

RECONNECTING CONSUMERS AND PRODUCERS: ON THE PATH TOWARD A SUSTAINABLE FOOD AND AGRICULTURE POLICY

*Susan A. Schneider**

University of Arkansas School of Law

Director, LL.M. in Agricultural Law

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I. INTRODUCTION

Over the last century, we have been transformed from a nation of farmers, with our hands and minds linked to the soil, to consumers lined up in supermarkets to buy an array of slickly packaged food products about which we know very little.¹

Food, as the most essential element to human survival is inherently connected to the fabric of our social structure. Yet over time, American consumers have become disassociated with how their food is produced, processed, and marketed. Similarly, methods of food production have moved in ways that fail to adequately take into account consumer preferences, societal values, or sustainability and that often rely on “family farm” imagery to keep consumers ill informed. This article examines recent developments in food law and suggests that consumers are now questioning the transformation that has disconnected them

* Professor, University of Arkansas School of Law, Director, LL.M. in Agricultural Law. Appreciation is extended to Jera Houghtaling, J.D., University of Arkansas School of Law, LL.M. Candidate, Graduate Program in Agricultural Law, University of Arkansas School of Law, and Ashley Schweitzer, J.D., University of Northern Ohio School of Law, LL.M. Candidate, Graduate Program in Agricultural Law, University of Arkansas School of Law, for their excellent research assistance.

¹ Andrew Kimbrell, *Introduction to FATAL HARVEST: THE TRAGEDY OF INDUSTRIAL AGRICULTURE* 1 (Andrew Kimbrell ed. 2002).

from their food sources. Recent events indicate an ongoing societal struggle to find a more sustainable balance between food consumers and those who grow and process their food. Signs of this change were clearly evident in the legal developments of 2008 and more change is likely until a sustainable balance is achieved.

II. HISTORICAL PERSPECTIVES ON FOOD AND AGRICULTURE

In the recent essay, *Food Democracy and the Future of American Values*, Neil Hamilton advocates for a closer connection between people and the food they eat and criticizes the loss of this connection.²

In a nation with agrarian roots like ours, until recent decades, growing food was part of the productive lives of many citizens. The story of human history is written in our agricultural past and for most of that history, humans have been intimately connected with food — gathering it, growing it, and cooking it. But human progress has changed this relation freeing us from the toil and the worry about whether our next meal will appear. For most Americans food today is just a product of the grocery store and farmers are an image in [the] news about drought or disease — or television characters hocking cereals and orange juice.³

Historical trends support this analysis. Not so long ago, the majority of Americans had some direct connection to farming. In the early 1900's, U.S. agricultural production took place on a large number of small diversified farms and 41% of the labor force was employed in agriculture.⁴ In 1910, more than half of the population lived in rural areas.⁵ Most people either knew a farmer, were related to a farmer, or were themselves involved in farming. If they did not know who produced their food, they at least knew something about how it was raised or grown. And, when they consumed an item of food, they knew pretty much what it was.

The twentieth century is characterized by a definitive and relatively rapid disassociation between farmers and non-farmers and thus between consumers and their food. A number of factors contributed to this disassociation, including cultural changes such as family structure, number of hours of work per week, and

2. See generally, Neil Hamilton, *Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9 (2004).

3. *Id.* at 10.

4. CAROLYN DIMITRI ET AL., USDA, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2 (2005); see also USDA, A History of American Agriculture: Farmers & the Land, http://www.agclassroom.org/gan/timeline/farmers_land.htm (reporting that farmers made up thirty-eight percent of the labor force in 1900).

5. DIMITRI ET AL., *supra* note 4, at 2, 3 fig.1.

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 changing gender roles. Some of the most important factors, however, relate specifically to food and agriculture themselves. These factors are discussed below.

Urbanization – In 1900, only 39.6% of the U.S. population lived in urban areas; 60.4% lived in rural areas.⁶ By 1990 a dramatic reversal had occurred, with 75.2% of the population residing in urban areas and only 24.8 % in rural areas.⁷ The 2000 Census reported a continuation of this trend, with 79% of the population in urban areas and only 21% in rural areas.⁸

Moreover, as rural areas are defined to include small towns and even some suburban areas,⁹ the number of people associated with farming reflects an even more precipitous decline. In 2005, less than 2% of U.S. workers were employed in agriculture.¹⁰ The United States had become a nation of urbanites who depended upon a small and distant farming community for their food needs.

Consolidation in agriculture – In 1900, although the United States had a population of only a little more than 76 million, there were 5,739,657 farms.¹¹ According to the USDA Economic Research Service,

The number of farms declined dramatically after its peak of nearly 7 million in 1935, with most of the decline occurring during the 1940s, 1950s, and 1960s. The decline in farm numbers still continues, but at a slower pace. By 1997, 1.9 million farms remained. Because the amount of farmland did not decrease as much as the number of farms, the remaining farms have a larger average acreage.¹²

The USDA estimates that there were 2.1 million farms in 2005.¹³ Although the number of small farms operated by part-time farmers may now be on the rise, the consolidation of agriculture over the century has resulted in a food and fiber system where 75% of agricultural production occurs on “large scale”

6. U.S. CENSUS BUREAU, URBAN AND RURAL POPULATION: 1900-1990, tbl.1 (1995), available at <http://www.census.gov/population/www/censusdata/files/urpop0090.txt>.

7. *Id.*

8. U.S. CENSUS BUREAU, URBAN/RURAL & INSIDE/OUTSIDE METROPOLITAN AREA (2000), available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-P1&-ds_name=DEC_2000_SF1_U&-redoLog=false&-mt_name=ACS_2007_1YR_G00_GCT2303_US37&-format=US-1&-CONTEXT=gct.

9. See Urban Area Criteria for Census 2000, 67 Fed. Reg. 11,663 (Mar. 15, 2002).

10. ROBERT A. HOPPE ET AL., USDA, STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT 4 (2007), <http://www.ers.usda.gov/Publications/EIB24/>.

11. U.S. CENSUS BUREAU, TWELFTH CENSUS OF THE U.S. — 1900 CENSUS REPORTS — VOL. V, AGRICULTURE PART I, FARMS, LIVESTOCK, & ANIMAL PRODUCTS xvi (1902), available at <http://www2.census.gov/prod2/decennial/documents/33398096v5ch1.pdf>.

12. USDA Economic Research Service, Farm Structure: Questions & Answers, <http://www.ers.usda.gov/briefing/farmStructure/Questions/farmnumbers.htm> (last visited Apr. 23, 2009).

13. HOPPE, *supra* note 10, at 4.

farms.¹⁴ Larger and fewer farms translates into fewer opportunities for non-farm consumers to connect to or understand the source of their food.

The industrialization of agriculture – Related to consolidation is the industrialization of American agriculture. In the book, *Family Farming*, published just over twenty years ago, Marty Strange described the difference between the “family farm” model of agriculture and the industrialized model.¹⁵ He described the family farming model as an “[o]wner-operated,” “[f]amily centered” operation that is “[e]ntrepreneurial,” and “[t]echnologically progressive” while still “[s]triving for production processes in harmony with nature,” through “[d]iversified” production and “[r]esource conserv[ation].”¹⁶ Such a system is characterized by “[d]ispersed” ownership, equal access to markets, and with a view of “[f]arming as a way of life.”¹⁷ In contrast, industrialization calls for a farming system that is “[i]ndustrially organized,” “[f]inanced for growth” with great reliance on debt, made up of “[l]arge scale, concentrated” operations, with “[s]pecialized” production.¹⁸ It is “[m]anagement centered,” “[c]apital-intensive,” and it seeks “advantage in controlled markets.”¹⁹ It embraces “[s]tandardized . . . production processes” and is “[r]esource consumptive.”²⁰ It is a business model that “values the economic virtues of efficiency, productivity, and competition.”²¹

Thus, an industrialized model of agriculture focuses on not only economies of scale but on a radically different concept of agricultural production. Farming is viewed as another form of manufacturing, capable of capturing increased profitability through the standard incidents of the industrial model: large scale production of a specialized product, reliance upon technology, and vertical integration.²² Accordingly, the goal is to produce mass uniform output with the lowest cost of production possible.

Agriculture, however, is not simply manufacturing the proverbial widget. It is a unique industry in that it relies on the production of living things through

14. *Id.* at iv, 2 (defining “Large scale farms” as those with gross sales of over \$250,000.).

15. MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 32-39 (1988).

16. *Id.* at 32-35.

17. *Id.* at 33-35.

18. *Id.* at 36-37.

19. *Id.* at 37-38.

20. *Id.* at 38.

21. *Id.* at 39.

22. See Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 214 (1993); see also STRANGE, *supra* note 15, at 32-42.

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use of natural processes and the consumption of natural resources.²³ Being in the business of creating living things through an intertwined relationship with nature gives agricultural producers a special responsibility to confront ecological and ethical issues that arise.²⁴ In contrast, under an industrialized model, the primary responsibility is mass production of a uniform product at the lowest price. Natural processes of life are not respected, but are to be controlled and modified for improved efficiency. The intense specialization that is key to the industrial model – making a lot of one product very cheaply – runs counter to the forces of nature which reward, perhaps demand, such non-industrial attributes as genetic diversity and crop rotation.

Food produced or manufactured under an industrial model furthers the disconnection between consumers and their food. As Michael Pollan describes, it obscures the relationships and connections between people and the natural world.²⁵ The very goal of industrialized production – a completely uniform product – is lacking in uniqueness and it works against the appreciation of food as something natural or real. Wendell Berry is quoted as saying: “if human values are removed from production, how can they be preserved in consumption?”²⁶

In a physical sense, the scale of the large, monocultural industrialized operation puts the farm far out of the sight of the consumer. In this regard, the industrialized model thrives on consumer disconnection. Until very recently, many Americans believed that their food came from the diversified family farms that they recalled from past generations,²⁷ and given the substantial political support afforded to these family farms, industrialized operations reap many legal benefits.²⁸ Andrew Kimbrell refers to this as the “essential ‘cover’” that masks the impact of industrialization.²⁹

Food technology – Scientific discoveries have enabled the development of processed and packaged foods, many with a dramatically extended shelf life.

23. See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* 43 (1977) (stating “food is a cultural product; it cannot be produced by technology alone.”).

24. See Susan A. Schneider, *What is Agricultural Law?*, 26 *AGRIC. L. UPDATE* 1, Jan. 2009, at 2 (discussing this characterization of agriculture as one of the reasons why agriculture is treated differently under the law).

25. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 10 (2006) [hereinafter *OMNIVORE’S DILEMMA*].

26. Rebecca Spector, *Forging Links Between Farmers and Consumers*, *FATAL HARVEST*, *supra* note 1 at 352; see also *COMMUNITY FOOD SECURITY NEWS* 8 (2002), <http://www.foodsecurity.org/CFSCSpring2002.pdf>.

27. See PEW COMM’N ON INDUS. FARM ANIMAL PROD., *PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA* 1 (2008).

28. Schneider, *supra* note 24, at 2.

29. Kimbrell, *supra* note 1, at 1.

Many foods today are made of ingredients that defy consumer understanding.³⁰ While technology has improved food safety by reducing spoilage, provided new ways to enrich and fortify foods, and reduced meal preparation time, it is another culprit in the disconnection between consumers and the food they eat. When Michael Pollan recommends, “[d]on’t eat anything your great grandmother wouldn’t recognize as food[,]”³¹ he speaks to the overuse of technology to create “foods” that are no longer recognizable to the consumer. This has led to consumers that are often confused, skeptical, and sometimes even paranoid about the food they eat.

While an analysis of historical food science developments is clearly beyond the scope of this article, consideration of how our legal system has served to promote the use and sometimes the overuse of food technology is instructive. The regulation of food ingredients for the protection of the consumer over the course of the last fifty years goes from one extreme to the other, beginning with rigid control over what could be added to food and ending with a system where food processors play the most significant role in ingredient approval.

For much of twentieth century, the core principle underlying the regulation of food labeling and identity by the Food & Drug Administration (FDA) was the promulgation of “food standards of identity” that were essentially recipes for standard foods.³² A food “standard of identity” was described as “a definition of the common name of a food, listing those ingredients which must be included and those which may be included at the producer’s option in a food which goes under that name.”³³ Food that was defined by an FDA standard had to conform to the recipe set forth in the regulations.³⁴

The rigidity of this approach constrained the development of food technology and produced results that seemed to deny consumers the benefits of these developments.

[T]omato catsup containing everything required for that product but with a small amount of sodium benzoate added cannot be sold as “tomato catsup with preservative”; farina with vitamin D added cannot be sold as “farina enriched with vitamin D” because vitamin D is not an optional ingredient of “farina” and the product lacks

30. See, e.g., STEVE ETLINGER, TWINKIE, DECONSTRUCTED: MY JOURNEY TO DISCOVER HOW THE INGREDIENTS FOUND IN PROCESSED FOODS ARE GROWN, MINED (YES, MINED), AND MANIPULATED INTO WHAT AMERICA EATS (2007).

31. MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER’S MANIFESTO 148 (2008) [hereinafter IN DEFENSE OF FOOD].

32. See 21 U.S.C. § 341 (2007).

33. *Developments in the Law - The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 660 (1954).

34. *Id.* at 659.

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other nutrients required by the standard for “enriched farina”; and a product labeled as “fruit spread” which does not conform to the standard for “jam” may be condemned as misbranded where it is packed in jam-type jars and is treated as jam by retail dealers and consumers.³⁵

In 1972, the FDA began to relax the food standards of identity, spurred on by the recommendations of the White House Conference on Food, Nutrition and Health that provided in part:

[t]hat the restrictive nature of the standards be relaxed regarding permitted optional ingredients so that any functional ingredient which is the subject of a food additive regulation or prior sanction, or that is generally regarded as safe (GRAS) could be used if the standard does not inherently or explicitly preclude it.³⁶

The regulation of food additives rather than the use of food standards now forms the dominant structure of the FDA regulation of food ingredients. Food additives are defined as “any substance the intended use which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food[.]”³⁷ Included are substances used in the production, processing, treatment, packaging, transportation, or storage of food.

The Food Additives Amendment to the Federal Food, Drug, and Cosmetic Act passed in 1958 required pre-market approval for new food additives and for new uses of existing additives.³⁸ Approval by the FDA, however, is based on testing and information provided by industry. As Marion Nestle described in *Food Politics*, “Congress does not grant the FDA a mandate or funds to conduct independent evaluations of additives under review.”³⁹

Moreover, the statute provides, that substances that are “generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown . . . to be safe under the conditions of its intended use[.]” are excluded from the definition of “food additive.”⁴⁰ As was explained in *Food Safety Magazine* and reprinted on the FDA website, “[p]ut

35. *Id.* at 660 (citations omitted).

36. Proposed Revision of Existing Standards and Establishment of New Identity Standards, 37 Fed. Reg. 18,392 (prefatory comments) (proposed Sept. 9, 1972) (to be codified at 21 C.F.R. pt. 18).

37. 21 U.S.C. § 321(s) (2007).

38. Food Additives Amendment of 1958, Pub. L. 85-929, § 409(c)(1)(A), 72 Stat. 1784 (1958) (current version at 21 U.S.C. § 348(c)(1)(A) (2007)).

39. MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 339 (2002).

40. 21 U.S.C. § 321(s) (2007).

simply, substances that are GRAS under conditions of their intended use are not food additives and do not require premarket approval by FDA.”⁴¹

How ingredients obtain the important GRAS status and escape pre-market approval is a process that has undergone a significant change in recent years, with the result being a streamlined process that allows for many new ingredients to be classified as GRAS without FDA scrutiny. The process previously required food manufacturers to submit a petition to the FDA along with data indicating scientific consensus that the ingredient in question was safe for the prescribed use.⁴² The FDA would then undertake an evaluation of the substance and if it agreed with the petition, affirm the ingredient’s GRAS status with a published regulation.⁴³

In 1997, the FDA expressed concerns that the GRAS affirmation petition process was taking too many FDA resources and affirmations were taking too long to complete.⁴⁴ A new proposed rule was published outlining a new GRAS notification process that would replace the affirmation process.⁴⁵ Under this new notification program, “any person may notify FDA of a determination that a particular use of a substance is GRAS.”⁴⁶ The FDA can accept that classification by affirming it or by simply deciding not to question it. The FDA indicated that the new process would save FDA resources – resources that could be better directed elsewhere.⁴⁷ And, in a rather unsettling statement, FDA admitted that it “conceivably would provide an incentive for manufacturers to inform FDA of their GRAS determinations. This would result in increased agency awareness of the composition of the nation’s food supply and the cumulative dietary exposure to GRAS substances.”⁴⁸

41. Paulette Gaynor & Sebastian Cianci, *Regulatory Report: FDA's GRAS Notification Program Works*, FOOD SAFETY, Dec. 2005/Jan. 2006, reprinted in CTR. FOR FOOD SAFETY & APPLIED NUTRITION, FDA, REGULATORY REPORT: FDA’S GRAS NOTIFICATION PROGRAM WORKS (2007), <http://www.cfsan.fda.gov/~dms/grasov2.html>.

42. 21 C.F.R. § 170.35(c) (2009) (note that although this rule is still codified, it no longer describes the practice followed by the FDA). *See infra* notes 44-49 and the accompanying text.

43. *Id.*

44. Substances Generally Recognized as Safe, 62 Fed. Reg. 18,938, 18,941 (proposed April 17, 1997) (to be codified at 21 C.F.R. pts. 170, 184, 186, and 570); *see also* Gaynor & Cianci, *supra* note 41.

45. Substances Generally Recognized as Safe, 62 Fed. Reg. at 18,941.

46. *Id.* at 18,938

47. *Id.*

48. *Id.* at 18,942

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Although the GRAS notification process was proposed in 1997, and the FDA began using it as an interim policy shortly thereafter, a final rule has never been promulgated.⁴⁹

While very few would argue for the elimination of food additives, it is indisputable that they have encouraged the disconnection of consumers from producers and consumers from the basic source of their food. As the FDA web-site fact sheet on additives proudly proclaims:

Since most people no longer live on farms, additives help keep food wholesome and appealing while en route to markets sometimes thousands of miles away from where it is grown or manufactured

Some additives could be eliminated if we were willing to grow our own food, harvest and grind it, spend many hours cooking and canning, or accept increased risks of food spoilage. But most people today have come to rely on the many technological, aesthetic and convenience benefits that additives provide in food.⁵⁰

III. CURRENT INTEREST IN RECONNECTING TO FOOD AND OUR FOOD SYSTEM

There is undeniably an increasing interest in food and food systems in the United States. It is seen in the popularity and numerosity of food and food system books such as *Omnivore's Dilemma*,⁵¹ *In Defense of Food*,⁵² *Fast Food Nation*,⁵³ *Twinkie, Deconstructed*,⁵⁴ *Animal, Vegetable, Miracle*,⁵⁵ *What To Eat*⁵⁶ and others that have come out in the last several years. These books not only evidence consumer interest in food, they have played an important role in fueling this interest by disclosing many aspects of the food system to unsuspecting consumers. Similarly, documentaries about food and agriculture are also abundant and have taken on the role of exposing consumers to a world of food production and food policy that is not what they expect. Examples include *KING CORN*,⁵⁷ *FOOD, INC.*,⁵⁸ and *OUR DAILY BREAD*.⁵⁹ Encouraging this new genre, the New

49. Gaynor & Cianci, *supra* note 41, at 2.

50. FDA Food Additives Fact Sheet, <http://www.foodsafety.gov/~lrd/foodaddi.html>.

51. *OMNIVORE'S DILEMMA*, *supra* note 25.

52. *IN DEFENSE OF FOOD*, *supra* note 31.

53. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (Harper Perennial 2002) (2001).

54. EITTLINGER, *supra* note 30.

55. BARBARA KINGSOLVER ET AL., *ANIMAL, VEGETABLE, MIRACLE: A YEAR OF FOOD LIFE* (2007).

56. NESTLE, *supra* note 39.

57. *KING CORN* (Mosaic Films, Inc. 2007).

58. *FOOD, INC.*, (Robert Kenner & Elise Pearlstein 2009).

York Food Film Festival is making preparations for its third annual event in June of 2009.⁶⁰ Additionally, food issues are pervasive in the news media, with even political commentators such as George Will writing about our food system.⁶¹ Universities, anxious to build on student interest, are developing food studies programs. Such programs have now “[h]it the [a]cademic [m]ainstream.”⁶² As these programs are preparing the consumers and the consumer leaders of the future, it is likely that the “disconnect” that has marked our food system in recent years will become an historic anomaly.

For many consumers, there is a desire not only to know about their food, but to connect more personally with its source.⁶³ This trend is evidenced by the increased number of consumers who seek to purchase their food directly from the producer. For example, the number of farmers’ markets in the United States continues to grow each year, and gained 6.8% between August of 2006 and August of 2008.⁶⁴ USDA Agricultural Marketing Service (AMS) Administrator Lloyd Day explained the increase stating, “[m]ore and more consumers are discovering the wide array of fresh, locally grown produce available at farmers markets.”⁶⁵ He further stated, “food buyers like the opportunity to interact with the producers.”⁶⁶ Neil Hamilton refers to this latter motivation as “[p]utting a [f]ace on our [f]ood.”⁶⁷

Others may simply want to know more about how their food is raised. The increasing popularity of organic foods exemplifies the interests of many of these consumers. According to the Organic Trade Association, “U.S. sales of organic food and beverages have grown from \$1 billion in 1990 to an estimated \$20 billion in 2007, and are projected to reach nearly \$23 billion in 2008

59. OUR DAILY BREAD (Nikolaus Geyrhalter Filmproduktion GmbH 2005).

60. See [nycfoodfilmfestival.com](http://www.nycfoodfilmfestival.com), Third Annual NYC Food Film Festival 2009, <http://www.nycfoodfilmfestival.com> (last visited Apr. 25, 2009).

61. See George F. Will, *Where the Obesity Grows*, WASH. POST, Mar. 8, 2009, at A19.

62. See Jane Black, *Field Studies*, WASH. POST, Aug. 20, 2008, at F01. This article and the issue in general were discussed in the Agricultural Law Blog at <http://aglaw.blogspot.com/search?q=academic+mainstream>.

63. See Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL’Y 45, 48-50 (2008).

64. Press Release, USDA, Agricultural Marketing Service, Number of Farmers Markets Continues to Rise in U.S. (Sept. 19, 2008), <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5072472>.

65. *Id.*

66. *Id.*

67. Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 DRAKE J. AGRIC. L. 407, 407 (2002); see also, Coit, *supra* note 63, at 49-50.

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Representing approximately 2.8 percent of overall food and beverage sales in 2006, this continues to be a fast growing sector, growing 20.9 percent in 2006.”⁶⁸

Clearly many American consumers are no longer content to be that nation of “consumers [that line] up in supermarkets to buy an array of slickly packaged food products about which we know very little.”⁶⁹ This offers both a challenge and an opportunity to food producers and marketers, and it suggests a significant impact on our food system.

IV. RECENT DEVELOPMENTS IN FOOD LAW IN THE CONTEXT OF CONSUMER INTEREST IN FOOD AND AGRICULTURE: HOW IS MY FOOD PRODUCED?

There were a number of very significant food related legal developments in 2008 and into early 2009.⁷⁰ Many of these developments evidence the heightened consumer interest in food, but one area in particular reflects both the opportunities presented to the food industry (including producers) and the risk of consumer deception. This is the area of “production claims.”

As consumers seek more of a connection to their food, they often question not only the ingredients, but also the methods used in producing or processing it. The importance of these methods to consumers today is perhaps most clearly evidenced by the marketing labels on food packages and the advertising of food in the media. The food industry knows that many consumers are interested in how their food was produced or raised, and producers, manufacturers, and retailers are all anxious to show that their product provides the right answers. Michael Pollan refers to this as “storied food” or “supermarket pastoral,” which are characterized as a “seductive literary form” that includes descriptions of lovely pasture scenes and harmony with nature.⁷¹ Amid the stories, however, are specific terms and assurances that consumers rely on in making their purchasing decisions. It is the government’s role to prevent “false or misleading” labeling and advertising of food.⁷² And, recently, the government has been trying to figure out the proper parameters of that role.

68. Organic Trade Assoc., Industry Statistics and Projected Growth, <http://www.ota.com/organic/mt/business.html> (last visited Apr. 21, 2009) (citations omitted).

69. Kimbrell, *supra* note 1.

70. For an excellent overview of food law developments each year, see Professor Bryan Endres’ regularly feature article, *United States Food Law Update* which appears yearly in the JOURNAL OF FOOD LAW & POLICY. See, e.g., A. Bryan Endres, *United States Food Law Update: Food Safety Planning, Attribute Labeling, and the Irradiation Debate*, 4 J. FOOD L. & POL’Y 129 (2008).

71. OMNIVORE’S DILEMMA, *supra* note 25, at 134-39.

72. 21 U.S.C. § 343(a) (2007).

Production claims are voluntary labeling and advertising claims that are used to identify the methods by which a product was produced. They are typically used as part of a marketing strategy to inform consumers that have special interests or concerns that are not addressed by the general market.⁷³ “Organic” and “free range” are examples of production claims.

Because production claims are tied to marketing efforts, they are often associated with product labeling. For most non-meat food products, the FDA regulates labeling requirements, including production claims (except for organic foods) and while the claims cannot be “false or misleading,” pre-approval of the label is not required.⁷⁴ Regulations defining a claim or certain terminology may be promulgated if the FDA believes that such a definition is needed.

For meat and poultry products under the jurisdiction of the USDA, all labeling, including production claims contained on the label must be pre-approved by the USDA, with this authority delegated to the Food Safety and Inspection Service (FSIS).⁷⁵ The FSIS will attempt to verify that the claim is accurate, i.e., not “false or misleading.”⁷⁶

Certain production claims may be covered by a voluntary certification program administered by a private certifying agent⁷⁷ or by the Agricultural Marketing Service (AMS).⁷⁸ Either certification program will have established standards for use of the claim as well as a verification process.⁷⁹ Producers who wish to have their product certified can do so, using the certification on their product label.⁸⁰

73. See, e.g., Endres, *supra* note 70, at 135-36 (noting how the meat and livestock industries use production claims to market their products or processes).

74. 21 U.S.C. § 343(a) (2007). See generally Center for Food Safety and Applied Nutrition, FDA, *Guidance for Industry: A Food Labeling Guide*, available at <http://www.cfsan.fda.gov/~dms/2lg-toc.html>.

75. 21 U.S.C. § 601 *et seq* (2007) (meat); 21 U.S.C. § 451 *et seq* (2007) (poultry). See generally USDA Food Safety and Inspection Service, *A Guide to Federal Food Labeling Requirements For Meat and Poultry Products*, available at http://www.fsis.usda.gov/Regulations_&Policies/Labeling_Guidance/index.asp.

76. 21 U.S.C. § 601(n) (2007) (meat); 21 U.S.C. § 453(h) (2007) (poultry).

77. See, e.g., Humane Farm Animal Care, <http://www.certifiedhumane.org/> (illustrating the private certification of humanely raised livestock by Humane Farm Animal Care).

78. See generally USDA AMS, Grading, Certification and Verification, <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplTemp&navID=GradingCertificationandVerfication&leftNav=GradingCertificationGradingCertifi&page=GradingCertificationAndVerification>.

79. *Id.*

80. *Id.*

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Organic production claims are defined and governed by a specific chapter of the United States Code (USC)⁸¹ and a regulatory scheme known as the National Organic Program,⁸² and both meat and non-meat organic food labeling is specifically regulated by the USDA through the use of private, approved certifiers.⁸³

In all cases of advertising, the Lanham Act, enforced by the Federal Trade Commission (FTC), prohibits false or misleading advertising and unfair trade practices in interstate commerce.⁸⁴

All of these agencies, and the regulatory schemes that they enforce, were evident in the past year, as the government, consumers, and marketers embraced the new connection that consumers seek to have with their food.

A. "Natural" and "Organic"

The term "natural" continues to be used extensively, with inconsistent meanings. While consumers seek out more natural products, marketers clamor to package their products accordingly. Yet, what does the term natural mean? Unfortunately, there is little agreement. Whereas organic is strictly defined, the definition of natural remains elusive.

Clearly, "natural" foods are big business. The following excerpt from a news story confirms this, and also confirms the confusion caused by merging the concept of organic and natural into one grouping.

The natural and organic market continues to gain strength in food, drug, and mass outlets riding on the coat tails of the success of stores such as Whole Foods and Trader Joe's, which brought natural and organic foods and beverages to mainstream America. Consumers have become a whole lot savvier about what they eat and through increased educational efforts by both manufacturers and retailers they are increasingly buying more organic and natural food and beverage products. Packaged Facts estimates that 2008 sales of natural and organic food and beverages will continue at a double-digit growth rate to reach \$32.9 billion. For the period between 2005 to 2008, Packaged Facts estimates a remarkable market growth of 67.6% with a compounded annual growth rate of 18.8%.

Not even the current economic upheaval due to the rising prices of fuel and grain is enough to impede the market's steady development, which Packaged Facts projects will experience strong single-digit growth through 2013.

81. The Organic Food Production Act of 1990, 7 U.S.C. §§ 6501-6523 (2007).

82. 7 C.F.R § 205 (2008).

83. 7 U.S.C. §§ 6503, 6514 (2007).

84. 15 U.S.C. § 1125(a)(1) (2007).

“While natural and organic products are no longer recession proof, Americans are waking up to expect natural and organic food in their stores; food that is pesticide-free, hormone-free and non-GMO. And suppliers and retailers are quickly acting to provide it to them. We believe this consumer demand will continue to spur the strong growth for these products,” says Tatjana Meerman, Publisher of Packaged Facts.⁸⁵

As noted, organic products are specifically defined by statute and regulation, and have been regulated accordingly since the promulgation of the National Organic Program in 2002.⁸⁶ Nevertheless, the standards continue to evolve and one recent development is particularly important. Last fall, the USDA proposed to tighten the rules that regulate the pasture requirements associated with ruminants.⁸⁷ Consumers and many organic producers themselves have long argued that the standards were too lax and that a vague “access to pasture” requirement was subject to substantial abuse. The proposed rule requires in part that animals over the age of six months must be on pasture throughout the growing season, and that they must receive at least thirty percent of their dry matter intake (DMI) from pasture.⁸⁸ The comment period for the proposed rule closed on December 23, 2008, and at this time the final rule has not been promulgated.⁸⁹

In contrast, there is no unified standard for the term “natural.” For meat products under its jurisdiction, USDA FSIS Labeling Policy Handbook defines the term natural in part as meaning that:

(1) the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative (as defined in 21 CFR 101.22), or any other artificial or synthetic ingredient; and (2) the product and its ingredients are not more than minimally processed.⁹⁰

85. *Surge in Natural and Organic Food Sales Means Billion Dollar Boom*, PACKAGED FACTS, Sept. 9, 2008, <http://www.marketwire.com/press-release/Packaged-Facts-898129.html>.

86. *See* 7 C.F.R. § 205; *see also* GEORGE KUEPPER, ORGANIC FARM CERTIFICATION & THE NATIONAL ORGANIC PROGRAM, NAT’L SUSTAINABLE AGRIC. INFO. SERV. 1-2 (2002), *available at* <http://attra.ncat.org/attra-pub/organcert.pdf>.

87. National Organic Program (NOP) – Access to Pasture (Livestock), 73 Fed. Reg. 63,584, 63,584 (proposed Oct. 24, 2008) (to be codified at 7 C.F.R. pt. 205).

88. *Id.* at 63,590-92.

89. *Id.* at 63,584.

90. OFFICE OF POLICY, PROGRAM AND EMPLOYEE DEV., USDA, USDA FOOD STANDARDS AND LABELING POLICY BOOK 116 (2005), *available at* http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf. For a good discussion of the USDA definition of “natural,” *see* A. Bryan Endres, *United States Food Law Update: Labeling Controversies, Biotechnology Litigation, and the Safety of Imported Food*, 3 J. FOOD L. & POL’Y 253, 261-70 (2007).

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The FDA, however, has refused to define “natural,” although its discussion of the issue indicates a broader meaning than that applied by USDA. There is a 1993 food labeling rule that discusses but declines to define the term.⁹¹ In this rule, FDA noted the ambiguity in the use of the term natural and that defining the term would ease the problem of misleading claims, but stated that “[b]ecause of resource limitations and other agency priorities [the agency was] not undertaking rulemaking to establish a definition”⁹² The FDA’s current (and long standing) policy is that “natural” means “that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.”⁹³ Note that this excludes the “minimally processed” prong of the USDA definition.

Thus, the legal development in this area is unfortunately lacking. The use of the term natural continues to be used in a variety of confusing contexts, including in the marketing of products made with high fructose corn syrup (HFCS), a much maligned product that has come to symbolize some of the problems with our food system.⁹⁴

The Corn Refiners Association and a number of food manufacturers who use HFCS in their products consider HFCS as a “natural” sweetener and have embarked on an extensive marketing campaign to boost the image of HFCS.⁹⁵ On its website, Sweet Surprise, the Corn Refiners Association makes the claim that “HFCS is made from corn, a natural grain product” and that “HFCS contains no artificial or synthetic ingredients or color additives and meets the Food and Drug Administration’s requirements for use of the term ‘natural.’”⁹⁶ The website cites to the FDA regulation on artificial flavoring to support its claim, although

91. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) (affecting 21 C.F.R. pts. 5, 101).

92. *Id.*

93. *Id.*

94. *See, e.g.*, IN DEFENSE OF FOOD, *supra* note 31, at 104-05, 150-54. Special appreciation is extended to LL.M. Candidate Jera Houghtaling for her presentation on this issue to the *Selected Issues in Food Law* class at the University of Arkansas School of Law, LL.M. Program in Agricultural Law, March 12, 2009.

95. *See, e.g.*, SweetSurprise.com, The Facts About High Fructose Corn Syrup, <http://www.sweetsurprise.com/>; *see* Corn Refiners Assoc., Corn Sweeteners are Natural, <http://www.corn.org/CornSweetenerNatural.pdf>.

96. SweetSurprise.com, Natural Sweeteners, <http://www.sweetsurprise.com/myths-and-facts/faqs-high-fructose-corn-syrup/natural>.

that regulation does not define the term natural, and arguably, sweetening is not a flavor of the kind described in the regulation.⁹⁷

The sugar industry as well as consumer groups such as the Center for Science in the Public Interest have criticized the natural claim, maintaining that HFCS cannot be considered natural because of the chemical processes involved in its manufacturing. In April of 2008, it was reported that the FDA agreed, stating in response to a media inquiry that HFCS could not be considered to be a natural product.⁹⁸ According to an article published on NutraIngredients-USA.com, a food media group, FoodNavigator-USA.com, posed a question to FDA representative Geraldine June, Supervisor of the Product Evaluation and Labeling team at FDA's Office of Nutrition, Labeling and Dietary Supplements, who stated that the FDA "would object to the use of the term 'natural' on a product containing HFCS," because of the chemical processing involved in its manufacture.⁹⁹ The article also noted that "the FDA has received two petitions to define the term 'natural' - one from the Sugar Association, and one from bakery firm Sara Lee."¹⁰⁰ However, June was quoted as stating at that time that the FDA had no plans to define the term in the near future, due to limited resources.¹⁰¹ June went on: "We're not sure how high of an issue it is for consumers[.]"¹⁰²

As an indication of the continuing controversy, however, in July it was reported that the FDA reached the opposite conclusion in response to a request from the Corn Refiners Association.¹⁰³

It was reported that the FDA's response was based on the particular chemical process used by Archer Daniel Midland, and that with respect to HFCS produced using this process, "[h]igh fructose corn syrup may be labeled natural when synthetic fixing agents do not come into contact with it during manufacturing[.]"¹⁰⁴ This technical determination clearly runs afoul of the responsibility of the FDA to assure that labeling is not only truthful, but that it is not misleading.¹⁰⁵ It is highly unlikely that consumers would base their understanding of the

97. *Id.* (citing 21 C.F.R. § 101.22(a)(3) (2008)).

98. Lorraine Heller, *HFCS is Not 'Natural', Says FDA*, NUTRAINGREDIENTS-USA, Apr. 2, 2008, <http://www.nutraingredients-usa.com/Regulation/HFCS-is-not-natural-says-FDA>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Laura Crowley, *HFCS is Natural, Says FDA in a Letter*, FOODNAVIGATOR-USA.COM, July 8, 2009, <http://www.foodnavigator-usa.com/Financial-Industry/HFCS-is-natural-says-FDA-in-a-letter>.

104. *Id.*

105. *See* 21 U.S.C. § 343(a) (2007).

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word natural on the specific and very technical chemical process used to create some, but not all, high fructose corn syrup.

Therefore, largely due to the FDA's reluctance to take a consistent and defensible stand, the definition of natural has become more, rather than less, confusing in recent months.¹⁰⁶

B. "Naturally Raised"

In a very recent and related development, after much consideration, the USDA set a voluntary standard for a "naturally raised" marketing claim for livestock and meat.¹⁰⁷ The press release accompanying the USDA's notice confirmed consumer interest in this claim, stating as follows:

The segment of the marketplace that includes specific animal raising claims has experienced exponential growth in the past five years. Use of a naturally raised marketing claim standard has the potential to increase the available supply of U.S. meat products eligible for niche marketing programs in the United States, the European Union, and other export markets that require livestock to be raised without the administration of growth promotants.¹⁰⁸

According to the new standard, livestock that "have been raised entirely without growth promotants, antibiotics (except for ionophores used as coccidiostats for parasite control), and have never been fed animal (mammalian, avian, or aquatic) by-products derived from the slaughter/harvest processes" can be certified as "naturally raised."¹⁰⁹

Two organizations, Consumers Union and Food & Water Watch, criticized the new regulation as not going far enough to meet consumer expecta-

106. See *Manufacturers and Consumers Lose Faith in Natural Label Claims*, FOODNAVIGATOR-USA.COM, Sept. 11, 2008, <http://www.foodnavigator-usa.com/Financial-Industry/Manufacturers-and-consumers-lose-faith-in-natural-label-claims>.

107. United States Standards for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived from Such Livestock, 74 Fed. Reg. 3541, 3541 (Jan. 21, 2009).

108. Press Release, Billy Cox, USDA Establishes Naturally Raised Marketing Claim Standard (Jan. 16, 2009), <http://www.ams.usda.gov/AMSV1.0/ams.printData.do?template=printPage&navID=&page=printPage&dDocId=STELPRDC5074955&dID=106698&wf=false&docTitle=USDA+Establishes+Naturally+Raised+Marketing+Claim+Standard+>.

109. 74 Fed. Reg. at 3545.

tions.¹¹⁰ Dr. Urvashi Rangan, Senior Scientist and Policy Analyst at Consumers Union, stated:

This regulation will allow an animal that has come from a cloned or genetically engineered stock, was physically altered, raised in confinement without ever seeing the light of day or green of pasture, in poor hygiene conditions with a diet laced in pesticides to be labeled as 'naturally raised.' This falls significantly short of consumer expectations and only adds to the roster of misleading label claims approved by USDA for so-called natural meat[.]¹¹¹

A January 16, 2009 article on ConsumerUnion.org included results from a recent national telephone poll conducted by Consumer Reports' National Research Center that "showed American consumers want the 'naturally raised' meat claim to mean more than USDA's proposed standard[.]"¹¹² According to the survey, consumers think that a naturally raised animal:

- Had a diet free of chemicals, drugs and animal byproducts (86%)
- Was raised in a natural environment (85%)
- Ate a natural diet (85%)
- Was not cloned or genetically engineered (78%)
- Had access to the outdoors (77%)
- Was treated humanely (76%)
- Was not confined (68%)¹¹³

Note that in 2007 the AMS established a voluntary certification for "grass-fed meat" that provides the animal's diet must be grass and forage for the lifetime of the animal with the exception of milk consumed prior to weaning.¹¹⁴

C. "Raised Without Antibiotics"

For some time, the scientific, medical, and public health communities have been concerned about the use of antibiotics in animal production.¹¹⁵ Antibiotic resistance is a serious concern, and one that is linked in large part to the use

110. *Consumers Union and Food & Water Watch Say New USDA Standard for So-Called Naturally-Raised Meat Sanctions Unnatural Practices*, CONSUMERS UNION, Jan. 16, 2009, http://www.consumersunion.org/pub/core_food_safety/006534.html.

111. *Id.*

112. *Id.*

113. *Id.*

114. United States Standards for Livestock and Meat Marketing Claims, Grass (Forage) Fed Claim for Ruminant Livestock and the Meat Products Derived From Such Livestock, 72 Fed. Reg. 58,631, 58,637 (Oct. 16, 2007).

115. See Robyn L. Goforth & Carol R. Goforth, *Appropriate Regulation of Antibiotics in Livestock Feed*, 28 B.C. ENVTL. AFF. L. REV. 39, 51-64 (2000).

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and overuse of antibiotics.¹¹⁶ The recently released report of the Pew Commission on Industrial Farm Animal Production, *Putting Meat on The Table: Industrial Farm Animal Production in America* addressed the “subtherapeutic” use of antibiotics in farm animal production and raised concerns about its serious public health consequences.¹¹⁷ Subtherapeutic use is the practice of adding low levels (below the therapeutic dose for illness) of antibiotics and growth hormones for the purpose of stimulating growth and improving performance.¹¹⁸ In situations where livestock or poultry are confined in large numbers and in close quarters, the antibiotics also provide security from disease.¹¹⁹ It is estimated that as much as 71% of antibiotic use in the United States is associated with this subtherapeutic use in animal production.¹²⁰

In June of 2007, Tyson Foods began a multi-million dollar campaign to market a new line of fresh poultry labeled as “raised without antibiotics.”¹²¹ The press release for the campaign stated that market research determined that “91% of consumers agree it’s important to have fresh chicken produced and labeled ‘raised without antibiotics.’”¹²²

Although the Food Safety & Inspection Service (FSIS) initially approved Tyson’s label based on submissions provided by the company, a disagreement regarding the claim surfaced soon thereafter, and by fall, USDA had rescinded its approval for the label.¹²³ The disagreement focused on whether ionophores were technically an antibiotic. Through negotiation, labeling language stating that the Tyson chickens were “raised without antibiotics that impact antibiotic resistance in humans” was agreed upon.¹²⁴

Competitors, Sanderson Farms, Inc. and Perdue Farms Inc. sued Tyson under section 1125(a) of the Lanham Act for false advertising, claiming that Ty-

116. *Id.* at 41.

117. *See generally* PEW COMM’N ON INDUS. FARM ANIMAL PROD., *supra* note 27 at 15-16.

118. *Id.* at 15; *see also* Goforth & Goforth, *supra* note 124 at 45-46.

119. *Id.*

120. The Pew Charitable Trust: Human Health and Industrial Farming, Our Work, <http://www.saveantibiotics.org/ourwork.html> (last visited Apr. 25, 2009).

121. Press Release, Tyson Food Service, All Tyson® Brand Fresh Chicken to be “Raised Without Antibiotics”; Products Available to Mainstream Consumers at an Affordable Price (June 19, 2007), <http://www.tyson.com/Corporate/PressRoom/ViewArticle.aspx?id=2744&print=true>.

122. *Id.*

123. Press Release, Tyson Food Service, Tyson Statement on FSIS Letter on Raised Without Antibiotics Chicken Label (June 3, 2008) <http://www.tyson.com/Corporate/PressRoom/ViewArticle.aspx?id=2957>.

124. Press Release, Tyson Food Service, *Tyson to Use New Label for Raised Without Antibiotics Chicken; Company & USDA Agree to More Informative Wording* (Dec. 27, 2007), available at <http://www.tyson.com/Corporate/PressRoom/ViewArticle.aspx?id=2850>.

son's extensive advertising campaign was "false and misleading."¹²⁵ Plaintiffs alleged that Tyson's advertisements containing the claims "Raised Without Antibiotics" and "Raised Without Antibiotics that impact antibiotic resistance in humans" were false and that they misled consumers.¹²⁶ Plaintiffs specifically alleged that Tyson used ionophores in its chicken feed and that ionophores are antibiotics.¹²⁷ Tyson moved to dismiss, arguing in part that the USDA's approval of its label insulated it from the advertising challenge.¹²⁸ The district court rejected Tyson's motion, holding that USDA label approval was not a defense to a Lanham Act claim for false advertising, nor did it shield Tyson in any way from the advertising claim.¹²⁹

As a result of the litigation, however, it was revealed that in addition to the disclosed use of ionophores, Tyson used the antibiotic Gentamicin on its eggs two or three days before they hatched.¹³⁰ A preliminary injunction was issued against Tyson's advertisements.¹³¹ The case was subsequently settled.

FSIS, learning of the Gentamicin, notified Tyson that it was rescinding its labeling authority and said that they must stop using the qualified claim by June 18, 2008.¹³² Tyson objected, claiming that its administration of the antibiotic prior to hatch did not fall within the notion of "raising" a chicken.¹³³ The FSIS disagreed.¹³⁴

V. CONCLUSION

While some in the agricultural industry may feel threatened by consumers' new found desire to know about and perhaps to influence the food system, the current trend of connecting consumers to their food offers incredible opportunities for American farmers, food manufacturers, and retailers. Some of this opportunity is reflected production claims, provided that industry does not abuse the consumer trust. If we are serious about food/consumer connections, we have

125. Sanderson Farms, Inc. v. Tyson Foods, Inc., 549 F. Supp. 2d 708, 709-10 (D. Md. 2008).

126. *Id.* at 710.

127. *Id.* at 711.

128. *Id.* at 713.

129. *Id.* at 720.

130. Sanderson Farms v. Tyson Foods, 547 F. Supp. 2d 491, 494 (D. Md. 2008)

131. *Id.* at 509.

132. Press Release, USDA, Statement by Under Secretary for Food Safety Dr. Richard Raymond Regarding the Tyson Foods, Inc. Raised Without Antibiotics Label Claim Withdrawal (June 3, 2008), available at http://www.fsis.usda.gov/News_&_Events/NR_060308_01/index.asp.

133. *Id.*

134. *Id.*

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the opportunity for our food and agricultural systems to re-connect and to focus not simply on quantity but on quality. As has been shown in other industrialized sectors, it is difficult for the U.S. to compete when the goal is cheap, mass produced products. However, when quality, local production, and consumer support is combined, a strong domestic food system should be the result. The successful producers, food processors and retailers of the future will be the ones who accept that consumer interest is a positive and not simply something to be manipulated. Consumers, consumer advocates, and those in the agricultural and food industries who share this vision will need to be proactive to ensure the accuracy of the information that is provided.