

# FOOD CHOICE AND FUNDAMENTAL RIGHTS: *A PIECE OF CAKE OR PIE IN THE SKY?*

*Kammi L. Rencher\**

## INTRODUCTION: A CONTROVERSY OVER SPILLED MILK

On October 15, 2009, Georgia officials were waiting at the state line for Eric Wagoner as he drove his truck across from South Carolina.<sup>1</sup> In the back, he carried 110 gallons of fresh, unpasteurized, non-homogenized milk (commonly known as “raw milk”) from a Grade A dairy in South Carolina.<sup>2</sup> Although in Georgia it is legal to drink raw milk, raw milk sales are illegal.<sup>3</sup> Wagoner, an agent of the Athens Locally Grown virtual farmers’ market (ALG), was transporting the milk, legally purchased in South Carolina, to ALG members in Georgia.<sup>4</sup> Georgia officials searched and seized Wagoner’s truck, and then embargoed it—without a warrant.<sup>5</sup> Four days later, without affording any legal process to Wagoner or ALG members, the Food and Drug Administration (FDA) and Georgia officials destroyed the milk.<sup>6</sup>

It sounds silly: hunting down raw milk as if it were cocaine. However, this was not the first such raid. In a 2006 “sting operation,” officials stopped another man on his way from Indiana to Michigan with \$7,000 worth of raw dairy in his truck.<sup>7</sup> The driver, Richard Hebron, ran a Michigan farming cooperative and brought raw dairy to co-op members in Ann Arbor.<sup>8</sup> Officials took the cargo, Hebron’s wallet and cell phone,<sup>9</sup> and later his business files and computer, and searched both his home and the gourmet food store where he

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\* J.D. candidate, 2012, William S. Boyd School of Law. I would like to thank the many people who have supported this Note and given invaluable feedback, especially Professor Bret C. Birdsong, Bracken Longhurst, Ryan Henry, and Karolee Talbot.

<sup>1</sup> Complaint at 8, Farm-to-Consumer Legal Def. Fund v. U.S. Dep’t of Health & Human Servs., 734 F. Supp. 2d 668 (N.D. Iowa 2010) (No.5:10-cv-04018-MWB), <http://www.farmtoconsumer.org/litigation-FDA.htm#documents>.

<sup>2</sup> *Id.* at 8–9.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 7–8.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> In Michigan, it is illegal to sell raw dairy, although it is legal to consume raw milk. DAVID E. GUMPERT, *THE RAW MILK REVOLUTION: BEHIND AMERICA’S EMERGING BATTLE OVER FOOD RIGHTS* 8, 11 (2009) [hereinafter GUMPERT, *RAW MILK REVOLUTION*]; Wendy Cole, *Got Raw Milk? Be Very Quiet*, *TIME* (Mar. 13, 2007), <http://www.time.com/time/health/article/0,8599,1598525,00.html>.

<sup>8</sup> GUMPERT, *RAW MILK REVOLUTION*, *supra* note 7, at 8 (2009); Cole, *supra* note 7.

<sup>9</sup> GUMPERT, *RAW MILK REVOLUTION*, *supra* note 7, at 8.

distributed his products.<sup>10</sup> The Michigan Department of Agriculture had planned the sting operation following reports that Hebron's raw milk was behind an illness outbreak.<sup>11</sup> However, officials never found any evidence of pathogens in the milk.<sup>12</sup> A reporter later uncovered that only sketchy evidence linked raw milk to the illnesses in the first place, and that pasteurized milk, not raw milk, was likely to blame.<sup>13</sup>

In February of 2010, the Farm-to-Consumer Defense Fund (the Fund), an Ohio non-profit organization, filed suit against the U.S. Department of Health and Human Services (HHS) and the FDA on behalf of Eric Wagoner and the ALG.<sup>14</sup> In its complaint, the Fund stated that it “defends and protects the right of farmers to directly provide, and for consumers to directly obtain, unprocessed and processed farm foods.”<sup>15</sup>

In its response, the government skirted the issue of interstate travel with legally purchased raw milk<sup>16</sup> and noted that health authorities have extensive power to protect the public from communicable disease<sup>17</sup>—even to the point of instituting an *intrastate* ban on a food item.<sup>18</sup> In their motion to dismiss, the FDA and HHS stated:

there is no ‘deeply rooted’ historical tradition of unfettered access to foods of all kinds. . . . Plaintiff’s assertion of a ‘fundamental right to their own bodily and physical health, which includes what foods they do and do not choose to consume for themselves and their families’ is similarly unavailing because plaintiffs do not have a fundamental right to obtain any food they wish.<sup>19</sup>

The Fund replied, contending both that food choice is an inalienable right and that the FDA's crackdown on interstate travel of raw milk is arbitrary and capricious—especially given that the reason behind the crackdown is safety, although so many dangerous foods and items are allowed in interstate commerce.<sup>20</sup> It was also skeptical that raw milk can create communicable diseases, and suggested that government officials irrationally presume all raw milk is dangerous.<sup>21</sup> The Fund argued that “the right to privacy includes the right to consume for oneself and one’s family the foods of choice. . . .”<sup>22</sup>

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *Id.* at 20–23. Furthermore, some suggest that the government’s blaming raw milk for illness is becoming something of a habit. *Id.* at 35 (see pages 33–34 for specific examples).

<sup>14</sup> Complaint, *supra* note 1, at 7–10 (describing the incident).

<sup>15</sup> *Id.* at 11.

<sup>16</sup> Brief in Support of United States’ Motion to Dismiss Plaintiff’s Amended Complaint at 3, 18, Farm-to-Consumer Legal Def. Fund v. U.S. Dep’t. of Health & Human Servs., 734 F. Supp. 2d 668 (N.D. Iowa 2010) (No.5:10-cv-04018-MWB).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 26.

<sup>20</sup> See Plaintiffs’ Brief in Support of Resistance to Defendant’s Motion to Dismiss at 37 (and generally 28–66), *Farm-to-Consumer Legal Def. Fund*, 734 F. Supp. 2d 668 (No.5:10-cv-04018-MWB) (noting that knives, axes, cigarettes, alcohol, and medicines could also be considered “potentially dangerous products.”).

<sup>21</sup> *Id.* at 36–37.

<sup>22</sup> *Id.* at 50.

So who is right? Is there a right to food choice, or is there no right at all? At first glance, the battle over raw milk may seem like an eccentric issue ultimately unimportant to the majority of Americans. However, it is a proxy for the much larger issue of the general right to food choice.<sup>23</sup> Food advocates ask: if the government has the final say based solely on what it believes is “safe” or “unsafe,” what else will the government regulate if advocates lose the battle over raw milk?<sup>24</sup>

This Note will explore some of the issues behind the question of food choice as a fundamental right. Because this area is too broad to sufficiently address in a short work, this Note will not attempt to establish that food choice is a fundamental right. Rather, it will measure food choice against established fundamental rights and explore potential arguments in favor of a right to choice of food. Section II will look briefly at food safety concerns and recommend that in light of the subjectivity of food safety, courts should consider other reasons for food choice when determining a person’s right to choice of food. Section III will look at some potential considerations, including food choice as control over health and as an expression of religion, culture, and self-identity, and as a form of speech. This Note ultimately concludes that while food choice may not be a fundamental right, it may still deserve some level of heightened protection.

#### THE SUBJECTIVITY OF SAFETY: HAVING THE CAKE AND EATING IT, TOO?

Congress enacted the Food, Drug, and Cosmetic Act to “protect the public health by ensuring that—foods are safe, wholesome, sanitary, and properly labeled.”<sup>25</sup> Clearly, food safety is central to the purpose of FDA regulation.<sup>26</sup> This is for good reason, as food adulteration was rampant before the 1906 Food and Drug Act<sup>27</sup> and continues to be a problem in modern America.<sup>28</sup>

Moreover, food adulteration cases continue to crop up in court. Situations include: wheat that was moldy and contaminated with insect larvae, rodent excreta, live insect infestations, and insect carcasses;<sup>29</sup> cheese which was prepared in a solution swimming with dead flies, left sitting out with bugs on top, cut from moldy blocks, and housed in a factory full of dead insects, cobwebs, and dirt;<sup>30</sup> and a seafood-packing plant which packaged ready-to-eat seafood

<sup>23</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at xiii–xv. For example, fruit and vegetable juices are being pasteurized, as are almonds. *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> 21 U.S.C. § 393(b)(2) (2006).

<sup>26</sup> *Id.*

<sup>27</sup> *See The Fight Against Food Adulteration*, EDUC. IN CHEMISTRY, Mar. 2005, available at <http://www.rsc.org/Education/EiC/issues/2005Mar/Thefightagainstfoodadulteration.asp>.

<sup>28</sup> One recent example of food adulteration is the 2006 outbreak of illness that was traced to contaminated spinach. *See News & Events: Spinach and E. coli Outbreak*, U.S. FOOD & DRUG ADMIN. (Aug. 21, 2009), <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm179124.htm> (with a list of articles tracing the illness and actions taken to combat the outbreak).

<sup>29</sup> *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987).

<sup>30</sup> *United States v. Union Cheese Co.*, 902 F.Supp. 778, 780–81 (N.D. Ohio 1995). The company failed to recall the cheese, which tested positive for listeria, because it was poorly coded and sales could not be traced. *Id.*

that had been prepared on unwashed and unsanitary surfaces, stored in rooms full of mold, and handled by unclean hands.<sup>31</sup>

In light of such cases, few would argue against regulating food safety. However, beyond these obvious cases of unsafe food are situations where the concept of safety is very subjective. Is synthetic growth hormone (rBST/rBGH) in milk safe?<sup>32</sup> What about antibiotics in meat?<sup>33</sup> Heightened levels of polychlorinated biphenyls (PCBs) in farmed fish?<sup>34</sup> Genetically modified foods?<sup>35</sup> FDA-approved adulterants and hidden ingredients?<sup>36</sup> Foods grown with pesticides?<sup>37</sup> Debate abounds over whether such things are safe or toxic, but in the end, the debate boils down to whether food *is* safe,<sup>38</sup> not whether it *should* be safe. Given the debate, some theorists conclude that “food safety is as much a matter of politics as it is of science.”<sup>39</sup> This also leads to the paradox of banning a food based on a *presumption* that it is unsafe<sup>40</sup> when there are so many other obvious problems with the safety of America’s food.<sup>41</sup>

A quick study of raw milk illustrates this point. The FDA has long held that raw milk is so dangerous that it is akin to “playing Russian roulette with your health.”<sup>42</sup> Yet raw milk advocates counter that raw milk is healthy and that pasteurization kills healthful bacteria in the milk.<sup>43</sup> Proponents of raw milk

<sup>31</sup> United States v. Blue Ribbon Smoked Fish, 179 F.Supp. 2d 30, 35–36 (E.D.N.Y. 2001).

<sup>32</sup> MYRNA CHANDLER GOLDSTEIN & MARK A. GOLDSTEIN, FOOD & NUTRITION CONTROVERSIES TODAY: A REFERENCE GUIDE 87–96 (2009) (noting that while the manufacturers claim it is safe, some worry that the hormones may pass to human and may trigger an antibody response, that excess levels of the hormone may cause cancer, and that it significantly harms the health of the cow).

<sup>33</sup> TIM LANG & MICHAEL HEASMAN, FOOD WARS: THE GLOBAL BATTLE FOR MINDS, MOUTHS, & MARKETS 248–50 (2004) (noting the concern that an excess of antibiotics in meat may contribute to antibiotic resistance and generate “super bugs”).

<sup>34</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 64 (noting that farmed fish have a high level of PCBs and that experts disagree whether this level is harmful to humans).

<sup>35</sup> *Id.* at 106–10 (noting the debate over whether GMOs may cause unanticipated side effects or serious allergies as well as birth defects or cancer).

<sup>36</sup> *Id.* at 115–22 (noting concerns over the fact that insects and sawdust are both used in producing “natural flavorings”).

<sup>37</sup> *Id.* at 170–72 (noting that pesticides may cause nausea, nerve damage, cancer, Lou Gehrig’s disease, and even birth and immune system defects).

<sup>38</sup> MARION NESTLE, SAFE FOOD: BACTERIA, BIOTECHNOLOGY, AND BIOTERRORISM x (2003).

<sup>39</sup> *Id.* at xii.

<sup>40</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 20–24 (2009) (discussing how officials assumed raw milk was the culprit of an illness and prosecuted raw milk producer, even though evidence clearly suggested raw milk was not the cause).

<sup>41</sup> In an additional example, a little more than one percent of food imported from foreign countries is inspected. GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 127 (see 125–27 for examples of illness outbreaks that have stemmed from imported food). Of approximately 300 ports-of-entry, only about 90 have full-time food inspectors. *Id.* at 127. Furthermore, these food inspectors examine only the finished product, not individual ingredients, and even when a food is declared unsafe it is easy for the importer to simply change ports in order to get the food admitted. *Id.* at 127–28.

<sup>42</sup> John F. Sheehan, *Presentation: On The Safety of Raw Milk (with a word about pasteurization)* (powerpoint presentation), U.S. FOOD & DRUG ADMIN. (Nov. 3, 2005), <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ConsumerInformation/AboutMilkSafety/ucm165539.htm>.

<sup>43</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 94 (listing illnesses caused by pasteurized milk); Heidi Knapp Rinella, *In the Raw*, LAS VEGAS REV.-J., Jun. 17, 2009, at 1E.

advance hundreds of examples of raw milk improving health, and note that some individuals even depend upon raw milk for their health.<sup>44</sup> Proponents also point out that pasteurization does not mean the milk is safe—pasteurized milk may still contain harmful pathogens.<sup>45</sup> Yet the FDA consistently holds that raw milk's safety "is not a debatable issue,"<sup>46</sup> and maintains raw milk is extremely dangerous—although their information on contaminated raw milk combines statistics from all types of raw dairy, including cheese produced under known unsanitary conditions, milk intended for pasteurization (and therefore not subject to strict sanitary practices),<sup>47</sup> and cases where raw milk takes the blame by default.<sup>48</sup> Even taking the FDA's numbers into account, raw milk's contribution to foodborne illness is miniscule: from 1973 to 2005, an average of 54 persons per year were sickened by raw milk.<sup>49</sup> This number is minute when one considers that the CDC estimates 76 million people become ill each year from contaminated food.<sup>50</sup>

Furthermore, pasteurization does not guarantee milk's safety, despite the FDA's confidence in the process.<sup>51</sup> Instead, pasteurized milk sickens an average of over 600 people per year.<sup>52</sup> There are many documented outbreaks that have been traced back to pasteurized milk: 1983, when 49 people became ill and 14 died from listeria from milk that was contaminated before pasteurization;<sup>53</sup> 1985, when 16,000 people became ill with salmonella from pasteurized milk traced to a single dairy;<sup>54</sup> 1994, when 224,000 Americans became ill from salmonella traced to Schwan's ice cream;<sup>55</sup> 2006, when 1300 prisoners in California became ill with campylobacter from pasteurized milk;<sup>56</sup> and 2007, when three people were killed by listeria from contaminated pasteurized milk.<sup>57</sup> This begs the question: if pasteurized milk is not safer than raw milk, why are people denied the right to choose raw milk?

The scope of this Note is too narrow to sufficiently cover food safety debates, and it will not discuss this area in depth. Still, this debate is worth noting since whatever rights may exist regarding food choice will be measured

<sup>44</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 83–90.

<sup>45</sup> *Id.* at 94. Furthermore, proponents note many common diseases traced to raw milk have since been eradicated—a feat more likely accomplished by better sanitation generally, the modern sewage system, and vaccines, than by pasteurization. *Id.* at 18.

<sup>46</sup> *Id.* at 37.

<sup>47</sup> *Id.* at 116–17.

<sup>48</sup> See *supra* text accompanying notes 12–13.

<sup>49</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 119.

<sup>50</sup> *Id.* at 120.

<sup>51</sup> See 38 Fed. Reg. 27, 921 (Oct. 10, 1973) (to be codified at 21 C.F.R. pt. 18); Brief in Support of United States' Motion to Dismiss Plaintiff's Amended Complaint, *supra* note 16, at 8; Milk & Cream; U.S. FOOD & DRUG ADMIN., *Questions and Answers: Raw Milk* (Mar. 26, 2010), <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm122062.htm>.

<sup>52</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 119.

<sup>53</sup> *Id.* at 115 (noting the bacteria came from the dairy farms, and that the pasteurization process was not insufficient—suggesting that the bacteria had survived pasteurization).

<sup>54</sup> *Id.* at 115 (noting that number is likely underestimated; the final toll was probably 10 times that number).

<sup>55</sup> *Id.* (though in this case officials were not sure if milk or eggs were to blame).

<sup>56</sup> *Id.* at 115–16 (noting that contamination probably happened post-pasteurization).

<sup>57</sup> *Id.* at 116 (noting that the illness also caused an expectant mother to lose the fetus).

against the government's interest in food safety. In light of the subjectivity of food safety, this Note suggests that courts should look to additional considerations when determining a person's right to choose and access food. This Note will briefly explore some of the reasons behind food choice, namely food choice as control over health, as an expression of religious and cultural identity, and as a form of self-expression and speech.

#### FOOD RIGHTS: A CORNUCOPIA OF CONSIDERATIONS

People choose food for many different reasons, some of which may be comparable to established fundamental rights. This Note will first look at fundamental rights generally, then fundamental rights in the context of a few of the reasons behind food choice.

##### *Fundamental Rights*

A fundamental right is one that is deemed so important that the government cannot infringe upon that right without proving the necessity of doing so.<sup>58</sup> Some fundamental rights, such as the right to vote and freedom of speech, are either stated in or clearly implied by the Constitution or Bill of Rights, or have been applied to the states through selective incorporation.<sup>59</sup> Other rights are implied under the equal protection clause of the Fourteenth Amendment.<sup>60</sup> If a right is found to be fundamental, government infringement on that right is permitted only when the infringement is narrowly tailored to achieve a compelling state interest.<sup>61</sup> The fact that a right is fundamental does not mean that the state cannot interfere, but the interference must be necessary.<sup>62</sup>

Implied rights under the Fourteenth Amendment can stem from several tests. One test asks whether the right is "fundamental to the very existence and survival of the race"<sup>63</sup> or is a "vital personal right[ ] essential to the orderly pursuit of happiness by free men."<sup>64</sup> Another, the history or tradition test, asks whether the right at stake is "so rooted in the tradition and conscience of our

<sup>58</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792 (3d ed. 2006).

<sup>59</sup> See *Palko v. Connecticut*, 302 U.S. 319, 324–325 (1937) (asking whether the right is "implicit in the concept of ordered liberty"); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 206 (2007).

<sup>60</sup> See Farrell, *supra* note 59, at 206–07.

<sup>61</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); see also CHERMERINSKY, *supra* note 58, at 797. Furthermore, a fundamental right should not be unduly difficult to obtain. See *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971). Moreover, even if the right is not deemed fundamental, the government must still show its actions restricting that right were rationally related to a state goal. CHERMERINSKY, *supra* note 58, at 794. However, it is worth noting that some scholars theorize "strict scrutiny" is rarely used and almost never enforced. See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227–28 (2006).

<sup>62</sup> *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). This is particularly true when the state interferes with the parents' right to control the child's upbringing. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>63</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>64</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

people as to be ranked as fundamental.”<sup>65</sup> Meanwhile, a third test asks whether the government’s invasion of a personal liberty is so outrageous that it shocks the conscience.<sup>66</sup> Over the years, the Supreme Court has utilized these tests to recognize several implied fundamental rights, most of them dealing with control over one’s own body, health, or family.<sup>67</sup>

The Court has long recognized that “freedom of personal choice in matters of family life is a [protected] fundamental liberty interest.”<sup>68</sup> This area encompasses several rights and “denotes not merely freedom from bodily restraint but also the right of the individual to . . . generally . . . enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>69</sup> The Court has recognized the right to control the upbringing of one’s own children as a fundamental right ever since 1923, when the Supreme Court in *Meyer v. Nebraska* invalidated a state law prohibiting foreign language classes in schools.<sup>70</sup> Shortly thereafter, in 1925, the Court upheld an injunction stopping the state from forcing every child to receive an education at a public school.<sup>71</sup> The Court has also recognized the right to marry regardless of race,<sup>72</sup> the right to custody of children,<sup>73</sup> the right to procreate,<sup>74</sup> and the right to keep the family together.<sup>75</sup>

The right of privacy has also long been protected by the Court.<sup>76</sup> Included in the right of privacy are the rights to access contraceptives<sup>77</sup> and control reproduction,<sup>78</sup> and the right to abort a fetus prior to the age of viability<sup>79</sup>—even though these rights are not expressly set forth in the Constitution or Bill of Rights. The Court makes these exceptions because there is “a right of personal

<sup>65</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

<sup>66</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>67</sup> See *infra* text accompanying notes 69–85.

<sup>68</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing court cases that recognize the interest).

<sup>69</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>70</sup> *Id.* at 403.

<sup>71</sup> *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). In 2000, the court reaffirmed this concept, noting that a state act should not “unreasonably interfere[ ] with the liberty of parents and guardians to direct the upbringing and education of children under their control,” *id.* at 534–35, because “[t]he child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for [life].” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Furthermore, “the care, custody, and control of . . . children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].” *Id.*

<sup>72</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>73</sup> *Santosky*, 455 U.S. at 745.

<sup>74</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541.

<sup>75</sup> *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 505–06 (1977).

<sup>76</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right is a penumbral one—it is not directly articulated by the Bill of Rights, but is suggested by the existence of other rights. *Id.* at 484–85.

<sup>77</sup> See generally *Griswold*, 381 U.S. 479.

<sup>78</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>79</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. at 154. Note that in *Roe v. Wade*, the court focused on a woman’s right to avoid physical and psychological hardships that come with unwanted motherhood. *Id.* at 153.

privacy, or a guarantee of certain areas or zones of privacy, [that] does exist under the Constitution.”<sup>80</sup>

The Supreme Court has also suggested a right to bodily integrity. In *Rochin v. California*, the Court found “shock[ing to] the conscience” the actions of police officers who forcibly pumped a suspect’s stomach for drug evidence, and held these acts were unconstitutional.<sup>81</sup> The Court continues to use the “shocks the conscience” standard, though it is seemingly confined to cases of police brutality.<sup>82</sup> However, the Court has indicated that *Rochin* established a fundamental right to bodily liberty.<sup>83</sup>

Another fundamental right the Court has recognized is the right to be free from state interference in personal choices concerning health and medical care.<sup>84</sup> Thus, although the Court recognizes some limits to a person’s right to choose to consume certain substances,<sup>85</sup> the case law strongly suggests that there is an implied right to control of over health.

Taking all this into account, when considering whether something is a fundamental right, one may ask the following: 1) Is the right explicitly included in the Constitution? 2) Is it an important right? 3) Is it implied by the concept of ordered liberty? 4) Is it deeply rooted in America’s history and traditions? 5) Is it implied as necessary by the structure of either the government or the Constitution? 6) Is it necessary to access a governmental process? and 7) Has the Supreme Court previously identified or suggested that or a similar right?<sup>86</sup>

When it comes to food choice, a few of these implied rights can be ruled out from the start. Food choice is not explicitly included in the Constitution, and has little to do with ordered liberty. It is not implied as necessary by the structure of the government or the Constitution, and is not necessary to access a governmental process. However, is food choice an important right? One deeply rooted in American tradition? Or analogous to other identified fundamental rights?<sup>87</sup> Furthermore, how does the freedom of choice of food compare to

<sup>80</sup> *Roe*, 410 U.S. at 152. Likewise, “[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . .” *Eisenstadt*, 405 U.S. at 453 (emphasis omitted). The right to privacy may also be found in the third and fourth amendments. Though the third amendment, which generally disallows the quartering of soldiers in private homes, has not been the subject of much litigation, at least one circuit has recognized it as furthering the fundamental right to privacy in regards to the use and enjoyment of property. *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir.1982); see also Ann Marie C. Petrey, *The Third Amendment’s Protection Against Unwanted Military Intrusion*, 49 BROOK. L. REV. 857, 863–64 (1983). The fourth amendment, which protects citizens from unreasonable search and seizure, has been seen as promoting the right of privacy. *Katz v. United States*, 389 U.S. 347, 350–52 (1967); Farrell, *supra* note 59, at 240–41.

<sup>81</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>82</sup> See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (describing a history of the test); Farrell, *supra* note 59, at 237.

<sup>83</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Farrell, *supra* note 59, at 221–22.

<sup>84</sup> See *Washington v. Harper*, 494 U.S. 210 (1990) (holding that prisoners could not be forced to take antipsychotic drugs); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>85</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>86</sup> See Farrell, *supra* note 59, at 216.

<sup>87</sup> It is important to note that an affirmative answer to one or more of these questions does not guarantee the right is fundamental. For example, the right to an education is not a funda-



other fundamental right? What may be some of the arguments in favor of granting food choice some level of heightened protection? To answer these questions, it is important to understand some of the reasons behind food choice. Specifically, this Note will explore the ways in which people exercise and express themselves through choice of food.

#### *Food Choice as a Means of Expression*

While for some food choice is only a minor consideration, for others it is an important part of who they are. As the proverb goes, “you are what you eat,”<sup>88</sup> and food choice can be a means of self-expression and self-identity.<sup>89</sup> One study notes that “[t]he correlation between what people eat, how others perceive them, and how they characterize themselves is striking.”<sup>90</sup> Moreover, a person’s views of the world affect which foods they like and dislike, and through choice of food, people express their views of the world.<sup>91</sup>

Health, religion, culture, self-identity, and even politics are expressed by and play important roles in a person’s food choice, and may support some level of constitutional protection to the right to choice of food.

#### *Food Choice as Control over Health*

One of the most hotly debated issues—nutrition and health—increasingly drives food choice.<sup>92</sup> It is not difficult to understand why: In 2008, the Centers for Disease Control and Prevention (CDC) found that 34 percent of American adults were overweight, and a further 34 percent were obese.<sup>93</sup> Researchers at Johns Hopkins fear that by 2015, 75 percent of Americans will be overweight.<sup>94</sup> And it is well-established that extra weight can lead or contribute to

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mental one. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34–35 (1973). This is true even though “education has a fundamental role in maintaining the fabric of our society.” Plyler v. Doe, 457 U.S. 202, 221 (1982); *see also* Farrell, *supra* note 59, at 221. Some scholars have also opined that there is no fundamental right to physical liberty. *See* Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (discussing prisoners’ rights and society’s approval of deprivation of physical liberty in retaliation for certain crimes). Furthermore, there is no absolute right to consume any substance—*Smith* and prohibitions on drug consumption are just two examples that illustrate the denial of that particular right. *See* Emp’t Div. v. Smith, 494 U.S. 872 (1990).

<sup>88</sup> PAMELA GOYAN KITTLER & KATHRYN P. SUCHER, *FOOD AND CULTURE* 3 (4th ed. 2004).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See* GOLDSTEIN & GOLDSTEIN, *supra* note 32, at xi.

<sup>93</sup> *Obesity and Overweight*, CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) <http://www.cdc.gov/nchs/fastats/overwt.htm> (last visited Jan. 16, 2012).

<sup>94</sup> JORDAN RUBIN WITH BERNARD BULWER, *PERFECT WEIGHT AMERICA* 15 (2008).

many health problems, including diabetes, cancer, and heart disease.<sup>95</sup> Thus, it is little wonder that many people tailor their diets toward weight loss.<sup>96</sup>

However, some eating plans focus less on caloric or food restrictions and more on other values. For example, raw food eating plans avoid processed foods, even foods only minimally processed, and encourage eating whole foods, such as organic vegetables, seeds, nuts, fruit, and raw dairy.<sup>97</sup> Raw foodists believe raw food is nutritionally complete, and that cooking food harms or destroys its nutritional value.<sup>98</sup> Similarly, many people choose to eat organic foods, often in an effort to avoid Genetically Modified Organisms (GMOs), antibiotics, synthetic ingredients, or pesticides—all of which often accompany conventionally-grown foods, but which are not currently allowed in organically-produced foods.<sup>99</sup> Furthermore, some choose organic food because they argue it is more nutritious, and although the USDA asserts that there is no nutritional difference between organic and conventionally-grown foods,<sup>100</sup> studies show that the nutrient content of conventionally-grown food has been dropping ever since the 1950s.<sup>101</sup>

Others eat specific foods for their particular healthful properties. Antioxidants provide one example, and people consume citrus fruit,<sup>102</sup> tea,<sup>103</sup> blueberries,<sup>104</sup> acai berry,<sup>105</sup> and chocolate,<sup>106</sup> among other foods, in order to glean antioxidants. While science and medicine remain skeptical that antioxidants or other nutrients have much, if any, impact on a person's health,<sup>107</sup> many people swear their health is improved, or even saved, by consuming certain nutri-

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<sup>95</sup> *Id.* at 20; GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 38. Indeed, rising health problems were likely behind sections 4201 and 4205 of the Patient Protection and Affordable Care Act (PPACA), which encourage communities to find ways to promote better nutrition, and require chain restaurants to disclose certain nutrition information. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 4201, 4025 (2010).

<sup>96</sup> Betty Kovacs, *The "Skinny" on Popular Diet Plans*, MEDICINET.COM, [http://www.medicinenet.com/diet\\_plans\\_and\\_programs/article.htm](http://www.medicinenet.com/diet_plans_and_programs/article.htm) (last visited Jan. 16, 2012). Well-known diet examples include the Atkins Diet, the Pritikin Principle, South Beach Diet, Jenny Craig, Nutrisystem, and The Zone Diet. *Id.* People on these diets strive to avoid carbohydrates, sugars, or fats, eat an abnormal amount of protein or fiber, consume foods low on the glycemic index, simply count calories, or eat only foods specially manufactured for that program. *Id.* (follow the various diet links).

<sup>97</sup> *Raw Foodism*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Raw\\_foodism](http://en.wikipedia.org/wiki/Raw_foodism) (last visited Jan. 16, 2012).

<sup>98</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 197.

<sup>99</sup> *Id.* at 168–70.

<sup>100</sup> *Id.* at 169.

<sup>101</sup> MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 118 (2008) (“[Y]ou now have to eat three apples to get the same amount of iron as you would have gotten from a single 1940 apple.”).

<sup>102</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 2.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.* at 11.

<sup>106</sup> *Id.*

<sup>107</sup> Robert Russell, *Nutrition Society President Says Eat Less, Move More*, SCIENCE NEWS, Jul. 17, 2010, at 32, available at [http://www.sciencenews.org/view/generic/id/60728/title/Comment\\_\\_Nutrition\\_society\\_president\\_says\\_eat\\_less,\\_move\\_more](http://www.sciencenews.org/view/generic/id/60728/title/Comment__Nutrition_society_president_says_eat_less,_move_more).

ents.<sup>108</sup> Fats provide another example. Once seen only as the culprits of obesity, healthful fats are making a comeback.<sup>109</sup> Adding dietary fats such as Omega-3s may help control or prevent nerve pain, inflammation, dry eye syndrome, Alzheimer's, heart disease, attention deficit disorder, and other conditions.<sup>110</sup>

On the other hand, people also make choices based on avoidance. Whether it be censured foods like sugar, certain fats, or refined carbohydrates,<sup>111</sup> or the less-vilified foods such as pasteurized milk, orange juice, and soy,<sup>112</sup> some structure food choice more around what they do not eat instead of what they do eat.<sup>113</sup> For example, consumption of kosher products has gone up in the last two decades; as much as 40 percent of food in the marketplace is now labeled as kosher.<sup>114</sup> The majority buy kosher products because they believe kosher food is more healthful than other food,<sup>115</sup> perhaps because kosher products contain only pure ingredients,<sup>116</sup> must be accurately labeled, and cannot contain hidden elements.<sup>117</sup> Another example is found in foods made from GMOs, which came on the market in 1994.<sup>118</sup> Although many government officials and researchers maintain that GMOs are safe for consumption,<sup>119</sup> others disagree.<sup>120</sup> In direct contrast to company-sponsored research,<sup>121</sup> outside studies indicate a link between genetically modified foods and organ and immune defi-

<sup>108</sup> For an example, in one case a man recovered from a deadly combination of the swine flu and leukemia only after taking high doses of vitamin C. *Living Proof: Vitamin C – Miracle Cure?*, 3NEWS, NEW ZEALAND (Aug. 18, 2010, 7:30PM), <http://www.3news.co.nz/Living-Proof-Vitamin-C—Miracle-Cure/tabid/371/articleID/171328/Default.aspx>. His doctors believed he would die within the week when they agreed to let the family give the man vitamin C. *Id.* Within days after taking doses of vitamin C, his condition had improved significantly, and the man made a record recovery. *Id.*

<sup>109</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 47–48.

<sup>110</sup> *Id.* at 51–54. Conversely, studies have shown that a lack or imbalance of dietary fats can contribute to arthritis, type 2 diabetes, cancer, and mental conditions that may lead to depression, suicide, and even homicide. *Id.* at 48–50.

<sup>111</sup> See FOOD CHOICE AND THE CONSUMER 136 (David W. Marshall, ed., 1995).

<sup>112</sup> Joseph Mercola with Rachael Droegge, *Five “Health Foods” to Avoid*, MERCOLA.COM (Jan. 31, 2004), <http://articles.mercola.com/sites/articles/archive/2004/01/31/food-warnings-part-two.aspx>.

<sup>113</sup> See GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 137.

<sup>114</sup> Kim Severson, *For Some, ‘Kosher’ Equals Pure*, N.Y. TIMES, Jan 13, 2010, at D1, available at [http://www.nytimes.com/2010/01/13/dining/13kosh.html?\\_r=1](http://www.nytimes.com/2010/01/13/dining/13kosh.html?_r=1).

<sup>115</sup> *Id.* In fact, only 15 percent of consumers buy kosher products for religious reasons. *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 117. Hidden elements can be anything from insects to chemicals to the body parts of other animals. *Id.* at 116–17, 121 (noting the allowed amount of maggots, fly eggs, and insects or their larvae in canned tomatoes or packaged berries; “smoke flavoring” can be nothing more than chemicals released from charred sawdust (quoting Eric Schlosser); and how some chefs add pork jowls or pigs feet to dishes, passing them off as “secret spices”).

<sup>118</sup> *Id.* at 104–05. By 2007, 87 percent of soy and 52 percent of corn were genetically modified. *Id.* at 105.

<sup>119</sup> *Id.* at 104.

<sup>120</sup> *Id.* at 106. See also *Ten Reasons to Avoid Genetically Modified Foods*, MERCOLA.COM (Feb. 27, 2010), <http://articles.mercola.com/sites/articles/archive/2010/02/27/10-reasons-why-no-one-needs-gm-foods.aspx>.

<sup>121</sup> See *Ten Reasons to Avoid Genetically Modified Foods*, *supra* note 120.

ciencies, insulin regulation, and infertility, among other problems.<sup>122</sup> However, those who choose not to eat foods made with GMOs face a difficult task, since the intentional lack of labeling effectively denies these people that choice.<sup>123</sup>

In some cases, food allergies and sensitivities force a specific diet since the consumption of an allergen can cause everything from mild reactions to deadly ones.<sup>124</sup> The CDC estimates that four out of every one hundred American children have a food allergy.<sup>125</sup> At present, the *only* way to control a food allergy is through strict prohibition of the trigger food.<sup>126</sup> However, there is evidence that food intolerances may be the direct result of the way food is produced, and that the sensitive person may be able to consume the food if it is produced by natural or traditional means.<sup>127</sup> Raw milk is one example.<sup>128</sup> For years, raw milk advocates have argued that many “lactose-intolerant” people are not actually lactose intolerant; they are just allergic to *pasteurized* milk.<sup>129</sup> Their theory is that pasteurization destroys essential enzymes that help the human body process the milk.<sup>130</sup> The anecdotal evidence is strong: in one unofficial study, 82 percent of “lactose-intolerant” participants reported they could drink raw milk, but not pasteurized milk, without triggering any symptoms.<sup>131</sup>

<sup>122</sup> Amy Dean & Jennifer Armstrong, *Genetically Modified Foods*, AM. ACAD. ENVTL. MED., <http://www.aemonline.org/gmopost.html> (last visited Jan. 16, 2012).

<sup>123</sup> See GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 104, 108–10.

<sup>124</sup> *Id.* at 146.

<sup>125</sup> Amy M. Branum & Susan L. Lukacs, *Food Allergy Among U.S. Children: Trends in Prevalence and Hospitalization*, NAT'L CENTER FOR HEALTH STAT., October 2008, at 1, available at <http://www.cdc.gov/nchs/data/databriefs/db10.pdf>. The top allergens for children are milk, eggs, peanuts, tree nuts, fish, shellfish, soy, and wheat; these account for 90 percent of all food allergies. *Id.* Although many children will outgrow their food allergies, for some it becomes a lifelong problem, and there is a concern that food allergies are on the rise. *Id.*

<sup>126</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 118. Cross-contamination can make avoidance difficult, and significantly reduce a person's food options. See *Id.* at 118–21, 149. Cross-contamination may come from seemingly-innocuous practices, such as forgetting to clean the food slicer between slicing cheese and meat, to the sickeningly unsanitary, such as only cleaning a food conveyor belt once a year. *Id.* Foods may even become contaminated through touching a surface that the contaminant previously touched. *Id.*

<sup>127</sup> For example, many people struggle to digest beef, but there is evidence that some of the problems with beef may be attributable to the cow's diet rather than the meat itself. POLLAN, IN DEFENSE OF FOOD, *supra* note 101, at 167–68. Cows fed on corn (as most are) produce meat with more saturated fat and less omega-3 acid than cows fed on grass. *Id.* Humans are not adapted to this new, high-fat beef, and studies suggest that only those who eat beef from corn-fed cows are likely to develop heart disorders stemming from beef consumption. *Id.* Similarly, emerging evidence suggests that GMOs may be responsible for rising allergies to foods like soy. *Ten Reasons to Avoid Genetically Modified Foods*, *supra* note 120.

<sup>128</sup> Prior to pasteurization, milk was heralded as one of the best whole foods around. GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 18. For example, in 1905 medical doctors recommended raw milk as a cure for many common ailments, such as asthma and high blood pressure. *Id.*

<sup>129</sup> David Gumpert, *New Study Says Raw Milk Not Panacea for the Lactose Intolerant*, GRIST (Nov. 1, 2010, 1:21 PM), <http://www.grist.org/article/2010-11-01-raw-milk-mystery-new-stanford-study-indicates-it-doesnt-reduce> [hereinafter Gumpert, *Raw Milk not Panacea*]; GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 99–100.

<sup>130</sup> GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 99–100.

<sup>131</sup> Gumpert, *Raw Milk not Panacea*, *supra* note 129; GUMPERT, RAW MILK REVOLUTION, *supra* note 7, at 99–100.

However, as noted above, not all people are allowed to legally access raw milk.<sup>132</sup>

Should there be a right to access these foods, such as raw milk, for health? Although health claims are often controversial, the right to make decisions based on health is clearly important. The government deems this right important to the point that the new health care law, PPACA, mandates that restaurants disclose key nutrition information believed to be necessary to making healthful decisions.<sup>133</sup> Furthermore, legal history suggests there is a right to make choices regarding one's own health. In *Cruzan v. Director, Missouri Department of Health*, the Court found that a person has a right to refuse life-saving nutrition and hydration<sup>134</sup>—implying that a person has a fundamental right to make choices, even “unsafe” ones, for his or her health. The Court recognized that this right is steeped in the long history of common law.<sup>135</sup> The Court also noted its earlier ruling that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>136</sup>

The Court has continued to suggest that the right to make choices based on health is constitutionally protected. In *Roe v. Wade*, the Court discussed women's right of choice to be free from psychological, mental, and physical health problems that could stem from an unwanted pregnancy.<sup>137</sup> Likewise, *Planned Parenthood v. Casey* also noted the potential mother's fundamental right to choose to be free from the pain and physical constraints of childbearing.<sup>138</sup> While these abortion cases remain controversial, the language of these cases suggests the choice over health is entitled to some level of protection. Going one step further, a food choice could be protected if the person is making the choice in an effort to control his or her own health for better<sup>139</sup> or worse.<sup>140</sup>

The right may also have some connection to the fundamental right to personal liberty. In *Washington v. Harper*, the Court found that prisoners had “a significant liberty interest” in their personal choice to reject antipsychotic drugs.<sup>141</sup> Although *Washington* dealt with forced administration of drugs to unwilling prisoners, the holding suggests a person has a right to make choices over his or her health—even if officials would consider the choice to be dangerous to the person's health. Thus, even if officials feel a food, such as raw milk, poses significant risks, a person may still have the right to make the choice to access and consume this food even though officials feel the choice is a dangerous one.

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<sup>132</sup> *Supra* Part I.

<sup>133</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205 (2010).

<sup>134</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

<sup>135</sup> *Id.* at 277.

<sup>136</sup> *Id.* at 269 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>137</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>138</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

<sup>139</sup> *See id.*

<sup>140</sup> *See Cruzan*, 497 U.S. at 279.

<sup>141</sup> *Washington v. Harper*, 494 U.S. 210, 221–22 (1990).

Therefore, in light of fundamental rights that overlap the right to make choices regarding health, there is an argument that the right to choice of food as it relates to decisions over health deserves some level of heightened protection.

### *Food Choice as Religious Expression*

Religion is an important factor in food choice, as specific foods (or the abstinence thereof) are central to many religions.<sup>142</sup> “Religion has a profound impact on what people do, . . . how they vote and shop and cook” and in other ways define themselves.<sup>143</sup> Food, to religion, “is a daily reverence. The child, the hard-headed worker, and the mystic theologian all join for the ritual repast. . . . It is food sharing, not solely dogma and creed, that unites them all.”<sup>144</sup> In most religions, food and diet is at least one way to separate members from nonmembers.<sup>145</sup> To illustrate, this Note will briefly explore the food rules for several religious groups, specifically Jews, Seventh-day Adventists, Latter-day Saints, Muslims, Hindus, and Jains.

Food has always been a central part of Judaism, and Jews have a diverse food culture.<sup>146</sup> In particular, Judaism is well-known for its dietary laws and kosher foods.<sup>147</sup> Under kosher food laws, any animal slaughtered for food must be rinsed clean of blood, meat and dairy must not mix, and any product of an animal that is considered unclean, excluding honey, is forbidden.<sup>148</sup> Kosher food’s high demand has caused fast-food franchises to offer kosher food,<sup>149</sup> and kosher food laws are so widespread that they have even raised the question of excessive entanglement between church and state.<sup>150</sup>

Likewise, food is important to Seventh-day Adventists, who discourage overeating and encourage vegetarianism because the Bible does not state that Adam and Eve’s diet in the Garden of Eden included meat,<sup>151</sup> and because of

<sup>142</sup> KITTLER & SUCHER, *supra* note 88, at 71.

<sup>143</sup> Wendy Leonard, *University of Utah Fellow to Study Origins of Mormon Food Subculture*, DESERET NEWS (May 17, 2010, 12:00 AM), <http://www.deseretnews.com/article/700032147/University-of-Utah-fellow-to-study-origins-of-Mormon-food-subculture.html?pg=1>.

<sup>144</sup> E.N. ANDERSON, *EVERYONE EATS: UNDERSTANDING FOOD AND CULTURE* 155 (2005).

<sup>145</sup> *See id.*

<sup>146</sup> *To Eat or Not to Eat . . . That Is a Jewish Question!*, EDUC. PROGRAM ON YIDDISH CULTURE, [http://epyc.yivo.org/content/10\\_1.php](http://epyc.yivo.org/content/10_1.php) (last visited Jan. 16, 2012).

<sup>147</sup> Kosher meat is that which comes from any mammal that has a completely cloven foot and chews cud, any bird that has a crop, gizzard, and an extra talon, and any fish that has fins and scales, so long as the animal is properly slaughtered and the meat is free from blemish and disease. KITTLER & SUCHER, *supra* note 88, at 73–74.

<sup>148</sup> *Id.* at 74; *see also* Severson, *supra* note 114.

<sup>149</sup> Stefanie Pervos, *Going Kosher: Dunkin’ Donuts, Subway Bring Kosher ‘Fast Food’ to Chicago*, JEWISH UNITED FUND NEWS (Dec. 19, 2007, 9:35 AM) <http://www.juf.org/news/arts.aspx?id=29016>.

<sup>150</sup> Joseph P. Fried, *Court Ruling Highlights Divergences on ‘Kosher’*, N.Y. TIMES, Aug. 5, 2000, at B3, *available at* <http://www.nytimes.com/2000/08/05/nyregion/court-ruling-highlights-divergences-on-kosher.html?src=pm>. In New York, a federal judge declared unconstitutional state laws that required state inspectors to ensure kosher food at the supermarket was, in fact, kosher. *Id.* The judge found that the laws fostered excessive entanglement between the state and religion. *Id.* This generated a debate about how “kosher” should be defined given the different levels of orthodoxy among Jews. *Id.*

<sup>151</sup> KITTLER & SUCHER, *supra* note 88, at 83.

the health benefits of a vegetarian diet high in whole grains.<sup>152</sup> They do not consume tea, coffee, or alcohol,<sup>153</sup> and avoid mustard, chili powder, black pepper, and other hot spices.<sup>154</sup> Furthermore, they view their bodies as temples of the Holy Spirit and emphasize the importance of health.<sup>155</sup>

Members of the Church of Jesus Christ of Latter-day Saints (“Mormons”) have a food code similar to that of Seventh-day Adventists. They abstain from tea, alcohol, coffee, and tobacco,<sup>156</sup> and encourage the consumption of grains, vegetables, and fruit, but discourage the consumption of more than small amounts of meat.<sup>157</sup> Mormons view their dietary code as important to their identity, and for good reason—people are more often aware of Mormons’ food rules than their doctrine.<sup>158</sup>

Food is important to Muslims because they believe eating is a matter of worship; for this reason, they prohibit self-indulgence.<sup>159</sup> Because food is an important part of the religion, Muslims treat it with respect.<sup>160</sup> Their strict food rules are so important to their religion and their religion is so widespread that restaurants have emerged or evolved to cater to the religion’s dietary rules: one French restaurant chain serves fast food that strictly adheres to the Muslim dietary code, and even Chinese restaurants in Hong Kong offer *halal* Chinese food.<sup>161</sup>

Similarly, Hindu food customs embody their religious concept of purity.<sup>162</sup> Specifically, purity of food and drink lead to purity of mind and spirit.<sup>163</sup> To Hindus, correct food habits are essential to reaching mental purity,

<sup>152</sup> See *The Seventh-day Adventist Position Statement on Vegetarian Diets*, SEVENTH-DAY ADVENTIST DIETETIC ASS’N, <http://www.sdada.org/position.htm> (last visited Jan. 16, 2012). In fact, Seventh-day Adventists are credited with inventing breakfast cereals. *Breakfast Cereal*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/78499/breakfast-cereal> (last visited Jan. 16, 2012).

<sup>153</sup> KITTLER & SUCHER, *supra* note 88, at 83.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Word of Wisdom*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://lds.org/study/topics/word-of-wisdom?lang=eng> (last visited Jan. 16, 2012).

<sup>157</sup> *Id.*; see also KITTLER & SUCHER, *supra* note 88, at 82.

<sup>158</sup> Jana Riess & Christopher Kimball Bigelow, *What’s Not on the Mormon Menu*, DUMMIES.COM, <http://www.dummies.com/how-to/content/whats-not-on-the-mormon-menu.html> (last visited Jan. 16, 2012). Additionally, Mormons have a lesser-known but still distinctive food culture, which centers (most notably, perhaps) around items like Jell-O and “funeral potatoes.” Leonard, *supra* note 143. Research is currently determining how Mormon culture has influenced food to create their distinctive culture. *Id.*

<sup>159</sup> KITTLER & SUCHER, *supra* note 88, at 84. Prohibited foods include meat from any mammal that catches its food with its mouth, birds of prey, as well as any by-products from these animals. *Id.* at 84–85. Animals that were slaughtered improperly cannot be consumed, nor can any product from blood. *Id.* at 85. Muslims prohibit alcohol and drugs, unless prescribed by a doctor, and discourage smoking and drinking coffee or tea. *Id.*

<sup>160</sup> *Id.* at 84.

<sup>161</sup> E.g., Derrick Chang, *Islamic Centre Canteen: Halal Dim Sum in the Heart of Hong Kong*, CNN Go (Mar. 8, 2010), <http://www.cnn.go.com/hong-kong/none/halal-dim-sum-212805>.

<sup>162</sup> KITTLER & SUCHER, *supra* note 88, at 90. Because pollution undermines purity, it should be avoided. *Id.*

<sup>163</sup> *Id.*

which in turn allows them to commune with God.<sup>164</sup> Furthermore, careful food consumption is mandated by scripture because “all that [Hindus] eat . . . should be done as an offering unto [God].”<sup>165</sup> Hindus encourage avoidance of certain foods but do not prohibit any food, although the cow enjoys special protection as Hindus consider it to be a sacred animal.<sup>166</sup>

Jainism has one of the strictest food codes among all religions, and food choice is a pillar of the religion. Central to Jainism is the concept of nonviolence toward every living organism<sup>167</sup> because violence blocks the path to liberation and harms the Jain’s progression.<sup>168</sup> Thus, Jains do not eat the meat of any animal,<sup>169</sup> and even discourage over-consumption of vegetables in order to protect plants.<sup>170</sup> Their food rules are so strict that they do not eat vegetables grown below ground because to harvest the vegetable requires destroying the plant, which is seen as valuable in its own right.<sup>171</sup>

This small sampling of religions demonstrates the important role that food can take within a religious context. In light of the fact that the Bill of Rights gives particular deference to freedom of religion,<sup>172</sup> food choice may deserve protection as a right because of its religious importance. On the other hand, it is well established that “freedom of religion” does not mean that a person may act or refuse to act for religious reasons and be absolutely shielded from government intervention.<sup>173</sup> To the contrary: while the Constitution protects the freedom to believe, it does not necessarily protect the freedom to act in accordance with those beliefs.<sup>174</sup> Specifically, a person’s choice is protected from government actions that target the person’s religious beliefs,<sup>175</sup> but the same choice may not be protected if the government action only incidentally interferes with a religious practice.<sup>176</sup>

<sup>164</sup> *Id.* at 89.

<sup>165</sup> *Bhagavad-gita* 9.27. Furthermore, “[i]n Hindu culture, eating is a ritual: a sacrifice to the Supreme, unified by the recognition that process (cooking), object (food), and individual are all inextricably connected.” Deepa S. Iyer, *The Sacred Act of Eating: A Hindu Foodie’s Daily Ritual*, THE HUFFINGTON POST (Jan. 14, 2011, 07:14 PM) [http://www.huffingtonpost.com/deepa-s-iyer/a-foodies-daily-ritual\\_b\\_807350.html](http://www.huffingtonpost.com/deepa-s-iyer/a-foodies-daily-ritual_b_807350.html).

<sup>166</sup> KITTLER & SUCHER, *supra* note 88, at 89–90. Foods that Hindus discourage include meat, especially beef and pork, crabs, snails, crocodiles, antelope and camel, boars, and many fish; milk from any animal that has recently given birth; alcohol; and some vegetables. *Id.*

<sup>167</sup> Nathmal Tatia, *The Jain Worldview and Ecology*, in *JAINISM AND ECOLOGY: NONVIOLENCE IN THE WEB OF LIFE* 3, 6–8 (Christopher Key Chapple ed., 2002).

<sup>168</sup> Christopher Key Chapple, *Introduction*, in *JAINISM AND ECOLOGY*, *supra* note 167, at xxxi–xxxiv.

<sup>169</sup> Bhagchandra Jain ‘Bhaskar,’ *Ecology and Spirituality in the Jain Tradition*, in *JAINISM AND ECOLOGY*, *supra* note 167, at 176.

<sup>170</sup> Tatia, *supra* note 167, at 7–8.

<sup>171</sup> Satish Kumar, *Jain Ecology*, in *JAINISM AND ECOLOGY*, *supra* note 167, at 183.

<sup>172</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

<sup>173</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

<sup>174</sup> *Id.* The court has recognized that “[t]he freedom to hold religious beliefs and opinions is absolute,” *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961), but the “freedom to act . . . cannot be [absolute].” *Cantwell*, 310 U.S. at 303–04.

<sup>175</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>176</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).



A few well-known examples illustrate this point. In *Employment Division v. Smith* the Court upheld a state law prohibiting the use of the drug peyote.<sup>177</sup> Some Native American religions require consumption of peyote for certain rituals.<sup>178</sup> However, the law was constitutional because it did not target Native American religions.<sup>179</sup> In contrast, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a law prohibiting the ritual sacrifice of animals was unconstitutional because it was enacted specifically to stop a religious practice of a particular sect.<sup>180</sup>

Thus, a court should consider the effect of rules restraining food choice where that restraint interferes with the free exercise of religion. For example, some orthodox Jews believe that foods made with GMOs are not kosher.<sup>181</sup> Does not requiring food manufacturers to label GMO ingredients interfere with the ability of these Jews to select only kosher foods?<sup>182</sup> Is the government's interest in curtailing access to raw milk as important as its interest in curtailing other religious choices that run counter to established social rules and public policy—such as drug use<sup>183</sup> or polygamy?<sup>184</sup>

Of course, the Court has made it clear that it only guarantees protection of beliefs, not of actions.<sup>185</sup> Furthermore, laws restricting food are rarely—if ever—aimed at religion.<sup>186</sup> So, under the *Smith* and *Hialeah* tests, it would seem that food, just by virtue of its connection to religion, does not achieve fundamental rights status. Still, food choice for religious reasons may deserve some level of heightened protection because of its religious importance. As of yet, no case has litigated this particular issue,<sup>187</sup> which further clouds the fundamental rights question. Hence, at the present, the answer to whether food choice deserves heightened protection because of its importance to religious expression is uncertain.

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<sup>177</sup> *Id.* at 882. Peyote is made from the *Lophophora williamsii Lemaire* plant and is a hallucinogen. *Id.* at 874.

<sup>178</sup> *Id.* at 874.

<sup>179</sup> *Id.* at 890.

<sup>180</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993).

<sup>181</sup> GREG CIOLA, *GMOs: A BIBLICAL RESPONSE TO GENETIC ENGINEERING* 58–59, 62 (Crusader Enterprises, 2d ed. 2006), available at <http://www.healthtruthrevealed.com/products.php> (scroll down; then click on “free download” on right-hand side; then submit name and email form).

<sup>182</sup> See Barry Estabrook, *Feds on GMO Labeling: Don't Tell, Don't Ask*, THE ATLANTIC (Apr. 26, 2010, 8:33 AM), <http://www.theatlantic.com/life/archive/2010/04/feds-on-gmo-labeling-dont-tell-dont-ask/39452/>.

<sup>183</sup> *Emp't Div.*, 494 U.S. at 874.

<sup>184</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>185</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); see *supra* notes 174–80.

<sup>186</sup> This author is not aware of any law that restricts food for the sake of restricting religious belief.

<sup>187</sup> This author is not aware of any case that has litigated this particular issue.

*Food Choice as Cultural Expression*

Food is a signal of ethnic identity,<sup>188</sup> and many choose foods based, at least in part, on cultural heritage.<sup>189</sup> As one writer noted, “As long as humans have been taking meals together, eating has been as much about culture as it has been about biology.”<sup>190</sup> Food choice is comparable to dress or language in reaffirming cultural identity.<sup>191</sup> Furthermore, groups create and maintain social and ethnic boundaries through food.<sup>192</sup>

Ethnic groups are often defined by their food,<sup>193</sup> and people affirm their cultural identity through food choice.<sup>194</sup> One informal study showed that people, when confronted with a cultural situation such as a celebration, a visit by a friend of the same ethnicity, or another special occasion, tend to default to the food of their culture.<sup>195</sup> Sociologists conclude that “the role of food cannot be underestimated.”<sup>196</sup>

Even a layperson knows that certain foods, spices, and food preparation methods are strongly associated with certain parts of the world.<sup>197</sup> For example, rice and soy sauce are associated with China, corn and chili peppers with Mexico.<sup>198</sup> Squash is associated with the Native Americans;<sup>199</sup> potatoes with the Irish; tea with the British; cheese and wine with the French; pastas with the Italians<sup>200</sup>—and the list goes on.

American food culture is harder to define because American scientists have long fostered a culture-free diet coined “nutritionism.”<sup>201</sup> Many Americans favor science over taste in deciding what to eat,<sup>202</sup> even though a diet based on science dissolves food’s cultural and historical ties.<sup>203</sup> Perhaps this makes cultural food all the more important for Americans—especially given that science has failed to meet nutritionism’s goal of keeping Americans

<sup>188</sup> Susan Kalèik, *Ethnic Foodways in America: Symbol and the Performance of Identity*, in *ETHNIC AND REGIONAL FOODWAYS IN THE UNITED STATES: THE PERFORMANCE OF GROUP IDENTITY* 37, 44 (Linda Keller Brown & Kay Mussell eds., 1984).

<sup>189</sup> Paul Rozin, *The Socio-Cultural Context of Eating and Food Choice*, in *FOOD CHOICE, ACCEPTANCE AND CONSUMPTION* 83, 90 (H.L. Meiselman & H.J.H MacFie eds., 1996); see also MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 17 (2007).

<sup>190</sup> POLLAN, *supra* note 101, at 8.

<sup>191</sup> KITTLER & SUCHER, *supra* note 88, at 47.

<sup>192</sup> Kalèik, *supra* note 188, at 47–48.

<sup>193</sup> ANDERSON, *supra* note 144, at 201.

<sup>194</sup> *Id.* at 202; KITTLER & SUCHER, *supra* note 88, at 4.

<sup>195</sup> ANDERSON, *supra* note 144, at 202–03.

<sup>196</sup> Fiddes, *supra* note 111, at 137 (quoting Back). It is central not only to expression of cultural identity, but is material to group cohesion. *Id.* Some have suggested that likes and dislikes develop out of group or cultural identity. *Id.* In essence, food choice is a code that expresses social relations and, therefore, culture. *Id.*

<sup>197</sup> Rozin, *supra* note 189, at 90.

<sup>198</sup> *Id.*

<sup>199</sup> KITTLER & SUCHER, *supra* note 88, at 99.

<sup>200</sup> See *id.* at 123–28, 139.

<sup>201</sup> See POLLAN, *supra* note 101, at 55–58. Even in early America, nutritionists viewed the need to eat as a form of weakness, and their followers attempted to swap culture for science. *Id.* at 54–55 (citing Harvey Levenstein).

<sup>202</sup> *Id.* at 56–58.

<sup>203</sup> *Id.* at 58.

healthy.<sup>204</sup> Interestingly, scientists are now turning to traditional cultures to see if they can piece together the keys to a healthy diet.<sup>205</sup> Even the USDA supports cultural eating: the agency now promotes several non-traditional food guide pyramids, each based on a particular culture.<sup>206</sup> Furthermore, Americans are turning to traditional American food culture through supporting locally-grown foods and boosting the once-prevalent American culture of small farmers.<sup>207</sup> As one news headline put it, “Small Farmers Are As American As Apple Pie.”<sup>208</sup> Proponents of local food see supporting local food as protecting America’s past culture and preserving and protecting America’s current and future culture by protecting the economy and environment of the local area.<sup>209</sup>

This runs parallel to legal attitudes concerning culture. After all, the Supreme Court has been protective of the family’s right to promote its own culture. As far back as 1923, the Court has recognized the fundamental right of the family, or in other words, the right parents have to raise their children, and, by extension, the right to instill family virtues—culture—in their family unit.<sup>210</sup> Indeed, in *Meyer v. Nebraska*, the Court found that the state’s attempt to control (if not eradicate) the advocacy of a foreign language, and by extension its culture, was unconstitutional.<sup>211</sup>

Similarly, in *Wisconsin v. Yoder*, the Court found that a religious lifestyle could be protected as fundamental.<sup>212</sup> Although the Court expressly declined to extend the freedom of religion clause to secular lifestyle choices,<sup>213</sup> its focus on the Amish lifestyle as protected leaves open the question of whether choices defined by cultural identity may deserve some measure of increased protection under the Constitution.

Nevertheless, culture has not been recognized as a fundamental right. While undoubtedly important, an argument for a fundamental right based on cultural importance alone is difficult to make. Still, because food is an important part of cultural expression, there may yet be reason to give food choice heightened protection.

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<sup>204</sup> See *id.* at 50–53.

<sup>205</sup> See *id.* at 70, 128–29; see also NESTLE, *supra* note 189, at 86 (discussing how scientists have studied other food cultures such as French, and Mediterranean diets, to see why those people are healthier than Americans).

<sup>206</sup> See *Ethnic/Cultural Food Pyramids*, USDA FOOD & NUTRITION INFO. CENTER, [http://fnic.nal.usda.gov/nal\\_display/index.php?info\\_center=4&tax\\_level=3&tax\\_subject=256&topic\\_id=1348&level3\\_id=5732](http://fnic.nal.usda.gov/nal_display/index.php?info_center=4&tax_level=3&tax_subject=256&topic_id=1348&level3_id=5732) (last visited Jan. 16, 2012).

<sup>207</sup> See Katherine Goldstein, *6 Reasons to Eat Local Food This 4th of July*, THE HUFFINGTON POST (July 2, 2009, 4:36 PM), [http://www.huffingtonpost.com/katherine-goldstein/6-reasons-to-eat-local-fo\\_b\\_224185.html](http://www.huffingtonpost.com/katherine-goldstein/6-reasons-to-eat-local-fo_b_224185.html); see also Jennifer Maiser, *10 Reasons to Eat Local Food*, EAT LOCAL CHALLENGE, [http://www.lifebeginsat30.com/elc/2006/04/10\\_reasons\\_to\\_e.html](http://www.lifebeginsat30.com/elc/2006/04/10_reasons_to_e.html) (last visited Jan. 16, 2012).

<sup>208</sup> Goldstein, *supra* note 207; see also Complaint, *supra* note 1, at 12.

<sup>209</sup> Goldstein, *supra* note 207; see also Complaint, *supra* note 1.

<sup>210</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

<sup>211</sup> *Id.*

<sup>212</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 218–19, 236 (1972).

<sup>213</sup> *Id.* at 215–16.

*Food Choice as Self-Expression and Speech*

Food is both a means of self-expression and, at the same time, a means of speech. Because self-identity influences food choice,<sup>214</sup> it is of little surprise that people choose food based on the personal values with which they identify.<sup>215</sup> Additionally, as people become more educated to food issues, they are becoming increasingly concerned with the quality of food and the way it is produced.<sup>216</sup>

Hence, some people express their personal code of values or ethics by choosing or refusing to eat foods they consider to be moral or immoral.<sup>217</sup> This expression becomes a form of speech by virtue of the impact that moral labeling and subsequent food choice can have on the food industry.<sup>218</sup> Food choice is even seen as a form of political speech, since food marketers view the check-out till as a polling booth<sup>219</sup> and see food choice as a form of voting.<sup>220</sup> And, as attitudes concerning food have changed, food producers and the government have responded.<sup>221</sup>

There are innumerable values that drive food choice, and three examples illustrate the point: how concerns over animal cruelty have led to consumer rejection of animal products, how negative impacts to the environment have caused consumers to choose foods they believe are environmentally-friendly, and how ethical concerns concerning agriculture and big business cause consumers to choose foods that they believe speak out against unethical practices.

For centuries, advocates of the humane treatment of animals have spoken out against animal cruelty by refusing to eat meat.<sup>222</sup> Their food choices protest practices that harm the animal<sup>223</sup> and indirectly harm those who consume the

<sup>214</sup> KITTNER & SUCHER, *supra* note 88, at 3.

<sup>215</sup> See FOOD CHOICE AND THE CONSUMER, *supra* note 111, at 205–06 (discussing how social and ethical issues impact consumer choice).

<sup>216</sup> See *id.* at 10.

<sup>217</sup> See, e.g., *id.* (pointing out that people have begun to search for moral stability).

<sup>218</sup> See FOOD, INC. (Magnolia Pictures 2008).

<sup>219</sup> “The more consumed, the higher the vote.” TIM LANG ET AL., FOOD POLICY: INTEGRATING HEALTH, ENVIRONMENT & SOCIETY 52 (2009).

<sup>220</sup> “Vote With Your Fork” is a slogan that has popped up in the past few decades to describe this process. NESTLE, FOOD POLITICS, *supra* note 189, at 372–373; FOOD, INC., *supra* note 218.

<sup>221</sup> FOOD, INC., *supra* note 218 (discussing the power of consumer demand and the effect it can have on changing food production and noting that consumer rejection of synthetic grown hormone has led to a significant decrease in its use); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b)(H)(ii) (2010) (mandating that calorie counts be made available for certain restaurant food).

<sup>222</sup> See GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 216–17, 224–28 (describing the conditions under which animals are raised and killed).

<sup>223</sup> See FOOD, INC., *supra* note 218; GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 224–27. For example, chickens are usually raised in large, dark henhouses with poor ventilation. *Id.* at 225. The chickens are so tightly packed that they have no room to roam. *Id.* at 224. The chickens live in their own litter and may be too sick or fat to walk more than a few steps. *Id.* at 225. Ammonia fumes are so strong in these henhouses that chickens contract “ammonia burn” from which they develop sores, a chronic respiratory disease, and blindness. *Id.* at 225–26. Droppings and litter may be allowed to accumulate for years before it is cleaned out. *Id.* at 225. When the chickens are gathered for slaughter, the workers are free to kick

animal's products.<sup>224</sup> For example, advocates protest the way beef cows are raised, in part because the cows are fed a diet that destroys their internal organs and alters the composition of the meat, which humans then struggle to digest.<sup>225</sup> Around 30 million people in America are either vegetarians or strive to follow a vegetarian diet.<sup>226</sup> A few others vote against animal cruelty by seeking out meat suppliers who treat their animals humanely.<sup>227</sup> Considering that the vast majority of meat comes from only a handful of producers,<sup>228</sup> abstinence is usually the easiest option.

Another issue in food politics is how food production impacts the environment.<sup>229</sup> Many choose—and even demand—foods that are environmentally friendly.<sup>230</sup> These food choices speak against food production practices that harm the environment, such as the use of synthetic chemicals,<sup>231</sup> deforestation,<sup>232</sup> the genetic modification of living organisms,<sup>233</sup> and the practice of

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and throw the birds around the room and into the cages without any concern for potential injuries. *Id.*; FOOD, INC., *supra* note 218.

<sup>224</sup> See *infra* note 225.

<sup>225</sup> To speed growth, beef cows are fed a mixture of corn, liquefied beef tallow (from the slaughterhouse), and a protein supplement (which includes a synthetic nitrogen, similar to fertilizer). MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEAL* 71, 74–75, 78 (2006). Cows naturally have a stomach pH that is neutral, but a diet of corn increases the acid in the cow's stomach, which leads to symptoms such as diarrhea, ulcers, and bloating, and liver disease. *Id.* at 78. At least 15 to 30 percent of feedlot cows have abscessed livers by the time they are slaughtered. *Id.* On some feedlots, this figure might be as high as 70 percent. *Id.* Growing evidence suggests that the decreasing health in beef cows may be passed along to humans because the way the cows are raised changes the composition of the meat itself, and humans are not well-adapted to eating the changed meat. *Id.* at 75.

<sup>226</sup> *Vegetarianism in America*, VEGETARIAN TIMES, [www.vegetariantimes.com/features/archive\\_of\\_editorial/667](http://www.vegetariantimes.com/features/archive_of_editorial/667) (last visited Jan. 16, 2012).

<sup>227</sup> POLLAN, *THE OMNIVORE'S DILEMMA*, *supra* note 225, at 241–42.

<sup>228</sup> FOOD, INC., *supra* note 218.

<sup>229</sup> LANG ET AL., *FOOD POLICY*, *supra* note 219, at 189–91.

<sup>230</sup> *FOOD CHOICE AND THE CONSUMER*, *supra* note 111, at 205.

<sup>231</sup> Increased farm production has led to synthetic chemicals that require considerable energy to manufacture and has also contributed significantly to groundwater pollution. LANG ET AL., *FOOD POLICY*, *supra* note 219, at 193. The Mississippi basin is so polluted with agricultural run-off that it is now a “dead zone.” *Id.* Even the byproducts of food production, once useful, have now become environmentally harmful. POLLAN, *THE OMNIVORE'S DILEMMA*, *supra* note 225, at 79. In years past, farmers used animal waste to fertilize their crops, but today the waste from feedlot cows is so toxic that it cannot be used as fertilizer, since it contains high levels of nitrogen and phosphorus (which would kill plants), as well as heavy metals and hormone residues. *Id.* In fact, these chemicals—which pollute nearby water supplies—may be responsible for the new and abnormal sex characteristics displayed by fish and amphibians that inhabit these waterways. *Id.*

<sup>232</sup> The increased demand for plant- and animal-based foods has led to deforestation in order to provide land to farm or graze. LANG ET AL., *FOOD POLICY*, *supra* note 219, at 194.

<sup>233</sup> For example, companies have created genetically modified salmon, which grows twice as fast as normal salmon; the fish is pending FDA approval. *Clarified: What Does “Genetically Modified” Salmon Mean?*, EATOCRACY.CNN.COM (Sept. 20, 2010, 4:00 AM), <http://eatocracy.cnn.com/2010/09/20/genetically-modified-salmon/>. Concerns range from whether genetically modified salmon would mix with (and potentially overtake) the native population, to general concerns about the ethics of manipulating the genetic code of living creatures. GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 66; Mary Clare Jalonick, *Fish or*

mono-culture planting and upland grazing.<sup>234</sup> For those speaking out against environmentally-harmful food production practices, food choice can be especially important since policy responses have been quite slow,<sup>235</sup> but producers will nonetheless change a practice if the market demands it.<sup>236</sup>

In other cases, the choice of one type of food over another is a way of speaking out against business practices believed to be unethical.<sup>237</sup> For example, some see large seed-manufacturing corporations, such as Monsanto, as engaging in unethical practices because they use patent laws to corner the market for their products and force farmers to either buy their seeds or go out of business.<sup>238</sup> For example, Monsanto manufactures and sells genetically modified seeds, and its tactics have been so successful that non-GMO seeds are becoming difficult to buy.<sup>239</sup> Farmers and environmentalists worry that these crops, which have the ability to spread to the native population, could eventually eradicate native grains<sup>240</sup>—especially where some GMO varieties are now more prevalent than the natural variety.<sup>241</sup> Thus, those who oppose GMOs intentionally purchase foods they believe are likely to be GMO-free.<sup>242</sup>

Are people who choose food to support or discourage certain practices utilizing a form of speech? Moreover, could food choice be considered political

*Frankenfish? FDA Weighs Altered Salmon*, ABC NEWS (Sept. 20, 2010), <http://abcnews.go.com/Business/wireStory?id=11678777>.

<sup>234</sup> Mono-culture planting and upland grazing contributed to a sharp decline in the diversity of species. LANG ET AL., FOOD POLICY, *supra* note 219, at 195. Between 1970 and the late 1990s farmland bird populations declined by 60 percent. *Id.* An estimated three-quarters of agricultural biodiversity was lost in the last century as mass food production increased and food crop variety consequently decreased, such as potatoes, apples, and wheat varieties. *Id.* at 194.

<sup>235</sup> *Id.* at 187–88.

<sup>236</sup> See *supra* text accompanying notes 217–221.

<sup>237</sup> For example, some people speak out about human trafficking in the chocolate industry by refusing to buy chocolate unless it is fair trade. *Slave-Free Chocolate*, STOP CHOCOLATE SLAVERY, <http://vision.ucsd.edu/~kbranson/stopchocolateslavery/main.html> (last visited Jan. 16, 2012); see also THE DARK SIDE OF CHOCOLATE (Bastard Film 2010) (discussing how child slave labor continues to supply the largest chocolate companies with cocoa beans, in spite of labor laws and the industry's promises and assertions that the chocolate is not produced with child labor).

<sup>238</sup> FOOD, INC., *supra* note 218. Companies like Monsanto scrutinize farmer's crops to see if farmers who do not buy GMO seeds nevertheless have these seeds in their crops; however, non-GMO crops may contain GMO seeds simply because they are blown in from neighboring fields. *Id.* But under the current laws, a farmer is presumed guilty if any traces of GMO seeds are discovered in the crop. *Id.* Likewise, these companies attempt to stop farmers from saving any seeds (even non-GMO) to protect their patents—but this also precludes the farmer's ability to collect and save seeds for future crops—often even when the seeds are neither genetically modified nor patented—which in turn makes the farmer dependent upon the seed companies for future crops. *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> For example, genetically modified soy has become so common that it accounts for 91 percent of America's soy crop. Gregory Damato, *GM-Soy: Destroy the Earth and Humans for Profit*, NATURALNEWS.COM (May 27, 2009), [http://www.naturalnews.com/z026334\\_soy\\_research\\_Roundup.html](http://www.naturalnews.com/z026334_soy_research_Roundup.html).

<sup>242</sup> FOOD, INC., *supra* note 218; GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 105.

speech, and, if so, would this justify granting some level of heightened protection to food choice?

Speech is expressly protected by the First Amendment, and has long been protected by the courts.<sup>243</sup> There are many reasons for protecting speech: speech helps further truth and democracy, it advances autonomy and personhood, and it promotes tolerance.<sup>244</sup> The concept of speech encompasses more than the spoken word,<sup>245</sup> and conduct is one form of speech.<sup>246</sup>

Of course, not all conduct is speech since not all conduct is communicative. The Supreme Court views communicative conduct as that which was intended to convey a particular message, and likely did convey it to those who viewed the conduct.<sup>247</sup> Examples of communicative conduct include wearing a black armband to protest war,<sup>248</sup> burning a draft card,<sup>249</sup> and burning the American flag.<sup>250</sup> Communicative conduct is somewhat protected by the Court, though the Court still gives deference to the government if it can articulate a substantial interest in restraining the conduct and that interest is incidental to restricting freedom of expression.<sup>251</sup> However, if the speech is political in nature, it receives heightened protection.<sup>252</sup>

Self-expressive food choice may meet the test for communicative speech: it is meant to convey a particular message and likely does convey that message, given that food producers and retailers are so sensitive to market demands. For example, when a customer pays a dollar extra for eggs from free-range chickens, that person is likely voting against animal cruelty and both the retailer and the producer are meant to understand that message.<sup>253</sup>

Furthermore, policy makers and food producers have implicitly recognized that “voting with the fork” is a form of political speech, as food choice has a history of driving changes in food production and politics.<sup>254</sup> For example, the 1906 Food and Drug Act was enacted as a direct result of popular demand.<sup>255</sup> Before 1906, almost 200 food bills had been brought and defeated.<sup>256</sup> It was not until public outrage over the meat-packing industry

<sup>243</sup> CHEMERINSKY, *supra* note 58, at 1063.

<sup>244</sup> *Id.* at 926–30.

<sup>245</sup> “People often communicate through symbols other than words. . . . To deny First Amendment protection for such forms of communication would mean a loss of some of the most effective means of communicating messages.” *Id.* at 1063.

<sup>246</sup> *See id.* at 1063.

<sup>247</sup> *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

<sup>248</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>249</sup> *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>250</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>251</sup> *O’Brien*, 391 U.S. at 376–377 (articulating a test that suggests heightened scrutiny).

<sup>252</sup> *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966). The Supreme Court has said that “a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to the political process.” *Id.*

<sup>253</sup> *See, e.g., supra* notes 219–20 and accompanying text.

<sup>254</sup> *See supra* notes 219–20 and accompanying text.

<sup>255</sup> Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 *CARDOZO L. REV.* 2174, 2216–17 (2009).

<sup>256</sup> *Id.*

spurred consumers to demand change that Congress passed the Act that banned food adulteration and established food guidelines.<sup>257</sup>

The political debate surrounding synthetic growth hormones provides a more recent example. Ever since the invention of recombinant bovine somatotropin (“rBST”), controversy has abounded concerning whether rBST is safe for human consumption and whether it is harmful to cows.<sup>258</sup> Though rBST was approved in the U.S., Canada decided in 1999 not to approve the hormone based on research suggesting that it could be harmful to humans and that it was likely harmful to the overall health of the cows injected with the hormone.<sup>259</sup> Canada was not alone; European countries and Australia also decided to limit or disapprove of the hormone.<sup>260</sup> In the U.S., the hormone has been approved for commercial use ever since 1994,<sup>261</sup> but many people still worried that milk treated with rBST was not safe for human consumption.<sup>262</sup> Because consumers began choosing to buy milk from cows not treated with growth hormones, many companies have stopped selling rBST-treated milk,<sup>263</sup> and the patent holder, realizing sales had declined, decided to sell its patent.<sup>264</sup> Although voting against rBST has not yet changed government policy regarding the hormone, it did succeed in changing the market.

Thus, interfering with food choice may arguably be seen as restricting speech. Again, raw milk provides a current example. In the U.S., it is legal to consume raw milk.<sup>265</sup> However, as of May 2010 the District of Columbia and 11 states ban all sales of raw milk, 15 states allow farms to sell raw milk, and 10 states allow the retail sale of raw milk.<sup>266</sup> Consumers are fighting these bans: for example, a store owner in Nevada has begun a petition urging the state to legalize raw milk sales.<sup>267</sup> Given the market’s responsiveness to consumer demand, the most effective way of voting for raw milk would likely be

<sup>257</sup> *Id.* (discussing that until Upton Sinclair’s *The Jungle* alerted the general population to the problems within the industry, policy-makers were unable to effect change).

<sup>258</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 87.

<sup>259</sup> Frédéric Forge, *Recombinant Bovine Somatotropin (rBST)*, GOV’T OF CANADA PARLIAMEN- TARY RES. BRANCH (Aug. 11, 1999), [dsp-psd.communication.gc.ca/Collection-R/LoPBdP/BP/prb981-e.htm](http://dsp-psd.communication.gc.ca/Collection-R/LoPBdP/BP/prb981-e.htm). Canadian health officials decided that although the milk posed some risk of causing allergies in humans, the bigger problem was the harm to the cows, which suffered significant increases in mastitis, infertility, and lameness when injected with the hormone. *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> GOLDSTEIN & GOLDSTEIN, *supra* note 32, at 87.

<sup>262</sup> *Id.* This fear is made worse by the fact that FDA approval stemmed from studies overseen by researchers with strong ties to the patent company, Monsanto. *Id.* at 90–91. Indeed, there is some research indicating that the growth hormone may evoke antibody responses, is chemically and nutritionally different from natural milk, may accidentally be absorbed by the body, may cause or contribute to cancer, and may affect fertility among other things. *Id.* at 91–94.

<sup>263</sup> *Id.* at 94–95.

<sup>264</sup> Andrew Martin & Andrew Pollack, *Monsanto to Sell Off Hormone Business*, N.Y. TIMES, Aug. 7, 2008, at C1, available at [http://www.nytimes.com/2008/08/07/business/07bovine.html?\\_r=2](http://www.nytimes.com/2008/08/07/business/07bovine.html?_r=2).

<sup>265</sup> See Rinella, *supra* note 43.

<sup>266</sup> *Raw Milk Nation: State-by-State Review of Raw Milk Laws*, FARM-TO-CONSUMER LEGAL DEF. FUND (May 17, 2010), [www.farmtoconsumer.org/raw\\_milk\\_map.htm](http://www.farmtoconsumer.org/raw_milk_map.htm).

<sup>267</sup> Rinella, *supra* note 43.



to buy raw milk. Yet, since Nevadans cannot buy raw milk, this avenue of speech is foreclosed.

Whether or not food choice is a form of speech or political speech is a complex question. However, a brief overview of the issue does suggest that food choice deserves some level of protection because of its value as self-expression and speech. Furthermore, if it is a form of political speech, it may receive heightened protection under the Constitution.

#### CONCLUSION: A TOUGH NUT TO CRACK

Is there a right to food choice, and if there is, what level of constitutional protection does the right deserve? The Farm-to-Consumer Defense fund argues that food choice is a fundamental right because it implicates autonomy, the right to control over one's family, the right of health, a right of privacy, and other rights.<sup>268</sup> Conversely, the FDA contends not only that there is no fundamental right to choice of food, but there is no right at all to control diet.<sup>269</sup> Are either right? Or does the answer fall somewhere between these two extremes?

These are difficult questions, and are currently unanswered. Yet, when considering the right to choice of food, the law should look to additional considerations beyond food safety. Whether food is safe or dangerous is a subjective question that can be a matter of opinion, or worse, a matter of politics, and therefore should not be the only issue considered when determining whether to grant or deny access to a particular food. Meanwhile, food choice is important for a number of reasons beyond safety, including its impact on health, its importance to religion, its value in cultural identity, and its importance as self-expression and a form of speech. Furthermore, these reasons compare favorably to established fundamental rights and protected choices. Given these considerations, it may well be that food choice does indeed deserve some level of heightened protection.

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<sup>268</sup> Plaintiffs' Brief in Support of Resistance to Defendant's Motion to Dismiss, *supra* note 20, at 46–58.

<sup>269</sup> Brief in Support of United States' Motion to Dismiss Plaintiff's Amended Complaint, *supra* note 16, at 25–27.