FOOD CHOICE IS A FUNDAMENTAL LIBERTY RIGHT

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"[P]laintiffs do not have a fundamental right to obtain any food they wish."[1]

"When did we lose our right to buy whatever food we want directly from farmers and assorted food producers, outside of the regulatory system of permits and inspections?"[2]

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1. Br. in Supp. of United States' Mot. to Dismiss Pl.'s Am. Compl. at 26, Farm-To-Consumer Legal Def. Fund v. Sebelius, No. 5:10-cv-04018-MWB (N.D. Iowa, filed Apr. 26, 2010).

I. THE FOOD MOVEMENT RISES

For millennia, humans either caught or raised their own food or purchased it from local farmers or shopkeepers; however they obtained their food, they knew where it came from.[3] In fact, obtaining one's food directly from the farmer who grew it is one of the most traditional economic practices that there can be. But with the industrial age came industrial food, which has broken the local food connection between producer and consumer.[4] For example, two companies now grow 85% of all of the carrots eaten in the U.S.[5] The four largest beef slaughterers have sold between 65% and 70% of all beef consumed nationally since 2000.[6] But local food is making a comeback; locavores look for locally grown or raised food, and other epicurean consumers seek organic and naturally produced food.[7] These alternative food movements are a "challenge to and a denouncement of the current industrial food system," which writer Michael Pollan, champion of the food movement, calls "Big Food."[8]

Pollan explains that the alternative food movement is about many things, including consumer health, food safety regulation, farmland preservation, and efforts to promote urban agriculture, as well as "community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other."[9] For Pollan, eating is a political act[10]

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2. DAVID E. GUMPERT, LIFE, LIBERTY AND THE PURSUIT OF FOOD RIGHTS: THE ESCALATING BATTLE OVER WHO DECIDES WHAT WE EAT 5 (2013).

3. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods,"* 33 HAMLINE J. PUB. L. & POL'Y 49, 55 (2012).

4. *Id.* at 50.

5. Mark Bittman, *Everyone Eats There*, N.Y. TIMES, Oct. 12, 2012, http://www.nytimes.com/2012/10/14/magazine /californias-central-valley-land-of-a-billion-vegetables.html?pagewanted=all&_r=0.

6. U.S. DEP'T OF AGRIC., PACKERS & STOCKYARDS PROGRAM, 2011 P&SP ANNUAL REPORT: GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION 30 (2012), *available at* http://www.gipsa.usda.gov/Publications/psp/ar/2011_psp_ annual_report.pdf.

7. Jaime Bouvier, *The Symbolic Garden: An Intersection of the Food Movement and the First Amendment*, 65 ME. L. REV. 426, 430 (2013).

8. *Id.*

9. Michael Pollan, *The Food Movement, Rising*, N.Y. REVIEW OF BOOKS, June 10, 2010, http://www.nybooks.com/articles/archives/2010/jun/10/food-movement-rising /?pagination=false.

10. MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 11 (2006).

and the food movement is a way "to foster new forms of civil society."[11]

Activists, journalists, and researchers take Pollan's theories even further; for them, food choice expresses one's self-identity,[12] and the food movement is a political, communicative, and self-expressive act that is based in substantial part on consumers' desire to reconnect with food production and regain trust in the producers of their food.[13]

Food movement participants want to demonstrate their support for local farmers, communicate their positions, pro and con, on food-related laws and regulations, associate with like-minded people, and advocate locavorism.[14] Their advocacy for small food and against intrusive governmental regulations necessarily questions Big Food, seeks liberty, and creates social change.[15] But it is not just locavores who have historically prized small, local farmers. Over a century ago, the North Carolina Supreme Court recognized the value of small farmers in a vendor's licensing appeal. In North Carolina, the court held that public policy favored the farmer exception because it encouraged "the general raising of live stock by the small farmer, which will not only be profitable to the individual, but adds[s] to the aggregate wealth of the community."[16] This is not just old law and an old way of thinking; still on the books today are a number of state and federal statutes that explicitly value the small farmer and the family farm.[17]

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11. POLLAN, *supra* note 10.

12. Carole A. Bisogni et al., *Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice*, 34 J. NUTR. EDUC. & BEHAV., 128, 129 (2002).

13. *See generally, e.g.,* Bouvier, *supra* note 7, at 430; 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, 46-50 (2008); Jeffrey R. Follett, *Choosing a Food Future: Differentiating Among Alternative Food Options*, 22 J. AGRIC. & ENVTL. ETHICS 31, 33 (2009); Johnson & Endres, *supra* note 3, at 56-57; Molly Kate Bean, Consumer Support for Local and Organic Foods in Ohio (2008) (unpublished Ph.D. dissertation, The Ohio State University) (on file with The Ohio State University).

14. Bouvier, *supra* note 7, at 431; Follett, *supra* note 13, at 33; Johnson & Endres, *supra* note 3, at 57-58.

15. Follett, *supra* note 13, at 37, 42.

16. State v. Spaugh, 129 N.C. 564, 567, 40 S.E. 60, 61 (1901).

17. *See, e.g.*, 7 U.S.C. § 2266 (2012) ("Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation"); ALA. CODE § 2-6B-1 (1975); IOWA CODE § 175.4(10) (2013); ME. REV. STAT. ANN. tit. 7, § 1-A (2002 & Supp. 2012); MINN. STAT. ANN. § 500.24 (2010); S.D. CODIFIED LAWS § 47-9A-1 (2012) ("[t]he Legislature of the State of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state").

Locavores and other food movement participants do not want food from far away agribusinesses; they seek to buy their food locally and connect with the farmers who produced the food.[18] Buying locally allows them to meet and speak with those who grew their vegetables and raised their beef; one can hardly shake hands with someone at Kellogg's cereals or ask Mr. Dole about how he grew his pineapples.[19] In contrast, anyone at a farmers' market can walk up to the farmer and ask, before buying any food, how he grew his lettuce or how she raised her pigs. Learning about where their food came from empowers consumers to develop or regain their connection with their community and with their food, and helps them recover or even discover a sense of place.[20] Finally, it helps consumers gain or regain trust in their food's safety and quality. Traditionally, "perceptions of food quality were often the result of personal observation and social networks in the local community."[21] Industrial food made this impossible. But when a buyer can see the seller and ask her about her products, the buyer regains trust in his food.[22]

II. AN ARGUMENT FOR FOOD RIGHTS

This article will explore consumers' rights to purchase meat and poultry directly from the food's producer without mandatory governmental inspection. It expands former University of Nevada law student Kammi L. Rencher's recent proposition that food choice may deserve at least some degree of heightened constitutional protection.[23] Rencher suggested that health, religious expression, cultural expression, self-expression, and speech can explain a person's food choice, but did "not attempt to establish that food choice is a fundamental right."[24] I take the next step and demonstrate that: a) the consumer's desire to purchase and consume meat and poultry from the farmer who raised the animals, without governmental interference, are indeed statements of self-identity and self-expression and forms of political speech and political action that are aspects of our constitutionally protected liberty interests; and b) our national customs and practices of purchasing meat and poultry directly from the farmer who produced that food, without mandatory governmental inspection, is so deeply

18. Coit, *supra* note 13, at 48-50.
19. Johnson & Endres, *supra* note 3, at 92.
20. *Id.* at 50.
21. Bean, *supra* note 13, at 62.
22. Johnson & Endres, *supra* note 3, at 93.
23. Kammi L. Rencher, Note, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418, 420 (2012).
24. *Id.*

rooted in our nation's history and tradition that it should constitute a fundamental liberty right guaranteed under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.[25]

Although health, religious, and cultural expression may indeed be fundamental rights in the context of food choice, I do not make those arguments here.[26] The Supreme Court accepts as fundamental the rights to make decisions as to one's health care and the right of bodily integrity, but has not extended those rights beyond actual illnesses, diseases, or protecting against governmental desires to invade one's bodily integrity.[27] Accordingly, analysis of those rights, as well as the rights of religious and cultural expression, which involve a whole new ball of wax, are best explored in a separate article.

While American food regulation laws date back to the founding of the colonies and were surprisingly detailed in certain areas, a detailed review of these laws reveals that they were narrow in scope.[28] Until the twentieth century, colonial and state statutes focused on food packing and exporting, food adulteration, vendor licensing, and weights, measures, and assizes; food inspection was a secondary aim.[29] The comprehensive food safety laws as we know them today are a modern invention.[30] Thus, while state statutes regulated numerous aspects of the food sale transaction, they rarely affected consumers' rights to purchase food directly from the farmer, especially when the transaction occurred on the farm.[31] Most early state food inspection statutes applied only to food sold at municipal markets, food sold in barrels, or food sold to middlemen for resale elsewhere, either for export or at markets.[32] Until well into the twentieth century, farmers and food producers in most states remained free to sell the products of their farms directly to consumers without any government regulation.[33]

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25. It should be noted that Florida State University College of Law Professor Samuel R. Wiseman recently argued that food choice is not a fundamental right. While I respectfully disagree with Professor Wiseman, this article is not intended to be a rebuttal of Professor Wiseman's article. Instead, I will let my analysis of the legal issues speak for itself. Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 738 (2013).

26. Rencher, *supra* note 23, at 425-26, 431-37.

27. Deana Pollard Sacks, *Elements of Liberty*, 61 SMU. L. REV. 1557, 1580-82 (2008).

28. Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 35-44 (1984).

29. *Id.* at 39, 40.

30. *Id.* at 41.

31. *See infra* Section V.B.

32. *Id.*

33. *Id.*

Meat inspection statutes were no different. Before the twentieth century, almost all state meat inspection statutes applied only to cured meat packaged in barrels for export.[34] Some statutes required inspection of all meats packaged in barrels, whether for export or not.[35] Others set up voluntary inspection procedures on the theory that inspected and certified food would be more valuable in the marketplace than uninspected food.[36] Still other states required farmers to keep the hide of cattle that they slaughtered for market, but only a few states required mandatory inspections prior to the sale of food products such as beef and pork.[37] Even in the modern meat inspection era in the twentieth century, eighteen states had at one time or another explicitly excluded from otherwise all-encompassing inspection statutes meat slaughtered by the farmers who raised the animals or meat slaughtered in rural districts, where an inspector could not conveniently access the meat. The significance of this number is illustrated by the fact that only twenty-eight states even required inspection of all meat sold intrastate as late as 1967.[38] In fact, farm slaughtered exemption statutes were on the books of twelve states until the federal Wholesome Meat Act of 1967 mandated federal or state inspection of all meat slaughtered for sale for the first time. Poultry was even less regulated.[39] No state required inspection of poultry products prior to sale until well into the twentieth century.[40] The federal government required no poultry inspection until 1957.[41]

This article lays out my argument step by step. Section III will review the law of substantive due process, with emphasis on defining a fundamental right and attempting to make a claim for a new, as yet undeclared, fundamental right. Section IV defines my proposed right in a way that should meet the Supreme Court's restrictive specifications. Section V shows that the right to purchase meat and poultry from the farmer who raised the animals is deeply rooted in our national tradition. Section VI explains our constitutionally protected liberty rights and demonstrates that courts should consider food choice to be an aspect of liberty. Finally, Section VII provides a brief conclusion.

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34. *Id.*
35. *Id.*
36. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).
37. *See infra* Section V.B.
38. *Id.*
39. *See infra* Section V.E.
40. GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 98 (1963).
41. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968).

III. SUBSTANTIVE DUE PROCESS: HOW TO DEFINE A FUNDAMENTAL RIGHT

Substantive due process claims arise under the Fifth and Fourteenth Amendments to the Constitution.[42] The Fifth Amendment Due Process Clause applies to the federal government, and the Fourteenth Amendment Due Process Clause applies to state and local governments.[43] Substantive due process claims address whether the government's claimed deprivation of a person's life, liberty (including the right to privacy),[44] or property is justified by a sufficient purpose.[45] In order to determine whether the government's deprivation of one's life, liberty, or property is justified by a sufficient purpose, "one must first determine what kind of means-end scrutiny applies and, second, whether the deprivation is justified under that test."[46] If the deprivation infringes a fundamental right, the strict scrutiny test applies. If the deprivation infringes a non-fundamental right, the rational review test applies.[47] Under the strict scrutiny test, the government must prove that the infringement is necessary to further a compelling governmental interest. Under the rational review test, the citizen "normally has the burden of proving that the deprivation is not a rational means for furthering any valid government interest."[48]

Because the strict scrutiny test is far more favorable to the litigant objecting to governmental action (it has been described as "fatal" to the government's case),[49] plaintiffs in constitutional rights litigation naturally seek to show that the right at issue is a fundamental right, which would re-

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42. The Fifth Amendment Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment Due Process Clause states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

43. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625 n. 1 (1992).

44. Jacobson v. Tahoe Reg'l Planning Agency, 558 F.2d 928, 936 (9th Cir. 1977); Aznavorian v. Califano, 440 F.Supp. 788, 799 n. 11 (S.D. Cal. 1977) (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Providence Journal Co. v. Fed. Bureau of Investigation, 460 F.Supp. 762, 771 n. 27 (D.R.I. 1978); United States v. Hubbard, 650 F.2d 293, 304-305, n. 38-39 (D.C. Cir. 1980); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

45. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

46. Galloway, *supra* note 43, at 627.

47. *Id.*

48. *Id.* at 627-28.

49. Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1057 (1990).

quire application of the strict scrutiny test. The critical issue in substantive due process claims is thus how to define a fundamental right.

The Supreme Court has employed two approaches for addressing fundamental rights claims.[50] The first approach evaluates the claimed right on the basis of "personal dignity and autonomy,"[51] which is also called the theory of "reasoned judgment."[52] Under this approach, "the Court itself evaluates the liberty interest of the individual and weighs it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right."[53] The Court used this approach most notably in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an abortion case, in which it proclaimed, "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[54] *Casey* held that "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[55] The Court has most recently approved of *Casey* in the 2003 gay rights case of *Lawrence v. Texas*.[56]

The second, more restrictive, approach looks to the "[n]ation's history and legal tradition."[57] The Court notably employed this approach in the 1934 case of *Snyder v. Massachusetts*, which held that "[t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless, in so doing, it offends some principle of justice so rooted in the traditions and

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50. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 476 (D.C. Cir. 2006), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007).

51. *Abigail Alliance for Better Access to Developmental Drugs*, 445 F.3d at 476 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

52. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66-67 (2006).

53. *Id.*

54. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

55. *Id.* at 849.

56. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Conkle, *supra* note 52, at 67.

57. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 478 (D.C. Cir. 2006) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007). It should also be noted that the reasoned judgment approach also considers history and tradition. The Court in *Roe v. Wade* used this approach, and "spent a substantial portion of its opinion exploring tradition." Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 862 n. 56 (1991).

conscience of our people as to be ranked as fundamental."[58] The Court best explained the history and tradition approach in the 1997 right to die case, *Washington v. Glucksberg*, which intoned, "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices" in order to determine whether the "asserted right has any place in our Nation's traditions."[59] In order to prove that a supposed right has a place in American history and traditions, a plaintiff must: a) provide "a careful description of the asserted fundamental liberty interest;" and b) show that the alleged fundamental right is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[60]

While the Court has been traditionally "reluctant to expand the concept of substantive due process,"[61] *Glucksberg* did leave the door open for new fundamental rights claims by acknowledging that the "outlines" of the liberty protected by the Fourteenth Amendment have never been "fully clarified" and that they may never be "capable of being fully clarified."[62]

The Court has therefore left constitutional rights advocates with the problem of two independent, incompatible approaches to substantive due process claims. However, because *Lawrence* interpreted *Casey* as applying strictly to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," the cautious food rights advocate may not want to advocate the *Casey* approach for rights other than those specifically identified in *Casey*.[63] Consequently, the soundest, most practical solution is to employ the test that allows for the broadest definition of a fundamental right, but also defines the right in the way that has the lowest chance of being overruled at the appellate level. Practically, this means following *Glucksberg*; for the past decade and a half, the lower courts have been "overwhelmingly relying on *Glucksberg* and ignoring *Lawrence*."[64] While the *Casey* "reasoned judgment" approach

58. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

59. Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (citations omitted).

60. *Id.* at 720-21 (citations and internal punctuation omitted).

61. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

62. *Glucksberg*, 521 U.S. at 722.

63. Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); *see also* URI Student Senate v. Town Of Narragansett, 707 F.Supp.2d 282, 291 (D.R.I. 2010), *aff'd*, 631 F.3d 1 (1st Cir. 2011) (stating that the types of choices that are "central to [*Casey's*] personal dignity and autonomy" are "personal decisions" that relate to "marriage, procreation, contraception, family relationships, child rearing, and education") (citation omitted).

64. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 476 n.8 (D.C. Cir. 2006) (noting that other circuits have either treated the *Glucksberg* analysis as controlling after *Lawrence* or viewed *Lawrence*

is certainly more open to new fundamental rights claims than *Glucksberg*, it is a red herring. As will be shown in Section V, *infra*, the consumer's right to purchase meat and poultry directly from the farmer who raised the animals is indeed deeply rooted in American history and tradition and so fits quite easily into the *Glucksberg* pigeonhole.

A. *Creating a Careful Description*

The food rights advocate's first problem under *Glucksberg* is to provide a "careful description" of the alleged fundamental right. But what is a "careful description?" Unfortunately, the Court "has not settled on how precisely formulated the right must be."[65] *Glucksberg* did not define "careful description," instructing only that the proposed right be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[66] Nor has the Court offered much additional guidance. At the most restrictive end of the continuum, Justice Scalia argued in a footnote to his plurality opinion in an earlier case, *Michael H. v. Gerald D.*, that the claimed right should be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[67] However, this footnote, which was joined by only one other Justice, Chief Justice Rehnquist, the author of *Glucksberg*, was immediately controversial. Justices O'Connor and Kennedy, who later authored *Casey*'s plurality opinion, concurred in the opinion, but rejected the footnote, contending that:

> [t]his footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area . . . On occasion, the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available.[68]

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as not, properly speaking, a substantive due process decision) (citations and punctuation omitted); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1527 (2008) (citing Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 411 (2006)).

65. *Abigail Alliance for Better Access to Developmental Drugs*, 445 F.3d at 477.

66. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

67. Michael H v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

68. *Id.* at 132.

Three years later, they reiterated their disapproval in *Casey*.[69] More recently, a 2003 case reaffirmed only that "vague generalities, such as 'the right not to be talked to [in a Fifth Amendment case],' will not suffice."[70] This dispute is not just an ivory tower argument; it has practical implications for the food rights advocate. As Tribe and Dorf succinctly stated, "[t]he more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection."[71]

The lower courts have been slightly more instructive. The Seventh Circuit termed a "careful description" as "one that is specific and concrete, one that avoids sweeping abstractions and generalities."[72] The court's duty is to "carefully define the contested right, employing sufficient specificity to ground the right in a concrete application and sufficient generality to connect the right to its animating principles."[73] The Eleventh Circuit advised that grounding the right in a concrete application means that the claimed right "be dictated 'by the precise facts' of the immediate case."[74] The District of Columbia Circuit views the careful description requirement "as a means of constraining the inadvertent creation of rights that could fall within the scope of loosely worded descriptions and thus threaten the separation of powers."[75]

While definitions are helpful, examples are even better. In a school immunization case, the court noted that "whether a parent has a fundamental right to decide whether her child should undergo a medical procedure such as immunization," was a right too broadly claimed.[76] The court reformatted the "careful description" by stating that, "the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school."[77] Another example comes from a convicted sex

69. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).

70. Chavez v. Martinez, 538 U.S. 760, 776 (2003).

71. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

72. Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).

73. *Id.* (quoting Hutchins v. D.C., 188 F.3d 531, 554 (D.C. Cir. 1999)) (Rogers, J., concurring in part and dissenting in part).

74. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004).

75. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 445 F.3d 470, 478 (D.C. Cir. 2006); *see also Williams*, 378 F.3d at 1240 (noting that "the requirement of a 'careful description' is designed to prevent the reviewing court from venturing into vaster constitutional vistas than are called for by the facts of the case at hand").

76. Boone v. Boozman, 217 F.Supp.2d 938, 956 (E.D. Ark. 2002).

77. *Id.*

offender's appeal of his banishment from public parks in his city. A "generalized right to movement" was too broad; more careful was "a right to enter the parks to loiter or for other innocent purposes."[78] A more restrictive example comes from a municipal employment rights case stemming out of a policewoman's affair with another police officer, where the Tenth Circuit rejected "a right to private sexual activity" in favor of the right to engage in "off-duty [sexual] conduct with a fellow officer at a training conference paid for in part and supported by the department."[79] Finally, *Glucksberg* itself provided an excellent example. The Supreme Court rejected the Court of Appeals' "liberty interest in determining the time and manner of one's death" in favor of a more specific "right to commit suicide which itself includes a right to assistance in doing so."[80]

Boone, *Doe*, and *Glucksberg* all illustrate how a reasonably narrow – but not too narrow – right can be constructed out of the facts of the case. In contrast, *Seegmiller* dictates the opposite conclusion. Such a constricted "right" is impossible to defend or substantiate, and in fact the Tenth Circuit quickly found that the petitioner failed to show that this "right" is deeply rooted in American history and tradition.[81]

B. *Proving a Deeply Rooted Tradition*

The second *Glucksberg* factor requires proof that the right in question is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty."[82] The nation's history, legal traditions, and practices include not just American legal traditions, but also the American philosophical and cultural heritages.[83] Courts have, on occasion, reviewed our nation's history, traditions, and practices extensively. For example, *Glucksberg* analyzed seven hundred years of Anglo-American history on suicide and assisting suicide going back to the thirteenth century.[84] Just a few years ago, in the Second Amendment case of *McDonald v. City of Chicago*, the Supreme Court examined the Anglo-American historical and legal traditions of gun rights and usage dating back to the seventeenth century.[85] In *Abigail Alliance II*, a drug regulation case, the District of Columbia

78. Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).
79. Seegmiller v. LaVerkin City, 528 F.3d 762, 770 (10th Cir. 2008).
80. Washington v. Glucksberg, 521 U.S. 702, 722-23 (1997).
81. *Seegmiller*, 528 F.3d at 770.
82. *Glucksberg*, 521 U.S. at 711.
83. *Glucksberg*, 521 U.S. at 711.
84. *Id.* at 711-719.
85. McDonald v. City of Chicago, 130 S.Ct. 3020, 3036-42 (2010).

Circuit explored the Anglo-American tradition of drug regulation going back to the fifteenth century.[86]

However, too much historical evidence or unrelated historical evidence is as bad as not enough historical evidence. For example, in *Williams*, a case involving the right to sell sexual devices, the Eleventh Circuit criticized the district judge for too much historical analysis as a result of defining the right too broadly. The district judge's first problem was defining the question too broadly, as a "fundamental right to sexual privacy,"[87] which the Court of Appeals rejected, instead defining the right as a right to use sexual devices.[88] This overbroad description led directly into the district judge's second problem, too much history. The district judge provided a sixteen page study of American sexual practices and laws from colonial times to the present day,[89] which the Court of Appeals dismissed as an "irrelevant exploration of the history of sex in America."[90] The Court of Appeals held that the "inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of sexual devices within that history and tradition."[91] *Williams*' message is that the historical analysis in a fundamental rights question should match up perfectly with the definition of the right. The parties and the court should only analyze the American history and traditions that directly support the carefully described right in question.

C. *The Problem of Traditionally Unregulated Rights*

A challenge in discerning our national history and traditions involves the distinction, if any, between a right that has been traditionally protected and one that has been merely "traditionally unregulated."[92] Traditionally protecting a right means that the government has affirmatively acted to protect the right. A traditionally unregulated action is the opposite; the government has neither protected, nor prohibited, the action. Thus, showing "a lack of government interference throughout history" with citi-

86. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 495 F.3d 695, 703-05 (D.C. Cir. 2007); *see also* Nordyke v. King, 563 F.3d 439, 451 (9th Cir. 2009) (stating that "[w]e must trace this right, as thus described, through our history from the Founding until the enactment of the Fourteenth Amendment").

87. Williams v. Pryor, 220 F.Supp.2d 1257, 1277 (N.D. Ala. 2002), *rev'd sub nom.* Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).

88. *Williams*, 378 F.3d at 1242.

89. Williams v. Pryor, 220 F.Supp.2d 1257, 1277-1294 (N.D. Ala. 2002).

90. Williams v. Attorney Gen. of Ala., 378 F.3d 1242 (11th Cir. 2004).

91. *Id.* at 1243.

92. Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1489 (2008).

zens' assertion of a right is "some evidence" that the right is "deeply rooted," but, for two Courts of Appeals, was not itself enough proof.[93] In *Abigail Alliance II*, the District of Columbia Circuit recently pointed out that:

> [a] prior lack of regulation suggests that we must exercise care in evaluating the untested assertion of a constitutional right to be free from new regulation. But the lack of prior governmental regulation of an activity tells us little about whether the activity merits constitutional protection: "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise."[94]

Indeed, creating constitutional rights to be free from regulation based solely upon a prior lack of regulation would undermine much of the modern administrative state, which, like drug regulation, has increased in scope as changing conditions have warranted.

In *Williams*, the Eleventh Circuit criticized the district court for accepting as a deeply rooted tradition what the Eleventh Circuit considered to be traditionally unregulated actions. "[R]ather than look for a history and tradition of *protection* of the asserted right, the district court [wrongly] asked whether there was a history and tradition of state *non-interference* with the right."[95] For the Court of Appeals, the district court's key findings, "the relative scarcity of statutes explicitly banning sexual devices and the rarity of reported cases of sexual-devices prosecutions . . . essentially inverted *Glucksberg's* history and tradition inquiry."[96] Instead of showing "that the right to use sexual devices is 'deeply rooted in this Nation's history and tradition,' [the district court] looked for a showing that proscriptions against sexual devices are deeply rooted in history and tradition."[97] However, one Eleventh Circuit judge has powerfully argued, albeit in dissent, that the argument that "the panel misreads *Glucksburg* to say the only relevant historical inquiry is whether there has been a tradition of laws affirma-

93. Abigail Alliance for Better Access to Developmental Drugs v. C. Von Eschenbach, M.D., 495 F.3d 695, 706 (D.C. Cir. 2007).

94. *Id.* at 707 (quoting U.S. v. Morton Salt Co., 338 U.S. 632, 647 (1950)).

95. Williams v. Attorney Gen. of Ala., 378 F.3d 1242 (11th Cir. 2004) (emphasis in original).

96. *Id.* at 1244.

97. *Id.*

tively protecting the conduct at issue."[98] That judge, Judge Rosemary Barkett, argued that the Eleventh Circuit panel "made up" that requirement, which was "entirely unsupported by any Supreme Court case," and that, if "the Supreme Court required affirmative governmental protection of an asserted liberty interest, all of the Court's privacy cases would have been decided differently."[99]

An analogous way to view this issue is through federal preemption law. In *Freightliner Corp. v. Myrick*,[100] a personal injury case involving faulty truck brakes, the Supreme Court held that federal highway safety laws did not preempt state trucking regulations and thus permitted the plaintiffs' suit to proceed.[101] A federal law, the National Traffic and Motor Vehicle Safety Act, expressly preempted state law whenever a Federal motor vehicle safety standard was in effect.[102] The predecessor to the National Highway Traffic Safety Administration (NHTSA) had issued regulations concerning truck brakes, known as Standard 121, but a Court of Appeals suspended the standard because it "was neither reasonable nor practicable."[103] The NHTSA amended Standard 121, but never took final action to reinstate the standard, and thus it remained suspended.[104] Despite the fact that Standard 121 was suspended, Freightliner argued that "the absence of regulation itself constitutes regulation."[105] The Court rejected that contention, holding that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes."[106] The Court justified its conclusion by noting that the NHTSA did not affirmatively decide anything. "Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations."[107]

The logic of *Abigail Alliance*, *Williams*, and *Freightliner* places no roadblocks in the food advocate's way. If legislative "affirmative action" is the difference between a traditionally protected and a traditionally un-

98. Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1308 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing *en banc*).

99. *Id.* at 1309; *see also id.* at 1309 n.49 (noting that "there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause").

100. Freightliner Corp. v. Myrick, 514 U.S. 280, 284 (1995).

101. *Id.*

102. *Id.* at 284.

103. *Id.* at 285 (quoting Paccar, Inc. v. NHTSA, 573 F.2d 632, 640 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978)).

104. *Id.* at 286.

105. *Id.*

106. *Id.* at 286.

107. *Id.* at 286-287.

regulated right, review of state and federal legislative action with respect to farm slaughtered meat and poultry shows that state legislatures and Congress have acted affirmatively for hundreds of years to protect farm to consumer transactions.[108] As will be shown in Section V, *infra*, the American colonies and states had a long tradition of regulating food safety dating back to 1641.[109] For centuries, states regulated many different aspects of food sales, but always carefully left farm to consumer transactions alone.[110] Such carefully considered inaction was clearly an affirmative decision to not regulate farm to consumer transactions. Even when states began requiring meat inspection at the turn of the twentieth century, they often left farm to consumer transactions unregulated.[111] And, when Congress began regulating food safety in the late nineteenth century, it followed suit and also left farm to consumer transactions unregulated until as late as 1967, only forty-seven years ago.[112] Thus, for the vast majority of our nation's history, our government has studiously avoided regulating farm to consumer meat and poultry sales even though it regulated many other aspects of food safety.[113]

IV. DEFINING THE PROPOSED RIGHT CAREFULLY

Defined broadly, we are talking about the individual's right to purchase and consume food of her choice. While that argument may work in philosophy, it is too broad for constitutional law, and especially for constitutional law as marked by *Glucksberg*. Because the right to food choice must be defined very narrowly in order to satisfy *Glucksberg*, a right to purchase and consume food of one's choice is far too sweeping and general.[114] More to the point is an individual's right to purchase food of her choice directly from the producer or grower of that food. But even that is too broad for *Glucksberg*; the category of "food" includes many different types of food, all of which are grown or produced in different ways and so

108. *See infra* Sections V.C & V.E.

109. Hutt & Hutt, *supra* note 28, at 35.

110. Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 252 (1992).

111. *See infra* Section V.B.

112. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

113. Washington v. Glucksberg, 521 U.S. 702, 723 (1997) (stating that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it") (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)); *see also id.*; Walz v. Tax Comm'n of New York, 397 U.S. 664, 678 (1970) (an "unbroken practice . . . openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside").

114. *See generally, e.g.*, Doe v. City of Lafayette, 377 F.3d 757, 769 (7th Cir. 2004).

have different means of preparation for sale and different safety concerns. In order to keep the right as narrow as possible, the right to purchase food should be limited to food that is grown or produced similarly. Meat and poultry are more similar than vegetables. Meat and poultry are live animals that must be raised, slaughtered, and then kept cold so that they do not spoil. Vegetables certainly have safety issues, but at the very least, they do not need to be slaughtered, and some vegetables do not need to be kept cold to avoid spoilage. For this reason, the consumer's right to purchase vegetables of her choice directly from the farmer should be treated separately.

A second issue is that, because we are concerned with purchasing food free from governmental interference, the proposed right must include that limitation. Finally, because we are also talking about farm slaughtered meat and poultry, that qualification must also be included in the proposed right.

Thus, the narrowest and most reasonable definition of our proposed right that is based on the Nation's historical traditions is an individual's right to purchase meat and poultry directly from the person who raised and participated in the slaughtering of that meat or poultry without mandatory governmental inspection. Such a restricted, focused definition satisfies *Glucksberg's* requirement that one must "exercise the utmost care whenever [breaking] new ground" in substantive due process litigation,[115] as well as the requirement that the careful description be dictated by the precise facts of the case.[116]

V. THE RIGHT TO PURCHASE MEAT AND POULTRY DIRECTLY FROM THE FARMERS WHO RAISED THE ANIMALS, WITHOUT GOVERNMENTAL INSPECTION, IS DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION

The federal government and a majority of the states have traditionally preserved the consumer's right to purchase meat and poultry from the farmer without government inspection throughout the vast majority of American history.[117] From the Pilgrims' landing at Plymouth Rock in 1620 until 1897, almost three centuries later, no American colony or state had ever legally required mandatory inspection of meat or poultry sold by a farmer on the farm directly to the consumer.[118] By 1907, only four states had such requirements for meat.[119] As late as 1967, only twenty-eight

115. *Glucksberg*, 521 U.S. at 720.
116. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004).
117. *See infra* Sections V.B & V.C.
118. *See infra* Section V.B.
119. 1905 Ariz. Sess. Laws 65, 89 (codified as REV. CODE ARIZ. § 3739 (1913)); REV. LAWS MASS. ch. 75, § 105 (1901)); 1897 Okla. Sess. Laws 237, 246 (codified as

states had passed laws requiring such inspections, and eleven of those states specifically exempted farm slaughtered meat from mandatory inspection.[120] Thus, only forty-five years ago, a majority of states still had no laws requiring inspection of farm slaughtered meat. Nor did the federal government enact any such requirements until Congress passed the Wholesome Meat Act in 1967, 191 years after the Revolution.[121]

Laws requiring inspection of poultry were even fewer and further between. Congress passed no national poultry inspection law until 1957.[122] By 1968, when Congress passed the more comprehensive Wholesome Poultry Products Act,[123] only twelve states had mandatory poultry inspection laws, and only four of those had active inspection programs.[124]

Analysis of state meat inspection laws shows that there can be no question that the right to purchase meat and poultry directly from the farmer is deeply rooted in American history and tradition. American history includes centuries of direct farm to consumer purchases of meat and poultry without governmental inspection. American legal traditions include acknowledging the value of the local farm and ensuring the continuation of farm to consumer purchases of meat and poultry without governmental inspection. [125]

A. *A Brief History of the Meat Trade: From the Local Farmer to the National Meatpacking Industry*

1. The Beginnings

From the earliest days of the American colonies until after the Civil War, consumers slaughtered their own meat or purchased it locally, either directly from the farmer or from a local butcher.[126] The slaughtered meat

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REV. STAT. OKLA. ch. 3, (37) §19 (1903)); 1907 Utah Laws 223 (codified as COMP. LAWS UTAH §1990 (1917)).

120. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).

121. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

122. Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as 21 U.S.C. § 451 (1958)).

123. *Id.*

124. *Id.*; *see also* WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968).

125. *See generally* State v. Spaugh, 129 N.C. 564, 567, 40 S.E. 60, 61 (1901); Follett, *supra* note 13 at 37, 42.

126. *See generally, e.g.*, RUDOLF A. CLEMEN, THE AMERICAN LIVESTOCK AND MEAT INDUSTRY 3 (1966); GARY FIELDS, TERRITORIES OF PROFIT: COMMUNICATIONS, CAPITALIST DEVELOPMENT, AND THE INNOVATIVE ENTERPRISES OF G.F. SWIFT AND DELL COMPUTER 92 (2004); George K. Holmes, *The First American Farmers*, in THE

trade in those days was so rudimentary as to not even be considered a formal industry.[127] As historian Charles W. McCurdy wrote, "[w]hen fresh meat was available, consumers knew it had been slaughtered nearby."[128] Until the second half of the nineteenth century, slaughtered beef remained a local product, regardless of how it was slaughtered; it rarely traveled more than fifteen miles to its ultimate destination.[129]

Cattle and hogs grazed all spring and summer, and were slaughtered in the fall.[130] Livestock could only be slaughtered in the fall because the flesh was not suitable for butchering in the spring, and, in the summer, warm temperatures created a high risk of the meat spoiling before it was cured.[131] Because fresh meat did not last long, farmers would it eat it quickly, share it with their neighbors, sell it locally for immediate consumption, or cure and pack it for storage and sale.[132] Once the slaughtering season ended, there would be no more fresh meat until the next fall, and families ate cured, packed meat or no meat at all. Prior the development of refrigeration in the early 1870's, the only way to store beef was to cure it and pack it in barrels.[133] The packed beef would be sold locally or exported, either to other colonies or abroad.[134]

2. The Modern Meat Industry Changes the Way Americans Purchase Meat

The modern, industrial food era began in the second half of the nineteenth century. New food products and technologies appeared, which allowed items such as baking powder, oleomargarine, canned foods, and

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MAKING OF AMERICA (Robert M. La Follette ed. 1907); Joanne Bowen, *To Market, to Market: Animal Husbandry in New England*, 32 HIST. ARCHAEOLOGY 137, 141 (1998); Karen J. Friedmann, *Victualling Colonial Boston*, 47 AGRIC. HIST. 189, 197-204 (1973); Elmer R. Kiehl & V. James Rhodes, *Historical Development of Beef Quality and Grading Standards* 728 U. MO. C. AGRIC. RES. BULL. 1, 10-11 (1960). Sarah F. McMahon, *A Comfortable Subsistence: The Changing Composition of Diet in Rural New England, 1620-1840*, 42 WM. & MARY Q. 26, 34-37 (1985).

127. FIELDS, *supra* note 126, at 96.

128. Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875- 1890*, 38 J. ECON. HIST. 631, 643 (1978).

129. FIELDS, *supra* note 126, at 96.

130. *Id.*; SUSANNE FREIDBERG, FRESH: A PERISHABLE HISTORY 53 (2009); McMahon, *supra* note 126, at 36.

131. McMahon, *supra* note 126, at 36.

132. CLEMEN, *supra* note 126, at 25, 92; FREIDBERG, *supra* note 130, at 53; McMahon, *supra* note 126, at 35.

133. CLEMEN, *supra* note 126, at 8; McMahon, *supra* note 126, at 34-35.

134. CLEMEN, *supra* note 126, at 3.

chemical preservatives to be shipped from afar without fear of spoilage.[135] The nation underwent wrenching changes that affected the food industry and food safety. As a result of the Civil War, the country began to industrialize and urbanize.[136] The new national railroad network allowed more food to be transported into the growing cities.[137] The railroads, as well as the development of new lands in the West, where livestock could be pastured, and the invention of the refrigerated boxcar, allowed a national beef industry to develop and thrive in the 1870's.[138] For the first time, ranchers and meatpackers could ship live cattle and dressed meat long distances. Unfortunately, these developments came with a dark side; the large Midwestern meatpackers[139] centered in Chicago now had the power, which they used collusively to destroy the traditional, local meat trade.[140]

The newly industrializing and urbanizing cities became overcrowded, increasing the spread of disease,[141] and ultimately leading to federal food regulation.[142] The increased urbanization also damaged the relationship between the consumer and the food producer; consumers were now increasingly buying products about which they knew little.[143] With the loss of the consumer's relationship with the food producer came a loss of trust. This new dependence on impersonal markets "eroded consumers' traditional methods of identifying quality food, beverage, and drug products," which was the connection with the local producer or seller.[144] But even in-

135. Dennis R. Johnson, *The History of the 1906 Pure Food and Drugs Act and the Meat Inspection Act*, 37 FOOD DRUG COSM. L.J. 5, 6 (1982); Marc T. Law, *The Origins of State Pure Food Regulation*, 63 J. ECON. HIST. 1103, 1105 (2003) [hereinafter Law, *Origins*]; MARC T. LAW, HISTORY OF FOOD AND DRUG REGULATION IN THE UNITED STATES, http://eh.net/encyclopedia/history-of-food-and-drug-regulation-in-the-united-states/ (last visited Dec. 26, 2013) [hereinafter Law, *History*].

136. Johnson, *supra* note 135, at 5.

137. FIELDS, *supra* note 126, at 98; Peyton Ferrier & Russell Lamb, *Government Regulation and Quality in the U.S. Beef Market*, 32 FOOD POL'Y 84, 87 (2007); Johnson, *supra* note 135, at 5.

138. CLEMEN, *supra* note 126, at 6; Ferrier & Lamb, *supra* note 137, at 86.

139. CLEMEN, *supra* note 126, at 3 (noting that the term "packing" originally meant to cure and smoke meat for local use during the winter).

140. *Id.* at 173, 225; FIELDS, *supra* note 126, at 92, 95; Ferrier & Lamb, *supra* note 137, at 87; McCurdy, *supra* note 128, at 643.

141. Johnson, *supra* note 135, at 6.

142. Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 21-22 (1985).

143. *Id.* at 20; Johnson, *supra* note 135, at 6; Law, *Origins*, *supra* note 135, at 1105; Law, *History*, *supra* note 135.

144. Barkan, *supra* note 142, at 20.

to the twentieth century, farmers continued to sell slaughtered animals directly to the consumer.[145]

B. *Meat Inspection Under Colonial and State Law*

1. The Earliest Days

Much has been written about the ubiquity of colonial and state food regulations prior to the modern, federal food regulation era,[146] but the earliest colonial food safety laws were "largely designed to protect colonial trade."[147] Dating back to 1641,[148] these laws focused on inspection of exports, food adulteration, and weights and measures.[149] Just about every colony and state regulated food to some degree.[150] Nevertheless, despite the occasional food adulteration law, in those days, as one historian put it, consumers "were their own food and drug inspectors."[151] After the Revolution, the majority of early state food safety laws continued to focus on the export trade,[152] requiring that the merchant submit the product for inspection and repacking before export.[153]

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145. LOUIS D. HALL ET AL., U.S. DEP'T OF AGRIC., MEAT SITUATION IN THE UNITED STATES, PART V, METHODS AND COST OF MARKETING LIVE STOCK AND MEATS 5, 8, 60 (1916), *available at* https://ia601809.us.archive.org/26/items/meats ituationinu11unit_2/meatsituationinu11unit_2.pdf.

146. See, *e.g.*, ALBERT A. GIESECKE, AMERICAN COMMERCIAL LEGISLATION BEFORE 1789 74-80 (1910); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 84-112 (1996); Hutt & Hutt, *supra* note 28, at 35-44; Wallace F. Janssen, *America's First Food and Drug Laws*, 30 FOOD DRUG COSM. L.J. 665, 666-69 (1975); Arthur L. Jensen, *The Inspection of Exports in Colonial Pennsylvania*, 78 PENN. MAG. HIST. & BIOGRAPHY 275, 276-77 (1954); Law, *Origins*, *supra* note 135, at 1103.

147. Hutt & Hutt, *supra* note 28, at 38.

148. *Id.* at 35.

149. GIESECKE, *supra* note 146, at 75; Hutt & Hutt, *supra* note 28, at 38-39; Janssen, *supra* note 146, at 667; Jensen, *supra* note 146, at 276 (stating that "[n]o economic legislation of the eighteenth century was more characteristic than the attempt to maintain the quality of exports by means of compulsory inspection laws").

150. *See* GIESECKE, *supra* note 146, at 74-80; NOVAK, *supra* note 146, at 88-89.

151. Janssen, *supra* note 146, at 665.

152. Hutt & Hutt, *supra* note 28, at 38-39.

153. Jensen, *supra* note 146, at 277-278.

2. Early State Meat Inspection Statutes

Using the HeinOnline databases,[154] I researched colonial and state food inspection statutes prior to the enactment of the comprehensive 1907 Meat Inspection Act to determine whether they affected farm to consumer sales of fresh meat or poultry in any way. This search revealed that, while many states had some type of meat inspection statute, these statutes typically did not affect direct farm to consumer meat purchases. The statutes fell into a number of categories. First, there were the meat inspection statutes that applied only to exports.[155] Second, while some states did require inspection of intrastate meat sales, they almost invariably governed only cured meat that was sold in barrels.[156] The third category consisted of inspection statutes that applied only to public markets.[157] The fourth category required only inspection of the slaughtered animal's ears and hide.[158] A fifth category provided for mandatory meat inspection, but only for meat sold in urban areas.[159] Sixth were the four states that passed mandatory meat inspection laws in the late 1880's, however, these statutes were not based on safety concerns. Rather, these laws were passed solely on economic grounds, and the Supreme Court almost immediately held these statutes to be unconstitutional in 1890, as will be discussed in Section V.C.2, *infra*.

Only the following four states and territories required either antemortem or postmortem inspection, or both, of all meat, fresh or cured, sold within the state by 1907: a) Arizona;[160] b) Massachusetts;[161] c) Oklaho-

154. HeinOnline has two important databases of historical state statutes. The first is its Session Laws Library, which "contains exact replications of the official bound session laws of all fifty states" back to inception. HEINONLINE, SESSION LAWS LIBRARY, http://heinonline.org/HeinDocs/DigitalSessionLaws.pdf (last visited Dec. 26, 2013). The second is the HeinOnline State Statutes: A Historical Archive, which contains superseded statutes for all fifty states going back to 1717. HEINONLINE STATUTES, A HISTORICAL ARCHIVE, http://heinonline.org/HOL/Welcome?collection=ssl (last visited Dec. 26, 2013). These databases give a nearly complete picture of state and colonial laws going back to the seventeenth century.

155. *See, e.g.*, Act to Regulate the Inspection of Beef and Pork, ch. CXLVIII (codified as 1821 Me. Laws 499).

156. *See, e.g.*, An Act to Provide for Inspecting Pork and Beef, 1840 Mo. Laws 92.

157. NOVAK, *supra* note 146, at 97.

158. *See, e.g.*, 1895 Tex. Rev. Civ. Stat. art. 4949.

159. *See, e.g.*, 1889 Ind. Acts 150 (codified as IND. CODE § 8145 (1881)), *invalidated by* State v. Klein, 126 Ind. 68, 25 N.E. 873 (1890); 1901 Mont. Laws 65 (codified as MONT. CODE ANN. §§ 1540-43 (1907)), *repealed by* 1921 Mont. Laws 582.

160. 1905 Ariz. Sess. Laws 65, 89 (codified as ARIZ. REV. STAT. § 3739 (1913)).

161. MASS. GEN. LAWS ch. 75, § 105 (1901).

ma;[162] and d) Utah.[163] This left forty-four states and territories with no comprehensive mandatory inspection requirements at that time.[164]

States remained reluctant to require comprehensive meat inspection until well into the twentieth century. Even as late as 1967, the year Congress enacted the Wholesome Meat Act, which required inspection of intrastate meat sales for the first time, only twenty-eight states had mandatory antemortem and postmortem meat inspection laws.[165] Moreover, at least six of those states had only passed their laws within the previous six years.[166] By 1967, about 15% of commercially slaughtered animals and 25% of commercially processed meat food products were sold intrastate, and so they were still not federally or state inspected to a significant degree.[167]

3. Meat Inspection: The Exemptions

Many states had exemptions in their meat inspection statutes large enough to drive a truck through. The statutes featured two types of exemptions: a) the farm slaughtered meat exemption; and b) the rural district, or "no inspector available" exemption. The ubiquity of the farm slaughtered exemption shows that many state legislatures had carefully considered the need to regulate meat sales, but affirmatively decided that the safety of farm slaughtered meat meant that it did not warrant regulation.[168]

The farm slaughtered exemption typically exempted all meat slaughtered by a farmer from otherwise mandatory state meat inspection. At least fourteen states had enacted such exemptions over the years. Of the twenty-eight states with mandatory meat inspection laws in 1967, twelve had farm or other type of local slaughtered exemption.[169] These statutes

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162. 1897 Okla. Sess. Laws 237, 246 (codified as OKLA. STAT. tit. 3, § 19 (1903)).

163. 1907 Utah Laws 223 (codified as UTAH CODE ANN. § 1990 (West 1917)).

164. South Dakota passed a comprehensive mandatory meat inspection law in 1905, but repealed it two years later. 1905 S.D. Sess. Laws 62, *repealed by* 1907 S.D. Sess. Laws 80.

165. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 4 (1967).

166. 1967 Ark. Acts 761; 1965 Iowa Acts 264; 1967 Mo. Laws 371; 1967 Nev. Stat. 1350; 1961 N.C. Sess. Laws 900; 1966 Vt. Acts & Resolves 572.

167. FEDERAL MEAT INSPECTION ACT, H.R. REP. NO. 90-653, at 2 (1967).

168. Freightliner Corp. v. Myrick, 514 U.S. 280, 286 (1995).

169. California (CAL. AGRIC. CODE § 307 (Deering 1933), *as amended by* 1963 Cal. Stat. 1223); Illinois (1959 Ill. Laws 1944); Indiana (1967 Ind. Acts 1104); Iowa (1965 Iowa Acts 264); Michigan (MICH. COMP. LAWS § 327.111 (1948)); Missouri (1967 Mo. Laws 371); North Carolina (1937 N.C. Sess. Laws 459 and 1961 N.C. Sess. Laws 900); Oregon (1961 Or. Laws 156); Utah (1907 Utah Laws 223 (codified as UTAH CODE ANN. § 3-10-68 (1943), *as amended by* 1957 Utah Laws 24 (limiting consumption of meat to the farmer's own family)); Vermont (1966 Vt. Acts & Resolves 572); Wash-

were passed at various times from 1901 to as late as just months before the passage of the federal Wholesome Meat Act in 1967, and were from two of the top three cattle producing states in 1966, Iowa and California, and four of the top nine.[170] Two other states, Idaho and Montana, had passed meat inspection acts with farm slaughtered exemptions that were repealed or superseded before World War II.[171] Indiana also had a prior farm slaughtered exemption that was included in a state inspection statute that the Supreme Court invalidated in *Minnesota v. Barber* in 1890, as will be discussed in Section V.C.2, *infra*.[172] Thus, of all of the states that had even passed comprehensive meat inspection statutes prior to the passage of the comprehensive 1967 Wholesome Meat Act, fully half of them had specifically exempted farm or other locally slaughtered meat.

The second type of exemption was the rural district or "no inspector available" exemption. In states with this exemption, if no inspector was available or if an inspector could not conveniently get to the farm in question to inspect the meat, the farmer need not have the meat inspected before sale. Four states had enacted such statutes over the years: a) Colorado; b) Florida; c) Montana; and d) Oklahoma.[173]

That the American colonies and states had for centuries carefully and affirmatively regulated food safety is obvious from the plethora of such statutes. That many states carefully and affirmatively exempted fresh meat from inspection for hundreds of years is also obvious from the sheer number and scope of food safety statutes. The only way to buy fresh meat until after the Civil War was from one's local butcher, and, as discussed previously, no state required inspection of fresh meat for any reason until well after then. Because most states required inspection of goods other than fresh meat, putting two and two together tells us that state legislatures presumably considered whether fresh meat needed to be inspected, and concluded that it did not. Finally, that many states carefully and affirmatively

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ington (WASH. REV. CODE §16.49.210 (1951)); and West Virginia (1966 W. Va. Acts 685).

170. STATISTICAL REPORTING SERV, U.S. DEP'T OF AGRIC., LIVESTOCK SLAUGHTER 40 (1966).

171. Idaho (1911 Idaho Sess. Laws 607, *amended by* 1913 Idaho Sess. Laws 365 (codified as IDAHO CODE ANN. § 36-1326 (1932)), *superseded by* 1933 Idaho Sess. Laws 108); Montana (MONT. CODE ANN. § 1542 (1907), *repealed by* 1921 Mont. Laws 582).

172. IND. CODE § 8145 (1881), *invalidated by* State v. Klein, 126 Ind. 68, 25 N.E. 873 (1890).

173. 1889 Colo. Sess. Laws 244, *invalidated by* Schmidt v. People, 18 Colo. 78, 31 P. 498 (1892); 1885 Fla. Laws 57, *repealed by* 1891 Fla. Laws 84; 1901 Mont. Laws 65 (codified as MONT. CODE ANN. §§ 1540-43 (1907)), *repealed by* 1921 Mont. Laws 582; 1905 Okla. Sess. Laws 44, 47 (codified at OKLA. STAT. tit. 2 § 8807 (1931)).

exempted farm slaughtered meat from otherwise mandatory inspection is similarly apparent from the number of such exemptions. Thus, farm-to-consumer transactions can by no means be considered a traditionally unregulated area of commerce such that it is not deeply rooted in American history and tradition.

C. Federal Law Affirmatively Preserved the Consumer's Right to Purchase Meat Directly from the Farmer Without Inspection Until 1967

1. The Meat Inspection Acts

Consideration of the federal Meat Inspection Acts of 1890, 1891, 1906, and 1907, plus the 1938 amendment, dictates the same conclusion that can be drawn from the state laws; until 1967, Congress affirmatively regulated meat sales and affirmatively exempted farm slaughtered meat from regulation. The original Meat Inspection Act of 1890 was very limited, requiring inspection only of "salted pork and bacon intended for exportation."[174] The revised 1891 Act was more comprehensive, requiring inspection of all live cattle intended for export and antemortem inspection of "all cattle, sheep, and hogs which are subjects of interstate commerce and which are about to be slaughtered at slaughter-houses, canning, salting, packing or rendering establishments in any State or Territory."[175] Postmortem inspection was made optional.[176] The Act contained an explicit farm slaughtered exemption that stated that "none of the provisions of this act shall be so construed as to apply to any cattle, sheep, or swine slaughtered by any farmer upon his farm, which may be transported from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia."[177]

The 1906 and 1907 Meat Inspection Acts[178] then reversed the 1891 Act's inspection requirements.[179] Previously, antemortem examinations of

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174. An Act Providing for an Inspection of Meats for Exportation, Prohibiting the Importation of Adulterated Articles of Food or Drink, and Authorizing the President to Make Proclamation in Certain Cases, and for Other Purposes, 26 Stat. 414 (1890).

175. An Act to Provide for the Inspection of Live Cattle, Hogs, and the Carcasses and Products Thereof Which are the Subjects of Interstate Commerce, and for Other Purposes, 26 Stat. 1089 (1891).

176. *Id.*

177. *Id.*

178. An Act Making Appropriations for the Department of Agriculture for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Seven, 34 Stat. 669, 674-79 (1906); An Act Making Appropriations for the Department of Agriculture for the Fiscal Year Ending June Thirtieth, Nineteenth Hundred and Eight, 34 Stat. 1256, 1260-65 (1907),

animals intended for interstate commerce had been compulsory, and postmortem examinations were discretionary. Now, postmortem inspections became mandatory and antemortem inspections became discretionary. Both Acts retained the farm slaughtered exemption. The 1907 Act stood, with only minor change, for sixty years until Congress replaced it in 1967 with the Wholesome Meat Act, which, for the first time, subjected all intrastate meat sales to mandatory inspection and also removed the farm slaughtered exemption for meat to be sold, substituting it with very limited exemptions from inspection for meat to be used exclusively by the farmer's family and for custom slaughtered beef.[180]

2. The History of the Meat Inspection Acts

The legislative history of the Meat Inspection Acts, combined with the history of non-Congressional events of those eras, shows that Congress had never been concerned about the safety of farm slaughtered meat and that it had "affirmatively determined that requiring [mandatory inspection of farm slaughtered beef] was substantively inappropriate."[181] Thus, these Acts do not raise the problem of the traditionally unregulated right questioned by Professor Barnett, *Abigail Alliance II*, and *Williams*.

a. *Economic Concerns, Not Safety, Drove the Passage of the First Meat Inspection Act*

The 1890 Act's legislative history reveals that it was not food safety concerns, but two unrelated economic concerns, that motivated Congress. First, Europe started boycotting American pigs and pork in 1879 due to alleged safety concerns.[182] Wanting to reclaim their business, the large meatpackers sought governmental inspection as a way to demonstrate the wholesomeness of their products.[183] Second, local butchers had been trying

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codified as 21 U.S.C. §71 (1925). The farm slaughtered exemption appeared at 21 U.S.C. § 91.

179. 29 Op. Att'y Gen. 355, 358 (1912).

180. Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967) (codified as 21 U.S.C. § 601 (2012)). The current exemption appears at 21 U.S.C. § 623.

181. Freightliner Corp. v. Myrick, 514 U.S. 280, 286 (1995) (stating that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating"); Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 612 (5th Cir. 2000) (applying *Freightliner* in a preemption case), *abrogated by* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

182. CLEMEN, *supra* note 126, at 320; KOLKO, *supra* note 40, at 98; Barkan, *supra* note 142, at 23.

183. KOLKO, *supra* note 40, at 98; Kiehl & Rhodes, *supra* note 126, at 15.

to stave off the large meatpackers' intrusion into their markets by claiming that the national meatpackers slaughtered diseased cattle and that "dressed beef was unwholesome."[184] In the hopes of slowing the national meatpackers' incursion into their livelihood, they lobbied state governments to pass meat inspection laws requiring local antemortem inspection of cattle, ultimately convincing three states and one territory, Minnesota, Indiana, Colorado, and New Mexico, to pass such laws.[185] Nothing was said about food safety; the rationale for these laws was strictly economic.[186] Such a requirement would have made the interstate meat trade economically infeasible, and so the national meatpackers challenged the constitutionality of these laws, ultimately convincing the Supreme Court in 1890 to invalidate the laws on the grounds that they unfairly affected interstate commerce.[187] To solve these two problems, a Senate Committee (the Vest Committee) recommended in 1890 a national meat inspection scheme, as well as antitrust legislation (which became the Sherman Antitrust Act).[188] After *Barber*, the national meatpackers then joined the Vest Committee's call for federal inspection as a permanent solution to the problem of local inspection.[189]

Either way, no evidence of any significant health issues over domestic beef consumption emerged,[190] and the demand for federal meat inspection requirements was certainly "not because Congress had in view the protection of the people of this country from the result of eating diseased meats."[191] In fact, the House Agriculture Committee report on the 1890 meat inspection bill flatly stated that the Committee did not believe the European allegation of diseased pork and that it had no knowledge of the existence of disease in American pork, but that it was the Committee's duty to do what needed to be done to satisfy European concerns over American pork.[192]

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184. Libecap, *supra* note 110, at 244.

185. INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3262, at 1 (1890); Libecap, *supra* note 110, at 253.

186. McCurdy, *supra* note 128, at 646.

187. Minnesota v. Barber, 136 U.S. 313 (1890); FIELDS, *supra* note 126, at 133-34.

188. Libecap, *supra* note 110, at 255.

189. McCurdy, *supra* note 128, at 643-48.

190. Libecap, *supra* note 110, at 246, 251.

191. CLEMEN, *supra* note 126, at 323.

192. FUNSTON, INSPECTION OF MEATS FOR EXPORTATION, ETC., H.R. REP. NO. 51-1792, at 1 (1890) (Conf. Rep.).

b. *Congress was not Concerned with the Safety of Farm Slaughtered Meat*

In passing the Meat Inspection Acts, Congress implicitly and explicitly concerned itself only with food safety at the big meatpacking plants, not with the safety of farm slaughtered fresh meat. For example, a clue to Congress's implicit intent comes from an unusual juxtaposition of Congressional findings for the 1891 Act. On the one hand, Congress acknowledged that the layman could not detect unsafe or unwholesome meat, but, on the other hand, in the same document, it considered inspection of farm slaughtered meat to be impractical. First, the House Commerce Committee, in considering the Senate bill that became the basis for the 1891 Act, quoted quite positively a letter from the Minnesota state veterinarian that opined that "it is impossible for the masses" to determine the safety of meat.[193] Nevertheless, the House subsequently "almost unanimously revolted"[194] against the Senate bill and demanded, among other changes, the farm slaughtered exemption, which had not been in the original bill,[195] as the price of passing the 1891 Act.[196] The most reasonable inference to draw from this combination of statements is that Congress simply was not concerned with any safety issues from farm slaughtered meat. Otherwise, how else could the House pronounce the average consumer incapable of ascertaining meat quality, but then allow farm slaughtered meat to be sold to the consumer without inspection?

The year of 1906 proved no different. A House Committee report that year pleaded that "the most rigid inspection of the meat and meat food products which constitute so large a part of the food of the country must be insured."[197] But the plea fell on deaf ears. The Committee approved the continued exemption from inspection of farm slaughtered meat.[198]

More explicitly that year, in the House Agriculture Committee hearings for an amendment (the Beveridge Amendment) to the bill that became the 1906 Act, a Department of Agriculture solicitor, George P. McCabe, testified that "[t]he impression that we have had in regard to that is that this legislation was directed toward the proprietors of canning, slaughtering,

193. STOCKBRIDGE, INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3262, at 1 (1890) (Conf. Rep.).
194. 22 CONG. REC. 43,713 (1891).
195. 22 CONG. REC. 1422 (1891).
196. HATCHER, INSPECTION OF LIVE CATTLE, ETC., H.R. REP. NO. 51-3761, at 1 (1891) (Conf. Rep.).
197. WADSWORTH, AMENDMENTS TO AGRICULTURE APPROPRIATION BILL, H.R. REP. NO. 59-4953, at 5 (1906) (Conf. Rep.).
198. *Id.*

rendering, and packing establishments."[199] For McCabe, the conditions in the Chicago packing houses were the single reason for the passage of the Meat Inspection Act.[200] In fact, "Conditions in Chicago Stock Yards" was the running header of the hearing testimony published by the House Agriculture Committee.[201]

President Roosevelt agreed with McCabe. The only area of concern to the President was the conditions in the Chicago stock yards.[202] A 1906 Attorney General opinion confirmed that:

> [i]t is well known that [the 1906 Meat Inspection Act] was enacted by Congress immediately in response to the message of the President of June 4, 1906, transmitting the report of Messrs. Reynolds and Neill, who had been appointed by him to investigate the conditions in the Chicago stock yards and packing houses.[203]

And even when focus is limited to the conditions in the Chicago stockyards, freshly slaughtered (dressed) beef was not a concern; it was only packaged beef that people were worried about. Solicitor McCabe later wrote that, "[a]t no time during the investigation of the packing-house conditions was there any considerable complaint against fresh meats (which would have included farm slaughtered meat). The criticism was directed

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199. *Hearings Before the Committee on Agriculture on the So-called "Beveridge Amendment" to the Agricultural Appropriation Bill (H.R. 1853) as Passed by the Senate May 25, 1906 – To Which are Added Various Documents Bearing Upon the "Beveridge Amendment,"* 59th Cong. 93 (1906) (statement of George P. McCabe, Solicitor for the Department of Agriculture) [hereinafter *Hearings on the Beveridge Amendment*].

200. George P. McCabe, *The New Meat-Inspection Law and its Bearing Upon the Production and Handling of Meats,* 101 U.S. DEP'T OF AGRIC. BUREAU OF ANIMAL INDUS. CIRCULAR 5, 14 (1907).

201. *See Hearings on the Beveridge Amendment*, *supra* note 199, at 261.

202. *Id.*

203. 26 Op. Att'y Gen. 50, 51 (1906). Later, an opinion repeated this position, stating that:

> [t]he meat inspection and sanitation provisions were . . . introduced late in the debate and was directed to curing the "evils" of the packing industry. The debate in the Senate centered not on the types of establishments to be subjected to the inspection and sanitation requirements, but on the issue of whether the "packers" or the federal government should pay the costs of inspection.

42 Op. Att'y Gen. 459, 462 (1972).

against conditions of filth and uncleanliness in the preparation and handling of prepared meat-food products."[204]

The following year, the Chief of the Department of Agriculture's Bureau of Animal Industry, Dr. Alonzo D. Melvin, testified in the committee hearings for the 1907 Act in response to questions about whether the previous year's exposé of unsafe conditions in the meatpacking industry (as depicted in Upton Sinclair's *The Jungle*) had affected American meat exports. He testified that, "I think that the meat that was affected by this agitation was almost entirely confined to canned meats. I do not think our fresh meat suffered at all."[205] Farmers, of course, produced fresh meat.

Three decades later, Congress amended the Meat Inspection Act.[206] It was a minor amendment, but it should be interpreted as another affirmative Congressional statement of confidence of the safety of farm-raised meat. The amendment was passed in order to define the term "farmer," because unscrupulous livestock buyers were buying unwholesome calves and taking advantage of the farm slaughtered exemption (which also included a limited retailer exemption) to sell them without inspection.[207] Congress could have shut the whole thing down right then and there; it could have simply eliminated the farm slaughtered exemption and moved on. But it did not. The amendment was an unspoken Congressional vote of confidence in the farmer's continued ability to provide safe meat for the consumer.

Finally, and significantly, at no point in any of the Congressional debates on any of the four Meat Inspection Acts did any legislator raise any concerns over the safety of farm slaughtered meat.[208] Nor did Congress, when it eliminated the farm slaughtered exemption in 1967, express any concerns over the safety of farm slaughtered meat.[209]

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204. McCabe, *supra* note 200, at 14.

205. *Hearings Before the Committee on Agriculture on the Estimates of Appropriations for the Department of Agriculture for the Fiscal Year Ending June 30, 1908*, 59th Cong. 244 (1907) (statement of Alonzo D. Melvin, Chief of the Bureau of Animal Industry).

206. Meat Inspection Act of March 4, 1907, 34 Stat. 1260 (codified as 21 U.S.C. § 71).

207. FLANNAGAN, AMEND. MEAT INSPECTION ACT, H.R. REP. NO. 75-2310, at 3 (1938) (Conf. Rep.).

208. GEORGE P. MCCABE, U. S. DEP'T OF AGRIC., INDEX TO LEGISLATIVE HISTORY OF ACTS OF CONGRESS INVOLVING THE UNITED STATES DEPARTMENT OF AGRICULTURE 1, 6-7, 26-27, 30 (1912). This publication contains an index to the Congressional debates for, among other acts, the four Meat Inspection Acts. With this document as a guide, I was able to read the Congressional debates for the Meat Inspection Acts. Whenever any Congressman raised food safety, it was always about the meatpackers. There were no negative statements about farm-raised meat.

209. *See, e.g.*, 113 CONG. REC. 30,508-551 (1967).

This evidence is more than sufficient to show that farm raised meat is not a traditionally unregulated right. For eight decades, Congress had considered national meat safety and always believed that farmers could be trusted to raise and produce safe meat.

D. *Farm Slaughtered Meat: The Statistics*

Farm slaughtered meat was still very common at the turn of the twentieth century. By 1903, 11% of American cattle was still farm slaughtered.[210] By 1909, after the passage of the 1906 and 1907 Meat Inspection Acts, that figure had decreased only slightly, to 10.3%.[211] However, it was far higher for veal calves (17.4% of the total) and for hogs (28.9% of the total).[212] By 1916, farm slaughtered cattle maintained a substantial presence in many states, including New Hampshire (13% of the total), Maine (12.3%), North Carolina (11.7%), and Florida (11.0%).[213] While farm slaughtered animals were generally sold to local butchers, farmers would still sell them on the farm directly to consumers at that time.[214] The amount of farm slaughtered beef decreased substantially during the twentieth century, but even as late as 1961, six years before the passage of the 1967 federal Wholesome Meat Act, farmers still farm slaughtered 3.2% of American cattle, and, in 1965, 2.5% of cattle were still farm slaughtered.[215]

E. *Poultry Develops from a Trade to an Industry*

Poultry was a strictly local commodity that did not become big business until well after World War II.[216] As late as the early 1920's, there was still no American poultry industry to speak of.[217] Approximately 90% of all American farms as of that time kept a small flock of chickens for eggs; chicken sales in this era were primarily a byproduct of egg produc-

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210. HALL ET AL., *supra* note 145, at 16.
211. *Id.* at 12.
212. *Id.* at 15.
213. *Id.* at 8-9.
214. *Id.* at 60.
215. STATISTICAL REPORTING SERV, U.S. DEP'T OF AGRIC., *supra* note 170, at 5.
216. 103 CONG. REC. 11,123 (1957) (statement of Rep. Leonor Sullivan); STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD 32 (2005); James A. Albert, *A History of Attempts by the Department of Agriculture to Reduce Federal Inspection of Poultry Processing Plants - A Return to the Jungle*, 51 LA. L. REV. 1183, 1184 (1991).
217. Marc Linder, *I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RES. L. REV. 33, 43 (1995).

tion.[218] The modern broiler industry began in the mid 1920's in Delaware, although it was not until the 1940's and 1950's that it really began to take off due in part to American war policies and price subsidies during World War II.[219] One can better appreciate how the broiler industry went from zero to a chicken in every pot by taking in the consumption statistics—from 0.5 pounds of chicken eaten per capita in 1934 to 60.3 pounds per capita in 1987.[220]

1. State Poultry Inspection Statutes

Even as late as 1968, only twelve states had mandatory poultry inspection laws, and only four had active inspection programs.[221] Moreover, eight of those twelve states exempted either farm slaughtered poultry or poultry sold very locally.[222] A total of 13% of American poultry was still slaughtered without federal inspection at that time.[223] However, this paucity of regulation should still not be interpreted as a traditionally unregulated industry. As stated above, poultry was barely an industry until the Great Depression; Americans simply did not eat poultry in any significant amount until after World War II. They ate eggs and the occasional chicken. Accordingly, poultry was not a traditionally unregulated industry; rather, it had not been an industry at all until the 1930's and 1940's. To be

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218. *Hearings Before the Subcommittee on Legislation Affecting the Food and Drug Administration of the Committee on Labor and Public Welfare,* 84th Cong. 23 (1956) (statement of Earl L. Butz, Assistant Secretary of Agriculture) [hereinafter Statement of Earl L. Butz]; WRIGHT PATMEN ET AL., PROBLEMS IN THE POULTRY INDUSTRY, H.R. REP. NO. 85-2717, at 2 (1959); DONALD D. STULL & MICHAEL J. BROADWAY, SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA 43-44 (2nd ed. 2013).

219. Statement of Earl L. Butz, *supra* note 218, at 23. (noting that "[c]ommercial broiler production was hardly recognized as an industry in the late thirties"); STRIFFLER, *supra* note 216, at 33-35, 43.

220. FLOYD A. LASLEY ET AL., U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMIC REPORT NO. 591: THE U.S. BROILER INDUSTRY 8-9 (1988).

221. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 4 (1968) (Conf. Rep.).

222. California (1955 Cal Stat. 3417, 3418-19), Delaware (191 Del. Laws 628, 638 (1967)), Illinois (1959 Ill. Laws 1944), Iowa (1965 Iowa Acts 264), and Missouri (1967 Mo. Laws 371) had straightforward farm slaughtered exemptions. Indiana (1967 Ind. Acts 1104) and North Carolina (1961 N.C. Sess. Laws 1183, 1184) exempted intra-country poultry sales from inspection. Tennessee exempted farm slaughtered poultry from inspection when the farmers slaughtered the animals for their own consumption and sold the excess directly to consumers. 1967 Tenn. Pub. Acts 261.

223. WHOLESOME POULTRY PRODUCTS ACT, S. REP. NO. 90-1449, at 3 (1968) (Conf. Rep.).

concerned with the lack of poultry regulations before World War II would be equivalent to being concerned with the lack of internet regulations prior to the 1990's. Then, once the industry arose, governmental regulation followed. But, just as with meat inspection, a substantial number – in fact, a majority – of state poultry inspection statutes recognized the safety of farm slaughtered or locally raised poultry and exempted such poultry from otherwise mandatory inspection.

2. The Poultry Inspection Acts

Although an early draft of the 1906 meat inspection bill called for poultry inspection, only meat remained in the final bill,[224] and so the Poultry Products Inspection Act of 1957 became the first federal poultry inspection act.[225] The Act required both antemortem and postmortem inspection of all poultry slaughtered in "any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area."[226] Like the Meat Inspection Acts, the Poultry Products Inspection Act exempted from inspection poultry raised by poultry producers on their own farms which are sold directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only.[227] But only eleven years later, Congress passed the Wholesome Poultry Products Act, which substantially limited the farm slaughtered exemption.[228] As rewritten, the Act exempted farm slaughtered poultry from inspection only for farmers who slaughter or process the products of more than 5000 turkeys or 20,000 chickens or other domesticated birds per year.[229] Congress later revised the exemption to eliminate the chicken and turkey distinction, and the exemption now applies to all farmers who slaughter fewer than 20,000 birds per year.[230]

224. KOLKO, *supra* note 40, at 104.
225. Poultry Products Inspection Act, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as 21 U.S.C. §451 (1958)).
226. *Id.* at § 6(a).
227. *Id.* at § 15(a)(1).
228. Wholesome Poultry Products Act, Pub. L. No. 90-492, 82 Stat. 791 (1968) (codified as 21 U.S.C. §451 (2012)).
229. *Id.* at § 14(c)(3).
230. 21 U.S.C. § 464(c)(1)(A-D) (2006).

3. The Poultry Inspection Acts: Legislative History

In debating the Poultry Inspection Acts, Congress strongly vouched for the safety of farm raised and slaughtered poultry. Congressmen and Congresswomen went out of their way to emphasize the safety of the poultry raised by the local farmer. For example, in debating the 1957 Act, several legislators pointedly recounted, without rebuttal, how they and their neighbors would buy their poultry from the local farmer without any need for inspection and without any safety concerns over potentially unsanitary processing.[231] It was Congresswoman Leonor Sullivan who hit the nail right on the head by stating:

> Now let me explain how the need for this poultry legislation has arisen. One might ask why we suddenly need poultry inspection laws when we have managed to get along for 51 years since the passage of the Meat Inspection Act without having poultry included along with the red meats—beef, pork, lamb—under a compulsory inspection system.
>
> There are two answers to that question. One is that until food technology and refrigeration engineering made possible freezing and nationwide distribution of poultry by big firms, you usually bought a chicken or turkey raised not far from where you lived, and sold by a farmer from his truck or sold by a neighborhood storekeeper whom you knew had a good reliable supplier from a nearby farm.
>
> But in recent years, poultry has gone bigtime and big business. The small farmer is not a factor. As a matter of fact, under this bill, the farmer can still raise his chickens and take them to town and sell them directly to the housewife without having to worry about inspection. But when you buy his poultry you know where that chicken comes from.[232]

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231. *Hearings Before the Subcommittee on Legislation Affecting the Food and Drug Administration of the Committee on Labor and Public Welfare United States Senate*, 84th Cong. 2 (1956) (statement of Senator James Murray) (stating that "I have been convinced that S. 3176 should be amended to exempt from inspection poultry slaughtered, dressed, and sold to the ultimate consumer by farmers themselves"); 103 CONG. REC. 11,122-123 (1957) (statements of Congresswomen Cornelia Knutson and Leonor Sullivan).

232. 103 CONG. REC. 11,123 (1957).

Congresswoman Sullivan told the truth that dared not to be told. Small and local was safer than big and distant, or so people believed. As was seen in Section I, *supra*, this is one of the factors that now drives the local food movement.

The House Agriculture Committee's formal reason for the farm slaughtered exemption was twofold and particularly telling: first, it did not want to burden small farmers "who are marketing wholesome poultry products" as a side business, and second, requiring inspection of all poultry sold in the country would simply be impracticable.[233] The Committee thus assumed that the small farmers would be marketing wholesome poultry products.

F. *Conclusion*

The main conclusion to be drawn from the history of the Meat and Poultry Inspection Acts is that meat has been subject to heavy governmental regulation since the 1600's, but that governments, both state and federal, maintained a hands-off approach to farm to consumer meat transactions until relatively recently in our history. There was far less government regulation of poultry throughout the years, but there was also far less commerce in poultry. Once the poultry trade matured into an industry, governmental regulation appeared to control it, again with a hands-off approach to farm to consumer poultry transactions. For these reasons, Americans can make a strong argument that they have a deeply rooted tradition of purchasing meat and poultry directly from their local farmer without governmental interference.

VI. THE CONSUMER'S RIGHT TO PURCHASE MEAT AND POULTRY DIRECTLY FROM THE FARMER WITHOUT MANDATORY GOVERNMENT INSPECTION IS A FUNDAMENTAL RIGHT

In Section IV, I defined the proposed right carefully. In Section V, I showed that the right is deeply rooted in American history and tradition. Now we will see that the right to purchase meat and poultry of one's choice directly from the farmer who raised the animals, without mandatory governmental inspection, is indeed a fundamental liberty right protected by the Due Process Clauses of the U.S. Constitution.

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233. WHOLESOME POULTRY PRODUCTS ACT, H.R. REP. NO. 90-1333, at 14 (1968) (Conf. Rep.).

A. *The Surprisingly Inclusive Definitions of Liberty and Privacy*

The Supreme Court has defined liberty very broadly over the years. One seeking to show that he has a protected right to purchase food of his choice directly from the farmer or producer, or that food choice is essential to one's self-identity or self-expression, can point to many expansive definitions of the concept over the years. A logical starting point is the Supreme Court's famous 1923 definition, in which it stated that liberty:

> denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[234]

Given that American history and traditions have long included the right to purchase meat and poultry directly from the farmer without governmental interference, the common law surely recognizes that activity as essential to the orderly pursuit of happiness by free men. And with respect to the pursuit of happiness, our most philosophical Founding Father, Thomas Jefferson, who knew a little about that quest, once warned that:

> [t]he legitimate powers of government extend to such acts only as are injurious to others. . . . Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as medicine, and the potatoe as an article of food.[235]

Today, by barring the door to the purchase of farm slaughtered meat and poultry without governmental interference, governments are, as Jefferson counseled against, prescribing our diet to us.

Governmental prohibition of private farm to consumer transactions also limits Americans' liberty to take the risks that they wish to take. As food lawyer Peter Hutt wrote:

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234. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

235. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 235-36 (3d American Ed. 1801).

> even the most unsophisticated citizen can readily determine that the risks from some of the dangers charged to the food supply are far smaller than the risks that we willingly accept without question as we go about our daily business. . . . Since we are free to choose or reject many other risks, it is difficult for the public to perceive why we should not also be free to choose, on an individual basis, the risks that we will accept in the food we eat.[236]

All forms of living entail some amount of risk. To the extent that eating uninspected, farm slaughtered meat and poultry is riskier than consuming industrial meat and poultry from Big Food, which is a subject beyond the scope of this article, it should be for the consumer to determine how much governmental protection and how much risk she wants.

The Food and Drug Administration's (FDA) Assistant Commissioner for Professional and Consumer Programs acknowledged decades ago that "[c]onsumers want to know, 'How much risk exists?' At the same time, they want to retain the right to take risks, if they feel the benefits are great enough," and that "[r]ealistically, we know that consumers do not and will not have their food habits dictated to them by a regulatory agency."[237] The then Acting Director of the FDA's Bureau of Foods bluntly stated that "we should stop pretending that absolute safety for food is possible. It isn't, for there is virtually no food that is without some risk to some person. We should acknowledge and explain this to the public."[238] A dissenting opinion from the Minnesota Supreme Court in a dispute over the sale of uninspected meat touched on this issue, perhaps even touching a nerve with a demand for the evidence of comparative risk between farm slaughtered meat and Big Food's meat, opining that:

> [d]espite the fact that custom processors may return uninspected, processed meats to an unlimited number of qualifying persons for individual use, a farmer may not sell his own custom-processed meats to the public. If the former does not present a public health risk, it is difficult to see

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236. Peter Barton Hutt, *The Basis and Purpose of Government Regulation of Adulteration and Misbranding of Food*, 33 FOOD DRUG COSM. L.J. 505, 528 (1978).

237. William V. Whitehorn, *Consumer Interests – Do We Get the Foods We Want?*, 31 FOOD DRUG COSM. L.J. 656, 657, 661 (1976).

238. Peter Barton Hutt, *Unresolved Issues in the Conflict between Individual Freedom and Government Control of Food Safety*, 33 FOOD DRUG COSM. L.J. 558, 563 (1978) (citing 124 CONG. REC. E1310 (1978)).

> how the latter does, especially considering the low volume of sales normally associated with sales by a single farmer.[239]

B. *Liberty and Philosophy*

For the philosophers, the idea of liberty means that a person has "the 'right' to make his own choices no matter how foolish or self-defeating such choices may be."[240] Advocates of this school of thought included John Locke, "the ideological father of the American revolution,"[241] and John Stuart Mill, the great nineteenth century proponent of liberty. For Locke, "individuals do not give up to the government those rights of self-autonomy that do not threaten to invade the rights of others or to cause harm to others."[242] Mill wrote more explicitly, stating that:

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.[243]

Liberty, for Mill, clearly "entails the right to make bad decisions and poor choices."[244] According to Mill, "[t]he only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[245] While the Supreme Court has not explicitly adopted this position,

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239. Minnesota v. Hartmann, 700 N.W.2d 449, 461 (Minn. 2005) (G. Barry Anderson, J., dissenting).

240. ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY 63 (1986).

241. In re Cincinnati Radiation Litigation, 874 F. Supp. 796, 815 (S.D. Ohio 1995).

242. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative To Substantive Due Process Analysis Of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 112-13 (2000); Kevin S. Toll, *The Ninth Amendment and America's Unconstitutional War on Drugs*, 84 U. DET. MERCY L. REV. 417, 420 (2007).

243. John Stuart Mill, *On Liberty*, in THREE ESSAYS 5, 15 (1966).

244. THOMAS FLEINER-GERSTER & LIDIJA R. BASTA FLEINER, CONSTITUTIONAL DEMOCRACY IN A MULTICULTURAL AND GLOBALISED WORLD 205 (2009).

245. Mill, *supra* note 243.

lower courts have traced the modern American notions of personal autonomy and the right of self-determination back to Locke and Mill's ideas on liberty.[246] At least several lower court judges have explicitly agreed with Mill's idea that liberty grants one the right to be wrong.[247] Locke's and Mill's views on liberty and autonomy thus clearly point the way to a constitutional right to be free from governmental involvement in a private farm to consumer meat or poultry sale.

However, the food rights advocate should be aware that Mill is not the last word on liberty. Although courts, including the Supreme Court, have invoked Mill from time to time,[248] Supreme Court Justice Powell, sitting by designation on the Eleventh Circuit after his retirement from the Supreme Court, sniffed that "the impressive pedigree of [Mill's] political ideal does not readily translate into a constitutional right."[249]

C. *Liberty Includes the Right to Self-Identity*

In 1984, the Supreme Court explicitly included self-identity within the ambit of protected liberty interests, holding in a case involving the right to association that the ability to "define one's identity" is "central to any concept of liberty."[250] Another indispensable element of liberty is the abil-

246. *See, e.g., In re Cincinnati Radiation Litigation*, 874 F. Supp. at 815-16; Armstrong v. State, 989 P.2d 364, 372-73 (Mont. 1999); Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626, 633 (Mass. 1986); In re Gardner, 534 A.2d 947, 950 (Me. 1987).

247. In re Fisher, 552 N.Y.S.2d 807, 813 n. 17 (N.Y. Sup. Ct. 1989) (noting that "[t]he fact that someone else might, or could make better choices is not the point. In a constitutional system such as ours which prizes and protects individual liberties to make decisions, even bad ones, the right to make those decisions must be preserved"); Richards v. State, 743 S.W.2d 747, 751 (Tex. Ct. App. 1987) (noting that "'[l]iberty' also necessarily implies one's acceptance of the risks involved in being free to make mistakes, to be foolish, to err, to blunder, without being punished by the social organization unless harm is thereby inflicted on others") (Levy, J., dissenting); State v. Betts, 21 Ohio Misc. 175, 184 (1969) (noting that "[i]ncluded in man's 'liberty' is the freedom to be as foolish, foolhardy or reckless as he may wish, so long as others are not endangered thereby. The State of Ohio has no legitimate concern with whether or not an individual cracks his skull while motorcycling; that is his personal risk").

248. *See, e.g.*, Furman v. Georgia, 408 U.S. 465, 467 (1972) (Rehnquist, J., dissenting) (stating that "[t]he Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill"); New York Times Co. v. Sullivan, 376 U.S. 254, 272 n. 13 (1964).

249. Picou v. Gillum, 874 F.2d 1519, 1522 (11th Cir. 1989); *see also* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (stating that "[r]egardless of [Mill's] force as a policy argument, however, it does not translate *ipse dixit* into a constitutionally cognizable standard").

250. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

ity to further personal bonds "by cultivating and transmitting shared ideals and beliefs."[251] Then there is the plurality opinion in *Casey*, which stated that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[252] The right to define one's own concept of existence surely includes the right to decide what foods one wants to eat and where and how one wants to purchase them. [253] *Lawrence* continued this theme, holding that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct . . . [both in] its spatial and in its more transcendent dimensions."[254] Even brief definitions from the Supreme Court include such pronouncements as: "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed,"[255] and liberty "extends to the full range of conduct which the individual is free to pursue."[256] Once again, the full range of conduct that one might want to pursue is buying one's meat and poultry in a private transaction, without governmental interference, from the farmer who raised the animals.

D. *Liberty Includes the Right to Self-Expression*

Americans' liberty rights have long since included self-expression.[257] As the Supreme Court has held, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[258]

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251. *Id.*

252. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

253. *See* Alan Rubel, *Local Trans Fats Bans and Consumer Autonomy*, 10 AM. J. BIOETHICS 41, 42 (2010) (stating that "[t]he freedom to choose what we eat is important insofar as it is a function of persons' autonomy over their food choices. That is, personal autonomy is what underwrites the value of choosing what we eat.").

254. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

255. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

256. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

257. Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 847 F. Supp. 178, 196 (D. Mass. 1994) (noting that "[o]f course, the party seeking to communicate has an individual liberty interest in self-expression.").

258. Bridges v. California, 314 U.S. 252, 270 (1941); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783 (1985) (stating that "[t]he free speech guarantee gives each citizen an equal right to self-expression").

E. *Concurring and Dissenting Supreme Court and Lower Court Opinions on Liberty are Even Broader*

Concurring and dissenting opinions from the Supreme Court have been particularly far reaching. Justice Blackmun wrote in *Casey* that "personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government."[259] Concurring in *Glucksberg*, Justice Stevens cited his earlier Seventh Circuit holding that the liberty clause "brings to mind the origins of the American heritage of freedom – the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.'"[260] Justice Douglas' concurring opinion in *Doe v. Bolton*, the companion case to *Roe v. Wade*, contains as broad a definition of liberty as has been seen in American jurisprudence. For Justice Douglas, liberty includes, among other rights: a) "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality;" and b) "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."[261]

Appellate decisions also paint with a broad brush. In reversing summary judgment for the defendant police department in a hair grooming case, the Second Circuit held that "[p]ersonal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference."[262] In another hair length case, the First Circuit held that liberty "seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty."[263] Given that food choice is somewhat less momentous than such life-altering decisions as abortion or marriage,

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259. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring and dissenting).

260. Washington v. Glucksberg, 521 U.S. 702, 744-45 (1997) (Stevens, J., concurring) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975) (footnotes omitted).

261. Doe v. Bolton, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring). A federal judge cited this concurrence in ruling that the constitutional liberty guarantee protected parents' right to name their child whatever they wanted. Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979).

262. Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973); *see also* BAM Historic Dist. Ass'n v. Koch, 723 F.2d 233, 237 (2d Cir. 1983) (stating that liberty "includes the opportunity to make a range of personal decisions concerning one's life, family, and private pursuits").

263. Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

Dwen and *Richards*, as well as Justice Douglas's *Doe* concurrence, protect a right to food choice by showing that our constitutional liberty rights protect the smaller things in life as well as the big.

F. *Defining Privacy*

The Supreme Court has recognized two separate types of privacy rights: a) "the individual interest in avoiding disclosure of personal matters;" and b) "the interest in independence in making certain kinds of important decisions."[264] The first right is often referred to as the "confidentiality" branch, and the second the "autonomy" branch.[265] Only the autonomy branch is relevant for the practitioner advocating a consumer's right to food choice. While the Court has not defined the "outer limits" of the right to privacy,[266] it has only explicitly found privacy rights in matters involving marriage, procreation, contraception, family relationships, and childrearing and education.[267] However, Justice Douglas would add to the right to privacy "the privilege of an individual to plan his own affairs, for, 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'"[268]

Lower courts have made clear that, at least in the medical treatment context, the right to privacy means "the sanctity of individual free choice and self-determination."[269] In finding a privacy right in a patient's right to receive acupuncture from a traditional acupuncture practitioner, as opposed to a licensed physician, the Southern District of Texas in *Andrews v. Ballard* defined *Carey's* "important decision" requirement as a decision that "must profoundly affect one's development or one's life."[270] *Andrews'* reasoning is helpful to the food rights campaign. If choices in food are important decisions, perhaps even very important decisions that profoundly affect one's life, then certainly our constitutional right to privacy should protect such choices.

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264. Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977); Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

265. Pouliot v. Town of Fairfield, 226 F. Supp.2d 233, 247 (D. Me. 2002).

266. *Carey,* 431 U.S. at 684-85.

267. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

268. Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

269. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977).

270. Andrews v. Ballard, 498 F. Supp. 1038, 1046 (S.D. Tex. 1980).

G. *You Are What You Eat: Food Choice as a Part of Self-Identity and Self-Expression*

1. What are Self-Identity and Self-Expression?

As an academic term, "self-identity refers to the understanding that an individual has of himself or herself."[271] Another way to put it is that self-identity is one's "life story."[272] Self-expression is closely related to self-identity. Then, if self-identity is one's life story, self-expression is telling one's life story to someone else; it is the "assertion of one's individual traits."[273] A person might use his self-identity and self-expression to answer the question, "who am I?"[274] And, in academia, the question "who am I?" necessarily incorporates the question "what do I eat?"

2. What is Food Choice?

Modern sociological research has confirmed the obvious; you truly are what you eat. Human food preferences are some of the oldest human inclinations; in fact, food choice is "close to the center of [human] self-definition."[275] It is religious and cultural expression.[276] For millennia, humans have traditionally thought of food choice as a means of distinguishing between their tribe, group, or culture and the alien, enemy tribes or groups.[277] Modern social science research recognizes that food choice is "fundamental to our sense of self,"[278] a method of assigning identity to oneself and to others,[279] a way to act upon one's personal ideologies,[280] a

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271. RONALD L. JACKSON II, ED., 1 ENCYCLOPEDIA OF IDENTITY 547 (2010).
272. *Id.*
273. Heejung S. Kim & David K. Sherman, *"Express Yourself": Culture and the Effect of Self-Expression on Choice*, 92 J. PERSONALITY & SOC. PSYCHOL. 1, 1 (2007) (quoting MERRIAM-WEBSTER DICTIONARY (2006)).
274. *E.g.*, PAMELA GOYAN KITTLER & KATHRYN P. SUCHER, FOOD AND CULTURE 15 (4th ed. 2004); Jostein Rise et al., *The Role of Self-Identity in the Theory of Planned Behavior: A Meta-Analysis*, 40 J. APPLIED SOC. PSYCHOL. 1085, 1087 (2010).
275. SIDNEY W. MINTZ, SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY 3 (1986).
276. *See* Rencher, *supra* note 23, at 431-36.
277. *Id.*
278. Avi Brisman, *Fair Fare? Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL'Y 49, 52 (2008).
279. Bisogni, *supra* note 12, at 129.
280. J. Pollard et al., *Factors Affecting Food Choice in Relation to Fruit and Vegetable Intake: A Review*, 15 NUTRITION RES. REV. 373, 381-82 (2002).

way to make sense of the world,[281] a political statement,[282] and a way to create meaning in one's life.[283] Food choice is "a basic form of self-creating, self-expression, and self-definition."[284] It is so basic that the "correlation between what people eat, how others perceive them, and how they characterize themselves [has been called] striking."[285] Even a brief review of the social science literature on the subject shows that there are no contrary views.

3. Social Science is Valid Evidence

While American courts have not yet acknowledged food choice as a component of self-identity or self-expression, this does not necessarily preclude the possibility in the future. American jurisprudence unquestionably accepts social science opinions. For more than a century, the Supreme Court has employed social science opinions in constitutional disputes,[286] notably utilizing it in *Brown v. Board of Education*, in which it cited numerous such studies in support of its opinion.[287] Since *Brown*, the Court has frequently consulted social science research in cases involving school desegregation, the death penalty, obscenity, and juvenile delinquency, among other topics.[288] As of 1986, all nine sitting Justices of the Supreme Court had "either authored or joined opinions using social science research to establish or criticize a rule of law."[289] Parties can present social science research through expert testimony or include it in a brief (e.g., the famous "Brandeis" brief),[290] although such evidence would certainly be more cred-

281. Bruce Pietrykowski, *You Are What You Eat: The Social Economy of the Slow Food Movement*, 17 REV. OF SOC. ECON. 307, 310 (2004).

282. Johnson & Endres, *supra* note 3, at 56; Bean, *supra* note 13, at 50.

283. Bean, *supra* note 13, at 37-40.

284. Assya Pascalev, *You Are What You Eat: Genetically Modified Foods, Integrity, and Society*, 16 J. AGRIC. & ENVTL. ETHICS 583, 588 (2003).

285. KITTLER & SUCHER, *supra* note 274, at 3, quoted in Rencher, *supra* note 23, at 426.

286. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477-78 (1986).

287. Bolling v. Sharpe, 347 U.S. 497, 494 n.11 (1954); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 n. 11 (1954); *see also* Williams v. Florida, 399 U.S. 78, 101-02 (1970) (citing social science studies on jury size).

288. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 111-12 (1993).

289. Monahan & Walker, *supra* note 286, at 477 n. 2.

290. *Id.* at 496; *see also* McCleskey v. Kemp, 753 F.2d 877, 888 (11th Cir. 1985) (noting that "[h]istorically, beginning with 'Louis Brandeis' use of empirical evidence before the Supreme Court . . . persuasive social science evidence has been presented to the courts'") (quoting Forst, Rhodes & Wellford, *Sentencing and Social Science: Re-*

ible if a qualified expert testified and was subject to cross-examination on the issue. But either way, a trial court must consider properly introduced social science opinions as to the significance of food choice.

H. *American Jurisprudence Has Acknowledged the Significance of Food Choice*

The legal world uses the same definition as the academic world for self-identity and self-expression.[291] In the courts, just as in academia, a person would employ his self-identity and self-expression to answer the question, "who am I?"[292] However, no decision has addressed the relationship between liberty, self-identity and self-expression, and food choice. The question of whether any aspect of food choice is a fundamental right has not to date been presented to an American court.

But the courts have offered some fleeting acknowledgments of the significance of food choice. The first known instance of an American court recognizing, even in passing, a citizen's right of food choice was in a nineteenth century dispute over a Missouri oleomargarine statute.[293] In that case, the Missouri Court of Appeals criticized the nascent oleomargarine industry, stating that:

> [a] practice has sprung up which operates to defraud the people of their right of choice as to what they will eat [i.e., ostensibly counterfeit food such as oleomargarine], with reference to an article of food of constant and universal consumption. The legislature has passed an act which, if properly administered, will nip the practice in the bud.[294]

Most significant for the food rights advocate is that the court cited no authority for its proposition that food choice is a right.[295] In 1882, in Missouri, the right to food choice was so natural that the Court of Appeals did not need to look in any law book to determine whether it was a right or not.

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search for the Formulation of Federal Guidelines, 7 HOFSTRA L. REV. 355, 355 (1979)).

291. Richenberg v. Perry, 909 F.Supp. 1303, 1310 (D. Neb. 1995).

292. *Id.* (noting that a prohibition on plaintiff stating that he is a homosexual "may result in a denial of self-identity").

293. *See generally* Missouri v. Addington, 12 Mo. App. 214, 225 (1882), *aff'd*, 77 Mo. 110 (1882).

294. *Id.*

295. *Id.*

In the Show-Me state, the Court of Appeals did not need to be shown. The right to food choice is no less natural and obvious for us today.

The most eloquent account of the American's right to choice in food came from Supreme Court Justice Stephen Field in his dissenting opinion in *Powell v. Pennsylvania*, another oleomargarine case.[296] The majority had upheld the constitutionality of a Pennsylvania statute banning the sale of certain types of imitation dairy products, and Field dissented.[297] He argued that the right to one's choice of food was part of the liberty right guaranteed by the Constitution.[298] He began bluntly, "I have always supposed that 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."[299] He even connected the pursuit of happiness with food rights in stating that:

> [t]he right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no state can give, and no state can take away, except in punishment for crime. It is involved in the right to pursue one's happiness.[300]

But this was no mere dissenting rant; Field fit food rights into a magisterial portrayal of liberty that is the law today. For Field, liberty meant the freedom "to follow such pursuits as may be best adapted to his faculties, and which will give to him the highest enjoyment."[301] Field's interpretation thus differed only insubstantially from the Supreme Court's 1954 version, in which "[l]iberty under law extends to the full range of conduct which the individual is free to pursue."[302] And the full range of conduct that the locavore wishes to pursue includes purchasing her meat and poultry from the farmer of her choice, without governmental interference.

Finally, two more recent cases briefly touched on food's significance and meaning. In 1973, the North Carolina Supreme Court weighed a workers' compensation claim with a most unfortunate set of facts involving food.[303] An employee had been on a business trip and met a friend for din-

296. *See generally* Powell v. Pennsylvania, 127 U.S. 678 (1888).
297. *Id.* at 690 (Field, J., dissenting).
298. *Id.* at 698.
299. *Id.*
300. *Id.* at 692.
301. *Id.*
302. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
303. Bartlett v. Duke Univ., 200 S.E.2d 193 (N.C. 1973).

ner at a restaurant, where he accidentally choked to death on his food.[304] The court, in justifying its ruling that the employee's death did not arise out of his employment, noted that "eating is not peculiar to traveling; it is a necessary part of daily living, and one's manner of eating, as well as his choice of food, is a highly personal matter."[305] This statement was not dicta; it was an integral part of the framework for the court's opinion that eating was not related, at least in this instance, to one's employment.

Most recently, the Washington Supreme Court, in answering a certified question regarding emotional distress damages in a contaminated food tort case, noted, "[c]ommon sense tells us that food consumption is a personal matter."[306] This aphorism succinctly illustrated the court's belief that every person has different and independent views on food and that every person must be allowed the freedom to react differently to food related issues.

VII. CONCLUSION: FOOD CHOICE, AS NARROWLY DEFINED, IS A LIBERTY RIGHT DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION

If liberty is the freedom to make one's own choices in life, why can we not make those choices with respect to our food? This dilemma was foremost in food lawyer Peter Hutt's mind when he wrote, "the constitutional authority of the government to determine the food that can lawfully be marketed, and the constitutional right of the individual to personal freedom and control over his own destiny, will at some junctures inevitably conflict."[307] The day of this conflict has now arrived.

A court hearing a food right claim must accept that the Bill of Rights is not the final word on our liberty rights,[308] and that even *Glucksberg* conceded that our constitutional liberty rights have never been "fully clarified."[309] The courts must acknowledge that the right to purchase certain types of food free from governmental interference can be carefully described and that the American custom and practice of buying meat and poultry directly from the farmer is deeply rooted in American history and tradition. That leaves the advocate with trying to prove that this custom and practice is indeed a liberty right, which can be shown with the following syllogism: the Supreme Court has placed such rights as self-identity and self-expression squarely within liberty's domain; social science em-

304. *Id.* at 195.
305. *Id.* at 234.
306. Bylsma v. Burger King Corp., 293 P.3d 1168, 1171 (en banc) (Wash. 2013).
307. Hutt, *supra* note 238, at 513.
308. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992).
309. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

braces food choice as part of self-identity; the courts, from the Supreme Court on down, accept social scientists' opinions; thus, the courts should logically accept food choice as part of liberty. If only it were that easy.[310]

Food choice is not a new right; it is a right and a practice as old as civilization. It allows us to "define [our] own concept of existence, of meaning, of the universe, and of the mystery of human life."[311] As one sociologist put it, governmental limitation on one's right "to choose what goes into her body represents a violation of one's authenticity and authorship in life that limits greatly that person's ability to live according to her conception of the good life."[312] However, it was not until industrialization and regulation that citizens felt the need to assert such a right, and now courts and legislators will increasingly have to take this right into account.

But, to the extent that the right to food choice might be considered a new right, it can be analogized to John Adams' famous May 12, 1780, letter to his wife Abigail, where he lamented and prophesied, "I must study Politicks and War that my sons may have liberty to study Mathematicks and Philosophy. My sons ought to study Geography, natural History, Naval Architecture, navigation, Commerce and Agriculture, in order to give their Children a right to study Painting, Poetry, Musick, Architecture, Statuary, Tapestry and Porcelaine."[313] Perhaps the search for food, too, can be compared to the passage of the generations. First, our distant ancestors hoped to find food – any food; second, our forefathers sought food that would allow them to thrive physically; and third, locavores and alternative food movement advocates now seek the liberty to consume food that allows them to thrive mentally and live their version of the good life.

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310. Chemerinsky, *supra* note 45, at 1521-22 (stating that "I think that when you read *Bowers v. Hardwick* and *Washington v. Glucksberg* together, it becomes extremely difficult for plaintiffs to persuade courts to recognize any additional unenumerated rights, given the importance of the interests involved in those cases and the fact that they were not recognized"); *see also* Minnesota v. Wright, 588 N.W.2d 166, 168 (Minn. Ct. App. 1998) (noting that "[t]he right to sell or peddle farm products is not a fundamental liberty").

311. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

312. Pascalev, *supra* note 284, at 588.

313. JOHN FERLING, JOHN ADAMS: A LIFE 174-75 (1992).