2018

Journal of Food Law & Policy - Volume 14 Spring 2018

Journal Editors
University of Arkansas, Fayetteville

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The Journal of Food Law & Policy is published twice annually by the University of Arkansas School of Law in Fayetteville, Arkansas.

Subscription Information: The Journal of Food Law & Policy is available to subscribers for $34.00 per year. Subscribers may mail a check and contact information to the Journal offices. Changes of address should be sent by mail to the address above or to foodlaw@uark.edu. The Journal assumes each subscriber desires to renew its subscription unless the subscriber sends notification, in writing, before the subscription expires. Back issues may be purchased from William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571.

Citation Format: Please cite this issue of the Journal of Food Law & Policy as 14 J. Food L. & Pol’y 1 (2018).

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Postmaster: Please send address changes to the Journal of Food Law & Policy, University of Arkansas School of Law, 1045 West Maple Street, Fayetteville, AR 72701.
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Cooperation or Compromise? Understanding the Farm Bill as Omnibus Legislation

Professor Margaret Sova McCabe*

“Since the early days of the revolution, the founding fathers had fought together for the future of their country. But . . . divisions had slowly begun to form between them that, once hardened, would lead to the formation of the United States of America’s first political parties. Key to their emergence were fundamental differences in what the revolutionaries believed ought to be the fabric of American society – the dream of a nation of farmers versus the vision of a merchant and trader elite.”

I. Introduction: Making Food Law with Omnibus Legislation

Is the development of American food law and policy benefited or burdened by a Farm Bill (“the Bill” or “Bill”) that sets appropriations and policy for commodities, conservation, trade, nutrition, credit, rural development, forestry, and energy? On one hand, a broad Bill that ties together many pieces of the food system under one legislative process could be a brilliant way to infuse systems thinking and alignment into a complex, politicized realm. On the other, the Bill, as omnibus legislation, could simply represent a classic case of logrolling that does little

* Professor of Law; Faculty Fellow, Rudman Center for Justice, Leadership & Public Service, University of New Hampshire School of Law. Professor Sova McCabe has been selected as Dean of the University of Arkansas School of Law and assumed her duties on July 1, 2018.


3 Ted A. Donner & Brian L. Crowe, Attorney’s Practice Guide to Negotiations § 12:46 (2d ed. 1995 & Supp. 2009) (“Logrolling is often described as a concession tactic that is difficult to utilize in competitive negotiations because it involves one side’s conceding his or her lesser concerns for the other side’s more substantial concerns, in
to promote a deeply coordinated, systematic approach to one of the most important components of stable democracy and the economy: food and its production.

The distinction between urban and rural agendas in U.S. food law and policy stretches back to the country’s political roots, as the introductory quote captures. As time has passed, the issues and demographics have evolved to shift dominance from agrarian interests to the urban agenda. However, one thing remains constant: producing and consuming affordable, accessible food is essential to all Americans. Given that the Bill represents our nation’s traditional process for setting food law and policy, this essay explores the modern influence of the urban-rural divide and how omnibus legislation has bridged that gap. That bridging remains essential to developing balanced food law and policy, but with each Bill it becomes increasingly apparent that without overarching, bi-partisan goals for the American food system the process will continue to be bogged down in divisive politics that are fueled, in part, by the Bill’s omnibus nature.

Omnibus legislation is typically “[a] single bill containing various distinct matters, usu[ally] drafted in this way to force the executive either to accept all the unrelated minor provisions or to veto the major provision.” By definition, omnibus legislation produces compromise. But, should the American food system be a compromise? Are there ways that the policy tensions sought to be resolved with omnibus legislation could instead be made more transparent to law makers and citizens with the goal of aligning

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4 See Wulf, supra note 1, at 83.
5 See Christopher Bosso, Framing the Farm Bill: Interests Ideology, and the Agricultural Act of 2014 35-43 (University of Kansas Press 2017) (discussing the policy evolution in U.S. agriculture from the 30s to modern day).
interests to spur innovation, rather than simply positioning for compromise?

This essay wants readers to consider whether we should reimagine the Bill as an opportunity to set rural and urban policy in ways that maximize economic supports in both areas. This essay emphasizes that such a reimaging would align the American population’s interest in a reliable, affordable, and healthy food supply rather than settling for the Bill to be an every-five-year opportunity to simply logroll support for commodities and nutrition programs. While the latter scenario clearly has had its benefits for both titles over the years, the political dynamics of the 2014 Farm Bill illustrate that the simplistic tension may no longer be useful. However, that possibility should not lead us to conclude that continuing to use the omnibus vehicle is not in the interests of farmers and consumers.

II. The Farm Bill 1949 – 2014: Slowly Changing Traditions

In 1933, as President Roosevelt moved to address the devastation the Dust Bowl wrought on many farmers and the agricultural markets, he acknowledged that “free-market agricultural economics [were] over for good.”8 Congress first moved to control markets with the Agricultural Adjustment Act of 1933.9 And, five years later, the Agricultural Adjustment Act of 1938 became the first omnibus farm bill.10 It offered payments to farmers, price supports, and crop insurance among other tools that represented government management of agricultural markets.11 The Act also authorized the use of these tools for five years so that Congress could shape agricultural market management

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8 Timothy Egan, The Worst Hard Time: The Untold Story of Those Who Survived the Great American Dust Bowl 133 (2006) (discussing the origins of The Agricultural Adjustment Act as well as describing, in detail, the devastation the Dust Bowl wrought on its landowners and farmers).


10 Bosso, supra note 5, at 35, 37 (discussing the origins of the farm bills in the Agriculture Adjustment Act of 1933 and 1938).

11 Agriculture Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938); see Bosso, supra note 5, at 37-38.
in response to economic shifts. As 2014 would illustrate, the 1949 Congressional revision to the 1938 market management techniques – known as the ‘permanent law’ – remains highly relevant to the success of each Bill. If no Bill passes, then the commodity programs set by these laws once again become ‘the law of the land.’ Thus, the procedural mechanism of omnibus legislation has been part of American food law and policy nearly from the inception of government intervention in agricultural markets. And, the existence of the ‘permanent law’ is a powerful tool to prompt Congressional action, lest it let farm policy supports revert to 1949 levels.

Through the 50s and 60s, the American economy would shift dramatically, moving from rural to urban. President Kennedy’s victory has been identified as one starting point for seeing the shift in influencing food policy from rural interests to urban ones. This is because Kennedy’s victory was propelled by urban and suburban voters – signaling that support for rural issues and interest was set to decline. And, it did. By 1973, it was necessary for the ‘farm bloc’ to accept that “no bill supporting commodity programs would ever get enough votes beyond the Agriculture Committees unless it also did something for nutrition.” This marriage survives today, even following a 2014 attempt at separation, as discussed below. Significantly, nutrition

12 Bosso, supra note 5, at 37.
14 See Neil Hamilton, The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion, 19 Drake J. of Agric. L. 1, 23 (noting that the 2014 effort to replace the 1949 permanent law to ease future pressures to pass a Farm Bill failed); see Bosso, supra note 5, at 38 (emphasizing that though an arcane point, the suspension of the permanent law in each farm bill creates an incentive for Congress to pass a new Bill).
15 See Giessel, supra note 13, at 766.
17 Bosso, supra note 5, at 58.
18 Id.
19 Id. at 59.
appropriations accounted for 80% of 2014 spending.\textsuperscript{20} There are several excellent analyses of the political dynamics surrounding the details of 2014 Farm Bill.\textsuperscript{21} The richness of the political process is beyond the scope of this essay, but readers are encouraged to review some of those analyses as the 2018 votes approach. For the purposes of this essay’s discussion of whether omnibus legislation is helpful or harmful to the Bill, three key attributes of the 2014 Bill are relevant:

- The Farm Bill at one point was split into two bills in the House – removing nutrition provisions from the remainder of the Bill.\textsuperscript{22} This break from the tradition set in 1973 is reflective of some politicians’ desire to decouple food system interests to push for more radical changes in the law.
- In the final outcome, neither party could claim political victory and the omnibus process served to secure many compromises in important areas such as conservation, crop insurance, dairy, and SNAP.\textsuperscript{23}
- Innovation and food system change continued to advance as evidenced by funding of ‘progressive’ programs such as support for fruits, vegetables, organics, and significant initiatives to fund healthy food financing and food and agriculture learning.\textsuperscript{24}


\textsuperscript{21} See, e.g., Bosso, supra note 5; see, e.g., Hamilton, supra note 14; see, e.g., Stephen Ansolabehere & Kattalina Berriochoa, Why does the American Public Support Redistributive Logrolls? An Analysis of Policy Preferences for the 2014 Farm Bill (May 2016), https://www.princeton.edu/csdp/events/Ansolabehere05122016/Draft-Ansolabehere-Berriochoa-Who-Benefits_-v2.pdf.

\textsuperscript{22} Hamilton, supra note 14, at 5.

\textsuperscript{23} See Bosso, supra note 5, at 156 (“In some ways, and all the noise aside, passage of the Agricultural Act of 2014 resembled the normal Farm Bill process. It was just messier than usual, to be sure, but Congress ultimately got the job done, and in the end, it did so with bipartisan majorities.”); see Hamilton, supra note 14, at 35 (“[f]or the Tea Party members who believed the farm bill process could be used to gain major reforms, the final bill was a disappointment.”).

All three points have a common denominator. They are, in part, a product of the omnibus process. The first – the splitting of the bill – was a direct attack on the benefits of the omnibus approach and could signal that a contentious 2018 process will again cause peeling off of major issues to achieve particular outcomes or political victories. The second two illustrate that omnibus legislation both protects ‘the middle’ by requiring compromise (which is likely where most citizens’ interest are represented) and creates space for cross-aisle and cross-sector dialogue to advance the food system.

With the protective effect of omnibus legislation in mind, we should also consider how food law and policy benefit from an expansive bill. Marion Nestle has described the Bill this way:

There isn’t anything in American agriculture, farming, and health that this bill doesn’t touch, but there is no overarching agenda. The Farm Bill is simply a collection of government-supported programs, each with its own collection of lobbyists, proponents, and opposing forces. You get the sense that everyone said, “Let’s just throw this program in.” There is nothing rational in the Farm Bill.25

While some would find rationality in the Bill, it is simply not coherently designed based on a common understanding of the goals of the American food system. Regardless of its rationality or design, the Bill has played a critical role in maintaining a stable food system by supporting farmers and eaters with federal dollars deployed in the way that its titles’ subject matter experts have determined optimal.26 However, because there are disparate and broad ranging areas of expertise and seemingly no political


process designated to align the desired outcomes of each title with a coherent, overarching food policy, the Farm Bill falls short of synthesizing many important components of the food system. And, in that sense, omnibus legislation, without clear underlying values is a blunt instrument ill-suited for the challenges facing the American food system domestically and internationally.

The Farm Bill is the principal driver of U.S. food law and policy. It is also economic legislation that subsidizes the American food system – either in the way it stabilizes agricultural markets with a variety of economic tools or by providing means for needy Americans to purchase foods through feeding programs such as the Supplemental Nutrition Assistance Program (“SNAP”).

Since 1973, when ‘food stamps’ were added to the Farm Bill, it has been characterized as a legislative tool to promote economic security for rural communities and the farmers who live in them by ensuring that elected officials, who are principally from urban and suburban areas, will vote for their needs because they are inextricably linked to the need for the food security offered by SNAP. Senators McGovern and Dole are credited with creating this strategy, but 45 years later the question is whether the oversimplification of the rural-urban logroll and the rise of partisan politics threatens to stagnate or stymy future Bills.

III. Farm Bill 2018: Reframing the Omnibus as Opportunity

Food is political. But, under the politics are some universal truths that reveal why continuing an expansive Bill creates

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opportunities for a better food system for all, if politicians and stakeholders are willing to see it that way. First, America needs a rural population to support agricultural production and to steward natural resources. Second, America needs an urban population to support commerce and to create broad economic activity. The two domains – even considered in tension by Jefferson and Hamilton – are not mutually exclusive or independently viable. Thus, lawmakers who see the benefit in providing a safety net to both farmers and eaters do their constituents a great service because they adopt a food system approach. Of course, the size of the safety nets and market controls will likely always be fodder for vociferous debate, but delinking nutrition titles from farm supports does little to advance that debate in a principled manner.

Food system thinking is critical because food is critical to economic, human, and environmental health. Food is obviously a human need. Food production is also key driver of environmental and human health. For example, agriculture contributes significantly to water pollution and air quality. Similarly, links between eating patterns and environmental health are emergent principals for developing nutritional guidance. Additionally, human health conditions such as obesity, diabetes, and heart disease are linked to diet. Finally, food production and processing creates important economic activity. In different regions of the country and across different demographics, production and

30 See Wulf, supra note 1, at 82-84 (discussing the philosophical differences between the two and analyzing how those differences manifest in political approaches to federalism and Constitutional powers).


consumption needs vary. And, while the Bill has long served to connect disparate parts of the food system, its lack of intentional systems design does little to build a permanent bridge among them.

When I began thinking about the effect of omnibus legislation on the Bill in 2008, it did not strike me that the procedural tool was beneficial to a better food system. In fact, it seemed to me that many years of logrolling had done little to advance the food system. And, Marion Nestle identifies why: “there is no overarching agenda.” To be sure, there are agendas and plenty of lawmakers, lobbyists, and special interests who check as many items on their agendas as possible as they trade, shape, and compromise. But, what if there were an explicit, transparent unifying, overarching agenda? Then, the collection of disparate programs is articulated through that agenda and the benefits, synergies, and opportunities to leverage rural and urban contributions to a functional food system is more possible. The pieces of a unified agenda already exist—

- American food policy rests on the fundamental goal of providing abundant, affordable food to all of its people.
- Urban areas rely on the rural population for food production.
- Rural areas produce raw materials and there must be adequate infrastructure in those areas to support the rural population.
- All Americans should have access to a food safety net that permits them to access nutritious food. Good nutrition is also fundamental, but more controversial.
- Agricultural production methods have profound impacts on environmental health, including top soil, water quality,

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35 Nestle Interview, supra note 25.
37 See id. at 1.
38 See id. at 26.
and air quality\textsuperscript{39} and producers may need incentives to sustainably steward the environment. 

There are other ideas that are likely more controversial, but given that they have been raised in the public discourse over the last two Bill cycles, they are included here. They should at least be recognized as representative of significant voter interest by legislators.

- Producing food that is affordable, healthy, environmentally sustainable, and economically viable is the common goal of federal farm and nutrition policy.
- The food system should include, and will benefit from, a variety of producers – from large mono-cropping operations to diverse family farms. Access to capital and to farm supports should be equitable and designed to promote farming viability across all sectors of production.
- Farm and food law and policy should align with environmental and public health goals.
- Though there may be disagreements concerning the amount and method of supporting farm and food programs, their importance to the overall security and well-being of the American people transcends partisanship.

There is no formal requirement that Congress articulate the values that inform any legislation. However, given the unique traditions of the Bill and the profound influence it has on all citizens, the Congressional Committees and the leadership responsible for them would make a significant contribution to American food law and policy if they undertook this task. Without a more transparent, bi-partisan agenda the Bill will likely be vulnerable to contentious political wrangling that does little to advance a food system that supports farmers and eaters in achieving economic, environmental, and human health.

\textbf{Conclusion}

\textsuperscript{39} See Mateo-Sagasta et al., supra note 31; see Agriculture: Agriculture and Air Quality, supra note 31.
The Farm Bill is the mechanism for setting American food law and policy. Since 1938, the use of omnibus legislation has been used to effectively secure compromise amongst disparate economic (and political) interests. However, as political discourse becomes more divisive and Congress less functional in the use of its legislative power, the Farm Bill process would benefit from a greater articulation of the overarching values that inform American farming and food lawmaking. Without such an organizing principle, the organic compromise that is inherent to omnibus legislation will likely be lost resulting in either failed Farm Bills or further polarization around food issues. Such polarization does little to serve farmers or eaters and also inhibits our ability to create economic and policy conditions that support a functional, healthy, and prosperous food system.

40 Josh Chafetz, Congress’s Constitution: Legislative Authority and the Separation of Powers 1 (Yale University Press 2017) (“Observers call Congress ‘the broken branch’ and lament that, ‘[g]ripped by stalemate, America’s chief lawmaking body can barely muster the ability to make law.’”) (quoting Michael J. Teter, Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction, 88 Notre Dame L. Rev. 2217, 2217).
The Fate of Industrial Hemp in the 2018 Farm Bill – Will Our Collective Ambivalence Finally Be Resolved?

Marne Coit

I. Introduction

As a nation, we are at a crossroads in the regulation of industrial hemp, and the 2018 Farm Bill is the time to decide which path we will choose. Congress has an opportunity to clear the path for farmers in the United States (“US”) to participate in this burgeoning market. With an estimated 25,000 uses, industrial hemp is one of those rare crops that has both food and agricultural uses.¹ There is undoubtedly a market for hemp products.² The Hemp Industries Association (“HIA”) estimates that US retail sales of hemp-based products was $688 million in 2016 – up from $573 million in 2015.³ By 2020 the industry is estimated to grow to $1.8 billion.⁴

Considering the projected market growth, one could conclude that growing industrial hemp has a lot of potential for farmers in the US.⁵ However, the biggest impediment to farmers doing so is the current state of the law that regulates this crop.⁶ There is a discrepancy between what Congress seemingly

² See id.
³ HARBOR NEW YORK, INDUSTRIAL HEMP FROM SEED TO MARKET 6 (Cornell University 2017), http://allegany.cce.cornell.edu/resources/industrial-hemp-from-seed-to-market.
⁵ Yonavjak, supra note 1.
mandated in the 2014 farm bill and the Drug Enforcement Administration’s (“DEA”) interpretation of the language of the Controlled Substances Act, a statute from 1970.\footnote{See 21 C.F.R. § 1308.}

Under the 2014 Farm Bill, Congress seemingly paved the way for industrial hemp to once again be grown in the US, as it granted authority for states to create industrial hemp pilot programs.\footnote{\text{Renee Johnson, Cong. Research Serv., Hemp as Agricultural Commodity 1 (2017).}} However, the Drug Enforcement Administration’s interpretation of the Controlled Substances Act (“CSA”) of 1970 still precludes farmers from fully participating in these programs.\footnote{Id.} The DEA claims that it has authority to regulate all species of \textit{Cannabis sativa} under the CSA, and does not distinguish between marijuana and industrial hemp.\footnote{Id. at 18.}

In the upcoming 2018 Farm Bill, Congress has the opportunity to clarify that the definition of marijuana does not include industrial hemp, and by doing so simultaneously clarify (and limit) the scope of DEA’s authority. In order for farmers, processors, and retailers to move forward, Congress must take this action, and, therefore, restrict DEA’s jurisdiction to marijuana. This is the only path forward for a thriving industrial hemp industry in the US.

\section*{II. Background}

For context, there has been an increasing demand for industrial hemp products in recent years\footnote{Market Size: Hemp Industry Sales Grow to 688 Million in 2016, Hemp Bus. J., https://www.hempbizjournal.com/market-size-hemp-industry-sales-grow-to-688-million-in-2016/ (last visited Jan. 29, 2018) [hereinafter Hemp Industry Sales Grow].}. However, industrial hemp is not a new crop in the US. From the 1800s through the early 1900s it was grown widely, and was used in a variety of everyday products such as fabrics, twine, and paper.\footnote{Johnson, supra note 8, at 11.}
this time period, it was treated the same as other commonly
grown crops.\textsuperscript{13} For example, the United States Department of
Agriculture ("USDA") published crop reports, compiled statistics,
and provided assistance to hemp producers with production and
distribution.\textsuperscript{14}

Peak production of industrial hemp in the US was about
1943, when approximately 150 million pounds were produced.\textsuperscript{15}
Due to a combination of changes in both the law and societal
attitudes,\textsuperscript{16} production dropped after this time, until 1958 when
the last known crop of industrial hemp was grown in the US.\textsuperscript{17}

As stated earlier, though, there is a resurgence of interest in
this crop.\textsuperscript{18} Market growth in the retail sector is increasing, which
means increased opportunities for producers, manufacturers, and
retailers.\textsuperscript{19} However, industry growth is hampered by the current
confusing and conflicted state of the law.

## III. State of the Law – Historical

The heart of the problem is how industrial hemp is defined
– and who is defining it. In order to understand the present day
complexities of the law, it is important to understand the historical
context.

As stated above, up until the mid-1900s, industrial
hemp was commonly grown in the US.\textsuperscript{20} In 1937, Congress
passed the Marijuana Tax Act. \textsuperscript{21} This was the first legislative
attempt to regulate marijuana in the US, and came about, in
part, because of shifting societal attitudes regarding drugs and
drug use.\textsuperscript{22} Although it did not prohibit production outright, it

\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 12.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} JOHNSON, supra note 8, at 12.
\item \textsuperscript{18} See Hemp Industry Sales Grow, supra note 11.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} JOHNSON, supra note 8, at 12.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id. at 11-12.
\end{itemize}
did make production much more difficult.\textsuperscript{23} The Marijuana Tax Act prohibited individual possession and sale of marijuana.\textsuperscript{24} It permitted medicinal use, but under this law it became highly regulated.\textsuperscript{25} In addition to requiring extensive documentation, it also imposed a tax if marijuana was bought, sold, imported, cultivated, or prescribed.\textsuperscript{26}

It is very important to note that the Marijuana Tax Act specifically regulated marijuana.\textsuperscript{27} It recognized a distinction between marijuana and industrial hemp, and it did not prohibit the production of industrial hemp.\textsuperscript{28} In fact, during World War II, the federal government encouraged production of hemp for fiber and oil.\textsuperscript{29}

In 1970, there was a significant shift in the law when the Controlled Substances Act (“CSA”) was passed.\textsuperscript{30} Under the CSA, certain plants and drugs were placed under federal jurisdiction.\textsuperscript{31} Specifically, the DEA was given jurisdiction over \textit{Cannabis sativa}.\textsuperscript{32} The critical piece here – and what has created complexities through the present day – is that the CSA does not specifically distinguish between marijuana and industrial hemp.\textsuperscript{33} The impact of not distinguishing between these two varieties is what causes the most issues for producers, manufacturers, and retailers today.\textsuperscript{34}

Under the CSA, drugs are placed into what is known as “schedules” based on a combination of acceptable medical use

\begin{itemize}
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{Johnson}, supra note 8, at 12
\item \textsuperscript{26} \textit{Id}.
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id}.
\item \textsuperscript{30} \textit{Johnson}, supra note 8, at 12
\item \textsuperscript{31} \textit{See id}.
\item \textsuperscript{32} \textit{See generally} Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513
\item \textsuperscript{33} \textit{Johnson}, supra note 8, at 32
\item \textsuperscript{34} \textit{Id} at 31-32.
\end{itemize}
and abuse potential.\textsuperscript{35} Marijuana has been identified as a Schedule I drug,\textsuperscript{36} which means that it is considered to be in the tier with the most dangerous drugs, and has a high potential for abuse and no currently accepted medical use.\textsuperscript{37} Technically, the CSA does not prohibit the production of industrial hemp outright, but it does implement strict controls.\textsuperscript{38} For example, if one were to import or grow cannabis seed, one must register with the DEA and obtain a permit to do so.\textsuperscript{39}

Notably, the CSA states that “[t]he term ‘marihuana’ means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof;… and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. \textbf{Such term does not include} the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant… \textbf{or the sterilized seed of such plant which is incapable of germination}” (emphasis added).\textsuperscript{40}

The language in the above definition is not clear and has led to arguments about whether industrial hemp is excluded. If this were the case, then it leads to the conclusion that marijuana is regulated by the DEA, but that industrial hemp is not. For example, hulled hemp seeds, or hemp seed hearts, are sold as a food product.\textsuperscript{41} Hemp seed in this form is considered to be non-viable, or incapable of germination.\textsuperscript{42} Because it cannot germinate, one might argue that it fits into the exemption of the definition of marijuana above. However, the DEA maintains that the definition in the CSA includes all categories of \textit{Cannabis sativa}, which they

\textsuperscript{37} 21 U.S.C. §812(b).
\textsuperscript{38} \textit{Johnson, supra} note 8, at 12
\textsuperscript{39} \textit{Id.} at 17.
\textsuperscript{40} 21 U.S.C. § 802(16).
\textsuperscript{42} \textit{Hulled Hemp Seeds, HEMPSEED.CA}, \url{http://www.hempseed.ca/hulled-hemp-seed/} (last visited Feb. 6, 2018).}
argue gives them jurisdiction to regulate industrial hemp.  

IV. State of the Law – Present Day

As mentioned above, the DEA has been acting under the presumption that industrial hemp and marijuana are essentially the same, and that they have authority to regulate both. The reason that the scope of DEA’s authority is now coming under increased scrutiny is because of a provision in the 2014 Farm Bill. Under §7606, Congress specifically granted authority to universities and state departments of agriculture to grow or cultivate industrial hemp if it is done for the purposes of research under an agricultural pilot program. These pilot programs can be developed to study the growth, cultivation, or marketing of industrial hemp. The details for how the pilot programs are run is left up to the individual states, as the law gives states the authority to enact regulations in this area. The statute does specify that such programs may only be created in states that allow industrial hemp to be grown.

What is particularly significant about this provision in the farm bill is the definition of industrial hemp that is provided. Under this statute industrial hemp, for the purposes of these state pilot programs, is defined as any part of the Cannabis sativa L. plant, whether the plant is growing or not, as long as the THC concentration is 0.3% or below.

In and of itself, this provides a clear distinction between what is to be considered marijuana – THC concentration above 0.3%, and industrial hemp – THC concentration of 0.3% or

46 Id.
47 See id.
48 Id.
below.\textsuperscript{49} However, this law does not exist on its own, but rather co-exists with, and has the same legal weight as, the CSA.\textsuperscript{50} And so it creates the appearance of a misalignment or conflict between these two laws.

What Congress failed to do when enacting this law was to specifically amend the definition of marijuana under the CSA to exclude industrial hemp. Instead of creating a straightforward path for those who want to produce or process industrial hemp, in reality, it has created confusion and uncertainty. While states have autonomy, to a certain extent, to create their own industrial hemp programs,\textsuperscript{51} the DEA continues to define industrial hemp in such a way as to be within their jurisdiction.

This creates some unusual results. First, it means that not all producers are able to participate in this market. It only provides opportunities for producers who live in states that have since created industrial hemp pilot programs.\textsuperscript{52} For those who do live in states with pilot programs, they are still subject to restrictions within those programs.\textsuperscript{53} For example, most programs require some type of licensure for producers and manufacturers, and producers may be required to supply certain data to the state programs.\textsuperscript{54}

There are additional limitations to growing industrial hemp that do not exist with other crops. If one wants to grow industrial hemp under a state pilot project, one is still required to register with DEA, because it is considered to be a Schedule I drug.\textsuperscript{55} This creates the odd reality for farmers of having to register with the

\textsuperscript{49} Johnson, supra note 8, at 1-2.
\textsuperscript{50} H.R. Res. 2642, 113th Cong. (2014) (enacted).
\textsuperscript{52} State Industrial Hemp Statutes, supra note 44. As of the time of this writing, at least 34 states had passed legislation related to industrial hemp. Id.
\textsuperscript{53} See id. Specific requirements vary by state; details of individual state programs are beyond the scope of this essay. Id.
\textsuperscript{54} See id.
\textsuperscript{55} See State Industrial Hemp Statutes, supra note 44. Under some state programs, the state department of agriculture will be the entity that registers with the DEA. Id. For example, this is the case under the state industrial hemp pilot program in North Carolina. See e.g., N.C. Gen. Stat. § 106-568.53(1).
DEA to grow a crop that is seemingly legal. There are few other crops that require producers to jump through as many regulatory hoops in order to obtain seed and be permitted to grow them.

It has also created complications for farmers who want to purchase seed to plant industrial hemp. Under the CSA, industrial hemp plants and seeds cannot be transported across state lines; this applies to driving the seed or plants across state lines, as well as mailing or shipping seed. So, for example, if a producer lives in a state with a pilot program such as North Carolina and wants to purchase seed from Colorado (also a state with a pilot program), and is stopped in a state in between, the producer could potentially be charged with possession of a controlled substance under criminal law.

The result is potential fines and/or a prison sentence under both state and federal law. This seems like a harsh result for a producer who is trying to obtain seed to plant a crop.

In August of 2016 the DEA, USDA and Food and Drug Administration ("FDA") issued the Statement of Principles on Industrial Hemp in an attempt to clarify the positions of the three federal regulatory agencies that are most involved in regulating industrial hemp. The purpose was to inform the public so that people could participate in state pilot programs and still be in compliance with federal law.

Notably, the guidance document specifically states that "Section 7606 did not remove industrial hemp from the controlled substances list. Therefore, Federal law continues to restrict hemp-
related activities, to the extent that those activities have not been legalized under section 7606.”

In addition, it also explains that the provision in the farm bill “did not eliminate the requirement under the Controlled Substances Import and Export Act that the importation of viable cannabis seeds must be carried out by person registered with the DEA to do so.”

Perhaps most telling was the statement that section 7606 of the farm bill “left open many questions regarding the continuing application of Federal drug control statutes to the growth, cultivation, manufacture, and distribution of industrial hemp products, as well as the extent to which growth by private parties and sale of industrial hemp products are permissible.”

Indeed, the farm bill did seem to open many questions, as discussed above. Unfortunately, the Statement of Principles did not do much to resolve them. We are still left in a reality in which a crop is seemingly legal, yet is hampered by the restrictions placed upon it by criminal drug laws.

The DEA has taken actions that seem to be at odds with the language and intent of section 7606. For example, in December of 2016, the DEA published a final rule stating that a new drug code would be used for extracts of marihuana. The term “marihuana extract” is defined as “an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis…” The agency stated that these extracts would remain listed as Schedule I drugs, and that anyone who handled them would be required to register with the DEA accordingly.

This is notable because it would impact a significant portion of the industrial hemp industry that is focused on producing and/or retailing cannabidiol (“CBD”). CBD is a non-psychoactive

62 Id.
63 JOHNSON, supra note 8, at 35.
66 Id.
67 Id. at 90,195-90,196.
68 Id. at 90,195.
compound that can be derived from industrial hemp, and can be used as a dietary supplement. The DEA’s rule stating that these extracts would fall under their jurisdiction and be classified as Schedule I drugs seemed to contradict the farm bill provision. Although the agency did provide further clarification in March of 2017, this situation is evidence of the need for greater clarification across the board about the DEA’s role in regulating industrial hemp and hemp products.

V. Next Steps

The current legal status of industrial hemp leaves the industry in limbo. Congress has the authority to remedy this. Perhaps the most straightforward approach is to provide a fix in the upcoming 2018 Farm Bill. First, Congress can expressly state that the industrial hemp pilot programs are permanent. Section 7606 on its face does not seem to sunset; however, there is also no express language stating that it is a permanent program. In fact, the language specifically refers to the state programs as being “pilot programs”, seemingly indicating a non-permanent nature.

In addition, Congress can specifically clarify and amend the definition of marijuana under the CSA to exclude industrial hemp. This would have the effect of clearing up any current discrepancies between the language of the current farm bill and DEA’s interpretation of the language of the CSA. In so doing, Congress could take the additional step of clarifying the scope of


73 Johnson, supra note 8, at 13-14.
DEA’s authority by drawing a bright line between marijuana and industrial hemp.

To go one step further, after removing the regulation of industrial hemp from the DEA’s authority, Congress could expressly preempt this area of law. This would eliminate the state programs altogether and level the playing field by permitting all producers and processors the opportunity to enter this market if they choose, regardless of what state they reside in.

Congress could also choose to pass separate, freestanding legislation that would essentially serve the same function as above. Such legislation has been introduced, but so far has not been passed into law. For example, the Industrial Hemp Farming Act was introduced in the House of Representatives in July of 2017. The purpose of the bill was to amend the CSA to exclude industrial hemp from the term marihuana.

VI. Conclusion

Congress provided the opportunity for states to create industrial hemp pilot programs in the last farm bill. This demonstrates a clear intent to have industrial hemp be a legitimate, legal crop. And societal norms seem to have shifted in favor of allowing this crop to be grown for food and other uses, as is evidenced by the steadily increasing market in industrial hemp. However, the current state of the law creates confusion about the legality of industrial hemp and leaves a potentially profitable industry in limbo. It is understandably difficult for potential producers and manufacturers to engage in this industry under the current state of the law. Congress took a step in the right direction by allowing for the industrial hemp pilot programs and providing a means (although still limiting) for states to move forward. Now Congress must take the next step and remove the remaining legal and regulatory obstacles so that producers, manufactures and retailers can move forward confidently with their businesses.

75 Id.
next step is not necessarily complicated, but it is one that Congress needs to take action on. It is time to remove any ambiguity and move forward.
Building Indian Country’s Future through Food, Agriculture, Infrastructure, and Economic Development in the 2018 Farm Bill

By Janie Simms Hipp,* Colby D. Duren,** and Erin Parker***

Introduction

Agriculture is, and has always been, important to Indian Country. According to the data collected by the National Agricultural Statistics Service (“NASS”) for the most recent Census of Agriculture, there are over 71,947 American Indian...
and Alaska Native (“AIAN”) Farmers and Ranchers, working on more than 57 million acres of land, with a market value of products producing reaching over $3.3 billion—including $1.4 billion in crops and $1.8 billion in livestock and poultry. Indian Country operations are twice the size of non-Native operations, but with half the income and involvement in federal farm security programs. These numbers tell us not only what contributions Indian Country already makes to American agriculture, but also speak to the potential for future opportunities if current operations were expanded, and contemporary federal policy adjusted in a way that facilitates Tribes and individual AIAN operators to more fully take advantage of U.S. Department of Agriculture (“USDA”) programming. Food and agriculture production could be a huge economic driver for Tribes, the entirety of Indian Country, and the rural communities in which their communities are found. Production could equal the revenue generated by gaming and create opportunities for Tribes that will never benefit from gaming because of their isolated location.

In order to realize this potential, we must re-calibrate USDA programs to capitalize on current successes in Indian Country agriculture and agribusiness and expand those opportunities throughout Indian Country, including feeding the people living in our most rural and remote places. Agriculture and agribusiness can create jobs and stabilize economies for Native

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2 Experts in this area suggest the total number of AIAN operators is undercounted by as much as half; focused attention and outreach in Tribal communities results in more accurate reporting. See William Iwig et al., Multi-Cultural Outreach to Ethnic Farmers for the 2007 Census of Agriculture, U.S. Dept. of Agric., https://unstats.un.org/unsd/statcom/statcom_09/seminars/innovation_Innovation%20Seminar/USA-AgriCensus-Abstract.pdf.


4 See id.
people who have deep connections to the land on which they live, to farming and ranching, and to the foods they produce every day. In addition, Tribal governments and Tribal communities have always been and are continuing to be the providers of essential governmental services in countless rural, remote, and isolated communities throughout the United States. This essay focuses on several key provisions and themes that could have the greatest impact to support and grow agriculture and agribusiness in Indian Country if implemented in the 2018 Farm Bill reauthorization.

Acknowledgement and Parity for Tribal Governments Throughout the Farm Bill

One of the most substantial steps forward that can be taken in the 2018 Farm Bill is for Congress to permanently acknowledge the status and role of Tribal governments and Tribal Departments of Agriculture in setting and shaping agricultural policy. Similar to their State counterparts, Tribal Departments of Agriculture are created by their Tribal governments and are charged with administration of agriculture and food systems, yet Tribal Departments of Agriculture have not been recognized in the law with the clear authority to interface with all agencies within USDA and the Office of Intergovernmental Affairs at USDA. Recognizing Tribal governments, Tribal Departments of Agriculture, and Tribal law in the same manner as similar authorities defer to States, State Departments of Agriculture, and State law is a critical step towards improving USDA program delivery throughout Indian Country. This simple action would fully realize the existing trust responsibility and treaty obligations the federal government has to Tribal Nations, and would support the self-governance and self-determination that stabilize Tribal communities and accelerate the ability of Tribes to meet their economic, food, infrastructure, and health needs.

Most USDA programs have not begun to be seriously utilized by Tribes because, for the most part, the acknowledgement of Tribal governmental authority has not been clearly embraced
by USDA. Including “Tribal governments” in the existing intergovernmental approaches, through which many of the USDA programs are delivered, will acknowledge Tribal governments’ inherent sovereignty and importance to rural America and will expand the reach of programs, create jobs, and build more food businesses in Indian Country.

**Tribal Government Management of All Nutrition and Food Assistance Programs**

In this Farm Bill, Congress must allow Tribal governments to directly manage all federal nutrition and food assistance programs, especially the Supplemental Nutrition Assistance Program (“SNAP”), and improve the ability for Tribes to manage and include traditional and Native grown foods in the Food Distribution Program on Indian Reservations ("FDPIR") food packages. Tribal governments are best positioned to serve food insecure citizens within their own communities making direct communication, outreach, nutrition education, and feeding program delivery more streamlined. Not only can this lead to greater program efficiency and customer service, it can also present Tribes with the opportunity to tailor these programs to suit their communities and build more robust food systems.

Tribal citizens have high usage rates of all federal feeding and nutrition programs. In some rural and remote reservation communities, nearly 25 percent of all community citizens are taking part in the feeding programs,\(^5\) and in other communities those numbers can climb as high as 60 to 80 percent.\(^6\) These participation rates remain high because of the relative unemployment rates of individuals in the communities that are directly caused by the lack of employment options,\(^7\) poor transportation to jobs and food

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\(^7\) Kenneth Finegold et al., U.S. Dept. of Agric., Background Report on the Use and Impact of Food Assistance Programs on Indian Reservations 1 (2005),
sources/retail facilities, the age and population characteristics of the individuals in the communities, and the prevalence of chronic health problems, among other issues. Because the rate of obesity, diabetes, chronic heart diseases, cancer, and rated health problems is so high in so many communities in Indian Country, participation rates in the feeding programs, when coupled with the prevalence of persistent poverty, create a fragile system of food security and food access across Indian Country. Yet, most feeding program participants live on the lands that could feed them, but, instead, grow foods that are destined for far away markets.

A consistent, comprehensive, and Tribal government-led approach tailored to the needs of Indian Country is paramount. Linking or “coupling” the feeding programs to the food production that occurs on Tribal lands will do two things simultaneously. First, it will ensure that, over time, the use of feeding programs in Indian Country could decline, and, in some regions, could disappear altogether because of the ability to link with local food production to meet the needs of tribal communities. Second, it will ensure that food produced on Indian lands are focused on three simultaneous goals: (1) retaining enough food products that Tribal citizens will be fed by food produced locally or regionally; (2) ensuring that fresher foods are available to Tribal citizens needing access to feeding programs; and (3) ensuring the stabilization of food businesses because the foods are being used to feed people who lack food access and, at the same time, offering a consistent, albeit federal, market or anchor contract that gives food producers the economic stability to continue access to additional markets off tribal lands.

However, key issues remain that are critical to the future of the feeding programs, and how those programs are delivered


8 Id. at 10.
9 Id. at 9.
10 Id. at 14.
to or serve Indian Country citizens and these must be addressed in the 2018 Farm Bill. In a report authorized by the 2014 Farm Bill, USDA reviewed the feasibility of Tribal administration of federal food assistance programs. Nearly all Tribes participating and more than 90 percent of all respondents expressed interest in administering federal nutrition assistance programs as an exercise of sovereignty and to provide direct service to Tribal citizens in need of assistance.\textsuperscript{11} These respondents felt the ability to provide flexibility in the management of nutritional quality of the food provided and culturally appropriate programming and service delivery were also critical.\textsuperscript{12}

While there are many additional infrastructure needs identified to achieve these interrelated goals of management of feeding programs, the report states that USDA, and its Food and Nutrition Service ("FNS"), does not have the requisite "638-like authority" that explicitly provides Congressional support for executing contracts between federal agencies and Tribes to coordinate the management of specific federal programs.\textsuperscript{13} This can be achieved by introducing legislative language modeled after the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638,\textsuperscript{14} as amended, or by providing treatment as a state/parity for Tribes to manage these programs in the Farm Bill.

Tribal governments must directly manage all the nutrition and feeding programs, because they are best able to ensure that food security needs in their reservation, rural, and very remote communities are met. They are also more capable of directly linking agribusiness food production to the long-term vision of removing people from feeding program participation and into


\textsuperscript{12} Id. at vii.

\textsuperscript{13} See id. at 52, n. 68.

the local job market, which can and should include a strong and viable agribusiness economic development approach. For Tribal governments, marrying the food security needs of the people with food job opportunities at the Tribal level promotes both enhanced food security and economic diversification in Indian Country.

**Improve Credit Access in Indian Country and Support Authority for Farm Service Agency and the Farm Credit System**

Due to the capital-intense nature of farming, ranching, and agribusiness in general, many titles have long been important parts of the Farm Bill, including: credit, commodity, conservation, and crop insurance. Farming, ranching, and agribusiness are high-risk enterprises, and are linked to production systems that have unique regulatory requirements and challenges. Good times for agriculture can very quickly be followed by bad times. Having access to a lending entity willing to understand these financial realities is critical. During turbulent times, Indian Country is always hit as hard or harder than most other areas of the country, because of the remote and isolated nature of our farms, ranches, and agribusinesses and the reality that in most reservation communities a “credit desert” exists alongside food deserts.

First, our important partners in lending in rural areas, like those in the Farm Credit System (“FCS”), must have no questions concerning their authority to lend in Indian Country. Due to the nature of landholding and land ownership in Indian Country, which is a matter controlled by federal law, some clarification of the authority to lend is to help provide additional certainty for the FCS in lending within Indian Country. Tribal governments, tribal producers, and groups of producers must often organize their business engagement in ways not required of non-Tribal entities and governments due to unique issues associated with federal Indian law; making sure that they are able to borrow under FCS laws and regulations is important.

Additionally, the improvements the Farm Service Agency (“FSA”) has made in the extension of credit to farmers and
ranchers in Indian Country in the post-Keepseagle era must continue, but separate programs that allow for unique training and technical assistance concerning financial issues and loan servicing for tribal producers must also be considered. Access to credit through FSA and Rural Development (“RD”) must not be hampered by outdated program rules that do not match our credit needs. Further, we must make sure that the program officers at RD and FSA have deep awareness of the way in which Tribal governments, Tribal agribusinesses, and Tribal producers do business, and ensure they are not constrained by an additional regulatory burden nor shut out of lending opportunities available to all producers.

Many smaller or beginning producers who are not yet ready for FSA or FCS lending relationships utilize the services of local, smaller retail banking entities, community development financial institutions (or “CDFI”s), credit unions, or use other means of acquiring needed capital. Native CDFIs must be included in all FSA and Rural Development lending authorities in order to leverage access to credit for Indian Country producers and Tribal governments. Ensuring that Native-owned banks can easily interface with FSA, RD, and FCS lending institutions on agribusiness and agriculture infrastructure business opportunities will further support credit access and economic growth in Indian Country.

Ensure the Commodity, Conservation, Forestry, and Crop Insurance Farm Bill Titles Support Indian Country and Native Producers

The Commodity, Conservation, and Crop Insurance Titles of the Farm Bill all work together to provide not only farm security for producers, they also support the health of our Tribal lands. These programs must be updated to consider the unique jurisdictional and agribusiness/product needs of Tribal governments and Tribal producers.

First and foremost, many Tribal governments and Tribal farming, ranching, and food businesses produce covered
commodity crops of wheat, corn, and soybeans, and are deeply engaged in livestock operations impacted by the Commodity Title. We must ensure equitable access to these programs for Tribal producers, including ensuring federal or Tribally chartered corporations, especially those created under Tribal law, Section 17 of the Indian Reorganization Act of 1934,\textsuperscript{15} or Section 3 of the Oklahoma Indian Welfare Act of 1936,\textsuperscript{16} are explicitly eligible for programs such as the commodity disaster assistance programs. Additionally, the definition of “livestock” must be amended to include commonly raised livestock like “reindeer,” “caribou,” “elk,” “horses,” or other animals raised or harvested in Tribal communities. All of these animals must be recognized as livestock and their owners must be eligible for full protection and program participation Department-wide.

Since the Conservation Title programs are often the gateway to participate in other USDA programs, it is vital that Tribal governments and producers can access all program authorities and funding. Wherever there is a reference to “state”, “local”, or “regional” agricultural producers, the term “tribal” should be inserted into that section to ensure that any inadvertent failure to list Tribal governments, Tribal producers, or Tribal organizations does not preclude them from participating or relegate them to a lesser importance or priority within the relevant section. This also includes making sure any reference to “state law” in the Conservation Title says “state law or tribal law” to acknowledge the conservation laws and codes our Tribal governments pass and enforce each day with regard to the lands over which they have jurisdiction. This change also needs to be extended to the Forestry Title programs, especially by adding “Tribes” to title of the State and Private Forestry program, and including Tribes explicitly in the Good Neighbor Authority” cooperative agreement program. Further, the Farm Bill must allow for greater Tribal participation


in Tribal Forest Protection Act of 2004\textsuperscript{17} ("TFPA") projects by authorizing the application of "638" contracting authority to TFPA projects on Forest Service lands at USDA or Bureau of Land Management lands at the U.S. Department of the Interior.

Crop insurance is an important tool of risk management and the products in place now must be examined to ensure they are suitable for Tribal food production systems. The Risk Management Agency ("RMA") must conduct a study to ascertain the efficacy and applicability of the current crop insurance products as they relate to Indian Country agriculture production. If that study reveals that either the specific crop insurance products or the general guidance documents of RMA do not adequately consider unique tribal production issues, a separate administrative guidance or notice should be issued to solve these concerns, and RMA should pursue unique crop insurance products and crop insurance administration systems. The goal must be to increase the utilization and remove any inadvertent barriers to access crop insurance products in Indian Country. Finally, USDA must engage Native-owned insurance companies and Native CDFIs and other entities to encourage the offering of crop insurance products in Indian Country. While many Tribes and Tribal producers maintain crop insurance, the current crop insurance research, product development, and policy sales areas are not developed for, and do not adequately reach, Tribal producers.

\textbf{Apply the Substantially Underserved Trust Area designation to all Rural Development and USDA Funding Authorities}

The Substantially Underserved Trust Area ("SUTA") designation authorized by the 2008 Farm Bill\textsuperscript{18} helps USDA’s Rural Utility Service ("RUS") offer low interest rates; waive non-duplication, matching, and credit support requirements; extend

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loan repayment terms; and provide the highest funding priority for SUTA projects. Currently, SUTA is only applied to a small segment of utilities infrastructure programs, but more explicit instruction must be provided to allow the Secretary to exercise this discretion more broadly.

This change will help ensure more equitable access to Rural Development (“RD”) programs and authorities in these substantially underserved areas, and can be used to provide much-needed support to Tribal citizens operating businesses and living in rural communities. The change would, among other things, allow the waiver of matching requirements for projects funded through RD, which can be a significant barrier to applicant participation in RD business and infrastructure projects where remoteness and related lack of tax base is a problem. In the determination of eligibility and repayment ability, local school district social demographics should be utilized instead of county-wide data. A broader application of SUTA will recognize the unique and essential Tribal infrastructure needs and will help build rural America, as many tribal governments are the backbone of the rural infrastructure now and those trends appear to be unrelenting.

Establish a Permanent Rural Development Tribal Technical Service and Assistance Office

In addition to the SUTA provision above, establishing a permanent office providing technical service and assistance across all RD funding authorities, via a cooperative agreement with USDA, would help with two major issues of access to RD programs in Indian Country. First, the complexities of lending and infrastructure establishment in Indian Country--tied to the nature of the trust land base--call for the establishment of such an office that can prepare and monitor lessons learned,

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establish user-friendly application systems, and assist staff at the tribal or business level in preparing applications. This is a function the federal government cannot readily undertake. Such assistance would also provide needed insight to federal staff in the ongoing execution of their roles by providing a single point-of-contact for all concerned. Second, the trust responsibility of the federal government to tribes supports the need to establish such assistance interventions. This would model some current RD practices, particularly in the infrastructure arena, where field staff assist agency staff and the applicant in analyzing financial viability, key engineering specifications, and related technical requirements for more complex infrastructure projects.

**Equal Access to Research, Education, and Extension Funding for Tribal Colleges and Universities and the Federally Recognized Tribes Extension Program**

All entities working within research, extension, and education in Indian Country, including Tribal Colleges and Universities (“TCU”s) and the Federally Recognized Tribes Extension Program (“FRTEP”) must have the same access to research, education, and extension funding as all other entities. Further, FRTEP must maintain its unique program authorities and be protected from over-subscription by those who have access to other program funding like the 1862, 1890, and 1994 land-grant institutions and TCUs. FRTEP was created by Congress to address the needs of those Tribes not served by Tribal colleges.\(^{21}\) The funding for both extension for TCUs and FRTEP is very low.\(^{22}\) Entities serving Indian Country must be entitled to the same level of eligibility and access to National Institute of Food and Agriculture (“NIFA”) funding as all other entities. Educating the next generation of producers, scientists, technical specialists,


business managers, engineers, lawyers, and related professionals who advise and support the agriculture and food sectors is vital and making sure that Native youth aspire to those career paths is important to the survival of Tribal communities and to creating viable occupations that support food and agriculture sectors in Indian Country. We are in an intergenerational shift in agriculture. and Indian Country is no different. Our farmers are older and our young people are hungry for a meaningful career. With 12,000 Native students in FFA as of 2016, we know many AIAN young people want that career to be in agriculture. Agriculture research, education, and extension programs are critical to our food, health, and self-sufficiency. Agriculture research is important because it monitors and explores old and new knowledge regarding plant and animal health, explores the impact of science to solve food problems, tackles societal issues related to health, and ensures our food supplies are sound and resilient. Accessing research, building our own research systems within TCUs, and supporting educational institutions and faculty within Tribal communities is essential to stabilizing agriculture production and communities. Focusing on the importance of traditional knowledge and exploring its use in modern communities is best done at Tribal-owned and managed institutions. Extending knowledge and research outcomes into communities and onto tribal farms, ranches, and food businesses is critical to their growth and stabilization.

We must address these issues in a thoughtful and comprehensive manner; however, FRTEP cannot be opened up in such a way that it becomes available to larger institutions with no relationship to Tribes and Tribal communities and that already have access to thirty thousand students or more and billion-


dollar endowment funds. FRTEP funding must be returned to a process that preserves the programs in place while continuing to grow. TCUs have a very low and totally inadequate funding level for extension services and research. Even with low funding levels, TCUs do an incredibly important job within their communities and need to be respected and fully eligible for all of the funding authorities within the Research Title of the Farm Bill and research programs at USDA. Stabilizing both programs while growing both programs should be the goal; pitting programs against one another will not improve the situation. Opening the full portfolio at NIFA to equitable access for Tribal-serving institutions is necessary.

Finally, we need data. A farmer, rancher, or food business has better productivity if they have good records and data access. We can use mobile technology in new ways with a new generation of farmers and ranchers, but we must make sure Tribes have greatly improved access to that technology as well. E-connectivity and rural broadband is incredibly important for all rural America and for Tribes—this access was among the first recommendations made to support prosperity for all rural America by the USDA Interagency Task Force of Agriculture and Rural Prosperity.25 Their report to the President noted that e-connectivity is “a tool that enables increased productivity for farms, factories, forests, mining, and small businesses.”26 TCUs and FRTEP agents must be a part of the technological revolution in farming and ranching and agribusiness growth and be afforded access to improved research, education, extension funding.

**Conclusion**

The next Farm Bill presents an incredible opportunity to address the broad needs of a changing food and agriculture sector alongside the needs of our rural and remote communities.

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26 *Id.* at 17.
around the country. To take full advantage of the opportunities that Indian Country has in agriculture and agribusiness, as well as enhancing food sovereignty and securing the health of our people and communities, Tribal governments must be seen as equal governmental partners in delivering and accessing Farm Bill programs.

By adjusting, developing, and improving the Farm Bill’s programs, we can build upon the great work already happening in Tribal communities surrounding food and agriculture. We can improve and expand our infrastructure. We can develop our Tribal food systems. We can provide the means for our agriculture businesses to thrive. We can continue to address and improve the health of our people. We can feed our communities in vibrant Native food systems with foods raised and grown by Tribal people. But equally important, the country can acknowledge the role Tribes have always played in our nation’s food security and we can now become better partners in food security, food production, and the agriculture sector. Improving the Farm Bill for Indian Country will help bolster the important work ahead for us all.
Climate change affects farmers and ranchers more than almost any other sector. Agriculture depends on consistent weather patterns, and the more frequent droughts, floods, heat waves, pest attacks, and other impacts of climate change make an often uncertain activity even more so. A farm bill that focuses on the true long-term interests of farmers would help producers slow climate change, while also helping them better prepare for the inevitable coming weather changes. Fortunately, many practices that help producers reduce their contribution to climate change also enhance their farms’ resilience to higher temperatures and more extreme weather. The farm bill should prioritize adoption of these climate-friendly practices. It’s time to decarbonize the farm bill.

While this is a radical—or at least politically charged—idea in the United States, other countries are beginning to treat agriculture as a major source of emissions and as a major pathway for reducing net emissions. Alongside the negotiations over the Paris Agreement on climate change in 2016, hundreds of countries, regional groups, and others joined in an initiative called “4/1000” to increase soil carbon stocks by 0.4 percent.

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1 See, e.g., Eva Wollenberg et al., Reducing Emissions from Agriculture to Meet the 2°C Target, 22 GLOBAL CHANGE BIOLOGY 3859, 3860 (2016). Under the 2015 Paris Agreement of the United Nations Framework Convention on Climate Change, each country sets their own emission targets, while also planning and reporting their contribution. Id. So far at least 119 countries have pledged to reduce their agricultural greenhouse gas emissions in their statements of Intended Nationally Determined Contributions (“INDC”s). Id.
every year. This could be enough to offset about 30 percent of global anthropogenic emissions.

The measures necessary to increase soil carbon stocks would also reduce nonpoint source water pollution and soil erosion, while increasing agricultural productivity, soil water carrying capacity, and drought resilience. With the reauthorization of the farm bill every five years, and perhaps as soon as 2018, the U.S. has an opportunity to incentivize practices that benefit producers as well as society more broadly. This essay offers suggestions on how the farm bill can be reformed to accomplish this. Although it’s unlikely the 2018 farm bill will address climate change, it’s not too early to lay the foundation for 2023 and beyond.

**Moving beyond the 1938 Farm Bill**

The structure and priorities of the farm bill still owe much to the Agricultural Adjustment Act of 1938. The 1938 Farm Bill compensated farmers for “soil conservation,” but, as observers at the time noted, the conservation component was largely a legal fiction, intended to ensure that the legislation, which primarily benefitted large-scale commodity producers, passed constitutional

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muster.\textsuperscript{7} Subsequent farm bills have followed this pattern, using conservation as a means to support large-scale, capital-intensive agriculture, but rarely treating it as an end in itself. This has resulted in a farm safety net that places the interests of agribusiness over farmers and conservation programs that often do not do enough to strengthen the environment or rural communities.

This history must help guide the decarbonization of the farm bill. Some agricultural practices may, in the short-term, help reduce greenhouse gas emissions, but in the long-run shore up an industrial model of agriculture that is ultimately less climate-friendly.\textsuperscript{8} Moreover, a successful, climate-friendly farm bill would not only include programs designed to reduce emissions and increase soil health, but it would also work to change the political dynamics of farm communities. Without building a robust base of support in rural America by targeting benefits at a wide range of people—rather than a small group of very large, often corporate farms—any climate-friendly programs will soon face co-option or dissolution.

Both the farm safety net and conservation programs must be designed with these long-term goals in mind. Some proposals to make conservation and research programs more “flexible” and financially secure by increasing the private sector’s involvement,\textsuperscript{9}


for example, while advertised as a win-win for farmers and the environment,\textsuperscript{10} would in fact harm both.\textsuperscript{11} Many of the largest sources of private funding have very different interests than environmental stewardship or rural communities. Thus, ranking research funding applications higher if the applicants secure corporate matches would in the long-run advance the interests of agribusiness over those of independent farmers and the environment.

Fortunately, it may be politically advantageous to decarbonize the farm bill with a long-term focus, prioritizing the public interest with the input of rural communities and a diverse range of farmers. Agribusiness is increasingly concentrated: Just four companies sold over 85 percent of the beef in the U.S.;\textsuperscript{12} five companies slaughter almost 70 percent of the swine;\textsuperscript{13} with recent mergers, just three companies control over 60 percent of agro-chemical and seed sales internationally.\textsuperscript{14} This concentration, as well as the concentration of payments under federal farm programs,\textsuperscript{15} creates tensions in farm country,\textsuperscript{16} and thus a political opening.


\textsuperscript{13} \texttt{The Agribusiness Accountability Initiative, Hogging the Market: How Powerful Meat Packers are Changing our Food System and what We Can Do About It 2}, \url{http://www.ase.tufts.edu/gdae/Pubs/rp/AAI_Issue_Brief_4.pdf}.

\textsuperscript{14} \texttt{Merge-Santo: New Threat to Food Sovereignty}, ETC Grp. (Mar. 23, 2016), \url{http://www.etcgroup.org/content/merge-santo-new-threat-food-sovereignty}.

\textsuperscript{15} The largest 7 percent of producers owns 60 percent of the harvested cropland, receives almost half of all government farm payments, and takes in almost 90 percent of all net farm income. \textit{See U.S. Dep’t of Agric., 2012 Census of Agriculture} 94, 98, 100 tbl. 65 (2014), \url{https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1, Chapter 1 US/usv1.pdf} (Calculated by the authors using data from the Census of Agriculture).

\textsuperscript{16} See, e.g., \texttt{Ctr. for Rural Affairs, May/June 2013 Study among Rural/Small-
Advancing carbon-sequestering policies could prove popular in many rural areas if those policies were designed to benefit a broader range of farmers than current programs, improve water quality and local landscapes, and help reverse land consolidation.

**Reforming farm bill programs**

The farm bill is a massive omnibus bill. Its most recent iteration, the Agricultural Act of 2014, ran to 357 pages, amended 16 previous farm bills, and authorized almost a trillion dollars of spending. Because the bill is typically so large, we do not attempt to provide a comprehensive guide to decarbonizing it. Instead we focus on six critical steps that Congress should take to make future farm bills better for rural communities and the climate.


1. Expand research and extension service on climate-friendly practices.

Over the last decade, public spending on agricultural research has dropped by almost one-third and less than two percent of the remaining funding is devoted to diversified systems, which offer the greatest climate and environmental benefits. Given the critical need both for greater study and demonstration of many climate-friendly practices, Congress should restore sufficient funding to U.S. Department of Agriculture (“USDA”) research programs and require that at least half of the department’s research expenditures support climate-friendly practices or systems.

Similarly, extension services have proven remarkably effective at disseminating and perpetuating new agricultural practices. Yet funding is way down and there is inadequate focus on climate-friendly practices such as the use of cover crops, prairie grass strips, perennial crops, and buffer zones along streams and lakes. Congress should both restore funding for extension to at least $900 million annually, and, perhaps building on the existing (for now) Climate Hubs, devote the additional funding to support practices that will both increase soil carbon stocks and improve farm resilience to extreme weather.

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21 See id.


23 Congress should also provide permanent baseline funding for the USDA National Agroforestry Center, while increasing its budget to at least $10 million. It was originally appropriated $5 million by Congress in the 1990 Farm Bill; however it typically receives about $1 million, despite agroforestry’s demonstrated potential to rapidly increase carbon sequestration. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101–624, §1243, 104 Stat. 3546 (1990).
2. Enforce conservation limitations—and place new ones on payment size

In order to remain eligible for a number of important federal farm programs, farmers are prohibited from producing agricultural products on highly erodible land without a conservation plan,24 or from doing so on unconverted wetlands under any circumstances.25 These requirements, known as “conservation compliance,” apply to the crop insurance program, each of the conservation programs, and many smaller programs. They offer potentially important climate benefits because conventional farming on highly erodible land and wetlands results in significant greenhouse gas emissions.26

These requirements must be strengthened, however, to ensure that government funds protect—rather than undermine—soil and water quality and that farmers implementing sound stewardship practices are not placed at a disadvantage. Congress should require operators and landowners to plan and implement conservation systems for all land planted with annual crops in order to be eligible for farm program benefits and crop insurance subsidies.27 These conservation systems must help protect carbon stocks by ensuring that soil erosion on annually planted cropland does not exceed the soil loss tolerance level—the maximum annual rate of soil erosion possible without causing a decline in long-term

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productivity; address gully erosion, which is responsible for up to 40 percent of soil loss in the United States; and maintain waterway buffers to reduce runoff and nitrous oxide emissions. These steps will greatly improve soil and water quality locally and throughout the country, resulting, among other benefits, in significantly reduced climate impacts.

The USDA Inspector General has also found that the department has failed to consistently enforce current conservation requirements. Congress should adequately fund conservation compliance enforcement and increase USDA’s technical assistance capacity to ensure that providers know how to comply. Finally, Congress should require USDA to report compliance and enforcement data to Congress, allowing policymakers and the public to evaluate USDA’s enforcement efforts.

Just as USDA programs should, at a minimum, preserve environmentally sensitive land, they should also protect small- and medium-scale farms, which provide a number of services to rural

28 See generally H.R. 4425 (proposing to require conservation plans to maintain soil erosion levels at or below the soil loss tolerance level); Nat’l Sustainable Agric. Coalition, supra note 18, at 36 (urging Congress to require conservation plans for highly erodible land to achieve soil erosion levels at or below the soil tolerance level); Env'tl. Working Grp., supra note 27 (recommending that Congress integrate the soil tolerance level into conservation plans).

29 See generally H.R. 4425 (proposing to require conservation plans to address ephemeral gully erosion); Nat’l Sustainable Agric. Coalition, supra note 18, at 37 (discussing USDA’s inadequate efforts to reduce gully erosion and proposing reforms); Env'tl. Working Grp., supra note 27, at 3 (recommending that conservation plans prevent gully erosion).

30 See generally H.R. 4425 (requiring 50 feet of perennial vegetation between annually tilled land and intermittent or perennial waterways); Env'tl. Working Grp., supra note 27 (proposing that the 2018 Farm Bill require conservation plans to include 50 feet of perennial vegetation between annually tilled land and waterways).


32 See Farm Bill Law Enterprise, supra note 27 (detailing possible improvements in enforcement and compliance within the conservation compliance regime).

33 Both FBLE and NSAC also recommend mandated collection and reporting of conservation compliance data. See Farm Bill Law Enterprise, supra note 27; Nat’l Sustainable Agric. Coalition, supra note 18, at 36.
communities,\textsuperscript{34} reduce wealth inequality,\textsuperscript{35} and have been found to be disproportionately likely to adopt sustainable practices.\textsuperscript{36} Currently, however, USDA programs disproportionately favor large-scale producers and help drive land consolidation. The top 7 percent of producers, for example, received almost half of all government farm payments in 2012.\textsuperscript{37} While some programs currently cap payments, many, including crop insurance, do not, and existing caps are too high. Congress should place a cap on payments across all farm safety net and conservation programs at $150,000 or lower, and use the resulting savings to increase support for sustainable small- and medium-sized farms.

3. Require crop insurance providers to base premiums on soil health

In an era when the public is growing increasingly skeptical of industrial agriculture and farm subsidies, crop insurance has become a politically palatable way for the federal government to subsidize large-scale operations. The program is portrayed as, and often perceived to be, a safety net for farmers in the event of catastrophic crop failure. While about 16 percent of federal crop insurance contracts are limited to this type of protection, the vast majority, 84 percent, also include revenue protections.\textsuperscript{38} These revenue-based policies guarantee enrolled farmers a certain level of income regardless of market prices or their crop productivity.\textsuperscript{39} Further, crop insurance premiums are themselves highly subsidized. A 2016 analysis of crop insurance


\textsuperscript{35} See Rosset, supra note 34, at 78-79.

\textsuperscript{36} Id. at 80-81; Lobao & Stofferahn, supra note 34, at 226-28.

\textsuperscript{37} U.S. DEP’T OF AGRIC., supra note 15, at 94, 100 tbl. 65.

\textsuperscript{38} DENNIS SHIELDS, CONG. RESEARCH SERV., Federal Crop Insurance: Background 2 (2015), \url{https://fas.org/sgp/crs/misc/R40532.pdf}.

\textsuperscript{39} Id.
policies, for example, found that farmers realized an annual average return of 120 percent on their policies between 2000 and 2014. These extraordinarily high crop insurance premium subsidies have increased agricultural emissions by incentivizing agricultural production on marginal land, while also increasing land consolidation.

Crop insurance should do the opposite. Rather than encouraging cultivation of marginal lands, which is financially risky, and discouraging climate-friendly practices such as cover crops, Congress should create financial incentives for practices that will make the system more secure. It should make soil health—one of which soil carbon content is a key factor—a criterion in determining insurance premiums, rewarding those who act as good stewards of the land. This would discourage planting on poor quality land (which is often the most ecologically important) and create financial incentives for practices that both reduce climate change and improve resilience to droughts, floods, and the like, thus reducing the very risks that the program seeks to address. All this would, in turn, reduce federal expenditures. Congress should also ensure that USDA and researchers have access to soil health data, allowing them to quantify the impact of different sustainability practices on soil health.

4. Turn the Conservation Reserve Program into a true land retirement program

The Conservation Reserve Program ("CRP") pays farmers for taking environmentally sensitive land out of production for 10-

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43 Id. at 769.
15 years.\footnote{Conservation Reserve Program, U.S. Dep’t of Agric., Farm Service Agency, \url{https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/} (last visited Apr. 28, 2018).} Out of the three main conservation programs, Congress gave it the largest allocation in the 2014 bill, resulting in roughly $1.8 billion annually.\footnote{See Cong. Budget Office, CBO's March 2015 Baseline for Farm Programs 26 (2015), \url{https://www.cbo.gov/sites/default/files/recurringdata/51317-2015-03-usda.pdf} [hereinafter CBO's March 2015 Baseline for Farm Programs]; Cong. Budget Office, CBO's March 2016 Baseline for Farm Programs 26 (2016), \url{https://www.cbo.gov/sites/default/files/recurringdata/51317-2016-03-usda.pdf} [hereinafter CBO's March 2016 Baseline for Farm Programs]; Cong. Budget Office, CBO's June 2017 Baseline for Farm Programs 28 (2017), \url{https://www.cbo.gov/sites/default/files/recurringdata/51317-2017-06-usda.pdf} [hereinafter CBO's June 2017 Baseline for Farm Programs].} USDA estimated that CRP sequestered over 43 million metric tons of carbon dioxide emissions in 2014, mitigating about 7 percent of agriculture’s greenhouse gas emissions that year.\footnote{US. Dep’t of Agric., Farm Serv. Agency Strategic Plan: Fiscal Year 2016-2018 Update 25, 28, \url{https://www.fsa.usda.gov/Assets/USDA-FSA-Public/ufsfiles/AboutFSA/fsa-strategic-plan-2016-2018.pdf}.} This is misleading, however, since many producers bring their CRP acres back into production after their contracts expire, quickly releasing any carbon stored during the contract’s term. A 2016 study found that expired CRP land was 10 times more likely to be converted into crop production than to be shifted into other set-aside conservation programs.\footnote{Philip E. Morefield et al., Grasslands, Wetlands, and Agriculture: The Fate of Land from the Conservation Reserve Program in the Midwestern United States, 11 Envtl. Res. Letters 1, 5 (2016).} Between 2007 and 2014, for example, an estimated 15.8 million acres previously protected by CRP—at a cost of $7.3 billion—were returned to agricultural production.\footnote{Envtl. Working Grp., supra note at 27 at 7.} Researchers have also found that some farmers compensate for the loss of production on CRP lands by converting marginal land to crop production.\footnote{See JunJie Wu, Slippage Effects of the Conservation Reserve Program, 82 J. Agric. Economics 979, 990 (2000) (finding that for each 100 acres of land enrolled in CRP, another 20 acres were put into production); David A. Fleming, Slippage Effects of Land Based Policies: Evaluating the Conservation Reserve Program Using Satellite Imagery, 93 PAPERS REGIONAL SCI. S167, S176 (2013) (observing varying rates of slippage according to land cover using satellite data); Nancy Leathers & Lisa M.B. Harrington, Effectiveness of Conservation Reserve Programs and Land “Slippage” in Southwestern Kansas, 52 Professional Geographer 83, 83-93 (2004) (finding that slippage greatly reduce CRP’s effectiveness in Kansas).}
In order to effectively reduce agricultural emissions, Congress should restructure CRP in two ways. First, satellite imagery and other modern technology should be used to identify the most sensitive lands (such as former wetlands or stream beds), which should then be prioritized. Second, the CRP should provide farmers with either permanent easements or 30-year easements that are linked to permanent set-asides, effectively expanding the current Agricultural Conservation Easement Program ("ACEP").

Farmers who complete a 30-year easement contract, for example, could be given an incentive to sign a permanent contract to keep the land from being cultivated. This would change CRP to a program that both supplements the incomes of farmers and provides sustained water quality and climate benefits.

5. **End EQIP subsidies for industrial operations**

The Environmental Quality Incentives Program ("EQIP") offers farmers funding and technical assistance for developing and implementing single conservation practices.

In recent years, Congress has provided EQIP with approximately $1.4 billion annually. More than a quarter of EQIP payments went to support waste storage facilities in large-scale animal production facilities (legally termed “concentrated animal feeding operations” or “CAFO”s) and irrigation systems. Doing so has the effect of subsidizing large-scale, environmentally degrading practices.

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50 USDA currently offers farmers long-term and permanent easements through ACEP, but funding for its component initiatives has been cut substantially in recent years and the program now receives between 8 to 15 percent of CRP’s funding annually. See Cong. Budget Office, supra note 45.


52 See, e.g., Cbo’s June 2017 Baseline For Farm Programs, supra note 45.

53 See, e.g., Andrew Martin, In The Farm Bill, A Creature from the Black Lagoon, N.Y. Times (Jan. 13, 2008), http://www.nytimes.com/2008/01/13/business/13feed. html (suggesting that the program’s name should be changed to the “Factory Farm Incentive Program”); Tom Laskaway, Stop The Environmental Subsidy for Factory Farms, GRIST (Apr. 17, 2009), http://grist.org/article/stop-the-environmental-subsidy-
When Congress created EQIP in 1996, it required that at least 50 percent of the program’s total funding go toward livestock operations.\textsuperscript{54} However, it excluded large confined livestock operations,\textsuperscript{55} and limited payments to a maximum of $50,000 in most cases,\textsuperscript{56} ensuring that EQIP funds would benefit smaller operations. In the 2002 Farm Bill, Congress eliminated the restriction against large confined livestock operations and raised the payment cap to $450,000,\textsuperscript{57} where it currently stands.\textsuperscript{58} As a result, waste storage facilities for CAFOs received a larger share of payments—over $100 million—than any other single practice supported by EQIP.\textsuperscript{59} Since CAFOs depend on the production of vast amounts of grain—the production of which causes significant air and water pollution—and concentrate manure in ways that create further air and water pollution, supporting CAFOs effectively subsidizes a greenhouse gas-intensive form of animal production that also undermines rural economies and animal welfare.\textsuperscript{60}

The largest share of EQIP payments—$181 million in 2016\textsuperscript{61}—however, goes to a bundle of practices designed to improve irrigation systems, such as the installation of new

\begin{itemize}
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{60} Carrie Hribar, \textit{Nat’l Assoc. of Local Boards of Health, Understanding Concentrated Animal Feeding Operations and Their Impact on Communities 7-10} (2010), \url{https://www.cdc.gov/nceh/ehs/docs/understanding_cafos nalboh.pdf}.
\item \textsuperscript{61} Nat’l Sustainable Agric. Coal., \textit{supra} note 18, at 52.
\end{itemize}
irrigation pipelines or reservoirs.62 Instead of using EQIP funding just to improve the efficiency of irrigation, however, farmers often use their savings to expand irrigated crop production, switch to more water-intensive crops, or both.63 This leads to land conversion, a major source of greenhouse gas emissions.64

Farmers deserve support for installing environmentally friendly infrastructure, but EQIP must be better tailored. Congress should prohibit funding for new and expanding CAFOs. It should also contractually bar operators receiving EQIP payments for water conservation from expanding irrigated crop production. The resulting savings should be redirected to practices used in sustainable systems, ensuring long-term benefits to the environment and climate.

6. Focus the Conservation Stewardship Program on environmental benefits

The Conservation Stewardship Program (“CSP”) is an incentive-based working lands program, designed to make active farms more environmentally friendly.65 Farmers participating


65 EQIP, in contrast, is a cost-share working lands conservation program. CSP may be merged with EQIP in the upcoming farm bill, however, a similar performance-based payment program will likely remain in some form. Conservation Stewardship Program (CSP), U.S. Dep’t of Agric., Natural Resources Conservation Service, https://www.nrcs.usda.gov/wps/portal/nrcs/main/oh/programs/financial/csp/ (last
in CSP enroll their entire operation in a contract to plan and adopt comprehensive conservation measures. While CSP has the smallest budget of the three main conservation programs—it has received about $1.1 billion annually since the last farm bill—CSP is the largest USDA conservation program on an acreage basis. Unfortunately, recent changes to CSP have deemphasized environmental considerations in USDA’s application and payment determinations.

Congress should require that CSP payments encourage practices with the most environmental and climate benefits. Now, payments for many CSP practices that increase crop diversity and soil health, such as Resource Conserving Crop Rotations (“RCCR”s) and Soil Health Crop Rotations, are actually lower than payments for standard enhancements. Congress should strengthen the CSP sustainability standards for participation; increase the importance of environmental benefits in the application process; and raise payment rates for practices that provide the greatest climate benefits.

**Transforming the farm bill**

Agricultural land, which covers more than 60 percent of the continental United States, is capable of producing a number of public goods in addition to agricultural commodities, including environmental goods, such as biodiversity, water quality, and climate stability, and social goods such as rural vitality, animal welfare, and food security. The farm bill should move beyond its traditional focus on the production of agricultural commodities and embrace a more comprehensive approach that recognizes the multifunctional role of agricultural land.

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66 See Cbo’s June 2017 Baseline For Farm Programs, supra note 45.
67 Conservation Stewardship Program (CSP), supra note 65.
commodities and treat agriculture’s other public goods with equal consideration. In addition to the specific changes recommended above, Congress should develop a robust program to pay farmers for these important stewardship services.

The federal government currently incentivizes farms to grow crops that are used, in a highly inefficient manner, to produce corn ethanol, sweeteners, and highly processed food products. Why not encourage farms to produce what the country needs more of? Congress should develop a program to pay farmers for permanent carbon sequestration, which measures would also protect water quality and quantity. The farm safety net should not just enrich the largest farms, but protect the environment, mitigate climate change, grow healthy food, and strengthen rural communities. Decarbonizing the farm bill would not only help stabilize our climate, but would also transform rural America into a healthier, more sustainable, and equitable place.

This would not necessarily result in a decline in production or an increase in land use, although funding for research in agroecological methods would need to be increased in order to maintain productivity.

While the production of these commodity crops may be efficient when measured by inputs (such as labor) or yield, their use is grossly inefficient when human needs, such as nutritious food, are considered. Lehner & Rosenberg, supra note 18, at 10853. A 2013 study found that 67 percent of calories and 80 percent of protein in crops produced in the United States are diverted to animal feed. Emily Cassidy et al., Redefining Agricultural Yields: From Tonnes to People Nourished Per Hectare, 8 Envtl. Res. Letters 1, 4 (2013). An additional 6 percent of both calories and protein of U.S. crops were diverted to a biofuel production—a share that has likely increased significantly since the enactment of the Renewable Fuel Standard. Id. Finally, an estimated 75 percent of the average American’s diet comes from processed or ultra-processed foods, which are low in nutritional quality. Jennifer Poti et al., Is the Degree of Food Processing and Convenience Linked With the Nutritional Quality of Foods Purchased by US Households, 101 Am. J. Clinical Nutrition 1251, 1251 (2015). Some researchers have started to refer to this diet as a “commodity-based diet” due to its reliance on commodity crop production. See David Ludwig, Commentary, Technology, Diet, and the Burden of Chronic Disease, 305 JAMA 1352, 1352 (2011).
Insuring a Future for Small Farms

Mary Beth Miller* & D. Lee Miller**

Introduction

All farmers face systemic risk from bad weather and the vagaries of the market.¹ Farmers with small, diversified operations must also contend with treacheries as unique as the farms they threaten. As a beginning farmer and coordinator of a farm incubator in North Carolina, you see and hear these stories all the time. An independent slaughter facility serving 600 small poultry farmers shuts down three weeks before the national celebration of poultry that is Thanksgiving.² An ice storm cancels a bustling weekend farmers market after produce has been picked, washed, and packed, and then collapses a high tunnel holding the next month’s harvest.³ Coyotes destroy one third of a heritage-breed turkey flock in a single night.⁴ A soil-borne fungus prevents planting and renders a field barren for six years.

Whole-Farm Revenue Protection (“WFRP”), a pilot

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program created by the 2014 Farm Bill and administered by USDA’s Risk Management Agency (“RMA”), enables farmers to protect against financial ruin after events like these. With a few tweaks, WFRP could become an even stronger safety net against weather extremes and natural disasters, as well as the market and supply-chain disruptions that endanger small, diversified operations. As WFRP expands its reach, it would enable more small, diversified farms to access credit and find the security to invest in expansion. Congress has an opportunity to make needed reforms in WFRP in the upcoming farm bill, and they have a good reason to follow through: as small, diversified farms flourish, they bring economic, social, and environmental benefits that justify the public investment in their financial security.

WFRP has only been available since 2015, and few scholarly papers have considered the role of whole-farm policies in catalyzing small farm viability. Section I of this essay highlights why small, diversified farms deserve public support and how whole-farm revenue policies can fill a need by providing insurance tailored to these farms. Section II provides an overview of the first three years of WFRP. Section III explores four concrete opportunities for Congress to improve upon WFRP through the next farm bill by increasing program awareness and education, aligning incentives for agents to write whole-farm policies, mitigating and reversing conflicts between coverage and


6 Several studies have examined the potential to replace existing commodity and crop insurance programs with a whole-farm revenue approach. However, these studies are limited to scenarios where producers have significant program base acreage, making whole-farm coverage less advantageous relative to status quo. Area-based whole-farm designs help reduce adverse selection and moral hazard while reducing recordkeeping burdens, but do little to benefit producers for whom product differentiation and crop diversity are key to their marketability. See Lekhnath Chalise et al., Developing Area-Triggered Whole-Farm Revenue Insurance, 42 J. OF AGRIC. AND RESOURCE ECON. 27, 28 (2017), http://ageconsearch.umn.edu/record/252753/files/JARE_Jan2017_3_Chalise_27-44.pdf; see J. Marc Raulston et al., Agric. & Food Policy Center Texas A&M University Dep’t of Agric. Econ., The Farm Level Impacts of Replacing Current Farm Programs with a Whole Farm Revenue Program 1,2 (2011), http://ageconsearch.umn.edu/record/98785/files/SAFA2011%20Raulston.pdf.
conservation activities, and simplifying program access for small farms. The section ends by outlining how WFRP could be used as a basis for more ambitious public support for small, diversified farms.

I. Support for Small, Diversified Farms

Like most definitions in agriculture, what should qualify as a “small” farm necessarily varies among geographic areas and production systems. USDA’s definition of a farm with $350,000 or less in gross annual sales provides enough of a reference point for the purposes of this essay. By this count, the average small farm controls 231 acres.7 Within this universe of small farms, those that earn between $10-250k in gross sales account for slightly more than one third of all farms in the United States.8

Like “small”, USDA has a definition of “diversified”,9 although what we mean by diversified farms is better illustrated by examples from our home state of North Carolina. At Four Leaf Farm, Tim and Helga MacAller grow specialty fruits and vegetables, ornamental plants, and microgreens intensively on two acres, cultivating well over fifty varieties of plants in a single year.10 Over seventeen years, they have built a thriving business that provides fresh, organically grown food to the community and employs aspiring young farmers throughout the year.11 Jillian and Ross Mickens of Open Door Farm got their start on a farm incubator

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9 For the purposes of the WFRP program that is the subject of this essay, diversification is measured by counting the number of distinct commodities a farm producers. To be included, the commodity must account for a percent of total revenue equal to the operations total revenue, divided by the number of commodities grown, divided again by 3. U.S. Dep’t of Agric., Risk Mgmt. Agency, Whole Farm Revenue Protection 2 (2017), https://www.rma.usda.gov/pubs/rme/wfrpfactsheet.pdf.
10 See Four Leaf Farm, http://www.fourleaffarm.org/, (last visited Apr. 18, 2018).
11 Id.
six years ago, with almost no prior agricultural experience. After three seasons at the incubator, they purchased land where they now grow vegetables, cut flowers, and microgreens. Daniel Dayton runs Old Milburnie Farm, specializing in mushrooms, seasonal vegetables, and pasture-raised pork and poultry on ten acres, where he regularly hosts community dinners.

Embedded in these operations, and the many other small, diversified farms throughout the country, are a set of economic, social, and environmental benefits that farm policy, as enacted by the farm bill, should go out of its way to support. For example, small farm size is linked to a stronger middle class, reduced unemployment, greater socioeconomic stability, and higher rates of civic engagement. Small, diversified farms account for 46 percent of all direct-to-consumer sales through farmers markets, roadside stands, or community-supported agriculture (“CSA”) programs. In other words, small farms have a disproportionate role in driving local food economies, which shorten the supply chain and put a greater share of each food dollar in the farmers’ pockets. This money is often reinvested in local business by way of seed, equipment, livestock, and feed purchases, creating a “multiplier” effect where each dollar spent generates more value.

13 Id.
18 Union of Concerned Scientists, supra note 18, at 2.
as it moves through the local economy. The upshot is tremendous opportunity for rural economic development through the vehicle of small, diversified farms. And as the average American farmer approaches retirement age, a new generation of growers is taking root on small farms. 97 percent of all beginning farmers run “small” farms.

Small and diversified go hand in hand. Compared to larger operations, small farms are more likely to implement environmentally sustainable agronomic systems and maintain diversified production that promotes biodiversity. At the Elma C. Lomax Incubator Farm in Concord, NC, we train small farmers how to rotate multiple plant varieties and choose disease-resistant cultivars; incorporate cover crops in field management and minimize synthetic inputs; use season extension techniques and high tunnels; and diversify revenue streams with niche specialty crops, among many other things. These practices add to biodiversity, soil health, ecosystem stability, and a farmer’s capacity to adapt to unexpected weather and changes in consumer

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21 See Beginning Farmer and Rancher Loans, U.S. Dep’t of Agric., https://www.fsa.usda.gov/programs-and-services/farm-loan-programs/beginning-farmers-and-ranchers-loans/index (last visited Apr. 18, 2018) (defining “beginning farmer” as those who have operated a farm or ranch for fewer than 10 years); The Federal Crop Insurance Act reserves Beginning Farmers benefits to those with five or fewer crop years. 7 U.S.C. § 1502(b)(3).


24 Kristina Belfrage et al., Effects of Farm Size and On-Farm Landscape Heterogeneity on Biodiversity—Case Study of Twelve Farms in a Swedish Landscape, 39 Agroecology and Sustainable Food Systems 170, 177-179, 183 (2015).
demand, which in turn, improve resilience and mitigate risk. Diversified farms are more resilient farms, economically and ecologically.

The Role of Insurance

For all their benefits, the characteristics of small, diversified farms that make them reliable producers of public goods also make them difficult to insure through traditional yield or revenue policies. Commodity-specific policies do not effectively serve the needs of operations growing many different crops. A diversified farmer would need to insure each crop separately—a headache on its own—and would not capture the benefit of mitigating risk through diversification. Many small, diversified farms, like those profiled above, sell into multiple markets at different price points. For them, traditional insurance cannot effectively manage either yield or price risk.

Yet small, diversified farms need insurance. Because small farms operate on even tighter margins than the industry as a whole, moderate to severe losses can cause a farmer to default on her operating loans or mortgage, fail to cover personal expenses, or ultimately file for bankruptcy. This creates a double bind for small farms. Many banks require proof of insurance before approving a loan, but crop insurance has been difficult or

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26 Id.
27 Id.
31 See Anna Johnson & Glen Ready, Center for Rural Affairs, New Option for
impossible to access without scale. Perhaps the greatest promise of an insurance product for small, diversified farms is that it expands access to credit, thereby increasing solvency and opening credit lines for further investment. Enter WFRP.

II. Whole Farm Revenue Protection

WFRP is a pilot program developed by RMA to meet the 2014 Farm Bill’s inclusion of a revenue protection policy for diversified farms. Congress specified that the whole farm program include both a diversification incentive and market-readiness provision. When policies were first made available for 2015, Secretary of Agriculture Vilsack touted that WFRP “gives farmers more flexibility, promotes crop diversity, and helps support the production of healthy fruits and vegetables.”

To achieve this broader access, WFRP provides coverage for many types of farm operations that other federal insurance programs ignore. In so doing, it provides a template that future farm bills can build upon. The current iteration of WFRP already improves upon previous whole farm revenue programs, Adjusted Gross Revenue (“AGR”) and AGR-Lite, which had been around since the late 1990s. Researchers credit the underutilization of AGR and AGR-Lite to its limited geographical availability, program complexity and, above all, insufficient coverage rates that protected a maximum of 80 percent of expected revenues.


33 Id. at § 1522(c)(19)(C).

34 Id.


WFRP begins to address the shortcomings of AGR and AGR-Lite by increasing coverage levels up to 85 percent and removing payment rate limits, meaning that producers are indemnified for 100 percent of covered losses. The market-readiness provision covers some of the labor-intensive post-production expenses—e.g., packing, packaging, washing, and labeling—necessary to bring crops out of the field. Finally, WFRP increases the premium subsidy up to 80 percent.

**Whole-farm policies, 2014-2017**

<table>
<thead>
<tr>
<th>Crop Year</th>
<th>Policy</th>
<th>Policies Sold</th>
<th>Total Liabilities (millions)</th>
<th>Total Premium (millions)</th>
<th>Federal Subsidy (millions)</th>
<th>Indemnities (millions)</th>
<th>Loss Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>AGR + ARG-L</td>
<td>840</td>
<td>$525</td>
<td>$20</td>
<td>$11</td>
<td>$55</td>
<td>2.87 (AGR); 2.71 (AGR-L)</td>
</tr>
<tr>
<td>2015</td>
<td>WFRP</td>
<td>1,126</td>
<td>$1,146</td>
<td>$53</td>
<td>$38</td>
<td>$69</td>
<td>1.30</td>
</tr>
<tr>
<td>2016</td>
<td>WFRP</td>
<td>2,228</td>
<td>$2,332</td>
<td>$119</td>
<td>$84</td>
<td>$165</td>
<td>1.39</td>
</tr>
<tr>
<td>2017</td>
<td>WFRP</td>
<td>2,845</td>
<td>$2,866</td>
<td>$145</td>
<td>$103</td>
<td>$33*</td>
<td>.23*</td>
</tr>
</tbody>
</table>

*Indemnity and loss ratio data will fluctuate until the claim filing window closes.

When WFRP was first offered in 2015, it covered 1200

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38 U.S. Dep’t of Agric., supra note 12, at 2.
39 See id. at 3.
farms, insuring over a billion dollars in production value, more than twice the coverage of the AGR programs it replaced.\textsuperscript{42} Program participation more than doubled over the following two years and in 2017, insured revenue reached almost $3 billion.\textsuperscript{43} Over its first two years, the loss ratio fell by half compared to AGR policies, meaning that WFRP comes much closer to RMA’s mandate to provide insurance at rates that are actuarially sound.\textsuperscript{44}

\textit{Early Administrative Refinements}

As WFRP entered its second crop year in 2016, RMA updated the policy in an effort to improve access and coverage.\textsuperscript{45} First, RMA made WFRP universally available.\textsuperscript{46} AGR and AGR-Lite used a checkerboard approach that excluded large swaths of the Midwest, South, and Plains, and in its first year WFRP excluded five states and some counties in states where policies were available.\textsuperscript{47} WFRP is now available in every state and every county.\textsuperscript{48}

Second, RMA took a first step toward increasing access for beginning farmers by modestly adjusting production history requirements that excluded farmers who could not produce such histories because they began farming recently.\textsuperscript{49} The program also enrolls new farmers who take over 90 percent of an existing operation,\textsuperscript{50} which recognizes the importance of supporting producers during the growing wave of intergenerational farm

\begin{footnotesize}
\begin{enumerate}
\item See 2015 Federal Crop Insurance, supra note 44.
\item See 2017 Federal Crop Insurance, supra note 46
\item See 2015 Federal Crop Insurance, supra note 44; see 2016 Federal Crop Insurance, supra note 45.
\item Historic Changes to Whole Farm Revenue Protection, Rural Advancement Foundation International (Aug. 27, 2015), http://rafiusa.org/blog/rma-announces-historic-changes-to-whole-farm-revenue-protection/.
\item See id.
\item U.S. Dep’t of Agric, supra note 12, at 1.
\item See id. at 2.
\item Historic Changes to Whole Farm Revenue Protection, supra note 52.
\end{enumerate}
\end{footnotesize}
transitions. Finally, beginning farmers and ranchers receive an automatic 10 percent increase in premium subsidy levels.

III. Farm Bill Opportunities

Despite impressive growth to date WFRP remains broadly underutilized. The remainder of this essay proposes farm bill reforms that would improve WFRP to meet the needs of small, diversified operations. Targeting this tranche of farms, WFRP could easily surpass the benchmarks set in its first years. In turn, expanding WFRP participation would strengthen the risk pool, help achieve and maintain actuarial soundness, and manifest trust among farmers and insurance providers that the program is here to stay. Growth in program participation, we believe, is the best long-term solution to overcome institutional barriers. Once agents and underwriters see WFRP as a permanent program, a virtuous cycle of investment in agent training and specialized software will attract still broader participation.

First, however, Congress should demonstrate its support through reforms to WFRP that increase program awareness, encourage agents to write whole-farm policies, mitigate and reverse conflicts between coverage and conservation activities, and simplify program access for small farms.

Immediate Opportunity: Expand and improve WFRP education and outreach.

Farmers and their advisers lack awareness and information on WFRP, contributing to its broad underutilization. Risk management education is nothing new, and Congress has established and funded efforts to provide education on risk

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52 See Johnson & Ready, supra note 35, at 5.
53 Id. at 10.
management strategies generally, and crop insurance specifically, through the National Institute of Food and Agriculture’s Risk Management Education (“RME”) program and RMA’s Risk Management Education Partnerships (“RME”) and Risk Management Education in Targeted States (“RMETS”) programs.

Each program makes grants to both public and private entities that provide education and outreach on risk management, including several recent projects that specifically target WFRP. However, in 2016 their combined budgets totaled only $13.7 million. The next farm bill provides an opportunity for Congress to increase its investment in risk management education through these existing programs, and to direct that NIFA and RMA should prioritize projects that focus on whole farm risk management strategies. Beyond increased funding, Congress should ensure that there is adequate reporting and evaluation built into each funded project so that the most successful educational materials and outreach strategies can be identified and replicated in future years.

**Immediate Opportunity: Create a simplified policy for small farms.**

Farmer advocates identify the complexity and number of WFRP documentation requirements as a significant barrier preventing broader participation. Documentation includes: extensive revenue history forms to write the policy, three interim reports submitted during the growing season, and a variety of worksheets. For small farms, this additional recordkeeping can consume more time than the benefit of carrying insurance.

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58 See, e.g., Johnson & Ready, supra note 35, at 10.
59 See Nat’l Sustainable Agric. Coal., supra note 61, at 78.
60 See RAFI Producer Survey on Whole Farm Revenue Protection, Rural
Congress can address this barrier by creating a simplified WFRP policy for small farms.

There is recent precedent for such a move in the Microloan program. Introduced in 2013, and expanded in the 2014 Farm Bill, the Microloan Program streamlines the application process required for larger loan programs. For example, farmers may demonstrate farming experience and production history using more flexible means. The next farm bill should include a similar mandate that RMA develop a WFRP policy for small farms. Congressman Rick Nolan (D-MN) recently introduced a marker bill that would create a streamlined WFRP policy for farms insuring under $1 million in annual revenue.

_Immediate Opportunity: Remove barriers and incentivize adoption of resource-conserving practices._

A farmer’s coverage should not be threatened by the use of resource-conserving agronomic practices, which inherently lower on-farm risks especially over time. In order to meet the terms of their insurance contract, farmers must follow “good farming practices.” Because these practices include, inter alia, strict planting and harvest deadlines, they can retard or even prevent adoption of conservation practices like cover cropping. The

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65 Gabrielle Roesch-McNally et al., _The trouble with cover crops: Farmers’ experiences with overcoming barriers to adoption,_ RENEWABLE AGRIC. AND FOOD SYSTEMS 1, 9 (2017), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/732DAC57E92E1C9E5C5A451F7E4F454A/S174217051700096a.pdf/trouble_with_cover_crops_farmers_experiences_with_overcoming_barriers_to_](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/732DAC57E92E1C9E5C5A451F7E4F454A/S174217051700096a.pdf/trouble_with_cover_crops_farmers_experiences_with_overcoming_barriers_to_)
farm bill should specify that all NRCS-approved conservation activities are considered “good farming practices” and prohibit the insurance industry’s practice of using contract “terms and conditions” to undermine this safe harbor, ensuring that practices like cover cropping never threaten coverage.

Although such a safe harbor for conservation activities mitigates some existing challenges, Congress should take additional action requiring RMA to make WFRP’s diversification incentives more robust. One such proposal by the Farm Bill Law Enterprise would reserve the highest subsidy rates for farmers who adopt advanced conservation practice bundles or resource-conserving crop rotations, as determined by NRCS. Another approach, proposed by NRDC, would create a pilot program tying subsidy rates to practices shown to improve soil health and mitigate climate risks.

**Immediate Opportunity: Create WFRP evangelists by improving insurance agent compensation.**

All federal crop insurance policies, whole-farm or otherwise, are sold by independent crop insurance agents and assigned to RMA-approved private insurance companies. The


insurance companies bid for agents’ books of business, and each insurance company receives revenue from underwriting gains and administrative and operating (“A&O”) subsidies in relation to the value of the policies assigned. Thus, agent compensation ultimately depends on the value of the policies they write.

Due to their complexity, it takes more time to write WFRP policies than other crop insurance policies, creating opportunity costs for agents who could be writing simpler policies with higher values. As a result, agents are less likely to seek out or create opportunities to sell them. Congress should correct this prejudice against WFRP by requiring RMA to develop alternative compensation schemes for agents who write whole-farm policies, for example by setting a flat commission per policy or by paying agents based on the time spent writing the policy.

A Vision for WFRP

As we consider immediate reforms, it is worth sparing a moment to consider what a farm bill could do with a program like WFRP if it were truly dedicated to the long-term success of small, diversified farms. We envision a program that is altogether removed from RMA and the private crop insurance companies it uses to deliver its products. The characteristics that make small, diversified farms unique, resilient, and valuable public assets—commitment to environmental stewardship and biodiversity, reliance on local economies and food systems, a young and diverse workforce—are the same traits that cause these farms to be unintelligible or simply ignored by traditional credit agencies and crop insurance companies. The government pays an enormous price to outsource crop insurance program delivery, while the insurance industry captures about one third of total federal crop

residual beneficiaries in the crop insurance industry.

71 Id. at 86.
73 See id.
insurance outlays. Yet this expense has failed to buy adequate delivery for small farms. As we note above, private actors lack robust incentives to service small farms with complex operations. A “public option,” administered and delivered through FSA, addresses all the issues we have identified and many others.

FSA is a logical choice for a revenue guarantee program for small farms. FSA already serves small farms through points of contact that include microloans, the Non-Insured Crop Disaster Assistance (“NAP”), and outreach through efforts like the “Bridges to Opportunity” program. There are over 2,100 FSA offices nationwide including in nearly every rural county, and farmers are connected to FSA from the time they first acquire a farm number at their local FSA office. A whole-farm program administered by FSA disentangles farmers’ needs from insurance agent incentives, strengthens working relationships between farmers and FSA, and it puts FSA into a position of insuring the livelihoods of those who are willing to sustain rural communities while investing in local soil and water quality through conservation practices. For small farmers, FSA could be more than the “Lender of Last Resort,” but the “Insurer of First Opportunity.”

Conclusion

Our farmers are aging and we need a new generation that not only takes their place, but that is ready to meet the public’s demand for nutritious and local foods grown in healthy soil. We need a farm bill that updates the social contract between farmer and eater, and that embraces the opportunities that small, diversified farms offer to farmers and their communities. When we invest in small, diversified farms, we invest in the promise

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76 Id.
of jobs that cannot be exported, stewardship of local natural resources, revitalization of rural communities and shortening the distance food travels. The next farm bill, and the ones that follow in the years to come, have an opportunity to improve and build on the Whole Farm Revenue Protection program so that it becomes a pillar of small farms throughout the country.
Proactive Policies: Building the Farm Bill of the Future Through New Collaborations and Perspectives

Jennifer Zwagerman

Consumers and agricultural producers have been linked in the Farm Bill for over 70 years, in various and evolving ways. While the Farm Bill has evolved and grown over the years, with numerous new programs added through subsequent farm bills and additional legislation, there is no denying that with its broad scope of programs impacting agriculture and nutrition, producers and consumers remain absolutely connected in today’s Farm Bill as well.¹ However, this comprehensive, broad-based piece of legislation that impacts not just every American, but has a much more global impact, is contentious and involves much debate and political fighting each time it comes up for renewal.² I believe more can be done to bridge the many divides that occur when it comes to the Farm Bill, starting with a change in process and in mindset that will build more broad-based coalitions of support beyond the traditional agricultural block, while also helping remove some of the contentious debate that occurs every renewal cycle. A more broad-based view of the purpose and scope of the Farm Bill will also more accurately reflect the changing scope of agriculture, where agriculture means much more than just food production, and help agriculture and its many partners focus on long-term, sustainable solutions to issues that are intricately tied to agriculture, food, the environment, rural development, and more.

Consumers and Producers, and the Rural/Urban Divide

The origins of what we call the “Farm Bill” date back to the 1930s and the Great Depression, part of FDR’s New Deal, with a goal of helping farmers by boosting crop prices. Despite a generally strong economy, the 1920s were not good to farmers and the farm economy, and the Great Depression made a bad situation even worse for agricultural producers.

One way the 1933 legislation supported prices was by paying farmers to limit production. This bill, the Agricultural Adjustment Act, provided the payments for non-production, allowed the government to purchase excess grain from producers, and provided for financing options, among other things. This was an emergency declaration, stated to “cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has ended.”

For the purpose of this essay, the importance of this law lies in some of its goals: parity and avoiding a disparate impact on consumers. In the 1933 Farm Bill, parity was defined as “an equality of exchange relationship between agriculture and industry or between persons living on farms and persons not farms.” The 1993 Act also stated an “intent to protect the consumers’ interest by readjusting farm production to a level that would not increase

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4 Id.


7 Agricultural Adjustment Act §13.

the percentage of consumers’ retail expenditures” above the amount used as the financial baseline goal.\textsuperscript{9} In short, the goal was to provide support to farmers, as the country saw value in a strong agricultural industry, while also ensuring that an improving farm economy and crop prices would not have an overly negative impact on consumers.\textsuperscript{10}

The Farm Bill today continues, in many ways, to reflect those same goals, albeit on a much broader and larger scale. Programs have expanded to include not just those directed towards commodity support, but conservation, trade, nutrition, rural development, energy, and more.\textsuperscript{11} The Farm Bill is legislation that has tremendous impact, is vital to supporting strong agricultural and rural communities, and ensures millions of Americans have access to food.\textsuperscript{12} This legislation has unrealized potential to do great things, but it has to start with expanding the public’s perception of agricultural production and its role in our society.

In order for the Farm Bill to grow, to modernize, and to reflect the current state of our country and needs, it is more important than ever that new coalitions of support be created to develop and support the Farm Bill. These coalitions need to more strongly reflect all voices, move beyond the “us vs them/urban vs rural” mentality, and reflect the changing environment and needs of the current economy and population. In doing so, I believe we will see not only stronger legislation addressing environmental, rural, nutritional, agricultural, and scientific needs, but find a path that will provide for a more collaborative and less contentious path moving forward.

\textsuperscript{9} \textit{Id.} at 4.

\textsuperscript{10} \textit{What is the Farm Bill?} NAT’L SUSTAINABLE AGRIC. COAL., \url{http://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/} (last visited Mar. 11, 2018).


\textsuperscript{12} \textit{See} Vilsack, \textit{supra} note 1.
Changing Rural Economies and US Population Divides

At the time of the first Farm Bill, in the 1930s, rural Americans and those involved in agriculture made up a higher percent of the population that what we see today.\(^\text{13}\) When the U.S. began collecting farm census data in 1920, the population was approximately 105.7 million, and the farm population was just over 30.2% of the total population.\(^\text{14}\) As of 2016, less than 2% of the population was directly involved in agriculture,\(^\text{15}\) and only 14% of the population resides in rural parts of the country (with continued downward population trends).\(^\text{16}\) However, agriculture is 6% of the overall economy and 10% of US employment overall.\(^\text{17}\) I do not expect that the number of farms will grow in the near future (the last USDA Census of Agriculture reported approximately 2.1 million farms in 2012, down from 2.2 million in 2007);\(^\text{18}\) I do expect that agricultural-related employment will increase. Examples of growth areas include wind and solar energy, which are tightly connected to agriculture and continue to expand, even as we see industries like biofuel slow.\(^\text{19}\) There


is also growth, with the potential for much more, in the sciences and agricultural-related technology, as we seek means to address concerns such as climate change, water quality, and soil health. Agriculture as a whole is an industry that matters for so many reasons and to different people for different reasons, yet Americans are increasingly removed from rural American and agricultural production, leading to many misunderstandings and misconceptions about the impact of agriculture on our everyday lives. One of the most direct effects is the fact that Americans pay a lower percentage of household income on food than the rest of the developed world, in some cases much, much less. That is due, at least in part, to our agricultural policies such as those in the Farm Bill.

However, the importance of agriculture to those not directly connected has waned over the years. Only 14% of the U.S. population resides in rural areas, despite almost 75% of

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the U.S. land base considered rural. The urban/rural divide is also seen in the composition of the elected officials who draft and debate the Farm Bill, with over 80% of our elected officials not representing rural parts of the country. When some of the more modern battles over the Farm Bill began, nutrition support programs (formerly called food stamps) were combined with the more traditional agricultural support programs, making the bill more appealing to a broader audience. Over time, though, that coalition of support has been waning, leading to prolonged battles each renewal cycle, and I believe a process that has kept the Farm Bill from evolving in a way that more directly reflects and meets both our current and future needs in the agricultural sector.

That is not to say that there are not changes to the Farm Bill with each cycle. Some years those changes have been more profound than others. I believe that, overall, the Farm Bill has maintained its status quo over the years in terms of the core types of programs and support, despite the addition of new or pilot programs or making changes to existing programs or payment types. It also demonstrates the strength of the coalitions that seek to help define two of the key aspects of the Farm Bill: commodity support (including direct support and crop insurance) and nutrition

23 U.S. DEPT. OF AGRIC., supra note 16.


26 See e.g., Sara Wyant, Lesson #1, Every Farm Bill is Unique, The Last One Was a Doozy, AGRI PULSE (Feb. 10, 2017), https://www.agri-pulse.com/articles/8894-lesson-1-every-farm-bill-is-unique-the-last-one-was-a-doozy.

programs.\textsuperscript{28}

It is in many ways necessary to keep the status quo though to maintain a core coalition of legislative support.\textsuperscript{29} Despite changes on the surface of the law, certain new initiatives, and various attempts to modernize it, I believe the Farm Bill remains more reactive than proactive. It reacts to current market conditions and needs, and it primarily reacts to the current state of the industry and world.\textsuperscript{30} While the Farm Bill is an important part of agricultural policy that provides support to many individual and organizations, it could do so much more by helping shape the future of the industry instead of focusing on the current state of the industry. A shift in focus, in long-term goals, and in the coalitions of legislators and organizations that help shape the Farm Bill, would provide an opportunity to draft a Farm Bill that would proactively lead and shape our food and agricultural industries for the future.

We must start from the premise that there is value in building and supporting a strong agricultural economy within the United States. However, we need to make sure that the programs and policies in effect to do so also support the rest of our food, environmental, and energy needs. Agriculture is not an insular industry. We need to ensure that farmers producing our food supply have forms of support to ensure our industry thrives. However, we also need to ensure that the agricultural


\textsuperscript{29} See id. at 2, 4.

\textsuperscript{30} See generally Sara Wyant, Lesson #1, Every Farm Bill is Unique, The Last One Was a Doozy, AgriPulse (Feb. 10, 2017), \url{https://www.agri-pulse.com/articles/8894-lesson-1-every-farm-bill-is-unique-the-last-one-was-a-doozy} (noting that during the contentious debate surrounding the 2014 Farm Bill, net farm income peaked and legislators looked to the current environment and farm economy where prices, and spending, were high, stating that “From a political lens, some lawmakers said farmers were making too much money and didn’t need any more help from the government. And many commercial farmers and ranchers weren’t terribly interested in what the government, or more specifically, the farm bill, could do for them”).
support is done in a way that complements and supports other U.S. policy priorities and interests, including public health and environmental concerns. If we do not separate agriculture from other interests, but instead think of them as a complementary and dependent pieces of a larger puzzle, can we start to ease some of the contention and divides when it comes to the Farm Bill? Perhaps we can then realize that the agricultural industry of the future is more than just commodity production, and that for agriculture to succeed, it needs to be deeply intertwined with environmental, energy, research, and rural interests. This can be done, with goals such as fighting climate change, building stronger rural communities, improving nutrition and access to healthy foods, and in particular, harnessing the focus on STEM initiatives to support public research providing tools and solutions that will allow agriculture to thrive in the future both domestically and abroad.

By developing a more holistic Farm Bill, and by building new coalitions with equal voices and input from numerous areas,


32 See Todd Edwards & Matt Russell, Earth Friendly Agriculture for Soil, Water, and Climate: A Multijurisdictional Cooperative Approach; 21 Drake J. Agric. L. 325, 339-40 (2016) (discussing how the Farm Bill could be used to create a market for environmental services, similar to that being done to create a market for farm products in the energy sector).


34 See CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NUTRITION POLICIES FOR 2018 FARM BILL 1 (2017), https://cspinet.org/sites/default/files/attachment/2018-farm-nutrition-bill.pdf (PDF download available on webpage) (stating “recommendations to address hunger while improving nutrition and health, and to increase access to affordable, nutritious food, particularly for vulnerable populations” from numerous organizations).

there is also the potential to lessen, if not remove, the legislative strife that occurs every Farm Bill cycle.\textsuperscript{36} The more that private and public industries and individuals can work together to get behind proactive and innovative policies, the more likely our politicians are to listen and provide support.

**Shifting power of the consumer**

As we talk about building new coalitions and a broad base of support (and understanding) for future Farm Bills, we cannot overlook the role and power of the consumer in this process.

Consumers are increasingly exhibiting power over the agricultural sector.\textsuperscript{37} You can often hear examples in the news, from increased demand to know how food is produced and where it originates,\textsuperscript{38} to recently causing several of the world’s leading food manufacturers to make major changes in agricultural inputs and ingredients.\textsuperscript{39} Food manufacturers are showing an increasing inclination to respond to consumers when it comes to certain demands and concerns, and this has a direct impact on agricultural producers. If more and more major food companies decide to source sugar from non-GE sources, the market for

\textsuperscript{36} See Hamilton, supra note 27, at 2-5 (discussing the hotly debated, and delayed, process that went into crafting and passing the 2014 Farm Bill).

\textsuperscript{37} See Label Insight, 2016 Label Insight Food Revolution Study, How Consumer Demand for Transparency is Shaping the Food Industry 2 (2016), https://www.labelinsight.com/hubfs/Label_Insight-Food-Revolution-Study.pdf?hsCtaTracking=f61f8a2f-7e6b-4b05-b2b4-delade992d33%7C95a8b6ef6-d0cc-4bb2-8102-529d937eb427.


genetically-engineered sugar beets will be severely impacted. Farmers may seek alternative seed sources, but could find that there are not sufficient supplies of non-GE seeds available, or that those available may not respond as well to our current climate and volatile weather patterns. Consumers, with a demand for non-GE, non-organic products initiated this action which trickles down not only to the producer, but to the many industries and entities that are depending on that crop throughout the growing cycle: input suppliers, processing companies, the rural communities and towns where these entities are located, and the many employees that live and work in these communities. We cannot have a discussion about food and agricultural industry power dynamics and policy initiatives without including the consumer as a voice.

**Conclusion**

As a colleague of mine told me, “Agriculture solves human problems.” Agriculture has the potential to solve many of our human problems, only one of which is how we feed a growing population. The more we think of the Farm Bill as a proactive tool for solving developing problems and designing the food and agricultural system of the future, and not just one supporting our current systems and policies, the better chance we have to expand and develop effective and efficient farm policies. If we continue with the status quo, with the same coalitions, the same fights, and ultimately, a newer version of essentially the same bill, that will not happen.

Change is not easy, nor does it come fast. Revamping our Farm Bill in a way to make it a proactive tool that can do everything we ask of it to do in its many Titles will take time, concerted effort, and the dedication and support of a broad group of coalitions and organizations. In our current political climate, I remain skeptical of any real success in this area. However, I remain hopeful that coalition-building in the private sector may start to occur and that rural and urban interests, environmental and agricultural interests, and those seeking to ensure there is a sufficient and nutritious food supply available to all, can start to
build relationships. We need to move beyond our traditional camps and the entrenched interests and instead build relationships that can help build bridges, reduce misunderstandings and misconceptions, encourage education and cooperation, and better realize the potential of what food and agricultural policy, and the Farm Bill in particular, can be.

If we want to develop a strong agricultural industry, one built around strong rural communities and with policies in place that support environmental, energy, and public health goals, then it is time to come together. Agriculture is not an insular industry, and in order for it to succeed, it needs to be a partner in all ways with consumers and even opposing interest, to craft the Farm Bill of the future. Starting small and having these conversations on a local level, hoping to build upon them from there, is a good first step. These are big hopes and big goals, but there is real potential if we all come together in a constructive fashion to build a sustainable agricultural system that truly meets the needs of the country and the world, beyond all that it does now.

40 We are seeing many new voices emerge in the Farm Bill discussion and seek to have influence, but a key step is encouraging collaboration and not competition among the various groups, while ensuring groups with historically less impact on the process are heard as well. See D. Lee Miller, A Seat at the Table: New Voices Urge Farm Bill Reform, 127 YALE L.J. F. 395, 409 (2017) (discussing role of coalition of food law and policy professionals in advocating for Farm Bill reform); see Our Mission, PLATE OF THE UNION, http://www.plateoftheunion.com/about/ (last visited Apr. 12, 2018) (announcing a new collaborative campaign for Farm Bill advocacy between a series of partners). See also, SUSAN SCHNEIDER, FOOD FARMING AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 18 (2d ed. 2016) (stating that “development of agricultural laws and overall farm policy have traditionally been left to those involved in the industry…In recent years, however, a variety of voices outside of the agricultural industry have increasingly sought a place at the table in agricultural policy debates … [and are] often critical of not only agricultural policies but food policies as well.”).
The SNAP Sugar-Sweetened Beverage Debate: Restricting Purchases to Improve Health Outcomes of Low-Income Americans

Nicole E. Negowetti*

Introduction

The Supplemental Nutrition Assistance Program (SNAP)¹ is a highly effective government program that reduces poverty and improves food security for millions of our country’s most vulnerable families. SNAP is the nation’s most important and largest anti-hunger and anti-poverty food and nutrition benefits program.² It is the nation’s “first line of defense” against hunger and serves as the foundation of America’s nutrition safety net.³ It aims to address food insecurity and improve food access by increasing the food purchasing power of low-income households.⁴ SNAP assists low-income households to meet their food needs by providing cash benefits via a debit card that can only be spent on food. Households may not use SNAP benefits to purchase alcohol, tobacco, household supplies, pet food, vitamins, medicines, food to be eaten in the store, or prepared foods.⁵ Approximately 42 million Americans—or 13 percent of the population—depend on these benefits to purchase food.⁶ Nearly 40 percent of all SNAP

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³ Id. (Subtitle A of the 2014 Farm Bill reauthorized appropriations for SNAP through fiscal year 2018).
⁵ Id.
recipients live in households with earnings and half of SNAP recipients are children.\textsuperscript{7} SNAP is reauthorized pursuant to the farm bill and is jointly administered by the United States Department of Agriculture (USDA) and states.\textsuperscript{8} Congress changed the program’s name from “Food Stamps Program” to “SNAP” in 2008, declaring that SNAP’s purpose is to “permit low-income households to obtain a more nutritious diet,” to raise their “levels of nutrition,” and alleviate “hunger and malnutrition.”\textsuperscript{9} The goal of providing eligible households with an “opportunity to obtain a more nutritious diet” was also emphasized in the text of the law establishing the program.\textsuperscript{10} Despite these declarations, there are no nutrition standards accompanying the redemption of SNAP benefits.\textsuperscript{11} This has fueled a debate about whether the program should actually provide nutrition assistance, or whether it should simply provide supplemental income for food purchases.\textsuperscript{12}

When SNAP was first implemented in 1939, the program was designed to address calorie insufficiency and was also intended to reduce agricultural surpluses.\textsuperscript{13} Eight decades later, nutrition-related health challenges have changed significantly. In the U.S. approximately one third of adults are obese.\textsuperscript{14}

\begin{itemize}
\item \textsuperscript{7} Brian Barth, \textit{How Would Trump’s Food Stamp Cuts Hurt Americans? Let Us Count the Ways}, Modern Farmer (July 13, 2017), \url{https://modernfarmer.com/2017/07/trump-snap-benefit-cuts/}.
\item \textsuperscript{8} 7 U.S.C. § 2011 (Subtitle A of the 2014 Farm Bill reauthorized appropriations for SNAP through fiscal year 2018).
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} 7 U.S.C. § 2013(a).
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Supplemental Nutrition Assistance Program (SNAP): A Short History of SNAP}, U.S. Dep’t of Agric., Food & Nutrition Serv., \url{www.fns.usda.gov/snap/short-history-snap} (last updated Nov. 28, 2017).
\end{itemize}
diabetes continues to climb, with 30.3 million Americans suffering from the disease, and approximately 84.1 million adults have prediabetes. There is an undeniable link between rising rates of obesity and rising medical spending. Medical costs associated with obesity (which largely fall on Medicare and Medicaid) are estimated to be at least $147 billion per year.

A. Poverty and Health: the Paradox of Food Insecurity and Obesity

The U.S. now faces a food insecurity-obesity paradox, where many individuals suffer from both conditions simultaneously. The problem is now a lack of access to affordable, healthy food, rather than calorie deficits. In the United States, 15.6 million households—comprising about 12.3 percent of the U.S. population—experience food insecurity, defined as “difficulty at some time during the year providing enough food for all their members due to a lack of resources.” Low-income individuals are likely able to obtain enough calories but these calories may come from cheap foods that are calorically dense and nutritionally poor. A USDA study using data from the National Health and Nutrition Examination Survey (NHANES) showed that SNAP participants were more likely than income-eligible and higher

cdc.gov/obesity/data/adult.html (last updated Mar. 8, 2018).


16 See Eric A. Finkelstein et al., Annual Medical Spending Attributable to Obesity: Payer and Service-Specific Estimates, 28 Health Affairs w822, w822 (2009).


income nonparticipants to be obese (40 percent versus 32 percent and 30 percent, respectively). Although there is mixed evidence about a causal relationship between obesity and food insecurity, there is agreement that food insecurity and diet-related diseases co-occur in communities, families, and individuals. Because both food insecurity and obesity are consequences of economic and social disadvantage, it not surprising that these conditions coexist.

Several theories have been offered to explain the paradox of food insecurity and obesity. Some argue that food insecurity and obesity are independent consequences of poverty and the resulting lack of access to enough nutritious food or stresses of poverty and that obesity among food insecure and low-income people occurs in part because they are subject to the same challenging cultural changes as other Americans (e.g., more sedentary lifestyles, increased portion sizes), and also because they face unique challenges in adopting and maintaining healthful behaviors. Low-income families may spend their limited food budget on high-calorie, low-quality products. They may also experience variation in food availability, causing them to over-

22 See Marlene B. Schwartz, Moving Beyond the Debate, 52 AM. J. PREV. MED. S199, S201 (2017) (noting that because it is a difficult empirical question, there is considerable debate in the scientific literature about the strength of evidence demonstrating whether SNAP participants are at higher risk of poor diet than the general population).
23 Id. at S199.
24 FOOD RESEARCH & ACTION CENTER, supra note 17, at 1.
25 Id. at 4. (“There is emerging evidence that food insecurity is associated with less physical activity (a risk factor for obesity) and greater perceived barriers to physical activity (e.g., too tired to be physically active). In addition, many studies find that low-income populations engage in less physical activity and are less physically fit than their higher income peers. This is not surprising, given that many environmental barriers, such as lack of attractive and safe places to be physically active, to physical activity exist in low-income communities.”).
26 Id. at 3.
27 David S. Ludwig et al, Opportunities to Reduce Childhood Hunger and Obesity Restructuring the Supplemental Nutrition Assistance Program (the Food Stamp Program), 308 J. AM. MED. ASSN. 2567, 2567 (2012).
consume food at the beginning of the month after receiving SNAP benefits and then to go without adequate food at the end of the month when benefits have run out.  

In addition to higher rates of obesity, low-income people face heightened risk of diet-related chronic diseases that directly relate to poor dietary choices—approximately 70 percent higher prevalence of diabetes and 19 percent higher prevalence of hypertension, compared with the highest-income population. These health disparities have precipitated a national conversation about how the government can harmonize its efforts to improve nutrition with those to reduce food insecurity. This essay examines the debate surrounding a longstanding and controversial proposal to improve the health of SNAP recipients—restricting the purchase of sugar-sweetened beverages (SSBs) with SNAP benefits. This article first provides a brief history of proposals to restrict SNAP purchases to improve nutrition.

I. A brief history of proposals to restrict SSB

Although proposals to restrict SNAP purchases have received considerable attention over the past several years, the idea of restricting SNAP is not new. Policymakers at the federal and state governments have proposed restrictions multiple times since the program began. Changes to SNAP would need to be authorized or mandated by the federal government and implemented by states or localities. Congress can require the USDA to either pilot a program, or engage in notice and comment rulemaking to amend SNAP guidelines, perhaps to reflect nutrition science and public health concerns.

28 Id.
30 Schwartz, supra note 22, at S199.
31 See id.
32 See Pomeranz & Chiqui, supra note 11, at 432.
33 See id.
34 Id. Congress required the USDA to open rulemaking to revise the Women, Infants and Children (WIC) Program food package. See Women, Infants and Children (WIC)
State agencies administering SNAP have requested waivers of the USDA to implement pilot programs restricting the purchase of certain unhealthy foods. In 2004, Minnesota’s Department of Human Services petitioned the USDA for permission to exclude soft drinks and candy from the foods eligible for purchase with SNAP. In 2007, the USDA explained its rationale for rejecting the waiver in a position paper, Implications of Restricting the Use of Food Stamp Benefits, asserting that “there are serious problems with the rationale, feasibility and potential effectiveness of” prohibitions on types of foods that could be purchased with SNAP. In 2010, New York State submitted a proposal to the USDA to administer a demonstration project in New York City that would restrict SSBs from SNAP to test whether a restriction would lead to changes in consumption of sweetened beverages and other food groups among SNAP recipients, as well as whether a restriction could be implemented. The USDA has consistently denied all requests for waivers. Most recently, the USDA denied Maine’s second request for a restriction on the purchase of candy and SSBs with SNAP.


State legislators in states including California, Illinois, Maine, and West Virginia have also proposed a range of bills that would permit their states to seek a waiver from the USDA, conduct a pilot program, or pass a resolution urging Congress to remove certain foods from SNAP eligibility.

Federal and local leaders have also called on Congress and the USDA to allow pilot programs to restrict purchases with SNAP, to no avail. In 2013, Senators Harkin and Coburn attempted to amend the Farm Bill to allow SNAP demonstration projects in two states to promote the purchase of healthier food. Mayors of 18 major cities across the United States, including Boston, Chicago, Los Angeles, and New York similarly called on Congress to allow the opportunity to “test and evaluate” restrictions on SSBs while also incentivizing the purchase of healthier foods. When Harkin and Coburn’s amendment failed to pass, the Senators urged the USDA to engage in two demonstration projects on its own to limit the use of SNAP benefits on foods that are over-consumed and may increase risk of chronic disease. The USDA rejected this request.

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41 H.B. 0177, 98th Gen. Assemb. (Ill. 2013) (proposal to ban the purchase of carbonated soft drinks, snack cakes, candies, chewing gum, flavored ice bars, fried, high-fat chips with SNAP).
42 S. Res. 505, 126th Leg., 1st Reg. Sess. (Me. 2013) (prohibiting the purchase of foods not “consumed for human nourishment,” including soft drinks, iced tea, sodas, fountain beverages, candy, confections, and prepared food).
44 Pomeranz & Chriqui, supra note 11, at 430.
48 Pomeranz & Chriqui, supra note 11, at 439.
II. Targeting SSBs to Improve Nutrition and Health

Unlike proposals from states and advocates calling for a ban on a variety of “junk foods” (e.g., candy, chips, snack cakes, etc.) with SNAP, a restriction of just SSBs is based on clear evidence of the harms of added sugar and the potential impact to improve public health. The USDA’s Dietary Guidelines note that beverages, including soft drinks, fruit drinks, and energy drinks, are the major source of added sugars in typical U.S. diets—almost half of added sugars consumed by the U.S. population come from sweetened beverages.⁴⁹ Scientific evidence suggests that the consumption of SSBs, can have profound and serious negative effects on health, especially among children.⁵⁰ As the Centers for Disease Control and Prevention, (CDC) has recognized, frequently drinking SSBs is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout.⁵¹ Reducing the consumption of SSBs also follows the guidelines of leading health agencies such as the World Health Organization, the National Institutes of Health, the Centers for Disease Control and Prevention, the Institute of Medicine, and the Surgeon General of the United States.⁵² The USDA itself urges Americans to “drink water instead of sugary drinks.”⁵³

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⁵³ U.S. Dep’t of Agric., Find Your Healthy Eating Style & Maintain It for a Lifetime (2016).
Commission on Hunger reasoned in supporting a restriction on the purchase of SSB, SNAP benefits should help families meet their nutritional needs, not contribute to negative health outcomes through poor nutrition choices. “With its right hand, the federal government funds nutrition education and wellness programs to encourage healthy eating; but with its left hand, the federal government funds SNAP participants’ purchase and consumption of sweetened beverages.”

SNAP is the only federal nutrition assistance program that fails to regulate the quality of foods that can be purchased and is the only one to subsidize the purchase of SSBs. This lack of focus on nutrition in SNAP may simultaneously exacerbate hunger and promote obesity. Sweetened beverages do not alleviate hunger because they do not satiate and they have minimal nutritional value. To illustrate, if a child consumes 20 ounces of a sugary drink, she will become hungrier more quickly than if she ate a large apple and a large tablespoon of peanut butter, even though both contain same number of calories. The addition of SSBs merely adds excess calories and sugar, which contribute to obesity, diabetes, and other chronic diseases. By putting SSBs on the same economic basis as more-healthful choices, SNAP may

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55 Id. at 6.


60 Ludwig et al., supra note 27, at 2567.

61 Ludwig et al., supra note 27, at 2567.

62 Id. at 2567-68.
actually aggravate diet-related diseases.\footnote{Levin et al., supra note 29, at S191.} A nutrition assistance program that permits the purchase of SSBs is blatantly ignoring decades of research documenting the harm associated with these products.\footnote{Vartanian et al., supra note 50, at 667, 671; Malik & Hu, supra note 50, at 1615-16.}

While recent polls reveal that an overwhelming majority of American voters of both parties favor restricting SNAP benefits from being used to buy soda and candy,\footnote{Steven Kull, Program for Public Consultation, Americans on SNAP Benefits 6-7 (2017), \url{http://vop.org/wp-content/uploads/2017/04/SNAP_Report.pdf}. The study found that of the 7,000 voters polled, 73 percent were in favor for banning SNAP recipients from using their benefits to buy soda. Id. Eighty-two percent of Republican respondents and 67 percent of Democrats agreed with soda restrictions. Id.} the issue has polarized typical allies—anti-hunger and public health nutrition groups.\footnote{Schwartz, supra note 22, at S200. For example, when New York City requested a waiver from the USDA to conduct a pilot study to test the effect of restricting sugary drinks from purchase using SNAP benefits, the Food Research & Action Center published a report in opposition to changing SNAP. See Heather Hartline-Grafton et al., Food Research & Action Center, A Review Of Strategies To Bolster SNAP’S ROLE IN IMPROVING NUTRITION AS WELL AS FOOD SECURITY 14 (2013), \url{http://frac.org/wp-content/uploads/SNAPstrategies_full-report.pdf}. In contrast, the Center for Science in the Public Interest organized a letter signed by more than 50 organizations and health experts to USDA Secretary Vilsack to allow pilot tests of restricting SSBs from SNAP. Letter from Center from Science in the Public Interest to Thomas Vilsack, supra note 47.} Arguments against a purchasing restriction in SNAP can be divided into two main themes: whether a restriction can successfully be implemented (i.e., whether it is feasible and likely to be effective) and whether it should be enacted (i.e., whether it is ethical to impose such a restriction). In the following sections, key arguments under each theme are explained and responded to in turn.

III. Could it be done? The Feasibility and Effectiveness of a Restriction on SNAP

The USDA and groups who oppose a SSB restriction in SNAP argue that such a policy would impose significant administrative burdens on the USDA, states administering the program, and retailers accepting SNAP benefits. In addition to these concerns about the feasibility of implementing a SSB
restriction, some opponents of the policy have questioned whether it would have any impact on consumption of SSBs or health outcomes. Each argument is addressed below.

A. The Feasibility of Implementing a Ban on SSBs

One general argument against restricting certain foods from SNAP is that it would require the USDA to rate or rank foods on some type of nutrition scale, and second, it would need to define the uncertain boundaries of “healthy” and “unhealthy” foods. The USDA and others claim that doing so would be problematic because such a ranking system does not exist—the Dietary Guidelines recommend overall eating patterns, not specific foods. Another related concern is that this process will open up the floodgates of food industry lobbying to ensure that their products are not restricted, or alternatively, are incentivized.

While these issues may be relevant to a proposal for banning all “junk” food (over which debates could be had over the nutritional value of some granola bars, pretzels, chips, etc.), the evidence is quite established regarding the lack of nutritional value of SSBs.

Another concern regarding feasibility of implementation is that imposing restrictions in the SNAP program would burden retailers. As a result, some retailers might stop accepting SNAP which could limit access for households. SNAP represents a large share of the national food budget and it seems unlikely that retailers would be deterred from participating because of an additional

67 See Hartline-Grafton et al., supra note 66, at 14.
68 Id.
69 U.S. Dep’t of Agric., supra note 49.
71 See U.S. Dep’t of Agric., supra note 36, at 3-5.
restriction. EBT systems are already capable of implementing restrictions. When the NY waiver was proposed, retailers were consulted about the ease or difficulty of implementing such a SSB restriction. Those with EBT systems indicated that it could be done fairly easily because restrictions are already in place for other purchases, such as alcohol or nonfood items. In addition, retailers who accept SNAP must already adhere to certain stocking requirements. The 2014 Farm Bill amended the Food and Nutrition Act of 2008 to increase the requirement that certain SNAP authorized retail food stores have available on a continual basis at least three varieties of items in each of four staple food categories, to a mandatory minimum of seven varieties—meat, poultry or fish; bread or cereals; vegetables or fruits; and dairy products.

The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) serves as another example of the feasibility of implementing nutrition standards in a public nutrition assistance program. WIC provides federal grants to states for supplemental foods, health care referrals, and nutrition education.
for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk. WIC participants receive checks, vouchers, or an electronic benefits transfer (EBT) card to purchase specific nutritious foods each month to supplement their diets. Eligible foods include infant cereal, eggs, milk, cheese, peanut butter, dried and canned beans/peas, canned fish, soy-based beverages, tofu, fruits and vegetables, baby foods, whole-wheat bread. Unlike for SNAP, Congress directs the USDA to amend the WIC food package “to reflect nutrition science, public health concerns, and cultural eating patterns” at least every 10 years “to reflect the most recent scientific knowledge.” In 2005, the Institute of Medicine issued a report suggesting the USDA revise the WIC food package to encourage a healthier diet and match dietary guidance for infants and children. Based almost entirely on these recommendations, the USDA issued proposed rules and interim requirements that were finalized in 2014, strengthening WIC nutritional requirements to increase the allotment of whole grains, fruit, and vegetables; reduce juice; exclude white potatoes; and replace whole milk with low-fat or nonfat milk. The successful adoption of nutrition standards for WIC demonstrates the feasibility of supporting a pilot to test whether the restriction

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81 Id.


of SSB could support SNAP’s goal of improving nutrition of low-income Americans.

There is also precedent from previous farm bills to fund projects that could improve health and nutrition of SNAP recipients. The 2008 Farm Bill authorized $20 million for pilot projects to evaluate health and nutrition promotion in SNAP to determine if incentives provided to SNAP recipients at the point-of-sale increase the purchase of fruits, vegetables or other healthful foods.86 The Healthy Incentives Pilot (HIP), which operated from 2010 – 2013 demonstrated that providing incentives for fruits and vegetables increases consumption among SNAP participants.87 A logical next step is for the 2018 Farm Bill to authorize a randomized controlled trial paralleling the Healthy Incentives Pilot trial, testing a ban on SSBs.88

HIC can serve as a model to test the SSB restriction.89 Just as the HIP reprogrammed retailers’ EBT data systems to identify and calculate incentives, the same could be done with a SSB restriction.90 Pilot participants assigned to the restriction group would receive special EBT cards and retailer EBT systems would be programmed to not allow SSB purchases among those SNAP households. Few retailers who participated in HIP identified problems with their EBT systems or store operations.91 Similarly, piloting a restriction on SNAP would not be overly burdensome on retailers. A pilot similar to HIP is thus both feasible and likely to provide a strong control study to demonstrate whether restrictions on the purchase of SSBs with SNAP reduce consumption and

88 Sanjay Basu et al., Ending SNAP Subsidies For Sugar-Sweetened Beverages Could Reduce Obesity and Type 2 Diabetes, 33 Health Affairs 1032, 1038 (2014).
89 Rachidi, supra note 74, at 8.
90 Id.
91 Id.
improve health.  

B. Likelihood of Effectiveness

Some argue that restricting SSBs from SNAP will have little to no effect on consumption of SSBs because the majority of SNAP recipients can substitute their own funds to buy the excluded product. If total household expenditure on unhealthful foods was less than total household cash expenditure on food, the household can purchase healthful foods with SNAP and unhealthful foods with cash—with no change in total purchase or intake of unhealthful foods. While SNAP benefits make up a substantial share of the food budget in most SNAP households, they are modest—approximately $4.50 per person per day. SNAP benefits do not necessarily provide the entire food budget, nor are they expected to do so. Nearly all families supplement their SNAP purchases with groceries purchased from their cash income. As reflected in its name, SNAP is intended to be a supplemental program and consistent with the program’s intention, the SNAP benefit formula is calculated with the assumption that households spend 30 percentage of income on food. If SNAP recipients continue to purchase SSBs, then it is unlikely that a SSB restriction would actually change the nutrition profile of food purchases or induce any behavioral changes.

A related concern is that the exclusion of sweetened beverages will cause SNAP participants to switch to other

92 Id.
94 Klerman et al., supra note 72, at S173.
95 Policy Basics: The Supplemental Nutrition Assistance Program (SNAP), supra note 6.
96 U.S. DEP’T OF AGRIC., supra note 36, at 5.
97 Id.
98 Klerman et al., supra note 72, at S172.
99 Id.
beverages, such as diet soda, that have no nutritional value—a seemingly inefficient use of nutritional assistance funds.\textsuperscript{100} SNAP recipients could use their benefits to purchase other unhealthy foods, such as candy, chips, and cakes. It is also argued that a SSB restriction without increased access to healthy foods could be ineffective because low-income households purchase energy-dense foods because they are cheap and readily available source of calories.\textsuperscript{101}

Other opponents of a restriction note the lack of evidence base demonstrating that a SSB restriction could improve diets or reduce obesity.\textsuperscript{102} In addition, food choices are affected by a number of factors, including cost, taste, convenience, personal preference, and availability.\textsuperscript{103} Restricting food choice would not substantially change most of these factors.\textsuperscript{104}

In response to these arguments, recent studies do show promising results about the potential for a SSB restriction to lead to reduced consumption of SSBs. A recent study examined the effects of financial incentives for the purchase of fruits and vegetables, restriction of the purchase of SSBs, candy, and sweet baked goods, or both, on food purchases among lower income adults.\textsuperscript{105} Restricting the use of food program benefits for purchasing SSBs, sweet baked goods, and candy appeared to be effective in reducing the purchase of SSBs and sweet baked goods. The results suggest that interventions that limit SSB purchases may be effective in decreasing spending for these foods, and thus may contribute to improvements in dietary quality.\textsuperscript{106} Even though some out of pocket funds were used in place of food

\textsuperscript{100} Barnhill, supra note 56, at 2039.
\textsuperscript{101} Hartline-Grafton et al., supra note 66, at 8.
\textsuperscript{102} Id. at 15.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Simone A. French et al., Financial Incentives And Purchase Restrictions In A Food Benefit Program Affect The Types Of Foods And Beverages Purchased: Results From A Randomized Trial, 14 Int. J. Behavioral Nutrition & Physical Activity 1, 2 (2017).
\textsuperscript{106} Id. at 6.
benefit funds to purchase restricted foods, results suggest that out of pocket funds did not fully replace what otherwise may have been spent on these types of foods.\textsuperscript{107} Certainly, further research is warranted to explore the potential effects of a restriction on both food purchases and dietary intake of all household members.\textsuperscript{108} That is precisely the reason to allow pilot programs.

Another study which used a combination of economic and epidemiological modeling techniques, concluded that a SSB restriction in SNAP is likely to significantly reduce obesity prevalence and type 2 diabetes incidence.\textsuperscript{109} The study combined data from a nationally representative dietary survey and a price database of nearly 20,000 children and adults in SNAP to simulate proposed SSB restriction.\textsuperscript{110} These data reveal that SNAP participants consume almost twice as many calories from SSBs as they do from vegetables and fruit, but they are sensitive to changes in SNAP benefits and food prices.\textsuperscript{111} The result of this study suggest that the impact of a SSB restriction could be very significant—obesity prevalence could decline by over 281,000 adults and 141,000 children under a SSB restriction policy.\textsuperscript{112} The researchers concluded that a policy to ban SSBs purchases made with SNAP dollars is more likely to significantly reduce obesity prevalence and type 2 diabetes incidence than a policy to subsidize vegetable and fruit purchases using SNAP dollars.\textsuperscript{113}

In addition, a USDA study of the Summer Electronic Benefit Transfer for Children Program published in 2016 supports these conclusions about the likely impact of a restriction on SSBs. The USDA study found that only a WIC–based model of food

\textsuperscript{107} Id. at 8.
\textsuperscript{108} Id.
\textsuperscript{109} Basu et al., \textit{supra} note 88, at 1033, 1038. The largest effects in the model were observed among adults ages 18–65 and among nonblack, non-Mexican ethnic minorities such as other Latinos and Asians, although the effects remained significant for children and white populations as well. \textit{Id.} at 1036.
\textsuperscript{110} Id. at 1037.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. It is interesting to note that a vegetable and fruit subsidy had a nonsignificant effect on obesity and type 2 diabetes. \textit{Id.}
assistance, which restricted what could be purchased with benefits (including SSBs), led to a reduction in SSB consumption among families who participated.\textsuperscript{114} The SNAP-based model, which had no restrictions, did not reduce SSB consumption.\textsuperscript{115}

The effectiveness of a restriction on SSB purchases and consumption is an empirical question that requires a pilot test of the policy to answer. As the USDA itself has stated, “There is no way to know – other than through carefully designed and evaluated pilot tests – to what extent the proposed restriction would have the desired effect of reducing purchases of foods with limited nutritional value.”\textsuperscript{116}

\textbf{IV. Should it be Done? The Ethics of Restricting SNAP Purchases}

Those who oppose a restriction on SNAP purchases assert several arguments related to the ethics of governmental interference with a free market and personal purchasing decisions. The sections below explain and respond to the two primary assertions—that a SSB restriction unfairly and inequitably limits the choices of SNAP recipients and that the restriction is demeaning and stigmatizing.

\textit{A. Restricting Free Choice and Limiting Access}

The SSB exclusion is considered inequitable because it restricts the beverage options of SNAP recipients so that they have less access to beverages of their choice than non-participants.\textsuperscript{117} The restriction is thus considered a strategy “aimed uniquely at keeping poor people from the normal streams of decision-making and commerce.”\textsuperscript{118} Put another way, a restriction on SSB


\textsuperscript{115} Id.

\textsuperscript{116} U.S. Dep’t of Agric., supra note 36, at 5.

\textsuperscript{117} Anne Barnhill & Katherine F. King, Evaluating Equity Critiques in Food Policy: The Case of Sugar-Sweetened Beverages, 41 J. L. Med. & Ethics 301, 302 (2013).

\textsuperscript{118} Hartline-Grafton et al., supra note 66, at 13.
considered by some to be a patronizing attempt to “micromanage” the lives of the poor.\textsuperscript{119} The message conveyed through the restriction on SSB purchases with SNAP is that that poor people make bad choices, therefore requiring government intervention to manage their food choices whereas higher income persons do not.\textsuperscript{120}

Relatedly, critics of the SSB restriction assert that SNAP participants and non-participants have similar intakes and purchases of unhealthy foods.\textsuperscript{121} There is limited evidence that SNAP participation increases SSB consumption beyond the risk associated with poverty.\textsuperscript{122} Therefore, if SNAP benefits are not to blame for additional purchases of SSBs, restricting only SNAP purchases in this way is not justified.\textsuperscript{123}

There is an ethical concern that the SSB ban unfairly targets SNAP participants, without imposing a similar restriction across other government programs, thereby singling out poor persons for a problem experienced by the majority of Americans.\textsuperscript{124} Thus, some critics have argued that the restriction on SSBs can pass ethical muster only if it can be applied to all types of government funds used to purchase beverages, including cafeterias in all government buildings and all beverages purchased with federal grant funds.\textsuperscript{125}

To address the concerns about undermining the free choice and autonomy of SNAP recipients with a SSB restriction, it is necessary to note how our eating behavior and choices are more constrained than we may imagine.\textsuperscript{126} Research studies demonstrate


\textsuperscript{120} Nancy Kass et al., \textit{Ethics and Obesity Prevention: Ethical Considerations In 3 Approaches To Reducing Consumption Of Sugar-Sweetened Beverages}, 104 Am. J. Pub. Health 787, 791 (2014); Barnhill & King, \textit{supra} note 117, at 302.

\textsuperscript{121} Hartline-Grafton et al., \textit{supra} note 66, at 13.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} Schwartz, \textit{supra} note 22, at S201.

\textsuperscript{124} Kass et al., \textit{supra} note 120, at 791.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} Barnhill & King, \textit{supra} note 110, at 304.
how various features of the external food environment, such as large portion sizes, availability and location of snack foods and caloric beverages, function as psychological “cues” that encourage “mindless” overconsumption.\textsuperscript{127} Furthermore, there is evidence that salty and sugary foods disrupt our appetite regulation, subverting the psychological and physiological systems that regulate food intake.\textsuperscript{128} There is also evidence that low-income youth and adults are exposed to disproportionately more marketing and advertising for obesity-promoting products that encourage the consumption of unhealthy foods such as fast food and SSBs.\textsuperscript{129}

It is thus difficult to claim that obesity prevention policies, such as a restriction on the purchase of SSBs with SNAP, would impose for the first time, a constraint on choice of what to consume.\textsuperscript{130} This reality helps us to understand that a SSB restriction is not based on an assumption that low-income people are uniquely bad at making food choices, or that low-income people are more easily manipulated by their environments.\textsuperscript{131} The influence of environmental cues on all people, regardless of income levels, should force policymakers and advocates to question whether “maximizing consumer food choice” is the pinnacle of good policy.\textsuperscript{132} This is admittedly a complex ethical issue; however, freedom of choice must be balanced with public health goals.\textsuperscript{133} Of course, decisions about what or how much we eat deserve protection, but it must be acknowledged that when obesity prevention policies such as a SSB restriction in SNAP are implemented, they would replace one set of influential external stimuli with a different set, rather than exert influence on consumer

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Food Research & Action Center, \textit{supra} note 17, at 4.
\textsuperscript{130} Kass et al., \textit{supra} note 120, at 792.
\textsuperscript{131} Barnhill & King, \textit{supra} note 117, at 304-05.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 305.
choices where none had previously existed.\textsuperscript{134}

Furthermore, and perhaps most importantly, the disparity in consumer choice is not ethically decisive. The goal of SNAP is to address a specific problem: the diet and nutrition of low-income people.\textsuperscript{135} The disparity of overriding importance, when evaluating the proposal to restrict SSBs, is the disparity in diet, nutrition, and health between low-income and higher-income Americans.\textsuperscript{136} Thus, because low-income Americans have a disproportionately higher prevalence of diet-related disease than other Americans, SNAP policy changes may disproportionately benefit these populations most affected by the health consequences of poor nutrition.\textsuperscript{137} National data show that people with lower incomes consume fewer fruits and vegetables and more SSBs compared with higher income people.\textsuperscript{138} They also experience higher rates of obesity and type 2 diabetes than higher-income groups.\textsuperscript{139}

Such disparities were revealed in a recent review of 25 studies that examined the diets of SNAP participants, eligible non-participants, and higher income individuals.\textsuperscript{140} Although overall caloric intake and consumption of macronutrients and micronutrients were similar between SNAP and income-eligible non-participants, adult SNAP participants consumed a less healthy diet than either comparison group.\textsuperscript{141} Children whose families participated in SNAP had similar nutrition quality to income-eligible non-participants, but lower quality than higher-income

\textsuperscript{134} Kass et al., supra note 120, at 792.
\textsuperscript{135} Barnhill, supra note 56, at 2040.
\textsuperscript{136} Id.
\textsuperscript{137} Basu et al., supra note 88, at 1032. It can also be said that the issue of whether SNAP participants have worse nutrition or health than non-participants is irrelevant; what is relevant is whether SNAP participants’ nutrition and health could be improved with a SSB restriction. Barnhill & King, supra note 117, at 305.
\textsuperscript{138} French et al., supra note 105, at 1.
\textsuperscript{139} Basu et al., supra note 88, at 1032.
\textsuperscript{141} Schwartz, supra note 22, at S201.
While the findings comparing SSB consumption of SNAP participants with eligible nonparticipants were mixed, overall, the data suggest that SNAP participants consume more SSBs than higher-income individuals, but similar amounts as eligible non-participants. Results showed that SSBs accounted for approximately 12 percent of total daily caloric intake of SNAP participants, higher than that of SNAP-eligible nonparticipants (9 percent total daily intake) and SNAP-ineligible nonparticipants (6 percent total daily intake).

Another reason to restrict SNAP purchases is economic. As a federally funded program, taxpayers pay for SSBs twice: once at the point of sale through the SNAP program and later as health care expenditures for treatment of diet-related diseases through Medicaid and Medicare, and indirect economic costs from future lost work productivity attributable to obesity, type 2 diabetes, and cardiovascular disease. SNAP pays for an estimated $4 billion in soft drinks per year, or about 20 million servings each day. The costs of medical spending attributable to obesity is estimated at $147 billion per year. Of this amount, $61.8 billion is financed by Medicare and Medicaid. Put this way, SSBs have enormous costs to public health and spending.

In summary, where the goal of unfettered consumer choice is at odds with the goal of promoting health and good nutrition, it is ethically justifiable to modestly limit the consumer choice to improve the nutrition and health of SNAP participants, just as it is ethically justifiable to limit choice of unhealthy products in other settings such as schools, day care centers, hospitals, and places

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142 Id.
143 Id.
145 Basu et al., supra note 88, at 1032-33; Ludwig et al., supra note 27, at 2567-68.
146 Ludwig et al, supra note 27, at 2567.
147 Finkelstein et al., supra note 17, at w822.
148 Id.
of employment.\textsuperscript{149} Such limitations are already incorporated into SNAP—an assistance program to buy food, not to generally maximize consumer choice.\textsuperscript{150}

\textit{B. Stigmatization of SNAP Recipients}

The USDA\textsuperscript{151} and opponents to a restriction on SNAP purchases have expressed concerns that such a policy would stigmatize low-income families.\textsuperscript{152} There is a related concern about the message such a policy conveys to society about the poor.\textsuperscript{153} As stated by Joel Berg, former Executive Director of New York City Coalition against Hunger, such proposals to restrict SNAP purchases are “based on the false assumption that poor people were somehow ignorant or culturally deficient.”\textsuperscript{154} There is concern that rejection of purchases at checkout could cause embarrassment and stigmatization of SNAP recipients by signaling them out as receiving assistance.\textsuperscript{155} Increased stigma could become a threat to participation, and a decline in SNAP participation could in turn increase food insecurity.\textsuperscript{156}

To counter the concerns above, the issue of whether SNAP participants would feel stigmatized and deterred from using their benefits are empirical issues that can only be assessed through a pilot study.\textsuperscript{157} Several surveys of SNAP recipients may actually demonstrate that concerns about potential negative impacts of a restriction are unwarranted. In recent surveys of SNAP recipients, the majority of respondents agreed that it would be

\textsuperscript{149} Barnhill, \textit{supra} note 56, at 2040.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} U.S. Dep’\textsc{t} of Agric., \textit{supra} note 36, at 1, 4.


\textsuperscript{153} Kass et al., \textit{supra} note 120, at 793.

\textsuperscript{154} McGeehan, \textit{supra} note 119.

\textsuperscript{155} U.S. Dep’\textsc{t} of Agric., \textit{supra} note 36, at 1, 4-5.

\textsuperscript{156} Schwartz, \textit{supra} note 22, at S202.

\textsuperscript{157} Barnhill, \textit{supra} note 56, at 2039.
appropriate to restrict SSBs from SNAP.\textsuperscript{158} When New York City SNAP participants were surveyed on their consumption patterns and attitudes around restrictions in 2011, “almost 70 percent of surveyed SNAP participants supported restricting sweetened beverages from SNAP (49 percent)” or did not express an opinion on the issue (16 percent).\textsuperscript{159} An extensive campaign to notify all SNAP recipients should accompany any change in the types of items that can be purchased. Embarrassment and stigma, if any, would have to be weighed against the potential benefits of SSB restriction, such as lower rates of obesity, diabetes, and other chronic disease, conditions that are themselves stigmatizing.\textsuperscript{160}

Rather than causing the stigmatization of SNAP recipients, there could actually be a reduction of stigma associated with a restriction of SSBs. Excluding SSBs from SNAP could bolster the public perception of SNAP, portraying the program as a carefully designed nutrition assistance program that helps families eat healthier, as opposed to an inefficient welfare program.\textsuperscript{161} Rather than sending negative messages about SNAP participants, a restriction on SNAP sends messages about nutrition—that SSBs are unhealthy, people drink fewer SSBs, and that SSBs do not contribute to good nutrition.\textsuperscript{162} These messages should be aimed not only at SNAP recipients, but at all Americans.\textsuperscript{163} Put another way, a restriction on purchases of SSBs is a policy focused on singling out the drinks, not singling out SNAP participants. It is a policy solidly backed by nutrition science and public health goals articulated by the government and advocacy organizations.\textsuperscript{164}

\textsuperscript{158} Michael Long et al., \textit{Public Support For Policies To Improve The Nutritional Impact of The Supplemental Nutrition Assistance Program (SNAP)}, 17 PUB. HEALTH NUTRITION 219, 219 (2014); Cindy Leung et al., \textit{Improving the nutritional impact of the Supplemental Nutrition Assistance Program: perspectives from the participants}, 52 AM. J. PREV. MED. 193, 196 (2016).

\textsuperscript{159} Rachidi, \textit{supra} note 74, at 7.

\textsuperscript{160} Barnhill, \textit{supra} note 56, at 2038-39.

\textsuperscript{161} Id. at 2039.

\textsuperscript{162} Barnhill & King, \textit{supra} note 117, at 306.

\textsuperscript{163} Id.

\textsuperscript{164} See Centers for Disease Control & Prevention, The CDC Guide to Strategies for Reducing the Consumption of Sugar-Sweetened Beverages 4 (2010),
There are other examples of anti–SSB policies that only reach a subset of the population, such as restricting these products in schools, hospitals, and government buildings. Like the SSB SNAP restriction, “these policies are not aimed uniquely” at poor people; they are aimed uniquely at sugary drinks.¹⁶⁵

In summary, a pilot program to test the efficacy of a restriction on SSB purchases with SNAP can and should be included in the 2018 Farm Bill. The administrative obstacles for the USDA, states, and retailers are not insurmountable, as evidenced by other such as WIC nutrition assistance programs and HIC pilot program. There are several recent studies suggesting that a SSB restriction would reduce consumption of SSBs, which could lead to improved health outcomes. The ethical objections to a SSB restriction as patronizing and demeaning, though valid, are not decisive. At stake is the public health of 42 million Americans who depend on the SNAP program to purchase food. Given the “general consensus that SSBs contain no beneficial nutrients”¹⁶⁶ and compelling evidence linking SSBs to obesity, diabetes, and other chronic diseases for which low-income Americans are particularly at risk, it is the government’s moral imperative to implement policies that address health disparities.¹⁶⁷

V. Recommendation for a SSB Restriction Pilot Project

The 2018 Farm Bill presents an opportunity for Congress to authorize the funding of a pilot that restricts the purchase of SSBs¹⁶⁸ with the use of SNAP. Such a restriction brings the


¹⁶⁵ Schwartz, supra note 22, at S201.

¹⁶⁶ Blondin, supra note 57, at 5.


¹⁶⁸ Although pilot proposals can suggest definitions of SSBs, one suggestion is from the CDC: caloric, sweetened beverages including: soft drinks (soda or pop), fruit drinks, sports drinks, tea and coffee drinks, energy drinks, sweetened milk or milk alternatives, and any other beverages to which sugar, typically high fructose corn syrup or sucrose, has been added. Centers for Disease Control & Prevention,
program in alignment with its longstanding goal—to “safeguard the health and wellbeing of the Nation’s population and to raise levels of nutrition among low-income households.”

An evidence base is needed to evaluate the most effective ways to curb the obesity epidemic, particularly among the nation’s most vulnerable populations who are at higher risk of diet-related diseases. As the USDA has recognized, “carefully designed and evaluated pilot tests” are the only way to evaluate the effect of a SSB restriction on reducing consumption. To date, no randomized trial has been conducted to examine the effects of restrictions on the purchase of certain food and beverage items. The objections regarding feasibility and efficacy discussed in the preceding sections rely on empirical issues that could be resolved with a pilot project. In addition, many of the ethical debates and assumptions about stigma to SNAP recipients could similarly be resolved with more data, and more importantly, more inclusion of SNAP recipients in the conversation about how to improve nutrition of low-income populations. Thus, Congress should direct the USDA to invite applications from states to pilot a well-designed, thoroughly evaluated, and carefully messaged SSB restriction.

A well-designed pilot will include a rigorous evaluation plan to compare similar locations that would experience the restriction while others would not, and to assess whether retailers could appropriately implement the restriction and whether participants could follow the changes. Like the NYC proposal, a pilot authorized in the farm bill should use survey data and retailer data to assess changes in consumption patterns over time, as well as qualitative assessments of the experiences of retailers.

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169 The Food Stamp Act of 1964, Pub. L. 88-525, §2, 78 Stat. 703 (1964) (demonstrating the goal of the original food stamp program).
170 U.S. DEP’T OF AGRIC., supra note 36, at 5.
171 French et al., supra note 105, at 2.
172 Rachidi, supra note 74, at 8.
and participants during the pilot. Messaging and education will also be critical to address concerns regarding stigma and administrative burdens for retailers. A public information campaign should inform all SNAP recipients of changes, and retailers should be notified well in advance of implementation to allow time to upgrade systems and procedures. The public information campaign should explain the public health justifications for the restriction to make clear that the policy is aimed at SSBs, not SNAP recipients.

A restriction on the purchase of SSB should not be read to support a reduction of SNAP benefits. It is beyond dispute, from this author’s perspective, that SNAP benefits should be increased to alleviate food insecurity, increase food expenditures, and improve diet quality among low-income Americans, while also injecting money into local economies. Nor should this proposal be interpreted as a rejection of other measures to improve the health and nutrition of SNAP recipients, such as educational campaigns about the harms of SSBs and incentives to purchase fruits and vegetables. Rather, a restriction on the purchase of SSBs means that the federal government will cease subsidizing the purchase of products that are demonstrably and indisputably harmful to public health.

There should be no winners or losers in the debate about restricting SNAP among anti-hunger and public health advocates. Anti-hunger, social justice, and public health groups should

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coalesce around the issue of improving the health and nutrition of our country’s most vulnerable populations. Rather than framing the issue as a restriction of choice, with low-income individuals as targets, the issue is about targeting SSBs as void of nutrition, detrimental to public health, and undeserving of subsidization by the government. Allowing the purchase of SSBs with SNAP makes the government complicit in lining the soda industry’s pockets at the expense of the public health.

**Conclusion**

SNAP is essential for hunger prevention in the United States, but its exclusive focus on food quantity contributes to malnutrition and obesity and is misaligned with the goal of helping beneficiaries lead healthier lives.\(^{177}\) SNAP is not merely a transfer of wealth, but a program intended to alleviate hunger and improve nutrition and health of low-income Americans. Authorizing a pilot program in the 2018 Farm Bill to test the efficacy of a SSB restriction could be a significant opportunity to reduce the burden of diet-related disease among low-income children and families.

\(^{177}\) Ludwig et al., *supra* note 27, at 2568.
Strengthening the National Organic Program with State Organic Programs

Kelly Damewood*  

Introduction  
Now, more than ever before, organic stakeholders must consider all options to strengthen the U.S. Department of Agriculture’s (USDA) National Organic Program (NOP). Over the last 15 years, USDA-certified organic production significantly grew both domestically and abroad. This growth is largely attributed to consumer trust in the integrity of the USDA-certified organic seal—NOP sets and enforces federal organic standards for all products sold or labeled as organic in the United States.

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2 Robust organic sector stays on upward climb, posts new records in U.S. sales, Organic Trade Association (May 24, 2017), https://www.ota.com/resources/market-analysis (“The robust American organic sector stayed on its upward trajectory in 2016, gaining new market share and shattering records, as consumers across the United States ate and used more organic products than ever before. . . . Organic sales in the U.S. totaled around $47 billion in 2016, reflecting new sales of almost $3.7 billion from the previous year. The $43 billion in organic food sales marked the first time the American organic food market has broken though the $40-billion mark. Organic food now accounts for more than five percent -- 5.3 percent to be exact -- of total
But the continued success of organic depends on whether NOP can maintain strong oversight in a rapidly evolving marketplace with its current enforcement budget and authority.³ Therefore, organic stakeholders must work to strengthen NOP enforcement resources because it will protect consumer trust in the integrity of the USDA-certified organic seal.

At the federal level, efforts are well underway to strengthen NOP enforcement resources through the next farm bill.
Congress first authorized NOP when it passed the Organic Foods Production Act of 1990 (OFPA) as part of the 1990 Farm Bill, and Congress must reauthorize funding for NOP in the next farm bill as well as include any other changes to the program. So now is the time to make any changes to the program—such as shoring up NOP enforcement authority—and to advocate for increased authorized funding. Thus, organic stakeholders are prioritizing and advocating for increased NOP enforcement resources in the next farm bill.

But in addition to their farm bill advocacy, organic stakeholders should also consider how state-level action can support their federal efforts. Precedent and other pressing federal issues indicate that Congress could likely delay the next farm bill, which should be reauthorized in September 2018 when the 2014 Farm Bill expires. Moreover, the Trump administration has already taken action to undermine new organic enforcement standards. And organic critics have also called for changes to NOP that could undermine its efficacy. So, given the current political climate, it is worth supplementing farm bill advocacy

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5 See Organic Trade Association Priorities for Farm Bill, supra note 3 (describing need for “support and adequate funding for the [NOP] to keep pace with industry growth, set uniform standards, and carry out compliance and enforcement actions in the U.S. and abroad.”); Faso Introduces Bill to Crack-Down on Fake Organics, Support Organic Farmers, supra note 4.
6 See Organic Trade Association Priorities for Farm Bill, supra note 3.
with state-level action.

Specifically, organic stakeholders should consider advocating for state organic programs at the state-level because they are unique, often overlooked enforcement tools. It may seem counterintuitive to consider state-level action to protect a federal program, but OFPA has a unique provision whereby NOP can authorize state departments of agriculture to enforce federal organic standards, e.g. states can create ‘state organic programs’.\(^\text{10}\) So far, California is the only state to establish a state organic program, the California State Organic Program (SOP).\(^\text{11}\) NOP audits and oversees the program, but its program functions, funding, and structure are set forth in California state law.\(^\text{12}\) While the SOP has some drawbacks for California’s organic producers, overall California has the most robust, efficient organic enforcement in the United States.\(^\text{13}\) Therefore, organic stakeholders should consider how advocating for additional state organic programs can strengthen organic enforcement, and in turn support their farm bill priorities.

Thus, this article examines how organic stakeholders can strengthen NOP with state organic programs. Section I reviews the authority, functions, and responsibilities of state organic programs. Section II weighs the costs and benefits of the SOP. Section III then applies the cost-benefit analysis of the SOP to describe key attributes of states with potential to establish state organic programs. Section IV recommends guiding principles for new state organic programs. Finally, this article concludes that some states should consider establishing carefully constructed

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13 Damewood & Sooby, supra note 12, at 29-30 (discussing challenges SOP creates for California producers).
state organic programs because additional state organic programs can support national efforts to strengthen NOP enforcement resources in the next farm bill.

I. Overview of State Organic Programs

State organic programs are a commonly overlooked tool for organic enforcement. Although the NOP primarily works with organic certifiers to regulate the organic marketplace, OFPA also authorizes NOP to work with state organic programs to ensure local oversight and control over organic production in the state.\(^\text{14}\) California is the only state operating a state organic program.\(^\text{15}\) As a result, California has a different regulatory framework for organic production and certification than other states.\(^\text{16}\)

A. The NOP works with Organic Certifiers to regulate the Organic Marketplace

Organic certification is the primary means of ensuring agricultural products sold as organic in the U.S. are produced and handled in compliance with federal organic standards.\(^\text{17}\) NOP accredits private and governmental entities, both domestically and abroad, to verify that products with organic claims have been produced and labeled in compliance with the organic standards.\(^\text{18}\) Operations who produce or handle agricultural products intended to be sold as organic with gross annual organic sales of more than $5,000 must be certified by an accredited certifier.\(^\text{19}\) Thus, the NOP works with organic certifiers around the world to ensure products sold as organic are meeting the requirements of NOP’s standards.\(^\text{20}\)

Organic certifiers have an important role in oversight and

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\(^\text{14}\) 7 C.F.R. §§205.620-205.622.
\(^\text{15}\) State Organic Programs, supra note 11.
\(^\text{16}\) Id.
\(^\text{18}\) Id. §§ 205.500-205.501(a).
\(^\text{19}\) Id. § 205.100.
\(^\text{20}\) Id. § 205.400.
enforcement because they work directly with producers to ensure compliance with NOP standards. Certifiers review producers’ organic system plans, annually inspect facilities, verify producers’ record-keeping, and analyze residue samples of at least 5% of their certified clients annually.21 Producers must immediately notify their certifiers of any application, including drift, of a prohibited material or a change in production systems that may impact compliance with the organic standards.22 If a producer is not in compliance with NOP standards, then the certifier must alert NOP, issue a noncompliance, and evaluate actions taken to correct the noncompliance.23 Therefore, the rigorous organic certification process ensures products labeled as organic are in compliance with NOP standards.

While organic certifiers play an important role, NOP is ultimately responsible for enforcement. NOP has authority to enforce the standards through legal action, including stopping the sale of a product and issuing civil penalties.24 Any individual or operation who makes a false statement to NOP or to an organic certifier is subject to fines and even imprisonment of up to five years.25 Additionally, NOP must audit organic certifiers and oversee compliance with accreditation requirements.26 So NOP oversees all final enforcement actions and decisions.

In sum, NOP works with organic certifiers to monitor the organic marketplace. Through the organic certification process, accredited certifiers verify that agricultural products sold and labeled as organic are in compliance with the organic standards.27 And NOP has authority to enforce the standards and oversee certifiers.28

21 Id.; Id. §205.670.
23 Id. § 205.405.
24 Id. § 205.100(c)(1).
25 Id. § 205.100(c)(2); Id. §3.91.
26 Id. § 205.501.
28 Id. § 205.661; Id. § 205.668.
B. In California, NOP works with certifiers and the California State Organic Program.

In California, the NOP not only works with certifiers, but it also works with the California State Organic Program (SOP) to oversee organic production and certification. The NOP can authorize state departments of agriculture to establish what are referred to as ‘state organic programs.’ State organic programs are enforcement programs that provide local oversight of certification, production, and handling in the state; they do not operate independently from the NOP. So far, California is the only state operating a state organic program. So California is the only state enforcing NOP standards.

The SOP is a unique enforcement arm of the NOP. The SOP assumes activities conducted by NOP in other states such as working with certifiers to resolve non-compliances, stopping sale of noncompliant products, issuing civil penalties, or handling legal actions when a producer appeals the decision of a certifier. The SOP even takes on some enforcement activities that NOP cannot provide for all states such as proactively monitoring the organic marketplace with unannounced inspections and residue testing beyond what certifiers are already required to perform. Thus, the SOP handles all organic enforcement activities in California with approval and oversight from NOP.

If NOP suspects a noncompliance of a certified organic operation, then it will work with the operation’s certifier to investigate the complaint. But in California NOP will direct

29 Id. § 205.622.
30 Id. § 205.620; See also id. §205.100 (requiring that all agricultural products sold as organic be in compliance with OFPA and federal organic standards, i.e., OFPA preempts any state organic law or standard).
31 State Organic Programs, supra note 11.
32 Id.
34 Id. § 205.670.
35 State Organic Programs, supra note 11.
36 7 C.F.R. §205.661(a); Id. §205.668.
the SOP to work with the certifier.\textsuperscript{37} California is the only state where a state department of agriculture is regularly working with certifiers to resolve non-compliances.

Another important area of enforcement handled by the SOP is investigations of potential fraud. Any member of the public may submit a complaint to NOP.\textsuperscript{38} If the complaint regards a noncertified operation selling product as organic, then NOP must investigate the operation itself because certifiers only have jurisdiction over their clients.\textsuperscript{39} But if the complaint concerns a noncertified operation in California, then NOP will direct the SOP to investigate the complaint.\textsuperscript{40} The public may also submit complaints of fraud directly to the SOP.\textsuperscript{41} In other words, California is the only state with a state department of agriculture regularly receiving and investigating complaints of fraud in the organic marketplace.

In sum, the SOP is a unique enforcement arm of the NOP because it is the state-administered organic enforcement program in the U.S. As an enforcement arm, it enforces federal organic standards such as resolving non-compliances and investigating complaints of fraud within the state.\textsuperscript{42}

\textsuperscript{37} Id. §205.661(b); Id. 205.668.
\textsuperscript{39} 7 C.F.R. §205.661(a) (2017).
\textsuperscript{40} Id. §205.661(b).
\textsuperscript{42} Id.
C. State Organic Programs are different than State Organic Certifiers

An important yet often misunderstood distinction exists between state organic programs and state organic certifiers. California is the only state operating a state organic program while some states have state departments of agriculture that are accredited certifiers such as the Washington State Department of Agriculture (WSDA). An accredited state department of agriculture has the same requirements and functions as an accredited private company—they maintain records with their certified clients, notify clients of regulatory changes or compliance issues, and annually inspect their clients’ farm or facilities. In contrast, a state organic program takes on functions similar to the NOP—it works with certifiers to resolve non-compliances, investigates noncertified operations, and handles appeals or other legal actions. Thus, state organic programs have different roles than state organic certifiers.

The difference between a state organic program and a state organic certifier is further highlighted by the impact of each on producers operating in the state. Producers may choose to certify with any certifier operating in the state. So a producer in Washington could certify with the WSDA Organic Program, or it could choose to certify with another accredited certifier like Quality Insurance International (QAI), which is a private organization. In contrast, producers must comply with a state

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43 Kelly Damewood, California Certified Organic Farmers, Compilation of Interviews & Key Takeaways for SOP Report 2015-2016 (2016) (on file with author) (noting that many interviewees do not understand the differences between state certifiers and state organic programs) [hereinafter Damewood, Key Takeaways for SOP Report].
44 Damewood & Scooby, supra note 12, at 8.
45 Id. at 27-37.
46 Id. at 38-49.
47 See 7 C.F.R. § 205.100 (mandating certification of applicable operations with any accredited certifying agent), see also id. § 205.401 (setting forth requirements for certification applications and not requiring producers certify with any specific certifier).
48 Id.
organic program.\textsuperscript{49} For example, in California producers choose a
certifier but they must comply with SOP requirements \textit{in addition}
to certifying with their chosen certifier.\textsuperscript{50} So the SOP impacts
producers differently than a state organic certifier because it has
authority over all organic producers in the state while certifiers
only have authority over their clients.

\textbf{D. State Organic Programs may create Additional
Requirements.}

Another unique feature of state organic programs is their
ability to impose additional requirements for certification. The
NOP may allow a state organic program to set more restrictive
requirements than what is required under OFPA and the organic
standards.\textsuperscript{51} The additional requirements should address the
environmental conditions or the necessity of specific production
or handling practices particular to the State or region.\textsuperscript{52} So
producers selling agricultural product as organic in the U.S. must
meet the requirements of OFPA, but they may also be required
to meet state requirements if they operate in a state with a state
organic program.

In California, the SOP has four additional requirements:

1. Organic producers and handlers must register with the
SOP through the California Department of Food and
Agriculture.\textsuperscript{53}

2. Organic processors must register with the SOP through
the California Department of Public Health (CDPH).\textsuperscript{54}

3. Organic producers, processors, and handlers must

\textsuperscript{49} \textit{See id.} §§ 204.101 (c)(2), 205.620 (d), 205.668, 205.670 (requiring producers make
records and facilities available to state organic programs).

\textsuperscript{50} Damewood & Sooby, supra note 12, at 9.

\textsuperscript{51} 7 C.F.R. § 206.620 (c) (2017).

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} Policy Memorandum from Miles McEvoy to Stake Holders and Interested
Parties on California State Organic Program, Additional Requirements Granted,
(Jan. 21, 2011), \url{https://www.ams.usda.gov/sites/default/files/media/NOP-PM-11-8-
CaliforniaRequirements.pdf}.

\textsuperscript{54} \textit{Id.}
provide verification of SOP registration to their accredited certifying agent prior to granting or continuing organic certification;\textsuperscript{55} and

4. Accredited certifying agents must register with CDFA and pay registration fees.\textsuperscript{56}

As a result of these additional requirements, California producers must annually register and pay fees to the SOP in addition to annually renewing and paying fees to their certifier.

\textbf{II. The Benefits of the SOP outweigh the Costs.}

The costs and benefits of the SOP must be carefully evaluated before establishing more state organic programs because it is the only established state organic program from which to judge the merits of such a program on. Under its current structure, the benefits of the SOP outweigh the costs—the SOP had significant issues in the past, but these have largely been addressed or are being addressed through ongoing refinements to the program. But the SOP would not be easily replicated or suitable for all states; rather, state organic programs modeled after the SOP would only be appropriate in states where there is sufficient benefit to the state’s organic producers, high stakeholder engagement, and no conflict of interest issues with a state certifier.

\textit{A. The Benefits of the SOP.}

The SOP benefits California producers by providing them with the most efficient, robust enforcement of national organic standards in the U.S. The primary benefits include: reliable funding, local staff, local legal authority, marketplace surveillance, and close oversight over noncertified operations. The SOP also has several ancillary benefits to enforcement such as reliable data, administration of cost share, and authority to further support organic production in the state. Additionally, the SOP benefits the entire organic sector, not just California.

\textsuperscript{55} Id.

\textsuperscript{56} Id.
i. The SOP has consistent funding independent of farm bill negotiations and federal appropriations and is entirely focused on enforcement.

One significant benefit of the SOP is that it allows California to have a consistent, independent source of funding dedicated entirely to enforcement activities. NOP’s budget must fund a range of activities including enforcement actions, developing and implementing organic standards, auditing certifiers, responding to Freedom of Information Acts, and other administrative functions.\(^{57}\) In contrast, the SOP’s budget is almost entirely dedicated to enforcement activities—it has some administrative costs, but it does not write rules, conduct audits, or handle FOIA requests like NOP.\(^{58}\) Thus, the SOP funding is focused solely on enforcement.

Additionally, the SOP budget is not subject to farm bill negotiations and federal appropriations. Upon reviewing its entire farm bill budget, Congress authorizes an annual budget for NOP—that is, Congress determines the maximum amount Congress may appropriate to NOP annually.\(^{59}\) But Congress is not under an obligation to appropriate the full amount.\(^{60}\) To date, Congress, has not appropriated NOP at its full authorized amount—the 2014 authorizes $15 million a year for NOP but Congress has always appropriated $9 million a year.\(^{61}\) But the SOP budget is


\(^{60}\) Id.

completely independent of the NOP because it is funded almost entirely funded by registration fees paid by organic producers in the state.\textsuperscript{62} Therefore, SOP funding is consistent and independent of the political pressures faced by NOP.

Stable funding is increasingly important in today’s political climate. Some organic critics have called on Congress to slash funding to the NOP.\textsuperscript{63} While Congress so far seems unwilling to slash NOP funding altogether, there is ongoing uncertainty as Congress struggles to pass annual appropriations due to ongoing partisan disagreements.\textsuperscript{64} If NOP were to lose its funding for enforcement, then the organic seal would lose the confidence of consumers.\textsuperscript{65} Therefore, the consistent, independent funding stream is increasingly reassuring for organic producers during a time of heightened uncertainty.

Moreover, if Congress were to defund the NOP, either by cutting it from the 2018 farm bill or by not appropriating funds, then the SOP would become an important backstop for the organic marketplace. Before NOP implemented federal standards, the SOP had its own standards, which were the de facto standards for organic production nationwide because producers selling into California had to comply with the SOP.\textsuperscript{66} Today, California state

\textsuperscript{62} California Organic Food and Farming Act, CA AGRIC. CODE § 46013.1 (e)(1).

\textsuperscript{63} Tom Philpott, “Dark Forces” Are Coming for your Organic Food, MOTHER JONES (Feb. 9, 2017, 6:30 PM), www.motherjones.com/politics/2017/02/dark-forces-organic/.

\textsuperscript{64} See Appropriations for Fiscal Year 2017, CONGRESS.GOV RESOURCES, https://www.congress.gov/resources/display/content/Appropriations+for+Fiscal+Year+2017 (last updated May 4, 2017). (showing continued resolutions and partisan voting but no cuts to NOP funding).

\textsuperscript{65} See Organic Trade Association Priorities for the Farm Bill, supra note 3.

\textsuperscript{66} Mark Lipson et. al., Remarks at 2016 EcoFarm Conference Panel: Campaign to End State Organic Program Fees (2016), https://eco-farm.org/sites/default/files/session_audio/EFC16_Campaign_to_End_State_Organic_Program_Fees.mp3 (“In the 1990’s California organic foods act of 1990 was the de facto national standard. It was the foundation on which consumer trust on a national level was built. I strongly believe that”).
law mandates the SOP enforce federal organic standards.\textsuperscript{67} So if Congress defunds the NOP, then the SOP would once again become the de facto assurance of organic enforcement because it would still have funding and enforcement authority.\textsuperscript{68} Thus, under the worst case scenario of a defunded NOP, the SOP would serve as a back stop for enforcement.

\textbf{ii. The SOP has local enforcement Staff.}

A second benefit of the SOP is its local enforcement staff.\textsuperscript{69} NOP investigative staff are primarily based in Washington, D.C.\textsuperscript{70} To investigate complaints of fraud, the NOP must fund travel to the reported operation, handle the complaint from afar, or perhaps work with the local state department of agriculture, which may or may not have the expertise to track down the necessary information.\textsuperscript{71} In contrast, the SOP has trained organic investigators who immediately travel and respond to complaints in California.\textsuperscript{72} The SOP also contracts with county agricultural commissioners—county-based personnel who provide regulatory services for a variety of CDFA and USDA programs—to handle SOP enforcement activities in their region.\textsuperscript{73} Therefore, the SOP provides boots on the ground enforcement to quickly investigate and resolve compliance issues or complaints of fraud.

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\textsuperscript{67} California Organic Food and Farming Act, Ca Agric. Code §§ 46000 (2017).


\textsuperscript{70} See Miles McEvoy, supra note 2 (citing eight compliance and enforcement staff in addition to NOP Compliance and Enforcement Director).

\textsuperscript{71} interview with Miles McEvoy, former Deputy Administrator, U.S. Department of Agriculture, National Organic Program in Washington, D.C. September 30, 2015 (noting that NOP successfully contracted with state departments of agriculture to investigate fraud but NOP staff are primarily based in D.C.).

\textsuperscript{72} See Cal. Dep’t of Food and Agric., Compliance Summary, supra note 69. See also, Damewood & Sooby, supra note 12, at 12 (describing one supervising special investigator and three special investigators on SOP staff).

\textsuperscript{73} California Organic Food and Farming Act, Ca Agric. Code §§ 46000 (b) (2017).
\end{flushleft}
Local staff are especially important for investigating noncertified operations.\(^{74}\) For complaints or issues with certified organic operations, NOP can often rely on the certifier to inspect the operation, take residue tests, or otherwise investigate the operation.\(^{75}\) But if an operation is not certified, then the certifier has no authority to investigate the operation.\(^{76}\) So NOP cannot rely on certifiers for investigating noncertified operations, which then requires NOP to travel to the region, contract with the state staff, or otherwise handle the investigation.\(^{77}\) But as an enforcement arm of NOP, the SOP has authority over anyone selling agricultural product as organic in California so it can send staff to investigate noncertified operations.\(^{78}\) Thus, the SOP’s local enforcement staff ensure efficient resolution of issues with noncertified operations in California.

### iii. The SOP has Local Legal Authority.

A third benefit is the SOP resolves issues that rise to legal action more efficiently than the NOP because it handles local appeals and mediations. NOP may suspend or revoke certification of an operation.\(^{79}\) The operation may go through mediation with the NOP, appeal the suspension or revocation to the AMS Administrator, or, if the AMS Administrator denies the appeal, the operation may request a hearing with a USDA Administrative Law Judge.\(^{80}\) NOP may settle an appeal, and mediation is common.\(^{81}\) But in California alone, organic operations go through

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\(^{74}\) See 7 C.F.R. § 205.101 (2017) (stating that operations exempt from certification “must comply with the applicable organic production and handling requirements”).

\(^{75}\) Id.

\(^{76}\) See id. § 205.661(a) (granting authority to certifying agents to investigate production and handling operations “certified as organic by the certifying agent.”).

\(^{77}\) See id. § 205.101 (stating that operations exempt from certification “must comply with the applicable organic production and handling requirements”).

\(^{78}\) See Ca AGRIC. CODE § 46002 (adopting by reference the NOP standards); 7 C.F.R. § 205.661 (b) (stating authority of SOP over all organic operations in California).


\(^{80}\) Id. § 205.680(a)-(c).

\(^{81}\) Id. § 205.663.
a local legal system to appeal decisions. So California-based operations are not dependent on a backlogged federal system and do not have to work with a court from across the country. So the SOP responds to and resolves noncompliance issues more efficiently than NOP.

iv. The SOP provides Marketplace Surveillance.

A fourth benefit is that the SOP proactively monitors the organic marketplace. The NOP has limited staff and financial resources, so its enforcement budget is almost entirely aimed at responding to noncompliances and investigating complaints. The SOP, however, not only responds to noncompliances and investigates complaints, but it also monitors the organic marketplace through spot inspections and random pesticide residue sampling. So unlike NOP, the SOP helps certifiers monitor the organic marketplace.

Spot inspections may help find bad actors who would not otherwise be identified by a complaint. For example, the SOP contracts with the county agricultural commissioners who go to farmers markets to make sure producers have the appropriate signage and adequately separate organic produce from their conventional produce.


83 See Cal. Dep’t of Food and Agric., Compliance Summary, supra note 69; U.S. Dep’t of Agric., Agricultural Marketing Service, National Organic Program, Compliance & Enforcement/Appeals Summary: FY 2016 (2017), www.ams.usda.gov/sites/default/files/media/NOPQtrlyEnforcementRptQ4FY16Summary.pdf, (closing one out of three appeals in process in FY2015/216 versus NOP closing 14 out of 32 appeals in FY 2016. 6 of the closed appeals were carried over from previous fiscal years).

84 Interview with Miles McEvoy, former Deputy Administrator, U.S. Department of Agriculture, National Organic Program in Washington, D.C. September 30, 2015 (noting that NOP would like to do more random residue testing and marketplace surveillance, but it has limited capacity).


86 Id. § 46003.2 (6); Cal. Dep’t of Food & Agric., California’s State Organic Program Fact Sheet 1, 2 (2017), https://www.cdfa.ca.gov/is/
are out in the field proactively looking for any issues.87

Like spot inspections, pesticide residue sampling can be helpful in identifying any issues in the organic supply chain. SOP staff or county agriculture commissioners can go to farmers markets or retail establishments—from local grocers to large supermarkets—and sample produce for pesticide residues.88 If a residue test is over the allowed amount in organic production or shows a residue of a prohibited material, then the SOP will initiate an investigation where it will trace the produce back to the handler and producer.89

However, the value of marketplace monitoring should not be overly exaggerated. Some would argue that the SOP spot inspections and residue testing not only duplicate certification requirements but also duplicate other California regulations.90 For example, the Certified Farmers Market program also inspects for organic compliance at farmers markets and the Department of Pesticide Regulation (DPR) also conducts periodic residue sampling.91 A recent stakeholder taskforce reviewed the SOP and concluded that spot inspections and residue testing benefit the organic sector when the SOP prioritizes enforcement actions and does not duplicate other areas of enforcement.92 So marketplace surveillance is a benefit when surveillance activities are properly conducted.

v. The SOP monitors Noncertified Operations.

A fifth benefit is the SOP monitors exempt operations. All producers selling agricultural products as organic must comply

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87 See Cal. Dep. of Food & Agric., Compliance Summary, supra note 69.
88 Damewood & Sooby, supra note 12, at 24-25.
89 See Cal. Dep’t of Food and Agric., Compliance Summary, supra note 69 (detecting 4 instances of residues in violation of tolerance levels in FY2015/106 as a result of sampling and conducting).
90 Damewood & Sooby, supra note 12, at 30.
91 Id.
with the federal organic standards.\textsuperscript{93} However, organic producers with gross annual organic sales of $5,000 or less are exempt from certification requirements.\textsuperscript{94} There are two risks of fraud for these exempt producers: first, they may be surpassing the $5,000 mark but they are avoiding the hassle of certification;\textsuperscript{95} second, they may not be in compliance with the standards because they do not have a certifier annually inspecting and surveying their production practices.\textsuperscript{96} Many certified producers who sell at farmers market or directly to consumers suspect this may be an area of significant fraud.\textsuperscript{97}

The SOP is better equipped to enforce organic standards for exempt operations than the NOP. While the NOP has authority to investigate any exempt operation when it receives a complaint or suspects fraud, the NOP does not have information on hand about noncertified entities because they have no obligation to report to NOP, and they are not undergoing the annual inspection or paperwork of certified operations.\textsuperscript{98} In contrast, producers exempt from certification who operate in California must register with and provide production information to the SOP.\textsuperscript{99} The SOP uses this information to conduct investigations as well as spot inspections or residue testing.\textsuperscript{100} Thus, the SOP ensures robust oversight over exempt producers, which helps level the playing field at farmers markets and direct to consumer sales channels.

\textbf{vi. The SOP has Authority to Create Additional Requirements.}

A sixth benefit is the SOP has the unique authority to add requirements to organic certification. Its current additional

\textsuperscript{93} 7 C.F.R. § 205.102 (2017).
\textsuperscript{94} Id. § 205.101(a).
\textsuperscript{95} Id.
\textsuperscript{96} Id. § 205.102; id. §205.101(a).
\textsuperscript{97} Damewood, Key Takeaways for SOP Report, supra note 43.
\textsuperscript{98} 7 C.F.R. § 205.101(c) (2017).
\textsuperscript{100} Id.
requirements—registration and annual fees—provide for reliable funding, marketplace surveillance, and oversight over noncertified operations. However, the SOP could also leverage this unique authority to address enforcement issues when the federal rulemaking process is stalled or not making sufficient changes.

For example, the SOP could potentially strengthen the prohibition of the use of GMOs. Organic producers may not use inputs derived from GMOs and they must proactively prevent inadvertent contamination of their crops. Despite this requirement, testing shows that GMO contamination is occurring in organic grains. Many suspect that contamination most likely occurs when producers use conventional seeds. So one way to strengthen enforcement of the prohibition of GMOs is to add a requirement that producers growing crops at risk of GMO contamination keep records demonstrating the seed they plant has been tested to show no presence of GMOs. Certifiers could then verify that producers have taken all precautions to prevent inadvertent contamination. Thus, the SOP could add requirements to further strengthen enforcement.

But the authority of the SOP to strengthen enforcement through additional requirements—such as requiring increased

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101 See supra text accompanying section II A (i)-(v).
102 See 7 C.F.R. § 205.2; id. § 205.105(3) (prohibiting the use of excluded methods and defining excluded methods as “[a] variety of methods used to genetically modify organisms”).
104 NATIONAL ORGANIC STANDARDS BOARD, CROPS SUBCOMMITTEE PROPOSAL: STRENGTHENING THE ORGANIC SEED GUIDANCE 1 (2017) (“Since the mid-2000s, genetically engineered seeds have led to contamination of the seed supply, and organic seed companies are struggling to stay viable when the adoption of organic seed is not growing at the same rate as the organic products market.”).
106 Id.
record keeping for at risk seed—is only theoretical at this time. The SOP’s current additional requirements relate to fees and registration;\textsuperscript{107} they do not substantively alter enforcement of the federal organic standards.\textsuperscript{108} To date, an effort to strengthen standards at the state level have not been made in California; rather, organic stakeholders generally work to strengthen organic standards through the federal rulemaking or guidance process in which the National Organic Standards Board (NOSB) reviews public input and makes recommendations to the NOP for clarification, guidance, or new standards.\textsuperscript{109} Thus, the full potential to leverage the authority to impose additional requirements remains untested.

Further, establishing more requirements for certification through the SOP could be quite challenging because CDFA or stakeholders would have to sponsor legislation to change the requirements and then the NOP would have to approve the requirements.\textsuperscript{110} On one hand, some producers may not support more additional requirements because it would put them at a competitive disadvantage to other producers who certify with fewer requirements.\textsuperscript{111} On the other hand, some producers may welcome stronger enforcement and recognize the potential for California to pave the way for stronger standards as it leads by example. So it is not clear whether an effort to add requirements through the SOP would be successful.

Nonetheless, it is still important to consider the benefits of additional requirements because it could help strengthen enforcement when the federal NOSB and NOP process is stalled. For example, it took the NOSB at least three years before it finalized a recommendation to update the definition of GMOs in

\textsuperscript{107} Policy Memorandum from Miles McEvoy, supra note 53.

\textsuperscript{108} Id.

\textsuperscript{109} 7 U.S.S. § 6518.

\textsuperscript{110} California Organic Food and Farming Act, CA AGRIC. § 46000; 7 C.F.R. § 206.620(c) (2017).

the organic standards. \(^{112}\) And the NOSB recommendation is not enforceable; rather the NOP must go through formal public notice and comment. \(^{113}\) It can take years before NOP pursues rulemaking on an NOSB recommendation. \(^{114}\) And even if the NOP acts on the recommendation, the rule can be stalled by political pressures or Congressional interference. \(^{115}\) Therefore, the SOP’s authority to establish additional requirements is an untested but potentially potent benefit to California’s organic producers.

vii. The SOP also has Benefits ancillary to Enforcement.
While the primary purpose of the SOP is enforcement, the program also provides ancillary benefits to the organic sector in California. The SOP provides unique data on organic production, it administers the National Organic Cost Share Program on behalf of California producers, and it has authority to support organic producers through education, outreach, and other programmatic activities.

\(^{112}\) See Letter from Tracy Favre, Chair of National Organic Standards Board to Secretary of Agriculture, U.S. Department of Agriculture, Report to the USDA Secretary on Progress to Prevent GMO Incursion into Organic Agriculture (Nov. 18, 2016), [https://www.ams.usda.gov/sites/default/files/media/MSFall2016ReporttoSecy.pdf](https://www.ams.usda.gov/sites/default/files/media/MSFall2016ReporttoSecy.pdf) (“To address public concerns, 5 years ago the NOSB established an ad hoc Committee on GMOs”); Letter from Tracy Favre, Chair of National Organic Standards Board to National Organic Program, Formal Recommendation regarding Excluded Methods Terminology (Nov. 18, 2016), [https://www.ams.usda.gov/sites/default/files/media/MSExcludedMethods.pdf](https://www.ams.usda.gov/sites/default/files/media/MSExcludedMethods.pdf) (recommending updates to definitions of GMOs).


1. The SOP has unique data on California production.

The information collected by the SOP at registration has several uses not related to enforcement. For example, production data may be useful for producers who may evaluate crop trends to make decisions about perennial crop plantings. Additionally, county agriculture commissioners report they use SOP registration data to ensure organic farms are not sprayed with prohibited materials when there is a federal or state-mandated pest treatment. Finally, organic advocates use data about organic production to make the case for increased public investment in organic research and other programmatic support. Thus, the SOP registration data has uses beyond enforcement.

In fact, the unique data collection in California through the SOP is the most reliable data on organic production in the state. Organic data is notoriously difficult to track because traditional agricultural data reporting has not called out organic in the past. And most organic data is collected through voluntary reporting while SOP registration reporting is mandatory. Thus, historically California has had the most reliable farm production data on the organic farming sector because all organic producers are required to report to the SOP every year.

Moreover, California is the only state with reliable data on the organic processing industry. Organic farms and ranches voluntarily report production information to federal statistics and research agencies, but organic processors do not have analogous survey opportunities through federal agencies. In California, however, processors report production information, including gross organic sales, to the SOP. And the SOP annually reports

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116 Kelly Damewood, Notes from COPAC Technical Subcommittee on Registration (Jan.-May 2017) (on file with author).
117 Id.
118 Id.
119 Interview with Jane Sooby, Senior Policy Specialist, California Certified Organic Farmers, in Santa Cruz, CA (Aug. 1, 2017).
120 Id.; California Organic Food and Farming Act, CA AGRIC. CODE §§ 46013.1.
121 See CALIFORNIA STATE ORGANIC PROGRAM FACT SHEET, supra note 89.
122 DAMEWOOD & SOOBY, supra note 12, at 22.
this data back to the industry.\textsuperscript{123} Reports show that organic food processing has grown to almost $10 billion in 2016.\textsuperscript{124} This impressive sales number helps organic advocates demonstrate the value of organic to the California economy and make the case for investment in organic.\textsuperscript{125}

Despite the benefits of SOP data, it is also important to note that this data is not being used to its fullest potential. Under state law, the SOP must report data on the processing sector annually, but it is not required to report data on farm production.\textsuperscript{126} The SOP makes data available upon specific request, but it does not systematically report the data.\textsuperscript{127} So while the SOP registration data may have many uses, it is currently underutilized because the general public does not have regular access to it.\textsuperscript{128}

2. The SOP administers Cost Share

Another ancillary benefit of the SOP is it administers the National Organic Cost Share Program (cost share) on behalf of organic farmers in the state.\textsuperscript{129} First authorized in the 2002 Farm Bill, cost share is a federal program that reimburses organic producers 75\% of their certification costs, up to $750 per scope.\textsuperscript{130} The USDA works with state departments of agriculture, and the Farm Service Agency (FSA) to administer cost share.\textsuperscript{131} Some state departments choose not to administer it, but the SOP has always been committed to administering it and strives to enroll as many producers as possible in the program.\textsuperscript{132} Due to recent

\begin{footnotes}
\footnote{\textsuperscript{123} \textit{Id.}}
\footnote{\textsuperscript{124} CDPH Report on Organic Processing FY 2015-16 (on file with author).}
\footnote{\textsuperscript{125} Interview with Jane Sooby, \textit{supra} note 119.}
\footnote{\textsuperscript{126} \textit{See CA Health & Safety Code }§§\textsuperscript{110811-12} (requiring annual reporting); \textit{CA Agric. Code }§ 46000, et seq. (not requiring annual reporting).}
\footnote{\textsuperscript{127} Interview with Jane Sooby, \textit{supra} note 119.}
\footnote{\textsuperscript{128} Damewood & Sooby, \textit{supra} note 12, at 27-28.}
\footnote{\textsuperscript{129} \textit{Id.} at 27.}
\footnote{\textsuperscript{130} Farm Security and Rural Investment Act of 2002, 7 U.S.C. 6523(d).}
\footnote{\textsuperscript{132} Interview with Jane Sooby, \textit{supra} note 119; \textit{see also U.S. Dep’t of Agric., Report}}
\end{footnotes}
changes, California producers may also apply through their local FSA office; however, it is helpful for organic producers to apply through the SOP because they already register with the SOP annually. Therefore, the SOP benefits the organic sector by administering cost share.

3. The SOP can support Education, Outreach, and other Programmatic Activities.

An important but unrealized ancillary benefit of the SOP is its authority to support education, outreach, and other programmatic activities for organic producers. In 2016, California updated and streamlined the SOP through the passage of the California Organic Food and Farming Act (COFFA). These updates broadened the authority of CDFA and the SOP from solely enforcing federal organic standards to also incorporating education, outreach, and other programmatic activities for organic producers. While CDFA has not yet acted on this new authority, it is expected that COPAC will consider advising the Secretary of CDFA on new opportunities for the SOP in the future. Thus, the SOP could implement programs to support and grow organic production in the state.


134 Kelly Damewood, COFFA Signed into Law with your Help, From Field to Forum (Sep. 26, 2016), https://www.ccof.org/blog/coffa-signed-law-your-help, [hereinafter Damewood, COFFA Signed into Law with Your Help].

135 Id.

viii. The SOP benefits the entire Organic Sector.

The full range of SOP benefits cannot be discussed without considering the impact on national enforcement and the organic marketplace as a whole. As the state with the highest volume of organic production, strong enforcement in California supports consumer confidence in the integrity of organic production and compliance.\textsuperscript{137} Moreover, the SOP essentially subsidizes enforcement throughout the U.S.—by funding its own enforcement through fees, California’s SOP allows the NOP to direct its limited resources toward enforcement in other states.\textsuperscript{138}

As discussed below, many California producers resent subsidizing national enforcement.\textsuperscript{139} Nonetheless, additional resources and support for the NOP benefits the entire organic sector because the success of the organic marketplace depends upon strong enforcement.\textsuperscript{140} Therefore, the SOP benefits the entire organic sector by providing strong, self-funded enforcement.

\textbf{B. The Costs of the SOP}

While the SOP provides the strongest, most robust enforcement in the U.S., the SOP also has several disadvantages. California organic producers have the highest costs of certification because they pay more fees, comply with more paperwork, operate in a more confusing regulatory landscape, have more communications challenges, and have more need for engagement and advocacy. However, COFFA addresses many of these costs and stakeholders continue to work with CDFA to refine the program.

i. California’s Organic Producers pay more Fees for Organic Certification.

One SOP cost is the requirement that California producers pay an annual SOP registration fee in addition to their certification costs.

\textsuperscript{137} Damewood, Key Takeaways for SOP Report, supra note 43.
\textsuperscript{138} Id.
\textsuperscript{139} See infra text accompanying notes 130-40.
\textsuperscript{140} See supra text accompanying notes 1-4.
The NOP allows the SOP to collect an annual SOP registration fee as an additional requirement to organic certification. Many California producers resent paying an additional fee because they feel it puts them at an unfair advantage to organic producers outside the state who only pay a certification fee.

Many California producers also resent subsidizing national enforcement. The NOP does not spend enforcement dollars in California because the SOP is self-funded through its registration fees. This allows the NOP to spend its enforcement dollars outside the state. So, at the very least, California producers argue that they should receive their fair share of federal enforcement dollars from the NOP.

SOP fees also create an additional barrier to certification for small to mid-scale farmers. The fees are relatively low—they range from $25 to $3,000 depending on gross annual sales, with the majority paying in the range of $250. However, farmers operate with thin margins. And California farmers are arguably the most regulated farmers in the world with multiple layers of fees. Small to mid-scale producers report that the fees are a barrier to the success of their business. Therefore, even seemingly small SOP fees challenge producers, especially small to mid-scale farmers.

Organic stakeholders are also concerned that the SOP has an excess reserve fund of about three million dollars. The SOP

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142 Policy Memorandum from Miles McEvoy, supra note 53.
143 DAMEWOOD & SOOBY, supra note 12, at 9.
144 Id.
145 Id.
146 DAMEWOOD & SOOBY, supra note, 12 at 9.
147 Phil LaRocca, La Rocca Vineyards & Chair of California Certified Organic Farmers, Testimony before California State Board of Food and Agriculture (Feb. 2016).
149 Id. at 23.
150 DAMEWOOD & SOOBY, supra note, 12 at 9.
first accumulated a large reserve of excess funds in 2009 when every state agency was ordered to freeze spending.\textsuperscript{151} During that time, the SOP collected fees without expending them on enforcement.\textsuperscript{152} Now the SOP reports that it operates at budget, yet the reserve fund continues to grow.\textsuperscript{153} So some stakeholders are concerned about the legitimacy of the SOP growing a large reserve fund while small and mid-scale farmers struggle to pay their fees.

Fortunately, the burden of SOP fees has eased over the last year. In 2016, a new state organic law—the California Organic Food and Farming Act (COFFA)—streamlined SOP registration and updated the fee schedule.\textsuperscript{154} It capped the current fee schedule so producers will not see higher fees, and it lowered fees for producers in the lowest category of gross organic sales.\textsuperscript{155} CDFA could also lower SOP fees further, especially given the cost savings of a more streamlined registration process.\textsuperscript{156} Therefore, COFFA helped ease some concerns regarding fees.

Additionally, SOP fees are now eligible for cost share reimbursement as an additional scope of certification. California producers may receive up to $750 in reimbursement for their SOP fees, which would cover the entire SOP fee for most small to mid-scale producers.\textsuperscript{157} The downside is that producers must still pay their SOP fee and then apply for reimbursement.\textsuperscript{158} And an even more important concern is that cost share is at high risk for defunding in the 2018 Farm Bill because Congress will

151 Interview with Rick Jensen, former Director of Inspection Services, California Department of Food and Agriculture, Sacramento, CA November 24, 2014.
152 Id.
153 Id.
155 See Historic Updates to California State Organic Program Becomes Law, Reducing Duplicative Paperwork and Fees, CALIFORNIA CERTIFIED ORGANIC FARMERS (Sept. 21, 2016), HTTPS://WWW.CCOF.ORG/PRESS/HISTORIC-UPDATE-CALIFORNIA-STATE-ORGANIC-PROGRAM-BECOMES-LAW-REDUCING-DUPLICATIVE-PAPERWORK.
156 See id.
157 USDA provides new Cost Share Opportunities, supra note 133.
158 Interview with Jane Sooby, supra note 119.
be looking to cut programs that make direct payments such as cost share.\textsuperscript{159} So, as long as cost share funds are available and producers make use of the program, the burden of SOP fees is greatly diminished.\textsuperscript{160}

Concerns regarding the excess reserve fund are also being addressed. COPAC may advise CDFA on the expenditure of the reserve fund; however, it must work through bureaucratic budgeting steps to access the funds.\textsuperscript{161} COPAC began the process to access the funds in May of 2017.\textsuperscript{162} Now it will consider how to best spend the funds, such as updating communications to organic stakeholders about the role and enforcement actions of the SOP.\textsuperscript{163}

\textbf{ii. California organic producers have more paperwork.}

Historically, the most significant SOP cost has been cumbersome paperwork and reporting requirements.\textsuperscript{164} As part of their annual SOP registration, producers must report information about their crop production.\textsuperscript{165} Before COFFA, producers were reporting highly detailed information including gross sales per crop per location.\textsuperscript{166} These reporting requirements were especially cumbersome for highly diversified operations who may grow over 50 crops.\textsuperscript{167} And, just as California farmers pay multiple layers of fees, they also complete multiple layers of state paperwork requirements—they were reporting information to the SOP that they already reported to other state and federal agencies as well as


\textsuperscript{160} Interview with Jane Sooby, supra note 119.


\textsuperscript{162} See id.

\textsuperscript{163} See id.

\textsuperscript{164} Damewood, Key Takeaways for SOP Report, supra note 43.

\textsuperscript{165} DAMEWOOD & SOOBY, supra note 12, at 9.

\textsuperscript{166} Id. at 29.

\textsuperscript{167} Id.
their certifiers. The additional and duplicative paperwork was extremely burdensome for producers.

However, the cost of excess paperwork has largely been addressed or is being addressed by ongoing refinements to the SOP. COFFA significantly reduced the information required at SOP registration. And the SOP is working with CCOF, which certifies the majority of farms in the state, to develop a data sharing system whereby certifiers can report information on behalf of their clients. So the cost of additional paperwork has diminished.

iii. California producers operate in a more challenging regulatory landscape.

An unavoidable cost of the SOP is that it creates a more challenging regulatory landscape for California producers. Even with greatly improved fee and paperwork requirements, the SOP adds another layer of compliance on California producers who have seen significant rises in compliance costs over the last few years. For example, California producers must comply with a wide range of regulations not commonly required in other agricultural states such nutrient management reporting, comprehensive pesticide use reporting, and overtime and minimum wage requirements for farmworkers. Keeping up with regulations and state agencies is especially challenging for small and mid-scale producers who cannot afford staff to oversee compliance. Therefore, even a streamlined SOP costs California producers

168 Id. at 9.
169 Id. at 29.
170 Kelly Damewood, Comment Period Open on State Organic Program Registration Requirements, From Field to Forum (Aug. 7, 2017), https://www.ccof.org/blog/comment-period-open-state-organic-program-registration-requirements [hereinafter Damewood, Comment Period Open on State Organic Program Registration Requirements].
171 Id.
173 Id.
who are under significant regulatory pressures.

iv. SOP creates communication challenges around organic certification and compliance.

Another SOP cost is the communication challenges it creates for organic stakeholders. For many years, organic producers thought that they were paying fees and registering with the SOP for absolutely no reason—they were not aware of the extent of SOP enforcement activities.\textsuperscript{174} Although CCOF’s work to pass COFFA helped raise awareness about the program, many producers still struggle to understand the role of the SOP.\textsuperscript{175} Certifiers must explain to their clients that they cannot finalize certification until their client registers with the SOP.\textsuperscript{176} In other words, navigating the certification process is challenging enough for producers but in California they must also grasp the relationship between the SOP, the NOP, and certifiers.

COPAC and CDFA are slowly addressing the communication challenges. Historically, the SOP put out little to no communications about the program.\textsuperscript{177} It did not attend industry events such as organic conferences or NOSB meetings.\textsuperscript{178} As a result, organic stakeholders had no understanding of the program. Now, COPAC is working to recommend an updated website, newsletter, and other basic communication functions.\textsuperscript{179} Additionally, SOP staff have begun engaging in industry events such as hosting a booth at an organic trade show. So some communication challenges are being addressed.

v. Additional need for advocacy and engagement

An important SOP cost is that it will require ongoing advocacy and engagement from organic stakeholders. Like

\begin{itemize}
  \item \textsuperscript{174} Damewood, Key Takeaways for SOP Report, \textit{supra} note 43.
  \item \textsuperscript{175} Kelly Damewood, notes on input after COFFA (on file with author).
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Cal. Dep’t of Food & Agric., \textit{supra} note 92, at 9.
  \item \textsuperscript{178} Id. at 16.
  \item \textsuperscript{179} Id. at 16-17.
\end{itemize}
any industry, the organic stakeholders must ensure statewide officeholders and representatives are meeting the unique needs of organic producers and supporting the growth of organic production. But organic is especially challenged in arguing for their fair share of public funds and programs because they compete with powerful conventional lobby groups and critics of organic certification. Moreover, organic advocates spend significant advocacy efforts on improving and protecting organic standards. Thus, the need to engage with an additional state program strains organic stakeholders who already struggle to represent the diverse needs of the organic sector.

The importance of stakeholder advocacy and engagement should not be underestimated. The most significant SOP costs were made worse when organic stakeholders failed to engage CDFA and COPAC. Stakeholders did not ask the state to update the fee schedule and other program requirements for over ten years while producers expressed grave concerns about and resentment towards the program. COPAC could have long ago recommended streamlined reporting requirements, better communications, and other improvements; however, the committee struggled to maintain active membership. And stakeholders failed to go to committee members for help. Now, with renewed engagement from CCOF, the largest organic advocacy group in California, advocacy and engagement have improved. For example, COPAC has nearly a full roster and is working to further refine the program. Nonetheless, organic stakeholders will have to continue to engage with the SOP to ensure it is an effective, not

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180 See supra text accompanying notes 19-20.
181 See id.
182 See Damewood & Sooby, supra note 12; Minutes of January 2016 COPAC meeting (discussing long standing concerns not brought to COPAC’s attention and not addressed by SOP).
184 See Minutes of January 2016 COPAC meeting (discussing long standing concerns not brought to COPAC’s attention and not addressed by SOP).
185 Damewood, COFFA Signed into Law with Your Help, supra note 134.
overly burdensome program.

C. The Benefits outweigh the Costs.

Overall, the benefits of the SOP outweigh the costs. The SOP has numerous benefits for California’s organic producers, which in turn benefits the organic sector as a whole. Although the SOP had significant costs in the past, they have largely been addressed with the passage of COFFA or are being addressed through further refinements to the program. Meanwhile, funding for the NOP and its ability to strengthen standards is increasingly uncertain under the current political climate. Therefore, the SOP is a valuable program and a model for strengthening enforcement through state organic programs because the costs to organic producers in California are diminishing while the benefits are increasingly important.

III. Key Attributes of States with Potential for State Organic Programs.

The benefits of a new state organic program may not outweigh the costs for all states. The costs and benefits of the SOP are directly related to the unique regulatory landscape and the overall production value of organic in the state. Therefore, the costs and benefits of establishing a new state organic program should be considered in the context of that state’s own organic production and agricultural regulations.

Applying the SOP as a model, state organic programs are most likely viable in states with the following attributes: additional enforcement adds value to the state’s organic sector, organic stakeholders are highly engaged with the state department of agriculture and other agencies, and the state department of agriculture does not have a conflict of interest.

187 See supra text accompanying section II (A).
188 See supra text accompanying section II (B).
189 See supra text accompanying notes 16-18.
190 See supra text accompanying notes 19-20.
A. Additional Enforcement adds Value to the State’s Organic Sector.

To justify the costs, state organic programs should add value to the state’s organic sector. For example, the SOP adds value because California produces the highest volume of organic products, which increases the risks of noncompliance and fraud. By contrast, additional enforcement would not add much value to a state like Mississippi where there is a small amount of organic production and, therefore, relatively low risks of fraud.

But the potential value of additional enforcement should not be judged on volume of organic production in the state alone. The SOP helps with oversight of farmers markets and direct to consumer sales because it has registration data and local staff. Other states like Hawaii and Northeastern states have a strong direct to consumer market. Therefore, they would likely benefit from more oversight of the use of the term organic at farmers markets and other direct to consumer sales channels.

Another factor impacting the value of additional enforcement would be risks associated with the types of crops grown in the state. The SOP’s random testing and inspections help identify issues such as GMO contamination. So state organic programs may be helpful in a state like Montana where grain is staple crop for organic producers.

Thus, states should consider the volume of organic production, the types of sales channels, risks associated with the state’s main organic crops, and other factors when weighing the value of a state organic program.

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191 See supra text accompanying notes 133-36.
192 U.S. Dep’t of Agric., supra note 1, at 1.
193 See supra text accompanying section II (A) (ii), (v).
194 Id.
195 Id.
196 U.S. Dep’t of Agric., supra note 1, at 2.
197 Letter from Danny Lee, supra note 103.
198 U.S. Dep’t of Agric., supra note 1, at 1-2.
B. Organic Stakeholders are Highly Engaged with the State Department of Agriculture and other Regulatory Agencies.

It is also important to consider the level of engagement and advocacy a state may expect from organic stakeholders. One of the long standing problems with the SOP was a lack of understanding about the program and engagement from the community to improve its outdated requirements.\textsuperscript{198} If a state does not have existing organic organizations or trade associations, then it will be difficult for producers to understand state organic program developments or to advocate for changes to the program. But, for example, a state like Montana has an active organic farming association, which would presumably engage with a state organic program to represent the interests of its growers.\textsuperscript{199} Therefore, the level of engagement a state may expect from organic stakeholders will determine whether a state organic program will have long lasting benefits without overly burdening the state’s organic producers.\textsuperscript{200}

C. The State Department of Agriculture does not have a Conflicts of Interest.

Finally, state organic programs may not be appropriate for states where the state department of agriculture operates an organic certification agency. State organic programs can overrule a certifier’s decision and must work with all certifiers in the state.\textsuperscript{201} So a state department of agriculture may have a real or perceived conflict of interest if it operates both a state organic program and a state certifier.\textsuperscript{202} California has never operated an organic certification agency, and it is the only state that has applied for state organic program status.\textsuperscript{203} Therefore, the potential conflict

\textsuperscript{198} See supra accompanying text for notes 164–169.
\textsuperscript{200} See supra text accompanying notes 193-94.
\textsuperscript{201} See supra accompanying text for notes 40-59.
\textsuperscript{202} Id.
\textsuperscript{203} Interview with Miles McEvoy, supra note 84.
of interest issue has yet to be tested.

If a conflict of interest exists, then some state certifiers should consider becoming state organic programs. For example, Oregon has a long-established, well-respected private certifier—Oregon Tilth—as well as many other certifiers operating in the region while its state certifier is relatively new. Given the high amount of organic production in the state, a state organic program would make sense for Oregon’s department of agriculture. In contrast, WSDA has long certified producers in the state. So if a conflict of interest exits, then it may be more worthwhile to replace some state certifiers with state organic programs but it will depend upon the history and reputation of the certifier.

IV. Recommendations for Structuring State Organic Programs

Using the costs and benefits of the SOP as a model, a new state organic program should be structured under the following principles: high accountability, streamlined requirements, and fair funding sources.

A. State Organic Programs should have High Accountability to the State’s Organic Stakeholders.

New state organic programs can avoid the downfalls of the SOP by putting in place a program structure that ensures high accountability to the state’s organic sector. Prior to COFFA, one core issue with the SOP was lack of accountability—it had poor communications, outdated requirements, and low engagement with the organic community. Therefore, new state organic programs should be structured to ensure high accountability.

205 U.S. Dep’t of Agric., supra note 1, at 1.
207 See supra text accompanying notes 179-83.
To ensure high accountability, a state organic program should incorporate the following programmatic features: a concise advisory committee, staff attendance at industry trainings and events, state of the art communications, and a sunset date.

i. Establish a concise, meaningful advisory committee.

State organic programs should have advisory committees made up of a small, but representative number of committee members. COPAC advises the Secretary of CDFA on the SOP, but low participation in COPAC resulted in ongoing issues with the SOP. Some would argue that COPAC has too many seats to fill, including alternate seats, which requires ongoing outreach and support from NGOs and other stakeholders. A more effective committee would have a limited number of seats with no alternates—this would make selection more competitive and incentivize higher participation by sitting members. Another problem with COPAC is that it did not include a certifier seat, which made it difficult for the committee to address coordination with certifiers or complicated certification issues. Therefore, new state organic programs should have concise advisory committees.

Additionally, the committee members must have authority to advise the program on meaningful recommendations. One reason for low COPAC participation was its limited authority to advise the Secretary CDFA on enforcement activities. COFFA broadened COPAC’s authority, so it may now advise the Secretary of CDFA on a range of activities related to organic production. This broader authority is attracting more interest and participation from stakeholders. Thus, state organic programs should have

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209 Damewood, Key Takeaways for SOP Report, supra note 43.
210 Peter Nell, *CCOF Representation on COPAC Increases with Key Appointments, From Field to Forum* (May 1, 2017), https://www.ccof.org/blog/ccof-representation-copac-increases-key-appointments.
211 Damewood, Key Takeaways for SOP Report, supra note 43.
212 California Organic Food and Farming Act, CA AGRIC.§ 46003(b) (2017).
213 Damewood, *A New Era of Organic Leadership in California*, supra note
concise advisory committees who also advise on a range of topics related to organic production.

ii. Require staff attendance at Industry Trainings and Events

State organic programs should require staff to attend industry trainings and events. NOP hosts annual trainings for certifiers to ensure they are up to date on standards and enforcement activities as well as promote a consistent certification process among the certifiers.\textsuperscript{214} However, SOP did not regularly attend these trainings until 2010 when NOP audited the SOP and directed the SOP to require attendance at NOP-hosted trainings.\textsuperscript{215} SOP staff also did not frequent industry events such as organic conferences or NOSB meetings until work began to reform the SOP through the passage of COFFA.\textsuperscript{216} Now, staff attend industry events such as organic conferences or NOSB meetings, which is improving communication with the industry.\textsuperscript{217} Therefore, state organic program staff should attend industry trainings and events.

iii. Use State of the Art Communications

State organic programs should use state of the art communications. Perhaps one of the greatest downfalls of the SOP was its poor communications to the organic sector—the majority of organic producers in the state assume the SOP only collects fees;\textsuperscript{218} they do not understand the SOP’s important enforcement functions.\textsuperscript{219} By contrast, California’s new program to regulate cannabis production, CalCannabis, has a reader-friendly, regularly

\begin{footnotesize}
\begin{enumerate}
\item Letter to David Carlson, Senior Special Investigator for CDFA’s SOP from U.S. Department of Agriculture, Agricultural Marketing Service, National Organic Program (on file with author) (regarding 2009 audit May 11, 2010).
\item Interview with Jane Sooby, \textit{supra} note 119.
\item Id.
\item Damewood, Key Takeaways for SOP Report, \textit{supra} note 43.
\item Id.
\end{enumerate}
\end{footnotesize}
updated webpage, social media accounts, accessible flyers, and other useful communication tools. Producers regulated under CalCannabis already have much more public information available to them than producers regulated under the SOP. Thus, new state organic programs should use state of the art communications from the outset.

iv. Establish a Sunset Date

State organic programs should have sunset dates. A sunset date is a date in the authorizing legislation when the program will expire unless renewed by legislation. Although a sunset date is severe, it ensures accountability because organic stakeholders will have to weigh in with their state representatives when the state legislature votes on whether to renew the program. Organic stakeholders advocated for the original law establishing the SOP; however, when the NOP implemented the national standards, many stakeholders no longer supported the SOP. Rather, they wanted to be on the same regulatory playing field as producers in other states who were all subject to national standards and certification. But the SOP did not consult with stakeholders when it applied for state organic program status with the NOP. Thus, state organic programs should have sunset dates to ensure buy in from the state’s organic stakeholders.

B. Streamline Paperwork

The second principle for new state organic programs is

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221 See California Organic Program, CAL. DEPT. OF FOOD & AGRIC. (last visited August 1, 2017) (listing details about the program but showing no branding or reader-friendly interface; hosting one fact sheet created in 2016; not hosting any details about COPAC meetings).


223 LaRocca, supra note 147.

224 Id.

225 Cal. Dep’t of Food & Agric., supra note 92, at 17-18.
streamlined paperwork. State organic programs should collect data from certifiers rather than from producers. And they should share their data with state and federal agencies to avoid duplication of other reporting requirements.

i. State organic programs should collect data from certifiers rather than producers.

State organic programs should have as streamlined paperwork requirements as possible to ensure the program does not overly burden producers. COFFA helped ease the most significant cost of compliance for the SOP, excess paperwork, by greatly reducing the information producers must report at registration.\textsuperscript{226} And paperwork may be eliminated altogether when CDFA establishes a data sharing system with certifiers.\textsuperscript{227} While some certifiers may need to collect more information at certification to ensure they have all the information the SOP needs, it will be more efficient for the SOP to collect data from the 20 (give or take) certifiers operating in the state rather than the 3,000 plus individual farmers and ranchers.\textsuperscript{228} Thus, state organic programs can streamline paperwork at the outset by collecting registration information from certifiers rather than directly from individual producers.

ii. State organic programs should share data with other state and federal agencies.

State organic programs should share their data and registration information with other state and federal agencies because it could help ease the burden of duplicate reporting requirements. Organic producers report the same information in many different formats to many different agencies. For example, they complete annual production surveys for agencies like the Economic Research Service or the National Agriculture

\textsuperscript{226} See supra text accompanying notes 161-62.
\textsuperscript{227} Cal. Dep’t of Food & Agric., supra note 92, at 11.
\textsuperscript{228} Id.
Statistics Service. They also report production information for programs under the Farm Services Agency, the National Resource Conservation Service, and crop insurance programs. And they may have to report to state agencies like departments of pesticide regulation or water quality control boards. If state organic programs can share their information in such a way that it eliminates the need for producers to complete separate forms or reporting requirements, then the SOP would greatly benefit producers by streamlining paperwork across a variety of agencies and programs.

C. Establish a Fair Funding Source

The final principal for state organic programs is a fair funding source. A long-time concern of California producers is that they subsidize national enforcement by paying an unfair, additional fee in California. There are two complimentary solutions to establishing a fair funding source for a state organic program: NOP could allocate some funds to the program, and the state organic program can collect fees from certifiers rather than directly from individual producers.

i. NOP could allocate Funds to State Organic Programs.

The NOP could direct enforcement funds to state organic programs to ensure producers in those states receive their fair share of NOP resources. Arguably, the NOP should help fund investigations in California because it funds investigations in all other states. But the SOP also takes on enforcement activities that the NOP cannot afford in other states, like spot inspections and residue testing. NOP could give SOP funds for investigations while the SOP continues to fund its additional enforcement activities through fees. Thus, NOP could ensure producers receive

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229 Interview with Jane Sooby, supra note 119.
230 Id.
231 Id.
232 See supra text accompanying notes 140-42.
233 See supra text accompanying sections II (A)(i), (iv).
their fair share of enforcement resources by allocating funds to state organic programs for investigations.

ii. State organic programs should collect fees from certifiers rather than individual producers.

State organic programs should ensure they maintain a reliable funding source. NOP allocations should not be the sole income stream for state organic programs because the NOP has limited resources, and its funding is subject to Congressional discretion.234 By contrast, one of the benefits of the SOP is a consistent, abundant funding stream through registration fees.235 Therefore, state organic programs will need a locally generated funding source.

The most reliable way to ensure a funding source is fees not funds from the state general fund. Organic stakeholders would have to successfully pass legislation directing general funds to the program. This would be a challenging political lift for many states. Additionally, general funds are not as reliable as fees because they are subject to the discretion of the state legislature. So the most reliable funding source would be a fee-based program.

To be most cost effective and limit the burden on producers, state organic programs should collect fees from certifiers rather than individual producers. COFFA now allows certifiers to renew their clients’ registration on their behalf.236 However, the only certifier pursuing this option, CCOF, cannot renew their members registration at this time because collecting and passing on the mandatory registration fee is too challenging.237 A more straightforward option would be to levy a fee on certifiers rather than directly on individual producers. The certifier would pass

234 See supra text accompanying notes 16-18.
235 See supra text accompanying section II (A)(i).
236 California Organic Food and Farming Act, CA AGRIC. CODE § 46014.1(c) (2017).
237 See Damewood, A New Era of Organic Leadership in California, supra note 136 (stating that CCOF would pursue the option to renew their members certification); Damewood, Comment Period Open on State Organic Program Registration Requirements, supra note 170 (stating CCOF would pursue data sharing with CDFA but no longer stating it would pursue option to renew registration).
that cost onto its clients; however, producers would have the benefit of only one billing for their certification a year. Moreover, collecting from certifiers may reduce the fee because there will be cost savings when the program collects fees from 25-30 certifiers rather than over 3,500 individual organic operations every year. Thus, collecting fees from certifiers would provide stable, consistent funding for state organic programs.

**Conclusion**

Organic stakeholders should consider how to better leverage state organic programs as they work to advance their farm bill priorities. While there are a number of options to shore up enforcement through the farm bill process, state organic programs offer a viable, often- overlooked solution to strengthening organic enforcement without further changes to OFPA. As demonstrated in California, state organic programs create a robust enforcement scheme at the state-level and add valuable support to NOP. Therefore, organic stakeholders should consider establishing state organic programs to support organic enforcement throughout the United States.

But new state organic programs should not simply replicate the SOP; rather, they should learn from the successes and failures of the SOP to ensure effective programs in the future. Specifically, state organic programs should be established in states where additional enforcement adds value to the organic sector, where organic stakeholders are highly engaged with the state department of agriculture and other regulatory agencies, and where no conflict of interest exists for the state department of agriculture. And new programs should be structured to include the following principles: accountability, streamlined paperwork, and fair funding sources. By using the SOP as a model, organic stakeholders are well poised to create effective state organic programs in new states.

Thus, organic stakeholders in some states should consider establishing state organic programs with the recommended guiding principles outlined in this article because additional state
organic programs would support national efforts to strengthen NOP enforcement resources in the next farm bill.
The End of the Ramen Diet: 
Higher Education Students and SNAP Benefits

Erika M. Dunyak*

Introduction

Americans joke that college students have so little money that they subsist on ten-cent packs of ramen. Unfortunately, the current reality of nutrition on campus is no joking matter. Statistically, college students face much higher rates of food insecurity than the general population and the situation is particularly dire for students of color.1 This article will look to a solution for this hungry, and often neglected, population.

In a statement to Congress encouraging “Great Society” legislation, President Lyndon Johnson said, “Higher education is no longer a luxury, but a necessity.”2 The average graduate with a Bachelor’s degree will earn double what the average individual without a degree will make in his or her lifetime.3 By federally supporting students during this period, they will likely have greater financial self-sufficiency later in life.

Hunger advocates have focused especially on children, through the National School Lunch Program (NSLP);4 the

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4 National School Lunch Program, Food Research & Action Center (Feb.
working poor, though the Supplemental Nutrition Assistance Program (SNAP);\(^5\) and the elderly, though Meals on Wheels and SNAP.\(^6\) However, all of these programs exclude actively enrolled college students.\(^7\) Those students have outgrown NSLP and are excluded from SNAP.\(^8\) A two-prong solution would require striking the exclusion of college students from SNAP and, further, actively enrolling college students who are financially supported by federal income-based university programs.

In 2010, the Healthy, Hunger-Free Kids Act (HHFKA) reauthorized the NSLP.\(^9\) HHFKA contained several innovations in the NSLP; one that is particularly relevant is expansion of the “identified students” provision.\(^10\) Under this scheme, students whose families already receive SNAP benefits also qualify for free or reduced-price school meals without a separate application.\(^11\) With the next iteration of the Farm Bill, SNAP should be adjusted to similarly accommodate low-income college students without an additional application. Under this new program, students who qualify for Perkins Loans, Pell Grants, Federal Supplemental Educational Opportunity Grants, and similar federal programs would also receive SNAP benefits without an additional application.

The benefits to such a program would be tremendous. College students are often specifically excluded from receiving benefits such as SNAP and Medicaid. This policy change would move students away from food insecurity, reduce the burden of


\(^{6}\) [Id., Meals on Wheels Facts & Resources, Meals on Wheels America (Feb. 18, 2018, 9:55 AM)], [https://www.mealsonwheelsamerica.org/theissue/facts-resources](https://www.mealsonwheelsamerica.org/theissue/facts-resources).

\(^{7}\) See National School Lunch Program, supra note 5; see also Meals on Wheels Facts & Resources, supra note 7.

\(^{8}\) See National School Lunch Program, supra note 5.

\(^{9}\) Randy Alison Aussenberg, Cong. Research Serv., Tracking the Next Child Nutrition Reauthorization: An Overview 3 (2017).

\(^{10}\) 7 C.F.R. § 245.9(f)(1)(ii) (2016).

\(^{11}\) Id.
schools providing high quality dining experiences that are a major contributor to the cost of higher education, reduce student debt, and bring the political capital of university students to SNAP.

This article will first define the problem of hunger on campuses and provide an overview of the potential economic impacts of food insecurity on college campuses. The second section will describe the proposed Farm Bill-based solution to hunger and food insecurity on campuses. Finally, the third section will explore the possible benefits and difficulties of implementing the program.

This article is limited in its scope and only applies to undergraduate students. Further research must be completed to both understand the degree and effects of hunger for graduate students and research assistants and explore federal policy shifts to address those problems.

I. Background

Like any social policy, hunger policy exists within a complex landscape of moving parts. This section will break down that landscape. First, this section will define the terms “hunger” and “food insecurity” as they are used in this article. The next subsection will examine some of the latest data on hunger and food insecurity on college campuses. Third, this section will describe the economic burden of the college experience, generally, and the cost of providing food to students, specifically. The third subsection will also address the cost of food from the angles of the students, parents, and the schools. Finally, this section will briefly describe the existing legal frameworks that have the greatest effect on hunger in the United States, namely the Supplement Nutrition Assistance Program and the Healthy, Hunger-Free Kids Act.

A. What are Hunger and Food Insecurity?

In 2006, the Committee on National Statics (CNSTAT), at the behest of the U.S. Department of Agriculture (USDA), authored
a report that defined both “hunger” and “food insecurity.” The *Food Insecurity and Hunger in the United States* report defines “food insecurity” as “whenever the availability of nutritionally adequate and safe foods or the ability to acquire acceptable foods in socially acceptable ways is limited or uncertain.”

The USDA expands its definition to create a range of food security. The USDA contrasts “high food security,” defined as “no reported indications of food-access problems or limitations,” with “marginal food security,” defined as “one or two reported indications—typically of anxiety over food sufficiency or shortage of food in the house [with] little to no indication of changes in diets or food intake.” These two categories comprise the USDA definition for “food security.”

Similarly, “low food security” and “very low food security” make up “food insecurity.” “Low food security” occurs when a household “reports […] reduced quality, variety, or desirability of diet [with] little to no indication of reduced food intake[;]” low food security is sometimes referred to as food insecurity without hunger. “Very low food security” refers to “reports of multiple indications of disrupted eating patterns and reduced food intake” and is sometimes described as food insecurity with hunger.

The CNSTAT report defines hunger as “a potential consequence of food insecurity that, because of prolonged, involuntary lack of food, results in discomfort, illness, weakness, or pain that goes beyond the usual uneasy sensation.” Importantly, the report clarifies that hunger and food insecurity

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13 Id. at 43.
15 Id.
16 Id.
17 Id.
18 Id.
are distinct.\textsuperscript{20} Specifically, hunger is an indicator and a potential outcome of food insecurity and is a condition that researchers and agencies must study on an individual level and separate from food insecurity.\textsuperscript{21}

This article will use both the terms “food insecurity” and “hunger.” While “food insecurity” will typically describe the conditions described above as “low food security” and “very low food security,” some referenced research may use other definitions of food insecurity and those will be distinguished as appropriate. This article will also use the term “hunger” as described above, as the prolonged, involuntary lack of food. As described by CNSTAT,\textsuperscript{22} food insecurity usually, but not always, causes hunger. As such, this article will often use both terms. However, the program proposed in this article can only target food insecurity and the hunger resulting thereof.

\textbf{B. Food Insecurity and Hunger on Campus}

There is a significant lack of data regarding the overall problem of hunger and food insecurity on college campuses. Many schools’ researchers have collected data on the hunger and food insecurity for a specific campus.\textsuperscript{23} This research is important for effective policy advocacy. One study, and subsequent report, aggregated the data of thirty-four campuses — both community colleges and four-year universities — and found 48% of students at those institutions are food insecure.\textsuperscript{24} While that survey states its data may skew toward over-representing food insecure

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
students,\(^2\) that data is not grossly inconsistent with the findings of other, narrow-scope studies. Recently, the Wisconsin Hope Lab published a broad study on campus hunger.\(^3\) That study found that 36% of four-year university students experience food insecurity.\(^4\) Other studies estimate a range of food insecurity on campus from 14% to 59%, with most studies finding food insecurity in the mid-thirties percent range.\(^5\)

In addition to the limited number and scope of studies, the data on food insecurity and hunger on college campuses is lacking in other ways. The data to date suffers from four major inadequacies and inconsistencies, which make aggregating studies from various institutions difficult. First, current studies inquire about food insecurity over inconsistent durations — from one month to one year.\(^6\) Secondly, the studies that do aggregate

\(^2\) Id at 15.

\(^3\) See Goldrick-Rab et al., supra note 2, at 17.

\(^4\) Id. at 10.

\(^5\) See, e.g., Alisha Gaines et al., Examining the Role of Financial Factors, Resources and Skills in Predicting Food Security Status among College Students, 38 INT’L J. OF CONSUMER STUDIES 374, 379 (2014) (finding 14% food insecurity at the University of Alabama); Meg Bruening et al., Factors Related to the High Rates of Food Insecurity among Diverse. Urban College Freshmen, 116 J. OF THE ACAD. OF NUTRITION & DIETETICS 1450, 1452 (2016) (finding 32% food insecurity over one month and 37% food insecurity over three months at Arizona State University); Loran Mary Morris et al., The Prevalence of Food Security and Insecurity Among Illinois University Students, 48 J. OF NUTRITION EDUC. & BEHAVIOR 376, 379 (2016) (finding 35% food insecurity across four public Illinois universities); A. Hillmer et al., Prevalence of Food Insecurity Among College Students at a Small Midwestern University, Suppl. 1—Abstracts 117 J. OF THE ACAD. OF NUTRITION & DIETETICS A-92 (2017) (finding 37.5% food insecurity at a small Midwestern University); Linda L. Knol et al., Food Insecurity, Self-rated Health, and Obesity among College Students, 48 AM. J. OF HEALTH EDUC. 248, 251 (2017) (finding 37.6% food insecurity at the University of Alabama); R. Holland et al., Prevalence of Food Insecurity among College Students at a Southeastern University, Suppl. 1—Abstracts 117 J. OF THE ACAD. OF NUTRITION & DIETETICS A-93 (2017) (finding 48% food insecurity at a Southeastern University); Megan M. Patton-Lopez et al., Prevalence and Correlates of Food Insecurity Among Students Attending a Midsize Rural University in Oregon, 46 J. OF NUTRITION EDUC. & BEHAVIOR 209, 210 (Nov. 2014) (finding 59% food insecurity at a midsize, rural university in Oregon — this study includes students enrolled in academic programs other than 4-year undergraduate).

\(^6\) See, e.g., Goldrick-Rab et al., supra note 2, at 10 (one month); Gaines et al., supra note 29, at 378 (twelve months); Bruening et al., supra note 29, at 1452 (one month and three months); Morris et al., supra note 29, at 378 (nine months); A. Hillmer et al., supra note 29; Knol et al., supra note 29, at 250
information may include four-year universities, two-year programs, and graduate students. This is particularly relevant here, because only students enrolled in four-year undergraduate programs are excluded explicitly from participation in SNAP, see below for more information. The recent Wisconsin Hope study did aggregate several schools and separated data of four-year and two-year institutions. However, even that study only included 35 four-year institutions of the over three thousand four-year institutions in the country. Additionally, much of the data skews toward female students or other demographics. Finally, the inconsistency in recruitment and small sample sizes yield inconsistent results.

The studies mentioned in this article do consistently use a USDA-defined methodology of determining rates of food insecurity. This allows additional researchers and commentators to compare roughly the data from a variety of studies and reports. However, campus food security studies would be stronger if a single entity collected the data and further standardized it. The Department of Education should collect this data for every student in the United States. The Department of Education already collects (twelve months); R. Holland et al., supra note 29 (twelve months); Patton-Lopez et al., supra note 29, at 210 (did not disclose duration).


33 See, e.g., Goldrick-Rab et al., supra note 2, at 8 (over-represents female students); Gaines et al., supra note 29, at 379 (over-represents female students and seniors); Bruening et al., supra note 29, at 1452 (likely over-represents female students); Morris et al., supra note 29, at 378 (likely over-represents female students, over-represents white students); Knol et al., supra note 29, at 251 (likely over-represents female students); Holland et al., supra note 29; Patton-Lopez et al., supra note 29, at 210 (over-represents female students).

34 See, e.g., Gaines et al., supra note 29, at 379 (finding 14% food insecurity at the University of Alabama); Knol et al., supra note 29, at 251 (finding 37.6% food insecurity at the University of Alabama). These studies were only three years apart and at the same institution. Yet, they show vastly different statistics about the number of food insecure students at the University of Alabama. It is not likely that campus food security would change that dramatically over that time.
over thirty datasets; including student migration, demographics, and parental financial status.\textsuperscript{35}

Finally, and importantly, participation in a university-sponsored meal plan does little to curb food insecurity.\textsuperscript{36} Meal plans, participation in which is often required for first- and second-year students at four-year universities, typically include an option to receive only seven to ten meals per week. These smaller meal plans cost less over the semester, though more per meal, and are, therefore, a frequent choice of low-income students who are more likely to be food insecure. These students may be getting by on little more than one good meal per day. Additionally, the dining hall system relies on students receiving meals at designated food service locations, rather than cooking for themselves in kitchens. In addition to the costs associated with dining hall meals, students are losing valuable skills necessary for life after college.

Researchers have long focused on the impact of food insecurity as it relates to academic and social performance in children.\textsuperscript{37} Some recent studies have similarly examined the association of food insecurity and academic performance on college campuses.\textsuperscript{38} These studies have found a strong correlation between food security and grade point average.\textsuperscript{39}


\textsuperscript{36} Dubick et al., supra note 25, at 8.

\textsuperscript{37} See e.g., Diana F. Jyoti et al., Food Insecurity Affects School Children’s Academic Performance, Weight Gain, and Social Skills, 135 J. of Nutrition 2831 (2005) (finding that food insecurity in kindergarten predicts imparted academic performance).

\textsuperscript{38} Morris et al., supra note 29, at 378; Patton-Lopez et al., supra note 29, at 210.

\textsuperscript{39} Morris et al., supra note 29, at 378; Patton-Lopez et al., supra note 29, at 212.
In addition to the clear academic disadvantage for individual students who are affected by food insecurity and hunger, the difference in academic performance could have broader societal implications. Students who experience food insecurity are more likely to be low-income. A positive correlation between students with reduced food security and lower grade point averages likely means low-income correlates with lower grade point average. Grade point averages can be loosely associated with salary, where higher grades result in higher salaries and lower grades in lower salaries. Additionally, these students may have lower educational attainment, as grade point averages are critical in admission to professional degree programs. Due to difficulties in securing higher paying entry-level positions or obtaining graduate degrees.

Figure 1. Grade Point Average Distribution by Food Security.

40 Morris et al., supra note 29 (table created from data found in article).
41 See generally Dubick et al., supra note 25.
low-income and food insecure students may also have reduced earning potential. This could widen the income gap and further reinforce a cycle of poverty among low-income individuals, even those with college degrees.

Despite the inadequacies in data regarding food insecurity and hunger on campuses, the existing data is conclusive on the severity of the problem. The exact statistics of food insecurity and hunger may vary, but any public health issue that affects between 14% and 59% of students demands attention. This is particularly concerning due to this public health issue’s effect on academic performance and earning potential.

C. Economic Burden of Providing Food on Campus

Media outlets and politicians have recently taken up the charge of the student debt crisis. According to the Department of Education, in the fourth quarter of 2017, there were 42.6 million recipients with $1.37 trillion in outstanding federal student loan debt. This averages to more than $32,000 of student loan debt per recipient, just in federal loans. In 2007, the average outstanding debt was a mere $18,233 per recipient. The increase to an average debt over $32,000 for every individual with federal student loan debt represents an increase of 76% in just ten years.

The dramatic and sudden increase in federal student loan debt mirrors similarly dramatic and sudden increases in tuition. Based upon the average advertised cost of four-year universities,
in the last ten years, tuition and fees have increased about 37% and 26% at public and private universities, respectively, even after being controlled for inflation.\textsuperscript{47} School tuition increased most strikingly for the 2009-10 academic year, at the peak of the economic recession, when low- and mid-income students could least afford the increase. In that year alone, private universities increased tuition and fees by 5.9% and advertised tuition at public universities increased a staggering 9.5%.\textsuperscript{48}

Beyond tuition, many students pay room and board to attend a four-year university. The cost of room and board comprises a significant amount of the total cost of attendance at a university. In terms of percentage, room and board are 52% and 26% at public and private universities, respectively, of the total bill for a year of university attendance.\textsuperscript{49} Following the trend of tuition, room and board has also dramatically outpaced the rate of inflation. Between the 2007-08 and 2017-18 academic years, room and board costs increased 25% and 21% at public and private universities, respectfully.\textsuperscript{50} In the academic year 2014-2015, the average four-year student paid $4,412 and $5,021 at public and private universities, respectively, for board (meals); making it about half of the cost of room and board.\textsuperscript{51} Over a nine-month academic year, board costs about $115 and $131 per week at public and private universities, respectfully.\textsuperscript{52}

Each month, the USDA issues a report that details the cost of food when cooking at home, called the Official USDA Food Plans. The reports include four budget levels: the “Liberal

\textsuperscript{47} Tuition and Fees and Room and Board over Time, COLLEGE BOARD, TRENDS IN HIGHER EDUCATION (2017), https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-and-board-over-time.
\textsuperscript{48} Id.
\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} THOMAS D. SNYDER ET AL., INST. OF EDUC. SCIENCES, NAT’L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 2016 605 tbl. 330.20 (52d ed. 2016) (table titled “Average Undergraduate Tuition and Fees and Room and Board Rates Changed for Full-Time Students in Degree-Granting Postsecondary Institutions, by Control and Level of Institution or Jurisdiction: 2013-14 and 2014-15”).
\textsuperscript{52} Id.
Plan,” the “Moderate-Cost Plan,” the “Low-Cost Plan,” and the “Thrifty Plan.” The cost of a campus meal plan is dramatically higher than the USDA Food Plans — even “Liberal Plan,” has an estimated weekly cost of $85 for a male between the ages of nineteen and fifty. While the meal plans that offer fewer meals per week cost less per week, the cost per meal increases. As a result, in addition to the high cost per meal to every student, students with the fewest financial resources pay the most for their campus dining. The current system poses a dramatic cost to students and exaggerates the student debt burden, but has not been effective in alleviating student food insecurity.

The economic burden of providing food to college students affects not only students, but may also affect their parents. Parents are more likely to provide financial support to their adult children when their children are in need. This often includes financial and food insecurity. There is also evidence that parental support of their adult children has increased over the past generation.

55 See, e.g., Meal Plans: 2017-2018 Meal Plans, Williams College, https://dining.williams.edu/meal-plans/ (last visited May 16, 2018) (Smallest meal plan costing about $11.07 per meal over a 9-month academic year; largest meal plan costing about $8.69 per meal over a 9-month academic year); Columbus Campus Dining Plans, Ohio State Univ., https://dining.osu.edu/dining-plans/columbus-campus-dining-plans/ (last visited May 17, 2018) (Smallest meal plan costing about $8.38 per meal over a 9-month academic year; largest meal plan costing about $7.75 per meal over a 9-month academic year); Undergraduate Dining, Rice Univ., http://dining.rice.edu/undergraduate-dining/ (last visited May 17, 2018) (Smallest meal plan costing about $8 per meal; largest meal plan costing about $7.59 per meal); Traditional Meal Plans, Arizona State Univ., https://sundevildining.asu.edu/meal-plans/traditional-meal-plans (last visited May 17, 2018) (Smallest meal plan costing about $8.24 per meal over a 9-month academic year; largest meal plan costing about $7.75 per meal over a 9-month academic year).
While proving such a hypothesis is beyond the scope of this article, it is possible that this increased parental financial support might correlate to increased university expenses and decreased financial and food security. This means that even families whose students do not take out student loans may face significant financial burden due to the increasing cost of attending university.

Additionally, increased university-associated costs, such as food and other expenses, means that parents who support, at a higher rate than previous generations, their college-aged children are diverting money from other expenses and savings, such as retirement, to support their adult children financially. This could cause an important economic ripple effect. If parents are not saving for retirement until later in their careers, they must retire later. This pattern might prevent movement and transition at the highest-level positions in companies. Thus, if executives are not retiring, mid- and entry-level associates cannot advance and there is little space for new hires. This hypothetical chain of events would further compound both the student debt crisis and parental financial dependence by making entry-level employment unattainable resulting in reduced income and greater likelihood of defaulting on student loans.

Universities face similar burdens from the growing expense of campus dining, a system that leaves some students without consistent food access. In the competition to attract academically successful seventeen-year-olds, major universities are in an arms race for the best food and most interesting dining experiences. The National Center for Education Statistics at the Department of Education keeps data on university expenses, but the Center combines campus-dining expenditures with other

59 Id.
expenses, such as residence halls, into “auxiliary expenses.” However, these expenses, which fund programs that should be self-sustaining, cost public and private four-year universities $3,090 and $4,819, respectively, per full-time student in the 2013-2014 academic year. With every university expenditure, there is an associated opportunity cost; the same is true for campus dining expenditures. When schools spend more money on dining, they have less money to spend on instruction, research, or financial support.

Quality education from a four-year university is an expensive investment. The costs associated with higher education affect students, parents, and the universities, themselves. However, on many campuses, the high cost of postsecondary education does not include reliable access to food. Students must feed themselves on meager, but expensive, meal plans. Parents step in to offer financial support when meal plans fail. Yet, universities spend large amounts on a dining system that will always be outshined by the lavishness of another institution and leaves many students hungry.

D. Supplemental Nutrition Assistance Program Approach to Hunger

The federal government has many programs that work to alleviate hunger and food insecurity across the country, with some programs specifically adapted to regional and community needs. The two with perhaps the largest reach are SNAP, authorized through the Farm Bill, and the National School Lunch Program, last authorized through the Healthy, Hunger-Free Kids Act. This section and the next will briefly explain these two important

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63 Id. at 745 tbl. 334.10.
programs.

The Farm Bill is a large omnibus piece of legislation that includes agricultural trade, agricultural commodity support, agricultural conservation, nutrition, and other areas. The Supplemental Nutrition Assistance Program is one of the largest programs in the Farm Bill and makes up the majority of the Nutrition Title (Title IV). Nutrition spending comprises $756 billion over ten years or 79% of the total Farm Bill spending. Congress can amend SNAP with each new iteration of the Farm Bill though the Nutrition Title of the Bill.

SNAP is a monthly benefit program. Each month authorized state agencies provide eligible recipients with an allotment of benefits loaded onto an EBT (Electronic Benefit Transfer) card. In order to be eligible for the program, a recipient’s net income must be at or below 130% of the poverty line, which, in 2018, is $12,140 for an individual. The allotment of the benefits is determined by calculating the cost of the USDA’s Thrifty Food Plan, less 30% of an individual’s income minus deductions. For example, for a 20 year-old, the Thrifty Food Plan is $184, if that individual’s income is $200 per month after taking into account any deductions, the recipient would receive $124 per month in SNAP benefits or $184 minus $60, which is 30% of $200. The maximum monthly benefit for an individual in 2018 is $192 and the estimated average benefit for an individual in fiscal

66 Id.
69 Id. § 2014(c); A Quick Guide to SNAP Eligibility and Benefits, CTR. ON BUDGET & POLICY PRIORITIES (Feb. 7, 2018), https://www.cbpp.org/research/a-quick-guide-to-snap-eligibility-and-benefits.
70 Annual Update of the HHS Poverty Guidelines Notice, 83 Fed. Reg. 2642, 2642-44 (Jan. 18, 2018). 130% of the poverty line would be $15,782 for an individual.
71 U.S. DEP’T OF AGRIC., supra note 55 (for a male individual between 19 and 50 years old, the thrifty plan costs $184.60 per month).
year 2018 is $145.73 Once the state agency loads these benefits onto the recipient’s EBT card, the recipient may then use that card, similar to a debit card, to make approved purchases at any approved food retail store, which includes most food in grocery stores or convenience stores.74

SNAP has two limitations that are particularly relevant to college students First, SNAP’s authorizing language explicitly excludes students “enrolled at least half-time in an institution of higher education.”75 Some students are exempt from the blanket exclusion of college or university students from SNAP if the student works more than twenty hours per week, is not between the ages of eighteen and fifty, or meets other exemption criteria.76 Second, SNAP is only available to able-bodied adults without dependents for three months in a three-year period.77 Both of these present challenges to using SNAP to prevent food insecurity and hunger on college campuses.

There are certain exceptions to this general disqualification. Importantly, students who work more than 20 hours per week or participate in work-study may participate in SNAP.78 Additionally, students who are parents or enrolled in some career or technical education programs may also qualify for SNAP.79 However, only 27% of full-time students are employed and work more than 20 hours a week,80 and therefore, most college students are prevented

75 Id. § 2015(e).
76 Id.
77 Id. § 2015(o)(2).
78 Id. § 2015(e)(4).
from accessing SNAP benefits. Moreover, only 56% of food insecure students are employed and only 38% of those employed work over 20 hours per week. This means that 79% of food insecure students are either not employed or work fewer than 20 hours per week. This exception to the general disqualification of traditional college students does not reach most of the food insecure and hungry students on campuses.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 imposed limitations on SNAP. The act limits any able-bodied recipient with no dependents to only three months of benefits within any three-year period. There are certain exceptions to this restriction, including if a recipient works more than an average of twenty hours per week. The three-month limitation of SNAP benefits for non-working able-bodied adults without dependents is called the “work requirement.” Under the authorizing statute, state agencies are given the authority to waive the work requirement in areas in which the unemployment rate is over 10% or there is an insufficient number of jobs to provide employment to all individuals.

SNAP is a powerful food insecurity and hunger alleviation tool managed by the federal government. Through the monthly EBT structure, SNAP preserves individuals’ dignity and teaches valuable skills in finance management. However, under SNAP’s current design, it is unable to reach the food insecure and hungry students at four-year traditional universities. The few exceptions for students who work at least twenty hours per week are inadequate to sustain food security.

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81 Dubick et al., supra note 25, at 6.
84 Id.
85 See id. § 2015(o)(4) (2014).
E. Healthy, Hunger-Free Kids Act Approach to Hunger

Championed by First Lady Michelle Obama, the Healthy, Hunger-Free Kids Act (HHFKA) included several innovations on the National School Lunch Program (NSLP). The NSLP provides free and reduced-price meals to children while they are at primary and secondary school. Chief among the HHFKA innovations is expansion of automatic enrollment in the NSLP if a child’s family participates in SNAP, Medicaid, Head Start, or other federal programs. These students, who receive free lunch without an additional application, are “identified students.” In order to identify these students, HHFKA relies on interagency communication and coordination. Further building on the strength of the “identified students” system, schools could elect to participate in the “community eligibility provision” (CEP). CEP created a model in which schools with at least 40% identified students could provide free lunch to all students in the school.

HHFKA is an example of successful interagency coordination. By eliminating administrative burdens for parents, more students are able to participate in the NSLP. As will be explained, SNAP could build on the success of this program by similarly creating an automatic enrollment program based on participation in other federal programs.

F. Federal Need-Based Postsecondary Education Support Programs

Under Lyndon Johnson’s Great Society agenda, the federal government implemented and continues to maintain several programs designed to help students pay for college. At the signing of the Higher Education Act of 1965, President Lyndon Johnson said that Congress had opened a new door for

88 See id.
89 See id.
90 See id.
young people and “it is the most important door that will ever open — the door to education. And this legislation is the key which unlocks it.”

Many of these federal postsecondary education support programs are available to all students regardless of financial need, while others are reserved for students with demonstrated financial need. Federal financial assistance is divided into three categories — grants, loans, and work-study. The federal government determines need through a formula by calculating the cost of attendance minus expected family contribution minus financial assistance from other sources. Typically, the government obtains this information when students file their online “Free Application for Federal Student Aid” or “FAFSA.” There are five federal, need-based programs. Two of these programs are grant-based and do not require repayment — Pell Grants and Federal Supplemental Education Opportunity Grants. Two other federal aid programs are low interest or no interest loans — Perkins Loans and Federal Direct Stafford Loans (“Subsidized Loans”). The fifth program helps students pay for college when they work in addition to taking classes — Work-Study. Eligibility for these programs is not tied to the federal poverty line, in the way that SNAP or the NSLP are, but is instead more dynamic, reflecting both the cost of the education and financial resources of the student.

94 See id. § 1087-2.
95 See id. § 1090(a)(1).
96 See id. § 1070a(a).
97 See id. § 1070b-1(a).
99 See id. §§ 1078(a)(2); see id. 1087e(a)(2)(A).
100 See id. § 1087-52(c)(2) (2008).
II. Expanding SNAP to Meet the Needs of College Students

As described above, the current system of feeding America’s postsecondary students is expensive and does not alleviate food insecurity or hunger. Many students, who are the future leaders and current innovators of the country, face declining academic performance related to food insecurity and hunger. This section will propose a program that would allow more college students to access food using SNAP benefits.

The partial solution outlined in this article to the problems of hunger and food insecurity on college campuses is two-pronged. The first prong removes the barrier for college students wishing to participate in SNAP. This proposal eliminates the current exclusion of traditional, four-year college students from SNAP benefits by simply repealing § 2015(e) and creating an exception to the work requirement. The second component of the program actively facilitates enrollment in SNAP. Standing on the shoulders of the widely supported HHFKA, states should automatically enroll college students in SNAP according to data reported to the federal government in applying for student financial assistance. This section will describe each of these portions of this proposed federal program to stymie hunger on campuses.

A. Remove College Student SNAP Participation Disqualification

First, Congress must remove the exclusion of four-year college students from receiving SNAP benefits. Currently, SNAP is only available to traditional four-year university students without dependents if those students are enrolled in work-study or work more than twenty hours per week. As described above, these exceptions are quite small in comparison to the total student population experiencing food insecurity or hunger. By simply

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103 Id. § 2015(e).
104 Id.
striking the language of § 2015(e), Congress would permit the participation of 80% of food insecure and hungry students who do not work more than twenty hours per week.

Congress must also exempt students from the “work requirement” for able-bodied adults without dependents. Currently, the issue of only receiving benefits for three months in a three year window does not occur when making SNAP eligibility determinations for college students. This is because the college students who may currently enroll in SNAP are those who are working at least twenty hours per week and, thereby, satisfy the work requirement. However, if Congress made SNAP available to all college students that demonstrate financial need, it must also remove the work requirement for those students.

Congress should use one of three drafting strategies to make sure that the three-month limit does not apply to university students. First, Congress may accomplish this by adding “full-time student” to the list of exceptions to the work requirement. Second, Congress could redefine “work twenty hours” to recognize the over twenty hours of work per week that students invest in a full-time course load. This alteration, however, would require a formulation to adapt enrolled credit hours into working hours and could quickly become complicated; for example, two semester credit hours would convert to one working hour. Alternatively, Congress could completely remove the 1996 “work requirement.” The latter option is likely the least politically feasible. As Congress debates its steps forward in balancing the budget amid government shutdowns, a proposal to significantly expand SNAP to all recipients would likely not be met graciously.

There is one existing loophole to the “work requirement.” States may waive the “work requirement” in high poverty areas. As mentioned above, only about half of university students are employed. This would meet the definition waiver requirement

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105 Id. § 2015(o)(3).
106 Id. § 2015(o)(4).
of unemployment greater than 10% in a particular area, \(^{107}\) specifically within the university’s campus and student housing areas. Seemingly, the size of the allowable area for a state waiver is not defined and has not been tested in the courts. This would be a promising option if Congress only removes the exclusion of traditional college students from receiving SNAP, but does not remove the work requirement. The drawbacks with this approach are that it would rely on states to identify the problem of food insecurity and hunger on campuses, and to act on that information. This strategy would ultimately result in an unequal distribution of SNAP benefits, with students in some states receiving benefits and others not.

The best option is for Congress, in addition to repealing § 2015(e), to create an explicit exception to the “work requirement.” This would provide the greatest access to SNAP for college students in a way that simplifies the law, rather than further complicates it. This strategy also has the greatest political feasibility, to the extent that any SNAP expansion is currently politically feasible.

**B. Enroll Federally Supported Students in SNAP**

The second prong of the federal program to enroll traditional college students in SNAP revolves around the direct enrollment of students. Because states execute the eligibility determinations for SNAP,\(^{108}\) this plan requires that state governments are responsible for the enrollment of college students in SNAP. Similar to HHFKA, the program would enroll students based on data obtained through other programs. However, distinctions between HFFKA and automatic enrollment of students in SNAP are necessary. Primarily, SNAP and NSLP eligibility are both contingent on a particular income relative to the federally determined poverty line. However, the need-based programs through the Department of Education include the cost

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\(^{108}\) *Id.* § 2014.
of attendance in their need determinations and, as mentioned above, this metric is dynamic, not static. Therefore, it would not be practical for state agencies to directly enroll recipients in the “if SNAP, then NSLP” manner of HHFKA. Instead, the Department of Education compiles student financial data through FAFSA, and state agencies could then use this data to enroll students.

In order for state agencies to enroll students in SNAP, the Department of Education, which maintains student financial records, must release the aid information to the necessary state agencies. This plan would be similar to the successful interagency coordination mandated in HHFKA. Drafters could use the language directly from HHFKA, which requires appropriate access to information and includes penalties for misuse of information. The details of the FAFSA sharing scheme must be defined by federal regulation. It would also be necessary for the statute and regulations to define the exact criteria for automatic enrollment; this would make the program more predictable for students.

In implementing this two-pronged program, the federal government could make strides in curbing food insecurity and hunger on campuses. More needy college students would be eligible for SNAP by removing the disqualification of college students and altering the “work requirement.” Through effective information sharing, state agencies could directly enroll low-income college students in SNAP.

III. Benefits and Challenges of SNAP Expansion

The two-pronged approach of addressing SNAP benefits for college students has many benefits beyond reducing food insecurity and hunger on campuses. The next section will describe what some of those benefits might include. The following section is intended to describe some of the potential benefits and outline where more research must be conducted to further understand whether these benefits are achieved by SNAP access to college students. The subsequent section will describe the administrative hurdles of implementing the program outlined in this article.
A. Benefits of SNAP Program for Undergraduates

The primary benefit of the program to students is the alleviation of food insecurity and hunger during their college years. However, the benefits may extend beyond simply providing food. Students may attain greater financial independence, which has the potential to instill a sense of dignity and build financial management skills. Students may then matriculate from their undergraduate programs with less debt. This reduced burden might allow recent graduates to pursue public interest work or other lower-salary positions. Allowing students to eat at a lower cost may prevent the continued cycle of poverty related to academic performance, as described previously. Additionally, if students gain further financial security due to SNAP benefits, those students may be less dependent on financial assistance from their parents.

Beyond the financial benefits, participation in SNAP could help students develop necessary cooking skills. If schools would provide students with resident hall kitchens, those students could develop and maintain cooking skills that are essential to healthy and cost-efficient eating. These skills help contribute to life-long food security.

Universities could also benefit from the expansion of SNAP to low-income college students. Schools, who are concerned about access to food on their campuses, will not have to contribute funds to meal plans in order to increase their accessibility to low-income students. The program also generally reduces the cost of providing food on campus, by allowing students to participate in smaller programs, supplemented by SNAP. Finally, this program encourages schools to provide greater access to residence hall kitchens and off-campus housing options. This may slow or end the dining hall “arms race”, in which facilities that are more lavish are necessary to attract academically competitive high school graduates.

Some benefits may be less measurable; namely the benefits to the program itself. University students are a segment of the general population with substantial political capital. Once
these students graduate to become societal and political leaders, their experiences with SNAP could inform commonsense policy improvements in the future. These students would also come to understand, by either first- or second-hand, the benefits and drawbacks of federal entitlement programs. The program outlined in this article could provide SNAP greater visibility nationwide and decrease stigma among other recipients.

B. Challenges in Administering Undergraduate SNAP Changes

Any policy proposal of this magnitude faces significant challenges in its effective administration. Many of these challenges can be resolved through continued research. One possible difficulty with administering this program is that out-of-state students may have to establish residency in a state in order to qualify for that state’s social services. This process prevents fraud by ensuring that non-resident individuals do not receive services in more than one state. A possible solution to this problem may be to restrict the program to only in-state students. However, this alteration would shrink the program significantly and not serve students who are food insecure or hungry. Another possible solution is to grant eligible students temporary residency for students during their four-year tenure.

College students often take longer to receive their degrees than the expected four years. Politicians might be uncomfortable with allowing students to receive benefits for an indefinite amount of time. In drafting legislative language that expands options for college and university students, Congress could limit students to only receiving SNAP benefits for five years as an undergraduate student or even require a particular grade point average to ensure that the changes to SNAP do not incentivize poor academic performance.

An additional hurdle facing the program is reliable access to kitchens. Because current campus-dining programs require students to eat meals prepared in dining halls, many students, particularly underclassmen, do not have access to cooking
facilities. Furthermore, SNAP forbids the use of benefits on hot foods. Therefore, SNAP must be used to purchase raw ingredients or packaged foods requiring kitchen preparation. This program would require that universities provide kitchen-access to students or permit off-campus housing. Residence hall kitchens could be communal — for example, only one large kitchen per residence hall — but all students should have access. Federal law could begin to require cooking facilities in newly constructed student housing facilities.

Lastly, many students file FAFSA and taxes as dependents, even if they, in actuality, receive little financial support from their parents. This may prevent students from accessing SNAP benefits. Further research should determine how many students this discrepancy effects. If a significant number of students are affected, schools and states should consider simplifying processes for undergraduate students to establish independence. One solution could be that undergraduate students default to independent status, similar to graduate students, unless the student and his or her parents claim otherwise.

The above challenges to expanding SNAP to college students are not insurmountable. Further research may help illuminate the best path forward. Governments and institutions must find innovative solutions to the problem of food insecurity and hunger on America’s college campuses.

Conclusion

The status of food insecurity and hunger on college campuses is alarming. The federal government is well situated to make changes to the administration of SNAP. The recommendations proposed in this article are to eliminate the disqualification of college student participation and initiate an automatic enrollment of eligible college student recipients in SNAP. This new program has the potential to dramatically affect food insecurity and hunger on college campuses nationwide. This article did not address the federal economic impact of significantly expanding SNAP and further research is necessary to complete a full economic analysis
of the program described above.

Beginning with HHFKA and then moving to SNAP, this program could be part of an eventual movement to consolidate all federal benefits into a single FAFSA-style application. The government could eventually even move to automatically enroll eligible participants in federal programs when an individual files his or her taxes.

The SNAP expansion outlined in this article is only one proposed piece in the greater fight to end food insecurity and hunger on college campuses. In addition to the points of further research mentioned throughout this article, researchers, potentially through the Department of Education, must work to more fully understand the determinants of food insecurity on college campuses.
Food Localization: Empowering Community Food Systems through the Farm Bill

Brian Albert Fink,* Alexandra Oakley Schluntz,** Joshua Ulan Galperin***

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“It seeks for agriculture a normal income measured, not in money but in exchange value—in real human satisfactions. Because it has recognized this principle, the [Farm Bill] may be justly termed a Magna Carta for the American Farmer.”

Introduction

The 2014 Farm Bill felt somehow different from the sixteen previous Farm Bills. In the few years leading up to its passage, local-foods advocates across the United States seemed suddenly called to action. The Seattle City Council convened community leaders and quickly adopted Resolution 31296, official guidance called the “Seattle Farm Bill Principles” that instructed the city’s federal lobbyists to advocate for enumerated policy goals designed to turn the upcoming Farm Bill into a tool of localized reform. Soon after, Seattle took its new Farm Bill platform to the National League of Cities, who adopted it as NLC Resolution #2012-16. Across the country, cities rushed to adopt their own local platforms: Santa Monica, Philadelphia, Minneapolis, Duluth, Salt Lake City, and New York City. Months later, the United States Department of Agriculture unveiled its own local-foods platform, the Know Your Farmer, Know Your Food Compass. With the

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1 George N. Peek, Recovery from the Grass Roots, U.S. DEP’T OF AGRIC. AGRIC. ADJUSTMENT ADMIN. 7 (Feb. 1934) (referring to the Agricultural Adjustment Act of 1933, the first iteration of the Farm Bill).


6 Tim Vilsack & Kathleen Merrigan, Introducing . . . . . . The Know Your Farmer, Know Your Food Compass, U.S. DEP’T OF AGRIC. BLOG (Feb. 29,
goal of supporting local and regional food systems, the Compass helped all sorts of food-system stakeholders navigate agency programs and resources, learn about changes going on in their own communities, and read stories of the individuals transforming their own local food systems.\footnote{Id.}

For the first time, it looked like communities of all types had come together, empowered, to use federal legislation and federal agency actions to transform their local food systems. How long it would last, nobody could say. No doubt, though, the surge had not been sudden at all. By the time Michael Pollan began researching for his food-policy best-seller, \textit{The Omnivore’s Dilemma},\footnote{Michael Pollan, \textit{The Omnivore’s Dilemma: A Natural History of Four Meals} (2006).} he thought he may have been too late. “Something about the public’s attitude toward food and farming was already shifting underfoot,” he wrote in the \textit{Washington Post}, “and I became convinced my book was going to be dated on arrival.”\footnote{Michael Pollan, \textit{A Decade After “The Omnivore’s Dilemma,” Michael Pollan Sees Signs of Hope}, Wash. Post (June 6, 2016), \url{https://www.washingtonpost.com/lifestyle/food/a-decade-after-the-omnivores-dilemma-michael-pollan-sees-signs-of-hope/2016/06/06/85cdadfe-2c0a-11e6-9b37-42985f6a265c_story.html}.} Thankfully for Pollan, he was wrong. Now, it is impossible to imagine a discussion about food policy without acknowledging the tremendous influence of \textit{The Omnivore’s Dilemma}.\footnote{Blake Hurst, \textit{Michael Pollan and His Faddish Foodie Followers, Ten Years After The Omnivore’s Dilemma}, NAT’L REV. (Aug. 1, 2016), http://www.nationalreview.com/article/438548/michael-pollans-omnivores-dilemma-tenth-anniversary-edition-marks-decade-anti-science (“Ten years on, it is hard to think of a book that has influenced the public conversation on food more . . . ”); Susan A. Schneider, \textit{Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agriculture Policy}, 14 DRAKE J. AGRIC. L. 75, 79 (2009). The book’s impact on the legal literature in food law and policy is also noteworthy. \textit{See}, e.g., Rebecca L. Goldberg, \textit{Administering Real Food: How the Eat-Food Movement Should—and Should Not—Approach Government Regulation}, 38 ECO. L.Q. 773, 775 (2012) (“This Article represents an attempt to take one step toward bridging the gap between the large and complex regulatory structure that governs food production and sale of food in the United States, on the one hand, and the fast growing and highly influential food movement [made by popular by, most notably, Michael Pollan] . . . on the other.”); Michael T. Roberts, \textit{The Beginnings of the Journal of Food Law & Policy} [Vol. 14], 2012), \url{https://www.usda.gov/media/blog/2012/02/29/introducing-know-your-farmer-know-your-food-compass}.} But,
what Pollan was reflecting on in 2016, two years after the latest iteration of the Farm Bill became law, were “some remarkable changes [that] have taken place in the food and farming landscape since the book was published in 2006.”

Namely, the American food system has begun an unprecedented process of self-determination.

Today, the Seattle Farm Bill Principles are a civic relic, the platform’s website no longer accessible, and the Know Your Farmer, Know Your Food Compass seems to have vanished under Secretary of Agriculture Sonny Perdue. Nevertheless, as we attempt to show in this article, the seeds of food democracy have already been sown and are beginning to sprout, and, as we show, it is through the Farm Bill that these seeds are broadcasted. These seeds, however, are scattered across a vast landscape. Although Congress has shown its interest in promoting diverse representation in American food systems, the methods to demonstrate that interest are piecemeal, lopsided, and often temporary. Local-foods advocates and others concerned with transforming their community food systems may look ahead brightly to future Farm Bills, but more must be done to systematize the innovations and advances made in localizing the Farm Bill. In this article, we propose various methods Congress can use to focus its efforts in localizing food systems by promoting diverse representation in various Farm Bill programs and initiatives.

*Policy, 11 J. Food L. & Pol’y* 1, 1 (2015) (“The nascent, social food movement, popularized in literature, media, and progressive circles, was just starting. For example, Michael Pollan’s best-seller, *The Omnivore’s Dilemma: A Natural History of Four Meals*, which galvanized tremendous interest food policy and food studies, was published in 2006, one year following the Journal’s inaugural edition. In short, the Journal was a novel, specialty law journal attempting to lead the way of a food law and policy movement that was just inching off the starting block.”).

11 Pollan, supra note 12.

12 The website that formerly hosted this program—https://www.usda.gov/kyfcompass—no longer exists. Additionally, the USDA Center for Nutrition and Policy used to provide access to this program at https://www.cnpp.usda.gov/KnowYourFarmer. That website, too, no longer exists. The USDA archives the program, though, which is apparently only accessible through a search engine. See U.S. DEP’T OF AGRIC., KNOW YOUR FARMER KNOW YOUR FOOD, https://www.usda.gov/sites/default/files/documents/KYFCompass.pdf.
Our intent in this Article is not to delineate foods that are local or not local, nor is it to lionize one agricultural production method over another. Rather, we hope to build on the literature that for many decades has documented how local communities have emerged as influential actors on the American food system through establishing control over local supply chains often alongside national and global supply chains. Such a community food system are those “a collaborative network that integrates sustainable food production, processing, distribution, consumption and waste management in order to enhance the environmental, economic, and social health of a particular place.”13 In this network, farmers, consumers, and other community members “partner to create a more locally based, self-reliant food economy.”14 Thus, when we discuss food localization—that is, the so-called localization of the food system, local food systems, and local foods generally—we are discussing all at once community food systems.

We begin with Part I, which explores how some food-system scholars have conceptualized how these democratic changes are occurring. We look to Thomas Lyson’s concept of civic agriculture, which attempts to move corporation-oriented communities away from the model of industrial agriculture and toward a model in which individuals are locally empowered in the land and marketplace. We also review Neil D. Hamilton’s concept of food democracy, which, like civic agriculture, acts as a set of alternative choices to the industrial food system and allows for more localized control of the food supply chain. Afterward, we attempt to connect two seemingly unrelated case studies to demonstrate what a food system influenced by Lyson and Hamilton could look like and how it could empower local communities.

Next, in Part II, we turn to federal local-food policy.

14 Id.
We discuss why laws promoting local food systems are proxies for laws democratizing our food system, and we then review a selection of federal legislation, often originating in the Farm Bill, that promote localization of the food system.

In Part III, we explore deliberative democracy, a political framework that encourages the sort of participation and representation conceptualized in food democracy and civic agriculture. We then summarize the work of contemporary schools who have identified how deliberative democracy has been crafted by food-system participants. We highlight examples from the American political process to demonstrate their current existence in the food system. Afterward, we observe more deeply how deliberative democracy has grounded federal agriculture policy.

Finally, in Part IV, influenced by past Farm Bills and historical agricultural policy, we propose various mechanisms Congress can implement in future Farm Bills to further legitimize its actions to promote localized food systems, as well as to provide structure to the democratization efforts it continues to support. Specifically, we propose various ways Congress can increase diverse representation in the food system and federal agricultural programs, which, through expanded access to decision-making and the strengthening of self-determination among an array of individuals, provide for further and enhanced food localization.

I. Democratizing the Food System

The food movement comprises countless individual actors and independent groups, as well as coalitions and federations, advocating for myriad issues, ranging from increased food safety to greater concern for environmental effects of agriculture to demands for more sustainably sourced crops. The collective consequences of this advocacy has resulted in a remarkable transformation of the food system, noteworthy for its substitution of the dominant industrial food system. Scholars Thomas

Lyson and Neil D. Hamilton have conceptualized models of these changes, both as attempts to understand the changes and as visions of how these changes may further innovate the food system. At the heart of their models—civic agriculture and food democracy, respectively—is the self-determined, diverse community exercising sovereignty over decision-making in the food system.

A. Conceptualizing Localized Food Systems: Civic Agriculture and Food Democracy

Two years before Pollan published *The Omnivore’s Dilemma*, professors Thomas A. Lyson and Neil D. Hamilton separately published their own descriptions of the shifts in attitude toward American food and agriculture. Lyson termed these changes “civic agriculture,” which referred to “the emergence and growth of community-based agriculture and food production activities that not only meet consumer demands for fresh, safe, and locally produced foods but create jobs, encourage entrepreneurship, and strengthen community identity.”\(^{16}\) Meanwhile, Hamilton termed his own observations “food democracy,” a social movement that encompasses (1) citizen participation in all aspects of the food system; (2) the availability of information about the food system with citizens making choices based on such information; (3) a proliferation of choices for consumers, growers, manufacturers, processors, and others in the food system; and (4) strong local community engagement alongside robust federal food policy.\(^{17}\)

i. Civic Agriculture

Professor Thomas A. Lyson presents civic agriculture as an alternative model to the industrial model that largely dominates the American food system (and, thus, the global supply chain) today. For Lyson, this industrial model, which he

\(^{16}\) **Thomas A. Lyson**, *Civic Agriculture: Reconnecting Farm, Food, and Community* 2 (2004).

estimates began to replace small-scale family farming with the passage of the Morrill Act of 1862\textsuperscript{18} and the growing influence of “scientific agriculture,”\textsuperscript{19} has resulted in an artificial emphasis on agricultural inputs and outputs, favoring “commodities that can be ‘mass-produced’ in accordance with the precepts put forth by the neoclassical production function and that articulate with standardized mass markets” and leaving behind “[n]onstandard varieties or commodities that have not achieved ‘economies of scale’ because they are too embedded in household or community relations to get an ‘economically unencumbered’ reading . . . .”\textsuperscript{20}

In other words, the industrial model of the food system “is framed in terms of well-defined markets and constructed categories of land, labor, capital, and management, which are organized to fit the production function.”\textsuperscript{21}

Condensing the food system into this industrial model, Lyson believes, fails to account for the “community and household relations that can and do structure everyday economic activities.”\textsuperscript{22}

This community-centered economy is what Lyson calls the “civic economy” of urban and rural populations, “a richly textured set of intertwined household, community, and economic relations” that are evidenced especially by countless community gardens, farmers’ markets, community supported agriculture operations, community kitchens, and U-Pick operations.\textsuperscript{23}

Industrial agriculture and civic agriculture may be in philosophical opposition with each other, but for Lyson their co-existence is essential. Industrial agriculture comprises “large-scale, well-managed, capital-intensive, technologically sophisticated, industrial-like operations” that produce “large quantities of highly standardized bulk commodities” by a “network of national and global food producers” who will generate the

\textsuperscript{19} Lyson, supra note 19, at 15-16.
\textsuperscript{20} Id. at 22–23.
\textsuperscript{21} Id. at 23.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 26–28.
majority of gross agricultural sales.\textsuperscript{24} Civic agriculture, however, includes “smaller-scale, locally oriented, flexibly organized farms and food producers” who “will fill the geographic and economic spaces that have been passed over or ignored by large-scale, industrial producers” and “articulate with consumers demand for locally produced and processed foods.”\textsuperscript{25}

Civic agriculture, therefore, is an embedded local food system—local agriculture and local food processing—that not only provides income to the civic agriculture enterprises, but improves the “health and vitality of communities in a variety of social, economic, political, and cultural” forms that industrial agriculture is fundamentally ill-equipped to account for.\textsuperscript{26} Accordingly, because of its community-centered focus, the food system viewed under civic agriculture embodies the “civic concept.”\textsuperscript{27} Such manifestations may include direct marketing, integration into local networks of food processing, local producer and marketing cooperatives, regional trade associations, and community-based farm and food organizations.\textsuperscript{28} The supply chain here is not concerned with global influence, unlike its industrial counterpart; instead, the supply chain is controlled by and for the benefit of the local community.

\textbf{ii. Food Democracy}

Law professor Neil D. Hamilton synthesizes his own observations of the changing food system through political participation.\textsuperscript{29} For Hamilton, “[t]he medium is food, but the theme is democracy.”\textsuperscript{30} Food democracy, as Hamilton

\textsuperscript{24} Id. at 61.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 62.
\textsuperscript{27} Id. at 63.
\textsuperscript{28} Id.
\textsuperscript{29} Hamilton began writing about food-system alternatives and the move toward local decision-making in the food system as early as 1996. See Neil D. Hamilton, \textit{Tending the Seeds: The Emergence of a New Agriculture in the United States}, 1 \textit{Drake J. Agric. L.} 7 (1996).
\textsuperscript{30} Hamilton, \textit{supra} note 20, at 15.
searchingly calls his food-system model, refers to the collective
effort of communities to promote democratic ideals through food
and agriculture.\textsuperscript{31} In other words, it “is a framework for making
food more responsive to citizens’ needs (health, access, quality)
and decentralizing control of production.”\textsuperscript{32} Such attempts at
embodying these democratic values are seen in the growth of
farmers’ markets and CSA memberships, the rise of chefs as much
famous for their dishes of food as for their dishes of social justice,
the proliferation of process-oriented food labels, the emergence of
buy-local campaigns, and the increase in farmers and consumers
engaging in direct commerce and community building.\textsuperscript{33}

Food democracy comprises four essential traits. First,
because the success of democracy relies on citizens participating
in the democratic process and on their representation in making
decisions, food democracy requires that all stakeholders within
the food system participate in decision-making and have
their interests represented. Such stakeholders would include
consumers, food processors, farmers, food markets, workers,
and regulators. The interests of these stakeholders might consist

\textsuperscript{31} Id. at 16. As Baylen Linnekin points out, Hamilton “does not proffer a
succinct definition of the term . . . .” Baylen J. Linnekin, The “California
Effect” & the Future of American Food: How California’s Growing
Crackdown on Food & Agriculture Harms the State & the Nation, 13 Chap. L.
Rev. 357, 380 n.205 (2010). Despite this, the term “food democracy” was also
popularized by Tim Lang, who, believing that “food is both a symptom and a
symbol of how we organize ourselves and our societies,” wrote that the term
referred to “the demand for greater access and collective benefit from the food
system.” Tim Lang, Food Policy for the 21st Century: Can It Be Both Radical
and Reasonable?, in FOR HUNGER-PROOF CITIES: SUSTAINABLE URBAN FOOD
SYSTEMS 218 (Mustafa Koc et al., eds. 1999). See also Neva Hassanein,
Practicing Food Democracy: A Pragmatic Politics of Transformation, 19 J.
Rural Studies 77, 79 (2003) (“At the core of [Lang’s] food democracy is
the idea that people can and should be actively participating in shaping the
food system, rather than remaining passive spectators on the sidelines. In
other words, food democracy is about citizens having the power to determine
agro-food policies and practices locally, regionally, nationally, and globally.”).
Because of the strong similarity between Hamilton’s and Lang’s food
democracies—notably, both rely explicitly on alternatives and democratic
participation—we interchangeably cite literature referring to either author or
term.

\textsuperscript{32} Laurie Ristino, Back to the New: Millennials and the Sustainable Food

\textsuperscript{33} Hamilton, supra note 20, at 16.
of financial viability of small farmers, the workers’ wages, or consumer preferences. “This means a food democracy seeks ways to broaden the involvement and representation of all segments of the food system in decisions.”

Second, since democratic participation demands the availability of information and the ability of citizens to make informed choices using that information, food democracy thrives when stakeholders, especially consumers, question their food-system choices, uncover the reality of those choices, and adjust those choices according to what they learn. Ideally, consumers “have dozens of votes to cast for the food [they] buy [from] dozens of polling places,” like grocery stores and farmers’ markets, ideally favoring candidates “providing information and education to the voters involved . . . .”

Third, in order for a citizen to properly compare and contrast the various voting choices, a democracy necessitates that the voter have alternatives to choose from. Similar to Lyson’s civic agriculture, Hamilton’s food democracy exists as an alternative to the predominant industrial model of production and consumption. But for Hamilton, the existence of alternatives is essential to the success of his model, and the greater the choice of alternatives, the more vibrant and democratic the food system. This means that a robust food democracy includes not only various choices of food, but of markets, farms, food processors, and consumer education, as well.

Fourth, food democracy exists on various levels, from inside the home to national institutions. This means that citizens of a food democracy—food democrats—make decisions regarding local farms and local markets, school cafeteria criteria, national food labels, the impact of their food choices on distant reaches of the globe, and so on. Although food democracy is built on local food systems, it comprises myriad levels of democracy and

34 Id. at 21.
35 Id. at 21–22.
36 Id. at 9-10.
37 Id. at 22.
varying localized civic efforts.\footnote{Id. at 22–23}

Just as industrial agriculture stands as antithesis to Lyson’s civic agriculture, so does Big Food stand as antithesis to Hamilton’s food democracy. For Hamilton, Big Food constitutes the businesses and institutions that currently dominate the food system.\footnote{Id. at 19.} Big Food’s behemoth industrial model, Hamilton argues, is “in many ways anti-democratic” and thus anti-food-democracy.\footnote{Id. at 25.} In an essay published a year after his first essay on Food Democracy, he tells the story of the American public’s reaction to mad cow disease in 2003 and 2004 as an example of this argument.\footnote{See Neil D. Hamilton, Food Democracy II: Revolution or Restoration?, 1 J. Food L. & Pol’y 13, 18–24 (2005).} According to Hamilton, the shock of realizing that bovine spongiform encephalopathy (BSE), known colloquially and notoriously as mad cow disease, could originate in American beef surprised the American public in no fewer than six ways: (1) “downer” cows, regarded as carriers of BSE, were regularly processed at slaughterhouses for human consumption; (2) the number of downer cows actually tested for BSE by USDA was, at best, minuscule in comparison to the actual number processed; (3) luck, rather than reliable methods, led to the initial discovery of BSE; (4) animals suspected of containing BSE are nonetheless carried through processing because of inadequate storage facilities; (5) the meat Americans consumed often traveled halfway across the nation to reach their dinner plates; and (6) pet food was often made of the most detestable bits of “droppage” that no human would dare touch.\footnote{Id. at 19–21.} Had mad cow not swept the American media, the public may not have been so surprised; after all, Big Food, specifically Big Meat and Big Food Regulator, preferred to keep these revelations concealed.\footnote{Hamilton, supra note 20, at 25 ("Much of the economic and political agenda of Big Food is designed to limit the information and choices available to consumers, to restrict the availability of alternative products and markets, and}
however, the American public would soon force the USDA and some large meat processors to shift their practices based on the new available information.44

Fundamentally, Big Food and food democracy are at odds with each other in three significant and irremediable ways. The first is that Big Food opposes the consumer’s “right to know more about food,” as seen in the mad cow episode.45 The second is that Big Food’s products lack any sense of place or origin, which is at the heart of local foods and local markets.46 And the third concerns how food exists as an idea: Big Food regards food as a definition for a product, but food democracy regards it as a set of values or traits of the product.47 Unlike civic agriculture, which requires industrial agriculture for its co-existence, food democracy competes against Big Food for the preferred food-system model; Big Food is “threatened” by values that perpetuate food democracy.48

Regardless of the actual potential for civic agriculture or food democracy to flourish, both Lyson and Hamilton present their models in conjunction with their observations of what has already transpired. For Lyson and Hamilton, the localization of the food system was already underway, and the time had come, as Pollan also realized, to begin asking questions about how the food system was being transformed and how local efforts were steering its evolution.

B. Democratic Food Systems in Action: Two Case Studies

Both Lyson and Hamilton developed their models for more democratic food systems in relation to a dominant paradigm that, in many ways, is antithetical to democracy. Curiosity of and concern with the effects of the industrial model’s erosion of

44 Hamilton, supra note 44, 19, 22–24.
45 Id. at 34.
46 Id. at 34–35.
47 Id. at 35.
48 Hamilton, supra note 20, at 25.
local decision-making and participation within the food system has motivated others to determine whether models like civic agriculture and food democracy ought to be given a chance in rural communities or how rural communities might begin shifting toward a more democratic food system. In this section, we discuss how the unrelated studies of Walter Goldschmidt, an anthropologist who studied the agriculture and economies of two rural California towns in the 1940s, and Allyson Hayes-Conroy, a twenty-first-century sociologist who attempted to introduce civic agriculture to a small New Jersey town, illustrate the practical consequences of implementing these models in specific communities.

i. The Goldschmidt Study: Arvin and Dinuba

In the 1940s, Walter Goldschmidt was an anthropologist at the USDA Bureau of Economics when the Bureau took the lead in researching the economic problems and potential social consequences arising from a federal law designed to promote family farming in the West.\(^49\) Pertaining primarily to the Western United States, this law held that water, developed through projects of the U.S. Department of Interior’s Bureau of Reclamation, would be made available to those holding 160 or fewer acres; meanwhile, those with larger tracts had to take additional steps to claim some of that water.\(^50\)

Goldschmidt premised his investigation on a single question: “Within the framework of American tradition, what effect does scale of farm operations have upon the character of the rural community?\(^51\)” To determine the answer to this, he and his team analyzed the social, civic, political, and economic conditions of two rural California towns, Arvin and Dinuba, that


\(^50\) *Id.* at 456.

shared similar qualities, including geography, size, population, proximity to major roads, variety of crops grown, total value of production, and more.\textsuperscript{52}

Despite these similarities, certain differences existed, twelve of which Goldschmidt found noteworthy. Namely, compared to residents in Dinuba, residents of Arvin tended to be dependent on wages; have generally lower standards of living; experience less population stability; dwell in houses and on streets of general poorer appearance and condition; have less access to community social services; possess poorer schools, parks, and facilities; engage less often in community organizations; choose from fewer religious institutions; express a lesser degree of community loyalty; make fewer decisions on community affairs; live in a greater degree of social segregation and greater social distance between various groups; and shop at fewer retail and other businesses in a marketplace.\textsuperscript{53}

Goldschmidt began to address his question by scrutinizing various social aspects of community life between Arvin and Dinuba. For example, he concluded that a town’s incorporation and quality of civic government “are important to this analysis not only because they affect the lives of citizens, but because they are indicative of the spirit and motivation of the community.”\textsuperscript{54} While Dinuba had robust civic engagement, Arvin had never incorporated, which “undoubtedly finds its root cause in the lack of any real civic unity.”\textsuperscript{55} As another example, he looked at the recognized civic leaders of the two towns: In Dinuba, not only was the school superintendent recognized as a leader at social gatherings, but other teachers also served as leaders, such as by starting a civic organization, youth services, or other community improvements; yet, “lack of this type of leadership is constantly made evident in Arvin. School and community functions suffer from an inadequate number of public-minded and trained citizens

\textsuperscript{52} Id. at 287–91.
\textsuperscript{53} Id. at 394–95.
\textsuperscript{54} Id. at 344.
\textsuperscript{55} Id.
to supervise such affairs.”

After cataloguing these several social and economic differences between Arvin and Dinuba, Goldschmidt set out to discover their cause. He looked especially at cultural and demographic factors. In Arvin, eight out of ten families depended on wages; but, in Dinuba, only five out of ten were wage earners. “These workers, especially those who are agricultural workers,” Goldschmidt observed, “have little economic or social investment in the community. Furthermore, they do not supply the leadership for social activities, which almost without exception comes from farmers and white-collar workers.” This discrepancy in the pool of potential civic leaders is remarkable, because it influences the cultural, civic, and demographic development of the community. At its core, though, this difference is “very largely a direct result of farm size—a simple arithmetic certainty. For the number of farmers that can be supported by a given resource base is a direct function of the amount of resources each one controls.” In Arvin, the large-scale of agricultural operations that developed there “had one clear and direct effect upon the community: It skewed the occupation structure so that the majority of the population could only subsist by working as wage labor for others.” As a result, this occupation structure, “with a great majority of wage workers and very few persons independently employed and the latter generally persons of considerable means, has had a series of direct effects upon the social conditions in the community.” These direct effects, according to Goldschmidt, are reluctance among residents to engage socially or economically with their town and little incentive to motivate them to do so.

56 Id. at 351.
57 Id. at 401.
58 Id.
59 Id. at 401–02.
60 Id. at 402.
61 Id. at 415.
62 Id. at 415–16.
63 Id. at 416.
laboring population does not take leadership in general civic action and rarely supports organizations that exist, out of a usually well substantiated feeling of ostracism that results from the large differences in economic status.”

In other words, it is the very structure of agriculture in Arvin—large scale farming operations, absentee landowners, low-paid migrant workers, and clear class distinctions—that contributed to the town’s social, economic, and political nature. Consequently, the town’s social institutions and retail trade are impoverished, and it is difficult for entrepreneurs to become independently employed.

The answer to Goldschmidt’s question—*What effect does scale of farm operations have upon the character of the rural community?*—resulted in what is today known as the Goldschmidt Hypothesis. Based on his observations and conclusions, Goldschmidt hypothesized that large-scale farming bore the major responsibility for the social differences between Arvin and Dinuba for several reasons. First, and most importantly, it created the social conditions giving rise to social, civic, and economic impoverishment. Additionally, large-scale agricultural operations that dominate towns tend to produce company towns, in which the communities depend almost entirely on that business, and the conditions at the operations can directly affect the conditions of the community. Finally, similar conclusions by previous researchers in other California towns and a cursory review of other California towns support these conclusions.

Although Goldschmidt’s research was controversial as

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64 Id.
65 Id. at 416–17.
68 Id. at 421. Goldschmidt points out that Arvin is not entirely dominated by large-scale agriculture, since it maintains “a small nucleus of working farmers” whose land would likely be held in large farms in their absence. Id.
69 Id. at 421–23.
soon his project became public, his basic premise has remained relevant. The differences between Arvin and Dinuba roughly correspond to the differences that Lyson and Hamilton have long observed. While neither town fully embodies one model or its antithesis, Goldschmidt’s study has illustrated the practical consequences of how a community’s food system is controlled, designed, and incorporated civically and economically.

II. An Attempt to Introduce Civic Agriculture to a New Jersey Community

Inspired, in part, by the Goldschmidt Hypothesis and Lyson’s work, Allison Hayes-Conroy, a professor of critical food studies and geography, conducted a study in Burlington County, New Jersey, to determine the extent to which a rural community was willing to adopt a stronger community food system.

Hayes-Conroy conducted her study in two phases. The first was in a case study, wherein she gathered county educators and administrators and used civic agriculture as a “guideline for discussion” to determine individual perceptions of actualizing such an agricultural system. Her respondent group consisted of 30 individuals, comprising equal parts men and women, most of whom were in their 40s or 50s, and representing professors, nonformal educators, educational administrators, and county administrators. Through these dialogues, Hayes-Conroy hoped to ascertain what the respondents thought about such “a transformation, a movement in a different direction in regard to the overall way people think, society functions, and land figures on the horizon.”

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70 For a summary of the backlash Goldschmidt faced and the attempt by various individuals and groups to prevent the study’s publication, see Walter Goldschmidt, Agribusiness and Political Power, in As You Sow: Three Studies in the Social Consequences of Agribusiness 482–87 (1978).

71 Allison Hayes-Conroy, Reconnecting Lives to the Land: An Agenda for Critical Dialogue 49 (2007) (discussing the Goldschmidt Hypothesis); id. at 125–50 (summarizing her case study and discussion study).

72 Id. at 126.

73 Id.

74 Id. at 125.
She made six separate inquiries. First, she asked about the degree to which community members might notice ecological activities, which she termed “place-based perceptual ecology.”

She asked respondents to judge the ability of individuals in South Burlington to “notice, comprehend, and identify with the complexities of surrounding human systems and ecosystems.”

The majority of respondents, although diverse in their individual responses, generally agreed that Burlington County was “deficient” in “attentiveness to human and natural systems, including agriculture,” and many wondered whether collective action could really make a difference to that deficiency.

Second, she asked about the extent to which the attitudes and passions of community members were affected by the seasons.

The responses to this inquiry suggested to Hayes-Conroy that “the seasons will be an effective way to locate attentiveness precisely because everyone must be aware of seasonal change on some level. Furthermore in Burlington County many educators do tend to conflate seasonal change with phases in the agricultural calendar.”

Third, she inquired into the possibility of adjusting the specific professions of her respondents by proposing whether agriculture could be taught widely across the curriculum; that is, whether “agricultural seasonal rounds can affect what is taught in classroom and in outreach programs.”

Hayes-Conroy admitted that many of the respondents saw no connection between agriculture and their curriculum, but a majority were interested in discovering how their areas of expertise could fit with agriculture; moreover, Hayes-Conroy found a few respondents were inspired to “think holistically” about incorporating agriculture into the

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75 Id. at 126.
76 Id. at 127.
77 Id. at 128.
78 Id. at 128–29 (referring to “seasonal rounds”).
79 Id. at 129.
80 Id. at 130.
range of their work.\textsuperscript{81}

Fourth, inspired by Wendell Berry, Hayes-Conroy sought to measure how aware Burlington County residents were of linkages between the natural world and the act of eating food.\textsuperscript{82} Most respondents concluded that the community was “culturally inattentive” to these linkages, but several were personally inspired, after making the link themselves, to consider how much the term “agriculture” encompassed.\textsuperscript{83}

Fifth, she asked educators about “localism through food”—what they thought about “the potential effect of the whole agricultural experience,” the combination of the changing landscapes throughout the year, the act of cultivation, and the purchasing of and eating of food.\textsuperscript{84} Hayes-Conroy found that this issue was “quite contested” such that those involved in local planning believed localism through food and farm already had momentum, but those with less direct experience in farming and no similar experience in local planning believed more cultural awareness of local food and farm issues had “the potential to affect sense of place or belonging, but that they have never given it much thought . . . .”\textsuperscript{85} Moreover, all respondents were skeptical that agriculture could be “culturally significant enough to substantially affect those outside the farming community.”\textsuperscript{86}

Lastly, Hayes-Conroy asked the educators and administrators to consider “cultural reflection” of the ideas and its significance to the community and its issues of “land and landscape.”\textsuperscript{87} Overall, this inquiry exposed the most difficult obstacle to “transformational learning” in the community—that is, shifting cultural attitudes about agriculture and the food

\textsuperscript{81} Id. at 132.
\textsuperscript{82} Id. at 133.
\textsuperscript{83} Id. at 133–34.
\textsuperscript{84} Id. at 134.
\textsuperscript{85} Id. at 135.
\textsuperscript{86} Id. at 135–36.
\textsuperscript{87} Id. at 136.
system. 88 Several of the respondents appeared open to this wider view of agriculture in light of cultural reflection, while others voiced various obstacles “to furthered perceptual expansion in this direction.” 89

This first case study involving the preceding six inquiries revealed three broad barriers to transforming a community into one that adopts civic agriculture. These barriers are all rooted in attitudes of individuals: (1) the attitude that social change is too difficult; (2) the attitude that it is not one’s duty (for example, as an educator or administrator) to work for transformation; and (3) the attitude that agriculture and any of its potential ecological or social effects is simply not important. 90

Despite these attitudes, Hayes-Conroy found that respondents were enthusiastic about thinking through her agriculture-based questions, and many expressed an interest in thinking critically about and reflecting on the cultural issues implicated in them. 91 Most of the educators, she found, believed that interest in local land, landscape, and ecology existed among residents, and that this interest could give the necessary support to advance a community-wide dialogue on civic agriculture or its values. 92 For instance, pride in local food or locally grown produce, appreciation of or nostalgia for local agriculture, and the seasonal habits of purchasing and decorating could motivate residents to take up such discussions. 93

The necessity to bring together a representative sample of the community, including antagonists and neutrals, to begin that discussion process encouraged Hayes-Conroy to conduct her second study. 94 With support from a local community college, donations, and volunteers, she organized a community forum

88 Id. at 136–37.
89 Id. at 139.
90 Id. at 139–40.
91 Id. at 140–41
92 Id. at 141.
93 Id.
94 Id. at 141–42.
centered around the theme of adopting civic agriculture.\textsuperscript{95} Open to farmers, educators, landowners, business people, planners, naturalists, politicians, students, and others, the community forum included five break-out sessions, a keynote speaker to ground the various issues into a common theme of transformation, lunch with locally grown food, panel discussions, an open-floor Q&A, and an optional end-of-day field trip to a historical farming site.\textsuperscript{96} The topics were similar to those presented to the educators and administrators from the first study—seasonal awareness, farming in the suburbs, agriculture across the curriculum, eating as an agricultural act, and food security.\textsuperscript{97}

More than 100 individuals attended, from the “progressive Roman Catholic and conservative religious right, the struggling horse farmer and the concerned college student, the electrician and the professor, all side-by-side bringing up points that the rest may not have otherwise considered.”\textsuperscript{98} Noticeably, though, there were limitations in diversity and some “lifestyle” demographics were missing.\textsuperscript{99}

Overall, Hayes-Conroy found the responses positive. Motivated attendees felt a “sense of inspiration” and they planned “further programs on issues of agriculture and reconnection to the land for the local area.”\textsuperscript{100} Additionally, the forum generally recognized the importance of “wholeness” in the community and in agriculture—“the need to include all voices was stressed quite firmly at the forum; if a dialogue is to be ‘whole,’ in any sense of the word, it must actively seek out ways to be inclusive.”\textsuperscript{101}

According to early responses, stressing inclusion and wholeness prompted a “sense of belonging in individuals from divergent groups” and left “them with a sense of responsibility for land and

\textsuperscript{95} Id. at 143–46.
\textsuperscript{96} Id. at 144–147.
\textsuperscript{97} Id. at 144.
\textsuperscript{98} Id. at 147.
\textsuperscript{99} Id. at 149–50.
\textsuperscript{100} Id. at 148.
\textsuperscript{101} Id. at 148–49.
In other words, assuring individuals in a community that their opinions and decisions matter with respect to the local food system may negate the attitudes otherwise preventing a shift toward civic agriculture.

Goldschmidt’s study illustrates the potential economic and civic benefits of communities composed primarily of small farms owned and operated by community residents, especially in relation to towns dominated by large agricultural producers. Hayes-Conroy’s study identifies social barriers to transforming a community into one in which civic agriculture may prevail, but it also identifies how empowering individuals through inclusive and democratic discussion and decision-making may reduce those barriers. Taken together, these two studies illuminate how communities can work together to localize their food system and why doing so benefits them as individuals and as a civic body.

II. Legislating Local Food Systems: Federal Policies that Localize Food

In Part I, we saw the theories that motivate communities to localize their food systems and empirical examples of those theories in practice. In Part II, we turn to how the federal government has incentivized these community-centered food systems, particularly through the various iterations of the Farm Bill.

As much as they are prescriptive models toward which sectors of the food system may evolve, civic agriculture and food democracy are also normative explanations of how the food system has been changing toward conceptual food inversion. Both Lyson and Hamilton explain that their models follow the natural tendencies they had been observing for years. Since first presenting their models of localizing the food system, the

\[102\] Id. at 149.

\[103\] At least one case study has been developed to analyze the practicability of implementing a model of food democracy. See Neva Hassanein, Locating Food Democracy: Theoretical and Practical Ingredients, 3 J. Hunger & Envtl. Nutrition 286, 290–304 (2008).
tendencies they witnessed and were inspired by continue to unfold in dramatic fashion. While civic agriculture and food democracy might be dismissed or explained away by myriad arguments, the trends the two professors witnessed have remained remarkably resilient. The flourishing localization of the food system has been captured not only in the marketplace—seen around the United States in farmers’ markets, community supported agriculture and aquaculture, and public and private buy-local campaigns, to name a few—but in every link of the supply chain. Much has been written about the localization innovations in production,
processing, distribution, marketing, as well as developments among minority and urban populations. Such changes have come to embody the current food system.

As Lyson and others point out, however, for longer-lasting structural changes to occur, the American public must reckon with its governmental policies that help perpetuate the status quo. Cities and local municipalities have played increasing roles in developing and promulgating policies that promote the localization of the food system. The federal government, however, has the most potential to alter the national structure of the food system toward more localizing policies. In recent years, the federal government, especially through the 2008 and 2014 Farm Bills, has taken recent steps to encourage its citizens to take more local control of the food system. Specifically, it has done this through creating programs that promote local food.

A. Local Food as a Framework for Measuring Representation in the Food System

Local food, as useful shorthand for a rich and thematic conceptual framework of community food systems, lacks any uniform legal definition. When advocates, consumers, scholars, legislators and rule-makers, and other food-system stakeholders use the term, they often refer to distance or geography, but the term encapsulates numerous other attributes, as well, including who produced the food, how the food was processed, and other meaningful characteristics related to the supply chain. Since we consider community food systems synonymous with local

foods, local food systems, and the localization of the food system, we also consider policies promoting local foods as policies that promote community food systems. Specifically, this localization of the food systems refers to local participation in the community food system and local decision-making in the food supply chain.

While localizing the food system constitutes an array of attributes related to agriculture, economics, democratic participation, personal identity, and community problem-solving, it is helpful to look at the developments in local-food policy to understand the trends Lyson, Hamilton, and others witnessed and wrote about. Given the numerous ways to delineate local from non-local foods, or even “local foods” from “locality foods,” clarity can be fleeting. Nevertheless, the USDA Economic Research Service (ERS) has identified at least four broad iterations of local food: (1) distance traveled, (2) marketing outlet, (3) perceived attributes, and (4) potential to address food deserts.

First, local food as distance traveled refers to how far the food had to be transported to arrive at the consumer’s plate. This may, for example, refer to a specific number of miles, such as those in the 100-mile diet. It can, of course, be much more or much less than that. The ERS found a range of instances in distance-qualifying local foods, from as little as twenty-five miles from the originating location to as far away as 350 miles from it. Congress also relies on distance in the two instances it has defined local foods. In the first instance, the 2008 Farm Bill defined a “locally or regionally produced agricultural food product” for the purposes of a USDA loan program as food traveling fewer miles than the distance threshold.

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110 See Schneider, supra note 111, at 685.
113 Johnson, supra note 114, at 3.
than 400 miles.\textsuperscript{116} The second instance, the Food Safety and Modernization Act (FSMA)\textsuperscript{117} defined a “qualified end-user” as a restaurant or retail food establishment located in the same state in which the food was produced or “not more than 275 miles from such farm.”\textsuperscript{118} Although this is not an explicit reference to local food, FMSA exempts certain small-scale farms from the Preventative Controls Rule and the Produce Safety Rule based on amount of sales to qualified-end users, and these transactions are often entirely local in nature.\textsuperscript{119} More than a mere measurement of how far the crow might fly, distance can also refer to a specific region, such as within the boundaries of a state\textsuperscript{120} or some of other “geographical indicator,” which describes not only the place where the food comes from, but also the processes used to grow or manufacture that food; often, a geographical indicator informs the consumer of perceived quality, such as Washington apples, Florida oranges, or Napa Valley wines.\textsuperscript{121}

Second, local food as marketing outlet refers to the sorts of marketing channels farmers use to distribute the food they produced or manufactured to consumers.\textsuperscript{122} These channels include (1) direct-to-consumer outlets, such as farmers’ markets,

\begin{footnotesize}
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\item \textsuperscript{116} 7 U.S.C. § 1932(g)(9) (2012) (defining a local food as food produced within a state’s border or “the total distance that the product is transported is less than 400 miles from the origin of the product”).
\item \textsuperscript{118} 21 U.S.C. §§ 350g(l)(4)(B), 350h(f)(4)(A).
\item \textsuperscript{119} 21 U.S.C. §§ 350g(l)(1), 350g(l)(2) (exempting a “qualified facility” from the Preventative Controls Rule); 21 U.S.C. 350h(f) (exempting certain small-scale farms from the Produce Safety Rule); Gregory M. Schieber, Note, The Food Safety Modernization Act’s Tester Amendment: Useful Safe Harbor for Small Farmers and Food Facilities or Weak Attempt at Scale-Appropriate Farm and Food Regulations?, 18 Drak. J. Agric. L. 239, 252–53 (2013) (discussing motivation for these exemptions as arising from congressional concerns about FSMA’s regulatory burden on local-food systems).
\item \textsuperscript{120} See, e.g., 7 U.S.C. § 1931(g)(9)(A)(II); CT Grown Program, Conn. Dep’t of Agric., http://www.ct.gov/doag/cwp/view.asp?a=3243&g=398984 (last visited May 15, 2018) (stating that, with farmers and producers meeting certain conditions, “[f]arm products grown or produced in Connecticut may be advertised or sold in Connecticut as . . . “Local” or “Locally-Grown”). Nearly all states have their own “state-grown” programs. Johnson, supra note 114, at 4.
\item \textsuperscript{121} Id. at 4.
\item \textsuperscript{122} Id. at 5.
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roadside farm-stands, on-farm stores, and community-supported agriculture; and (2) intermediated outlets, such as grocery stores, restaurants, and regional distributors.123 As part of the agricultural census, the USDA collects sales information related to some of these local-food marketing channels, particularly direct-to-consumer models.124 The so-called Locavore Index, which ranks states based on local-food sales and consumption, is based, almost in whole, on these direct and intermediate marketing outlets and, in part, on the USDA’s data collection related to them.125 For many consumers, the economic support of regional agriculture and the community is the primary motivation for using these channels.126

Third, local food as perceived attributes refers to various social or supply-chain characteristics in the food’s production that consumers deem desirable.127 Such perceptions are based on the type of farm, the methods of production, the simplification of the supply chain, the financial and social support of local communities, the fairness of the food system, and, as Lyson and Hamilton show, alternatives to the predominant industrial model of food production. More concretely, these attributes might include whether the food originated at a small or urban

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123 Id. at 5–6.


126 JOHNSON, supra note 114, at 7–8.

127 Id. at 9.
farm or with sustainable practices; others might mean support of the local economy, farmland preservation, minimal harm to the environment, use of alternative fertilizer and pest-control methods, and products that provide fairer wages to farm workers.\textsuperscript{128}

Finally, local food as potential to address food deserts refers less to criteria delineating local from non-local food and more to the advocacy for an increase role of local foods in addressing concerns about access to healthy food in some low-income or otherwise underserved community (so-called food deserts).\textsuperscript{129} While this may mean passing tax incentives to attract more food-retail outlets, improving already-existing food-retail outlets by encouraging stocking fresh foods, or diverting from the waste-stream to the supply chain, it may also mean promoting programs that encourage these communities to become active producers in urban agriculture or community gardening.\textsuperscript{130} Many local food policy councils prioritize local food production and consumption in addressing community hunger issues.\textsuperscript{131}

Although “local food” lacks a formal definition, these four categories demonstrate, at the very least, that local food is rooted in a community’s identity of land, economics, political and social values, and unified problem-solving.\textsuperscript{132} Although these

\textsuperscript{128} Id.
\textsuperscript{129} Id. at 10.
\textsuperscript{130} Id.; Philip Ackerman-Leist, Rebuilding the Foodshed: How to Create Local, Sustainable, and Secure Food Systems 111–13 (2013).
\textsuperscript{132} See Roberts, supra note 117, at 386 (identifying ten related objectives of the local-food movement).
communities are not easily defined, their cohesion often seems bound by the voluntary participation of producers, distributors, retailers, consumers, advocates, and other members of the public in coming together to transact and exchange information. At its essence, then, local food is a proxy for the determination of a community to govern its food system, to set the goals that its food system should achieve, to design the infrastructure to support its food system, and to strive for self-reliance in its food system.

B. Federal Policies Localizing the Food System

Since at least the 1930s, during President Franklin Roosevelt’s sweeping New Deal reforms, the USDA has experimented with encouraging more diverse participation in local and regional food systems, notably in the face of more established agricultural interests, primarily in attempts to alleviate rural poverty. Not until the last decades, however, has the conceptual structure of a local-food system emerged as a part of federal action to increase participation in agriculture policy. Below is a brief summary of the various actions the federal government has taken to promote such a food system.

Federal policies and programs that support local foods often do not specifically limit themselves to or target local foods; instead, their breadth covers a wide range of food-system issues, including those associated with local foods. Increasingly, however, Congress and the USDA are carving out policies to particularly support the localization of food systems. This section identifies examples of both sorts. Because of the capacity of many federal laws to attract local foods into their purview, this is not an exhaustive list.

133 See Grant McConnell, The Decline of Agrarian Democracy 88–95 (1953) (discussing the work of the USDA Farm Security Agency in addressing rural poverty through programs designed to make impoverished families more self-sufficient, including promoting marketing and purchasing cooperatives, increased farm ownership, and overall community development, as well as focusing on bringing more Southern black farmers out of dire economic distress).

134 Johnson, supra note 114, at 28; Coit, supra note 112, at 63.
i. Promotion of Localized Food-System Transactions

Federal statutes regulating the marketing of agricultural products, such as through commodity-specific price controls and marketing orders, have been in place since the early twentieth century, but this focus on transactions began to widen in the century’s latter half.\textsuperscript{135} In 1976, when Congress passed the Farmer-to-Consumer Direct Marketing Act (Direct Marketing Act), federal agricultural-marketing legislation veered away from principally regulating commodities markets and expanded into the broader category of local foods.\textsuperscript{136} The purpose of this law was to “promote, through appropriate means and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers.”\textsuperscript{137} Additionally, through this new law, Congress empowered the Secretary of Agriculture to create and maintain a program “designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.”\textsuperscript{138} The Direct Marketing Act effectuated this program by directing the Secretary of Agriculture to coordinate with state departments of agriculture and local Extension Service offices for the development of direct-to-consumer activities most needed in the particular states.\textsuperscript{139} The activities could include, among other things, (1) sponsoring related conferences, (2) identifying state and local laws pertinent to direct-marketing and advocating for improved legislation, or (3) providing technical assistance to deepen understanding of direct marketing.\textsuperscript{140}

The Direct Marketing Act is remarkable not only for its authorization of $3,000,000 for these collaborative and local programs, but it is an early example of Congress’ willingness

\textsuperscript{137} Id. § 2.
\textsuperscript{138} Id.
\textsuperscript{139} Id. § 5.
\textsuperscript{140} Id.
to encourage the activities of community food systems.\textsuperscript{141} In defining “direct marketing from farmers to consumers,” Congress noted several examples where such transactions occurred—roadside stands, city markets, house-to-house marketing—which existed “to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers.”\textsuperscript{142} To the modern locavore, these examples resemble the current picture of local-food marketplaces, comprising farm-stands, farmers’ markets, and CSA subscriptions. At a time when direct marketing among farmers and consumers was widely viewed as “a step backward into inefficiency,”\textsuperscript{143} the Direct Marketing Act’s empowerment of the USDA to assist local communities in localizing their food system, especially as an alternative to the increasingly industrial food supply, began to legitimize the importance of community-controlled local-food economics and policies.\textsuperscript{144}

In the years that followed, the American farmers’ markets never succumbed to their alleged inefficiencies, and by 1992, as they continued to flourish, Congress passed the WIC Farmers’ Market Nutrition Act, which amended the Child Nutrition Act of 1966,\textsuperscript{145} and created the WIC Farmers’ Market Nutrition Program (WIC Nutrition Program) to both expand the public’s awareness for farmers’ markets and “provide resources to women, infants, and children who are nutritionally at risk in the form of fresh nutritious unprepared foods (such as fruits and vegetables), from

\textsuperscript{142} Id. § 3.
\textsuperscript{144} For an excellent analysis of the role of farmers’ markets across the United States during the period leading up to the passage of the Farmer-to-Consumer Direct Marketing Act and speculation about their demise in the face of the industrialized food-supply chain, see Jane Pyle, \textit{Farmers’ Markets in the United States: Functional Anachronisms}, 61 \textit{Geographical R.} 167 (1971).
farmers’ markets . . . .”146 Specifically, Congress authorized funding for grants that states could use, in coordination with the USDA, to create programs in which qualified beneficiaries could exchange coupons for locally grown food.147 States could only use these grants, however, if they agreed to contribute their own dollars to fund the programs.148 In 1998, Congress reauthorized the WIC Nutrition Program, thus solidifying its role in supporting local-food systems.149 With the passage of the WIC Farmers’ Market Nutrition Act, Congress now found itself as a direct funder of local-foods system.

Also, in 1998, the USDA National Commission on Small Farms recognized the significance of locally grown food on local communities, and it developed a thorough policy vision to promote local-food systems. Specifically, it urged the USDA “to develop an interagency initiative to promote and foster local and regional food systems featuring farmers markets, community gardens, Community Supported Agriculture, and direct marketing to school lunch programs.”150 Among the principles guiding these policies were developing relationships between farmers and consumers, strengthening rural communities, fostering sustainable farming practices, creating diverse market outlets, and expanding opportunities to all Americans to engage in farming.151

Just four years later, Congress amended the Direct Marketing Act through the 2002 Farm Bill152 and created the Farmers Market Promotion Program (FMPP). The FMPP was added to the Direct Marketing Act to “develop . . . new farmers’ markets, roadside stands, community-supported agriculture

146 Id. § 2.
147 Id. § 3.
148 Id.
151 Id. (search for “Guiding Principles for Federal Farm Policy”).
programs, and other direct-to-consumer infrastructure.”\textsuperscript{153} The grants created to put the program into force could be awarded to a variety of entities, such as local governments, nonprofit organizations, an agricultural cooperative, or an economic development corporation.\textsuperscript{154} Moreover, it instructed the Secretary of Agriculture to work with states to train farmers’ market managers, assist local Extension Service office in developing marketing techniques, and to help local producers develop farmers’ markets.\textsuperscript{155} Congress gave the Secretary of Agriculture discretion to establish the guidelines and criteria of the FMPP.\textsuperscript{156} Initially, Congress authorized that the FMPP be funded from 2002 through 2006; however, the program did not receive funds until Congress provided $1 million in 2005.\textsuperscript{157} It continued to reauthorize funding for the FMPP in the 2008 and 2014 Farm Bills, as well.\textsuperscript{158}

In addition to establishing and funding the FMPP, the 2002 Farm Bill also created the Senior Farmers’ Market Nutrition Program (Senior Nutrition Program). The Senior Nutrition Program, like the FMPP, amended the Direct Marketing Act.\textsuperscript{159} The purposes of the Senior Nutrition Program were numerous; some reiterated the desire to expand local direct-to-consumer marketplaces, while another explicitly promoted local foods, specifically to “provide resources in the form of fresh, nutritious, unprepared, locally grown fruits, vegetables, and herbs” at these marketplaces.\textsuperscript{160} Congress authorized $5,000,000 in 2002 and $15,000,000 each year from 2003 to 2007 to support this nutrition

\textsuperscript{154} Id. § 3005(c).
\textsuperscript{155} Id. § 3004(b).
\textsuperscript{156} Id. § 3005(d).
\textsuperscript{160} Id. § 3007(b).
program. As with the FMPP, it was up to the USDA to figure out how this program would work. In December 2006, the USDA Food and Nutrition Service finalized its rule, just in time to begin its operation at the start of 2007. The 2008 Farm Bill not only reauthorized funding for this program with $20,600,000 for each year through 2012, but it provided tax benefits, as well: purchases of qualifying food would not be subject to state or local sales taxes, and the economic benefits conferred on senior individuals would not be subject to local, state, or federal income tax. One small, but noteworthy amendment also included the addition of honey as a qualifying food. By adding honey, Congress once again recognized the actual activities occurring within local-food systems: in the face of honeybee colony collapse, many communities supported the sweet pay-offs of their local apiarists at their weekly farmers markets.

The 2002 Farm Bill also looped in the WIC Nutrition Program by providing it mandatory funding. With an eye toward expanding the program and supporting local communities addressing hunger issues through local foods, Congress directed the USDA to examine the potential of food-stamps funded transactions at farmers’ markets, by way of the electronic benefits transfer (EBT) systems. This instruction came as the USDA

161 Id. § 3007(a).
162 Id. § 3007(c).
166 Id. § 3001(c), (d).
167 Id. § 3001(b)(1).
170 Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 4111(b)
was shifting away from paper coupons and toward the paperless EBT platform.\footnote{U.S. Dep’t of Agric. Food 

The 2014 Farm Bill extended funding for the Senior Nutrition Program, it did not do the same for the WIC Nutrition Program.\footnote{Agricultural Act of 2014, Pub. L. 113-79, § 4203, 128 Stat. 649, 822-23 (codified as amended at 7 U.S.C. § 3007(a) (2014)).} At the same time, the 2014 Farm Bill amended the 2008 Farm Bill to create the Food Insecurity Nutrition Incentive (FINI).\footnote{Food Insecurity Nutrition Incentive (FINI) Grant Program, U.S. Dep’t of Agric. Nat’l Inst. of Food 
& Agric., https://nifa.usda.gov/program/food-insecurity-nutrition-incentive-fini-grant-program (last visited May 16, 2018).} FINI is a grant program that “supports projects to increase the purchase of fruits and vegetables among low-income consumers participating in the Supplemental Nutrition Assistance Program (SNAP) by providing incentives at the point of purchase.”\footnote{Food Insecurity Nutrition Incentive (FINI) Grant Program, U.S. Dep’t of Agric. Nat’l Inst. of Food 
& Agric., https://nifa.usda.gov/program/food-insecurity-nutrition-incentive-fini-grant-program (last visited May 16, 2018).} Grantees eligible for the millions of dollars in funding include farmers’ markets and community-supported

\footnote{(3)(A), 116 Stat. 134, 309.}
agriculture programs.\textsuperscript{178} The USDA coordinates the dispensing of FINI funds through cooperation with state agencies responsible for administering SNAP.\textsuperscript{179} Since its inception, FINI has supported local efforts across the United States to promote and expand use of SNAP benefits at farmers’ markets; these programs target not only beneficiaries of the Senior Nutrition Program and WIC Nutrition Program, but of all SNAP beneficiaries.\textsuperscript{180}

Although with modest roots, the federal support of farmers’ markets and direct-to-consumer markets has greatly expanded through the most recent Farm Bills. The Senior Nutrition Program and the WIC Nutrition merited particular attention. So strong is federal support for these two programs that they are regarded as the “single most important federal or state program[s] relating to farmers markets”\textsuperscript{181} Not only is this federal support more than forty years old, but it is diverse, manifesting as stated purposes of support, direct funding of market transactions, and various grants designed to promote and expand direct-to-consumer marketplaces.

\textbf{ii. Promotion of Participation Among Traditionally Underrepresented Food-System Stakeholders}

An essential characteristic of the localization of a food system is the ability of representatives of the entire community to participate in decision-making, market transactions, and goal-setting. Accordingly, policies and programs that encourage and incentivize groups traditionally under-represented in these processes to more equitably access them should be regarded as

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\textsuperscript{179} Food Insecurity Nutrition Incentive (FINI) Grant Program, supra note 180.


\textsuperscript{181} NEIL D. HAMILTON, FARMERS MARKET POLICY: AN INVENTORY OF FEDERAL, STATE, AND LOCAL EXAMPLES 7 (OCT. 26, 2005)
\end{footnotesize}
efforts to localize food systems.\textsuperscript{182} This is especially exemplified among those laws targeting beginning and socially disadvantaged farmers and ranchers.

1. Beginning Farmers

Through the Beginning Farmer and Rancher Development Program, the 2002 Farm Bill introduced the concept of “the beginning farmer” to federal legislation. In creating the Beginning Farmer and Rancher Development Program, the bill defined a “beginning farmer or rancher” as a person who, on top of other conditions set by the USDA, has either (a) never operated a farm or ranch or (b) who has operated a farm or ranch for fewer than ten years.\textsuperscript{183} This program gave the USDA a means of providing training, education, outreach, and technical assistance for this group.\textsuperscript{184} Specifically, beginning farmers or ranchers could compete for federal grants in numerous subject areas of farm ownership and operation, such as mentoring and apprenticeships, farmland transfers, marketing strategies, conservation, and financial management.\textsuperscript{185} Only collaborative projects involving various entities would be eligible for these grants, some of which would be required to match the federal funds.\textsuperscript{186} In rolling out this program, the USDA was tasked with undertaking a democratic survey based on input from a wide array of food-system stakeholders.\textsuperscript{187} In his first publicized vision of the 2018 Farm

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\textsuperscript{182} It is important to note that in the history of American agriculture, and perhaps today in some circles, “localization,” “democracy,” and “grassroots” participation were effectively, and often intentionally, proxies for race-based exclusion. See generally Nathan A. Rosenberg, \textit{The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural Policy}, 13 J. Food L. & Pol’y 12 (2017). It is our hope and expectation that with a clear focus on \textit{entire} communities and specific efforts to overcome the lasting impacts of racial discrimination in particular, the concept of local and democratic participation in agriculture can overcome its past.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.} (describing the process for soliciting “Stakeholder Input”).
\end{flushleft}
Bill, Secretary of Agriculture Sonny Perdue noted his support of providing resources to beginning, veteran, and underrepresented farmers, particularly in the areas of access to land and capital, as well as strengthening the USDA management to better serve these groups.\(^{188}\) This program remains a central force for carrying out that vision.

To effectively bring new federal programs and conduct other outreach efforts among beginning farmers, the 2008 Farm Bill created the USDA Office of Advocacy and Outreach.\(^{189}\) Congress created the Office to ensure that beginning farmers or ranchers, as well as socially disadvantaged farmers or ranchers, had access to and equitable participation in USDA program services.\(^{190}\) It did this through goal-setting, self-assessments, outreach, intra-agency coordination, analysis of program outcomes, and recommendations to the Secretary of Agriculture to further the Office’s objectives.\(^{191}\)

As part of the Office, Congress created the Small Farms and Beginning Farmers and Ranchers Group, which would work with the USDA National Institute of Food and Agriculture to administer the Beginning Farmer and Rancher Development Program, as well as perform other duties to promote the Office’s policies among beginning farmers.\(^{192}\) Congress authorized the Office through 2012,\(^{193}\) and the 2014 Farm Bill subsequently reauthorized it through 2018.\(^{194}\)

Meanwhile, Congress expanded USDA loan funding to beginning farmers. Although Congress had mandated reserving loan funds for beginning farmers and ranchers several years


\(^{191}\) Id.

\(^{192}\) Id.

\(^{193}\) Id.

before, the 1996 Farm Bill established an entire subsection of the Consolidated Farm and Rural Development Act dedicated to ensuring this group had access to federal funds. The new subsection increased reserved funding for beginning farmers from both the direct loan and guaranteed loan programs. The 2002 Farm Bill maintained these same levels of reserved funding and reauthorized the program through 2007. The 2008 Farm Bill further increased the amount of reserved funding for beginning farmers and reauthorized the program through 2012. Finally, the 2014 Farm Bill maintained these same increased reservations and reauthorized the program through 2018. Congress authorized funds to be appropriated for carrying out this program through 2007. The 2008 Farm Bill subsequently reauthorized the program through 2012, and the 2014 Farm Bill, extending the funds to related farm-to-school programs, reauthorized the program through 2018.

The 2002 Farm Bill also amended the Consolidated Farm and Rural Development Act to create the Beginning Farmer Land Contract Development Program. This program provided the USDA the means of launching a pilot program, in no fewer than five states, which encouraged private farmland or ranchland sales to beginning farmers or ranchers. It did this by guaranteeing loans used by qualifying beginning farmers or ranchers to purchase

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land from private sellers. The 2008 Farm Bill made permanent the structure of this pilot project and called the new program the Beginning Farmer or Rancher and Socially Disadvantaged Farmer or Rancher Contract Land Sales Program. The 2008 update greatly expanded access to the USDA’s loan guarantee, but it set limits on receipt of it, including requiring the beginning farmer or rancher to invest at least a 5-percent down-payment into the acquired land. The 2014 Farm Bill reauthorized funding for the program through 2018.

In addition to the expansion of loan funding and loan guarantee program, Congress also expanded the Federal Crop Insurance program to better service beginning farmers. Federal Crop Insurance emerged in 1938 as farmers were devastated by the Great Depression and the Dust Bowl, and over the twentieth century, the program, increasingly vital to the agricultural economy, underwent substantial changes, especially with its expansion in the Federal Crop Insurance Act of 1980 and the Federal Crop Insurance Reform Act of 1994. At the turn of the next century, Congress passed the Agricultural Risk Protection Act, which increased the amount premium subsidies to eligible farmers. Not until 2008, however, did Congress begin targeting beginning farmers as potential beneficiaries for these insurance assistance programs. Through an amendment to the Federal Crop Insurance Act of 1980, the 2008 Farm Bill created a risk-management program, which instructed the USDA to focus energy on educating, reaching out to, and otherwise training beginning farmers and ranchers, as well as socially disadvantaged farmers

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204 Id.
206 Id.
210 Id.
and ranchers, about managing financial risks on their farms. But it was the 2014 Farm Bill, through another amendment to the Federal Crop Insurance Act, that brought actual savings to the new group. The 2014 Farm Bill created provisions incentivizing beginning farmers to purchase crop insurance, specifically subsidized premiums for the federal crop-insurance policies, a similar benefit many farmers had long been enjoying. An additional financial incentive included a waiver of administrative fees for “limited resource” beginning farmers and ranchers.

The new law also roped beginning farming and ranching operations into the insurance program’s crop-yield determinations, although the benefit seems only calculated to make quantifying loss more streamlined with the rest of the program. A beginning farmer enrolled in the federal crop insurance program could, in instances of catastrophic loss or other covered losses, record a loss based on the actual loss incurred by the previous farmer of the farmland or simply use the option available to other enrolled farmers who could not prove actual loss, whichever is higher. This move for efficiency, rather than for encouraging underrepresented stakeholders to participate more in the food system, is evidenced by the definition of “beginning farmer or rancher,” which differed from that established by the Beginning Farmer or Rancher Development Program. The amendment defined a beginning farmer or rancher as “a farmer or rancher who has not actively operated and managed a farm or ranch with a bona fide insurable interest in a crop or livestock as an owner-operator, landlord, tenant, or sharecropper for more than 5 crop years, as determined by the Secretary.”

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214 Id. § 1508(g)(2)(B).
215 Id. § 1508(b).
217 Id. Congress also used a five-year minimum as part of eligibility for farm-
is likely tied to the provision requiring farmers or ranchers to show five years of actual production to prove loss.\textsuperscript{218}  

Nevertheless, beginning farmers and ranchers did catch a small break in one narrow circumstance regarding transitional yields. Each crop year, the Federal Crop Insurance Corporation—a sub-agency of the USDA charged with administering the Federal Crop Insurance program\textsuperscript{219}—assigns a maximum average production per acre to each crop. This is called the transitional yield.\textsuperscript{220} The transitional yield is used when the farmer or rancher does not provide acceptable proof of actual loss of a crop or livestock.\textsuperscript{221} In other words, the transitional yield is the USDA’s best guess at how much crop a farmer loses when the farmer is unable to prove how much he or she actually lost. When a farmer tries to prove actual loss, the transitional yield is used if the value of that crop lost, based on the current or one of the previous years, falls below 60 percent of the applicable transitional yield.\textsuperscript{222} Thus, if a farmer records 59 lost crops, but the transitional yield says the farmer should have lost 100 crops, then the Federal Crop Insurance Corporation will use the transitional yield. Generally, farmers may recover 60 percent of the transitional yield.\textsuperscript{223} However, the 2014 Farm Bill allowed beginning farmers and ranchers to recover 80 percent of it.\textsuperscript{224}  

In a similar vein, the 2008 Farm Bill amended the 1985 Farm Bill to incentivize limited-resource beginning farmers or socially disadvantaged farmers and ranchers to use the Environmental Quality Incentives Program (EQIP) by providing

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  \item \textsuperscript{218} See 7 U.S.C. § 1508(g)(2)(A) (requiring present year plus four previous years of recorded losses).
  \item \textsuperscript{219} Id. § 1503.
  \item \textsuperscript{220} Id. § 1502(b)(11).
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id. § 1508(g)(4)(B).
  \item \textsuperscript{223} 7 U.S.C. § 1508(g)(4)(B)(iii) (2014).
  \item \textsuperscript{224} Id. § 1508(e)(2)(E).
\end{itemize}
\end{footnotesize}
them payments higher than the standard set for others.\textsuperscript{225} EQIP is a competitively-awarded, voluntary conservation program administered by the USDA Natural Resource Conservation Service that provides farmers and ranchers with federal funds in exchange for implementing efforts to conserve natural resources, like water, and air.\textsuperscript{226} The 2008 Farm Bill allowed beginning farmers of limited resources to receive payments above the statutory limit for other producers.\textsuperscript{227} By providing limited resource farmers and ranchers greater access to EQIP, Congress formally recognized that many beginning farmers had been seeking to or practicing conservation agricultural programs, undoubtedly a product of community food systems, in which communities seek to improve the health of themselves and their environment.\textsuperscript{228} The 2014 Farm Bill expanded this program to veterans and reauthorized its funding through 2018.\textsuperscript{229}

The gains for beginning farmers and ranchers under the Federal Crop Insurance Program and EQIP may be small, but Congress including them in these programs is a first step in giving these underrepresented stakeholders a foothold in economic stability and, thus, greater access to local food-system engagement.

One last program of note is the Beginning Farmer and Rancher Individual Development Account Pilot Program. In an effort to help low-income beginning farmers and ranchers save enough money to invest in farmland, Congress created the Beginning Farmer and Rancher Individual Development Account

Pilot Program in the 2008 Farm Bill. This Farm Bill addition required the Secretary of Agriculture to create the New Farmer Individual Development Accounts Pilot Program in coordination with the Farm Service Agency. The pilot program would allow qualified low-income farmers and ranchers to set up a savings account with a qualified entity, and the USDA would match 50 percent of the individual contributions to that account. The money thus earned could be used by the farmer or rancher to purchase farmland, crops, or other related expenditures. The 2014 Farm Bill reauthorized funding for this program through 2018. Despite the reauthorization, Congress has not yet appropriated funds for this program, and the absence of the grants in the 2018 USDA Budget Report suggests the Secretary of Agriculture has stopped requesting money to launch it. With seemingly mixed messages, the USDA National Institute of Food and Agriculture remains committed through 2018 to requesting applications from the public for grants that fund education about this nonfunctional program.

2. Socially Disadvantaged Farmers

Many of the programs and benefits for beginning farmers discussed in the previous section also apply to socially disadvantaged farmers and ranchers (SDFRs), but the Farm Bill has also created programs specifically for this group of agricultural

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231 Id.
232 Id.
233 Id.
producers. Socially disadvantaged groups made their appearance in federal agricultural policy with the passage of the 1990 Farm Bill.\textsuperscript{237} Congress defined a “socially disadvantaged farmer or rancher” as a member belonging to a “socially disadvantaged group.”\textsuperscript{238} This group was defined as one “whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.”\textsuperscript{239} Today, the USDA Office of Advocacy and Outreach uses this same definition and provides examples of such recognized groups—African Americans, Native Americans, Alaskan Natives, Hispanics, Asians, and Pacific Islanders—as well as provides the Secretary of Agriculture to determine whether additional groups qualify under this definition.\textsuperscript{240}

Congress’ biggest statement of support for SDFRs is the Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers (“2501 Program”). The 1990 Farm Bill created the Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers, also called the 2501 Program in reference to the Farm Bill section under which the program fell.\textsuperscript{241} Congress created the 2501 Program to encourage and assist SDFRs, and later veteran farmers and ranchers, with farm ownership and equitable participation in USDA programs.\textsuperscript{242} Congress mandated that the USDA be responsible for administering this program, and it permitted the USDA to make grants to and enter into contracts with eligible entities able to carry out these outreach, education,  

\begin{footnotesize}
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\item \textsuperscript{238} Id. § 2501(e)(2).
\item \textsuperscript{239} Id. § 2501(e)(1).
\item \textsuperscript{240} Definitions, U.S. Dep’t of Agric., Off. of Advocacy & Outreach, \url{https://www.outreach.usda.gov/grants/oasdfr/definitions.htm} (last visited May 16, 2018).
\end{itemize}
\end{footnotesize}
and technical assistance efforts.\textsuperscript{243} Congress authorized funding for the 2501 Program through 2018.\textsuperscript{244} The 2014 Farm Bill extended this program to veteran farmers and ranchers.\textsuperscript{245} The 2501 Section remains “the only farm bill program dedicated to addressing the needs of family farmers and ranchers of color.”\textsuperscript{246}

SDFRs did not reappear again in the Farm Bill until 2002, when Congress allocated certain funds for them. In that year’s Farm Bill, Congress amended a subsection of the Consolidated Farm and Rural Development Act dealing with the target participation rates of federal loans.\textsuperscript{247} This small amendment affected funds related to farm-operating loans. Specifically, federal funds are made available to states in order to help the states reach their target participation rates among SDFRs in the farm-operating loan programs. These target rates are supposed to be proportionate to the number of SDFRs in each of the state’s counties.\textsuperscript{248} Before Congress passed this amendment, unused funds reserved to states to help them implement this loan program were reallocated to the states.\textsuperscript{249} The amendment, however, instructed the Secretary of Agriculture to keep those unused funds, instead, and use them to satisfy pending applications before reallocating the money to the states.\textsuperscript{250} Although a slight modification, this amendment prioritized SDFRs by using already existing funds to further support the 2501 Program’s mission of providing SDFRs equitable access to USDA programs.\textsuperscript{251}

But in 2008, with the creation of the Office of Advocacy

\textsuperscript{243} Id. § 2501(a)(3).
\textsuperscript{244} Id. § 2501(a)(4).
\textsuperscript{246} Funding Available to Support Outreach to Underserved Farmers, NAT’L SUSTAINABLE AGRIC. COAL. (June 27, 2016), http://sustainableagriculture.net/blog/2501-funding-available.
\textsuperscript{248} 7 U.S.C. § 2003(c)(2).
\textsuperscript{249} Id.
\textsuperscript{251} See id.
and Outreach, Congress once again made a bold statement of support for SDFRs. When the 2008 Farm Bill created the Office of Advocacy and Outreach, it created not only the Small Farms and Beginning Farmers and Ranchers Group, discussed above, but it also created the Socially Disadvantaged Farmers Group.\(^{252}\) Congress created this group to carry out the 2501 Program and gave it power to oversee and implement other programs related to the 2501 Program’s purpose.\(^{253}\)

Another statement of support came through the establishment of the Socially Disadvantaged Farmers and Ranchers Policy Research Center. The 2014 Farm Bill created the center through an amendment to the 1990 Farm Bill.\(^{254}\) Congress authorized one grant to an eligible college or university—so-called 1890 Institutions\(^{255}\)—to establish the policy research center for the purpose of “developing policy recommendations for the protection and promotion of the interests of socially disadvantaged farmers and ranchers.”\(^{256}\) The USDA subsequently awarded that grant to Alcorn State University.\(^{257}\)

Together with several of the programs and displays of support of beginning farmers and ranchers, these SDFRs-exclusive programs show how Congress has continued to localize food systems by encouraging and incentivizing more diverse representation among agricultural producers. Often, these producers were excluded from such robust participation because of race, a lack of wealth, or shallow or nonexistent agricultural networks. Encouraging these groups to again become agricultural producers also supports community food systems, since these


\(^{253}\) Id.


producers generally operate outside of Lyson’s industrial agriculture or Hamilton’s Big Food, and they are thus likely to search for markets in their local food supply chains.

iii. Promotion of Local-Food System Infrastructure

The federal government’s support of local-food-system infrastructure is characterized less by large and continuous programs, as its support of direct-to-consumer transactions and farmers’ market is, and more by hodgepodge policy decisions to support various aspects of local decision-making. Accordingly, this section is organized based on the law or program, rather than presented as a chronology of evolution.

The most direct federal support of local-food system infrastructure is in the form of grants, awarded on a competitive basis by the USDA. Because so many grants potentially support the localization of food systems, this not a comprehensive list. Rather, this comprises the most explicit programs.

Through an amendment to the Food Stamp Act of 1977, the 1996 Farm Bill established Community Food Projects for the purposes of helping low-income people meet their food needs, increasing the self-reliance of local communities providing their own food, and promoting “comprehensive responses to local food, farm, and nutrition issues.” Congress funded these programs to private nonprofit organizations with grants, administered by the USDA, through 2002, and it prioritized projects that connected different sectors of the food system, including links between

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261 Id.
nonprofit and for-profit sectors, supported entrepreneurial projects, and encouraged long-term planning projects and multi-system approaches to problem-solving. Each Community Food Project received a one-time grant, and Congress expected each project to thereafter become self-sustaining.

The 2002 Farm Bill reauthorized funding for the Community Food Projects program through 2007 and expanded its scope. For example, it specified the sorts of “comprehensive responses” the program was intended to support: infrastructure improvements and developments, plans for long-term solutions, and “innovative marketing activities that mutually benefit agricultural producers and low-income consumers.” Additionally, the 2002 Farm Bill provided examples of the multi-system projects that deserved priority: “long-term planning activities, and multisystem, interagency approaches with multi-stakeholder collaborations, that build the long-term capacity of communities to address the food and agricultural problems of the communities, such as food policy councils and food planning associations.” Finally, the 2002 Farm Bill added a provision for programs that could innovatively address community problems, including loss of farms and ranches, rural poverty, welfare dependency, hunger, the need for job training, and the need for self-sufficiency by individuals and communities.

Between 2005 and 2009, the USDA funded 307 Community Food Projects in thirty-nine states. During this five-year period, these projects formed nearly forty food policy councils

262 See id.
263 See id.
265 Id.
266 Id.
267 Id.
and network, representing a quarter of all program funding. In these councils, more than 560 organizations were represented, comprising more than 700 individuals. Collectively, these food policy councils implemented 183 policies, introduced or produced 383 policies, and began to develop 422 policies. The topics of these policies were diverse, covering market and economic development, consumer access, local-food-system infrastructure, communication improvements between local regulating agencies, and much more.

Following the trend set by the previous legislation, the 2008 Farm Bill reauthorized funding for the Community Food Projects program through 2012 and expanded its purview to urban areas. Specifically, it reserved funding for a Healthy Urban Food Enterprise Development Center, a nonprofit organization, individual, school, or other qualifying entity, with a purpose to increase underserved-community access to healthy and affordable foods, including local foods. The Center was required to give priority to projects that benefited underserved communities and developed market opportunities for small and mid-sized farms and ranches. Finally, the 2014 Farm Bill reauthorized funding for the Community Food Projects program, strengthened its commitment to address hunger, and expanded it reach to tackle food waste.

Thus, over the span of eighteen years, Congress created and maintained a grant program that directly funded community

269 Id. at 3.
270 Id. at 18.
271 Id. at 19.
272 Id.
275 Id.
efforts to solve local problems. Notably, with each iteration of the Farm Bill, Congress expanded the scope of the Community Food Projects program, so that by 2014, local communities could apply for federal funding to organize democratic food policy councils, build local-food infrastructure, develop marketplaces for local-food producers and manufacturers, innovate strategies to fight hunger and food waste, and coordinate these projects with local and state agencies.

In addition to Community Food Projects, Congress established the Local Food Promotion Program (LFPP). The 2014 Farm Bill expanded the FMPP by creating the LFPP, a grant program dedicated to supporting local food systems. The purposes of the LFPP is to increase domestic consumption of and access to local foods and to expand market opportunities for farmers and ranchers serving local consumers. The LFPP is administered by the USDA Agricultural Marketing Service, and that agency awards two types of grants in furtherance of it: Planning Grants and Implementation Grants. Either grant may be awarded, through a competitive process, to agricultural businesses or cooperatives, producer networks and associations, farmers’ market authorities, community supported agriculture networks, and others. Often bundled with the FMPP, the LFPP is distinguished by the USDA based on the food supply chain: the LFPP involves non-direct-to-consumer supply chain, and the FMPP involves direct-to-consumer marketing. Another difference between the two programs relates to financing. Unlike the FMPP, the LFPP requires the entity awarded the grant to

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277 Id. § 10003.
278 Id.
280 Id.
match 25 percent of the grant’s value. In its first year, the LFPP funded 184 projects, with grant awards ranging from around $25,000 to up to $100,000. These figures remained consistent through 2017, and they will likely remain so in 2018.

Although less explicit than Community Food Projects and the LFPP, farm-to-school programs are hugely important to the localization of the food system. Congress expanded local-food-system infrastructure into schools in 2004 with the passage of the Child Nutrition and WIC Reauthorization Act of 2004. This Act amended Section 18 of the Richard B. Russell National School Lunch Act by adding a provision that expanded access to local foods at schools and promoted school gardens. Specifically, it permitted the Secretary of Agriculture to award grants and provide technical assistance to schools and nonprofit organizations for projects that, among other things, (1) improved access to local foods in schools and other eligible entities, such as through farm-to-cafeteria or school garden projects; (2) were designed to procure local foods from small and mid-sized farms for school meals and support school garden programs; and (3) supported farm-based experiential education in local food and agriculture.

The Healthy, Hunger-Free Kids Act of 2010 reauthorized this program through 2015 and continued its mission of connecting schools and other institutions to local-food systems. As part of this broad farm-to-school effort, the 2008 Farm Bill also amended the Richard B. Russell National School Lunch Act to create an agenda that made it easier for schools and other institutions covered by the Act, as well as those covered by the

285 Id.
286 Id.
Child Nutrition Act of 1966, to procure “unprocessed agricultural products, both locally grown and locally raised, to the maximum extent practicable and appropriate” and “use a geographic preference for the procurement” of these products. \(^{288}\)

Building on this stated farm-to-institution language, the 2014 Farm Bill launched a pilot project for the procurement of unprocessed fruits and vegetables to provide participating states, among other reasons, flexibility in their local-food purchases by allowing “geographic preference, if desired, in the procurement of the products under this pilot project.” \(^{289}\) The Secretary of Agriculture was tasked with determining which eight states would participate in this pilot, and priority was based, in part, on the amount and variety of local growers and the demonstrated commitment of statewide farm-to-school program efforts. \(^{290}\)

Additionally, the 2014 Farm Bill created the Food and Agriculture Service Learning Program, which instructed the Secretary of Agriculture, working through the Director of the National Institute of Food and Agriculture and in coordination with other federal agencies, to competitively award $25,000,000 in grants to eligible entities that “increase knowledge of agriculture and improve the nutritional health of children.” \(^{291}\) The purposes of this program included increasing food, garden, and nutrition education within the host organizations or at schools; adding to the momentum of the farm-to-school programs implemented under section 18(g) of the Richard B. Russell National School Lunch Act; and fostering higher levels of community engagement and volunteering opportunities. \(^{292}\) The Secretary of Agriculture was directed to give priority to, among others, those entities that facilitated a connection between schools and local and regional

\(^{290}\) Id.
\(^{291}\) Id. § 4209.
\(^{292}\) Id.
farmers and ranchers. In other words, the Food and Agriculture Service Learning Program explicitly promoted and directly funded local-food education, local-food-system engagement, and community empowerment across the nation.

Another important structural contribution is Congress’ definition of local foods. The 2008 Farm Bill amended the Consolidated Farm and Rural Development Act to create USDA loans and loan guarantees for locally or regionally produced agricultural food products. For the first time, Congress attempted to delineate local from non-local food by defining “locally or regionally produced agricultural food products” as:

[A]ny agricultural food product that is raised, produced, and distributed in . . . the locality or region in which the final product is marketed, so that the total distance that the product is transported is less than 400 miles from the origin of the product; or . . . the State in which the product is produced.

The Secretary of Agriculture was required to reserve at least 5 percent of available funds for this program through 2012. The 2014 Farm Bill reauthorized this program through 2018 and affirmed Congress’ support of promoting community food systems.

The final important structural contribution is the Local Food Production and Program Evaluation program. While Congress places various reporting and evaluation requirements on the USDA for many of the programs mentioned in this article, the 2014 Farm Bill specifically created the Local Food Production

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293 Id.
295 Id. See also Marne Coit, Support for Local Food in the 2014 Farm Bill, 20 Drake J. Agric. L. 1, 2–3 (2015) (“[T]he first federal definition of ‘local food’ was provided by the federal government in the text of the 2008 Farm Bill.”).
and Program Evaluation program.\textsuperscript{298} This standalone research program directed the Secretary of Agriculture to collect data on (1) production and marketing of locally or regionally produced agricultural food products; and (2) direct and indirect regulatory compliance costs that affect the production and marketing of these products.\textsuperscript{299} Congressional concern with the burden of forcing small and mid-sized farms to comply with some costly requirements of the Food Safety Modernization Act, and thus disrupting the local-food-system efforts developing across the country, led to the so-called Tester-Hagan Amendment, which exempts qualifying farms from produce-safety standards and preventative-controls standards.\textsuperscript{300} Besides collecting data, the 2014 Farm Bill directed the Secretary to monitor the effectiveness of programs designed to promote local-food systems and barriers to this promotion because of federal regulations of small-scale production.\textsuperscript{301} Finally, the Secretary was tasked with evaluating how local-food systems contribute to improving community food security and help communities increase access to food.\textsuperscript{302} This comprehensive report came with various reporting requirements, including annual updates to Congress on the progress of the report.\textsuperscript{303} In other words, Congress appeared to take this report very seriously and fully expected the USDA to zealously write it. The USDA published its report in February 2016.\textsuperscript{304}

As these programs show, with Congress’ support communities have become better funded to localize their food systems. Combined, these several programs and benefits to local food system transactions, local food system representation,
and local food system infrastructure show clear support by the federal government to incentivize and legitimize individuals and organizations determined to govern their local food supply chains. But even though these various programs acknowledge some of the localization momentum occurring through American communities, the bill still “fails to adequately address the needs of our modern food system,” and that modern food system is increasingly being shaped at the local level. These changes have undoubtedly come about bit-by-bit, with small adjustments to existing programs and quiet additions to existing titles. By doing this, however, Congress has shown a clear willingness to provide communities with the funds and framework for developing their own community food systems. With support for transactions and marketplaces, traditionally underrepresented stakeholders, and necessary infrastructure, future Farm Bills are poised to bring about further systemic reform to local food systems, especially with respect to policy self-governance and more inclusive decision-making mechanisms—the very fiber of community food systems.

III. Toward Deliberative Food Democracy: Framework and Federal Agricultural Policies

In Part I, we showed how communities are localizing their food systems with a conceptual framework that guides these efforts and why such conceptual frameworks have real-world and measurable benefits for communities. In Part II, we discussed how laws promoting local foods are essentially laws promoting community self-governance within their local food systems, followed by many examples of how the Farm Bill has brought a systematic order to such laws. Having identified how the Farm Bill has contributed to structural and financial support of community food systems, we turn in Part III to the democratic spirit of these laws and examine how the Farm Bill’s programs, implicating deliberative democracy, can advance the goal of

increasing diverse representation and local decision-making in the food system.

The policy ideal, effectively, if not intentionally, underpinning the Farm Bill programs in Part II is diverse and equitable participation. Promoting direct-to-consumer transactions allows consumers greater decision-making in their purchasing options and allows producers to choose how and where to market their food products. Promoting the participation among food-system stakeholders traditionally underserved by decision-making directly contributes to more equitable representation in the food-system. Promoting local-food programs in a variety of forms eventually empowers individuals and communities to remodel their own food systems. Democracy, however, requires mechanisms. In order to promote legislation that edifies the localization of food systems, these mechanisms must be flexible enough to adapt to diverse communities by providing the structure for direct participation in decision-making. Deliberative democracy is that political process.

A. Deliberative Democracy

Deliberative democratic theory is an approach to public governance that grounds the legitimacy of political decision-making in, unsurprisingly, deliberation.306 Some traditional conceptions of democracy assert that legitimacy arises out of vote aggregating, while more modern ideals, often called neoliberalism, identify legitimacy in the aggregate signals of private economic activity.307 Deliberative democracy, however, promotes conversation, discussion, communication, and other forms of reflective decision-making as the source of, or best argument for, democratic legitimacy.308

308 Id. at 308–09; Melissa Mortazavi, Tort as Democracy: Lessons from the Food Wars, 57 Ariz. L. Rev. 929, 935 (2015).
According to Professor Simone Chambers, in deliberative democracy, “[t]alk-centric democratic theory replaces voting-centric democratic theory. Voting-centric views see democracy as the arena in which fixed preferences and interests compete via fair mechanisms of aggregation. In contrast, deliberative democracy focuses on the communicative process of opinion and will-formation that precede voting.”309 Despite describing this as a replacement, one could also view deliberative democracy as both a normative theory that argues for more deliberation as well as a positive description of how the public forms opinions about the issues on which it eventually votes. The identification of deliberation as a source of ideas and opinions then lends itself to the normative calls for increasing deliberation through new or better intuitions. Professor Chambers agrees that “deliberative democracy is not usually thought of as an alternative to representative democracy.”310 Deliberative democracy, rather than a challenge to other views, is a way to—among other important benefits—increase satisfaction with the political process.

Although the formal idea of deliberative democracy post-dated his work, John Dewey’s philosophical pragmatism dealt with some of the same features.311 Dewey’s philosophy called for moving away from absolutist assertions in forming government policy.312 Instead of absolutism, Dewey championed a communicative process to generate, mold, and settle on public goals.313 Like deliberative democracy theorists today, Dewey did not expect consensus, but he did expect that the very process of communication and reflection would produce, at least, more

309 Chambers, supra note 310, at 308.
310 Id. at 309.
satisfying results. At base, the ideal of deliberation is not merely to shape somehow objectively better public opinions, or public opinions on which political decisionmakers can more confidently rely. Instead, the ideal is to develop a system of governance that produces more satisfaction, despite individual outcomes.

In aiming for satisfaction in a pluralist system, deliberative democracy is a natural fit for food policy decision-making. The Food Movement itself is an immensely diverse category, to say nothing of the larger population of American eaters. The Movement includes “sustainability, equity, access, economic development, fair labor, animal health, food security, human health through prevention of foodborne illness and obesity or other diet-related illness, hunger relief, environmental protection, farm security (in terms of economic resilience), energy efficiency and conservation, and more.” A goal, therefore, is to fashion food policy that can account for this diversity while still producing meaningful and satisfying outcomes. Some legal scholars have already begun to merge the concepts of deliberative democracy and food policy, focusing primarily on a comparison of broad legal regimes such as common law versus administrative law. In this Section, however, we focus not on general principals, but on specific strategies and opportunities.

B. Deliberative Democracy in Food Policy

As the several laws summarized in Part II show, various iterations of the Farm Bill have strengthened local food systems and community decision-making and participation in food systems through grants, loans, research initiatives, outreach efforts, and agency programs. The expansion of these programs and benefits through decades of various congressional bodies highlights the non-partisan nature of these issues and the realistic opportunity of future farm bills to take up these issues with even greater vigor.

314 Id. at 158–60.
315 Id.
316 Galperin, supra note 18, at 356.
317 Mortazavi, supra note 311, at 929; Galperin, supra note 18, at 356.
Many of these policies began as victories earned by the lobbying efforts of the so-called Food Movement—a coalition of groups and individuals competing against the Farm Bloc and Hunger Lobby to convince Congress to pay more attention to sustainability and social issues in the food system.\textsuperscript{318} With new bills promoting and expanding these policies currently before Congress, the Food Movement, as a political coalition, appears to retain its place in the fight to gain access to congressional offices. Consequently, it has made the issue of supporting community food systems an established and expected one among Congress and the public.

While these and other policies discussed in this Article have brought legitimacy to the Food Movement’s political influence, they have also created, shaped, and broadened political processes that allow more dynamic public participation in the food system. This comes at a pivotal time in the broader food movement because “[a]lthough the need for public participation in food policy is clearly recognized, there is limited consensus on the appropriate mechanisms for promoting it.”\textsuperscript{319}

Deliberative democracy is becoming a component of those appropriate political mechanisms. In the last decade or so, scholars have begun identifying various approaches of deliberative democracy taking shape in food policy throughout the world.\textsuperscript{320}


These approaches include (1) soliciting public feedback through form submissions; (2) consensus conferences; (3) citizens’ juries; and (4) local food planning.\textsuperscript{321}

Soliciting public feedback through form submissions, or consultation by submission, refers to governmental bodies and regulating agencies using the Internet to ask members of the public for their views on a specific issue.\textsuperscript{322} The U.S. Food and Drug Administration (FDA) regularly solicits the public’s comments on the agency’s proposed rules—the so-called notice and comment rulemaking process.\textsuperscript{323} This form of democratic participation in the rulemaking process is highly structured. For example, the FDA sought public comments on the agency’s regulation of the term “natural” on food labels.\textsuperscript{324} In its solicitation, the FDA provided the public with a comprehensive summary of the issue followed by specific questions for which it sought answers.\textsuperscript{325} While the comment period was open, the FDA received 7,690 public comments, from concerned individuals to large food-retail companies.\textsuperscript{326} The ability of any person to submit a comment to the FDA is, at least in theory, a political mechanism to allow wider participation in the decision-making process of food-system rules. It is unclear, however, to what extent the FDA actually

\begin{thebibliography}{99}
\bibitem{1} Id. at 13–17.
\bibitem{2} Id. at 13.
\bibitem{5} Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments, U.S. Food & Drug Admin. (Feb. 10, 2016), \url{https://www.regulations.gov/document?D=FDA-2014-N-1207-0001}.
\end{thebibliography}
relies on this input. Back to the “natural” example: the FDA has tried numerous times to seek public comment on its regulation of the term on food labels. After again receiving thousands of public comments, the FDA ultimately appeared unresponsive to this input and left its rule unchanged and maintained its lax enforcement status quo. This deliberative democratic approach, if it can be called that, therefore, suffers from at least three serious limitations: the rule-maker narrowly sets the agenda, its use of the public input is entirely opaque, and it is free to downplay any and all putative consultation it solicits. This does not mean the democratic value of soliciting public feedback is minimal. Just as torts provide both individual relief and promote policy goals, the process here allows the individual to voice his or her own concerns, but also allows public access to the catalog, thereby providing knowledge-building among the public and government agencies, providing accountability of the regulating agency, and building a record for judicial review, all of which it accomplishes by allowing the public to see what others think.

Consensus conferences typically comprise a small group of non-experts brought together to discuss a controversial issue or policy proposal. Like consultation by submission, these conferences are arranged by one party seeking input from another party, such as in 2013, when the FDA convened several groups of various stakeholders before finalizing the Produce Safety Rule, mandated by the Food Safety Modernization Act (FSMA). This was in addition to the legally required notice and comment period associated with the proposed rulemaking process. Specifically, the FDA FSMA implementation team met with affected stakeholders, for a brief overview of the 1991 establishment of the term and FDA’s subsequent lax enforcement of its misuse, see Janney v. Mills, 944 F. Supp. 2d 806, 811–14 (N.D. Cal. 2013).

See Ankeny, supra note 322, at 13–14.


Ankeny, supra note 322, at 14-15.

especially farmers, to discuss the proposed rules, solicit feedback on how to improve those rules, and answer questions. The conferences ranged from small-group meetings to large public forums, in which the FDA “learned that a broad cross-section of our industry and consumer stakeholders are eager to push forward and look with us to successfully complete this crucial rule-writing step in FSMA implementation.” Consensus conferences have the advantage of bringing together laypeople to share their personal insight into the effects of otherwise impersonal technical policies. But the advantage is only so influential; after all, the public has no actual leverage over how the policies are made and its influence is thus limited to what decision-makers choose to be persuaded by.

Citizens’ juries are similar to consensus conferences, but take on the structure of trial juries, including random jury selection, cross-examination with a different perspective, and compulsory verdict selection. These have been used throughout the world to explore public attitudes toward genetically modified foods (United Kingdom, France, and South Korea), policies aimed at reducing childhood obesity (Australia), and consumer attitudes toward “organic” food labeling (United Kingdom). Unlike consensus conferences, which rely on volunteers to form a group, the randomization of the citizens’ jury pool is a method of creating a diverse group of apparently average citizens; as a result, any self-selection bias that affects randomization in consensus conferences is absent here. Moreover, urging jury members to inform themselves, deliberate, and make a decision is a simple and strong example of deliberative democracy in action. However, given the time- and resource-intensive

332 Id.
333 Id.
334 Ankeny, supra note 322, at 15.
335 Id.
336 Id.
337 See id. at 14–16.
338 Id. 16.
nature of creating and administering citizens’ juries, their model is difficult to implement on a routine basis, and, like consensus conferences, there is no mechanism for transferring participation into policymaking.\textsuperscript{339} They apparently have not been used in the United States.

Local food planning, which is the diverse participation of a community in creating a local food plan, has become the approach most favored by grassroots organizations and community leaders, particularly in the form of food policy councils.\textsuperscript{340} Each food policy council is free to adopt its own mechanisms for engagement, but typical formats assign chairpersons or facilitators who guide meetings, gather people into informal groups, provide information on key policy issues, and assemble the goals of the group based on council input.\textsuperscript{341} Importantly, these representatives are not favored as so-called experts.\textsuperscript{342} Often, participants represent different communities who are stakeholders in the food system and thus have interests in certain policy goals, and this especially includes stakeholders traditionally underrepresented in decision-making.\textsuperscript{343} In 2016, the United States had at least 262 verified food policy councils, of which 214 were active, 29 were in development, and 19 were in transition.\textsuperscript{344} At the time of this Article’s print, the total number of food policy councils had apparently reached 359.\textsuperscript{345}

As Part II mentions, the majority of these councils found support for their existence in the Farm Bill. Their popularity demonstrates, in part, their capacity to be adopted flexibly among different communities. While some cities or municipalities

\textsuperscript{339} Id. at 16.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{345} \textsc{Food Policy Council Directory, Johns Hopkins Ctr. for a Livable Future}, \url{http://www.foodpolicynetworks.org/directory/online/} (last visited May. 24, 2018).
officially sanction the activities of food policy councils, often they are formed outside of governmental activities and comprise volunteers. Thus, they may be formed without the direction of an agenda-setter. Their limitation, however, tends to appear in the deliberations, whether officially sanctioned or not. The organization participants usually have “predetermined agendas” that “often are opposed to industrialized food in any form . . . .”\textsuperscript{346}

Though these approaches are not the only available structures to deliberative democracy in the food system, they are the ones most widely experimented with. Of these, two approaches have prevailed in the United States: governmental bodies must use consultation by submission as embodied in the notice and comment process, for certain policymaking and local communities have drifted toward local food planning, evidenced by their independently creating hundreds of food policy councils. Congress has decidedly taken the latter approach in the latest iterations of the Farm Bill, favoring the inclusiveness and self-empowerment that local food planning offers. While the USDA is now beginning to assist individuals and communities begin to democratize their food systems, their experience in doing so is not at all new to them.

\textit{C. Roots of Deliberative Democracy in Federal Agricultural Policy}

Although apparently long forgotten, deliberative democracy once held a preferred position among influential program administrators at the USDA. This is embodied in the work of agricultural economist and USDA undersecretary M.L. Wilson. In 1935, with the blessing of Secretary of Agriculture Henry Wallace, Wilson established the Program Study and Discussion (PSD) under authority of the Agricultural Adjustment Act of 1933—the first iteration of the Farm Bill.\textsuperscript{347} The PSD primarily consisted of two programs: group discussions for

\textsuperscript{346} Ankeny, \textit{supra} note 322, at 17.

\textsuperscript{347} JESS GILBERT, \textsc{Planning Democracy: Agrarian Intellectuals and the Intended New Deal} 105 (Yale Univ. Press 2015).
farmers and schools of philosophy for Cooperative Extension workers.348

The discussion groups “emphasized broad social issues of agriculture and public policy.”349 In collaboration with state Extension workers, farmers in these groups discussed not only specifics of various USDA programs, but they spoke about the policy choices of the federal government and about systemic issues facing agriculture.350 The schools of philosophy, organized by USDA staff, brought together Extension workers (and later local planning leaders) at four-day conferences to discuss democracy in rural societies and agriculture, although the USDA encouraged participants to speak about topics beyond just those outlined in the government pamphlets.351 Even within the parameters of official discussion topics, the USDA encouraged attendees to question federal policy decisions and vocalize their criticism.352 The USDA held more than 150 such conferences, and the dominant question invoking discussion—What is a desirable agricultural program?—was one the USDA knew it could not answer on its own.353 Under the direction of Wilson’s former philosophy professor, Carl F. Taeusch, the PSD programs ultimately comprised more than 3 million rural men and women in the discussion groups, tens of thousands of whom were trained as discussion leaders, as well as more than 50,000 Extension workers and other rural community leaders who attended the Schools of Philosophy for Extension Workers.354

Wilson’s emphasis on education was a deliberate one. Similar to John Dewey, Wilson believed that democracy was

348 Id.; see CARL F. TAEUSCH, SCHOOLS OF PHILOSOPHY FOR FARMERS, IN FARMERS IN A CHANGING WORLD: THE YEARBOOK OF AGRICULTURE 1940 1112-19 (U.S. Dep’t of Agric. ed. 1940).
349 GILBERT, supra note 350, at 105.
350 Id. at 105–06.
352 GILBERT, supra note 350, at 106.
353 Id.
354 Id.; Shaffer, supra note 354, at 141.
more akin to a way of life, rather than a rigidly structured political process.\textsuperscript{355} In the penumbra of the Progressive Era, when federal policymakers seemed to rely as much on experts as ordinary citizens, Wilson “hoped for a renaissance” across the country “in which people would ‘search their souls for the deeper, more fundamental philosophical meanings’ and create new models of democratic processes.”\textsuperscript{356} For Wilson, the belief in democracy as a successful way of life was based on three assumptions. First, its adherents must believe that the average person was capable of making informed decisions; second, democracy requires participation by citizens who, in turn, learn the democratic process through that participation; and, third, the first two assumptions are primarily driven by educational processes.\textsuperscript{357} For Wilson, “[d]emocracy required participation—and informed participation was based on education.”\textsuperscript{358} The PSD, therefore, with its educational discussion groups and schools of philosophy, were ultimately Wilson’s method of reshaping a political institution to encourage his vision of a deliberative democracy.

Despite the apparent widespread success of the program, the PSD’s eventual demise in 1943 was part of a larger effort among established farm organizations to narrow the role of the USDA in American agriculture during a time that has been called “the bleakest in the history of agricultural politics.”\textsuperscript{359} When the PSD folded, it did so because of pressure from the American Farm Bureau Federation and some staff of the land-grant schools, all of whom believed the PSD’s democracy-strengthening programs in rural America deviated from the USDA’s traditional role of simply providing statistical and scientific data to farmers.\textsuperscript{360} But this ostensible realignment of the USDA with its traditional role

\textsuperscript{355} Id. at 143.
\textsuperscript{356} Id. (quoting M.L. Wilson, \textit{Facets of County Planning: I. On Using Democracy}, 1 \textit{Land Pol'y Rev.} 2, 2 (1939)).
\textsuperscript{357} Id. at 144.
\textsuperscript{358} Id. at 143.
\textsuperscript{359} McConnell, supra note 136, at 97.
\textsuperscript{360} Shaffer, supra note 354, at 143.
may not tell the whole story. By this time, the Farm Bureau had already launched attacks against outgrowths of the New Deal it could not heavily influence, specifically the Farm Security Administration.\(^{361}\)

During the years preceding the Great Depression, agricultural policy largely centered on prices, and as the economic crisis worsened, farm credit was a common subject among farm leaders, educators, and administrators.\(^{362}\) Meanwhile, public policy was primarily concerned with discovering more efficient methods of agriculture and sharing those methods with farmers, although tenancy, corporate farming, and soil conservation occasionally entered public discussions.\(^{363}\) Nevertheless, the established agricultural organizations were principally interested in policy that addressed prices, and the Farm Bureau did what it could to control agricultural policymaking.\(^{364}\)

When President Franklin D. Roosevelt took office, the USDA was not generally recognized as being organized to address rural poverty, despite the Extension Service’s “long arm of the department going out to nearly all the farming counties of the nation, in touch with the problems of farmers everywhere and ready to help in all their troubles.”\(^{365}\) Yet, rural poverty was a rampant problem, like urban poverty, that had to be solved. Since the USDA appeared to be the inappropriate agency to tackle that problem, that challenge fell on the Federal Emergency Relief Administration.\(^{366}\) In addition to fixing rural poverty, the New Deal programs sought to support the back-to-the-farm movement occurring at the time through a subsistence-homestead scheme.\(^{367}\) Spearheaded by Wilson, the undersecretary who created the PSD and who had played a key role in developing the Extension

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\(^{361}\) See McConnell, supra note 136, at 97–111.

\(^{362}\) Id. at 84.

\(^{363}\) Id.

\(^{364}\) Id.

\(^{365}\) Id.

\(^{366}\) Id. at 85.

\(^{367}\) Id. at 86.
Service, this scheme became the subject of public policy. Soon, the National Industrial Recovery Act codified this policy and authorized President Roosevelt to turn this scheme into action.

Rather than focusing almost exclusively on prices, federal agricultural policy began to address social issues, specifically rural poverty and subsistence homesteads. By 1935, as the PSD was formed, these two programs came under the purview of the Resettlement Administration, separate from the USDA, though former agricultural undersecretary Rexford Tugwell headed it. Within a couple of years, however, the Resettlement Administration merged into the USDA and the controversial Tugwell, in order to save his program, resigned. As this transition was underway, Congress passed the Bankhead-Jones Farm Tenant Act of 1937, which primarily assisted farm tenants with becoming landowners. As a result of this legislation, the Secretary of Agriculture dissolved the Resettlement Administration and created the Farm Security Administration.

Eventually, the Farm Security Administration far outgrew its predecessor and had become its own “poor man’s Department of Agriculture.” Through its rural rehabilitation efforts, it became an advocate for small farmers planting diversified crops, and it resisted foisting on these farmers the efficiency methods favored by larger producers. It installed loan and grant programs that targeted some of these farmers, and the Farm Security Administration provided assistance in helping this new group of farmers formulate and execute their farm plans. Although facing enormous practical and social challenges, the

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368 Id.
370 McCONNELL, supra note 136, at 86.
371 Id. at 88.
372 Id.
373 Id.
374 Id. at 89.
375 Id. at 90.
376 Id. at 90–91.
Farm Security Administration persevered and advocated for farm ownership among small-scale farmers. 377

Because the programs from the Resettlement Administration originated outside of the USDA, farm organizations were unable to influence them as they had been able to influence other agricultural programs. In 1941, the Farm Bureau began its attacks, and by 1943, vice-president of the Farm Bureau Edward O’Neal insisted that the Farm Security Administration clients should stop receiving any federal help because “2,000,000 smallest farms consumed on the average about one-half of the production of these farms and sent only $100 worth of products to market. This group produced only about 3 per cent of the marketed crops. They do not have the land, facilities, or labor to produce large quantities of food.” 378 Through this argument and prompting investigations into alleged program waste and violations, the Farm Bureau sought to put an end to the agricultural policies it had no voice in shaping. 379 By 1946, the Farm Security Administration formally ended, and whatever was left of it fell under the Farmers’ Home Administration, primarily a veterans’ agency at the time. 380

The life of these two major agricultural programs—the PSD and Farm Security Administration—demonstrate, first, that federal agricultural policy has long held multiple identities, and, second, one of those identities is the democratization of local and regional food systems through promoting self-empowerment among diverse stakeholders in agriculture, as well as funding economic and social programs to help farmers transition to owning small-scale, diversified farms, similar to those powering local-food efforts today. The back-to-the-farm movement of the early 20th Century might well have emerged as the farm-to-table movement of the early 21st Century. Regardless, it is clear that deliberative democracy has played a critical role in developing

377 See id. at 91, 93–94.  
378 Id. at 106.  
379 Id. at 106–10.  
380 Id. at 111.
IV. Leveraging the Farm Bill to Support Food Localization

As Part III shows, deliberative democracy is an effective policy basis for empowering communities to engage more directly and inclusively in their food system, and federal agricultural policy has a deep history of promoting the determination of individuals to participate democratically. Because of the Farm Bill’s established role in promoting community food systems, this Part identifies ways in which future Farm Bills should support the movement toward localized food democracy.

First, Farm Bills should be utilized to ensure that a wide array of stakeholder groups have full access to participate in decision-making bodies. Both local and federal boards wield authority over issues that are of concern to a wide range of stakeholders, yet representation does not currently reflect the diverse interests of these stakeholders. The proposals included here would help amplify the voices of stakeholders, thus supporting food democracy. Second, Farm Bills should work towards increasing representation of traditionally underrepresented groups in Farm Bill programs and food governance. These groups have historically been excluded from full participation in the food system; efforts to localize the food system should include these marginalized groups so that the entire community is effectively represented. Finally, Farm Bills should continue to bolster local food authorities, enabling citizens to have greater direct influence over their local food systems. As discussed earlier, Food Policy Councils are multiplying as citizens take an interest in food governance. Future Farm Bills present opportunities to encourage the creation and maintenance of such entities.

A. Diversifying Representation Among Agricultural Producer Stakeholders

In order to be truly representative, the entities that make
decisions at each level of government must include all relevant stakeholders. A democratic food system requires that everyone have a voice at the table. The following recommendations aim to ensure that a diverse array of stakeholder interests are included in decision-making processes.

i. Increasing Organized Labor’s Representation at the Federal Policy Level

The food system—including production, processing, distribution, retail, and service—employs roughly one-sixth of workers in the United States. These workers face many challenges. Less than 15 percent of food workers earn a living wage, despite the fact that 40 percent work more than 40 hours per week, and 11 percent work more than 60 hours per week. Wage theft runs rampant and over half of workers do not have health care coverage of any kind. In an unfortunate irony, almost one-third of food system workers experience food insecurity and nearly 14 percent depend on food stamps, compared to 8.3 percent for the general workforce. Given the various problems that food-chain workers endure, organized labor should have a voice in food policy decision-making processes. Of the dozens of advisory committees listed on USDA’s website, though, not one focuses on labor issues. This is a missed opportunity to directly address the interests of the 22 percent of food-system workers that are employed in production or processing—over four million

382 Id at 4.
383 Id.
384 Thirty-six percent of food chain workers had experienced wage theft in the week previous to being surveyed. Id.
385 Id.
386 The Food Chain Workers Alliance, supra note 384, at 21.
387 Id. at 68.
people—and to consider the impacts that these segments of the food system have on workers further down the chain.

Creating a new labor advisory committee in the Farm Bill is just one potential way to include this group of stakeholders in policy making. Another possibility is to integrate representatives of organized labor into existing committees. This approach, which could supplement an independent committee, would help ensure that labor issues are not overlooked when discussing policies that could impact workers. For instance, the National Agriculture Research, Extension, Education, and Economics Advisory Board (NAREEEAB) would benefit from the representation of labor. NAREEEAB provides advice to the Secretary of Agriculture and to land-grant institutions regarding research, extension services, education, and economics. The Board has twenty-five members, each representing a specific category of stakeholders as mandated by the 2008 Farm Bill. Represented stakeholders include commodity producers, nutritional scientists, and consumers—but not labor. The Farm Bill should be used as an opportunity to amend the membership requirements of NAREEEAB to include one additional member, from a non-profit representing labor interests in agriculture (for a total of twenty-six members).

Another area where federal policy stands to benefit from the representation of labor interests is in the National Organic Program (NOP). In 1990, the Organic Food Production Act (OFPA) established the National Organic Standards Board (NOSB) to act as a critical advisor to USDA regarding organic

389 The Food Chain Workers Alliance, supra note 384, at 17.
392 Id. at 369.
The NOSB, composed of fifteen members, issues recommendations that serve as the basis for NOP policy. The NOSB’s responsibilities also include periodically reviewing the National List of Allowed and Prohibited Substances, which identifies the substances that may be used in organic food production, and making formal recommendations to USDA about its contents.

Like NAREEAB, the NOSB’s composition is mandated by statute to include representatives of certain interest groups. For instance, three members must represent public interest or consumer groups, while two must own or operate organic handling operations. Under current law, no members are designated to represent labor interests. Fair labor practices are also not included as part of organic certification, as USDA claims that OFPA does not authorize the inclusion of labor-related standards in the NOP. Yet, the NOSB’s vision statement aims to “instill[] trust among consumers, producers, processors, retailers and other stakeholders.” Given that farmworkers constitute a key group of stakeholders, and that many commenters asked the NOP to develop fair labor standards as part of the program, the Farm Bill should amend the OFPA to both clarify that labor-related standards may be included in the NOP and to incorporate labor representatives in the NOSB. Two chairs could be allocated for

representatives of labor: one from a union representing agricultural workers, and one from a non-profit focused on labor in agriculture. Such an amendment may either raise the total number of chairs to seventeen, or it may reduce by one each the number of organic farm owners and operators and the number of public interest and consumer representatives. Including labor representatives on the NOSB would encourage the Board to revisit labor issues and would ensure that workers are not excluded from reaping the benefits of the NOP.

ii. Improving Specialty Crops Representation at the Federal Policy Level

Over the last few decades, specialty crops—including fruits and vegetables—have gained prominence in federal agricultural policy. Special crop production now generates roughly a quarter of the value of U.S. crop production, to the tune of $60 billion per year. To advise USDA on policy relating to this important area of agriculture, Congress created the Specialty Crop Committee (SCC). The SCC is tasked with studying issues that specifically affect the specialty crop industry. As a permanent subcommittee of NAREEEAB, representatives are appointed by the Board. The only statutory requirement regarding membership is that it “shall reflect diversity in the specialty crops represented.” This standard, while perhaps a worthy goal, is too vague to ensure that different groups of stakeholders are included in the democratic process.

Specialty crops are grown by a range of particularly diverse stakeholders, who may have unique viewpoints to contribute to

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402 Id.
policy development. For instance, small-scale farmers are more likely to produce specialty crops than commodity crops, perhaps because the labor-intensive nature of specialty crop production is often not well suited to large-scale production. The average size of all farms is 1.82 times greater than the average specialty crop farm, and over one-third of specialty crop farms have fewer than 15 acres. In addition, minority farmers disproportionately produce specialty crops, as compared to commodities. For instance, in 2012, 63.6 percent of Asian American farmers grew fruits and vegetables, compared to just 8.5 percent of white farmers. The particular issues that affect these groups, such as obstacles to accessing loans, therefore affect the specialty crops sector as a whole. However, of the ten members currently on the Committee, none specifically represent small-scale or minority growers. The Farm Bill presents an opportunity to ensure that the SCC includes the voices of small-scale and minority farmers, who will be able to contribute their distinctive expertise to policy research and analysis.


406 Ayazi & Elsheikh, supra note 407, at 58.

iii. Creating Opportunities for Urban Agriculture to Be Represented at Federal Policy Level

The previous recommendations have all focused on improving committee representation of specific stakeholders, including workers, small-scale farmers, and minority farmers. Another way to enhance the democratic process is to ensure that specialized venues for specific substantive topics exist, such that appropriate forums are available for discussion. To that end, the USDA would benefit from the creation of an Urban Agriculture Advisory Committee. As urban farming gains steam, it is important to have democratic channels for information sharing and policy development dedicated to issues particular to the challenges of farming in cities.

In keeping with the previous recommendations, the membership of the suggested Urban Agriculture Advisory Committee should include a diverse range of stakeholders. For instance, membership categories could include urban agricultural producers, urban food aggregators, experts on farm-to-school programs, public health experts, city government representatives, urban planners, institutional buyers, and experts on farmers markets. This approach would facilitate deliberation regarding urban food policy and enhance food governance more generally. In turn, the long-term effect of the committee’s efforts would contribute to the localization of food systems by providing communities participating in urban farming with additional resources to strengthen their work and enhance democratic engagement.

B. Increasing Representation of Traditionally Underrepresented Groups

Inherent in the idea of a democratic food system is an

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408 See S.3420, 114th Cong. § 101 (2016).
understanding that a diverse cross section of the community will be able to participate in governance, production, and consumption. The 2018 Farm Bill presents several opportunities to improve this aspect of our food system by fostering the inclusion of socially disadvantaged farmers and ranchers (SDFRs). Three proposals that would improve representation of underrepresented groups in the food system are detailed below.

   i. Matching Representation to Appropriate Demographics

   It is not just federal boards and committees that stand to benefit from including a more diverse range of stakeholders in decision-making processes; local governing bodies should also serve to amplify the voices of a variety of stakeholders. The importance of local participation in community food systems further underscores the need to ensure that local bodies are representative of their constituents. While the Farm Bill admittedly focuses on federal programs, it does still play a role in supporting local food systems, as Part II showed. The Farm Service Agency (FSA) oversees a county committee system, where members comprise a “critical component” of FSA operations. These committees were first authorized by Congress in the 1930s in a push for local democracy, “allow[ing] for grassroots input and local administration” of federal agricultural programs. Elected committee members help deliver FSA farm programs to their county and play a role in deciding which programs their counties will offer.

   Recognizing the need for fair representation, Congress in the 2002 Farm Bill mandated that county committees be “fairly representative” of producers within the area, and authorized the

410 See supra II.A.2.
413 Id.
Secretary of Agriculture both to promulgate guidelines to “ensure fair representation of disadvantaged groups” and to insure their inclusion through the power of appointment.\textsuperscript{414} Pursuant to that authority, the Secretary may appoint a socially disadvantaged (SDA)\textsuperscript{415} farmer or rancher to committees where no SDA member was elected, and the demographics of the county are such that one is needed to ensure fair representation.\textsuperscript{416} This regulation is an important first step to ensuring the inclusion in local democratic processes. Unfortunately, the method used to determine which counties qualify for an appointed member is flawed. The calculation of countywide demographics, for the purposes of the Secretary’s appointment power, is based on the eligible county committee voters—essentially, producers—rather than total population.\textsuperscript{417} This approach fails to consider or correct the historical discrimination and inequities in agriculture that have impacted today’s demographic makeup of farmers.\textsuperscript{418} Future Farm Bills could improve the existing rule by directing the Secretary to wield the appointment power based on demographics of the entire population of each county or even the entire state, thus ensuring that minorities and women are adequately represented on local committees even when they have been largely excluded from agriculture.


\textsuperscript{415} SDA groups are defined as African Americans, American Indians, Alaska Natives, Hispanics, Asian Americans, Pacific Islanders and women. Selection and Function of Farm Service Agency State and County Committees, 78 Fed. Reg. at 13,772.

\textsuperscript{416} Selection and Function of Farm Service Agency State and County Committees, 78 Fed. Reg. at 13,773.

\textsuperscript{417} Id.; see also COC Socially Disadvantaged (SDA) Voting Member and COC Advisor Appointments, Notice AO-1673, U.S. DEP’T OF AGRIC., FARM SERV. AGENCY (Jan. 30, 2017), https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1673.pdf (“An analysis by the National Office determined the counties in which the percentage of SDA producers indicates there is a need for increased SDA representation.” (emphasis added)).

\textsuperscript{418} For instance, between 1920 and 1997 the population of African American farmers in the U.S. fell from 926,000 to fewer than 20,000—a decline that was 2.5 to 5 times steeper than that experienced by white farmers. See Ayazi & Elsheikh, supra note 407, at 54–60.
ii. Continuing and Expanding Outreach Programs to SDFRs

In 2013, in an effort to provide more a more flexible financing option, FSA created the Microloan program to “better serve the credit needs of several types of farmers: small, beginning, veteran, and/or from historically socially disadvantaged groups (women/minorities).” Although FSA launched the program under their authority through the Direct Operating Loan Program, Congress permanently authorized the Microloan program in the 2014 Farm Bill.

Following implementation of the Microloan program, ERS conducted a study to investigate program outcomes. The study revealed that the number of new FSA direct loan borrowers receiving traditional operating loans fell after the Microloan program became available—indicating that the Microloan program may have attracted some of those applicants as well as additional new borrowers. Based on the findings, ERS made two conclusions. First, new borrowers prefer microloans to traditional operating loans. Second, all else being equal, “at least some of the new borrowers who received Microloans would likely have applied for and received traditional [direct operating loans] if the Microloan program did not exist.”

With this understanding, the ERS proceeded to examine the impact of the Microloan program on SDFRs. ERS found that white borrowers received 86 percent of microloans to new borrowers in the first two years of the program, although new black borrowers over that same period received 25 times more

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422 Id. at 15.
423 Id. at 18.
Microloans than small traditional operating loans. Eight percent of microloans to new borrowers went to black borrowers, and another 7 percent to other minorities. This represented a substantial increase over traditional operating loans of similar size from recent years.

These findings seemed to indicate that the Microloan program’s outreach efforts were initially successful. To examine the issue more closely, USDA conducted a controlled experiment designed to test the effectiveness of the agency’s targeted messages to SDFRs about the Microloan program. The results showed both that “the outreach increased interest in Microloans and the number of borrowers who received them” and that outreach “may have strong effects on some subgroups . . . and low effects on other subgroups.” The study also found that traditional direct operating loans are “still an important source of credit for targeted farmers.”

USDA’s findings demonstrate the importance of outreach among SDFRs as it relates to loan and grant awareness. In addition, the study’s results suggest that outreach may be useful in the context of other programs, as well. USDA should expand broader outreach among SDFRs to increase diversity within the food system, and it should consider launching a more comprehensive study regarding outreach to determine the most effective methods and to identify underserved subgroups that could benefit from targeted tools.

424 Id. at 19.
425 Id. at 19
426 U.S. DEP’T OF AGRIC., USDA MICROLOANS FOR FARMERS: PARTICIPATION PATTERNS AND EFFECTS OF OUTREACH 21–24 (2016), https://www.ers.usda.gov/webdocs/publications/81871/err-222.pdf?v=42761. Drawing from behavioral economics, USDA personalized each letter with the recipient’s name, and a staff member personally signed each letter. USDA then sent these letters to approximately 144,924 operations in 1,848 ZIP codes. The agency found that farmers in ZIP codes receiving the letters expressed much more interest in the program than farmers in ZIP codes not receiving the letters. Id.
427 Id. at 25.
428 Id. at 12.
iii. Including Native American Voices

It is undeniable that the Farm Bill greatly impacts Indian Country in the United States. More than 50 million acres of tribal lands are engaged in food production and agriculture; Native American or Alaska Natives make up more than 30 percent of minority farmers in the country. However, the Farm Bill leaves much to be desired in terms of supporting Native farmers and including Native voices in the democratic process.

In light of these deficiencies, Native advocates have been working towards a better Farm Bill that would include Native voices and open up opportunities for Native farmers. Last year, the Native Farm Bill Coalition published an impressively thorough report brimming with policy proposals that would result in a more fair and inclusive Farm Bill. The Coalition aims to give Native Americans a united voice in advocating for changes to the next Farm Bill. Stalwarts in this policy arena include the Intertribal Agriculture Council (IAC) and the National Congress of American Indians (NCAI), both of which are involved in the Coalition.

As a result of these groups’ research and advocacy, Congressional leaders are beginning to pay attention. Senator


433 Id. (“The Native Farm Bill Coalition is a joint project of the Shakopee Mdewakanton Sioux Community’s Seeds of Native Health campaign, the Intertribal Agriculture Council, the National Congress of American Indians, and the Indigenous Food and Agriculture Initiative to improve Native dietary health and food access.”)
Udall (D-NM) has expressed his support for increased inclusion of tribal representatives in Farm Bill discussions, while Senator Heitkamp (D-ND) recently introduced a bill that would permanently authorize a Rural Development Tribal Technical Assistance Office within USDA, among other things.

Congress should take advantage of the upcoming opportunity to democratize our food system by ensuring that Indian Country is fully included in Farm Bill programs and administration. Many of the Coalition’s recommendations would allow Native farmers and ranchers to participate more fully in the food system. For instance, the report recommends changing the Specialty Crop Block Grant Program to ensure that tribal departments of agriculture are eligible for funding and that tribal projects do not need to go through state agencies in order to receive support. Other proposals in the report aim at a different goal: including Native voices in food governance and administration. These types of recommendations would address the structural exclusion of Native interests in decision-making processes. Examples include creating of an Interdepartmental Task Force on Indian Agriculture and mandating tribal representation on USDA’s numerous advisory committees. Taken together, these recommendations would go a long way towards democratizing the Farm Bill.

C. Supporting Local Food System Governance Structures

434 Baca, supra note 433.
436 Hipp & Duren, supra note 434, at 109.
437 Id. at 131.
438 Id. at 132.
i. Increasing Coordination Among and Between Federal and Local Organizations.

In order to enhance food governance, substantive areas—which, as suggested in the previous recommendation, may merit specialized attention—should not be entirely siloed. Food policy spans a range of issue areas, including agriculture, public health, labor, environment, and urban development. The multifaceted nature of food policy is evident in the Farm Bill itself, with roughly a dozen titles spanning topics from forestry to trade.\textsuperscript{439} The USDA plays a major role in implementing agricultural policy, but many other agencies are also implicated in the Farm Bill, such as the Environmental Protection Agency, the Food & Drug Administration, the Department of Health and Human Services, the Department of Labor, and the Department of Energy. With so many actors involved, policies are often not crafted to complement one another. For instance, in its public health role, the USDA recommends that fruits and vegetables comprise half of an individual’s daily diet.\textsuperscript{440} Yet, a mere fraction of farm subsidies—less than 1 percent—is directed at specialty crop production.\textsuperscript{441}

To overcome this coordination problem, the Farm Bill could establish a new interagency Food Policy Advisory Committee. Such a committee would facilitate communication and information sharing between relevant government agencies, and it would include (at a minimum) representatives from the agencies mentioned above. The committee should also have the authority to add participants on a temporary or permanent basis, as it finds necessary. Tasks would include studying and making recommendations regarding substantial policy proposals that


\textsuperscript{441} Id. \textit{See also Agriculture and Health Policies in Conflict, Physicians Committee for Responsible Medicine}, \url{http://www.pcrm.org/health/reports/agriculture-and-health-policies-ag-versus-health}, (last visited April 18, 2018).
implicate multiple agencies. The committee could also tackle the development of a national food policy that would help guide agencies, resulting in a more coherent and consistent approach to food governance.\textsuperscript{442}

Horizontal coordination between federal agencies is just one piece of the governance puzzle; vertical coordination between different levels of government is also crucial. Food policy is both important to the nation as a whole, yet particular to specific regions and locales. Local, state, and regional organizations play important roles in shaping agricultural systems, complementing the federal policy enacted by the Farm Bill. Local involvement in food policy is an excellent way to support community food systems—yet for local entities to truly have a voice, they must not be isolated from other decision-making bodies. Increased coordination would serve to strengthen local leadership and democracy, and it would capitalize on the wealth of localized knowledge that communities possess. Established methods of communication and exchanges of information should therefore exist between local, state, regional, and federal entities.

The Farm Bill can be used as a vehicle to ensure that coordination between levels of government takes place. Statutory language could mandate federal advisory boards and committees, such as NAREEEAB, the SCC, and the NOSB, to liaise with local, state, and regional entities, just as the FDA met with communities in consensus conferences across the country while it was developing its FSMA regulations.\textsuperscript{443} For instance, the committees could be required to hold at least one meeting each year specifically for the purpose of hearing testimony from representatives of those entities. They could also be required to solicit input from such entities when considering policies that will impact local practices. These requirements, of course, would not solve the issue of vertical coordination; however, they form


\textsuperscript{443} See supra III.B.
an important step toward localizing the food system. To further advance coordination, committees could additionally be directed to formulate recommendations to streamline the channels between levels of government.

ii. Incentivizing Creation and Maintenance of Food Policy Councils

Of course, coordination across levels of government can only take place if a robust network of local entities exists. Currently, food policy councils serve as the primary vehicle for local food democracy. Food policy councils come in a variety of forms, but they essentially serve as forums to deliberate over local and regional food issues. As Part II showed, the Farm Bill has greatly bolstered the existence of these councils. There are hundreds of food councils currently in the United States. Some were formed as part of government agencies, while others are independent grassroots networks; some comprise volunteers, while others operate on funding from foundations. Food policy councils frequently coordinate with government officials; indeed, the most effective ones enjoy positive relationships with government.

Legislators could use the Farm Bill to encourage the creation and maintenance of food policy councils, thus supporting and strengthening community food systems. Food policy councils often struggle to find sufficient funding. To support these entities, then, the Farm Bill could include a program to provide

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446 Harper et al., supra note 447, at 22–3.
447 Id. at 24, 38.
grants to food policy councils. This would be more than the Community Food Projects program, which covers a range of issues; rather, this would specifically target food policy councils. The program could be modeled on similar programs authorized by the Farm Bill, such as the Beginning Farmer and Rancher Program, which helps fund a variety of projects every year that train, provide technical assistance, and educate new farmers to ensure their businesses are viable and successful. This program requires that recipients share the cost of their programs by contributing an amount equal to at least 25 percent of the awarded funds, and project grants are capped at $600,000. Similarly, a program to fund FPCs could include a matching condition and a cap, thus keeping the total cost low while boosting these crucial instruments of food democracy.

Like many existing Farm Bill programs that support food localization, our proposals are attempts to fill those gaps that civic agriculture and food democracy recognize as existing and being vital to democratization efforts. By promoting programs founded on deliberative democratic principles, our proposals not only follow the natural progression of one substantial strand of federal agricultural policy, but they provide a theoretical structure to many of the programs Congress has already promulgated and the USDA has spent countless resources administering.

**Conclusion**

Increasingly, the Farm Bill is becoming a tool for the democratization of the food system as much as it is a tool for crop insurance, agricultural credit, nutrition programs, trade, and so forth. More than that, though, Congress has included within some of these programs democratic mechanisms that empower

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449 See supra II.B.3.
450 See supra II.B.2.a.
452 *Id.*
individuals and communities to make decisions about what the programs support. With this steady momentum, the future of the Farm Bill looks increasingly more democratic. And why shouldn’t this be the case? Although deeply flawed by various forms of discrimination, the earliest Farm Bills quite explicitly sought greater democratic participation in federal farm programs. With this long view, the recent flirtations with democratization are a return to form rather than a radical departure.

It is, therefore, time that Congress begin taking these trends more seriously. By adopting some of our proposals founded on deliberative democracy, it will add legitimacy and structure to a policy that provides countless communities with the determination to make their own choices about how their food system should look—how the supply chain should function, which social issues to fund, and what aspects of the food system to experiment with. That policy is a deliberative food democracy. The Farm Bill, bolstered by the many efforts before it, should finally make that policy explicit.