

2015

AN ALTERNATIVE FOOD POLICY

Chris Erchull

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Chris Erchull, *AN ALTERNATIVE FOOD POLICY*, 37 W. New Eng. L. Rev. 1 (2015), <http://digitalcommons.law.wne.edu/lawreview/vol37/iss1/1>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

WESTERN NEW ENGLAND LAW REVIEW

Volume 37

2014-2015

Issue 1

ARTICLES

AN ALTERNATIVE FOOD POLICY

CHRIS ERCHULL, ESQ.*

INTRODUCTION

This paper proposes that the public health benefits of a new food policy¹ justify federal funding for food policy councils² at the state, regional, and municipal levels. The new policy should connect consumers with affordable, fresh, and healthy food³ while encouraging producers to use sustainable farming practices.⁴ A close look at recent policy efforts in New York City to improve public health through paternalistic restrictions illustrates important lessons for policy advocates who must strive to gather broad public support in order to implement effective policy.⁵ A new food policy movement has the

* J.D. 2014, Western New England University School of Law. Many thanks to Professor Julie Steiner for her support and encouragement. I am also indebted to the editors and staff of the Western New England Law Review for editing my work.

1. The term *new* is used only to imply that the federal government has never before approached food policy in the manner discussed in this article. The ideas discussed here are not new to the advocates who have been fighting to change food policy for a long time.

2. A food policy council is an organization of citizens and representatives from a community “who collaborate on mutually beneficial solutions to food system problems.” Christina DiLisio, *Food Policy Councils: Helping Local Regional, and State Governments Address Food System Challenges*, AM. PLAN. ASS’N 1 (2011), <http://www.iufn.org/wp-content/uploads/2013/08/APA-2011-Food-policy-councils.pdf>.

3. See generally Tess Feldman, *Re-Stocking the Shelves: Policies and Programs Growing in Food Deserts*, 16 LOY. PUB. INT. L. REP. 38 (2010) (describing the problem of “food deserts” and the effect on public health caused by a lack of access to fresh and healthy foods).

4. See generally Gail Feenstra et al., *What is Sustainable Agriculture?*, in FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW 30, 31 (Susan A. Schneider ed., 2011) (“Sustainable agriculture integrates three main goals—environmental health, economic profitability, and social and economic equity.”).

5. See *infra* Part II, notes 22-61, and accompanying text.

potential for great success because the public benefits are quantifiable and do not restrict consumer choice.

I. DIABETES: FEDERAL GOVERNMENT EXPENDITURES ON PREVENTABLE DISEASE

Americans spend a smaller percentage of their household income on food than citizens of any other country in the world.⁶ We owe the abundance of affordable food to a robust federal farm policy that has developed over the past seven decades to ensure plentiful cheap calories.⁷ However, these calories have hidden costs, and a new policy has become necessary to address some of the unforeseen side effects of the federal policy.

In the wake of contemporary consciousness regarding unsustainable healthcare costs,⁸ it is the perfect time for the federal government to take notice of excessive spending on a preventable disease. The obesity epidemic that is plaguing the nation is closely connected with several chronic medical conditions, resulting in a population with increasingly expensive medical care needs.⁹ Type 2 diabetes, largely a preventable disease,¹⁰ is one of the most serious and costly conditions associated with obesity.¹¹

The American Diabetes Association (“ADA”) has released data

6. According to the USDA, households in the U.S. spend less than 7 percent of their income on food. Very few nations spend under 10 percent on food, and nearly half of the nations surveyed spend more than 20 percent. *Food Expenditures*, U.S. DEPT. AGRIC. ECON. RES. SERV. (Dec. 1, 2014), <http://www.ers.usda.gov/data-products/food-expenditures.aspx#26654>.

7. See Fact Sheet, Inst. For Agric. And Trade Pol’y, *Food Without Thought: How U.S. Farm Policy Contributes to Obesity* (Nov. 2006), <http://www.nffc.net/Learn/Fact%20Sheets/Obesity%20and%20Ag.pdf>.

8. Jordan Rau, *Health Care Costs are Projected to Outpace Economic Growth*, NPR (Sept. 19, 2013, 9:08 AM), <http://www.npr.org/blogs/health/2013/09/18/223812518/health-care-costs-projected-to-outpace-economic-growth> (“[A]ctuaries forecast that in a decade the healthcare segment of the nation’s economy will be larger than it is today, amounting to a fifth of the gross domestic product in 2022.”).

9. According to the Centers for Disease Control and Prevention, one-third of adults are obese in the United States, causing serious health problems for a large number of Americans. *Chronic Disease Prevention and Health Promotion*, CTR. FOR DISEASE CONTROL (May 26, 2011), <http://www.cdc.gov/chronicdisease/resources/publications/aag/obesity.htm>.

10. See *Simple Steps to Preventing Diabetes*, HARV. SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/nutritionsource/preventing-diabetes-full-story/> (last visited Mar. 9, 2015).

11. Over 80 percent of people afflicted by type 2 diabetes are also obese. *A Codependent Relationship: Diabetes & Obesity*, DIABETIC® CARE SERV., <http://www.diabeticcareservices.com/diabetes-education/diabetes-and-obesity> (last visited Mar. 9, 2015).

illustrating the cost of medical care for diabetes patients in 2012.¹² According to the report, the cost of medical care for diabetes patients is especially high among people aged sixty-five and older, roughly totaling \$11,825 per person per year.¹³ A very large proportion of this expense falls on the federal government because of the Medicare program.¹⁴ With almost nine million Americans over the age of sixty-five afflicted by diabetes,¹⁵ the disease unquestionably puts a great burden on government coffers.

In particular, about 90 percent of diabetes patients suffer from *adult onset*, or type 2, diabetes.¹⁶ And about 90 percent of those cases could have been prevented through lifestyle changes, such as improved diet.¹⁷ In total, approximately eighty-five billion dollars of federal funds were dedicated in 2012 to treating completely preventable medical problems;¹⁸ in other words, a great deal of taxpayer money that need not have been spent. When viewed in light of our aging population¹⁹ and rapidly rising healthcare costs,²⁰ this number will continue to grow. Considering the fact that diabetes rates are expected to skyrocket over the next several decades,²¹ the federal government must take immediate action to mitigate these costs by sponsoring policies that help prevent type 2 diabetes, in addition to other costly diseases that are connected to poor nutrition. By providing funding for the development of a new food policy in the United States, the federal government can save money by reducing healthcare spending in the long term.

12. Wenya Yang et al., *Economic Costs of Diabetes in the U.S. in 2012*, 36 DIABETES CARE 1033 (April 2013), available at <http://care.diabetesjournals.org/content/36/4/1033.full> [hereinafter *Economic Costs*].

13. *Id.* at 1039-40. Note that these costs do not include expenses related to industry infrastructure or other diabetes-related expenditures that are not singularly attributable to the cost of managing the disease. *Id.* at 1039.

14. *Id.*

15. *Id.* at 1037.

16. *Diabetes*, WORLD HEALTH ORG., (Nov. 2014), <http://www.who.int/mediacentre/factsheets/fs312/en/>.

17. See *Simple Steps*, *supra* note 10.

18. Yang et al., *supra* note 12.

19. While 13 percent of the population was over the age of sixty-five in 2010, the proportion of the population in that age group is expected to be over 20 percent in 2050. Grayson K. Vincent & Victoria A. Velkoff, *The Next Four Decades: The Older Population in the United States: 2010 to 2050*, U.S. CENSUS BUREAU, app. tbl. A-1 (May 2010), available at http://www.aoa.gov/Aging_Statistics/future_growth/DOCS/p25-1138.pdf.

20. See *supra* note 8.

21. *Number of Americans with Diabetes Projected to Double or Triple by 2050*, CTR. FOR DISEASE CONTROL AND PREVENTION (Oct. 22, 2010), <http://www.cdc.gov/media/pressrel/2010/r101022.html>.

II. NEW YORK CITY'S SODA BAN: PATERNALISTIC POLICY TO IMPROVE HEALTH AND THE PUBLIC FISC

In the fall of 2012, the New York City Health Department (“NYCHD”), a board with eleven members appointed by Mayor Michael Bloomberg,²² voted to adopt regulations that would prohibit the sale of a selection of “sugary beverages” in serving sizes greater than sixteen ounces at food-service establishments.²³ This ban on large soft drink purchases is an extension of the “Pouring on the Pounds” policy that the NYCHD has been promoting since 2009 to persuade New Yorkers to reduce their consumption of soda and other high-calorie beverages.²⁴

The NYCHD estimates that over eight percent of the 8.3 million residents of New York City have type 2 diabetes,²⁵ a condition closely associated with the obesity epidemic in the United States. It is estimated that Medicaid expenditures directly related to obesity totaled \$2.7 billion in 2006 alone.²⁶ Because of the correlation between increased consumption of highly caloric sugary beverages and increased rates of obesity among New Yorkers, the NYCHD claims that the availability of large amounts of these drinks is a leading cause of diabetes and other obesity-related health problems and, accordingly, places a high cost burden on the City.²⁷ By enacting regulations that would reduce the availability of soft drinks, the NYCHD aimed to save taxpayer dollars while improving overall public health.

The regulations have not gone into effect in New York because of a successful challenge led by associations of businesses and labor whose members depend on soft drink sales for revenue and livelihood.²⁸ The

22. For background information about the New York City Health Board, see Michael M. Grynbaum, *Health Board Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, http://www.nytimes.com/2012/09/14/html?_r=0.

23. N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.53 (2008). See Press Release Announcing the Regulation, OFF. OF THE MAYOR (Sept. 13, 2012), <http://www.nyc.gov/> (search “PR- 326-12”).

24. See Press Release Announcing “Pouring on the Pounds” Campaign, N.Y.C. DEP’T HEALTH & MENTAL HYGIENE (Aug. 31, 2009), <http://www.nyc.gov/html/doh/html/pr2009/pr057-09.shtml>.

25. See Diabetes Homepage, *Type 2 Diabetes*, N.Y.C. DEP’T HEALTH & MENTAL HYGIENE, <http://www.nyc.gov/html/doh/html/living/diabetes-homepage.shtml>.

26. *Reversing the Epidemic: The New York City Obesity Task Force Plan to Prevent and Control Obesity*, N.Y.C. OBESITY TASK FORCE 5 (May 31, 2012), http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf.

27. Mary T. Bassett, *Statements from Health Commissioner Mary T. Bassett and Supporters of New York City’s Sugary Drink Portion Rule*, N.Y.C. DEP’T HEALTH & MENTAL HYGIENE 3 (June 4, 2014), <http://www.nyc.gov/html/doh/downloads/pdf/press/sugary-drinks-statement.pdf>.

28. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of

trial court decision, which was upheld on appeal before the highest court in New York,²⁹ determined that the NYCHD acted *ultra vires*, beyond the scope of its delegated powers.³⁰ Against this backdrop of complicated questions about administrative procedure, critical lessons regarding food and health policy arise that inform the efforts of advocates in the quest toward better nutrition. The NYCHD has been unable to overpower the opposition to its regulations, but this failure should not mean future food and health policy efforts must abandon bold approaches to improving nutrition and preserving the public fisc. The failure of the efforts of the NYCHD reflects a lack of sufficient public support for its policy goals. If policy advocates cannot find support from local consumers and voters, it is unlikely that aggressive efforts to improve health by improving nutrition will succeed.

A. *The Basis for the Court Decision*

The New York trial and appellate courts held that the NYCHD overreached, acting beyond its delegated powers and circumventing the legislative process.³¹ Typically, when courts assess whether a state administrative body has acted *ultra vires*, they look to the state legislation that created and granted power to the administrative body.³² In New York, the NYCHD is not a creature of state legislation, at least not directly. Rather, it is a municipal administrative body that derives its power from the city council.³³

There is case law in New York that explores the limits of state agencies and, moreover, case law that examines how far the city council may go in establishing innovative policies to promote public health.³⁴ The trial court determined that the Boreali balancing test applies to determine whether the NYCHD acted within its delegated powers, requiring the examination of four pertinent factors.³⁵

Under the first part of the test, the court looks at the influence of economic and political considerations where public health is the primary

Health and Mental Hygiene (hereinafter *NYC I*), No. 653584/12, 2013 WL 1343607, at *19, *20 (N.Y.S. Mar. 11, 2012), *aff'd*, 16 N.E.3d. 538 (N.Y. 2014).

29. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene, 16 N.E.3d. 538 (N.Y. 2014), *aff'g* 2013 WL 1343607 (N.Y.S. Mar. 11, 2012).

30. *NYC I*, *supra* note 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

goal of the administrative body.³⁶ Interestingly, the fact that the NYCHD bolstered the justification of the regulation with economic data became a liability, tending to prove action outside its delegated authority.³⁷ Moreover, exemptions that were intended to make implementation of the regulations less contentious provided evidence that political influences were also a concern of the NYCHD, further tipping the scales toward an *ultra vires* ruling.³⁸

In assessing the second factor, whether the regulation is within the scope of authority granted to the administrative body, the court undertook a lengthy examination of historical New York City charters. Ultimately, the court concluded that “one thing not seen in any of the Board of Health’s powers is the authority to limit or ban a legal item under the guise of ‘controlling chronic disease,’ as the Board attempts to do herein.”³⁹

Perhaps the most significant consideration in this case is the third factor, whether a superior legislative body, in this case the City Council, has undertaken efforts to address the issue.⁴⁰ The record shows three prior resolutions that were aimed at sugary beverages and all were rejected.⁴¹ Therefore, the City Council had an opportunity to initiate the policy through legislation but chose not to do so.

Under the fourth prong, the NYCHD was held to have successfully defended the technical expertise requisite to justify the promulgation of the regulations.⁴² In total, however, because three of the four factors were held to weigh against the NYCHD, the regulations were invalidated.⁴³

Notably, the court also addressed a claim that NYCHD acted in an arbitrary and capricious manner, which the court swiftly resolved also against the NYCHD.⁴⁴ Even if it were not found to be *ultra vires*, the soda ban would have been invalidated by the court.

The law in every state is different and the outcome of a challenge to a similar regulatory effort elsewhere may be different. But the principles that form the foundation for any analysis on the issue of aggressive

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

regulation can be applied across the country.

B. *The Backdrop: Libertarian Opposition*

The backlash was palpable from the moment the NYCHD voted in favor of the regulations. Many voices in the media complained of Mayor Bloomberg's paternalistic agenda to improve public health by limiting consumer choice.⁴⁵ In the legal battle, the courts have focused on the separation of powers. However, the outcome reflects a popular libertarian concept that appointed bodies should not make aggressive unilateral decisions that interfere with the marketplace.

It is easy to understand why chambers of commerce and labor unions would oppose the soda ban—income from the sale of soft drinks is an important part of the business revenue on which their members depend—but why haven't city legislators enacted a law that prohibits the sale of extra-large soft drinks? To be sure, elected officials are influenced by the support of commercial actors, but ultimately they are accountable to voters. Public support is essential to the success of aggressive policy initiatives because of the democratic process. If consumers were to rally behind policy initiatives such as this, legislators would feel pressure to enact laws that would not be susceptible to *ultra vires* challenges in the New York courts.

Distaste for paternalism appears to limit the potential for broad consumer support of this policy.⁴⁶ By forbidding the sale of large drinks, the NYCHD has, at least on the surface, attempted to undermine the autonomy of consumers. Through this lens, it seems unlikely that restrictive policies will garner vast and firm public approval, despite the strong pro-consumer health and economic arguments that motivated the political effort in the first place.

C. *A Broader Lens*

While it is clear that the NYCHD policy would result in a restriction on consumer choice by limiting the size of certain beverages available for sale, consumer autonomy is also restricted by broader policies that artificially lower the price of soft drinks. Soda is generally manufactured with high-fructose corn syrup, a food product made from corn, which is heavily subsidized by the federal government.⁴⁷ In fact,

45. See, e.g., Victoria Bekiempis, *Soda Ban Backlash: Mike Bloomberg's Plan Takes Supersized P.R. Hit*, VILL. VOICE (Jul. 6, 2012), <http://blogs.villagevoice.com/runninscared/ERGEFORMAT> 46. *Id.*

47. See Mark Bittman, *Don't End Agricultural Subsidies, Fix Them*, N.Y. TIMES (Mar. 1, 2011), <http://opinionator.blogs.nytimes.com/2011/03/01/dont-end-agricultural-subsidies->

aside from subsidies, there are many external costs to corn production that are absorbed by the public but do not factor into the cost of an extra-large soda, including well-documented environmental, health, and tax externalities.⁴⁸ By contributing to a lower cost-per-ounce for sugary beverages, federal policy is complicit in obscuring the true cost to consumers. This analysis is in direct contrast to how the New York trial court summarized the point of view of the challengers in its opinion: “[P]eople knowingly buy whatever portion size they desire, and are therefore aware of what they are ingesting.”⁴⁹

In general, the consumer will end up paying less per ounce for a soft drink if the volume of the purchase is larger. A limit on the size of a single purchase of soda will force the cost per ounce to stay higher than the cost would be for a larger beverage. The ban did not seek to prevent consumers from buying multiple soft drinks; theoretically, a person could purchase the same amount of soda under the NYCHD regulations as before. However, the cost per ounce would likely be greater because the serving size would be limited. Under this analysis, consumers would be faced with a higher cost per ounce and a choice in whether to purchase a second beverage. Arguably, by confronting the consumer with a higher cost and encouraging reflection upon that cost, the regulation helps to counteract the impact of the federal policy that obscures costs and helps to illuminate the *actual* cost to the consumer, including the related health and environmental externalities. Through this lens, consumer choice is preserved and even enhanced by the ban. Federal policy contributes to a misrepresentation to the consumer and the soda ban attempts to remedy that misconception. However, this argument is very difficult to articulate and also difficult to prove. For consumers to support policies like this, advocates must draw clear connections between the benefits to the consumer and the goals of the policy.

D. *Soft Paternalism and Individual Liberty*

The type of paternalist regulations at issue in New York City might be referred to as *soft paternalism*.⁵⁰ Regulations that employ soft

fix-them/?_r=0.

48. See Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593 (2010).

49. *NYC I*, *supra* note 28 at *5.

50. Colin Hector, *Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform*, 67 FOOD & DRUG L.J. 103 (2012). However, when framed as an absolute ban on the purchase of soda in containers larger than sixteen ounces, the regulation appears to fall into the category of hard paternalism.

paternalism to influence consumer choices without barring particular conduct are known as *nudge* policies.⁵¹ By subtly affecting the decision-making process of consumers, policymakers are correcting other influences that persuade consumers to make choices against their own interest. In this case, NYCHD believes that it is against a consumer's best interest to drink large quantities of soda. The influences that cause a consumer to make a choice against her best interest are no doubt diverse, but these influences include advertisements and artificially low prices. The price of soda does not reflect the *true cost* of its production, due at least in part to federal agriculture policy. The nudge toward a healthier choice, in this case, is meant to counteract other governmental influences on the consumer's decision-making process.

In this case, the public has an interest in the choices of the individual. It is not contested that state governments have an interest in regulating public health. Beyond that, however, the costs of poor health decisions fall upon the public, at least to some degree. Therefore, it is not unreasonable for the NYCHD to attempt to influence consumer choice in this respect.

Similarly, making sustainably produced healthy food more accessible to consumers is not a way to remove a choice, and it is not outside of the public interest. The Bloomberg model fails to satisfy the goal of increasing accessibility to nutritious foods; it simply attempts to limit soda consumption. A less restrictive regulatory system would serve the same purpose by expanding consumer choice to provide the consumer with alternatives. For example, if the New York regulations were to make fruit juice and water more available in restaurants, the alternative may have a coercive effect on the consumer, but it will not limit her ability to choose a large unhealthy soda.

E. *Policy Inferences*

The attempt to improve public health in New York by banning the sale of large quantities of soda appears to have failed, but it has illustrated important lessons for policy advocates. For one, policy efforts that limit consumer choice are less likely to succeed in garnering public support than those that simply *nudge* consumers by providing more information or expanding their options. Moreover, where the scope of policy efforts is overly narrow or broad, or insufficiently tailored to its goals, then the efforts are more vulnerable to criticism by the public and possibly invalidation by courts. A new food policy can

51. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 2* (rev. ed., 2009).

improve public health without limiting consumer choice. The policy aims must be clearly articulated, and efforts should be specifically tailored to meeting those goals.

It is likely that a new food policy would have broad public support. Over the past two decades, consumers have been embracing fresh and healthy foods in increasing numbers. Farmers markets have exploded in popularity, which is evidence of public approval for a shift in how we purchase our food. The local foods movement has attracted consumer interest, which is not surprising considering the numerous benefits that come along with a flourishing local food system, including economic benefits. As more people come to understand the hidden costs of industrial agriculture, consumers will demand a new food policy. A properly managed system will not only allay the hidden costs of food production, but will also keep purchase prices reasonable for consumers, especially those least able to afford any increase in the purchase price of food. In fact, under an ideal new policy, the price of food can even be reduced for those who suffer from an inability to afford sufficient nourishment.

Meanwhile, a new food policy can be structured so that it does not restrict consumer choice. Banning soda might be off-putting to consumers, but expanding the available options for food purchases will have a different effect.

Bad nutrition causes harm to human health, and it is a result of a lack of information and policies that hide the true costs of what we consume.⁵² People consider many factors when choosing what food to purchase, including availability, familiarity, pleasure, convenience, and cost. The most important factors are likely cost and availability. Federal policy influences consumer behavior by enabling some food products to have increased availability and low costs, but those products are often unhealthy and lacking in nutritional value.

For example, products made with processed corn and other grains are connected to poor nutrition.⁵³ Corn is a crop that is heavily subsidized by the federal government under the Farm Bill.⁵⁴ Therefore, federal policy contributes to bad nutrition and, at least indirectly, to diabetes. Ultimately, the public costs are much higher than the tax

52. Sarah Harwood, *United States Farm Bill—an Antiquated Policy?*, 88 U. DET. MERCY L. REV. 377, 393-94 (2010).

53. See Jeff Strnad, *Conceptualizing the “Fat Tax:” The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1312 (2005) (referring to refined grains as “a food category almost universally disfavored by nutrition experts”).

54. Anthony Kammer, *Cornography: Perverse Incentives and the United States Corn Subsidy*, 8 J. FOOD L. & POL’Y 1, 2-3 (2012).

dollars paid to farmers who grow corn. A new food policy can counteract the problems caused by federal farm policy, but the formation of the new policy can benefit from the failure of the New York soda ban.

Historically, the public has acquiesced to paternalistic efforts intended to benefit public health. Many drugs cannot be purchased without a prescription from a doctor.⁵⁵ At the federal and state level, there have been taxes, restrictions, and even bans on many common activities like tobacco and marijuana smoking, alcohol consumption, and gambling.⁵⁶ Food manufacturers are required to print labels that include all ingredients and nutritional content.⁵⁷

In fact, New York City has previously been successful in paternalistic measures to improve public health. In 2006, the City enacted a law that banned trans-fats outright from New York restaurants, yet just as with the “soda ban,” the effort did not survive in courts.⁵⁸ In that case, the issue was whether the ban on trans-fats was preempted by federal law, and the federal court ruled against the legislation.⁵⁹ The law was amended so that it required restaurants to post the trans-fat contents of menu items.⁶⁰ The new version of the law survived challenge in federal court.⁶¹ The soda ban is similar to the ban on trans-fats that initially failed to survive. The two efforts share something distinct in common: both are complete bans on what restaurants are permitted to sell to customers, and therefore both efforts limit consumer choice. The amended trans-fat law served the same purpose as the absolute ban, albeit less efficiently, but the law survived after it was re-framed to expand consumer choice by providing more information at the purchase point.

Approaches that *expand* consumer choice by increasing information and increasing availability are more likely to garner public support and survive challenge in court. Nutrition labels provide information to consumers, enabling more informed choices. Subsidies to industries improve availability to consumers, which expands consumer options.

55. Richard B. Goetz & Karen R. Growdon, *A Defense of the Learned Intermediary Doctrine*, 63 FOOD & DRUG L.J. 421, 431-32 (2008).

56. See generally Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121 (2005).

57. Nutrition Labeling and Education Act, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

58. N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351 (S.D.N.Y. 2007).

59. *Id.*

60. N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, No. 08 CIV. 1000(RJH), 2008 WL 1752455 (S.D.N.Y. Apr. 18, 2008) *aff’d*, 556 F.3d 114 (2d Cir. 2009).

61. *Id.*

By increasing information, purchasing power, and availability, smart policies can help to provide consumers with more options, in contrast to policies that restrict consumer choice.

III. FOOD POLICY COUNCILS: IMPLEMENTING A NEW FOOD POLICY

Building on the lessons learned in New York, a new food policy should be centered on carefully articulated goals that expand consumer options. A new food policy should be directed toward achieving increased local production of fresh and healthy foods, increased availability of fresh and healthy foods to consumers, and education for consumers about the benefits of fresh and healthy foods. Formed at the state, regional, or municipal level, food policy councils are a vital tool for studying, lobbying for, and advocating on behalf of improved local food systems.

The first food policy council was created in 1982 in Knoxville, Tennessee.⁶² In the past three decades, the all-volunteer organization boasts many accomplishments.⁶³ The group has performed research and issued reports on food injustice, food insecurity, and nutrition in Knox County.⁶⁴ The council has lobbied to support the development of community gardens and public transportation to connect people with fresh and healthy food.⁶⁵ Additionally, they have worked to incorporate food policy issues into curriculum for the Knox County school system.⁶⁶ Since the inception of the Knoxville Food Policy Council, scores of councils have been formed with varying degrees of success throughout the country.⁶⁷ They have different forms, including relationships with academic institutions,⁶⁸ community volunteers,⁶⁹ or agencies with authority from the state.⁷⁰ They are an increasingly popular and effective tool for shaping the way our food is produced and purchased.

The full potential of Food Policy Councils is difficult to assess. There is no way to know how many Food Policy Councils have

62. Michael Tyler Dinwiddie, *Knoxville Knox County Food Policy Council*, KNOX CNTY. HEALTH DEP'T (Dec. 2012), available at <http://www.cityofknoxville.org/boards/food/summaryhistory.pdf>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Althea Harper, et al., *Food Policy Councils: Lessons Learned*, CMTY. FOOD SEC. COAL. (2009), available at <http://www.foodfirst.org/en/foodpolicycouncils-lessons>.

68. *Id.*

69. *Id.*

70. *Id.*

dissolved or disbanded, nor is there adequate information to assess the impacts councils have had on specific food systems. What we do have is a collection of case studies and experience that still points to a powerful overall trend. Citizens and neighborhoods have begun to directly influence the policies of their local food systems, creating a context in which equitable and sustainable alternatives for ensuring access to good, healthy food are allowed to flourish. Food Policy Councils, at least anecdotally, are changing the rules to encourage these alternatives to scale up into government, scale out geographically and “scale in” to local neighborhoods.⁷¹

A. *Successes*

Food procurement policies are a way for state and local governments to encourage organizations funded by the government, like schools or prisons, to purchase food from local sources.⁷² The Los Angeles Food Policy Council has had great success with its Good Food Purchasing Program. Since implementing this procurement policy, the Los Angeles Unified School District now purchases 70 percent of its food from local farmers.⁷³ Procurement legislation can be designed not only to promote local purchasing, but also to mandate high nutrition standards for governmental food purchases, as in the Massachusetts policy promulgated by executive order in 2009.⁷⁴

Food policy councils have pushed for state legislation and programs that are friendly to small farms. Efforts include preserving farmland where land is susceptible to residential or industrial development, enabling small farms to achieve food safety certification, and providing loans to small farms. The Connecticut Food Policy Council has been instrumental in securing funding for farmland preservation in Connecticut since 1999.⁷⁵ The Michigan Food Policy Council has

71. *Id.*

72. Local procurement policies do not run afoul of the dormant Commerce Clause (*see infra* notes 115-116 and accompanying text) because of the “market participant exception,” which allows the state to discriminate against out-of-state economic interests when it is operating as a participant in the marketplace. *South-Central Timber v. Winnicke*, 467 U.S. 82 (1984).

73. Anisha Hingorani, *Los Angeles Food Policy Council’s Good Food Purchasing Pledge*, FOOD DAY BLOG (Dec. 12, 2013), available at http://www.foodday.org/los_angeles_food_policy_council_s_good_food_purchasing_pledge.

74. Establishing Nutrition Standards for Food Purchased and Served State Agencies, Mass. Exec. Order No. 509 (Jan. 9, 2009), available at <http://www.mass.gov/governor/docs/executive-orders/executive-order-509.pdf>.

75. Working Lands Alliance, *Plowing Ahead: Farmland Preservation in 2010 and Beyond*, AM. FARMLAND TRUST (Mar. 2010), available at <http://workinglandsalliance.org/pages/documents/PlowingAhead-FarmlandPreservationin2010andBeyondWhitePaper.pdf>.

recently recommended that the state food safety program be adjusted to accommodate small-scale farms that are unable to comply with regulations that are designed for larger agricultural operations.⁷⁶ The Food Bank of North Alabama, a nonprofit organization with a food policy arm, sponsors the Hiatt Loan Fund, which helps small-scale entrepreneurs and new farmers get started to encourage local food production.⁷⁷ Thriving small farms are a necessary component of a strong local food system.

Access to fresh and healthy food is an important area where food policy councils can have a substantial impact. For example, the Knoxville-Knox County Food Policy Council initiated a “grocery bus” program that helps transport people from the places where they live to the locations where healthy and affordable foods are sold.⁷⁸

Changes to zoning are sometimes necessary for community gardens and urban agriculture initiatives to be successful. Often, zoning laws from the middle of the twentieth century do not conceive of modern food systems issues, and the outdated legislation stands in the way of policy development. In Ohio, the Cleveland-Cuyahoga County Council successfully lobbied for a change to local zoning laws, creating an Urban Garden District in the city of Cleveland.⁷⁹ In 2013, Detroit updated its zoning ordinance to include provisions to make urban agriculture more feasible in the city.⁸⁰ Efforts to change outdated zoning laws are an important function of food policy councils.

This is only a small sample of the progress that food policy councils have made throughout the country.⁸¹ As a burgeoning form of local governance, food policy councils have tremendous potential to change the way Americans engage with the food system.

B. Roadblocks

While food policy councils offer innovative solutions to problems

76. *Report of Recommendations*, MICH. FOOD POL’Y COUNCIL (Sept. 2013), available at http://www.michigan.gov/documents/mfpc/Michigan_Food_Policy_Council_Full_Report_FINAL_437367_7.pdf.

77. FOOD BANK OF N. ALA., <http://fbofna.org/Hiatt%20Loan%20Fund.aspx>.

78. Dinwiddie, *supra* note 62.

79. Dustin Brady, *Councilman Introduces First Zoning Designation for Community Gardens*, PLAIN PRESS (Nov. 2007), available at <http://www.nhlink.net/plainpress/html/stories/2007-09/councilmanintroducesnewzoning.htm>.

80. City of Detroit Urban Agriculture Ordinance (Apr. 2013), http://www.detroitmi.gov/Portals/0/docs/legislative/cpc/pdf/Urban%20Ag%20Ordinance%20Abridged_Apr2013.pdf.

81. Harper, *supra* note 67.

created by modern federal farm policy, there are impediments to the ability for these councils to succeed in accomplishing their goals. Legal hurdles, political inefficacy, industry backlash, and consumer apathy all must be overcome in order for a food policy council to be effective.

Federal regulatory authority over the agriculture industry is pervasive and it preempts some efforts for local regulation.⁸² In 2010, California enacted legislation requiring the immediate euthanization of nonambulatory livestock (animals that are unable to walk) at slaughterhouses in order to protect the health of consumers and the dignity of animals.⁸³ The law was invalidated by the Supreme Court because it was preempted by federal meat safety standards.⁸⁴ Moreover, recent amendments to the Nutrition Labeling and Education Act have explicitly preempted state efforts to regulate menu labeling requirements at restaurants.⁸⁵ Ambitious food policy councils may find that federal and even state laws preempt legislative efforts to improve local food systems.

An important example of the clash between municipal, state, and federal authority arises in the context of *food sovereignty* laws. At least ten towns in the state of Maine, led by the Town of Sedgwick in 2011, have passed food sovereignty laws that explicitly “exempt” residents from federal and state food production and sales laws.⁸⁶ But these laws are unlikely to protect producers and purchasers of food from penalties for noncompliance because food sovereignty laws are preempted by federal and state regulation.⁸⁷

Because food policy councils have existed only a few decades, there is naturally doubt surrounding their potential efficacy, resulting in an understandable lack of political will. Hesitation on the part of legislators and voters must be overcome by visible success stories now that the presence of the councils is almost ubiquitous.⁸⁸ Backlash from

82. See *infra* notes 115-116 and accompanying text for constitutional barriers to local regulation of agriculture.

83. Nat'l Meat Ass'n v. Harris, 132 S.Ct. 965 (2012).

84. *Id.*

85. Michael P. Fairhurst, *Traffic Light Labeling on Restaurant Menus: A Call for the Communication of Nutrition Information Through Color-Coded Prices*, 16 QUINNIPIAC HEALTH L.J. 1, 11 (2013).

86. See Maria Godoy, *Farm Free or Die! Maine Towns Rebel Against Food Rules*, NPR (Jun. 21, 2013), available at <http://www.npr.org/blogs/thesalt/2013/05/28/186955163/farm-free-or-die-maine-towns-rebel-against-food-rules>.

87. Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65 ME. L. REV. 789 (2013).

88. See *Interactive Map of Food Policy Councils*, available at <https://maps.google.com/maps/ms?msid=213555848782270380380.0004729d8ff3817adc166&msa=0>.

the agriculture industry and other actors in the food supply chain is inevitable, but careful policymaking and diligent defense of new policy can defeat the most aggressive challengers. Consumer attitudes will become increasingly supportive when the benefits of a new food policy become apparent within their communities. There are political impediments to the implementation of any policy, and food policy is no different, so food policy councils must be prepared to work tirelessly to garner political will.⁸⁹

C. Funding

Perhaps the biggest impediment to success for food policy councils is funding. Currently, most members of food policy councils are volunteers. The work that they do generally receives only minimal financial support from state governments.⁹⁰ Nonprofit organizations have been known to raise money for projects or programs, but broad policy changes require a lot more than what is currently available.

Recently, the federal government has provided funding to food policy initiatives in the form of block grants, which have helped advocates in New Orleans,⁹¹ Madison,⁹² and Marquette,⁹³ to name a few, implement plans that increase community access to fresh and healthy foods that are locally produced. These grants demonstrate that funding for local food policy is taken seriously by the federal government. Governmental entities are beginning to take notice of the profound benefits that come along with developing a new food policy, but the funding must increase if sweeping changes to our food systems are going to be possible.

IV. BENEFITS OF A PARALLEL ALTERNATIVE FOOD POLICY

Federal farm policy developed as a reaction to dire conditions

89. Harper, *supra* note 67.

90. Molly M. Hatfield, *City Food Policy and Programs: Lessons Harvested From an Emerging Field*, CITY OF PORTLAND, OR. BUREAU OF PLAN. & SUSTAINABILITY 13 (Oct. 2012), available at <http://www.portlandoregon.gov/bps/article/416389>.

91. Mike Cantor, *Developing a Food Policy Council: An Example from New Orleans*, THE NEW ORLEANS FOOD POL'Y ADVISORY COMM. (2010), available at http://repsscottsimon.com/yahoo_site_admin/assets/docs/Developing_a_Food_Policy_Council.340164707.pdf.

92. Kailee Neuner, et al., *Planning to Eat? Innovative Local Government Plans and Policies to Build Healthy Food Systems in the United States*, UNIV. OF BUFFALO FOOD SYS. PLANN. & HEALTHY COMMUNITIES LAB (Sep. 2011), available at http://www.bnmc.org/wp-content/uploads/HKHC-Policy-Brief-3_Food-National-Best-Practices.pdf.

93. *USDA Announces Farmers Market Grants for Michigan*, U.S. DEPT. OF AGRIC. (Oct. 26, 2010), <http://www.usda.gov> (search title or "Release No. 0564.10").

resulting from the Great Depression and the Dust Bowl.⁹⁴ Laws were enacted to ensure that farmers could produce adequate food for the nation and to ensure that farming was economically viable.⁹⁵ In modern times, the policy tends to benefit larger farming operations and the number of small farms is dwindling.⁹⁶ Criticism of the federal farm policy is well documented.⁹⁷ The current federal policy fails because it is structured around the *farm industry*, thus it is not truly a *food policy*.⁹⁸ Blind support for the farming industry made sense at a time when over twenty percent of the population was farming.⁹⁹ People were more intimately involved with the production of their food. Now we have limited involvement with how our food is produced and it is grown by only two percent of the population.¹⁰⁰ Meanwhile, the powerful industrial agriculture lobby has successfully hidden the true costs of food production from the public¹⁰¹ and federal farm policy is a creature of that industry.¹⁰²

Today, it is important to think about food security and sustainable production. Increasing population and climate change mean that access to cheap and abundant food is no longer a certainty.¹⁰³ We need to act now to develop policy that will support our future needs and mitigate the harms caused by industrial agricultural practices. The benefits of developing such a policy extend far beyond reduced Medicare

94. William S. Eubanks II, *A Brief History of U.S. Agricultural Policy and the Farm Bill*, in *FOOD, AGRICULTURE AND ENVIRONMENTAL LAW* (Mary Jane Angelo, Jason J. Czarnezki & William S. Eubanks II 2013).

95. *Id.*

96. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods,"* 33 *HAMLIN J. PUB. L. & POL'Y* 49, 56 (2011).

97. See, e.g., William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 *STAN. ENVTL. L.J.* 213 (2009).

98. See Institute for Agriculture & Trade Policy, *Food Without Thought: How U.S. Farm Policy Contributes to Obesity* (Nov. 2006), available at <http://www.nffc.net/Learn/Fact%20Sheets/Obesity%20and%20Ag.pdf>.

99. *Growing a Nation: The Story of American Agriculture*, AGRIC. IN THE CLASSROOM, <http://www.agclassroom.org/gan/timeline/1930.htm>.

100. *Ag 101: Demographics*, U.S. ENVTL. PROT. AGENCY, (last updated Apr. 15, 2013), <http://www.epa.gov/oecaagct/ag101/demographics.html>.

101. *Hidden Costs of Industrial Agriculture*, UNION CONCERNED SCIENTISTS (last updated Aug. 24, 2008), http://www.ucsusa.org/food_and_agriculture/our-failing-food-system/industrial-agriculture/hidden-costs-of-industrial.html.

102. See Lauren Etter & Greg Hitt, *Farm Lobby Beats Back Assault on Subsidies*, *WALL ST. J.* (Mar. 27, 2008), <http://online.wsj.com/article/SB120657645419967077.html>.

103. Margaret Sova McCabe & Joanne Burke, *The New England Food System in 2060: Envisioning Tomorrow's Policy Through Today's Assessments*, 65 *ME. L. REV.* 549 (2013).

expenditures.¹⁰⁴ The following sections include a cursory look at some of these benefits.

A. *Human Health*

Better nutrition reduces obesity and diabetes.¹⁰⁵ But better nutrition also increases lifespan and quality of life.¹⁰⁶ It makes people happier and more productive.¹⁰⁷ Consuming foods produced in a sustainable manner is healthier because there is a lower incidence of pesticides in sustainably produced food.¹⁰⁸ Limiting the use of antibiotics benefits human health because overuse has caused resistant bacteria to develop, creating fear among scientists that antibiotics will no longer be effective.¹⁰⁹ Currently, antibiotics are not regulated by the Environmental Protection Agency (“EPA”) under the Clean Water Act,¹¹⁰ and little is being done to curb the overuse of antibiotics in meat production.¹¹¹

B. *Environment*

The environment would also benefit from a shift toward more sustainable farming practices.¹¹² Environmental harm is certainly sometimes caused by small farms, but a manure spill from a small farm causes far less harm than a spill from a large farm.¹¹³ To the extent that

104. See *supra* notes 6-21 and accompanying text.

105. Eloisa C. Rodriguez-Dod, *It's Not A Small World After All: Regulating Obesity Globally*, 79 MISS. L.J. 697 (2010).

106. Daniela Schlettwein-Gsell, *Nutrition and the Quality of Life: The Outcome of Nutritional Intervention?*, 55 AM. J. CLINICAL NUTRITION 1263 (1992), available at <http://ajcn.nutrition.org/content/55/6/1263S.full.pdf>.

107. See John Strauss, *The Impact of Improved Nutrition on Labor Productivity and Human Resource Development: An Economic Perspective*, in THE POLITICAL ECONOMY OF FOOD AND NUTRITION POLICIES 1, 1-22 (Baltimore: Johns Hopkins Press, 1993), available at <http://www.ifpri.org/sites/default/files/pubs/pubs/books/ppa93/ppa93ch10.pdf>.

108. Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in A Changing Global Environment*, 17 GEO. MASON L. REV. 593 (2010).

109. Nancy E. Halpern, *Antibiotics in Food Animals: The Convergence of Animal and Public Health, Science, Policy, Politics and the Law*, 14 DRAKE J. AGRIC. L. 401 (2009).

110. See *EPA Inaction in Identifying Hazardous Waste Pharmaceuticals May Result in Unsafe Disposal*, Report No. 12-P-0508 (May 25, 2012), available at <http://www.epa.gov/oig/reports/2012/20120525-12-P-0508.pdf>.

111. Peter Lehner, *FDA Still Dragging its Feet on Antibiotics in Animal Feed*, AM. COLL. OF ENVTL. LAW. (Nov. 13, 2012), <http://www.acoel.org/post/2012/11/13/FDA-Still-Dragging-Its-Feet-on-Antibiotics-in-Animal-Feed.aspx>.

112. Mary Jane Angelo, *The Environmental Impacts of Industrial Fertilizers and Pesticides*, in FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW (Mary Jane Angelo et al. eds., 2013).

113. *Facts About Pollution from Livestock Farms*, NAT.RES. DEF. COUNCIL (last updated Feb. 21, 2013), <http://www.nrdc.org/water/pollution/ffarms.asp>.

environmental regulations are unable to prevent all farming incidents that adversely affect water quality, the harm caused by small farms is more manageable.

C. *Economy*

Local economies will benefit from increased local food production. When food is purchased from local producers, the money spent is reinvested in the community, rather than going to support agribusiness in other parts of the country.¹¹⁴ However, it is important that policy advocates avoid framing the issue as one of economic protectionism.¹¹⁵ Courts are likely to thwart efforts to improve the local economy by discriminating against extraterritorial industry.¹¹⁶

D. *Social Justice*

The poorest members of a community will have better access to healthy and fresh food if it is produced locally.¹¹⁷ Programs that double the value of food stamps at farmers markets have been very successful in uniting the local foods movement with ideals of food justice.¹¹⁸ Poor nutrition is closely related to poverty, and there is a close association between poverty and insufficient access to fresh and healthy food products.¹¹⁹ Because of the social benefits that come with localized production of food, it is unconscionable that a local food policy would not be developed where there is a community suffering from lack of access. Urban farming initiatives have successfully taken steps to ensure that all members of a community have access to fresh and healthy food.¹²⁰

114. See Sarah DeWeerd, *Local Food: The Economics*, Jul./Aug. WORLD WATCH 20 (2009), available at <http://www.sustainlv.org/wp-content/uploads/Local-Food-WorldWatch.pdf>.

115. See Chris Erchull, *The Dormant Commerce Clause: A Constitutional Barrier to Sustainable Agriculture and the Local Food Movement*, 36 W. NEW ENG. L. REV. 371, 402-03 (2014).

116. *Id.*

117. See Emily Broad Leib, *Urban Agriculture Alleviates the Effects of Poverty*, NASHVILLE METRO. SOC. SERV., available at http://www.nashville.gov/portals/0/SiteContent/SocialServices/docs/UrbanAgricultureInLowIncomeComm_1209.pdf.

118. *Double Value Coupon Program (DVCP)*, WHOLESOME WAVE, <http://wholesomewave.org/dvcp/>.

119. Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL'Y 17, 24 (2013).

120. See Emily Broad Leib, *Urban Agriculture Alleviates the Effects of Poverty*, NASHVILLE METRO. SOC. SERV., [/http://www.nashville.gov/portals/0/SiteContent/SocialServices/docs/UrbanAgricultureInLowIncomeComm_1209.pdf](http://www.nashville.gov/portals/0/SiteContent/SocialServices/docs/UrbanAgricultureInLowIncomeComm_1209.pdf).

E. *Labor Conditions*

Labor conditions on large industrial farms are often atrocious.¹²¹ Local governments can regulate labor on a local farm, whereas consumers of food from out of state farms do not have control over labor conditions where the food is produced. Furthermore, there is not broad visibility to conditions on industrial farms because the farms are not connected to the communities they serve.¹²² Consumers are in a better position to demand acceptable labor conditions when the farm is part of the community.

F. *Animal Treatment Standards*

In a similar manner, states can regulate livestock to meet the standards of the community.¹²³ There is almost no transparency about the treatment of livestock at large-scale industrial farming operations, and the information we have suggests that the treatment of animals is often deplorable.¹²⁴ It is true that a small farm within a community might also employ cruel or inhumane practices, but there is more transparency within the community.¹²⁵ Consumers of locally produced food are in a position to demand ethical treatment for animals that meets community standards.

G. *Food Security*

Regional food security will improve when communities are more capable of producing food for themselves.¹²⁶ This is important for the poorest members of any community,¹²⁷ and it is also important for the community at large, especially in emergency situations. A weather event can prevent food from entering or leaving an area for an extended period of time, and a stable local food supply could become crucial under those circumstances.¹²⁸ Climate change may make it more necessary for communities to be able to produce enough food to compensate for

121. Megan Galey & A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J.L. & POL'Y 3, 10 (2012).

122. *Id.*

123. See Pamela Vesilind, *Animal Husbandry Redux: Redefining "Accepted Agricultural Practices" for Locally Sourced Foods*, 28-FALL NAT. RES. & ENV'T 37 (2013).

124. *Id.*

125. *Id.*

126. Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward A Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENVTL. L. REV. 493 (2011).

127. *Id.*

128. *Id.*

agricultural disasters.¹²⁹ The summer of 2012 brought the most severe drought the nation has seen in decades, resulting in a terrible season for many of the crops on which we depend for food. Whether or not this specific drought was caused by climate change, the International Panel on Climate Change predicts that climate change will bring a higher incidence of drought,¹³⁰ which will impact agricultural production worldwide.¹³¹ If the entire nation depends on food grown in the western part of the country, then we face a serious risk of food insecurity if drought reduces agricultural production for an extended period of time.¹³² However, if all regions across the country produce a substantial proportion of local demand, then the effect of drought in one region within the country will be mitigated.¹³³

H. *Contribution to Climate Change*

The agricultural industry is responsible for a large portion of the U.S. carbon footprint.¹³⁴ Transportation of agricultural products alone results in substantial greenhouse gas output. Small farms tend to operate less efficiently, proving that large farms provide some environmental benefit. On the other hand, when planning carefully, a community can encourage small farms to produce food in a manner consistent with the community values. If those values include sustainable energy practices, then the carbon footprint of local food production can be much better than that of industrial output.

V. ECONOMIC BENEFITS OF ENVIRONMENTAL REGULATION

The connection between public health and environmental regulation is clear.¹³⁵ The promulgation of environmental laws in the 1970s was largely geared toward protecting human health by removing hazardous substances from our surroundings.¹³⁶ Those who oppose environmental

129. Mary Jane Angelo, *Building A Sustainable and Resilient Agricultural System for A Changing Global Environment*, 43 ENVTL. L. REP. NEWS & ANALYSIS 11079 (2013).

130. IPCC, CLIMATE CHANGE 2007: SYNTHESIS REPORT 53 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

131. Mary Jane Angelo, *Building A Sustainable and Resilient Agricultural System for A Changing Global Environment*, 43 ENVTL. L. REP. NEWS & ANALYSIS 11079 (2013).

132. *Id.*

133. *Id.*

134. Mary Jane Angelo, *Into the Future: Building a Sustainable and Resilient Agricultural System for a Changing Global Environment*, in FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW (Mary Jane Angelo, Jason J. Czarnetzki, and William S. Eubanks II 2013).

135. Robin Kundis Craig, *The Public Health Aspects of Environmental Enforcement*, 4 PITT. J. ENVTL. PUB. HEALTH L. 1 (2010).

136. *Id.*

regulation often argue that the cost of compliance outweighs the benefit to human health,¹³⁷ but evidence suggests that the nation has benefitted economically from environmental regulation. In fact, the EPA recently released a study that shows that the Clean Air Act has had economic benefits that outweigh the costs of implementation.¹³⁸

The economic benefits of environmental regulation do not end with air quality. Eutrophication of waterways, primarily due to agricultural runoff, costs billions of dollars to the public each year.¹³⁹ Nitrogen and phosphorous from fertilizers and pesticides have caused “dead zones” to form in water bodies worldwide, including the Gulf of Mexico and the Chesapeake Bay, where large algal blooms are wreaking havoc on aquatic life.¹⁴⁰ This issue is of paramount importance to critics of industrial agricultural practices.¹⁴¹

While it is true that some of the harm caused by eutrophication is due to the operations of small farms serving local communities,¹⁴² state governments are well positioned to regulate the use of chemical pesticides and fertilizers within their borders. Additionally, state governments can mandate adequate waste management systems for local livestock producers. The state has the ability to monitor regional water quality and adjust regulations and oversight to reduce contamination.¹⁴³

Aside from nitrogen and phosphorous, there are other water pollutants that generally originate from industrial farming operations, including hormones, antibiotics, e-coli, and salmonella that impact the environment and human health.¹⁴⁴ The hidden health costs of all of this

137. Robert V. Percival, *Protecting Coastal and Estuarine Resources-Confronting the Gulf Between the Promise and Product of Environmental Regulation*, 47 MD. L. REV. 341, 351 n.49 (1988).

138. *The Clean Air Act and the Economy*, U.S. ENVTL. PROT. AGENCY (last modified Aug. 15, 2013), <http://www.epa.gov/air/sect812/economy.html>.

139. Walter K. Dodds et al., *Eutrophication of U.S. Freshwaters: Analysis of Potential Economic Damages*, 43 ENVTL. SCI. & TECH. 12 (2008), available at <http://www.k-state.edu/doddslab/journalarts/dodds%20et%20al%20est%202009.pdf>.

140. See Chris Erchull, *Examining the CWA Agricultural Exemption*, 27 WTR NAT. RES. & ENV'T 57 (2013).

141. Jeremy S. Scholtes, *The Siren Sounds for Nitrogen*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10253 (2008).

142. Evan Witek & Amanda King, *Veil of the Valley: A Soiled Past, A Natural Future*, BEAVER CNTY. TIMES (Apr. 30, 2013), http://www.timesonline.com/veilofthevalley/veil-of-the-valley-a-soiled-past-a-natural-future/article_dbc9f1c8-b20e-11e2-97a5-0019bb30f31a.html.

143. Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 ENVTL & ENERGY L. & POL'Y J. 63 (2011).

144. Carrie Hribar, *Understanding Concentrated Animal Feedlot Operations and Their Impact on Communities*, NAT'L ASS'N OF LOC. BD. OF HEALTH (2010), available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

pollution are difficult to quantify.¹⁴⁵ But as we have learned from the Clean Air Act, the costs required to mitigate environmental harms are outweighed by the benefits to human health. Congress should take notice of the public cost savings associated with policies that benefit the environment. It is further evidence that the federal government should sponsor an alternative food policy.

VI. LOCAL FOOD POLICY COUNCILS: SEEKING THE FEDERAL GOVERNMENT'S BLESSING

Federal policy with respect to agriculture is unlikely to undergo a dramatic shift overnight. For nearly a century, Congress has controlled farm policy through the federal Farm Bill. But there is also room for a parallel policy wherein the federal government permits local food policy development and provides funding for a new infrastructure.

A. *The Farm Bill*

The first Farm Bill, known as the Agricultural Adjustment Act of 1933, was enacted in the midst of the Great Depression and the Dust Bowl. It introduced subsidies into the U.S. agriculture system, which were “well-intentioned at the outset,” but “gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers.”¹⁴⁶ Seventy years later, the Farm Bill is much more complicated and in modern times it is deeply embedded in American politics and the economy. Drastic changes to the legislation at this point in time could have grave consequences because of this interdependency. In fact, dependence on U.S. agriculture policy is not limited to this country—it extends throughout the world.¹⁴⁷

The Farm Bill is laden with perverse incentives to produce corn and other cash crops that have contributed to the obesity epidemic.¹⁴⁸ But there are also beneficial aspects to the policy. These aspects include efficiently produced food products, land conservation efforts, worker

145. John Ikerd, *Who Pays the Cost of Water Pollution and Depletion?*, (May 18, 2013), <http://web.missouri.edu/~ikerdj/papers/Wisconsin%20-%20Water%20Pollution%20Depletion.htm>.

146. See William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 219 (2009).

147. *A Fair Farm Bill for the World*, INST. FOR AGRIC. & TRADE POL'Y (Mar. 2007), available at http://www.iatp.org/files/258_2_97624.pdf.

148. See Anthony Kammer, *Cornography: Perverse Incentives and the United States Corn Subsidy*, 8 J. FOOD L. & POL'Y 1, 31 (2012).

protections, and more.¹⁴⁹ To argue for its absolute demise would be misguided.

To hope for reforms that support small-scale farming and local food production is unrealistic, at least in the short term. Congress has been at a virtual standstill in recent history, and the likelihood for bipartisan support of major changes is not feasible. The current Farm Bill was set for renewal in 2012 and Congress has not been successful in making progress toward a new version. Our nation's food system would benefit from a delegation of power away from the federal government and its outdated agriculture policy. A return to pre-Depression state control over food policy may be the most sensible option available right now in a time of health crisis, food insecurity, social injustice, and climate change.¹⁵⁰

B. *Parallel Policies*

Federal agricultural policy can co-exist with a new food policy. The current dominant policy can continue to support the production of cash crops and grains for processed food products. But the federal government has a responsibility to counteract the harmful impacts of the old policy, not only for the health and welfare of the public, but also because it would be irresponsible to forego the economic benefits of a new policy. Implementing a new policy now would save money in the future by preventing disease and environmental harm. While a new policy that favors localized food production might result in economic injury to industrial agriculture operations, business will adapt to changes in policy and the argument against change can be applied to any policy that affects any industry.

C. *Congressional Approval and Funding*

Perhaps the most persuasive argument is that the beneficial reforms proposed here will take little action from Congress. The role of the federal government in a new food policy should consist of only two steps: empowering local food policy councils to develop policy and funding the work of food policy councils.

If Congress provided explicit statutory approval to food policy

149. See *Success in the 2008 Farm Bill: A New Direction for Farm and Food Policy*, AM. FARMLAND TR. (2008), <http://www.farmland.org/programs/farm-bill/analysis/documents/AFT-2008-Farm-Bill-brochure-August2008.pdf>.

150. "[T]he supervision of agriculture . . . [is] proper to be provided for by local legislation . . ." Margaret Sova McCabe, *Reconsidering Federalism and the Farm: Toward Including Local, State and Regional Voices in America's Food System*, 6 J. FOOD L. & POL'Y 151, 151 (2010) (quoting THE FEDERALIST NO. 17, at 118 (Alexander Hamilton)).

2015]

AN ALTERNATIVE FOOD POLICY

25

councils to act within the parameters discussed in this article, then there would be no risk of preemption for legislative efforts to improve local food systems. Moreover, if Congress provides funding to food policy councils, the money will be recovered in subsequent years as public health improves and local economies become more robust. Mayor Bloomberg and the NYCHD promulgated the ban on large containers of soda for the same reason: the benefits are clear. Popular support for strengthening local food systems is growing and the federal government must take advantage of the opportunity to allow a new vision of food policy to flourish.