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The “California Effect” & the Future of American Food: How California’s Growing Crackdown on Food & Agriculture Harms the State & the Nation

*Baylen J. Linnekin**

Thank you for your wine, California. Thank you for your sweet and bitter fruits.

—The Rolling Stones, *Sweet Virginia, on Exile on Main Street*
(Atlantic Records 1972).

INTRODUCTION

For several decades, California has been the epicenter of the American food scene. While data show that the state produces one-third of the nation’s food supply,¹ California is much more than where the food we eat comes from. One in eight American diners lives in the state,² which is home to more than 90,000 restaurants.³ California is also where eating trends are born, and where fast food, Chez Panisse, Mexican salsa, Wolfgang Puck, organic foods, street food, and Napa Valley wines became durable icons of American culinary culture.

The state’s place atop the national food chain, though, is in jeopardy. In recent years, California legislators have pursued

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¹ See U.S.D.A., NATIONAL AGRICULTURAL STATISTICS SERVICE, CALIFORNIA FIELD OFFICE, CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR 1 (Oct. 2008), available at http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2007cas-all.pdf [hereinafter U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR].

² See U.S. CENSUS BUREAU, GEOGRAPHIC COMPARISON TABLE, 2007 POPULATION ESTIMATES, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2007_EST&-redoLog=false&-mt_name=PEP_2005_EST_GCTT1R_US9S&-format=US-9S (last visited Apr. 1, 2010) [hereinafter U.S. CENSUS BUREAU, 2007 POPULATION ESTIMATES].

³ California Restaurant Association, About the CRA, <http://www.calrest.org/> (last visited Apr. 1, 2010).

regulations that negatively impact many important agricultural and culinary trends. State and local governments have banned or severely hampered a veritable smorgasbord of foods, including everything from eggs to French fries, foie gras to tacos, raw-milk cheeses to bacon-wrapped hot dogs.⁴ Meanwhile, California Proposition 65 requires proprietors of restaurants that serve olives, bread, and chicken to warn customers that they sell cancerous products.⁵ The nation's breadbasket now wants us to fear bread.

California's turn against food is worrisome across the country, too, since in addition to its place as the nation's breadbasket and culinary trendsetter, California is the country's cultural and regulatory bellwether. Regulations passed in California often become laws elsewhere, at both the state and federal level.⁶ Companies that can no longer market a food in California may be forced to decide whether that product—robbed of twelve percent of its potential market—is still viable.

This article explores the bright past, gloomy present, and cloudy future of food in California, and what this means for food in America. Section I describes the nature and history of California's agricultural and culinary development. Section II explores several of California's state and local food bans and restrictive food regulations. Section III analyzes the "California effect" and the nationwide impact of California's food crackdown, and describes several ways that burdensome California food laws have impacted agriculture or dining on a national scale. Section IV analyzes the likely causes of the state's burgeoning crackdown on food, and explores several arguments over California's food crackdown. Finally, this article concludes that what California and America need in place of what some critics label "food fascism"⁷ is *food freedom*: the right of people to grow, buy, sell, cook, and eat the foods they want.

⁴ See *infra* notes 55, 63, 90. Daniel Hernandez, *The Bacon-Wrapped Hot Dog: So Good It's Illegal*, LA WEEKLY, Feb. 7, 2008, <http://www.laweekly.com/2008-02-07/eat-drink/the-hot-dog-so-good-it-sillegal/>.

⁵ Office of Environmental Health Hazard Assessment, Proposition 65 in Plain Language, <http://oehha.ca.gov/prop65/background/p65plain.html> (last visited Apr. 1, 2010).

⁶ See *infra* Part III.C.

⁷ See, e.g., Peter Ferrara, Op-Ed, *Rise of Food Fascism*, WASH. TIMES, June 1, 2003, at B3 ("[F]ood fascism is a direct assault on our freedom of choice over our own diets.").

I. CALIFORNIA: THE CAPITAL OF MODERN AMERICAN FOOD

California is the nation’s third-largest state in terms of area,⁸ and it is the largest, by more than one-third, in terms of population.⁹ More than twelve percent of Americans call California home.¹⁰ Just as important for the purposes of this article, California is the birthplace of much of what we eat, and how and why we prepare a rich variety of foods.

A. California: America’s Agricultural Titan

Indigenous Americans who made their home in pre-colonial times in what is now California subsisted on a variety of wild foods, including acorns, game, and marine mammals.¹¹ Many crops and animals now raised in the state were brought by the Spaniards and Mexicans who first colonized today’s California in the latter half of the eighteenth century.¹²

California currently boasts more than 75,000 farms and ranches.¹³ These occupy more than 26 million acres, or 25 percent of the state’s total acreage.¹⁴ These farms generate more than \$36 billion in sales, which is nearly double that of Texas, California’s closest competitor.¹⁵ California’s agricultural output is so massive that its value dwarfs that of all but about a half-dozen countries in the world.¹⁶

California’s vast size, fertile soil, and largely temperate climate make the state an ideal location for growing a dizzying array of crops and raising livestock. Nationally, recent data show that the top five agricultural counties in America, in terms of sales, are located in California.¹⁷ Agriculture and crop production rank first and fourth, respectively, on the state’s own

⁸ See U.S. CENSUS BUREAU, UNITED STATES SUMMARY 2000, 2000 CENSUS OF POPULATION AND HOUSING 29 (2004).

⁹ See U.S. CENSUS BUREAU, 2007 POPULATION ESTIMATES, *supra* note 2.

¹⁰ See *id.*

¹¹ See Andrew F. Smith, *California*, in 1 THE OXFORD ENCYCLOPEDIA OF FOOD AND DRINK IN AMERICA 165 (Andrew F. Smith ed., 2004).

¹² See *id.* at 166.

¹³ CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2007 19 (2008) [hereinafter CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE].

¹⁴ *Id.*

¹⁵ See U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 1.

¹⁶ See UNIVERSITY OF CALIFORNIA-DAVIS, AGRICULTURAL ISSUES CENTER, THE MEASURE OF CALIFORNIA AGRICULTURE, 5-1 (2009), available at <http://aic.ucdavis.edu/publications/moca/moca09/moca09.pdf>.

¹⁷ U.S.D.A., Data Sets, State Fact Sheets (2009), <http://www.ers.usda.gov/StateFacts/US.htm> (last visited Apr. 1, 2010).

list of “competitive edge” private industries.¹⁸ Owing to California’s place as a wine- and beer-producing state, beverage manufacturing ranks tenth on the list.¹⁹

The sheer volume and variety of crops grown in California defy overstatement. The state leads the nation in production of almonds and walnuts and seemingly every crop alphabetically in between.²⁰ In addition to almonds and walnuts, California is America’s sole producer—meaning it is home to ninety-nine percent or more of the country’s overall production—of figs, raisins, olives, clingstone peaches, persimmons, prunes, pomegranates, sweet rice, and clover seed.²¹ The state leads the nation in production of asparagus, avocados, bell peppers, broccoli, carrots, cauliflower, celery, cut flowers, dates, eggplant, garlic, grapes, herbs, kiwi, lemon, lettuce, lima beans, melons, nectarines, onions, pears, pistachios, plums, raspberries, strawberries, turnips, and more than a dozen other crops.²² All told, California farms account for nearly half of America’s domestic production of fruits, nuts, and vegetables.²³ California growers ship the vast majority of these crops to other U.S. states.²⁴ California also accounts for all of America’s nut exports, and three out of five fruit and vegetable exports.²⁵

California is also the nation’s organics and dairy capital. Today, California leads the nation by a wide margin in both the number of certified organic farms and ranches with 1,916 (Wisconsin, in second place, has just 580 such operations) and organic crop acres with 223,263 (North Dakota, with 143,322, is second).²⁶ California, also America’s leading dairy maker,²⁷ accounts for twenty-two percent of America’s milk production,²⁸ about half of which is used to make cheese.²⁹ The state produces

¹⁸ See CALIFORNIA ECONOMIC DEVELOPMENT PARTNERSHIP, CALIFORNIA FACTS STATEWIDE (Nov. 2006), available at <http://www.labor.ca.gov/cedp/pdf/CaliforniaFacts.pdf>.

¹⁹ *Id.*

²⁰ See U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 1.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ Hyunok Lee, *California Horticulture: Current Trade and Policy Issues*, 6 AGRIC. & RESOURCE ECON. UPDATE 3, 3 (2002), available at <http://www.agecon.ucdavis.edu/extension/update/articles/v6n22.pdf>.

²⁶ See U.S.D.A., DATA SETS, ORGANIC PRODUCTION (2008), available at <http://www.ers.usda.gov/Data/Organic>.

²⁷ U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 65.

²⁸ *Id.* at 1.

²⁹ *Id.* at 65.

more milk than do its two closest competitors, Wisconsin and New York, combined.³⁰

B. California: America’s Culinary Titan

While California is undoubtedly America’s agricultural giant, the state may be even better known for its place as the epicenter of modern-day American cuisine. In so many different ways, what we eat today reflects California’s past and present culinary development.

The story of food in California, like that of most states and nations, mirrors immigration patterns. After Mexico won its independence from Spain a half-century after colonization, Mexican cuisine predominated in the state.³¹ The Mexican-American War, and, soon after, the state’s Gold Rush, brought an influx of Americans to the state, along with large numbers of immigrants from Europe, Asia, Australia, and the Pacific islands.³² Each group brought its own culinary traditions, immediately diversifying California’s cuisine.³³

California’s population doubled from 1920 to 1940.³⁴ With the advent of the automobile and freeway travel burgeoning, more Californians had the means to travel in search of different cuisines. Restaurateurs, like Oakland entrepreneur Victor Bergeron, met the demand head on.³⁵ Bergeron began a quest in the 1930s to bring California’s ethnic cuisines to the masses, setting the stage with his Mexican and Polynesian restaurants for today’s family-style Mexican and Szechuan dining experiences.³⁶

That same decade, California also gave birth to the hamburger chains that became America’s fast food icons—perhaps the state’s first and most lasting contribution to America’s national cuisine. In rapid succession, Bob’s Big Boy, In-N-Out Burger, McDonald’s, and Jack in the Box sprung up in California as small operations, each expanding quickly from local to state to regional or national operation.³⁷ The first twenty-four

³⁰ See CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, *supra* note 13, at 96.

³¹ See Smith, *supra* note 11, at 165–67.

³² *Id.* at 166.

³³ *Id.*

³⁴ U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES, CALIFORNIA (2000), available at <http://www.census.gov/dmd/www/resapport/states/california.pdf>.

³⁵ See Smith, *supra* note 11, at 171.

³⁶ *Id.*

³⁷ *Id.*

hour restaurant chain, Denny's, literally opened its doors (which have no locks) in Lakewood, California in 1953.³⁸

The first major post-WWII development in California's culinary experience was the state's place as a launching pad for an American revolution in French cooking. In the 1940s, California native Julia Child moved to Paris, where she studied culinary arts under various French masters.³⁹ Soon after her return to the United States more than a decade later, Child published *Mastering the Art of French Cooking*, the first cookbook to make French recipes and methods accessible to the masses.⁴⁰

In 1971, a decade after Child began to reshape the American culinary landscape for home cooks, Berkeley, California chef Alice Waters, who also trained in France, launched Chez Panisse, the restaurant that gave birth to "California cuisine."⁴¹ The restaurant was the first in the nation explicitly to serve food from a set menu featuring only fresh, seasonal, and local ingredients.⁴² Waters was also "the first to put [the word] 'organic' on the menu."⁴³ Waters and her chefs combined this approach with the variety of cuisines that had been popular in California since the end of the Nineteenth Century to create something truly original, truly Californian.⁴⁴ In so doing, she not only gave birth to California cuisine but to the "new American" food movement.⁴⁵ This movement, which stresses the Waters ideal of fresh, local, seasonal, and organic cuisine, spread across the country in the 1970s, 1980s, and 1990s due to the influence of Waters, Austrian California transplant Wolfgang Puck, and a host of other groundbreaking chefs.⁴⁶

Wine, for many the perfect complement to a great meal, is also at the center of California's culinary growth. Wine has been produced in the state since the time Spanish missionaries arrived in California.⁴⁷ Still, at the dawn of the twentieth century, even food writers were unaware that California produced nearly every

³⁸ See Denny's Restaurants, Denny's Restaurants History, <http://dennys.com/en/page.aspx?ID=31&title=History> (last visited Feb. 1, 2010).

³⁹ See Smith, *supra* note 11, at 171.

⁴⁰ *Id.*

⁴¹ *Id.* at 171–72.

⁴² See, e.g., Chez Panisse Restaurant, Alice Waters: Executive Chef, Founder and Owner, <http://www.chezpanisse.com/about/alice-waters/> (last visited Aug. 12, 2009).

⁴³ JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* 15 (2004).

⁴⁴ See generally JEREMIAH TOWER, *CALIFORNIA DISH: WHAT I SAW (AND COOKED) AT THE AMERICAN CULINARY REVOLUTION* (2006).

⁴⁵ *Id.* at 219.

⁴⁶ See *id.* at 212, 219.

⁴⁷ See Smith, *supra* note 11, at 170.

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wine varietal.⁴⁸ For more than 100 years, consumers and connoisseurs had considered the state’s wines—indeed all American wines—to be second-rate compared to those of the major European producing countries. That changed in 1976 with the “Judgment of Paris,” a competition pitting top French and California wines against one another in a double-blind expert tasting.⁴⁹ California wines crushed their French counterparts, opening the domestic and world markets to California vintners.⁵⁰

Today, California produces about ninety percent of all U.S. wine⁵¹ and is responsible for more than sixty percent of all wine sold in this country,⁵² generating more than \$58 billion in annual revenue in the state.⁵³ The state’s success in winemaking led to the subsequent creation of licensed wineries in all fifty U.S. states.⁵⁴ California is now the fourth largest producer of wine in the world, trailing only France, Italy, and Spain.⁵⁵

II. CALIFORNIA’S CRACKDOWN ON FOOD

A. California’s State and Local Bans

California’s unparalleled dual successes in the development of both world-class agriculture and cuisine are at risk today because of the strict food-regulatory climate in the state. The state currently has “some of the toughest food restrictions in the nation.”⁵⁶ Bans at the state or local level now threaten everything from authentic Hollandaise sauce and Caesar salad,⁵⁷

⁴⁸ See R.S., Foreign Correspondence, *Food at the Exposition*, N.Y. TIMES, Aug. 12, 1900 (noting with surprise that California “apparently produces every kind of wine”).

⁴⁹ See generally GEORGE M. TABER, CALIFORNIA VS. FRANCE AND THE HISTORIC 1976 PARIS TASTING THAT REVOLUTIONIZED WINE (2003).

⁵⁰ See *id.*

⁵¹ Press Release, Wine Institute, California Travel & Tourism Commission and Wine Institute Form Historic Partnership to Promote Culinary Travel (Aug. 21, 2007), available at <http://www.wineinstitute.org/resources/pressroom/08212007> [hereinafter Press Release, Wine Institute].

⁵² See Press Release, Wine Institute, A Signature California Industry: California Wine (Apr. 3, 2007), available at <http://www.wineinstitute.org/files/californiawineimpact.pdf>.

⁵³ See Press Release, Wine Institute, California Wine Has \$51.8 Billion Economic Impact on State and \$125.3 Billion on the U.S. Economy (Dec. 21, 2006), available at <http://www.wineinstitute.org/resources/pressroom/120720060>.

⁵⁴ Sharon Kapnick, *America: Land of the Red, White and Rose*, TIME, Mar. 17, 2003, at 83.

⁵⁵ See Press Release, Wine Institute, *supra* note 51.

⁵⁶ Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008, at A1.

⁵⁷ See Joel Rubin, *Making the Right Sick Call*, L.A. TIMES, Nov. 3, 2007, at A1 (discussing the new statewide ban, ostensibly enacted for health reasons, on the popular foods).

to tacos bought from some now-popular mobile stands,⁵⁸ to farm-raised salmon,⁵⁹ to a host of other cuisines and agricultural products.

Each of California's 480 cities and towns⁶⁰ and fifty-eight counties⁶¹ has the power to enact certain laws and regulations under the state Constitution.⁶² Many burdensome food regulations and prohibitions are born at the local level and percolate up to the state level, as in the case of menu labeling⁶³ and restaurant smoking bans.⁶⁴ The reason for this is that advocates find it easier and less costly to secure a law's passage at the local level than at the state level.⁶⁵

Still, the bans that burden the greatest number of people are undoubtedly those in force across the state. Perhaps no food impacted by a California ban is more widely consumed than eggs. In 2008, California voters passed Proposition 2 (Prop 2), the Prevention of Farm Animal Cruelty Act.⁶⁶ The real regulatory dilemma inherent in Prop 2 lies in its ban of the use of battery cages to house egg-laying hens.⁶⁷ The ban means that all such hens will have to be free-roaming by the implementation year.⁶⁸ Currently, the state is home to nearly four-dozen large-scale egg producers⁶⁹ and more than 20 million hens, which lay close to 5 billion eggs each year.⁷⁰ These numbers will plummet with the

⁵⁸ See Carolyn Marshall, *Proposed Ban on Taco Trucks Stirs Animosity in a California Town*, N.Y. TIMES, Jun. 15, 2007, available at <http://www.nytimes.com/2007/06/15/us/15taco.html> (describing opposition to a proposed ban on food served from taco trucks in Salinas, California).

⁵⁹ See Ann Powers, *Farming the Ocean*, 22 NAT. RES. & ENV. 45, 46 (2007).

⁶⁰ League of California Cities, *Facts at a Glance*, <http://www.cacities.org/index.jsp?zone=locc&previewStory=53> (last visited Apr. 1, 2010).

⁶¹ California State Association of Counties, *California's 58 Counties*, <http://www.csac.counties.org/default.asp?id=6> (last visited Apr. 1, 2010).

⁶² See CAL. CONST. art. XI.

⁶³ See *infra* Part IV.

⁶⁴ See Letter from David E. Garth, President/CEO, San Luis Obispo Chamber of Commerce, to Nebraska Senators (Jan. 29, 2001), available at <http://www.tobacco.org/News/010129garth.html>.

⁶⁵ See, e.g., Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491, 1535 (2007).

A general rule of thumb is that it is harder politically to get things done at the federal level, somewhat less hard at the state level, and easiest at the local level. That is why so many public health advocates are fond of touting local policies as a critical strategy.

⁶⁶ 20 CAL. HEALTH & SAFETY CODE §§ 25990–94 (West 2001).

⁶⁷ See Carla Hall & Jerry Hirsch, *Prop 2 Unlikely to Hike Egg Prices*, L.A. TIMES, Nov. 6, 2008, at C1.

⁶⁸ *Id.*

⁶⁹ See Peter Singer, *The Rights of Animals*, NEWSWEEK, Nov. 19, 2008, <http://www.newsweek.com/id/169881>.

⁷⁰ DANIEL A. SUMNER ET AL., UNIVERSITY OF CALIFORNIA AGRICULTURAL ISSUES CENTER, *ECONOMIC EFFECT OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN*

ban. Experts predict the number of eggs imported into the state in order to meet consumer demand will swell once the ban takes effect, since out-of-state eggs are not subject to the ban.⁷¹

Another farm-raised food subject to a statewide ban in California is foie gras, a delicacy made from the engorged liver of a duck or goose.⁷² Foie gras has probably existed since the time of the pharaohs, when Jewish slaves first noted that migrating geese tended to gorge themselves prior to their journey.⁷³ Jews brought their knowledge of foie gras to Europe, where French chefs eventually made the dish a staple part of the country's *haute* cuisine, and exported it around the globe wherever French food became popular.⁷⁴ Today, it often appears on French menus in the United States and elsewhere in appetizers, or as an ingredient in dishes like Beef Wellington.⁷⁵ Though both duck and goose foie gras are popular in France, duck is the chief variety consumed in the United States.⁷⁶ New York State is the chief supplier of foie gras in America, followed by California.⁷⁷

In 2004, California banned foie gras,⁷⁸ becoming the first state in the nation to do so.⁷⁹ Just as with the egg-crate ban, proponents of the foie gras ban based their opposition to foie gras on animal-rights grounds, claiming that the process of fattening the liver of fowl, which the French call *gavage*, is cruel.⁸⁰ The ban, passed by the state legislature and signed into law by Gov. Arnold Schwarzenegger, prohibits the manufacture or sale of foie gras beginning in 2012.⁸¹ The ban will impact Sonoma Artisan Foie Gras, the sole producer in the state;⁸² restaurants and grocers who wish to sell foie in California; and consumers there who wish to buy it in an eatery, or to cook and serve it at home.

CALIFORNIA at i, (July 2008), available at <http://aic.ucdavis.edu/publications/eggs/executivesummaryeggs.pdf>.

⁷¹ *Id.* at iv.

⁷² *California Decides to Permanently Pull Foie Gras off the Menu*, HUMANE SOCIETY OF THE U.S., Oct. 8, 2004, http://www.hsus.org/farm/news/ournews/california_bans_foie_gras.html [hereinafter *California Decides*].

⁷³ See generally Baylen Linnekin, *The Goose is Nothing: Fighting Chicago's Foie Gras Ban*, DOUBLETINK, July 8, 2007, <http://americasfuture.org/doublethink/2007/07/08/the-goose-is-nothing-fighting-chicago%E2%80%99s-foie-gras-ban/>.

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ CAL. HEALTH & SAFETY CODE §§ 25980–25984 (West 1999).

⁷⁹ See *California Decides*, *supra* note 72.

⁸⁰ See Linnekin, *supra* note 73.

⁸¹ See *id.*; *California Decides*, *supra* note 72.

⁸² See Sonoma Artisan Foie Gras, Industry Issues, <http://www.artisanfoiegras.com/> (last visited Apr. 1, 2010).

The state has also banned agricultural products not on animal-rights grounds but out of fear of an environmental cataclysm caused by genetic engineering. Food producers have turned increasingly to genetically modified food (“GMO”), both crops and animals, in order to help the modified organism combat pests or disease, or to introduce to the food new traits or traits too difficult or costly to introduce through selective breeding alone.⁸³ However, because of fears by some growers that countries like Japan might reject genetically modified rice from California,⁸⁴ the California Rice Certification Act of 2000⁸⁵ banned the growing of GMO rice in the state.⁸⁶ California also bans genetically modified fish from being introduced into its waters,⁸⁷ making it the only state to ban entirely a genetically modified organism.⁸⁸ The science behind both bans remains unclear. Referring to the fish ban, California Fish and Game commissioner Sam Schuchat called the ban “a question of values, . . . not a question of science.”⁸⁹

While animal rights and environmentalism are key factors behind some California bans, obesity is a driving force behind others, including those pertaining to trans fats, soda, and other foods served in schools. *Trans* fats occur naturally in all ruminant animals but also appear in hydrogenated cooking oils.⁹⁰ Critics contend artificial *trans* fats cause obesity, heart disease, and other ills.⁹¹ Los Angeles attempted to ban *trans* fats in 2006, just a week after New York City became the first city in the nation to do so.⁹² California’s state constitution, however, did not permit the city to enact the ban.⁹³ Then, in 2008, California

⁸³ See, e.g., U.S. Dept. Energy, Human Genome Project, What are Genetically Modified (GM) Foods?, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/gmfood.shtml (last visited Apr. 1, 2010).

⁸⁴ See Matt Gnaizda, *California Growers Wary of Genetically Modified Rice*, EPOCH TIMES (Los Angeles), Mar. 13, 2009, <http://en.epochtimes.com/news/7-3-13/52763.html>.

⁸⁵ CAL. FOOD & AGRIC. CODE §§ 55003, 55040 (West Supp. 2009).

⁸⁶ See Thomas P. Redick & Donald L. Uchtmann, *Coexistence Through Contracts: Export-Oriented Stewardship in Agricultural Biotechnology vs. California’s Precautionary Containment*, 13 DRAKE J. AGRIC. L. 207, 227–28 (2008).

⁸⁷ See Ann Powers, *Farming the Ocean*, 22 NAT. RES. & ENV. 45, 46 (2007).

⁸⁸ See Doug Farquhar & Liz Meyer, *State Authority to Regulate Biotechnology Under the Federal Coordinated Framework*, 12 DRAKE J. AGRIC. L. 439, 459 (2007).

⁸⁹ Don Thompson, *State Pulls Plug on Glowing Fish*, OAKLAND TRIBUNE, Dec. 4, 2003, at 3.

⁹⁰ See, e.g., Kim Severson, *Trans Fat Fight Claims Butter as a Victim*, N.Y. TIMES, Mar. 7, 2007, at F1.

⁹¹ See Press Release, California Office of the Governor, Governor Schwarzenegger Promotes Health and Nutrition by Signing Nation-Leading Trans Fat Bill (July 25, 2008), available at <http://gov.ca.gov/press-release/10291/> [hereinafter Governor Schwarzenegger Promotes Health and Nutrition].

⁹² See Esther Choi, Comment, *Trans Fat Regulation: A Legislative Remedy for America’s Heartache*, 17 S. CAL. INTERDISC. L.J. 507, 534 (2008).

⁹³ *Id.*

became the first state to ban the use of *trans* fats.⁹⁴ The ban will come into force in 2010 for restaurants in the state, and will apply to baked goods as of 2011.⁹⁵ Critics of *trans* fat bans contend the laws have no impact on obesity, and may instead be counterproductive.⁹⁶

Foods served in public schools are subject to myriad regulations, nowhere more so than in California.⁹⁷ In the push to tame childhood obesity, the state was in 2004 the first in the nation to ban soda from being served in grades K-8.⁹⁸ On another school front, one pending bill, S.B. 416, would amend the state food and agriculture code in order to banish from school cafeterias any meat or poultry that has been raised with the help of antibiotics.⁹⁹ In 2005, also under the guise of combating obesity, California legislators established school nutrition guidelines that went into effect in 2007.¹⁰⁰ These guidelines have had their greatest impact on one of America’s most beloved, civic-minded, and benevolent youth-fundraising activities: bake sales. Since there is no way to regulate ingredients used in foods made at home, schools throughout the state have banned cupcakes and brownies and, as one school newspaper put it, turned “birthday cakes into contraband.”¹⁰¹

B. California’s State and Local Regulations

Though less severe than an outright ban, a regulation can have a similar impact on producers and consumers. When a regulation tarnishes a product and makes it substantially less attractive to a consumer, a regulation can function much like a ban.

Los Angeles experimented with a “truth-in-menu” law in the 1970s, in part to combat the problem of area restaurants serving Roquefort dressing made of blue cheese and Maine lobsters that

⁹⁴ See Patrick McGreevy, *State Bans Trans Fats*, L.A. TIMES, July 26, 2008, at A1.

⁹⁵ See Governor Schwarzenegger Promotes Health and Nutrition, *supra* note 91.

⁹⁶ See Baylen Linnekin, *Solving the Problem of Childhood Obesity*, Reason.com, Mar. 31, 2009, <http://reason.com/news/show/132597.html> (“[Bans have] either been ineffective or disturbingly counterproductive, [says former USDA nutrition official Brian Wansink, now a Cornell University professor]. All the data we’ve seen about menu labeling doesn’t show a consistent answer at all.”) (internal quotations omitted).

⁹⁷ See Fried & Simon, *supra* note 65, at 1520 (“California has been a hotbed of activity over school nutrition for years.”).

⁹⁸ See *id.* See also DAVID HARSANYI, NANNY STATE 51 (2007) (noting California’s soda ban has had no impact on obesity rates in the state).

⁹⁹ See S.B. 416, 2009–2010 Sess. (Cal. 2009) (As originally drafted and introduced by Sen. Florez on Feb. 26, 2009).

¹⁰⁰ See Patricia Leigh Brown, *As School Food Slims Down, Bake Sales are Out*, N.Y. TIMES, Nov. 10, 2008, at A16 (“The old-fashioned school bake sale, once as American as apple pie, is fast becoming obsolete in California.”).

¹⁰¹ See *id.*

actually came from Rhode Island.¹⁰² This legitimate effort to combat genuine deceit was a reasonable reaction to a real problem. Three decades later, in 2008, California became the first state to implement a statewide menu-labeling law.¹⁰³ The new law is not a “truth-in-menu” law but, rather, requires calorie labeling on restaurant menus for operators that have more than twenty locations in the state.¹⁰⁴ The law did not arise in response to any deception but, instead, came about as a general response to the problem of obesity.¹⁰⁵ The law impacts close to 17,000 restaurants.¹⁰⁶ Critics of the menu-labeling law note that nearly every restaurant required by the law to post calorie information already does so at its website, provides such information on site, or both.¹⁰⁷

Another restaurant labeling requirement springs from Proposition 65 (Prop 65), the Safe Drinking Water and Toxic Enforcement Act (the “Act”), a statewide ballot initiative passed in 1986 by California voters.¹⁰⁸ Prop 65 requires the state’s Office of Environmental Health Hazard Assessment, housed in the California Environmental Protection Agency, to maintain a list of substances that are known by the state to cause cancer or birth defects.¹⁰⁹ The Act does not ban the substances, but instead requires businesses in which any of the substances are present at the minutest levels to post intimidating warning signs in prominent places. No specific manner of warning is required, meaning that warnings “can be given by a variety of means, such as by labeling a consumer product [or] posting signs.”¹¹⁰ In

¹⁰² See Mimi Sheraton, *When the Menu Misleads You*, N.Y. TIMES, June 29, 1977, at C1.

¹⁰³ S.B. 1420, 2007–2008 Sess. (Cal. 2008). See also Press Release, Center for Science in the Public Interest, California First State in Nation to Pass Menu Labeling Law (Sept. 30, 2008), available at <http://www.cspinet.org/new/200809301.html>.

¹⁰⁴ See Press Release, California Office of the Governor, Governor Schwarzenegger Signs Legislation Promoting Nutrition and Healthier Options (Sept. 30, 2008), available at <http://gov.ca.gov/index.php?press-release/10682/>.

¹⁰⁵ See *id.*

¹⁰⁶ See Patrick McGreevy, *State To Require Calorie Counts*, L.A. TIMES, Sept. 30, 2008, at B1.

¹⁰⁷ James Barron, *Restaurants Must Post Calories, Judge Affirms*, N.Y. TIMES, Apr. 17, 2008, at B4.

¹⁰⁸ See Cal. Office of Environmental Health Hazard Assessment, Proposition 65, <http://www.oehha.org/prop65.html> (last visited Apr. 1, 2010).

¹⁰⁹ See CAL. HEALTH & SAFETY CODE § 25249.6, Safe Drinking and Toxic Water Enforcement Act of 1986 (West 2006).

¹¹⁰ See Cal. Office of Environmental Health Hazard Assessment, Proposition 65 in Plain Language!, <http://oehha.ca.gov/Prop65/background/p65plain.html> (last visited Apr. 1, 2010) [hereinafter Proposition 65 in Plain Language!]. See also Cal. Office of Environmental Health Hazard Assessment, *Acrylamide and Proposition 65: Questions and Answers*, May 2005, <http://www.oehha.org/Prop65/acrylamideqa.html> [hereinafter *Acrylamide and Proposition 65*] (“In many cases, the warning appears on a product’s label, but warnings can be placed on signs in retail outlets or be provided through any

restaurants and groceries, this often means a sign posted on the establishment’s wall. Many individual products sold in groceries also contain warning labels.¹¹¹ These postings alert consumers to the presence on that business’s premises of a cancer-causing agent, one that could harm pregnant women, or both.¹¹² The required cancer warning, for example, reads, *WARNING: This product contains a chemical known to the state of California to cause cancer.*¹¹³ While Prop 65 empowers state and local prosecutors to enforce the Act, it also provides a private right of action to any person in the state to bring suit under the Act, and permits the award of money damages for violations.¹¹⁴

The Act, as originally envisioned and implemented, did not apply to foods.¹¹⁵ Over the last decade, though, scientists learned that acrylamide—a chemical known to cause cancer, according to Prop 65—occurs naturally in some foods like olives, and in bread and other starchy foods that are baked or fried.¹¹⁶ As a result, Prop 65 now requires restaurateurs and grocers who sell healthy foods like bread and olives to warn customers of the presence of cancer-causing substances.

California sued potato chip and french fry sellers over the unwarned presence of acrylamide in their foods.¹¹⁷ More recently, the Physicians Committee for Responsible Medicine (“PCRM”), a vegetarian-activist group,¹¹⁸ filed suit under Prop 65

other form of communication that conveys the warning in a clear and reasonable manner.”).

¹¹¹ See Grocery Manufacturers Association, Warning on Product Labels—Proposition 65, <http://www.gmaabrand.com/publicpolicy/docs/WhitePaper.cfm?docid=271> (last visited Apr. 1, 2010).

¹¹² *Id.*

¹¹³ CAL. CODE REGS. tit. 27 § 25601 (2008).

¹¹⁴ CAL. CODE REGS. tit. 11 §§ 3000–3204 (2003).

¹¹⁵ See, e.g., Alexander Volokh, *The Pitfalls of Environmental Right-to-Know*, 2002 UTAH L. REV. 805, 812–13 (2002).

¹¹⁶ See, e.g., FDA Consumer, Final FDA Acrylamide Action Plan, Data, May–June 2004, http://findarticles.com/p/articles/mi_m1370/is_3_38/ai_116734857/

In April 2002, the Swedish National Food Administration reported finding elevated levels of acrylamide in starch-containing foods cooked at high temperatures, such as potato products and bread The novel finding in the most recent sampling is the presence of acrylamide in black olives, prune juice, and Postum, a powdered beverage.

¹¹⁷ See *Lockyer v. Frito-Lay*, Case No. BC338956 (L.A. Super. 2005); Bob Egelko, *Lawsuit Over Chips is Settled*, S.F. CHRON., Aug. 2, 2008, at B3. See also Press Release, California Office of Attorney General, Attorney General Lockyer Files Lawsuit to Require Consumer Warnings About Cancer-Causing Chemical in Potato Chips and French Fries (Aug. 26, 2005), available at <http://ag.ca.gov/newsalerts/release.php?id=1207>. Several parties to the suit settled, agreeing to pay a fine and reduce acrylamide levels in their food.

¹¹⁸ See Center for Consumer Freedom, *7 Things You Didn't Know About PCRM*, Oct. 17, 2008, http://www.consumerfreedom.com/article_detail.cfm/article/168 (describing PCRM as devoted to animal rights and veganism, rather than to medicine).

against McDonald's, Burger King, and others.¹¹⁹ The suit claimed the chains had failed to warn customers that some of the chains' foods contain heterocyclic amines, a substance that also appears on the Prop 65 warning list and that, like acrylamide in bread, forms naturally in some foods, especially in cooked poultry.¹²⁰ At least one defendant, Burger King, settled with PCRM, agreeing to add a Prop 65 warning label to its grilled chicken products.¹²¹

Prop 65 also applies to alcohol beverages. It mandates that, in addition to cautioning customers not to drink in excess or drive drunk, sellers of alcohol beverages label their products with warnings alerting the consumer that the products can cause cancer and harm developing fetuses.¹²² California regulators have also targeted the state's important alcohol beverage industry in a variety of other ways. In 2002, winemakers were forced to adopt more "sustainable," costly practices in order to stave off threatened environmental regulations.¹²³ Then, in 2008, facing a record budget deficit, California proposed a massive 640 percent tax increase on wine.¹²⁴ Under the proposal, the state's wine excise tax would rise from the current \$0.20 per gallon to \$1.48 per gallon.¹²⁵ A report prepared by Stonebridge Research for the Wine Institute, a California wine industry advocacy group, estimates the tax increase could cost more than 11,000 wine-industry jobs in the state.¹²⁶

Also in 2008, California's State Board of Equalization opted to re-categorize flavored beers, known by critics as "alcopops," as

¹¹⁹ See Andrew Grossman, *California's Prop 65: Protecting us from the Evils of Cooked Chicken*, OVERLAWYERED, Dec. 26, 2006, <http://overlawyered.com/2006/12/californias-prop-65-protecting-us-from-the-evils-of-cooked-chicken/>.

¹²⁰ See Press Release, Physicians Committee for Responsible Medicine, *Fast-Food Grilled Chicken Contains Dangerous Carcinogen, Laboratory Tests Reveal* (Sept. 28, 2006), available at <http://www.pcrm.org/news/release060928.html>.

¹²¹ See Physicians Committee for Responsible Medicine, *Burger King Alerts Customers to Cancer-Causing Chemical in Grilled Chicken*, PCRM ONLINE NEWSLETTER, Dec. 2008, http://www.pcrm.org/newsletter/dec08/burger_king.html.

¹²² See, e.g., HARSANYI, *supra* note 98, at 146.

¹²³ See *California Wine Sector Going Green to Avert Regulation*, GreenBiz.com, Oct. 24, 2002, <http://www.greenbiz.com/news/2002/10/24/california-wine-sector-going-green-avert-regulation> (noting the California wine industry adopted over 300 pages of voluntary environmental standards "in a bid to head off potentially costly state regulation").

¹²⁴ See Wine Institute, *640% Wine Excise Tax Increase Will Eliminate Jobs, Reduce Sales & Harm Industry*, <http://wineinstitute.org/files/KeyPointsonProposedTaxIncrease.pdf>.

¹²⁵ *Id.*

¹²⁶ See STONEBRIDGE RESEARCH, *ECONOMIC IMPACT OF PROPOSED EXCISE TAX SURCHARGE ON CALIFORNIA WINE 4* (2009), available at <http://www.wineinstitute.org/files/StonebridgeReport.pdf>.

distilled spirits.¹²⁷ The Board couched the reclassification in language indicating it came to its decision in order to “send a signal to youth that alcopops are hard liquor.”¹²⁸ The change, though, like the proposed wine excise tax increase, is really little more than a spectacular 1,600 percent tax increase.¹²⁹ Diageo-Guinness USA, the American arm of the international beverage giant, has filed suit, claiming the Board of Equalization overstepped its authority when it reclassified flavored beer.¹³⁰

Another beverage subject to current scrutiny in California is unpasteurized (raw) milk. Raw milk products are increasingly popular in California and, indeed, across the United States.¹³¹ Raw milk sales often come at the expense of dairy products sold by larger, pasteurized dairy operations.¹³² One dairy in the state estimates that 100,000 Californians drink raw milk every week.¹³³ Proponents believe raw milk products taste better and contain beneficial bacteria that are killed during the pasteurization process.¹³⁴

Still, though it is legal to buy and sell raw milk in California, the regulatory tide against raw milk is growing in the state. The state cracked down on bacteria levels in raw milk in 2007.¹³⁵ The crackdown was launched in part in response to the illness of four children who drank raw milk from California’s largest raw milk producer, Organic Pastures Dairy.¹³⁶ Though the source of the

¹²⁷ See Press Release, California State Board of Equalization, Judy Chu Announces Flavored Malt Beverages to be Taxed as Distilled Spirits (June 11, 2008), available at <http://www.boe.ca.gov/news/2008/37-08-C.pdf>.

¹²⁸ *Id.*

¹²⁹ See Press Release, Diageo, Tax Increase on Flavored Beer Adopted Today in California: Flavored Malt Beverage Coalition Will Pursue Litigation to Challenge the Regulation (June 19, 2008), available at <http://www.diageo.com/en-row/NewsAndMedia/PressReleases/2008/Tax+Increase+On+Flavored+Beer+Adopted+Today+in+California.htm>.

¹³⁰ See *Diageo-Guinness USA, Inc. v. California State Bd. Equalization*, Case No. 34-2008-00013031 (Sacramento County Super. Ct. 2008). See also *Diageo Challenges California Beer Tax Change*, *Forbes.com*, June 17, 2008, <http://www.forbes.com/feeds/afx/2008/06/17/afx5122509.html>.

¹³¹ See Carol Reiter, *Cheers to Raw Milk is What Devoted Fans Say*, *MERCED SUN-STAR*, Jan. 16, 2009, at A1.

¹³² See U.S.D.A., CALIFORNIA AGRICULTURAL STATISTICS: 2007 CROP YEAR, *supra* note 1, at 65 (showing that a large number of California dairies closed in 2007).

¹³³ Wendy Cole, *Got Raw Milk? Be Very Quiet*, *TIME*, Mar. 13, 2007, available at <http://www.time.com/time/health/article/0,8599,1598525,00.html>.

¹³⁴ See, e.g., Elena Conis, *The Raw Milk Factor*, *L.A. TIMES*, Mar. 2, 2009, at F3.

¹³⁵ See Carol Ness, *Tough New Standards for State’s Raw Milk*, *S.F. CHRON.*, Oct. 26, 2007, at A1.

¹³⁶ See David E. Gumpert, *Getting a Raw Deal?*, *BUSINESSWEEK*, Sept. 28, 2006, http://www.businessweek.com/smallbiz/content/sep2006/sb20060928_865207.htm.

illnesses was never traced to raw milk,¹³⁷ the state began enforcing the 2007 regulations by employing undercover sting operations against various dairy operations.¹³⁸ Then, in 2008, Governor Schwarzenegger vetoed a bill that would have established separate bacteria content standards for raw milk, which would have allowed producers of raw milk to better compete with competitors who sell pasteurized milk.¹³⁹

III. THE “CALIFORNIA EFFECT” AND AMERICA’S FOOD FUTURE

A. California’s Food Crackdown: Why Care?

California is banning and cracking down on food. But why should the nearly eighty-eight percent of Americans who live outside the state care what California regulates *in California*? What makes California’s food regulations more important to a resident of Peoria, Illinois than, say, Salem, Oregon’s proposal to ban at-home cooks from raising chickens in residential areas?¹⁴⁰ Why not focus on this chicken ban or on any of the thousands of food regulations and bans in effect or under consideration around the country in places other than California?¹⁴¹

From a culinary perspective, every American should care about California food regulations because the state grows and raises the bulk of our food. It is the capital of “new American cuisine,” which was borne of “California cuisine.”¹⁴² Much of what we eat and how we eat it are of California. Consider that it can be difficult today to eat a meal in America free of California ingredients or culinary inspiration. Your lobster may come from Maine, but in all likelihood your butter and your salad, your asparagus and your Chardonnay, and your after-dinner ice cream and strawberries come from California. What’s more, pairing lobster with grilled asparagus and wine—the inspiration for your dish—probably also came from California.

From a regulatory perspective, every American should care about California’s propensity to ban and restrict food because the

¹³⁷ See John Hall, *Murrieta Family Suing in E. coli Case*, NORTH COUNTY TIMES, Mar. 2, 2008 (declaring that no “pathogen was . . . found in any of the manure tests of [Organic Pastures] cows or in any tests of packaged dairy products from his business”).

¹³⁸ Adam Foxman, *Raw Milk Issue a Mix-Up, Says Dairy Owner*, VENTURA COUNTY STAR, Jan. 11, 2009, at B1.

¹³⁹ See Conis, *supra* note 134; S.B. 201, 2007–2008 Sess. (Cal. 2008).

¹⁴⁰ See Thelma Guerrero-Huston, *Salem’s Chicken Ban Faces Debate*, STATESMAN JOURNAL, Mar. 2, 2009, at A1.

¹⁴¹ Whatever the cause, the “California effect” may have as much to do with smaller-state envy as it has to do with California’s wealth and power. See *infra* Part III.B.

¹⁴² See *supra* Part I.

state is the nation’s regulatory bellwether,¹⁴³ the genesis of many “tipping point” regulatory epidemics.¹⁴⁴ California is where regulations go from seed to seedling to weed, and from whence they subsequently propagate and pervade America.

B. The “California Effect” Generally

In 1995, Professor David Vogel of Berkeley’s Haas School of Business described the spread of strict regulations from larger, more influential states to other states as the “California effect.”¹⁴⁵ The term “refers to the critical role of powerful and wealthy ‘green’ political jurisdictions in promoting a regulatory ‘race to the top’ among their trading partners.”¹⁴⁶ The California effect is a more expansive concept than is federalism, because the effect concerns not just the notion of fifty experimental laboratories but “the ratcheting upward of regulatory standards in competing political jurisdictions.”¹⁴⁷ Vogel posits that in any given free market economy, as between and among states in America, the whims of “wealthy, powerful states” like California will have an outsized influence that impacts not just regulations within the home state but also in others who trade with that state.¹⁴⁸ Focusing much of his research on environmental regulations, Vogel notes that these factors have meant that California’s strict regulations have “helped drive many American environmental regulations upward” throughout the United States.¹⁴⁹

Vogel uses the example of California’s strict automobile emissions standards to illustrate this effect. In 1970, the federal government adopted vehicle emissions standards, and permitted California alone to set stricter standards.¹⁵⁰ The state capitalized on the exemption.¹⁵¹ When, in 1990, the federal government chose to implement stricter emissions standards, it adopted California’s regulations, and permitted the state to adopt still-stricter standards.¹⁵² California again adopted even more

¹⁴³ See Fried & Simon, *supra* note 65, at 1520 (calling California “a policy bellwether”).

¹⁴⁴ See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 7 (2000) (likening the birth of new trends and phenomena to “epidemics”).

¹⁴⁵ DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 5–8, 259 (1995).

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.* at 259 (“The term ‘California effect’ is meant to connote a much broader phenomenon than the impact of American federalism on federal and state regulatory standards.”).

¹⁴⁸ *Id.* at 5, 7.

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Id.* at 259.

¹⁵¹ *Id.*

¹⁵² *Id.*

stringent requirements, which a dozen states and the District of Columbia in turn adopted as their own.¹⁵³

In this example, California's decisions influenced both federal and other states' laws.¹⁵⁴ More important, California's stricter regulations influenced automakers, who had to choose whether to opt out of the California market (and later, thirteen others) or to "preserve valuable market access" by building cars that met the stricter standards.¹⁵⁵ Though automakers and California both sued each other over the rules,¹⁵⁶ no automaker chose to stop selling its vehicles in the state.

Outside of vehicle emissions, instances of the "California effect" abound. Perhaps the best example is California's leadership in the spread of smoking bans across America. The city of San Luis Obispo, California passed the world's first public anti-smoking ordinance in 1990.¹⁵⁷ Four years later, the state became the first in the nation to ban indoor smoking in public areas.¹⁵⁸ Today, thirty-one other states and the District of Columbia,¹⁵⁹ along with more than 3,000 municipalities around the country, have nonsmoking laws modeled after California's.¹⁶⁰

C. The California Effect and Food

While regulations concerning smoking are important to certain constituencies, California regulations concerning food and agriculture impact every American.¹⁶¹ The California effect,

¹⁵³ *Id.*

¹⁵⁴ See Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POLY REV. 67, 82 (1996).

¹⁵⁵ See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1292 (2008).

¹⁵⁶ Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *appeal docketed*, No. 08-17378 & 08-17380 (9th Cir. 2008). Compare Bob Egelko, *State Wins in U.S. Court on Tailpipe Emissions*, S.F. CHRON., Dec. 13, 2007, at A1 (outlining one industry lawsuit against the state), with Mark Lifsher, *California Sues Over Vehicle Emissions*, L.A. TIMES, Sept. 21, 2006, at C1 (outlining a California lawsuit against the auto industry that seeks to reduce tailpipe emissions).

¹⁵⁷ Miles Corwin, *Smokers Snuffed: San Luis Obispo Will Implement Nation's Toughest Tobacco Law Today*, L.A. TIMES, Aug. 2, 1990, at A3. Cf. Robert Reinhold, *In a Smoking Ban, Some See Ashes*, N.Y. TIMES, Aug. 15, 1990, at A22 (noting that two California cities and one in Colorado had just months later followed San Luis Obispo).

¹⁵⁸ See American Nonsmokers' Rights Foundation, *Summary of 100% Smokefree State Laws and Population Protected by 100% U.S. Smokefree Laws*, Jan. 5, 2010, <http://www.no-smoke.org/pdf/SummaryUSPopList.pdf>.

¹⁵⁹ See *id.*

¹⁶⁰ See American Nonsmokers' Rights Foundation, *Overview List—How Many Smokefree Laws?*, Jan. 5, 2010, <http://www.no-smoke.org/pdf/mediaordlist.pdf>. To explore the spread of smoking bans, see generally Patrick Kabat, Note, "Till Naught but Ash is Left to See": *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POLY L. & ETHICS 128 (2009).

¹⁶¹ See *supra* Parts I–III.

along with California’s place as “a national trendsetter in all matters edible,”¹⁶² increasingly means that the state’s burdensome food regulations are spreading across the United States. This article now posits several categories of California effects pertaining to food regulations.

1. California Regulations Passed & Considered in Other States: Foie Gras

When California banned foie gras in 2004, it was the first state to do so. Chicago soon followed suit.¹⁶³ New York State, America’s largest producer of foie gras, briefly considered a ban,¹⁶⁴ as did New Jersey, home of D’Artagnan, America’s largest seller of foie gras.¹⁶⁵ Other states also considered bans,¹⁶⁶ and at least one municipal government enacted a formal ban.¹⁶⁷ One activist group has petitioned the U.S. Department of Agriculture (“USDA”) in hopes of forcing a federal ban.¹⁶⁸ A New York ban, New Jersey ban, or federal ban would effectively cripple foie gras production, sales, and consumption in America.

2. California Regulations Adopted by the Federal Government: Organic Certification

California’s experience with regulations concerning organic certification closely parallels the story of vehicle emissions standards. California Certified Organic Farmers (“CCOF”), the first organic certifying body in America, formed in 1973.¹⁶⁹ By the end of 1974, similar bodies had emerged in eleven other states, including Oregon.¹⁷⁰

California passed the nation’s first true organic certification law in 1979.¹⁷¹ Though Oregon’s law preceded that of

¹⁶² See Steinhauer, *supra* note 56.

¹⁶³ Chicago overturned its ban in 2008. See BBC NEWS, *Chicago Overturns Foie Gras Ban*, May 15, 2008, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7403409.stm>.

¹⁶⁴ Posting of John Del Signore to Gothamist http://gothamist.com/2008/06/11/councilman_urges_albany_to_ban_forc.php (June 11, 2008, 16:06 EST).

¹⁶⁵ See Gordon Anderson, *Crisis in the Foie Gras Biz*, CNN.com, June 11, 2004, http://money.cnn.com/2004/06/10/pf/goodlife/foie_gras/index.htm.

¹⁶⁶ Lisa Rein, *Panel Airs Proposed Foie Gras Ban*, WASH. POST, Mar. 5, 2008, at B5.

¹⁶⁷ See WJZ.com, *Takoma Park Bans Foie Gras*, July 19, 2008, <http://wjz.com/pets/duck.foie.gras.2.775053.html>.

¹⁶⁸ See Press Release, Humane Society of the United States, Animal Protection Groups File Legal Petition Asking USDA to Declare Foie Gras Unfit for Human Consumption (Nov. 28, 2007), available at http://www.hsus.org/press_and_publications/press_releases/usdafoiegras112807.html.

¹⁶⁹ See CCOF, History of CCOF, http://www.ccof.org/history_mr.php#sec1 (last visited Apr. 1, 2010); Press Release, CCOF, CCOF Achieves Largest U.S. Organic Certifier Status (Jan. 15, 2006), available at <http://www.ccof.org/pr0106.php> [hereinafter Press Release, CCOF].

¹⁷⁰ See GUTHMAN, *supra* note 43, at 113.

¹⁷¹ *Id.*

California,¹⁷² Oregon's law was chiefly an anti-fraud measure¹⁷³ intended only to classify which producers could advertise their products as "organic."¹⁷⁴ California regulations built upon Oregon's and in addition defined the term "synthetic," contained public disclosure provisions, and required specific organic labeling language.¹⁷⁵ In 1982, California amended the 1979 regulations, making the state the first to define the term "organic."¹⁷⁶ In 1990, California again amended its law,¹⁷⁷ permitting public agencies or private certifiers like CCOF, today the nation's largest such body,¹⁷⁸ to inspect growers to ensure compliance with the regulations.

In 1990, Congress enacted the first federal organic standards.¹⁷⁹ The California Organic Food Act of 1979, which was based on CCOF's standards, played an important role in the creation of these national standards.¹⁸⁰ Though the rule was

¹⁷² See Kyle W. Lathrop, Note, *Pre-Emptying Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 891 (1991).

¹⁷³ See *id.* See also Kenneth C. Amaditz, Comment, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?*, 52 FOOD & DRUG L.J. 537, 539 (1997).

¹⁷⁴ Sunbow Farm, A History of Oregon Tilth, <http://www.sunbowfarm.org/tilth.php> (last visited Apr. 1, 2010).

¹⁷⁵ See Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?*, 68 N.D. L. REV. 405, 410 & n.26 (1992).

¹⁷⁶ See, e.g., Luanne Lohr & Timothy A. Park, *Improving Extension Effectiveness for Organic Clients: Current Status and Future Directions*, 28 J. AGRIC. & RES. ECON. 634, 645 (2003).

¹⁷⁷ CAL. HEALTH & SAFETY CODE §§ 110810–110958 (repealed 2003).

¹⁷⁸ See Press Release, CCOF, *supra* note 169.

¹⁷⁹ See 7 U.S.C. §§ 6501–6523 (2006).

¹⁸⁰ E-mail from Jane Baker, Director of Sales and Marketing, California Certified Organic Farmers (CCOF), (Mar. 10, 2009, 07:35 PST) (on file with author). See also Bones, *supra* note 175, at n.10 ("The most active state organization is the California Certified Organic Farmers (CCOF) . . . [which was] influential in the passage of state and federal organic food production legislation."); GUTHMAN, *supra* note 43, at 115 (asserting the federal government's 1990 organics law was "largely modeled after the California law").

The California effect also holds true for the state's administrative rules, which influence federal agency rulemaking as relates to food. For example, the USDA's Agricultural Marketing Service (AMS) has proposed and is currently considering a marketing agreement, the National Leafy Greens Marketing Agreement, which the agency says would help food handlers "reduc[e] the risk of pathogenic contamination during the production and handling of leafy greens." Handling Regulations for Leafy Greens Under the Agricultural Marketing Agreement Act of 1937, 72 Fed. Reg. 56678 (Oct. 4, 2007) (to be codified at 7 C.F.R. pt. 962). The USDA specified in its advanced notice of proposed rulemaking that:

[M]embers of the California [leafy green vegetables] industry initiated the establishment of a State marketing agreement for handlers of leafy greens (<http://www.caleafygreens.ca.gov/docs/resources.asp>) . . . Although AMS has not received an official proposal, members of the leafy greens industry have expressed interest in the establishment of similar standards through a Federal marketing program. Industry discussions have focused on the need for a program with national scope. In response, AMS is considering the

based in part on California’s standards, organic activists in the state and elsewhere criticized the final rule as watered-down and overinclusive.¹⁸¹ These same critics had long lamented what had become of California’s own organic experience. The state’s organic farms today are not, for the most part, mom and pop operations. Instead, they are now mostly large, profitable corporate-owned farms that are in the organic business to (1) turn a profit and (2) hedge their bets—maintaining organic crops along with their conventional crops in large part out of fear that “the state might ban certain key pesticides.”¹⁸²

3. California Regulations Forcing Uniformity Nationwide: The “Pennsylvania Bread” Effect

The Pennsylvania food code¹⁸³ requires all bread producers within and without the state who sell bread in Pennsylvania to register with the state’s agricultural department, and to print a registration mark to that effect on all bread packaging.¹⁸⁴ Because of this, consumers from Alabama to Wyoming are familiar with the language “Reg. Penna. Dept. Agr.” on bread packaging,¹⁸⁵ even if these consumers have no idea what the term means.¹⁸⁶ The reason this terminology appears on multi-state packaging, even though only Pennsylvania law requires the language, is that regional and national bakers find it less costly and easier to print the language on all packaging than it would be to “make up a separate package for Pennsylvanians.”¹⁸⁷

development of a marketing agreement . . . to meet the needs of the produce industry across the fifty States and the District of Columbia.

Id. at 56680. As with the USDA’s eventual organic rules, many small producers, organic farmers, and their supporters oppose the leafy-greens measure. *See, e.g.*, Oregon Tilth, National Leafy Greens Marketing Agreement, <http://tilth.org/news/national-leafy-greens-marketing-agreement> (last visited Apr. 1, 2010) (describing the group’s own efforts “in concert with a number of other conservation and organic farming groups . . . in opposition of the Act, which OTCO believes would have serious detrimental consequences for organic growers and the environment, while [doing] little to decrease the incidence of food-borne illness”).

¹⁸¹ *See, e.g.*, Claire S. Carroll, *What Does “Organic” Mean Now? Chickens and Wild Fish are Undermining the Organic Foods Production Act of 1990*, 14 SAN JOAQUIN AGRIC. L. REV. 117, 126 (2004).

¹⁸² *See* MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA* 174 (2006).

¹⁸³ 7 PA. CODE § 46.3 (2004).

¹⁸⁴ *See* Cecil Adams, *Why is “Reg. Dept. Penna. Agr.” On So Many Labels?*, THE STRAIGHT DOPE, <http://www.straightdope.com/columns/read/306/why-is-reg-dept-penna-agr-on-so-many-labels> (last visited Apr. 1, 2010).

¹⁸⁵ *See* Lathrop, *supra* note 172, at 904 (describing briefly the meaning of the term).

¹⁸⁶ *See* Adams, *supra* note 180.

¹⁸⁷ *Id.*

What Pennsylvania's bread registration is to bread packaging, California's *trans* fat ban¹⁸⁸ is to the contents of many restaurant and packaged foods. The ban applies to national companies, most of whose menu selections and grocery items, respectively, are uniform throughout the nation. These restaurants and food manufacturers will have to decide if it would be—as in the Pennsylvania example—cheaper and easier to cut *trans* fats from their recipes nationwide, rather than having a California version of their product and another version of that same product for the rest of the country. Because of the California effect, that decision will be easier than they might have hoped; states,¹⁸⁹ counties,¹⁹⁰ and cities¹⁹¹ around the country have followed California's lead and introduced measures to ban *trans* fats.

4. California Regulations Forcing Parties to Seek Preemptive, Uniform Federal Regulations: Menu Labeling

California is the first state to require restaurants to post calorie counts alongside all menu items.¹⁹² The law applies to restaurants with twenty or more locations in the state.¹⁹³

Scarcely had a San Francisco menu-labeling law¹⁹⁴ taken effect when California enacted its own statewide requirements.¹⁹⁵ One of the biggest supporters of the regulation, perhaps surprisingly, was the California Restaurant Association (CRA), the state industry lobbying association.¹⁹⁶ In supporting a uniform state requirement, though, the CRA admitted that one

¹⁸⁸ See, e.g., *California Bans Trans Fats in Restaurants*, MSNBC.com, July 25, 2008, <http://www.msnbc.msn.com/id/25853307/>.

¹⁸⁹ See, e.g., Darren Meritz, *Bill Would Ban Trans Fat Use in Restaurants*, EL PASO TIMES, Mar. 21, 2009, at 5B (describing Texas's plans to ban *trans* fats).

¹⁹⁰ See, e.g., Miranda S. Spivack, *Montgomery Bans Trans Fats in Restaurants, Markets*, WASH. POST, May 16, 2007, at A1.

¹⁹¹ See, e.g., Martin Finucane, *Boston Trans Fat Ban Goes Into Effect for Baked Goods*, BOSTON GLOBE, Mar. 12, 2009, http://www.boston.com/news/local/breaking_news/2009/03/boston_trans_fa.html.

¹⁹² See Patrick McGreevy, *State to Require Calorie Counts*, L.A. TIMES, Sept. 30, 2008, at B1.

¹⁹³ *Id.*

¹⁹⁴ See, *San Francisco Moves Forward on Menu Labeling*, NATION'S RESTAURANT NEWS, Mar. 12, 2008, http://www.nrn.com/breakingNews.aspx?id=351510&menu_id=1368.

¹⁹⁵ See, e.g., Press Release, Center for Science in the Public Interest, California First State in Nation to Pass Menu Labeling Law (Sept. 30, 2008), available at <http://www.cspinet.org/new/200809301.html>.

¹⁹⁶ See Press Release, California Restaurant Association, Governor Signs Menu Labeling Legislation Creating Statewide Standards (Sept. 30, 2008), available at <http://www.calrest.org/go/cra/news-events/newsroom/governor-signs-menu-labeling-legislation-creating-statewide-standards/>.

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preemptive state standard “was more reasonable for restaurants and their customers than a patchwork of differing local mandates.”¹⁹⁷

But the California law does not solve the problem of differing local and state regulations across the nation; complying with Seattle’s menu-labeling requirements¹⁹⁸ does not necessarily mean compliance in Philadelphia.¹⁹⁹ Thus, following the CRA’s lead, the National Restaurant Association is supporting the federal LEAN Act, which would mandate nationwide menu-labeling standards.²⁰⁰

IV. WHAT TO MAKE OF CALIFORNIA’S UNPALATABLE FOOD CRACKDOWN: CAUSES AND EFFECTS

A. *Why* is California Cracking Down on Food?

There is ample evidence California is cracking down on food at the state and local level. What is not so clear is *why* the state is doing so.

It would be easy enough to blame the state’s food-regulatory climate on one person: Alice Waters. While Waters may be best known for creating the California cuisine movement and helping launch new American food, she is also a “Berkeley radical”²⁰¹ who is well known among both her peers and food-regulation experts for “accept[ing] the legitimacy of regulatory [food] bans”²⁰² and favoring government meddling for the purpose of “legislating good eating habits.”²⁰³ Indeed, it can be difficult to distinguish between Waters’s regulatory fervor and her passion for food. Her oft-repeated claim that “eating is a political act”²⁰⁴ has become intertwined with the California cuisine movement and has been

¹⁹⁷ *Id.*

¹⁹⁸ See News report by Tonya Mosely, *Nutrition Menu Labeling Starts at King County Chain Restaurants*, King5.com, Dec 31, 2008, <http://www.king5.com/archive/60348702.html>.

¹⁹⁹ See Press Release, Center for Science in the Public Interest, Philadelphia Passes Strongest Nutrition Labeling Requirements for Chain Restaurant Menus (Nov. 6, 2008), available at <http://cspinet.org/new/200811061.html>.

²⁰⁰ See Press Release, National Restaurant Association, National Restaurant Association Applauds LEAN Act Introduction in U.S. House and Senate (Mar. 11, 2009), available at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1756>.

²⁰¹ HARVEY LEVENSTEIN, *PARADOX OF PLENTY: A SOCIAL HISTORY OF EATING IN MODERN AMERICA* 180 (2003).

²⁰² Posting of Don Boudreaux to Cafe Hayek, http://www.cafehayek.com/hayek/2004/05/whats_good_for_.html (May 15, 2004).

²⁰³ Interview by Jamie R. Liu with Anthony Bourdain, in Washington D.C. (Jan. 19, 2009), available at http://dcist.com/2009/01/chewing_the_fat_anthony_bourdain.php (discussing Bourdain’s thoughts on Waters).

²⁰⁴ See, e.g., Eric Asimov, *Proof of What They Say About Small Packages*, N.Y. TIMES, July 30, 2003.

incorporated into movements seeking “sustainable” food and “food democracy.”²⁰⁵ As a result, Waters and her many acolytes in the state that provides so much bounty and inspiration to the rest of the country seem intent on limiting America’s access to anything edible that does not walk lockstep with the movement’s rigid ideals.

Critics blast her movement, noting that not everyone can afford to eat like Waters,²⁰⁶ and disparage Waters herself, noting “her efforts [have] helped change the eating habits of the rich, not the poor.”²⁰⁷ Anthony Bourdain, a popular anti-regulatory chef, author, and television host, has been known to use expletives to describe Waters.²⁰⁸

In addition to owning restaurants, Waters has put her beliefs into action, as a central figure for the nonprofit Chefs Collaborative, formed in 1993.²⁰⁹ The group’s manifesto demands that government ensure food originates in a place “with unpolluted air, land, and water, environmentally sustainable farming and fishing, and humane animal husbandry”—a statement that indicates the need for drastic and expensive measures taken by at least a half-dozen federal agencies.²¹⁰

Still, it would be unfair to peg (or credit) Waters as the sole force behind California’s propensity to ban or curtail certain foods or agricultural practices. A slew of other factors likely also contribute to the leftist, pro-regulatory food climate in California.

From 1930 to 1960, the majority of immigrants to California from other American states identified as New Deal Democrats,

²⁰⁵ See generally Neil Hamilton, *Essay—Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9 (2004). Food democracy, though the author does not proffer a succinct definition of the term, concerns “building a more satisfying food system by offering alternatives to the ‘cheap’ foods that have come to define our diet[;]” incorporating the “values” of small producers; opposing fast food and agribusiness; the right to be an informed consumer; “the rights of farmers, chefs, and marketers to produce and market foods reflecting their diversity and creative potential; and our nation’s ability to have a food system that promotes good health, confidence, understanding, and enjoyment as well as economic opportunity.” *Id.* at 12–13.

²⁰⁶ See, e.g., Andrew Martin, *Is a Food Revolution Now in Season?*, N.Y. TIMES, Mar. 22, 2009, at SundayBusiness 1 (quoting a food marketing professor who says that organic food can be too expensive for some, and that canned and frozen foods are healthy and affordable).

²⁰⁷ See LEVENSTEIN, *supra* note 201, at 180.

²⁰⁸ Cf. Liu, *supra* note 203. Others find Waters’ breathy manner of speech and slightly affected accent—Waters hails from New Jersey—to be equally irritating. See Interview by Charlie Rose with Alice Waters (Feb. 6, 2008), available at <http://www.charlierose.com/view/interview/8925>.

²⁰⁹ Chefs Collaborative, About Chefs Collaborative, <http://chefscollaborative.org/about/> (last visited Apr. 1, 2010).

²¹⁰ *Id.*

and eventually outnumbered the state’s “old Republicans.”²¹¹ Those immigrating to California from elsewhere in the United States since 1960, like the New Deal immigrants before them, identified with the political left. These new immigrants, often “hippies,” tended to migrate to California not because of the state’s economic promise but to escape “restrictive moral codes” elsewhere in the country.²¹² But while these immigrants opposed the moral restraints imposed upon them in their hometowns in the American South, the Midwest, and on the East Coast, many soon saw fit to codify their own moral codes in their adopted home of California.²¹³

Several factors contributed to this shift. During the 1960s, after the release of Rachel Carson’s apocalyptic *Silent Spring*,²¹⁴ the issue of environmentalism ballooned in importance. California was an early adopter of so-called “green” regulations, in large part because Californians sought to “protect . . . the resources . . . of the nation’s loveliest landscapes.”²¹⁵ In fact, California has been the nation’s leading environmental regulator since at least the 1970s.²¹⁶ This rising tide of environmentalism in California coincided with an increasing interest in vegetarianism,²¹⁷ a movement also centered in the state,²¹⁸ and in animal rights.²¹⁹ The free-speech movement, the first large-scale example of student activism, was launched in Berkeley in the 1960s—a fact Alice Waters herself notes in tracing her inspiration for California cuisine.²²⁰ Farm workers also organized during this period to fight perceived exploitation in California. Their efforts, led by organizer Cesar Chavez, formed what would become the United Farm Workers of America, the first farm workers’ union in the country.²²¹

²¹¹ See JAMES G. GIMPEL & JASON E. SCHUKNECHT, PATCHWORK NATION 84 (2004).

²¹² *Id.* at 61.

²¹³ *Id.* There is nothing particularly novel about an immigrant population gaining power and, in so doing, transforming from oppressed to oppressor. In the 1600s, Puritans escaped persecution in England by immigrating to America. Once in this country, they gained power and proceeded to persecute each other and those unlike them. U.S. STATE DEPT., OUTLINE OF U.S. HISTORY 13 (2005).

²¹⁴ See generally RACHEL CARSON, SILENT SPRING (First Mariner Books 2002) (1962) (launching what became known as the “environmental movement” in a book that details alleged harms caused by manmade pesticides).

²¹⁵ Joel Kotkin, *Death of the Dream*, NEWSWEEK, Mar. 2, 2009, at 36, 38.

²¹⁶ See, e.g., VOGEL, *supra* note 145 at 6.

²¹⁷ See KAREN IACOBBO & MICHAEL IACOBBO, VEGETARIAN AMERICA 169–94 (2004) (describing the vegetarian movement in America in their chapter, “Peace, Love, and Vegetarianism: The Counterculture of the 1960s and 1970s”).

²¹⁸ See *id.* at 170–73.

²¹⁹ *Id.* at 172.

²²⁰ See Interview by Charlie Rose, *supra* note 208.

²²¹ See National Chavez Center, About Cesar E. Chavez, <http://www.nationalchavezcenter.org/main.html> (last visited Apr. 1, 2010).

As they aged, many of the post-New Deal leftists who immigrated to the state—and subscribed to these movements and supported their attendant regulatory requirements—found influential work in academia and the media, as well as in Congress and state government.²²² California's crackdown on food and agriculture is thus therefore best represented as the a confluence of pro-regulatory leftism, including environmentalism, the labor-rights movement, and the animal-rights movement; and the gradual transition into power of many former 1960s outsiders—along with reaction to the more recent problem of obesity.

Perhaps the archetypal example of this phenomenon—the movement crusader turned establishment regulator—is a graying radical named Edmund G. “Jerry” Brown.²²³ Mr. Brown served as governor of California and mayor of Oakland, unsuccessfully sought the presidency three times, and in his current capacity as California attorney general leads the state's Prop 65 prosecutions.²²⁴ Another stellar example of the phenomenon is Tom Hayden, an ex-husband of actress Jane Fonda. Hayden, who was a founding member of the 1960s radical anti-establishment student group Students for a Democratic Society, went on to spend a decade in the California state legislature where he championed animal rights and environmental causes.²²⁵

²²² LEVENSTEIN, *supra* note 201, at 179.

²²³ See Kevan Blanche, *The Red Side of Brown*, THE WEEKLY STANDARD, Oct. 27, 2006, <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/858gbeyz.asp> (claiming that Brown possesses an affinity for radical communist murderers like Che Guevara and Fidel Castro).

²²⁴ See Office of the Attorney General, Edmund G. Brown, Jr., <http://ag.ca.gov/ag/brown.php> (last visited Apr. 1, 2010); Lou Cannon, *Mayor's 'Magic' Turns City's Luck Around; Ex-Governor Brown and Oakland, Calif., Are Reincarnated as a Team Hard to Beat*, THE WASHINGTON POST, February 17, 1999, at A6. Brown's biography supports the archetype claim, as it notes that during his time as governor he

established the first agricultural labor relations law in the country, enacted collective bargaining for teachers and other public employees, started the California Conservation Corp (CCC), signed into permanent law the California Coastal Protection Act, earned federal protection of Northern California wild and scenic rivers, brought about the country's first building and appliance energy efficiency standards and made California the leader in solar and alternative energy.

Id.

²²⁵ See, e.g., Biography, Tom Hayden, <http://www.tomhayden.com/biography/> (last visited Apr. 1, 2010).

B. California Regulations May Not be Achieving Stated Goals and also Raise Concerns About Quality, Quantity, Freedom, and Prosperity

There are several arguments against California’s “blunt-instrument approach”²²⁶ to food and agriculture regulation. California’s crackdown threatens the quality and quantity of food available in California and across the United States, impedes culinary and agricultural advancement, encumbers economic freedom, hinders prosperity, and raises constitutional concerns.

California’s assault on food and agriculture has a negative impact on what and how we eat. The crackdown is bad for the state’s farmers, entrepreneurs, and consumers. The state’s burgeoning attack on raw milk harms farmers and consumers. This crackdown comes at a time when raw milk is increasing in popularity in the state and across the country.²²⁷ Prop 65, meanwhile, harms businesses that sell a host of healthy foods like chicken, olives, and bread, forcing them to warn consumers about the infinitesimal danger of eating otherwise healthful foods.²²⁸ Even acrylamide levels in less healthy foods are unlikely to cause cancer. One group estimates that, in order to contract cancer from consuming acrylamide, “a person of average weight would have to eat over 62 pounds of chips or 182 pounds of fries, every day, for his or her entire life.”²²⁹ In fact, virtually anything we eat can conceivably cause cancer, including fruits and vegetables,²³⁰ but the positive health effects of many foods far outweigh any perceived harm eating these foods might cause.

In the case of foie gras, California’s ban could have a far-reaching and dramatic impact on what Americans eat that extends well beyond the targeted food. The Humane Society of the United States, an animal-rights group involved in securing passage of the California ban, recently argued not just that foie gras is the result of the allegedly cruel process of *gavage* but also that it is a “diseased” product that cannot legally be sold in the

²²⁶ See Douglas Glen Whitman & Mario J. Rizzo, 2 N.Y.U. J. L. & LIBERTY, 411, 443 (2007).

²²⁷ Sharon Kiley Mack, *Popularity of Raw Milk Growing; Product Commands \$4.50–\$10 a Gallon*, BANGOR DAILY NEWS (MAINE), Aug. 1, 2008, at A1.

²²⁸ Prop 65 requires a food seller to post a warning unless it can demonstrate a food containing acrylamide would cause “not more than one additional cancer case (beyond what would otherwise occur) in a population of 100,000 people consuming the food over a lifetime.” Proposition 65 in Plain Language!, *supra* note 110.

²²⁹ Center for Consumer Freedom, *The Dose Makes the Poison*, May 15, 2006, http://www.consumerfreedom.com/article_detail.cfm/article/176.

²³⁰ See Robin McKie, *Research Links Cancer to Fruit and Vegetables*, THE OBSERVER, Feb. 17, 2002, at 9 (warning that fruits and vegetables that are treated with fertilizer may cause cancer).

United States.²³¹ Their argument concerns the swollen livers of foie gras fowl. While foie gras may not frequently be consumed in this country, this “diseased” argument could, if accepted by either state or federal government, have a dramatic impact on one food that *is* widely eaten in America: beef. Why? Most beef cattle in the United States are—like foie gras ducks—fed a diet of corn. Cows do not eat corn in nature. Because eating corn can cause cattle to experience severe gastric distress, most cattle are also fed antibiotics, which permit a cow to eat corn without the attendant gastrointestinal impact.²³² If the Humane Society of the United States were to succeed in having foie gras classified as a “diseased” food, that success might open the door to banning corn-fed beef—which, after all, is treated with antibiotics—as a “diseased” food.²³³

The crackdown also threatens California’s place as America’s culinary innovator and agricultural engine. California is slowly squeezing the life out of its cuisine via a series of assaults committed from farm to table. The state is banning everything from *haute* cuisine like foie gras to the everyman meals served by the state’s brilliant street vendors, from agricultural practices like caging hens to culinary practices like cooking with trans fats. As one commentator notes, “[t]he regime of personal prohibition can be stifling.”²³⁴

California’s food crackdown is also bad for consumers across America. The California effect has meant that the state’s food regulations and bans extend far beyond its borders, either because its regulations or bans encourage other states or the federal government to adopt them, or because they force producers to change their offerings nationwide, or because they force the regulated industry to seek preemptive nationwide

²³¹ See Anthony Ramirez, *Citing Treatment of Fowl, Groups Urge State to Ban Foie Gras*, N.Y. TIMES, June 22, 2006, at B3 (“[The Humane Society] want[s] foie gras declared an ‘adulterated’ food within the meaning of Article 17, Section 200 of the [New York State] Agriculture and Markets Law.”).

²³² See generally POLLAN, *supra* note 182 (describing in great detail the antibiotics consumed by corn-fed American beef cattle).

²³³ Incidentally, a divergent argument can be made that corn-fed beef is not Kosher under Jewish dietary laws. To be Kosher, an animal must “chew the cud,” meaning it must swallow, partially digest, and regurgitate its food before finally digesting it. LEVITICUS 11:3-8. The animal also must have cloven hooves. *Id.* Cows do chew the cud when eating their natural diet of grass but, notes author Michael Pollan, “they can’t chew their cud when they’re on corn.” Cf. Interview, Michael Pollan, FRONTLINE, available at <http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/pollan.html> (last visited Apr. 1, 2010). Thus, if Pollan is correct, cows fed corn do not “chew the cud” and, impliedly, their meat may not be Kosher.

²³⁴ Harvey Rishikof, *Long Wars of Political Order—Sovereignty and Choice: The Fourteenth Amendment and the Modern Trilemma*, 15 CORNELL J.L. & PUB. POL’Y 587, 617 (2006).

regulation. The result has been nationwide organic laws that are panned by organic advocates; the likely imposition of nationwide uniform menu-labeling standards; and dozens of discordant state laws battling the imagined scourge of *trans* fats. Evidence these bans and regulations actually encourage healthier eating is scant, which is why scholars like Brian Wansink note that these and similar regulations have had no discernable impact on obesity.²³⁵

California’s crackdown on food raises other serious economic concerns for its residents, for the state, and for the nation. The exorbitant increases in the state’s beer and wine taxes will cost thousands of jobs in California. One estimate indicates that Prop 2 could result in the elimination of most of the California egg industry and the loss of thousands of jobs, which could cost the state more than \$370 million in gross sales and resulting tax receipts.²³⁶ In addition to unemployment and reduced tax revenue, these regulations will increase prices for alcohol beverages and eggs in California. Because California exports wine and eggs, Americans will also pay higher prices for these goods because of California’s regulations.

Finally, California’s food regulations and bans are an ineffective and wrongheaded means of dealing with real and imagined problems. California’s ban on caged hens will do little more than shift jobs (and hens) from California to other states. Prop 65 casts such a wide net that Californians are subject to warning fatigue. Even the state admits that Prop 65 warnings are ubiquitous.²³⁷ The state’s efforts to curb childhood obesity in schools are also not working. Los Angeles, the city that first tried to ban soda from schools, was recently found to be in violation of its own regulations concerning the sale of soda and brownies on campus.²³⁸ While decent people may disagree whether legislation is a path for arresting the very real obesity problem,²³⁹ recent research by the independent RAND Corporation indicates that the presence of so-called junk food in

²³⁵ See Baylen Linnekin, *supra* note 96.

²³⁶ See generally DANIEL A. SUMNER, *supra* note 70.

²³⁷ See *Acrylamide and Proposition 65*, *supra* note 110 (“Proposition 65 warnings are common throughout California.”).

²³⁸ See Mary MacVean, *Schools Violate Junk Food Ban*, L.A. TIMES, May 9, 2009, at A9.

²³⁹ Compare Baylen Linnekin, *supra* note 96 (quoting Prof. Brian Wansink for the proposition that legislation to combat obesity has not been proven effective), and HARSANYI, *supra* note 98 at 53–55 (declaring that legislation has no impact on obesity rates), with Benjamin Montgomery, Note, *The American Obesity Epidemic: Why the U.S. Government Must Attack the Critical Problems of Overweight and Obesity Through Legislation*, 4 J. HEALTH & BIOMED. L. 375, 404 (2008) (calling for sweeping “wellness” legislation to counter obesity).

schools has “no statistically or economically significant effect” on body mass, a key indicator of obesity.²⁴⁰ The RAND study did note that such bans *do* have an impact on school budgets—and a negative one at that—since monies raised by food sales go into school coffers.²⁴¹

C. California Regulations Raise Constitutional Concerns

1. The Dormant Commerce Clause

The Dormant Commerce Clause, an implied provision of the federal Constitution, bars local and state governments from “restrict[ing] trade in a way that ultimately impacts interstate commerce[,] even when the intention of the political entity enacting the law is to effect a change solely within the boundaries of its particular jurisdiction.”²⁴² The Illinois Restaurant Association argued, in challenging Chicago’s foie gras ban in 2006, that the city’s ban violated the Clause.²⁴³

The crux of the plaintiffs’ Dormant Commerce Clause argument was twofold. First, they argued that Chicago’s ordinance was effectively an “economic boycott” against foie gras producers located *outside* the state.²⁴⁴ Second, they claimed the ordinance did not have the requisite local benefit that a law must have to overcome a Dormant Commerce Clause challenge.²⁴⁵ The court disagreed on both counts, holding that because the Chicago ban did “not govern foie gras production,” and had some local benefit in terms of animal rights, it did not overstep the bounds of the Dormant Commerce Clause.²⁴⁶ The difference in the case of the California ban is that the state targets producers and consumers outside and inside the state. Whether these differences would be sufficient for a court to determine that California’s ban violates the Dormant Commerce Clause is unclear, especially given that the “local effect” requirement may be fulfilled because of California’s in-state production. However, since the decision in *Illinois Restaurant Ass’n*, commentators have opined that bans such as those enacted in Chicago and California do indeed violate the Dormant Commerce Clause.²⁴⁷

²⁴⁰ See Ashlesha Datar & Nancy Nicosia, *Junk Food in Schools and Childhood Obesity: Much Ado About Nothing?* 5 (RAND Corporation, Working Paper No. 672, 2009).

²⁴¹ See generally *id.*

²⁴² See Alexandra R. Harrington, *Not All it's Quacked up to Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, 12 DRAKE J. AGRIC. L. 303, 317 (2007).

²⁴³ *Ill. Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891 (N. D. Ill. 2007).

²⁴⁴ *Id.* at 899.

²⁴⁵ *Id.*

²⁴⁶ See *id.*

²⁴⁷ See, e.g., Harrington, *supra* note 242 and accompanying text.

They argue that the Chicago and California foie gras bans do illegally interfere with interstate commerce while offering “no prescient public health, safety, or moral justification . . . that would withstand judicial scrutiny.”²⁴⁸ If this is the case, then the foie gras ban and many of California’s other bans—including those pertaining to egg-laying hens; genetically modified crops and fish; and *trans* fats—may also violate the Clause. Furthermore, California restrictions on agriculture may present an even more compelling Dormant Commerce Clause case because the state ships the vast majority of its crops to other U.S. states, and accounts for the vast majority of America’s fruit, vegetable, and nut exports.²⁴⁹

2. Do California’s Bans and Regulations Interfere with a Fundamental Right to Food Freedom?

The Supreme Court has never recognized an explicit right to eat certain foods. However, several Court justices have recognized a negative right²⁵⁰ to food. Justice William O. Douglas wrote, in dictum, that the Ninth Amendment guarantee of unenumerated fundamental rights²⁵¹ includes “one’s taste for food . . . [which] is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people.”²⁵² Other Justices have come out against food bans. Justice Stephen Field argued that a right to make and procure

²⁴⁸ *Id.* at 318.

²⁴⁹ See *supra* notes 21–23 and accompanying text. California’s bans may also violate the Privileges and Immunities Clause of the Fourteenth Amendment, which bars states from “mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV. The Clause was effectively written out of the Constitution in 1873 with the Supreme Court’s holding in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). An effort is currently underway, in *McDonald v. Chicago*, heard by the Court this term, to revive the Clause. *McDonald v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, 77 U.S.L.W. 3691 (U.S. Sept. 30, 2009) (No. 08-1521).

Proponents argue that the Clause exists at least in part to protect economic liberties, including the right to pursue a given trade. See Robert A. Levy, *How Gun Litigation Can Restore Economic Liberties*, 31 CATO POL’Y RPT. 2 (2009). In the *Slaughter-House Cases*, which concerned the economic rights of meat butchers, the Court “ruled that the law was a valid public health measure and did not violate the right of butchers ‘to exercise their trade.’” *Id.* A Court decision this term to revive the Clause could seemingly spell the end of California’s foie gras ban, among other California regulations, since the ban is after all a public morals measure that concerns the rights of fowl farmers and butchers to exercise their trade.

²⁵⁰ See, e.g., Cass R. Sunstein, *Free Speech Now*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 273 (Geoffrey R. Stone, Richard A. Epstein, & Cass R. Sunstein eds., 1992) (describing a “negative” rights argument as the “right to protection against the government, not to subsidies from the government”).

²⁵¹ U.S. CONST. amend. IX.

²⁵² See *Olliv v. E. Side Union High Sch. Dist.*, *cert. denied*, 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting) (likening a fundamental right to wear one’s hair in a certain style to one’s fundamental right to eat certain foods or enjoy certain cultural pursuits).

food is an integral fundamental right of all Americans.²⁵³ Field called this right an essential element of liberty.²⁵⁴ Importantly, Field distinguished between food regulation and food bans, contrasting the former, which he called a reasonable exercise of state police power, with the latter, which he would proscribe as unconstitutional.²⁵⁵ More recently, Justice Antonin Scalia, also in dictum, said the Court need not recognize a right to starve oneself to death in order to protect the “right to eat.”²⁵⁶

CONCLUSION

Proponents of California’s attack on food and agriculture paint the regulations that comprise it and the resultant California effect as a desirable “race to the top.” But California’s crackdown does not achieve its stated goals—whether the goal is ensuring a minimum level of quality; combating obesity; or protecting animals or consumers. The crackdown certainly does nothing to aid entrepreneurship or innovation. The result of the state’s regulations and bans has *not* been that Californians or Americans eat “healthier” or “better” as those terms are defined by the crackdown’s advocates.

When it comes to regulation, harsher does not mean better. The race to regulate is not a race to betterment. Ubiquitous and pervasive regulations might themselves be evidence of little more than the existence of “a race to the *strictest* standard.”²⁵⁷ Vogel recognizes the drawbacks of the “California effect,” noting that while economic liberalization and strict regulations can be compatible,²⁵⁸ he is careful “not to equate stricter standards with more effective regulations.”²⁵⁹ Vogel writes that stricter regulations often “contribute little or nothing” toward their

²⁵³ See *Powell v. Pennsylvania*, 127 U.S. 678, 690 (1888) (Field, J., dissenting) (“[T]hat the gift of life was accompanied with *the right to seek and produce food*, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others . . . is an element of that freedom which every American citizen claims as his birthright.”) (emphasis added).

²⁵⁴ *Id.* at 692 (“The right to procure healthy and nutritious food . . . is among these inalienable rights, which, in my judgment, no State can give and no State can take away except in punishment for crime.”).

²⁵⁵ *Id.* at 699 (favoring a state’s right to regulate food, but equating the prohibition of a food with an unconstitutional confiscation).

²⁵⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 980 at n.1 (1992) (Scalia, J., dissenting) (“It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.”).

²⁵⁷ Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 533 (2004) (emphasis in original); Raymond B. Ludwiszewski & Charles H. Haake, *Cars, Carbon, and Climate Change*, 102 NW. U. L. REV. 665, 672 (2008).

²⁵⁸ VOGEL, *supra* note 145 at 255.

²⁵⁹ *Id.* at 7.

stated goals, and that *overturning* regulations often benefits the public.²⁶⁰

Where does the pervasive spread of California’s bans and regulations point America’s food future? On the one hand, California’s mushrooming food and agricultural regulations and bans—the result of the state’s propensity toward hyper-regulation and the resultant California effect—are spreading across America. On the other hand, if these bans and strict regulations are bad for California, then their proliferation is also bad for America.

The many people who claim a food revolution is afoot in America today²⁶¹ are probably correct. But revolutions and revolutionaries have tried before to create top-down, small-farm agrarian utopias and to regulate nearly every aspect of human dining and existence.²⁶² What these societies managed to do instead was to create poverty and famine.

There is an alternative to the vision shared by California regulators, Alice Waters, and their allies. That alternative is *food freedom*—the right of people to grow, buy, sell, cook, and eat whatever foods they want, free from oppressive government intervention. For people who love and care about food and choice, who want to keep food legal, and who enjoy buying, cooking, raising, and eating a variety of foods, only the latter option will suffice.

²⁶⁰ *Id.*

²⁶¹ See, e.g., Martin, *supra* note 206 at SundayBusiness 1. See also Jamie Oliver, *Jamie Oliver’s Food Revolution*, <http://www.jamieoliver.com/campaigns/jamies-food-revolution> (last visited Apr. 1, 2010).

²⁶² See, e.g., Dan Fletcher, *A Brief History of the Khmer Rouge*, TIME, Feb. 17, 2009, available at <http://www.time.com/time/world/article/0,8599,1879785,00.html> (describing the history of the murderous Khmer Rouge, whose leader Pol Pot’s attempts to effect “a radical shift to an agrarian society” resulted in the death of millions of Cambodians).

