of "property interest" in restraining order enforcement).

148. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *STAN. L. REV.* 203, 205 (2008).

149. *See* Cross, *supra* note 129, at 910 (warning that constitutional positive rights could be hijacked by conservative judges intent on resurrecting *Lochner v. New York*, 198 U.S. 45 (1905)).

150. To be sure, the federal Constitution might impose a "right to nutrition" through an international treaty obligation. U.S. CONST. art. VI, § 2 (making treaties "the supreme Law of the Land"). As noted above, however, the international instruments that embrace a right to food constitute either "soft law" or unratified treaties. *See supra* notes 27–34 and accompanying text.

151. Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 *MICH. L. REV.* 1269, 1291 & n.139 (2009) (noting that "all fifty state constitutions contain a provision requiring the state legislature to provide for a system of public education" and citing each constitutional provision).

152. *E.g.*, ALA. CONST. art. IV, § 88 ("It shall be the duty of the legislature to . . . make adequate provision for the maintenance of the poor."); *see also* KAN. CONST. art. VII, § 4; N.Y. CONST. art. XVII, § 1; N.C. CONST. art. XI, § 4; OKLA. CONST. art. XVII, § 3; WYO. CONST. art. VII, § 18.

153. *E.g.*, IDAHO CONST. art. X, § 1 ("[Institutions] for the benefit of the insane, blind, deaf and dumb . . . shall be established and supported by the state . . .").

154. *E.g.*, FLA. CONST. art. I, § 6 ("The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.")

155. *E.g.*, ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment.")

the right to marriage,¹⁵⁶ support for public health,¹⁵⁷ and rights to more intangible ends like “safety” and “happiness.”¹⁵⁸ The widespread mention of positive rights in state constitutions belies the conventional wisdom that the American constitutional order is concerned solely with negative liberties. On the other hand, state-court enforcement of these rights has been uneven.¹⁵⁹ Nonetheless, some state courts have had a significant influence on governmental allocation of resources—the classic province of positive rights—in areas like education and indigent assistance.¹⁶⁰ Those examples demonstrate that judicial enforcement of positive rights is not necessarily a quixotic enterprise, as some opponents of judicially enforceable positive rights have claimed.¹⁶¹

With respect to an affirmative, judicially enforceable constitutional right to nutrition, such a right would need a textual “hook” to be viable, and only a handful of state constitutions currently offer even a potential hook. Six states have constitutional provisions affirmatively requiring “care for the needy” or “maintenance of the poor.”¹⁶² As these provisions are addressed to minimum levels of sustenance rather than food in particular, it would require significant judicial massaging to read these provisions as requiring the government to ensure that the “needy” or “poor” have access to nutritious food. Other state constitutional provisions impose a duty on the state to safeguard the environment.¹⁶³ Despite the temptation to extend these provisions to the “food environment,” these environmental provisions were undoubtedly initially directed toward issues like clean air and water.¹⁶⁴ Perhaps the most promising state constitutional provisions are those that require or urge the state to “protect” or “promote” the public health. Six states—Alaska, Hawaii, Michigan, New York, South Carolina, and Wyoming—have such provisions.¹⁶⁵ These provi-

156. *E.g.*, *In re Marriage Cases*, 183 P.3d 384, 427 (Cal. 2008) (recognizing a “right to marry” under the California constitution as a “positive” right that “obligate[s] the state to take affirmative action”).

157. *E.g.*, ALASKA CONST. art. VII, § 4 (“The legislature shall provide for the promotion and protection of public health.”); *see also* HAW. CONST. art. IX, § 1; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XVII, § 3; S.C. CONST. art. XII, § 1; WYO. CONST. art. 7, § 20.

158. *E.g.*, N.J. CONST. art. I, ¶ 1 (providing for the right of “pursuing and obtaining safety and happiness”).

159. *See Usman*, *supra* note 136, at 1497–1502 (noting that courts have avoided enforcing such provisions by declaring them “non-self-executing” or “political questions”).

160. For instance, although the going has not always been easy, the New Jersey Supreme Court’s school finance decisions—namely, the *Abbott v. Burke* trilogy, 693 A.2d 417 (1997); 643 A.2d 575 (1994); 575 A.2d 359 (1990)—have undoubtedly had a tangible effect on education in the state. *See Paul L. Tractenberg, Using Law To Advance the Public Interest: Rutgers Law School and Me*, 51 RUTGERS L. REV. 1001, 1013 (1999).

161. *See, e.g.*, Cross, *supra* note 129, at 888–89 (arguing that “rely[ing] on the judiciary to provide basic welfare for the disadvantaged” in the face of political opposition is “futile”).

162. *E.g.*, ALA. CONST. art. IV, § 88 (“It shall be the duty of the legislature to . . . make adequate provision for the maintenance of the poor.”); *see also* KAN. CONST. art. VII, § 4; N.Y. CONST. art. XVII, § 1; N.C. CONST. art. XI, § 4; OKLA. CONST. art. XVII, § 3; WYO. CONST. art. VII, § 18.

163. *E.g.*, PA. CONST. art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”).

164. *See Usman*, *supra* note 136, at 1474–76.

165. *See supra* note 157.

sions have been sparsely litigated, however, and have not yet been held to create an individual right to compel government action, which is the essence of a positive right.¹⁶⁶ As textual sources for a positive right to nutrition, therefore, much work would need to be done. Other, more far-fetched textual options for a positive right to nutrition include the “happiness” and “dignity” clauses of certain state constitutions¹⁶⁷ as well as potential “catch-all” provisions like equal protection or due process.¹⁶⁸

Even if a legitimate textual source for a positive right to nutrition could be found, or if an amendment guaranteeing a “right to nutrition” were added to a state’s constitution, enforcement of such a right would raise the same problems as—and likely to a greater degree than—those that have been raised by attempted state judicial enforcement of positive rights in other contexts, particularly education. In that sphere, the state courts that have chosen to enforce muscularly the state constitution’s guarantee of a free public education have often struggled to obtain compliance from the political branches. The New Jersey courts have been the most successful,¹⁶⁹ but even there the judiciary’s indirect management of the state’s educational system through school-funding cases has engendered some political resistance.¹⁷⁰ New Jersey also has one of the strongest state supreme courts in the country, one with a tradition of activism and significant political independence.¹⁷¹ In many other states, the courts have shied away from engaging in similar battles with the legislature and executive on issues like education or welfare funding.¹⁷² In the context of a right to nutrition, courts would likely struggle to force the legislature and executive to provide the necessary funding to fulfill any judicially pronounced constitutional mandate. Moreover, courts’ competencies would be strained by

166. *E.g.*, Alaska Inter-Tribal Council v. State, 110 P.3d 947, 953 (Alaska 2005) (rejecting argument for police protection that was premised, in part, on the Alaska constitution’s public-health provision).

167. *See* MONT. CONST. art. II, § 4 (“The dignity of the human being is inviolable.”); N.J. CONST. art. I, ¶ 1 (providing for the right of “pursuing and obtaining safety and happiness”).

168. *E.g.*, N.J. CONST. art. 1, ¶ 1 (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”); *see also* S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 725 (N.J. 1975) (interpreting the provision as mandating substantive due process and equal protection).

169. *See supra* note 160.

170. *See* Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 99–101 (2000) (describing struggle over education financing in New Jersey); *see also* Editorial, *Even for Gov. Christie, This One’s a Stretch*, N.Y. TIMES (May 10, 2011), <http://www.nytimes.com/2011/05/11/opinion/11wed4.html> (discussing governor’s and attorney general’s threatened opposition to court-ordered education spending).

171. *See* John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701 (1998) (“[T]he New Jersey Supreme Court has attained a reputation as one of the leading state supreme courts . . . [as] noted by numerous scholars and authors . . .”).

172. *E.g.*, Pendleton Sch. Dist. v. State, 200 P.3d 133, 135 (Or. 2009) (en banc) (declining to enforce judicially the state constitution’s guarantee of sufficient funding to provide a high-quality public education); Tucker v. Toia, 371 N.E.2d 449, 451–52 (N.Y. 1977) (substantially leaving enforcement of state constitution’s “care and support of the needy” guarantee to the legislature’s discretion).

the complex, policy-laden decision making inherent in fleshing out a right to nutrition, like figuring out what kind of food must be offered where, at what price, and in which retail settings. If state courts' intervention in education and other asserted positive rights has been the subject of much criticism, their attempts to "manage" the market for food would likely draw similar scorn from public officials and market participants. For all of these reasons, a positive right to nutrition rooted in state constitutional law is likely far-fetched.

State constitutional law might present a slightly more appealing forum for establishing a right to nutrition in a more negative sense—that is, as a right to be free or protected from unhealthy, obesogenic foods. Insofar as such a right could require the government to take action against private parties, however, it is still a somewhat positive right.¹⁷³ On the other hand, unlike a requirement that the government provide certain foods or money for the purchase of food, this component of the right to nutrition is less positive in that it could be fulfilled by the government merely exercising its regulatory powers rather than allocating money for the purchase of a particular good or service.¹⁷⁴ If there were a constitutional right to nutrition at the federal level, this negative component would be neutered by the state-action doctrine, which limits the applicability of most constitutional restrictions to government action.¹⁷⁵ At the state level, however, the state-action requirement has been relaxed in a few states with respect to certain constitutional rights like free speech¹⁷⁶ and privacy.¹⁷⁷ Similarly, therefore, a right to nutrition could be held to prohibit, say, fast-food restaurants from selling particularly obesogenic products even though restaurants are not state actors. Of course, many of the difficult policy questions presented by a positive right to nutrition would remain, such as how a court would decide which products are permissible, in what settings, and who might buy them.

IV. NONTRADITIONAL MODELS FOR A RIGHT TO NUTRITION

While the "traditional" American rights model is not particularly well-suited to a right to nutrition, this Part will present better candidates. In particular, this Part develops four different rights models that can be used to advance nutrition in the United States—namely, the "indirect constitutional," "common law concern," "public utility," and "legislative grace" models. Unlike the traditional

173. *See supra* note 140.

174. To be sure, the meaningful exercise of regulatory powers also requires government expenditures.

175. *See* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (reviewing federal state-action doctrine).

176. *E.g.*, *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 761 (N.J. 1994) (holding state constitutional free-speech protections applicable in privately owned mall setting).

177. *E.g.*, *People v. Zelinski*, 594 P.2d 1000, 1006 (Cal. 1979) (en banc) (applying California constitution's privacy protections to private security guards).

rights model, each of these models puts less pressure on the judiciary to develop the precise contours of a right to nutrition. Rather, the judiciary enforces a right to nutrition in conjunction with—and often in reaction to—steps taken by political actors or their delegates. This reactive role is one better suited to the conventional view of the institutional competence of a branch that lacks the power of the purse and has limited ability to engage in research and fact-finding. Although this Part envisions courts playing a significant role in the development of nutrition rights in the common law context, it is a role largely consistent with the conventional view of judicial competence and historical judicial practice.

The rights models set forward in this Part are highly interdependent, and even somewhat connected to the “traditional” rights model. Section IV.A, for instance, posits that a right to nutrition could and should be considered part of the federal Constitution, but not as a directly enforceable right. To be sure, the case for such indirect enforcement would be even stronger if the Constitution—or, in state courts, the state constitution—contained an explicit clause recognizing a right to nutrition. Such textual grounding would provide a surer footing for backdoor enforcement, and, as argued by Helen Hershkoff, could reasonably influence common law adjudication in such states, a matter addressed in section IV.B. Nonetheless, despite the absence of specific text, I argue that the same conceptions of justice that, according to Lawrence Sager and Frank Michelman, render minimum welfare part of the “underenforced” Constitution, counsel in favor of including a right to nutrition as well. The “common law concern” and “public utility” models of a right to nutrition offered in sections IV.B and IV.C are each bolstered significantly by—but do not necessarily depend upon—legislative action that supports access to nutritious food and protection from obesogenic food. The kinds of programs that legislatures may enact, as discussed in section IV.D, will stand a greater chance of judicial validation if, per section IV.A, a right to nutrition is recognized as an indirect constitutional right.

A. INDIRECT CONSTITUTIONAL RIGHT TO NUTRITION

In addition to those rights that are directly enforceable in court, as per the traditional model of rights in America, there are many rights of constitutional dimension that do not manifest themselves in the form of individual claims. These rights may be thought of as “underenforced constitutional norms,” per Larry Sager’s well-known formulation.¹⁷⁸ According to Sager, the judicially enforced Constitution can be thought of as a subset of a larger “justice-seeking Constitution,” which contains principles of political justice that the judiciary

178. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); see also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 417 (1993) [hereinafter Sager, *Justice*].

understandably leaves to the political branches to enforce in the first instance.¹⁷⁹ As an example of an underenforced constitutional norm, Sager offers the entitlement to minimum welfare, the very sort of positive right that has been emphatically rejected as a candidate for “traditional” judicial enforcement under the Constitution.¹⁸⁰ As Sager explains it, although the political branches bear the primary responsibility for determining the contours of providing for minimum welfare, the judiciary plays an auxiliary—but essential—role as enforcer of second-order principles like procedural fairness.¹⁸¹

Underenforced constitutional norms also manifest themselves through judicial relaxing of otherwise “hard” constitutional doctrines. For instance, Sager hypothesizes the Supreme Court traded off “marginal aspects” of its First Amendment freedom of association doctrine in order to allow state and local legislatures to further the judicially unenforceable, yet still constitutional, goal of repairing the entrenched injustice of racial and other forms of discrimination through public accommodations laws.¹⁸² Michelman uses Sager’s theory to explain other Supreme Court cases, which relaxed the takings doctrine in the context of government regulation of the landlord–tenant relationship, as implicitly recognizing a right to housing.¹⁸³ In this sense, underenforced constitutional norms can “figure as a kind of qualified judicial enforcement,” Michelman posits, which is “decidedly not synonymous with judicial nonrecognition.”¹⁸⁴

Sager and Michelman use the underenforcement thesis primarily as a means of explaining otherwise anomalous United States Supreme Court decisions *post hoc*. Relying on the thesis as a predictor of, or justification for, *future* judicial outcomes, requires at least one of two moves. The first is descriptive: in the case of a right to nutrition, it must be shown that this right is either already an underenforced constitutional norm or fits logically within a norm previously identified by Sager or others. As it happens, Sager has already identified at least two Supreme Court cases, both from 1973, in which something like a right to food or nutrition may have functioned as an underenforced norm. In its decisions, the Supreme Court, relying on no “traditional doctrinal hook,” invalidated a Congressional attempt to disqualify persons living in communal

179. Sager, *Justice*, *supra* note 178, at 414–28.

180. *Id.* at 429.

181. *Id.* at 432–33 (discussing *Goldberg v. Kelly*, 397 U.S. 254 (1970), and “its progeny”).

182. *Id.* at 434 (discussing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), and *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1 (1988)). *But see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the First Amendment immunized the Boy Scouts to the application of a state ban on sexual-orientation discrimination).

183. Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663, 678 (2008) (discussing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)).

184. *Id.* at 677. Michelman has also noted that judicial recognition of “compelling interests” may be another manner in which “a given principle or value . . . register[s] in constitutional adjudication . . .” Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in EUROPEAN AND US CONSTITUTIONALISM 156, 172 & n.34 (Georg Nolte ed., 2005).

arrangements from receiving food stamps.¹⁸⁵ According to Sager, these otherwise puzzling results can best be explained by the Court's secondary enforcement role in ensuring that the hungry are provided with food, which Sager views as part of the Constitution's overall commitment to ensuring standards of minimum welfare.¹⁸⁶

If the right to nutrition is deemed too attenuated from the minimum welfare rights identified by Sager, however, one must make the normative argument that a right to nutrition *should* be part of the underenforced Constitution, even if it has not been to date. Engaging in this exercise inevitably exposes one of the boldest assumptions—and also primary weaknesses—of Sager's thesis: that the Constitution and notions of “political justice” are fused.¹⁸⁷ While I recognize the strength of the arguments against this aspect of Sager's thesis, a full engagement with them is beyond the scope of this paper. For this Article's purposes, it is enough for the reader to agree that access to nutritious food and protection from unhealthy food *is* a matter of political justice, for the reasons stated earlier. If so, one may then agree with Sager that a right to nutrition ought to be considered part of the broader Constitution. If that is too much to stomach, whether on textual, legitimacy, or other grounds, one might retreat to the more doctrinally comfortable ground of “compelling interest” as a way to describe the right to nutrition's impact on constitutional adjudication—a change in labeling that, at least in some instances, may be of negligible practical difference.¹⁸⁸ Under either route, the effect of a right to nutrition on constitutional adjudication is indirect rather than direct.

What, then, is likely to be the practical effect of an indirect constitutional right to nutrition, under either the federal or state constitutions? The answer depends almost entirely on what is enacted by legislatures to further a right to nutrition. As noted above, the Supreme Court has already intervened to ensure that the federal government did not discriminate on bases deemed superfluous in distributing food stamps.¹⁸⁹ While there may be other chances for the courts to perform this sort of second-order enforcement of procedural or distributive fairness in the context of a right to nutrition, the more important function of

185. LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004) 99–100 (discussing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508 (1973)).

186. SAGER, *supra* note 185, at 99; *see also* *Dotson v. Butz*, Civ. No. 1210-73 (D.D.C. Aug. 3, 1973), in STAFF OF THE S. SELECT COMM. ON NUTRITION AND HUMAN NEEDS, 93D CONG., *TO SAVE THE CHILDREN* 32 (Comm. Print 1974) available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015013464469;num=32;seq=40;view=1up> (requiring the Nixon administration to implement WIC after Congress had funded the program).

187. *See* Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436, 437 (1993) (questioning Sager's contention that the Constitution fuses law and morality); Terrance Sandalow, *Social Justice and Fundamental Law: A Comment on Sager's Constitution*, 88 NW. U. L. REV. 461, 464 (1993) (“[T]he constitution Sager describes is not our Constitution.”).

188. *See supra* note 184.

189. *See supra* note 185 and accompanying text.

indirect constitutional enforcement will be in response to lawsuits challenging certain aspects of nutrition-promoting policy. As political actors continue to develop policies that aim to combat obesity, constitutional challenges on a number of bases are sure to arise.

For instance, food manufacturers and vendors may challenge requirements to list certain ingredients or nutritional information as unconstitutionally “compelled speech” under the First Amendment.¹⁹⁰ Limitations on the ability of fast-food restaurants to market packages of unhealthy food to children with toy giveaways—so-called “Happy Meal bans”—may be challenged as violations of restaurants’ freedom of expression.¹⁹¹ Requirements that retailers stock particular healthy products or not place unhealthy products in particular store locations might be challenged as violations of the First Amendment insofar as they allegedly interfere with a store owner’s commercial expression, or as violations of the Fifth Amendment’s taking clause for mandating that private property be used a certain way.¹⁹² Zoning limitations on fast-food restaurants or other purveyors of obesogenic products might be challenged as illegal takings or unlawful deprivations of “vested rights.”¹⁹³ Governmental entities’ attempts to condemn private property for ultimate use by supermarkets, in an attempt to irrigate food deserts, might be challenged as not a “public use” under the federal or state constitution.¹⁹⁴ Federal laws that seek to reduce obesity might be said to exceed Congress’s Commerce Clause authority for one reason or another.¹⁹⁵ In any of these areas, the effect of an indirect constitutional right to nutrition would be to decide close cases in favor of the nutrition-promoting legislation, “trading off” marginal aspects of, say, First or Fifth Amendment “doctrine” in recognition of the importance of promoting nutrition and fighting obesity.

190. *E.g.*, *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131–36 (2d Cir. 2009) (rejecting First Amendment challenge to ordinance requiring chain restaurants to post calorie content of menu items).

191. Michael Martinez, *Ban on Low-Nutrition Kid-Toy Meals Draws Nearer in San Francisco*, CNN, Nov. 4, 2010, http://articles.cnn.com/2010-11-04/us/california.fast.food_1_offer-toys-childhood-obesity-ordinance (reporting that McDonald’s argued that San Francisco’s ban on toy giveaways with “Happy Meals” infringed on “corporate First Amendment rights”).

192. Fleischhacker & Gittelsohn, *supra* note 13, at 54 (“If the government attempted to require corner stores to allocate a number of shelves . . . to fresh fruits and vegetables, corner stores could potentially challenge the government’s action as a taking requiring just compensation.”).

193. *E.g.*, L.A., Cal., Ordinance No. 180103 (July 29, 2008), available at http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf (establishing interim limitation on new fast-food restaurants in certain neighborhoods); see Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1242–61 (2009) (reviewing different constitutional underpinnings of doctrines like “vested rights” that protect existing uses of property).

194. See *Kelo v. City of New London*, 545 U.S. 469 (2005) (interpreting the “public use” term in Fifth Amendment’s Takings Clause). Since *Kelo*, many states have revised their own constitutional “public use” provisions to provide greater protection to private owners, whether by amendment or judicial interpretation. See, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114–48 (2009) (reviewing state responses).

195. *E.g.*, Smith, *supra* note 11, at 242–47 (2009) (reviewing potential Commerce Clause objections to proposed federal obesity-prevention legislation).

B. COMMON LAW CONCERN

The second viable manner in which a right to nutrition might have legal effect is by influencing nonconstitutional, common law adjudication of rights, particularly in the realm of real property and torts. In this sense, nutrition may be thought of as a policy goal worthy of particular judicial solicitude much like alienability¹⁹⁶ or, of more recent vintage, protection of the “rights” to housing¹⁹⁷ and the exercise of constitutional rights in private settings.¹⁹⁸ The hallmark of the common law is its evolutionary nature, and the bounded freedom it gives judges to adjust legal doctrines based on new information and changing social mores and problems.¹⁹⁹ Just as other social problems have influenced common law doctrine, the emergence of obesity as a public-health epidemic ought to change the way the judiciary settles legal disputes. Other examples of the common law changing to meet contemporary social needs are abundant: the development of the tort of sexual harassment accompanying women’s entry into the work force in large numbers;²⁰⁰ the evolution of nuisance law to consider environmental harms that were previously unknown or disregarded;²⁰¹ the shift of property law toward encouraging alienability of property with the decline of feudalism and the emergence of a market economy.²⁰² In each instance, the Anglo-American courts responded to ambient social transformations by adopting the common law to these new circumstances.

To be sure, the judiciary has not always responded to changes in society by changing the common law. Indeed, advocates of judicial restraint argue that such changes more appropriately come from the legislature. While I welcome nutrition-promoting legislative action that could influence common law adjudication, as explored below, I also side with the long line of scholarly and judicial

196. JOSEPH WILLIAM SINGER, *PROPERTY* 278 (3d ed. 2010) (“Property law has long been suspicious of restraints on alienation and has subjected such restraints to strict regulation.”).

197. See Florence Wagman Roisman, *The Right To Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 820 (2008) (“Security of tenure is one of the most important elements of the human right to housing.”).

198. E.g., Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1075 (N.J. 2007) (recognizing that despite lack of state action, private covenants that restrict constitutionally protected freedoms may violate the common law).

199. E.g., *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (“Courts have a duty to reappraise old [common law] doctrines in the light of the facts and values of contemporary life . . .”).

200. Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1709–10 (1996) (recounting courts’ recognition of sexual harassment in the 1970s and 1980s).

201. J.B. Ruhl, *The Fitness of Law: Using Complexity Theory To Describe the Evolution of Law and Society and its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1454 n.186, 1455 (1996) (“Within common law the nuisance doctrine developed into a powerful means of regulating the environment . . .”).

202. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191 (1985) (“Anglo-American lawyers have long identified the lifting of restraints on alienation as the major defining characteristic of a liberal commercial society as opposed to a feudal one.”).

authority proclaiming the legitimacy of judicially imposed change to common law principles.²⁰³ Even accepting the legitimacy of judge-made common law changes, one must argue for the direction in which the change should move the law, as the appropriate reaction to a particular social change is a contested matter. For instance, courts opposed to women's entry into the workforce could have reacted by *rejecting* the doctrine of sexual harassment. Similarly, in the industrial era, courts could have responded to increased workplace accidents by embracing strict liability to protect workers; instead, according to a leading account, they opted for an industry-enabling rule of negligence.²⁰⁴ The direction the common law takes in response to changing societal circumstances is not preordained. This Article, therefore, urges courts to consider obesity prevention a policy concern worthy of influencing common law decision making, and thereby embrace a right to nutrition. Three possible contexts for applying this approach follow.

1. Real Covenants

In property law, real covenants can restrict the uses to which a particular property may be put in the future. Although real covenants limit the immediate alienation and productivity of land, in the long term they can help neighbors preserve expectations and may, in fact, promote the alienability of land. Traditionally, courts only enforced those covenants that "touched and concerned the land," an ambiguous test that frequently served as a vehicle for more substantive policy concerns.²⁰⁵ The most recent *Restatement* and a handful of courts have modernized this test by calling it a "reasonableness" inquiry.²⁰⁶ Because supermarkets frequently use anticompetitive deed restrictions when selling property, the law of real covenants presents fertile ground for exploring the role of a right to nutrition in common law adjudication.

In *Davidson Bros. v. D. Katz & Sons*, a New Jersey court grappled with whether to allow a covenant to effectively restrict access to a supermarket for hundreds, if not thousands, of residents of New Brunswick.²⁰⁷ The plaintiff, Davidson Brothers, sold a parcel of property on which it had operated the only

203. See *supra* note 199; see also Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 984–94 (1989) (arguing for judicial power to alter common law rules when circumstances change).

204. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 85–108 (1977); see also Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349 (2010) (offering new perspective on Horwitz's account).

205. Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 939–40 (1988) ("When a court invalidates a covenant obligation on the ground that it does not touch and concern the land, it makes a substantive judgment . . .").

206. RESTATEMENT (THIRD) OF PROP.: SERVIDUES §§ 3.2, 3.4 (2000) (superseding "touch-or-concern doctrine" with reasonableness standard); e.g., *Davidson Bros. v. D. Katz & Sons*, 579 A.2d 288, 294–95 (N.J. 1990) (same).

207. 643 A.2d 642 (N.J. Super. Ct. App. Div. 1994). The Superior Court's decision in *Davidson Bros.* followed a remand from the New Jersey Supreme Court, which had limited its earlier consider-

downtown grocery store to a rug dealer after purchasing another site for a supermarket approximately two miles away.²⁰⁸ Included in the deed to the rug dealer was a clause prohibiting the use of the site for a supermarket or grocery store for forty years.²⁰⁹ Less than ten years later, the city, responding to the “hardship [of] downtown residents, many of whom did not own or have ready access to motor vehicles,” imposed by the closing of the grocery store, acquired the property in question and leased it to another grocer for a nominal rent.²¹⁰ Davidson Brothers sued the city and the rug merchant, seeking damages for past violation of the covenant’s terms.²¹¹ The formal inquiry for the court was whether enforcement of the covenant was “reasonable,” a component of which was whether the covenant “interferes with the public interest.”²¹²

In deciding the case, the *Davidson Bros.* court considered the particular circumstances of the supermarket location and the population it served. Although the term had not yet been invented, the court effectively recognized that without a grocery store, downtown New Brunswick might become a food desert. Specifically, the court relied on testimony that showed that a significant percentage of the downtown population—the poor, the elderly, single-parent families, non-vehicle-owners—would be “disadvantaged” by the lack of a supermarket within walking distance.²¹³ The court also credited expert witness testimony establishing that the absence of supermarkets in low-income urban neighborhoods makes nutritious food more expensive and has a negative impact on the diet and health of inner-city residents.²¹⁴ The court thus decided not to enforce the covenant due to its being contrary to the public interest.²¹⁵ By so explicitly recognizing the potential negative impact of food deserts, the opinion represents one of the clearest judicial endorsements of a right to nutrition in the common law context.

Admittedly, the court’s decision in *Davidson Bros.* involved some tradeoffs. By siding with the public’s interest in access to a grocery store, the court arguably unsettled property owners’ expectations regarding the enforceability of covenants. In theory, the plaintiffs received less money when they sold their former grocery site to the rug dealers in exchange for the promise not to open a supermarket on the site. The court’s opinion wipes away the forty-year benefit

ation of the real covenant issue in the case in 1990 to the question of whether the appropriate test for enforceability was “reasonableness” or “touch and concern.” 579 A.2d at 294–95.

208. *Davidson Bros.*, 643 A.2d at 643.

209. *Id.*

210. *Id.*

211. In the course of litigation, Davidson Brothers abandoned its claim for injunctive relief. *Id.* at 644.

212. *Id.* at 643–44.

213. *Id.* at 645.

214. *Id.*

215. *Id.* at 648.

that resulted from that private agreement.²¹⁶ Such a decision could have the effect of unsettling property owners' expectations generally when engaging in transactions with restrictive covenants, thereby reducing otherwise efficiency-promoting sales of land. Specific to the supermarket context, grocery owners aware of the decision might refuse to sell their properties if they could not count on enforcement of anticompetitive clauses in the future. They may instead lease their properties to non-grocery businesses to ensure that no competition arises on these properties. Although this scenario seems far-fetched, in part because one can assume that capital constraints are what prompted the *Davidson Bros.* plaintiffs to sell the former grocery site in the first place, this consequentialist argument arguably merits further analysis in any similar cases that may arise.

The consequentialist inquiry was largely academic in *Davidson Bros.* given that the plaintiffs sought damages only for past violations of the covenant rather than an injunction.²¹⁷ In *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, by contrast, an inquiry into the impact on nutrition could have been at the heart of the Florida appellate court's analysis.²¹⁸ In the case, Winn-Dixie, a supermarket chain, sought to enforce against another shopping center tenant, the Dollar Store, a clause in Winn-Dixie's lease that gave it the exclusive right to sell groceries in the shopping center.²¹⁹ The court asked whether the Dollar Store should have been aware of the grocery-exclusivity provision, which had been recorded, even though it was not mentioned in the Dollar Store's lease.²²⁰ Despite statutory language that arguably cut in the other direction, the court concluded that the exclusivity provision was enforceable against the Dollar Store because it should have been aware that large supermarkets typically obtain such provisions in their leases.²²¹ Nowhere did the court analyze which result better promoted nutrition. Winn-Dixie might have argued that the enforcement of exclusivity provisions is essential to attracting and retaining supermarkets that might otherwise not exist, while the Dollar Store might have argued that it attracted a different clientele from Winn-Dixie and that the ability to sell groceries could improve its customers' diets. While the answer to this hypothetical dispute might not have been easy to resolve, it is the kind of inquiry a court concerned with a right to nutrition should undertake.

2. Tort Law Negligence

In the last decade, a handful of plaintiffs have attempted to hold fast-food

216. See *Davidson Bros. v. D. Katz & Sons*, 579 A.2d 288, 300 (N.J. 1990) (Pollock, J., concurring) (arguing for award of damages to Davidson Bros.).

217. *Id.* at 644.

218. 964 So. 2d 261 (Fla. Dist. Ct. App. 2007).

219. To be precise, the covenant restricted any other tenant from devoting more than 500 square feet to groceries. *Id.* at 263.

220. *Id.*

221. *Id.* at 266 ("Dolgencorp was an experienced commercial tenant . . . aware that anchor tenants like Winn-Dixie typically secure restrictive covenants in shopping center leases.").

restaurants responsible for contributing to obesity by suing them in tort and through other causes of action. The most well-known case to date is *Pelman v. McDonald's*, in which a group of New York City teenagers filed a putative class action lawsuit seeking compensatory and punitive damages from the world's largest fast-food chain, alleging that McDonald's engaged in negligent and deceptive practices that caused obesity and related health problems.²²² The plaintiffs' initial claims were premised on both common law tort doctrine (negligence) and New York's consumer-protection statute.²²³ The claims focused on McDonald's marketing techniques, which the plaintiffs alleged were deceptive and geared toward children, as well as on McDonald's alleged failure to disclose or warn consumers about the health impact of its products.²²⁴ In 2011, nine years after it was first filed, plaintiffs voluntarily dismissed their case with prejudice²²⁵ following the denial of class certification.²²⁶

Along its tortuous procedural path,²²⁷ the *Pelman* litigation forced a federal district court to confront the degree to which traditional tort law principles might be used to hold fast-food franchises responsible for obesity. The court noted that under the *Restatement*, consumer products are not "inherently dangerous" just because they may cause health problems when over-consumed,²²⁸ so long as the adverse consequences of overconsumption are "common knowledge."²²⁹ The court assumed that the adverse effects of over-consumption of fast food were "common knowledge," and thus faulted plaintiffs' complaint for failing to allege either that McDonald's products were "so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public" or that they were "so extraordinarily unhealthy as to be dangerous in their intended use."²³⁰ In articulating its holding, the court opined that "[n]obody is forced to eat at McDonald's," and "nobody is forced to supersize their meal or choose less healthy options on the menu."²³¹

The *Pelman* court's autonomy-based justification for dismissing the plaintiffs' lawsuit likely ignored the "food swamp" environments in which many of

222. *Pelman v. McDonald's (Pelman I)*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003) (discussing plaintiffs' claims).

223. *Id.*

224. *Id.*

225. Stipulation of Voluntary Dismissal, *Pelman*, No. 1:02-cv-7821 (S.D.N.Y. Feb. 25, 2011).

226. 272 F.R.D. 82 (S.D.N.Y. 2010).

227. *Id.* at 84–90; see also *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439, 442 (S.D.N.Y. 2005) (tracing litigation history that resulted in opinions denominated "*Pelman I, II, and III*").

228. *Pelman I*, 237 F. Supp. 2d at 531–32 (discussing RESTATEMENT (SECOND) OF TORTS § 402(a) cmt. I (1979)).

229. *Id.* at 532 (citing example of liquor).

230. *Id.*

231. *Id.* at 533. Tongue-in-cheek, the court observed that one exception may be parents "pester[ed]" by their children who want to eat at McDonald's. *Id.* at 533 n.21. Such pestering is exactly what McDonald's seeks through its advertising campaigns targeting children. See *supra* note 66; see also SCHLOSSER, *supra* note 119, at 42–57 (describing advertising strategy of fast-food companies, including McDonald's).

the plaintiffs may have lived.²³² Even if the complaint had alleged that the plaintiffs had few other reasonably available options—based on both geographical accessibility and price—the court’s opinion assumes that eating choices are entirely a matter of free will.²³³ As in the real covenants context, a court cognizant of a right to nutrition might have adjusted its application of the common law rule regarding overconsumption, recognizing that for some Americans, the “choice” to eat at McDonald’s and to “supersize” their meals on a regular basis is not necessarily one that is “freely” made. Rather, overconsumption of fast food is closely linked to the food environment as well as stimuli—like advertising campaigns and combination offers—that are knowingly manipulated by fast-food companies to create habitual customers, especially among youth.²³⁴ Recognizing these factors would permit some fast-food consumers to make out a case similar to that which eventually achieved success against cigarette manufacturers: that the manufacturers knowingly manipulated their products to induce addiction.²³⁵ Of course, even if the *Pelman* plaintiffs and others like them could overcome the common law overconsumption barrier, they would still have to show causation to obtain relief, a feat that might be difficult to achieve under the traditional application of the doctrine,²³⁶ although recognition of a right to nutrition might also warrant relaxing the causation requirement given that incremental harms are spread across a large population.²³⁷

In the tort law context, the interaction between common law concerns and legislative intervention has become particularly clear. On one hand, plaintiffs like those in *Pelman* have buttressed their common law tort claims with claims premised on state consumer-protection statutes, which prohibit “deceptive acts or practices” and “false advertising.”²³⁸ These statutes may provide more explicit support than common law tort doctrine for imposing on purveyors of

232. The plaintiffs attempted to represent a class of “consumers, under the age of eighteen years, who purchased and/or consumed products of [McDonald’s] several times per week over several years.” Amended Verified Complaint at ¶48, *Pelman I*, (S.D.N.Y. Feb. 19, 2003) (No. 1:02-cv-7821), 2003 WL 23474873. The proposed class, therefore, did not depend on the characteristics of the members’ neighborhoods.

233. The amended complaint noted the high density of McDonald’s restaurants in the Bronx, *id.* at ¶28, but did not discuss the plaintiffs’ food environments in more detail. *Id.* Similarly, the original complaint, filed in state court before defendants removed to federal court, did not describe the surrounding neighborhoods of the plaintiffs in detail, although it did name two specific McDonald’s franchises as defendants. *See* Verified Complaint ¶¶ 6, 7, *Pelman v. McDonald’s Corp.*, No. 24809-02 (N.Y. Sup. Ct. Aug. 22, 2002).

234. Benforado et al., *supra* note 13, at 1700–01.

235. *Pelman I*, 237 F. Supp. 2d at 531 n.18 (citing Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive Based Regulation*, 107 YALE L.J. 1163, 1169–71 (1998)).

236. *Id.* at 523 (noting potential difficulties of proving causation in this context).

237. *See generally* Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873 (2005).

238. *See Pelman I*, 237 F. Supp. 2d at 524 (discussing plaintiffs’ claims under N.Y. GEN. BUS. LAW §§ 349, 350).

unhealthy foods a duty to warn consumers of the adverse effects of consumption.²³⁹ Where ambiguous, they can be amended by state legislatures to ensure that such a duty is binding. Even when not amended, the same concerns that justify a “right to nutrition” in common law could justify a court interpreting such statutes in a manner that protects nutrition. In this sense, the right to nutrition may manifest itself as not just a “common law concern,” but also as a guide for judges interpreting ambiguous, “ordinary” (as opposed to constitutional) law, like statutes and ordinances.²⁴⁰

While state legislation might buttress tort claims, it can also undercut the common law’s ability to impose liability for the sale of low-nutrient foods. Twenty-five states have enacted so-called “cheeseburger bills” in response to heavy lobbying by the retail food industry.²⁴¹ These laws eliminate liability, whether based on common law tort or consumer-protection statutes, for claims related to obesity.²⁴² Frequently couched in terms of “personal responsibility,” these statutes take the *Pelman* court’s approach to the next level by eliminating almost all potential claims against purveyors of allegedly unhealthy food. In almost half the states, therefore, a statute currently prohibits courts from using the common law to recognize a right to nutrition in the torts context.

3. Nuisance

Nuisance provides a third context for promoting a right to nutrition through the common law. Nuisance is a tort doctrine most commonly employed to regulate the uses of real property; it restrains uses that negatively affect surrounding properties.²⁴³ A “private nuisance” occurs when a person’s use of land unreasonably interferes with another’s use or enjoyment of land,²⁴⁴ whether due

239. *Id.* at 532 n.19 (citing RESTATEMENT (SECOND) OF TORTS, § 402A cmt. j (1979), for the proposition that, under tort law, “a seller is not required to warn with respect to products . . . which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized.”).

240. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Non-delegation Doctrine*, 81 S. CAL. L. REV. 405, 428 (2008) (“[J]udges make policy when they interpret vague, ambiguous, or gap-filled statutes, just as agencies do.”). Another broadly worded statute that might allow for judges to import nutritional concerns is the state law governing child custody, which often refers to “the best interest of the child.” See Ashby Jones & Shirley S. Wang, *Obesity Fuels Custody Fights*, WALL ST. J., Oct. 29, 2011, <http://online.wsj.com/article/SB10001424052970204294504576613100908629810.html> (reporting that children’s diets are increasingly analyzed by courts in deciding custody disputes).

241. See TRUST FOR AMERICA’S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA’S FUTURE 65 (2012), available at <http://healthyamericans.org/assets/files/TFAH2012FasInFatFnIRv.pdf>; David G. Yosifon, *Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH MATRIX 189, 210 n.52 (2011) (noting that “junk food corporations” spend millions of dollars on political advertising and lobbying and that such efforts resulted in the adoption of cheeseburger bills in many states).

242. See *supra* note 41. The United States House of Representatives passed a federal cheeseburger bill in 2005, but it died in the Senate. Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005).

243. SINGER, *supra* note 196, at 104.

244. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

to noise, odor, smoke, dust, light, or flies.²⁴⁵ Nuisance is distinct from trespass in that it does not require any interference with another's possession of land.²⁴⁶ Nuisance is a fundamentally utilitarian and contextual doctrine. In deciding claims, courts assess the social value of the allegedly offending use,²⁴⁷ as well as whether that use of property is in keeping with the overall character of the neighborhood.²⁴⁸ As Justice George Sutherland famously put it, "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."²⁴⁹

Insofar as they may be shown to contribute significantly to obesity, fast-food restaurants or other purveyors of low-nutrition food are unlikely to constitute private nuisances, since such establishments harm those who consume their products and the public at large rather than their contiguous neighbors in particular. On the other hand, by significantly interfering with public health, fast-food restaurants and others may constitute a *public* nuisance. Unlike private nuisances, public nuisances need not harm a particular property; it is enough if the offending use harms the community at large.²⁵⁰ Traditionally, only acts that were criminal in nature qualified as public nuisances,²⁵¹ but this requirement has been relaxed in recent years.²⁵² Indeed, public officials have asserted public nuisance claims against a variety of defendants for actions that are in and of themselves legal yet allegedly still harm the public. Examples include major emitters of greenhouse gases accused of contributing to global warming,²⁵³ power plant operators accused of air and water pollution,²⁵⁴ tobacco companies,²⁵⁵ and subprime lenders.²⁵⁶ In many instances, courts have rejected these

245. SINGER, *supra* note 196, at 99; Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 999 (2004).

246. *See* RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979) (distinguishing trespass from nuisance).

247. *E.g.*, *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

248. *E.g.*, *Rose v. Chaikin*, 453 A.2d 1378, 1382 (N.J. Super. Ct. Ch. Div. 1982) (finding windmill a nuisance in part because of "quiet and residential" character of surrounding area).

249. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

250. RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (1979). Traditionally, a neighboring property had to show especial harm resulting from a public nuisance in order to sue, but this requirement has been relaxed in recent years. *See* JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 382 (5th ed. 2010).

251. RESTATEMENT (SECOND) OF TORTS § 821B cmt. d (1979).

252. *Id.* (noting that a public nuisance "defendant need not be subject to criminal responsibility"); *see also* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. art. 4, Sept. 2011 (tracing history of Restatement's abandonment of traditional criminal conduct requirement).

253. *E.g.*, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533–34 (2011) (eight states suing power companies on theory that the companies' emissions contributed to global warming).

254. *E.g.*, *N. Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

255. *See* Merrill, *supra* note 252, at 2 (discussing lawsuits by state attorneys general against tobacco companies that settled for \$246 billion).

256. *E.g.*, *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 498–99 (6th Cir. 2010) (alleging causation of mortgage foreclosures and resulting harm to community).

claims of public nuisance for reasons including preemption²⁵⁷ and the failure to demonstrate harm to a “public right.”²⁵⁸ In other instances, however, the claims have been successfully pursued to at least the discovery stage of litigation, often leading to multimillion-dollar settlements.²⁵⁹

In deciding whether particular conduct may constitute a public nuisance, courts ask whether the defendant’s actions interfere unreasonably with “a right common to the general public.”²⁶⁰ The more courts think of nutrition as a right, the more appropriate it is for public nuisance to provide a doctrinal means for holding sellers of obesogenic products responsible for their impact on the public health, assuming causation can be established.²⁶¹ Just as the public nuisance doctrine is now generally understood to protect the public’s right to clean air and water,²⁶² so too might courts extend public nuisance to protect the public’s right to a nutritious environment. Even if courts are loath to expressly embrace a “right to nutrition” in other contexts, the *Restatement* makes clear that the “right” infringed upon by a public nuisance need not be constitutionally or even statutorily based, but rather may indicate more generally “the interests of the community at large” (as opposed to the interests of a specified number of persons relevant to private nuisance).²⁶³ In assessing a public nuisance claim, the *Restatement* asks whether “the conduct involves a significant interference with the public health,”²⁶⁴ a standard that should be reasonably easy to meet in the context of obesity, much as it was in the context of lawsuits against tobacco companies, whose interference with the “public health” was similarly significant.²⁶⁵

Using public nuisance doctrine to combat alleged causes of public-health problems would surely be controversial. Professor Thomas Merrill, for one, has argued that the authority to create public nuisance claims should rest solely with the legislature.²⁶⁶ Applying Merrill’s approach, a court should decline to hold a fast-food chain liable for its deleterious effects on obesity (even if causation could be shown) without an express enactment by a legislature prohibiting the chain’s conduct.²⁶⁷ Merrill’s position is largely inconsistent with prevailing

257. *E.g.*, *Cooper*, 615 F.3d at 302–05 (holding that North Carolina’s common law public nuisance claim was preempted by the federal Clean Air Act).

258. *E.g.*, *City of Cleveland v. Ameriquet Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 526 (N.D. Ohio 2009) (holding that plaintiff failed to allege interference with “public right” when defendant’s actions were lawful), *aff’d on other grounds*, 615 F.3d 496 (6th Cir. 2010).

259. *See supra* note 252.

260. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

261. *See supra* note 237 and accompanying text (noting the need for more relaxed causation requirements in the context of obesity).

262. *See* Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 260–61 (2012) (discussing “application of public nuisance to environmental pollution”).

263. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

264. *Id.* § 821B(2)(a).

265. *Cf.* Wiley, *supra* note 262, at 269 (explaining the “public bad” at issue in the obesity epidemic).

266. Merrill, *supra* note 252, at 5.

267. *Id.* at 50–51.

authority,²⁶⁸ however, and takes a constricted view of courts' ability to mold the common law. Nonetheless, Merrill offers a reminder that the relationship between public nuisance and statutory enactments has always been a close one. To that end, just as legislatures have undercut negligence liability in the obesity context, it is likely that cheeseburger laws would have the same effect in the public nuisance context.²⁶⁹ On the other hand, legislatures may also bolster the ability of public officials to sue food retailers for public nuisance by enacting legislation in support thereof. In some states, a statute expressly delegates the authority to define public nuisances to local governments.²⁷⁰ In these states, cities would have wide latitude to label fast-food restaurants, for instance, public nuisances if they saw fit.²⁷¹ By exercising their authority to define public nuisances, state or local governments would be creating or recognizing a right to nutrition through the legislative grace model of rights creation, which is discussed in more depth below.²⁷²

Real covenants, negligence, and nuisance are just three ways in which the common law might move toward recognizing a right to nutrition. As each example demonstrates, courts operate in the shadow of the legislature, which may undercut their authority to recognize such a right with few constraints. Even with the possibility of legislative preemption, however, courts likely have significant room within which to work to support a right to nutrition. In other contexts, court action has been instrumental in leading legislatures to bolster rights first tentatively recognized in court cases. For instance, in the landlord-tenant context, many states enacted statutes creating warranties of habitability only after courts found them implied by the common law. Court action can thus "destabilize" the legal status quo in a way that makes legislatures confront issues they might otherwise avoid.²⁷³ Although cheeseburger bills have reversed judicial attempts to move the preexisting legal regime toward recognizing a right to

268. *But see* *City of Cleveland v. Ameritrust Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 526–28 (N.D. Ohio 2009) (holding that public nuisance claim cannot proceed when defendant's actions were not prohibited by the legislature), *aff'd on other grounds*, 615 F.3d 496 (6th Cir. 2010).

269. *See supra* note 242 and accompanying text; *see, e.g.*, 745 ILL. COMP. STAT. 43/1–43/10 (2010) (immunizing any seller of "qualified" food products from liability in "a civil action . . . based on a claim of injury resulting from a person's weight gain, obesity, or any health condition that is related to weight gain or obesity").

270. *E.g.*, CAL. GOV'T CODE § 38771 (West 2008) ("By ordinance the city legislative body may declare what constitutes a nuisance.").

271. The power to declare a use of property a nuisance is closely linked to the zoning power. *See, e.g.*, *City of Oakland v. Superior Court*, 53 Cal. Rptr. 2d 120, 130–31 (Cal. Ct. App. 1996) (discussing this connection).

272. In this sense, Professor Merrill's objection that public nuisance litigation lacks legislative approval, *supra* note 252, at 5, would be alleviated, although the approval would be local rather than the state's. The state legislature would likely retain the authority to preempt the city's designation. *See generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007).

273. *See generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); *cf.* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2131 (2010) (discussing, in context of constitutional interpretation, the value of judicial interpretations that may be "ahead of the legal zeitgeist").

nutrition, increased public concern with the costs of the obesity crisis may lead legislatures to take a different approach in the future in other contexts, despite the enormous political influence of the processed and fast-food industries.

C. PUBLIC UTILITY

The third way in which the legal system might recognize a right to nutrition is by treating the provision of nutritious food as something like a public utility. Most fundamentally, public utilities differ from ordinary private firms in the degree to which their freedom to maximize profit is constrained by public regulation. Significant constraints on traditional public utilities include limitations on market entry and exit, a requirement to serve all customers in a particular area even when unprofitable, limitations on the ability to cut off service, and regulation of rates charged to consumers.²⁷⁴ For traditional public utilities like electricity, water, and natural gas, this heightened level of regulation is thought to be justified because only one firm can operate profitably due to economies of scale and high barriers to entry, thus creating “natural monopolies.”²⁷⁵ Without rate regulation, natural monopolies could charge consumers supracompetitive prices, thereby significantly reducing consumer surplus. Other justifications for heightened regulation of “natural monopolies” include that it is a quid pro quo for the protection against market entry by potential competitors, which ensures a steady return on investment;²⁷⁶ that it is a quid pro quo for the eminent domain authority that is often delegated to utilities or used on their behalf;²⁷⁷ and that utilities provide services that are so fundamentally important that such services *ought* to be available, at least presumptively, to a wide swath of the public.²⁷⁸

Because nutritious food is a fundamentally important good that is not always provided by the free market, one might argue that those entities capable of providing such food—say, supermarket chains—should be regulated like public utilities. Specifically, one might imagine a regulatory scheme requiring supermarkets to open stores in underserved areas, restricting their right to exit where the health of the community would be affected adversely and perhaps even regulating some product prices to ensure that nutritious foods remain affordable to vulnerable segments of the population. Since supermarkets stock plenty of unhealthy options and often provide lower quality foods in lower income

274. ROBERT L. HAHNE & GREGORY E. ALIFF, ACCOUNTING FOR PUBLIC UTILITIES § 1.01 (2011), available at Lexis ACCTPU (defining “public utility”); *id.* § 2.01 (introducing principles of regulation of public utilities).

275. *Id.* § 1.03 (discussing “economic characteristics of public utilities”).

276. *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm’n*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (“The utility business represents a compact [by which] a monopoly on service in a particular geographical area . . . is granted . . . in exchange for a regime of intensive regulation, including price regulation . . .”).

277. *Id.* (noting the “state-conferred rights of eminent domain or condemnation” that utilities receive in exchange for regulation).

278. *Id.* (noting that utility regulation affords ratepayers “universal, non-discriminatory service”).

areas, product regulation might be part of the mix as well.²⁷⁹ In exchange for such increased regulation, supermarkets in certain areas might receive protection from competitors and perhaps the use of eminent domain authority, which may be particularly helpful in securing the parcels of land necessary to construct reasonably profitable supermarkets in dense urban areas.²⁸⁰

Of course, supermarkets and other providers of nutritious foods are not quite like traditional public utilities in a number of respects. The barriers to entry, while not insignificant, are not nearly as great as they are in the traditional utility context.²⁸¹ Because they serve a customer base that is theoretically mobile, multiple supermarkets may survive and thrive in close proximity.²⁸² Further, customers often have more viable alternatives to supermarkets—such as farmers markets, internet-based food delivery, and other stores, like pharmacies, that are beginning to offer more nutritious food choices—than do customers of traditional utilities.²⁸³ Also, restaurant food, while often less nutritious, is an alternative to purchasing and preparing raw or unprocessed foods from a grocery store. For all of these reasons, a strict importation of the public utility model into the food context is unwarranted.

On the other hand, a softer version of the public utility model, like that used to regulate banking and rental housing, may be a more appropriate and effective way to promote a right to nutrition. The banking industry is highly regulated at both the federal and state levels. At the federal level, Congress has sought to increase access to banking services for population groups—primarily low-income and racial minorities—that have historically had less access to such services. To that end, Congress has enacted a law that bans discrimination in lending on the basis of the usual protected classes: the Equal Credit Opportunity Act (“ECOA”).²⁸⁴ Recognizing that such antidiscrimination legislation is not likely, on its own, to make banking services more widely available to the poor and members of certain racial or ethnic groups, Congress also passed the Community Reinvestment Act (“CRA”), which uses a mix of carrots and sticks to encourage banks to open branches in, and lend to residents of,

279. See Smith, *supra* note 11, at 206–17 (discussing varying levels of product quality and selection in supermarkets).

280. See Kennedy Smith, *Wanted: Downtown Grocery Stores*, 63 PLAN. COMMISSIONERS J., Summer 2006, at 11, 11 (reviewing obstacles to locating modern grocery stores in dense urban areas); *supra* note 117 and accompanying text.

281. See Paul B. Ellickson, *Supermarkets as a Natural Oligopoly*, 51 ECON. INQUIRY 1142, 1142 (2013) (showing that “competition remains fierce” in supermarket industry, but that “a small number of firms (between three and six) capture the majority of sales”). *But see* DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 247 (2000) (“The only grocery store in a small town is a *natural monopoly*.”).

282. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1515–29 (discussing benefits of “agglomeration” of people and firms, and citing economic literature).

283. See USDA FOOD DESERT REPORT, *supra* note 9, at 103.

284. 15 U.S.C. § 1691 (2006 & Supp. V 2011).

underserved areas.²⁸⁵ By requiring banks to serve those whom they otherwise might not, the CRA treats banks like a quasi-public utility providing services that ought to be available to more than just those who could obtain them in a less regulated market.²⁸⁶ The CRA, although maligned by some academic critics,²⁸⁷ has been defended as a reasonable and successful response to the “market failure” that would exist if private banks were allowed to choose where to lend and open branches on the basis of profit alone.²⁸⁸

In the rental-housing market, courts and legislatures have developed a number of regulatory rules, particularly since the 1970s, to restrain the ability of landlords to sell rental housing like any other market good. One major change in the vast majority of states is the adoption of warranties of habitability, which attempt to guarantee a minimum level of housing quality to renters, thus constituting a form of product regulation.²⁸⁹ While product regulation is not unique to the public utility context, it is often a particularly important component of a utility regulatory scheme. In addition to product-quality regulation through the warranty of habitability, the various forms of rent control serve as price regulation, much like rate regulation for traditional utilities.²⁹⁰ Perhaps most like public utility regulation, a number of rules restrain the ability of a landlord to cut off services to an existing tenant or to exit a market entirely. These rules include limits on the ability of a landlord to convert rental units to other uses like condominiums or hotels,²⁹¹ and restraints on a landlord’s ability to avoid making repairs by exiting the rental market entirely.²⁹² Although some judges and scholars have lamented the movement of landlord–tenant law toward

285. Community Reinvestment Act of 1977 (CRA), 12 U.S.C. §§ 2901–2908 (2006 & Supp. V 2011).

286. Michael Barr has argued that the CRA’s requirements are uniquely justified in part because banks “benefit from government subsidies” like federal deposit insurance. See Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 616–20 (2005) (listing subsidies).

287. E.g., Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561 (1995) (finding the CRA to be an inefficient solution to lending discrimination); Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291 (1993) (concluding that the CRA does more harm than good).

288. See generally Barr, *supra* note 286.

289. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 398–99 (2011) (noting that the rapid dissemination of the implied warranty of habitability doctrine across states in the 1960s and 1970s “was unusual among law reform initiatives in that it proceeded simultaneously through case law and legislation”).

290. Defined broadly, rent control measures may be hard caps on rent, perhaps subject to annual adjustment for inflation, see SINGER, *supra* note 196, at 468 or ordinances that allow for a market rent initially, but then limit the amount by which that rent may be raised on an existing tenant. See, e.g., D.C. CODE § 42-3502.06 (2010) (abolishing rent ceilings but allowing annual adjustments to base rent).

291. E.g., D.C. Code §§ 42-3401.01–42-3405.13 (2010); Residential Hotel Unit Conversion and Demolition Ordinance, S.F. CAL., ADMIN. CODE ch. 41 (2012), available at www.amlegal.com/library/cal/sfrancisco.shtml.

292. *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

a more public-utility-like model,²⁹³ others have defended these rules as appropriately recognizing renters' dignity as well as their reliance interests in maintaining their residences and community affiliations.²⁹⁴

Some version of the utility-like regulation of banking and housing may be useful in promoting a right to nutrition, particularly in communities underserved by supermarkets and other potential providers of nutritious food. In particular, government (I address shortly the question of which branch) might borrow from the CRA and require or incentivize supermarkets to operate in underserved areas as a condition of maintaining their retail food licenses.²⁹⁵ Just as the CRA is designed to mitigate the market failure that occurs in lower-income neighborhoods with respect to banking, supermarkets or other entities could be called upon to fill the void of nutritious food that exists in food deserts. The required action might be in the form of building a bricks-and-mortar supermarket, or it could be less onerous, like making extra efforts to deliver food to such areas or to set up temporary "pop-up" stores on a recurring basis.²⁹⁶ It need not be supermarkets that are required to provide nutritious foods in underserved areas; other businesses like convenience stores, gas stations, and pharmacies might be required or incentivized to offer a minimal amount of nutritious food as a condition of obtaining or retaining a business license.²⁹⁷ In addition to regulating product quality, regulation of the retail food market might borrow from the law's restraint on market exit in the rental housing context. Rather than allow a supermarket to quit serving a neighborhood entirely, rendering that area a potential food desert, supermarkets might be required to remain in business at least until another provider of adequate nutritious food emerges to serve the

293. *E.g., id.* at 871 (Robb, J., dissenting) ("The theory of the majority seems to be that . . . a landlord is . . . a public utility, subject to regulation by the court . . ."); Lawrence Berger, *The New Residential Tenancy Law—Are Landlords Public Utilities?*, 60 NEB. L. REV. 707, 749 (1981) (arguing that utility-like regulation of rental housing, including condominium conversion laws, rent control, and habitability regulations, "badly fail on efficiency grounds").

294. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 359–68 (1986) (defending rent control on the grounds that it promotes, inter alia, the tenants' "personhood" interests); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 679–84 (1988) (explaining how rental housing regulations protect tenants' "reliance interests" in their rental properties).

295. While there is little federal regulation of supermarkets *qua* supermarkets, states intensely regulate supermarkets to ensure minimum sanitation standards. See U.S. FOOD & DRUG ADMIN., REAL PROGRESS IN FOOD CODE ADOPTIONS (July 1, 2011), <http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/UCM230336.pdf> (last updated July 1, 2011) (noting that forty-nine of fifty states have adopted retail food codes premised on FDA model codes).

296. *E.g.*, Tyler Falk, *In Seattle Food Desert, Pop-Up Grocery Provides an Oasis*, SMARTPLANET (Sept. 21, 2011, 6:46 PM PDT), <http://www.smartplanet.com/blog/cities/in-seattle-food-desert-pop-up-grocery-provides-an-oasis/960>.

297. Such a program would be an extension of what is required in Minneapolis for grocery stores. See MINNEAPOLIS, MINN., CODE OF ORD. tit. 10 § 203.20(c) (2012) (requiring licensed grocers to stock a minimum number of varieties of "staple foods").

area.²⁹⁸

Thus far the discussion has proceeded in admittedly broad strokes, speaking of the “government” generally as the entity to adopt public utility regulation. In practice, such regulation most often emerges from an amalgam of judicial, legislative, and administrative sources. Indeed, a public utility approach to creating a right to nutrition falls somewhere between the “common law concern” model and the “legislative grace” model by virtue of its mixed common law, statutory, and administrative grounding. While most of the modern regime for regulating traditional public utilities is based on statutory law, the original source of regulation was the common law. By the eighteenth century, judges in England and America had developed rules that required monopolies to serve specified territories; to treat customers equally, often regardless of marginal cost; and to continue serving unless specifically permitted to withdraw by some other agent of government.²⁹⁹ These rules were closely related to those courts imposed on common carriers, including innkeepers. Those common law rules, rooted in the notion that certain businesses were “public callings,” required carriers to accept all customers who could pay the carrier’s rates, and sometimes imposed limitations on the profit-seeking ability of the carrier by limiting the rates he could charge.³⁰⁰ These rules reflected a policy concern that free-market economics could leave certain members of society vulnerable, and that certain enterprises, by virtue of the business in which they engaged, owed a higher duty to the public than an “ordinary” business.³⁰¹

Today most of the common law’s regulation of utilities and common carriers has been codified, but the common law continues to play a role in protecting and developing rules that create public-utility-like regulation, as demonstrated by rental housing. Courts could play a similar, albeit limited, role in the context of nutrition by limiting the ability of supermarkets to exit markets through, for instance, specifically enforcing covenants requiring that a supermarket operate on a particular parcel of property, or specifically enforcing “duty to operate” clauses in commercial leases. Courts might also expand the pool of parties eligible to enforce such restrictions.

For legitimacy and institutional competence reasons, however, the legislature—

298. Cf. Singer, *supra* note 294, at 724–32 (arguing that “a plant that has been in operation for a substantial period of time and which employs a lot of people . . . owes obligations to its workers and to the community” because of others’ reliance interest in its continued operation).

299. Barbara A. Cherry, *The Political Realities of Telecommunications Policies in the U.S.: How the Legacy of Public Utility Regulation Constrains Adoption of New Regulatory Models*, 2003 MICH. ST. DCL L. REV. 757, 762 (2003); Jim Rossi, *The Common Law “Duty To Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1242–48 (1998) (discussing history of common law “duty to serve”).

300. Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL’Y 435, 436–37 (1994) (discussing history of common-carrier requirements in England and the United States); Cherry, *supra* note 299, at 762–63 (discussing the “just price” doctrine).

301. See Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 146–58 (discussing distinction between “common (or public)” and “private” businesses in English and American legal history); Cherry, *supra* note 299, at 762–63.

whether federal, state, or local—is the best branch to adopt more far-reaching forms of utility-like regulation.³⁰² Due to the complex nature of public utility regulation, most states have codified such regulation in broad form and then delegated substantial powers to administrative agencies with subject-matter expertise to fill in the regulatory details. For the kinds of changes discussed herein, such as requiring supermarkets to serve underserved communities or requiring retailers to offer a particular quantity of nutritious food, either a state or local government is the most likely level of government to adopt such a policy. Unlike the banking industry, the retail food market is not significantly regulated at the federal level. States and local governments often regulate supermarkets and other food-retail outlets extensively in their enforcement of retail-food codes, and this preexisting regulatory infrastructure could provide a basis for adding other regulations that aim to ensure broad access to nutritious food.³⁰³ In addition, state legislatures might choose to delegate eminent domain authority to supermarkets—as they have to other public utilities—in exchange for increased regulation, assuming that such a move does not violate any state constitutional “public use” provisions.³⁰⁴

D. LEGISLATIVE GRACE

This Article’s final model for operationalizing a right to nutrition is through policies adopted by the legislative branch alone.³⁰⁵ Because legislatures create positive rights all the time,³⁰⁶ they are a more natural choice than courts to adopt a wide universe of policies that bolster nutrition. As discussed in Part I, some legislative attempts to improve food provision have been around for years, like the federal pillars of SNAP, WIC, and the NSLP. Although these programs may have dubious nutritional benefits in their current form, they embody a longstanding commitment by political actors at the federal level to some nutritional guarantee, even if misdirected.³⁰⁷ These programs should be changed substantially in order to promote nutrition rather than mere food provision, although recent efforts to do so have been halting, in no small part

302. Cf. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 264–67 (1918) (Brandeis, J., dissenting) (explaining that courts are “ill-equipped” to establish complex regulatory regimes).

303. E.g., Sonia Y. Angell et al., *Cholesterol Control Beyond the Clinic: New York City’s Trans Fat Restriction*, 151 *ANNALS INTERN. MED.* 129, 130 (2009) (explaining how New York City built on its “food safety infrastructure” to enforce trans-fat restrictions).

304. See *supra* note 194 and accompanying text.

305. Perhaps more accurately, one might say that “legislative grace” rights are those adopted without significant involvement of courts. Since executives usually possess a veto power, e.g., U.S. CONST. art. I, § 7, they play an important role in shaping legislation’s final contours. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 *GEO. L.J.* 705, 707 (1992) (discussing the essential role of “veto players” in the legislative process). In addition, much legislation is ultimately implemented by administrative agencies, which are usually under executive control.

306. See Cross, *supra* note 129, at 861 (“The notion of positive statutory rights is utterly unexceptionable.”).

307. See *supra* Part I.

due to food-industry resistance.³⁰⁸

A successful campaign against obesity is likely to require much more than changes to SNAP, WIC, and NSLP. The necessary efforts are likely to fall into three overlapping categories: provision, prevention and protection, and education and information. With respect to provision, it will take significant steps to ensure wider availability of nutritious foods. Particularly at the state and local level, a number of jurisdictions have already begun initiatives like providing subsidies to attract supermarkets,³⁰⁹ encouraging or requiring “corner” or “convenience” stores or other retail outlets to stock nutritious foods,³¹⁰ facilitating farmers markets,³¹¹ promoting community gardens,³¹² and encouraging or providing mobile delivery of fresh produce.³¹³ In terms of prevention and protection, a number of jurisdictions have enacted ordinances that seek to limit the availability of obesogenic food, whether through zoning ordinances that prohibit fast-food restaurants in areas with an already high density thereof,³¹⁴ or by prohibiting the packaging of toy giveaways by fast-food restaurants with foods that do not meet minimum nutritional quality.³¹⁵ Many school districts have attempted to limit the sale of soft drinks and other obesogenic products on campus, and recent changes to federal law may augur more changes in this

308. Congress, for instance, passed legislation blocking the USDA from requiring healthier school lunches. See *supra* note 54; see also Ron Nixon, *Congress Blocks New Rules on School Lunches*, N.Y. TIMES, Nov. 15, 2011, <http://www.nytimes.com/2011/11/16/us/politics/congress-blocks-new-rules-on-school-lunches.html> (noting that food companies like “ConAgra, Del Monte Foods and makers of frozen pizza like Schwan” lobbied for the legislation). New York City’s failed attempt to prohibit soda purchases with SNAP benefits, see Letter from Jessica Shahin, Assoc. Adm’r, Supplemental Nutrition Assistance Program, U.S. Dep’t of Agric., to Elizabeth R. Berlin, Exec. Deputy Comm’r, N.Y. State Office of Temp. and Disability Assistance (Aug. 19, 2011), <http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf>, “was a victory for the soft-drink industry, which had lobbied against the proposal.” Patrick McGeehan, *U.S. Rejects Mayor’s Plan To Ban Use of Food Stamps To Buy Soda*, N.Y. TIMES, Aug. 19, 2011, <http://www.nytimes.com/2011/08/20/nyregion/ban-on-using-food-stamps-to-buy-soda-rejected-by-usda.html>.

309. See e.g., Tracey Giang et al., *Closing the Grocery Gap in Underserved Communities: The Creation of the Pennsylvania Fresh Food Financing Initiative*, 14 J. PUB. HEALTH MGMT. & PRAC. 272 (2008) (discussing Pennsylvania’s efforts in this regard); see also Press Release, U.S. Dep’t of Health & Human Servs., Obama Administration Details Healthy Food Financing Initiative (Feb. 19, 2010), <http://www.hhs.gov/news/press/2010pres/02/20100219a.html> (discussing creation of the Healthy Food Financing Initiative, a federal interagency program).

310. See *supra* note 297.

311. See Patricia E. Salkin, *Trends in Urban Agriculture*, ST020 ALI-ABA 621 § III.G (Aug. 2011) (discussing local government support for farmers markets).

312. See Neil D. Hamilton, *America’s New Agrarians: Policy Opportunities and Legal Innovations To Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523, 546–47 (2011) (discussing numerous cities’ efforts to promote urban agriculture).

313. E.g., Lolly Bowean, *Next Stop: Fresh Produce*, CHI. TRIB. (Apr. 17, 2011), http://articles.chicagotribune.com/2011-04-17/news/ct-met-englewood-food-bus-20110417_1_food-deserts-healthy-food-food-activists (describing Chicago program that delivers “affordable, healthy food” to “food deserts”).

314. E.g., L.A., Cal., Ordinance No. 180103 (July 29, 2008), available at http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf (establishing one-year moratorium on the granting of new permits for fast-food restaurants in area of city with “over-concentration of fast food restaurants”).

315. See Diller & Graff, *supra* note 12.

regard.³¹⁶ Prevention strategy may also include increasing taxes on obesogenic products like soft drinks in order to reduce consumption.³¹⁷ Indeed, any comprehensive approach to prevention *and* provision of nutritious foods is likely to require significant attention to price and its effect on consumption. Some of this attention must come from Congress, which, as discussed above,³¹⁸ already distorts the prices for food through its massive corn subsidies.

Another way to reduce the consumption of obesogenic foods is to educate the public about obesity and nutrition, whether through schools, media advertisements, or direct contact with consumers. Some localities have begun offering cooking classes to help individuals learn how to prepare economical and nutritious meals.³¹⁹ Other legislative efforts have sought to reduce information asymmetries by, for instance, requiring restaurants to display more clearly the number of calories in the products they offer.³²⁰ Any serious effort to reduce childhood obesity is likely to require not just positive information provided to children about health, but also the prevention of advertising aimed at influencing children to consume obesogenic products. Other countries have banned or severely curtailed such advertising³²¹ while the United States has encouraged only voluntary efforts by the food industry, which have thus far been weak.³²²

The above examples are just some of the myriad ways in which political actors can bolster a right to nutrition by legislation. Of course, in a nation with judicial review, legislative efforts will often butt up against judicially enforced (and interpreted) constitutional restraints.³²³ In the context of nutrition, such potential restraints at the federal level include the Commerce Clause as a limit on Congress's authority to address social problems; the First Amendment as a

316. See *supra* note 53 and accompanying text.

317. See Tatiana Andreyeva et al., *Estimating the Potential of Taxes on Sugar-Sweetened Beverages To Reduce Consumption and Generate Revenue*, 52 PREVENTIVE MED. 413 (2011) (discussing potential public-health impact of such taxes).

318. See *supra* notes 93–94 and accompanying text.

319. See *Partner; Get Involved*, COOKING MATTERS, <http://cookingmatters.org/get-involved/partner/> (last visited Jan. 21, 2013) (explaining how a nonprofit organization partners with local programs to teach cooking and nutrition).

320. See Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148 § 4205(b), 124 Stat. 119, 573–77 (2010) (codified at 21 U.S.C. § 343(q)(5) (2006 & Supp. V 2011)). At the time of this draft, final federal menu-labeling standards had not yet been promulgated. See FDA, *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments*, <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=FDA-2011-F-0172> (last visited Jan. 21, 2013).

321. See Harris & Graff, *supra* note 66. Of course, many other countries do not have something akin to our judicially enforced First Amendment, which can limit significantly legislative efforts to curb advertising.

322. Even the government's efforts to get the food industry to adopt voluntary standards have been delayed after intense industry lobbying. See Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS, Apr. 27, 2012, <http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427>.

323. As Alexis de Tocqueville famously put it, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., 1945).

limit on government's ability to restrict or compel the flow of "information," even if advertising; and the Fifth Amendment as a limit on government's ability to regulate the use of private property.³²⁴ While detailed analyses of these potential conflicts are beyond the scope of this paper, their possibility demonstrates the interconnectedness of indirect constitutional rights, discussed above, and rights that are based on legislative grace.

When judicial review does not fell a legislatively created right, such a right may prove quite durable over time, even if subsequent legislatures are at liberty to rescind it without violating any judicially enforced constitutional provision. Indeed, although it is common in American jurisprudence to think that "rights" must be constitutionally based and judicially enforced, some of our most enduring freedoms and entitlements have been mere creatures of statute. Cass Sunstein has posited that the right to join a union, the right to be free of private discrimination, and the right to participate in Social Security have become "constitutive commitments" that our political system has made to the populace.³²⁵ Although these rights may generally be repealed by legislatures at will, doing so would require an unlikely fundamental change in the social understanding.³²⁶ Because courts are ill-equipped to enforce socioeconomic rights, Sunstein argues that FDR hoped to protect positive rights like the rights to adequate food, clothing, shelter, and medical care through ordinary legislation rather than constitutional amendment.³²⁷ The success of some of his efforts, like Social Security, according to Sunstein, proves the wisdom of this strategy.

Recent efforts, thus far unsuccessful, to restructure Social Security, as well as the partly successful efforts to repeal collective-bargaining rights at the state level³²⁸ do not necessarily demonstrate that Sunstein is wrong; rather, they may demonstrate that fundamental changes in the social understanding may be underway, at least with respect to some issues. On the other hand, the significant resistance to changes to Social Security demonstrates just how durable this "constitutive commitment" remains.³²⁹ To that end, some elements of FDR's "Second Bill of Rights" have evolved into "constitutive commitments" with respect to food: namely, SNAP, WIC, and the NSLP. While the nutritional benefits of these programs are now dubious, they could form the basis for improving public nutrition in the near future, provided political resistance thereto can be overcome. Other fledgling efforts to promote nutrition may metamorphose into durable legislative rights over time. For instance, just

324. See *supra* notes 190–95 and accompanying text.

325. SUNSTEIN, *supra* note 14, at 61.

326. *Id.* at 62.

327. *Id.* at 140–47.

328. See *Right-To-Work Resources*, NAT'L CONF. OF STATE LEGISLATORS (last visited Jan. 21, 2013), <http://www.ncsl.org/issues-research/labor/right-to-work-laws-and-bills.aspx>.

329. Another apparently durable "constitutive commitment" is the federal antidiscrimination regime. See Rebecca E. Zietlow, Essay, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 497 n.91 (2012) (discussing "critical outcry" in response to then-senatorial candidate Rand Paul's musings about repealing Title VII of the Civil Rights Act of 1964).

as many Americans take it for granted that zoning laws will protect their homes from nearby industrial and commercial activities, so too may Americans come to expect that zoning laws will not permit too high a density of fast-food restaurants. Similarly, once Americans become accustomed to seeing calorie information posted prominently on menu boards of franchise restaurants, they may come to rely on this information and perhaps even call for its required publication in more retail food outlets. Only time will tell which nutritional rights created as a matter of legislative grace transform into constitutive commitments, but the possibility of some doing so is distinct.

CONCLUSION

This Article sought to demonstrate the ways in which nutrition rights might be recognized short of the “traditional” model of constitutional basis and judicial enforcement. The different methods rely to varying degrees on the legislature and the judiciary for their adoption and enforcement. While this Article has discussed some of the relative institutional advantages of each branch, it has not addressed the *likelihood* of each to embrace nutrition rights in different forms. Any such analysis would need to look at the interest-group dynamics that can influence both the judicial and legislative branches. One such example is the persistent tilt of federal food policy, as formulated by Congress, toward big-agriculture and food-processing interests. Another example of industry influence is state legislatures’ passage of cheeseburger bills that absolve the fast-food industry of any liability in tort. Obviously, if political actors are to reorient food provision programs toward a right to nutrition, as this Article has argued, industry interests must be confronted, weakened, or somehow changed from within. “Public choice” analysis would require identifying and assessing the countervailing interest groups that might effectively accomplish this, a project beyond the scope of this Article. Further, insofar as a right to nutrition might be recognized or supported by the judiciary, one must ask whether and to what extent judges might be similarly influenced by the interests that have often prevailed upon Congress and state legislatures.

While leaving the public choice analysis to other work, I offer a few tentative thoughts. First, the analysis of legislative and judicial susceptibility to industry group “capture” must be finely tuned. Federal judges are unelected, but many of their counterparts at the state level run in elections that require raising significant amounts of money. Whether and to what extent the different selection mechanisms affect the potential influences on judges is a complicated inquiry. Similarly, while some of the “legislative grace” proposals discussed have fallen within Congress’s domain, many others have emerged from state and local legislatures or administrative agencies. Particularly at the local level, the ability of industry forces to influence policy, whether formulated by the city council or a city agency, is likely to vary widely. Indeed, the state and local levels may often offer the best opportunity for adopting nutrition-promoting

legislation that would never have originated at the federal level.³³⁰ Thus, the mere fact that the agricultural industry, say, has a tight grip on Congress, or that the restaurant industry holds sway in many state legislatures, does not necessarily doom many of the proposals that can help establish a right to nutrition.

Finally, whatever their susceptibility to food industry influence, judges and legislators may often simply be oblivious to the effects of their actions on the food environment and nutrition. This Article hopes to increase their awareness by demonstrating the myriad ways in which seemingly unrelated doctrines in constitutional law and the common law may have a significant effect on nutrition. Hence, even if government officials are loath to embrace the call for a “right to nutrition,” they may nonetheless choose to act with more solicitude toward nutrition in light of the obesity epidemic. A franker acknowledgment of the devastating impact of obesity and the food environment’s role in creating the problem will, hopefully, facilitate more successful legal strategies to reduce obesity.

330. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007); Diller, *supra* note 272, at 1129–32 (2007).