

**THE PROHIBITION OF MOOSHINE:
A CONSUMER PROTECTION ANALYSIS OF RAW MILK IN
INTERSTATE COMMERCE**

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I. INTRODUCTION

One better be careful sporting a milk mustache while walking across state lines.¹ Among the food fights currently raging in our nation is one heated debate over raw milk, otherwise known as moo-shine, and its prohibition in interstate commerce and some intrastate commerce.² Talk of dairy temperance comes at a time when concern over our nation's food system has increasingly become the focus of individual citizens³ and policy makers.⁴ Whole movements have pushed back on a system ever growing in technology but narrowing in transparency and accountability.⁵ Among the trends is consumer demand for raw milk.⁶

Federal regulation banned raw milk in interstate commerce largely for health reasons in the late-80s. Meanwhile, states have been left to decide individually whether those same health concerns warrant an intrastate ban as well. With consumer protection in the form of health safety, any limitation on choice additionally invokes the serious consideration of consumer sovereignty, another form of consumer protection.⁷ Consumer sovereignty is “the set of societal arrangements that cause[] [the] economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives”⁸ It means that “consumers choose what to consume.”⁹ The FDA has taken the stance that health safety trumps consumer sovereignty, but a close look at state regulation and a number of other

¹ *Past Events*, RAW MILK FREEDOM RIDERS, <http://rawmilkfreedomriders.wordpress.com/past-events/> (last visited Sept. 1, 2014).

² Anji, *Rocky Mountain “Moo” Shine and Raw Milk Temperance*, ALLIANCE FOR RAW MILK INTERNATIONALE (Aug. 11, 2010), <http://milkraw.wordpress.com/2010/08/11/rocky-mountain-moo-shine-and-raw-milk-temperance/#more-95>; Sally Fallon Morell et al., Harvard Food Law Society Conference: Raw Milk Debate (Feb. 16, 2012), available at <http://www3.law.harvard.edu/orgs/foodlaw?s=raw+milk>.

³ See generally Michael Pollan, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006).

⁴ *Fact Sheets and Presentations*, FDA, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247546.htm> (last updated Aug. 5, 2014).

⁵ NAT’L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/> (last visited Sept. 5, 2014); *National Organic Program—An Overview*, NAT’L AGRIC. LAW CTR., <http://nationalaglawcenter.org/overview/organic/> (last visited Sept. 5, 2014); FAIR FOOD NETWORK, <http://www.fairfoodnetwork.org/> (last visited Sept. 5, 2014).

⁶ *Home: The Facts About Real Raw Milk*, REALMILK.COM, www.realmilk.com (last visited Sept. 2, 2014).

⁷ Morell et al., *supra* note 2.

⁸ Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 344–45 (2008).

⁹ *Id.* at 345.

considerations shows that choice is unnecessary. The contrast between state and federal regulation reveals that consumer sovereignty may not have been granted appropriate weight at the federal level: around 30 states allow the sale of raw milk in some form. Moreover, the details of state regulation show the best option strikes a balance—optimizing both health safety and consumer sovereignty as consumer protection concerns.

Part II of this Note provides background information regarding the current state of milk regulation and its focus on health safety, the competing consumer protection consideration that is consumer sovereignty, the current state of state regulation, and, lastly, why raw milk is highly sought after and causes such debate. Part III of this Note then uses this information to show that federal regulation of raw milk is necessary because it would better meet the health safety objectives of the original ban: because current state regulation undermines some of those original objectives, and, furthermore, because those objectives were given disproportionate weight in comparison to consumer sovereignty when imposed. It then considers a number of state regulatory schemes insofar as they address these two competing consumer protection concerns.

In sum, this Note argues that consumer sovereignty and health safety are both consumer protection concerns of heightened importance for food; the FDA can and should maximize the goals of both by lifting the ban on the sale of raw milk in interstate commerce and instead imposing consistent regulations that draw from state examples and ultimately better realize the sole objective of the original ban—protecting the health of milk consumers.

II. BACKGROUND

All milk sold in interstate commerce must be pasteurized,¹⁰ which involves heating “every particle of milk” at or above a specified temperature for a set period of time.¹¹ Section A of this Part addresses milk safety and federal regulation of milk, particularly as compared to other raw food regulation. However, pasteurization is not necessarily required for intrastate sales of milk.¹² As a result, some states have opted to allow the sale of raw milk after considering both health safety and consumer sovereignty—the latter consumer protection concern is addressed in Section B.¹³ Section C provides

¹⁰ 21 C.F.R. § 1240.61 (2014).

¹¹ *Id.* (requiring milk to be heated at or above 145 degrees Fahrenheit for at least 30 minutes, 161 degrees Fahrenheit for at least 15 seconds, 191 degrees Fahrenheit for at least 1 second, 194 degrees Fahrenheit for at least 0.5 second, 201 degrees Fahrenheit for at least 0.1 second, 204 degrees Fahrenheit for at least 0.05 second, or 212 degrees Fahrenheit for at least 0.01 second).

¹² *Id.*; *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1231–32 (D.D.C. 1986).

¹³ Press Release, Nat’l Ass’n of State Dep’ts of Agric., NASDA Releases Raw Milk Survey 1 (July 19, 2011), *available at* <http://www.nasda.org/file.aspx?id=3916>.

context for the role of consumer sovereignty in food choice. This Part then explains in Section D the various forms of intrastate regulation. Lastly, Section E provides context for this debate—why consumers so adamantly want access to the raw product.

A. *Milk Safety and Federal Regulation*

Federal regulatory concern over raw milk is predominately health related.¹⁴ Indeed, contamination of milk can occur a number of ways.¹⁵ If a cow is unhealthy, bacteria and disease can survive the digestive tract and end up in its fecal matter.¹⁶ Fecal matter may come into contact with the cow's mammary glands, udder, or with farm equipment during the milking process.¹⁷ Additionally, both bacteria and disease can be secreted directly into milk when the lactating animal is ill.¹⁸ The surrounding environment also poses a number of contamination risks: sick farm laborers, bacteria kicked up in hay dust, and improper handling or refrigeration.¹⁹ After milk is taken from the cow, it is pooled with other milk for collection and transportation, thereby sharing any potential contamination with a larger quantity of milk.²⁰ Once contaminated, milk is "an ideal environment for a number of dangerous bacteria and viruses," including "Anthrax, Campylobacter, E. coli, Listeria, Rabies, Salmonella, Staphylococcus, Tuberculosis, Typhoid fever, and Yersiniosis."²¹ Opponents of raw milk consumption point out that these pathogens can be particularly harmful for children, pregnant women, and the elderly.²²

Many of these concerns led to federal and state regulation of milk production and marketing in order to protect public health beginning around the

¹⁴ *Id.*

¹⁵ Edmund Renner, *Effects of Agricultural Practices on Milk and Dairy Products*, in NUTRITIONAL EVALUATION OF FOOD PROCESSING 205–07 (Endel Karmas & Robert S. Harris eds., 3d ed. 1988); see also P. WALSTRA ET AL., DAIRY TECHNOLOGY: PRINCIPLES OF MILK PROPERTIES AND PROCESSES 101–02 (1999).

¹⁶ Damian C. Adams et al., *Deja Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305, 307 (2008).

¹⁷ *Id.* at 308.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See, e.g., S. Lin et al., *Identification of Contamination Sources of Bacillus Cereus in Pasteurized Milk*, 43 INT'L J. FOOD MICROBIOLOGY 159, 168–70 (1998); see also JOANN SILLS GROHMAN, KEEPING A FAMILY COW: A COMPLETE GUIDE TO RAISING COWS AND PRODUCING DAIRY PRODUCTS FOR HOME USE 77–78 (1975).

²¹ Adams et al., *supra* note 16, at 307.

²² Katie Burns, *Raw Milk: Clear Risks, No Benefits*, FOOD INSIGHT (June 27, 2012), <http://www.foodinsight.org/blogs/raw-milk-clear-risks-no-benefits>.

early twentieth century.²³ As people increasingly moved to cities, “milk from cows in the country was transported farther and stored at higher temperatures than in the past.”²⁴ “Milk produced closer to cities [often] came from cows kept under crowded and unsanitary conditions”²⁵ In 1927, the federal government took the first measures to protect consumers from the dangers associated with milk consumption.²⁶ It set standards for production and transportation.²⁷ Shortly thereafter, the Food and Drug Administration adopted the Standard Milk Ordinance, later known as the Pasteurized Milk Ordinance (“PMO”).²⁸ Originally, the ordinance focused on rules for safe production and handling.²⁹

The pasteurization of all milk in interstate commerce did not begin to materialize until the FDA passed a rule requiring it in 1973.³⁰ However, a complaint from a raw milk producer caused this rule to be stayed for six years, allowing the continued sale of “certified” raw milk, or raw milk that must meet certain quality standards.³¹ From 1974 to 1982, the FDA collected data and held hearings to assess public health issues.³²

Meanwhile, certified raw milk, produced by the Association of Medical Milk Commissions, Inc.; the Certified Raw Milk Producer’s Association, Inc.; and a few other dairies was subject to regulations to ensure quality and safety.³³ Certifying milk (as compared to pasteurizing) was originally conceived by the Medical Milk Commission to include the following:

[S]etting standards of purity for the milk, conducting periodic inspections of the dairies providing the milk, and providing for periodic examinations of the animals and the employees. . . . The milk produced was to be subjected to periodic chemical analyses, and to bacterial counts made under the direction of

²³ See *Grade “A” Pasteurized Milk Ordinance*, FDA (2011), <http://www.fda.gov/downloads/food/guidanceregulation/ucm291757.pdf>; E. MELANIE DUPUIS, *NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S FAVORITE DRINK* 81 (2002).

²⁴ Andy Weisbecker, *A Legal History of Raw Milk in the United States*, 69 J. ENVTL. HEALTH 62 (2007), available at <http://www.marlerclark.com/pdfs/raw-milk-jeh.pdf>.

²⁵ *Id.*

²⁶ Milk Importation Act, Pub. L. No. 69-625, 44 Stat. 1101 (1927).

²⁷ *Id.*

²⁸ See *Grade “A” Pasteurized Milk Ordinance*, *supra* note 23.

²⁹ *Id.* at iv.

³⁰ Milk and Cream, 38 Fed. Reg. 27924 (Oct. 10, 1973) (to be codified at 21 C.F.R. pt. 18).

³¹ *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1231–32 (D.D.C. 1986).

³² *Id.* at 1232.

³³ *Id.*

the Commission. The milk was required to be entirely free of pathogenic organisms.³⁴

Despite these efforts to ensure the safety of milk through certification, the FDA's data, after working closely with the Center for Disease Control and Prevention ("CDC") and individual states, revealed that "all forms of raw milk and raw milk products [were] linked to the outbreak of serious disease."³⁵

Importantly, certification would have been a more expensive way to regulate the safety of milk, especially for the larger producers.³⁶ Regulation in the form of certification would have been "more labor and capital intensive and would have depended on improvements in city sanitation as well as inspections of barns and milking practices."³⁷ It also would have been more expensive for the farmers to the extent it would require testing animals and monitoring farm laborers.³⁸ Though "cooked" milk was considered an inferior product at the time, pasteurization could be incorporated more cheaply and uniformly into the mass production of milk; it was especially worthwhile for dairy farms that were becoming increasingly large-scale productions that utilized technology.³⁹

After collecting data from 1974 to 1982, the FDA drafted, but did not adopt, a rule that would have required the pasteurization of all milk in interstate commerce.⁴⁰ The agency's reasoning for not adopting the rule was that there were too few sales of raw milk in interstate commerce to be of significant concern; it questioned whether regulation of raw milk in this way effectively addressed concerns when most sales were intrastate.⁴¹ The FDA's findings showed that the interstate sales of raw milk were "negligible" and that most raw milk was sold locally and intrastate, in states where it was legal.⁴²

³⁴ Ron Schmid, *Pasteurize or Certify: Two Solutions to "The Milk Problem,"* REALMILK.COM (Dec. 13, 2003), <http://www.realmilk.com/safety/pasteurize-or-certify/>; see also *Methods and Standards for the Production of Certified Milk*, THE AM. ASS'N OF MED. MILK COMM'NS (1999), <http://web.ncf.ca/fk980/nm/aammc.htm>.

³⁵ *Pub. Citizen*, 653 F. Supp. at 1232. "In particular, as documented by the Center for Disease Control, there has been a number of outbreaks of two serious bacterial diseases, campylobacteriosis and salmonellosis, which on rare occasions result in death. The link between raw milk and Salmonella Dublin Bacterium ('S. Dublin') was particularly strong, and the especially virulent S. Dublin often invades sites outside the intestine such as the lung and spinal fluid." *Id.* at 1232 n.3.

³⁶ DUPUIS, *supra* note 23, at 76–77.

³⁷ Donna M. Byrne, *Raw Milk in Context*, 26 J. ENVTL. L. & LITIG. 109, 127 (2011) (citing DUPUIS, *supra* note 23, at 76–77).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Pub. Citizen*, 653 F. Supp. at 1232.

⁴¹ Adams et al., *supra* note 16, at 313.

⁴² *Pub. Citizen*, 653 F. Supp. at 1240.

After the FDA opted not to adopt the rule, Public Citizen sued the Department of Health and Human Services.⁴³ The public watchdog group persuaded the court that “the FDA had unreasonably delayed promulgating the rule, and that [the] justification for this delay . . . was insufficient in light of the relative risk of disease,”⁴⁴ and therefore the failure was arbitrary and capricious.⁴⁵ The court’s primary reasoning in holding that the FDA must promulgate a rule was that “[r]esidents of non-producing states near the producing states do not have access to, and are not represented in, the producing state’s political process.”⁴⁶ The court explained that were the out-of-state consumer to become ill from raw milk, there would be no “recourse through the political process.”⁴⁷ Thus, on August 10, 1987, the FDA adopted the current rule requiring pasteurization of all milk for interstate commerce: “No person shall cause to be delivered into interstate commerce . . . any milk or milk product in final package form for direct human consumption unless the product has been pasteurized”⁴⁸

Presently, public consumption of raw milk is discouraged by both the FDA and the CDC.⁴⁹ Statistics from these authorities show that 70% of dairy-related foodborne illnesses are attributable to raw milk as compared to 30% being attributable to pasteurized milk.⁵⁰ Far from uncommon, nationwide and considering all foods, there are a number of ways people become ill from food

⁴³ Adams et al., *supra* note 16, at 313.

⁴⁴ *Pub. Citizen*, 653 F. Supp. at 1234–35.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1240–41.

⁴⁷ *Id.* Though an out-of-state purchaser may not have recourse in a producing state’s political system, purchasers of raw milk do have recourse through a number of negligence and products liability theories. See Adams et al., *supra* note 16. There are four theories that a consumer “is likely to use to recover for damages from raw milk: (1) Negligence and negligence per se; (2) Strict products liability for manufacturing, design, and warning defects; (3) Breach of express or implied warranty; and (4) Misrepresentation (fraud).” *Id.* at 320.

⁴⁸ 21 C.F.R. § 1240.61 (2014).

⁴⁹ See *Questions and Answers: Raw Milk*, FDA.GOV, <http://www.fda.gov/Food/FoodborneIllnessContaminants/BuyStoreServeSafeFood/ucm122062.htm> (last updated Nov. 1, 2011); *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, FDA.GOV (Aug. 2012), <http://www.fda.gov/downloads/Food/FoodborneIllnessContaminants/UCM239493>; *Food Safety and Raw Milk*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://cdc.gov/foodsafety/rawmilk/raw-milk-index.html> (last updated May 16, 2014). These websites are designed for a lay audience and do not provide citations to studies that would back up their claims. This lack of citation has given raw milk proponents ammunition to accuse the regulatory agencies of basing their positions on unsubstantiated conventional wisdom about the risks of unpasteurized milk.

⁵⁰ L.T. AYRES ET AL., CTR. FOR DISEASE CONTROL AND PREVENTION, SURVEILLANCE OF FOODBORNE OUTBREAKS—UNITED STATES, 2006 (June 12, 2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5822a1.htm>.

consumption: there are around 48 million cases of foodborne illness, affecting roughly one in six consumers annually.⁵¹ It is estimated that around 128,000 individuals are hospitalized and 3,000 die from foodborne illness.⁵²

Unlike raw milk, the federal government does permit and regulate the sale of raw meat in interstate commerce.⁵³ The United States consumption of raw meat includes traditions such as crudos, steak tartare, sushi, sashimi, raw oysters, and other delicacies.⁵⁴ Raw meat is regularly sold in supermarkets. It even is sold at restaurants with the intent that it be consumed raw.⁵⁵ Incidentally, the primary source of disease caused by microbial pathogens, or foodborne illness, is raw meat.⁵⁶ Moreover, any of the pathogens in raw meat are the same as those present in raw milk: *Campylobacter*, *E. coli*, *Listeria*, Rabies, *Salmonella*, and *Staphylococcus*.⁵⁷ However, raw meats contain a number of additional health hazards.⁵⁸

Post-processing regulations to protect consumers from raw meat are frequently limited to disclaimers on packaging and menus.⁵⁹ Rather than require that all meat be cooked before entering interstate commerce—as raw milk is—the process of producing meat is regulated preventatively.⁶⁰ The

⁵¹ U.S. FDA, *FOODBORNE ILLNESS-CAUSING ORGANISMS IN THE U.S.: WHAT YOU NEED TO KNOW* (2014), available at <http://www.fda.gov/food/resourcesforyou/consumers/ucm187482.pdf>.

⁵² *Id.*

⁵³ 21 U.S.C. § 601(k) (2012) (“The term ‘capable of use as human food’ shall apply to any carcass, or part or product of a carcass, of any animal, unless it is denatured or otherwise identified as required by regulations prescribed by the Secretary to deter its use as human food, or it is naturally inedible by humans.”).

⁵⁴ See NICK FIDDES, *MEAT: A NATURAL SYMBOL* 87 (1992).

⁵⁵ *Id.*

⁵⁶ See Geraldine Duffy et al., *A Review of Quantitative Microbial Risk Assessment in the Management of Escherichia Coli O157:H7 on Beef*, 74 *MEAT SCI.* 76 (2006), available at <http://www.sciencedirect.com/science/article/pii/S0309174006001136>.

⁵⁷ *Food Safety for Moms-to-Be: Medical Professionals - Foodborne Pathogens*, FDA.GOV, <http://www.fda.gov/food/resourcesforyou/healtheducators/ucm091681.htm> (last updated May 14, 2014); see also *supra* Part II.A.

⁵⁸ *Food Safety for Moms-to-Be: Medical Professionals - Foodborne Pathogens*, FDA.GOV, <http://www.fda.gov/food/resourcesforyou/healtheducators/ucm091681.htm> (last updated May 14, 2014); see also *supra* Part II.A.

⁵⁹ FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., *A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS* (R. Budak et al. eds., 2007), available at http://www.fsis.usda.gov/shared/PDF/Labeling_Requirements_Guide.pdf [hereinafter *FEDERAL FOOD LABELING REQUIREMENTS*].

⁶⁰ 21 U.S.C. § 350g (2012); 9 C.F.R. § 417 (2014) (The process of producing meat is highly regulated on the front end, rather than all regulation focus on the end product when the meat might be treated to account for contamination). Some meat is treated for contamination post-production—one example is irradiation. However, for the most part, preventive controls are the primary mechanism for ensuring meat safety. Irradiation is not required. See FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., *USDA ISSUES FINAL RULE ON MEAT AND POULTRY*

United States Department of Agriculture, through the Food Safety and Inspection Service regulates most meat with Hazard Analysis and Critical Control Point (“HACCP”) systems.⁶¹

HACCP plans for meat production call for upfront written hazard analysis plans that identify food hazards, evaluate those hazards, set control measures for hazards, review current control measures, and identify critical control points.⁶² The considered food hazards include: microbiological contamination, parasites, chemical contamination, unlawful pesticides residues, decomposition in food where a food hazard has been associated with decomposition, natural toxins, unapproved use of food or color additives, presence of undeclared ingredients that may be allergens, and physical hazards.⁶³ In addition, preventative considerations include a wide range of processes: “[p]rocessors should evaluate product ingredients, processing procedures, packaging, storage, and intended use; facility and equipment function and design; and plant sanitation, including employee hygiene, to determine the potential effect of each on the safety of the finished food for the intended consumer.”⁶⁴

HACCP plans aim to prevent contamination of meat and allow it be sold raw.⁶⁵ Consumer choice is thus preserved as to how and how much that meat will be cooked, if at all. Raw meat is an example of where preventive controls can enforce health safety while preserving consumer sovereignty.⁶⁶ Notably, the FDA has taken the stance that “[t]here is no absolute right to consume or feed [people] any particular kind of food.”⁶⁷ As discussed in the next Section, these two aspects of consumer protection are often in contention in the regulation of food.⁶⁸

IRRADIATION (Dec. 1999), available at http://www.fsis.usda.gov/Oa/background/irrad_final.htm; Food Standards Agency, *Hazard Analysis and Critical Control Point (HACCP) in Meat Plants*, FOOD.GOV.UK, <http://www.food.gov.uk/business-industry/meat/haccpmeatplants/#.UvA4vPZQ1Mo> (last visited Oct. 9, 2014) [hereinafter HACCP]; Am. Ass’n of Meat Processors, *HACCP*, AAMP.COM, <http://www.aamp.com/food-safety/food-safety-hazard-analysis-and-critical-control-point-haccp/> (last visited Oct. 9, 2014).

⁶¹ 9 C.F.R. § 417.2 (2014).

⁶² *Id.* § 417.2(a).

⁶³ 21 C.F.R. § 120.7(c) (2014).

⁶⁴ *Id.* § 120.7(d).

⁶⁵ HACCP, *supra* note 60.

⁶⁶ HACCP, *supra* note 60.

⁶⁷ David Gumpert, *In Court Case, FDA Takes a Strong Stand Against Unabridged Food and Health Rights*, GRIST (Aug. 29, 2010), <http://grist.org/article/in-court-case-fda-takes-a-strong-stand-against-unabridged-food-and-health-r/>.

⁶⁸ See *infra* Part II.C.

B. Consumer Protection and Consumer Sovereignty

Consumer protection laws at the state and federal level formed to make up for the common law's perceived failings.⁶⁹ For example, problems with "intent to deceive" requirements for tort remedies and privity of contract between buyer and seller for contract remedies, coupled with the cost of judicial remedies in general, prompted federal measures to ensure consumer welfare.⁷⁰ Modern federal consumer protection law is founded in the following language in the Federal Trade Commissions Act as an effort to prohibit "unfair or deceptive acts or practices . . . in commerce."⁷¹ This language was intentionally left open-ended in order to allow the Federal Trade Commission ("FTC") more latitude to promote consumer welfare.⁷² The FTC and the FDA have had a longstanding agreement to coordinate the protection of consumer welfare with respect to food⁷³: "[t]he two agencies have a common objective of preventing deception of the public through the misrepresentation of food, drugs, devices, or cosmetics."⁷⁴

The FDA and FTC each regulate by protecting its agency's own purposes and interests, which often overlap.⁷⁵ The FDA regulates labeling the listed commodities' packaging to avoid misrepresentations to the public, while the FTC regulates these commodities to avoid misrepresentation through advertisement.⁷⁶ Because of the potential overlap in responsibilities, the two agencies "provide for exchange of complete information so that both agencies will be utilized to the maximum effectiveness in the public interest."⁷⁷ Like

⁶⁹ Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2226 (2012).

⁷⁰ *Id.* at 2226–27.

⁷¹ *Id.* at 2227.

⁷² *See, e.g.*, Letter from James C. Miller III, Chairman, Federal Trade Comm'n, to Representative John D. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>; Letter from Michael Pertschuk, Chairman, Federal Trade Comm'n, to Senators Wendell H. Ford and John C. Danforth, Members of the Committee on Commerce, Science, and Transportation (Dec. 17, 1980), *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

⁷³ *See* Working Agreement Between Federal Trade Comm'n and Food and Drug Administration, 4 TRADE REG. REP. (CCH), at 9850 (June 9, 1954), *available at* <http://www.fda.gov/ohrms/dockets/DOCKETS/06p0394/06p-0394-cp00001-10-Tab-08-Trade-Reg-Rpts-vol1.pdf>.

⁷⁴ *Id.* at 9850.01.

⁷⁵ *Id.*

⁷⁶ *Id.* at 9850.03.

⁷⁷ *Id.* at 9850.02.

many regulatory measures, however, efforts to protect consumers can reduce consumer sovereignty.⁷⁸

Consumer sovereignty is “the set of societal arrangements that cause the economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives.”⁷⁹ It means that “consumers choose what to consume.”⁸⁰ Rational choice theory justifies consumer sovereignty by reasoning that “individual utility—and social welfare—are maximized when individuals make their own consumption choices.”⁸¹ Furthermore, consumer sovereignty is acceptable because the “consumer chooses between courses of action [that] differ only in . . . way[s] that affect him.”⁸²

Specifically for food consumption, consumer sovereignty may be conceptualized as “the right of the individual consumer to get information on food products and to make his or her own choice on the market of food products.”⁸³ Traditionally, governments only take into account the passive consumer when formulating regulations.⁸⁴ Increasingly, however, consumers are demanding that the goods they purchase, especially food products, be produced according to certain ethical standards—consumers are becoming more active participants in their consumption choices.⁸⁵ For food, this is largely the result of consumers becoming more concerned about safety for humans, animals, and the environment.⁸⁶

Each of these concerns—safety for humans, animals, and the environment—surface in the raw milk debate,⁸⁷ whether in newspapers, advocacy groups, or state legislatures. Proponents of raw milk in these forums consistently advocate for consumer sovereignty, or the individual consumer’s desire to obtain healthier milk, more compassionately produced milk, and milk that is less harmful to the environment.⁸⁸ Advocacy groups similarly hone in on

⁷⁸ Wright, *supra* note 69, at 2223–24.

⁷⁹ Edwards, *supra* note 8, at 344–45.

⁸⁰ *Id.* at 345.

⁸¹ *Id.* at 345 (citing Joel Waldfogel, *Does Consumer Irrationality Trump Consumer Sovereignty?*, 87 REV. ECON. & STAT. 691, 691 (2005)).

⁸² Michael Korthals, *Taking Consumer Sovereignty Seriously: Two Concepts in Consumer Sovereignty*, 14 J. OF AGRIC. AND ENVTL. ETHICS 201, 202 (2001).

⁸³ *Id.* at 204.

⁸⁴ *Id.* at 203.

⁸⁵ *Id.* at 202.

⁸⁶ *Id.* at 203.

⁸⁷ *See infra* Part II.E.

⁸⁸ *See* Morell et al., *supra* note 2; *Home: The Facts About Real Raw Milk*, *supra* note 6; Molly D. Anderson, *The Role of US Consumers and Producers in Food Sovereignty*, FOOD SOVEREIGNTY: A CRITICAL DIALOGUE, INTERNATIONAL CONFERENCE, YALE UNIVERSITY (Sept.

the importance of consumer sovereignty, especially in light of what they argue to be questionably portrayed hype regarding the safety risks of raw milk.⁸⁹ Lastly, state legislatures have responded to this debate by choosing a different form of regulation than that implemented at the federal level. Rather than ban raw milk altogether, approximately 30 states permit the sale of raw milk and regulate its safety so that consumers have the choice to consume it and consume it knowledgeably.⁹⁰ In taking a position unlike that imposed at the federal level, frequently, those media, advocacy groups, and state legislatures that permit the sale of raw milk argue that consumer sovereignty should be more heavily weighed when contemplating limitations on food.⁹¹

C. Consumer Sovereignty and Food

Food choice is an intimate decision⁹² and is closely tied with a number of fundamental rights and protected interests.⁹³ As a result, consumer sovereignty in food regulation is particularly important.⁹⁴ The choice a person makes as to what substances to allow to enter one's body and to be a part of one's culture or religion is an intimate one—food sustains life, affecting both mental and physical health.⁹⁵ Food choice is a different decision than, for instance, which lawn mower to purchase.⁹⁶ It is connected to autonomy in health, religion, cultural beliefs, and other forms of expression.

14–15, 2013), available at http://www.yale.edu/agrarianstudies/foodsovereignty/pprs/31_Anderson_2013.pdf.

⁸⁹ See Morell et al., *supra* note 2; *Home: The Facts About Real Raw Milk*, *supra* note 6; Anderson, *supra* note 88, at 14–15.

⁹⁰ *State-by-State Review of Raw Milk Laws*, FARM-TO-CONSUMER LEGAL DEF. FUND, http://www.farmtoconsumer.org/raw_milk_map.htm (last visited Mar. 8, 2014).

⁹¹ Anderson, *supra* note 88.

⁹² Korthals, *supra* note 82, at 206 (“Food is not only valued because of its connection with our health, but primarily because of its intimate connection with the quality of life we perceive. Food it is not like the furniture we live with or the gasoline we put in our cars, because it is much nearer to how we see ourselves and how we want to see ourselves.”).

⁹³ See Kammi L. Rencher, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418 (2012).

⁹⁴ See *id.*; see also Korthals, *supra* note 82, at 209 (“[C]onsumption of food is intrinsically connected with one's identity, the places where one lives, the interactions one is involved in, and the collectives one belongs to.”).

⁹⁵ Rencher, *supra* note 93, at 419.

⁹⁶ *Id.*; Korthals, *supra* note 82, at 207 (“Democratic societies will not entrust their water, their diets, or their natural resources blindly into the hands of farmers, agribusiness firms, and agricultural scientists. Agricultural producers must participate in the dialogue that leads to social learning and social consensus about risks, and they must be willing to contribute the time and resources needed to understand the positions of their fellow citizens, and to make articulate statements of their own position.”).

Diet decisions can be an individual's effort to control his or her health.⁹⁷ Consumers may choose a variety of diets for general increased nutritional value or in effort to obtain sought-after and hard-to-find nutritional components.⁹⁸ Consumers may avoid foods to limit any number of potentially harmful food additives or food qualities.⁹⁹ Additionally, allergies are a common consideration for consumers and food choice.¹⁰⁰ The notion that diet is critical to health is a longstanding one.¹⁰¹

Moreover, food choice can be an individual's effort to express religious beliefs.¹⁰² Many religions have doctrine involving what and what not to eat.¹⁰³ Some religious beliefs restrict the methods by which food may be processed,¹⁰⁴ while others may prohibit certain food and drink altogether.¹⁰⁵ Some practices condone only a certain demeanor, such as gratitude or restraint, when eating.¹⁰⁶

Though not necessarily a constitutionally protected interest, food choice can be an individual's effort to express cultural beliefs.¹⁰⁷ Dining

⁹⁷ See *Cruzan v. Dir.*, Mo. Dep't of Health, 497 U.S. 261, 279 (1990); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992); *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); see also Rencher, *supra* note 93, at 427–31.

⁹⁸ Rencher *supra* note 93, at 427–28.

⁹⁹ *Id.* at 428.

¹⁰⁰ *Id.* at 429; DAVID E. GUMPERT, *THE RAW MILK REVOLUTION: BEHIND AMERICA'S EMERGING BATTLE OVER FOOD RIGHTS* 100–03 (2009).

¹⁰¹ Hippocrates, after whom Western medicine's Hippocratic Oath is named, is quoted as saying, "[L]et food be thy medicine." Mat Edelson, *Take Two Carrots and Call Me in the Morning*, HOPKINS MED. (2010), available at <http://www.hopkinsmedicine.org/hmn/w10/feature2.cfm>. Furthermore, food and health are so closely tied that one ancient Chinese proverb states, "He that takes medicine but neglects diet, wastes the skill of the physician." THOMAS S. PURTELL, *NATURAL MARTIAL ARTS* 93 (2008).

¹⁰² Rencher, *supra* note 93, at 431–34. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Although, this "does not mean that a person may act or refuse to act for religious reasons and be absolutely shielded from government intervention." Rencher, *supra* note 93, at 433. "[I]t 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." *Id.*; see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

¹⁰³ Bryna Shatenstein & Parviz Ghadirian, *Influence on Diet, Health Behaviours and Their Outcome in Selected Ethnocultural and Religious Groups*, 14 *NUTRITION* 223 (1998).

¹⁰⁴ An example would be kosher foods. See Etan Diamond, *The Kosher Lifestyle: Religious Consumerism and Urban Orthodox Jews*, 28 *J. URB. HIST.* 488, 491 (2002), available at <http://juh.sagepub.com/content/28/4/488.short>.

¹⁰⁵ Shatenstein Ghadirian, *supra* note 103, at 225.

¹⁰⁶ *Id.*

¹⁰⁷ See *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 218–19, 236 (1972); Rencher, *supra* note 93, at 435–36 (Though culture is not a recognized

decisions often have deep roots in heritage.¹⁰⁸ Especially when socially dining, food can symbolize cultural identity as well as social and ethnic boundaries¹⁰⁹: “[a]s long as humans have been taking meals together, eating has been as much about culture as it has been about biology.”¹¹⁰

Finally, food choice can be an individual’s effort to express personal values and to express in general.¹¹¹ Vegetarians may avoid animal flesh for moral, ethical, or environmental reasons.¹¹² Vegans may avoid animal flesh as well as animal byproducts altogether for the same reasons.¹¹³ Individuals following macrobiotics, a diet as much as a way of life, may make dietary choices based on a unique way of viewing balance and the energy of foods.¹¹⁴ Each of these choices, when made in the presence of others, may be as important to the individual as an act of eating as it is an act of demonstrating an alternative lifestyle.¹¹⁵

The struggle to balance the consideration of food choice as an intimate decision and as one with significant health safety implications is reflected in the variety in state regulation of raw milk.¹¹⁶ Some states so heavily weigh health safety that it warrants the prohibition of raw milk sales, while others weigh both competing concerns, or weigh them differently, such that consumer sovereignty warrants permitting raw milk sales.¹¹⁷

D. Intrastate Regulation of Raw Milk

States vary widely on raw milk regulation. Some ban the sale of raw milk altogether, while others take a range of stances. Recently, the trend has

fundamental right, it has influenced the protection of certain rights.); Korthals, *supra* note 82, at 209.

¹⁰⁸ See Meyer, 262 U.S. at 399–401; Yoder, 406 U.S. at 218–19, 236; Rencher, *supra* note 93, at 435–36; Korthals, *supra* note 82, at 209.

¹⁰⁹ Paul Rozin, *The Socio-Cultural Context of Eating and Food Choice*, in *FOOD CHOICE, ACCEPTANCE AND CONSUMPTION* 83, 90 (H.L. Meiselman et al. eds., 1996); see also MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 15–17 (2007).

¹¹⁰ MICHAEL POLLAN, *IN DEFENSE OF FOOD: AN EATER’S MANIFESTO* 8 (2008).

¹¹¹ U.S. CONST. amend. I; Rencher, *supra* note 93, at 426.

¹¹² JONATHAN SAFRAN FOER, *EATING ANIMALS* (2009); ORAN B. HESTERMAN, *FAIR FOOD: GROWING A HEALTHY, SUSTAINABLE FOOD SYSTEM FOR ALL* (2011).

¹¹³ SAFRAN, *supra* note 112; HESTERMAN, *supra* note 112.

¹¹⁴ See generally MICHIO KUSHI, et al., *THE MACROBIOTIC WAY: THE DEFINITIVE GUIDE TO MACROBIOTIC LIVING* (2004); MICHIO KUSHI, *THE BOOK OF MACROBIOTICS: THE UNIVERSAL WAY OF HEALTH, HAPPINESS AND PEACE* (1987).

¹¹⁵ Rozin, *supra* note 109, at 93.

¹¹⁶ Anderson, *supra* note 88, at 10–12.

¹¹⁷ *Id.*

been towards more access to raw milk,¹¹⁸ although states may impose a number of restrictions, including production quotas, seller limitations, or labeling requirements. These approaches can be broken down into four categories: “(1) [a]ctual or de facto prohibition on sale, (2) [a]nimal-share or leasing, (3) [l]imited public sale and/or labeling requirements, and (4) [p]ret food exception.”¹¹⁹ Because these approaches are used in Part III.B to suggest potential federal regulation of raw milk sales, this Section explains briefly what each approach entails.

1. Prohibition on Sale

The most recent survey by the National Association of State Departments of Agriculture (NASDA) in 2011 showed that 30 states allowed the sale of raw milk, with five states increasing regulation in the three years since the 2008 survey.¹²⁰ Around 20 states prohibited the sale of raw milk to consumers.¹²¹ States that prohibit its sale do so mainly reasoning that raw milk poses a substantial health risk.¹²² For example, Delaware recently considered legalizing on-farm sales of raw milk, and the primary reason voiced for maintaining raw milk’s illegal status was the public health risk.¹²³ Many states de jure prohibit raw milk sales through laws that require pasteurization.¹²⁴ Some de facto prohibit raw milk sales by imposing regulatory standards that are too costly for producers.¹²⁵

¹¹⁸ Pete Kennedy, *State Raw Milk Bills*, FARM-TO-CONSUMER LEGAL DEF. FUND (Mar. 11, 2013), http://www.farmtoconsumer.org/news_wp/?p=5754 (“So far, bills have been introduced in 15 states with all but one either expanding or legalizing raw milk sales.”).

¹¹⁹ Adams et al., *supra* note 16, at 315.

¹²⁰ Press Release, *supra* note 13, at 1 (Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and Wisconsin).

¹²¹ *Id.* The sale of raw milk is prohibited in the following states: Alabama, Alaska, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Montana, New Jersey, North Carolina, North Dakota, Ohio, Tennessee, Virginia, West Virginia, and Wyoming. *Id.* at 2.

¹²² See, e.g., Sarah Plummer, *W. Va. House Moves on Raw Milk Consumption Bill*, ASSOCIATED PRESS (Feb. 12, 2014), available at <http://www.washingtontimes.com/news/2014/feb/12/wva-house-moves-on-raw-milk-consumption-bill/>.

¹²³ *Delaware Considers Allowing Farms to Sell Raw Milk*, FOOD SAFETY NEWS (June 20, 2013), http://www.foodsafetynews.com/2013/06/delaware-considers-allowing-farms-to-sell-raw-milk/#.VDdVY_IdWAV.

¹²⁴ *State-by-State*, *supra* note 90.

¹²⁵ Pete Kennedy, *SDDA Proposes Rules to Create Defacto Ban on Raw Milk Sales in South Dakota*, FARM-TO-CONSUMER LEGAL DEF. FUND (Nov. 8, 2009), <http://www.farmtoconsumer.org/news/news-08Nov2009-5.html>.

2. Animal-Shares, Herd-Shares, and Farm-Shares

In states where the sale of raw milk is prohibited, some consumers have opted to lease all or a portion of a dairy animal or herd from a farmer in order to obtain raw milk.¹²⁶ Sometimes lessees pay a service fee to the producer for milking the animal.¹²⁷ Similarly, some raw milk consumers purchase a portion of a dairy animal or herd—known as an animal-share or herd-share. Owners are allowed to keep milk produced by the animal or herd and sometimes pay an additional service fee.¹²⁸ In both scenarios raw milk is exchanged for money. However, the buyer and seller try to bypass prohibitive state raw milk laws by limiting the actual money transaction to one involving only the animal or the producer's service and not the raw milk itself.¹²⁹ As a result, a few states have acted to prevent these arrangements.¹³⁰ They have done so by clarifying in regulations that share arrangements are a purchase of raw milk.¹³¹

Where animal-shares have been banned, producers can set up the more difficult farm-share. In a farm-share, the consumer may obtain raw milk as part of the farm's profits.¹³² The consumers typically hold non-voting shares of a farm corporation.¹³³ One benefit of this arrangement is that the farmer is provided more protection because the consumer has a property interest in the farm itself.¹³⁴ The shareholder thus shares in the success or failures of the farm.¹³⁵ No state has yet to ban the consumption of raw milk via farm-shares.

¹²⁶ *Learn More - Cow and Goat-shares*, FARM-TO-CONSUMER LEGAL DEF. FUND, <http://www.farmtoconsumer.org/cow-shares.html> (last visited Sept. 1, 2014).

¹²⁷ *Id.*; Adams et al. *supra* note 16, at 318–19.

¹²⁸ *Share Agreements: Cowshares, Goatshare, Herdshares, Farmshares*, REALMILK.COM (Nov. 26, 2003), <http://www.realmilk.com/herdshares/share-agreements/> [hereinafter *Share Agreements*].

¹²⁹ *Learn More - Cow and Goat-shares*, *supra* note 126.

¹³⁰ Adams et al. *supra* note 16, at 318–19 (Florida, Maryland, North Carolina, Virginia, West Virginia, Wisconsin). *But see* Plummer, *supra* note 122.

¹³¹ William Wan, *Farmer Sues to Distribute Raw Milk*, WASH. POST, Feb. 15, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/14/AR2007021400894.html>.

¹³² *Share Agreements*, *supra* note 128.

¹³³ *Id.*

¹³⁴ *Id.* One issue some advocates have with current raw milk regulation is that, even as it stands, it currently transgresses private property rights and private right to contract. *See* Morell et al., *supra* note 2.

¹³⁵ *See Wild Willow Farm Shares*, SAN DIEGO ROOTS SUSTAINABLE FOOD PROJECT, <http://www.sandiegoroots.org/farm/farmshare.php> (last visited Oct. 9, 2014).

In states where raw milk is illegal, these various share agreements can leave raw milk virtually unregulated:¹³⁶ some farmers have successfully used share arrangements to provide consumers with raw milk.¹³⁷ On one farm, \$50 purchases a portion of a jointly owned cow and provides shareholders with about one gallon of milk per week.¹³⁸ The milk is distributed to shareholders at locations in nearby large cities, and no money exchanges hands when the raw milk does.¹³⁹

3. Limited Public Sale and Labeling Requirements

Although many states permit the sale of raw milk, most limit the sale in some way.¹⁴⁰ Raw milk sales might be allowed on farm, in farmer's markets, at road-side stands, in retail stores, or some limited combination of these options.¹⁴¹ Sales might be limited to a certain quantity of milk or to milk derived from a certain number of animals.¹⁴² They may also be limited to milk derived only from a certain type of animal, or may require bottle labeling, warning signs at the point of sale, or limited advertising.¹⁴³

In states that permit the sale of raw milk, the first realm permitted is usually on-farm sales.¹⁴⁴ Several states limit the sale of raw milk strictly to on-farm sales and vary whether licensing is required for the sale.¹⁴⁵ On-farm sales require that consumers drive to the farm "each and every time the consumer wishes to purchase milk."¹⁴⁶ Efforts to bypass strict adherence to the on-farm purchase requirements by purchasing online or by group purchasing and later distribution have resulted in state action.¹⁴⁷

¹³⁶ See Julie Rawe, *Raw Milk Ban Doesn't Stop Indiana Residents From Drinking It*, IND. PUB. MEDIA (Feb. 24, 2012), <http://indianapublicmedia.org/news/raw-milk-ban-stop-indiana-residents-drinking-27153/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *State-by-State*, *supra* note 90.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Background*, TEX. REAL MILK, <http://texasrealmilk.org/> (last visited Oct. 9, 2014).

¹⁴⁷ *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F.Supp. 2d 668 (N.D. Iowa 2010); PF Louis, *Texas Forces Raw Milk Dairy to Pour 700 Gallons of Perfectly Good Milk Down the Drain*, NAT. NEWS (Feb. 14, 2013), http://www.naturalnews.com/039096_texas_raw_milk_dairy_farms.html.

Off-farm sales at either farmer's markets or retail stores are permitted in around 13 states.¹⁴⁸ Some require that the producer own and operate the store or stand or at least require that the producer have a majority ownership in the store.¹⁴⁹ At least one state limits retail sales to milk derived from certain animals.¹⁵⁰ Three states permit farmer's market sales in addition to on-farm sales, but exclude retail sales.¹⁵¹

The dairy operation itself might be limited to a certain number of lactating animals.¹⁵² It may be required to obtain licensing, permitting, or registration.¹⁵³ Several states exclude cow's milk from permitted raw milk sales.¹⁵⁴ At least two states limit sales for human consumption by doctor's prescription only.¹⁵⁵ Raw milk regulation, as it stands, is highly inconsistent.

Even more inconsistent are raw milk labeling requirements. Labels provide consumers with health or producer contact information.¹⁵⁶ Some states require that the product be clearly labeled as ungraded,¹⁵⁷ not pasteurized,¹⁵⁸ or raw.¹⁵⁹ The substantive labeling language takes various forms. One example is: "Raw (unpasteurized) milk and raw milk dairy products may contain disease-causing micro-organisms. Persons at highest risk of disease from these organisms include newborns and infants; the elderly; pregnant women; those taking corticosteroids, antibiotics or antacids; and those having chronic illnesses or other conditions that weaken their immunity."¹⁶⁰ Another example of raw milk product labeling is: "Raw milk is not pasteurized. Pasteurization destroys organisms that may be harmful to human health."¹⁶¹

Warning signs at the point of sale may require the dissemination of similar information.¹⁶² A producer might also be required to reveal

¹⁴⁸ *State-by-State, supra* note 90 (Arizona, California, Connecticut, Idaho, Maine, New Hampshire, New Mexico, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, and Washington).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (Oregon).

¹⁵¹ *Id.* (New Hampshire, Missouri, and South Dakota).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (Kentucky, Mississippi, and Rhode Island).

¹⁵⁵ *Id.* (Kentucky and Rhode Island).

¹⁵⁶ WASH. REV. CODE § 15.36.231 (2014); WASH. ADMIN. CODE § 16-101-800 (2014).

¹⁵⁷ *See* KAN. STAT. ANN. § 65-771(w) (2014).

¹⁵⁸ ME. REV. STAT. tit. 7, § 2902-B (2014).

¹⁵⁹ S.D. CODIFIED LAWS § 39-6-3 (2014).

¹⁶⁰ CAL. CODE REGS. tit. 17, § 11380(a) (2014).

¹⁶¹ 330 MASS. CODE REGS. 27.08(F)(1) (2014).

¹⁶² *Id.*; WASH. ADMIN. CODE § 246-215-03610 (2014).

information describing the standards used by the farm or dairy with respect to herd health, and in the production of milk from the herd . . . together with results of tests performed on the cows or goats that produced the milk, tests performed on the milk, and an explanation of the tests and test results.¹⁶³

Advertising might also be limited in a number of ways. Some states ban advertising raw milk altogether.¹⁶⁴ Others limit advertising on farm¹⁶⁵ or at the point of sale.¹⁶⁶ Some states limit advertising to only incidental sales,¹⁶⁷ which are usually defined as some relatively small number of gallons of milk or purchasers.¹⁶⁸ Other states do not place restrictions on raw milk advertising,¹⁶⁹ or may merely limit specific language such as the term “fresh.”¹⁷⁰

4. Raw Milk as Pet Food

Almost all states permit the sale of raw milk as pet food.¹⁷¹ However, some have created regulations to discourage human consumption of raw milk intended to be pet food, including a regulation requiring that producers add dye to the raw milk.¹⁷² For example, Alaska requires that raw milk be labeled “FOR ANIMAL FOOD NOT FOR HUMAN CONSUMPTION.”¹⁷³ It also requires

¹⁶³ COLO. CODE REGS. § 25-5.5-117(d) (2014).

¹⁶⁴ 410 ILL. COMP. STAT. 635/8 (2014); MINN. STAT. § 32.393 (2014); MISS. CODE ANN. § 75-31-65 (2014); NEB. REV. STAT. § 2-3969 (2014); OR. REV. STAT. § 621.012(1) (2014).

¹⁶⁵ KAN. STAT. ANN. § 65-789 (2014).

¹⁶⁶ *State-by-State*, *supra* note 90.

¹⁶⁷ OKLA. STAT. tit. 2, § 7-414(A)(2) (2014).

¹⁶⁸ *Id.*; *State-by-State*, *supra* note 90.

¹⁶⁹ *E.g.*, S.C. CODE ANN. § 61-34 (2014).

¹⁷⁰ 2 VA. ADMIN. CODE 5-531-60(11) (2014). Recently, an Oregon farmer challenged the constitutionality of such limits on advertising for raw milk. However, this Note only argues that raw milk should be regulated and in a manner that best utilizes state examples that optimize consumer protection concerns; it does not necessarily argue the specific degree to which or manner in which raw milk should be regulated. *See Got Free Speech? Oregon Dairy Farmer Challenges Censorship of Raw Milk Advertising*, INST. FOR JUSTICE, <http://www.ij.org/ormilk-background>; *Oregon Dairy Farmer Challenges Constitutionality of Ban on Raw Milk Advertising*, REAL MILK (December 10, 2013), <http://www.realmilk.com/oregon-dairy-farmer-challenges-constitutionality-ban-raw-milk-advertising/>; *Oregon Dairy Farmer Fights Raw Milk Advertising Ban*, NWWATCHDOG.ORG, <http://watchdog.org/116796/farmer-fights-raw-milk-ban/>.

¹⁷¹ Adams et al., *supra* note 16, at 319; *State-by-State*, *supra* note 90 (Delaware, Hawaii, Iowa, Louisiana, Maryland, Montana, New Jersey, Rhode Island, Virginia, and West Virginia).

¹⁷² *See, e.g.*, IDAHO CODE ANN. § 37-404 (2014).

¹⁷³ ALASKA ADMIN. CODE tit.18, § 32.060 (2014).

dying raw milk with finely powdered charcoal or with a food dye that is blue, green, or red.¹⁷⁴

Importantly, enough “winking and nodding” can bring virtually unregulated raw milk permitted for animal consumption—but destined for human consumption—to be sold on-farm, at farmer’s markets, and even in retail stores.¹⁷⁵ For example, state regulations that only allow pet food sales of raw milk often only require that the product be labeled as “pet food” when sold; there are no laws against human consumption.¹⁷⁶ Attempts to exploit the pet food exception have, in fact, been made even in interstate commerce.¹⁷⁷

E. *Why Raw Milk Consumers Want the Product*

Raw milk consumers want the choice to consume the product because of its health benefits and taste benefits—even above those available via small-scale, sustainable, organic dairy farms that pasteurize—and also because of concerns with mainstream pasteurized milk. Rather than use technology to make up for unsafe processing, or potentially unsafe processing, and harm the nutrient value of milk, proponents argue that certified raw milk provides a superior alternative.¹⁷⁸ They argue that certification, as a preventative measure, maximizes safety and health benefits by avoiding pasteurization and focusing on the integrity of the raw product.¹⁷⁹

¹⁷⁴ *Id.* (“(A) finely powdered charcoal; (B) FD & C Blue No. 1, FD, & C Blue No. 2, Ultramarine Blue; or (C) FD & C Green No. 3, FD & C Red. No. 3, or FD & C Red No. 40.”).

¹⁷⁵ Dan Flynn, *Raw Milk Dropped in Florida*, FOOD SAFETY NEWS (Sept. 23, 2009), <http://www.foodsafetynews.com/2009/09/whole-foods-farmers-market-drop-raw-milk/#.Ur3tao1Q1Mo>; April Fulton, *Drinking Raw Milk Is Worth The Risk, Advocates Say*, NAT’L PUB. RADIO (July 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=128547897>; *Underground Raw Milk*, THE GLOG: CHEF GUI’S WEBLOG (Apr. 20, 2009), <http://www.chefgui.blogspot.com/2009/04/underground-raw-milk.html>.

¹⁷⁶ Flynn, *supra* note 175.

¹⁷⁷ *United States v. Organic Pastures Dairy Co.*, 708 F.Supp. 2d 1005, 1007 (E.D. Cal. 2010).

¹⁷⁸ *The Case for Raw Milk*, CERTIFIED RAW MILK, <http://www.certifiedrawmilk.com/> (last visited Oct. 9, 2014).

¹⁷⁹ *Id.* There are numerous aspects of the food system where food advocates voice concern over the inadequacy of reactive as opposed to preventative measures because reactive measures may lower the nutritional quality of food. See, e.g., *Regulatory Comments and Petitions, Re: Irradiation of Meat and Meat Products*, CTR. FOR SCI. IN THE PUB. INTEREST (Feb. 24, 1999), available at http://www.cspinet.org/foodsafety/irradiation_usda.html; Christine M. Williams, *Nutritional Quality of Food: Shades of Grey or Shades of Green?*, 61 PROCEEDINGS OF THE NUTRITION SOC’Y, 19–24 (2002).

Furthermore, raw milk is often obtained from sustainable and organic small-scale family farms.¹⁸⁰ It is often a different kind of transaction than one made in a large, impersonal grocery store.¹⁸¹ Rather, the closeness of the transaction between farmer and customer can create heightened accountability on the part of the farmer and connectedness to one's food on the part of the consumer.¹⁸²

1. Health Benefits

Proponents of raw milk argue that vitamins, minerals, immunoglobulins, proteins, and digestive enzymes are all of greater quantity or quality when milk is not subject to pasteurization.¹⁸³ For instance, the application of heat may degrade the vitamin A, D, B12, and B6 present in milk.¹⁸⁴ Heat also may undermine the quality of proteins and enzymes or destroy immunoglobulins.¹⁸⁵ Enzymes present in raw milk may help with digestion and may prevent the presence of unwanted bacteria.¹⁸⁶ Though raw milk contains all of the essential amino acids to ease protein absorption, 20% of the proteins in milk are derived from whey and are heat sensitive.¹⁸⁷ Immunoglobulins, also known as antibodies, provide resistance to viruses and

¹⁸⁰ Byrne, *supra* note 37, at 109; *see, e.g., Sources of Real Milk and Real Milk Products in Oregon* REAL MILK (Jan. 1, 2000), <http://www.realmilk.com/real-milk-finder/oregon/#or> [hereinafter *Sources of Real Milk*]; *Learn More-Cow and Goat-shares*, *supra* note 126.

¹⁸¹ Byrne, *supra* note 37, at 109; *Learn More-Cow and Goat-shares*, *supra* note 126.

¹⁸² Janice Blair, *Economic Impact on Wisconsin from the Sales of Raw Milk*, FARM-TO-CONSUMER LEGAL DEF. FUND, <http://www.farmtoconsumer.org/news/Economic%20Impact%20on%20WI%20summary%20for%20Hearing.pdf> (last visited Oct. 9, 2014).

¹⁸³ Morell et al., *supra* note 2 (arguing that pasteurization kills essential enzymes and in turn leads to higher rates of anemia, less bone strength, hair loss, and behavioral issues in rats; also arguing that there is a fivefold protective system in raw milk: (1) reduces pathogens in milk, (2) stimulated the immune system, (3) build healthy gut wall, (4) prevents absorption and toxins in the gut, (5) ensures assimilation of all nutrients). *But see Food Safety and Raw Milk*, CDC, <http://www.cdc.gov/foodsafety/rawmilk/raw-milk-index.html> (last visited Oct. 9, 2014); Dan Flynn, *Study: Raw and Pasteurized Milk Differ in Taste, Smell and Safety*, FOOD SAFETY NEWS (Oct. 10, 2013), <http://www.foodsafetynews.com/2013/10/milk-smell-and-taste-may-differ-but-benefits-are-the-same/#.UmrKmCR6aAc> (arguing that the only difference between raw and pasteurized milk are its "organoleptic" qualities, i.e. taste, smell, feel, and appearance).

¹⁸⁴ *See, e.g.,* Frank E. Runge & Rober Heger, *Use of Microcalorimetry in Monitoring Stability Studies*, 48 J. AGRIC. FOOD CHEM. 47 (2000); Terry Gompert & Martin Kleinschmit, *Raw Milk Use and Safety Fact Sheet*, THE NEW FARM (May 15, 2007), available at www.newfarm.org/features/2007/0607/rawmilk/bowman.shtml.

¹⁸⁵ *See* Runge & Heger, *supra* note 184; Gompert & Kleinschmit, *supra* note 184; *The Case for Raw Milk*, *supra* note 178.

¹⁸⁶ Gompert & Kleinschmit, *supra* note 184.

¹⁸⁷ *Id.*; *The Health Benefits of Raw Milk*, RAW-MILK-FACTS.COM, http://www.raw-milk-facts.com/raw_milk_health_benefits.html (last visited Oct. 9, 2014).

disease, but their numbers may be significantly decreased in the process of pasteurization.¹⁸⁸

In nutrition, balance can be as important as substance.¹⁸⁹ In the case of raw milk, it may have an ideal balance of minerals to promote absorption.¹⁹⁰ For example, calcium requires phosphorus and magnesium in order for the body to utilize the mineral.¹⁹¹ Raw milk may contain this balance when unpasteurized,¹⁹² and exposure to heat may alter it.¹⁹³ In fact, pasteurized milk may actually cause the depletion of calcium in the body's attempt to process it, due in part to this mineral imbalance.¹⁹⁴

The resulting health benefits of raw milk may include "protecting against infection, diarrhea, rickets, [and] tooth decay."¹⁹⁵ Raw milk may also lead to "better growth, denser bones, greater integrity of internal organs, less anemia, fewer signs of anxiety and stress, and fewer signs of nutrient deficiency."¹⁹⁶ Raw milk may positively affect asthma and allergies.¹⁹⁷ One study revealed that around 82% of individuals that could not consume pasteurized milk due to lactose intolerance could consume raw milk without digestive problems.¹⁹⁸ Advocates further argue that compromising the nutrients in raw milk through pasteurization cannot be countered with additives such that the same beneficial composition results.¹⁹⁹

¹⁸⁸ *The Health Benefits of Raw Milk*, *supra* note 187.

¹⁸⁹ David R. Jacobs Jr. & Linda C. Tapsell, *Food, Not Nutrients, Is the Fundamental Unit in Nutrition*, 65 NUTRITION REV. 439 (Jun. 28, 2008).

¹⁹⁰ *The Case for Raw Milk*, *supra* note 178; *see also* Morell et al., *supra* note 2.

¹⁹¹ *The Case for Raw Milk*, *supra* note 178.

¹⁹² *Id.*

¹⁹³ Martha M. Kramer, Esther Latzke & Mary Margaret Shaw, *A Comparison of Raw, Pasteurized, Evaporated, and Dried Milks as Sources of Calcium and Phosphorous for the Human Subject*, 79 J. BIOL. CHEM. 283 (1928), available at <http://www.jbc.org/content/79/1/283.full.pdf>.

¹⁹⁴ JOSEPH KEON, WHITEWASH: THE DISTURBING TRUTH ABOUT COW'S MILK AND YOUR HEALTH 210–11 (2010).

¹⁹⁵ Evelyn Sprawson, *Preliminary Investigation of the Influence of Raw Milk on Teeth and Lymphoid Tissue*, J. ROYAL SCI. MED. (Jan. 25, 1932); *see also* *Fresh, Unprocessed (Raw) Whole Milk: Safety, Health and Economic Issues*, REAL MILK, <http://www.realmilk.com/safety/fresh-unprocessed-raw-whole-milk/> (last visited Aug. 28, 2014) [hereinafter *Fresh, Unprocessed (Raw) Whole Milk*].

¹⁹⁶ *Fresh, Unprocessed (Raw) Whole Milk*, *supra* note 195.

¹⁹⁷ George Loss et al., *The Protective Effect of Farm Milk Consumption on Childhood Asthma and Atopy: The GABRIELA Study*, 128 J. ALLERGY & CLINICAL IMMUNOLOGY 766 (2011).

¹⁹⁸ Morell et al., *supra* note 2.

¹⁹⁹ *Fresh, Unprocessed (Raw) Whole Milk*, *supra* note 195.

2. Taste Benefits

Raw milk proponents also assert that unpasteurized milk has enhanced organoleptic qualities.²⁰⁰ These qualities include better taste, feel, smell, and appearance.²⁰¹ Supporters of raw milk claim it tastes sweeter.²⁰² This may be due to the lack of pasteurization itself²⁰³ or due to increased freshness because it spends less time being processed than if it were pasteurized.²⁰⁴ In addition to taste, raw milk enthusiasts claim the feel and consistency of the milk is more appealing without pasteurization.²⁰⁵

3. Concerns with “Mainstream” Pasteurized Milk

Consumers wanting to purchase raw milk are often dissatisfied with the reactive measure that is pasteurization.²⁰⁶ Instead, they think regulation should be a more proactive measure by certifying healthy milk from quality animals and farms.²⁰⁷ The choice to consume raw milk has as much to do with avoiding the negative qualities of mainstream milk as it does with obtaining raw milk’s positive qualities.²⁰⁸ While the latter objective may be more apparent, the decision to consume raw milk is just as much about the former. Raw milk proponents voice concerns over the substance of pasteurized milk as well as the processes involved in obtaining most pasteurized milk.²⁰⁹

The majority of milk consumed in the United States comes from large commercial dairies and is pasteurized and homogenized.²¹⁰ Even so, pasteurized milk has proven perfectly capable of causing foodborne illness:

[P]asteurized milk sickens an average of over 600 people per year. 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

²⁰⁰ Flynn, *supra* note 183.

²⁰¹ *Id.*

²⁰² *Id.*; Jennifer K. Nelson & Katherine Zeratsky, *Raw Milk Debate Heats Up*, MAYO CLINIC (Apr. 23, 2010), <http://www.mayoclinic.org/healthy-living/nutrition-and-healthy-eating/expert-blog/raw-milk/bgp-20056137>.

²⁰³ Nelson & Zeratsky, *supra* note 202.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; Byrne, *supra* note 37, at 110.

²⁰⁶ *Raw Milk Vs. Pasteurized Milk*, REAL MILK (Jan. 1, 2000), <http://www.realmilk.com/health/raw-milk-vs-pasteurized-milk/>.

²⁰⁷ *Id.* (at least to a plausible extent).

²⁰⁸ *Id.*; see also Morell et al., *supra* note 2.

²⁰⁹ Gompert & Kleinschmit, *supra* note 184, at 2.

²¹⁰ Byrne, *supra* note 37, at 109.

before pasteurization; 1985, when 16,000 people became ill with salmonella from pasteurized milk traced to a single dairy; 1994, when 224,000 Americans became ill from salmonella traced to Schwan's ice cream; 2006, when 1300 prisoners in California became ill with campylobacter from pasteurized milk; and 2007, when three people were killed by listeria from contaminated pasteurized milk.²¹¹

Instances such as these are often pointed to as having been deceptively omitted from statistical computations when opponents compare the relative safety of raw milk and pasteurized milk; comparatively, from 2002 to 2011, between 25 and 175 cases of foodborne illness were caused by raw milk.²¹² Proponents of raw milk typically admit that raw milk is relatively less safe as compared to pasteurized milk, but instead they argue that it is not as exceptionally unsafe as it is portrayed to be by government officials and opposing industry.²¹³ For example, in 2008 there were 23,152 reported cases of foodborne illness and half of a percent (0.5%), or 132 in number, of those reported cases are attributable to raw milk, whereas one third of the reported cases are attributable to beef, chicken, and fish.²¹⁴ The term "fearmongering" has been used by at least one raw milk advocate to describe the arguably misleading hype over raw milk risks.²¹⁵ As a distinction, advocates typically are not pushing for all milk to be unpasteurized, but only that raw milk be an option for those who seek to consume it; even advocates concede that raw milk produced and distributed at the level of pasteurized milk may not be appropriate for the very reasons that pasteurization was initially implemented.²¹⁶

Furthermore, among the reasons that raw milk consumers want access to the product is that whether due to the sheer volume of production or sway of industry, pasteurized milk is permitted to contain a number of contaminants.²¹⁷ For instance, mainstream dairy cows may be given hormone treatments to

²¹¹ GUMPERT, *supra* note 100, at 115–16, 119.

²¹² Morell et al., *supra* note 2.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* (explaining for example, that there are no reported deaths from raw milk since the 1980s, yet since 1999 there have been 32 deaths from cantaloupe, 5 from spinach, 14 from lunch meat, 9 from peanut butter, 30 *per year* from eggs, and 15 *per year* from oyster, which, notably, are often a raw animal product).

²¹⁶ *Id.* Consider, however, that HACCP plans for raw meat are implemented at as grand a scale as may be required for all milk to be preventatively regulated so that it could be consumed raw, potentially.

²¹⁷ *Opinion of the Scientific Panel on Contaminant in the Food Chain on a Request from the Commission Related to Aflatoxin B₁ as Undesirable Substance in Animal Feed*, 39 EFSA J. 1 (2004), available at <http://www.efsa.europa.eu/en/efsajournal/doc/39.pdf>.

increase milk production.²¹⁸ This increase can be in excess of ten times the amount a cow would naturally produce.²¹⁹ Due to the potentially harmful effect these hormones may have on human health after they leach into the milk, administering them was banned in the European Union and Canada.²²⁰

Increased production from hormone treatments in turn often necessitates antibiotic treatment to avoid mastitis and infection.²²¹ In order to keep up with such volume of milk production, cows are mechanically milked.²²² During this extended process, teats can obtain lesions just from the sheer amount of mechanized milking.²²³ The lesions cause severe pain for the animal.²²⁴ Only a limited amount of pus and related contaminants is allowed in mainstream milk, but nevertheless is permitted.²²⁵ Some have shown concern that increased use of hormones has led to an increased presence of pus.²²⁶

Another process concern is that cows must be inseminated and produce calves regularly in order to remain milk-producing animals.²²⁷ Dairy cows may suffer greatly from this process; they are highly social creatures that live in herds and would naturally remain with their young for years.²²⁸ In mainstream dairy production, calves are often removed from their mothers within minutes of birth.²²⁹ Additionally, traditional dairy cows may be kept in confinement for long periods of time,²³⁰ and may have their tails docked without anesthesia.²³¹

²¹⁸ *Id.*; JEFFREY MOUSSAIEFF MASSON, *THE FACE ON YOUR PLATE: THE TRUTH ABOUT FOOD* (2010). John Webster, Emeritus professor of animal husbandry at Bristol University's Clinical Veterinary Science Department, who is widely considered the world's leading authority on dairy cows, acknowledges that the removal of her calf is the single worst incident in the life of a dairy cow." *Cows for Dairy*, WOODSTOCK FARM ANIMAL SANCTUARY, <http://www.woodstocksanctuary.org/learn-3/factory-farmed-animals/cows-for-dairy/> (last visited Oct. 9, 2014).

²¹⁹ *Cows for Dairy*, *supra* note 218.

²²⁰ *Id.*

²²¹ *An HSUS Report: The Welfare of Cows in the Dairy Industry*, THE HUMANE SOC'Y OF THE U.S., <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-cows-in-the-dairy-industry.pdf>.

²²² *Cows for Dairy*, *supra* note 218.

²²³ *HSUS Report*, *supra* note 221, at 5.

²²⁴ *Id.*

²²⁵ 7 C.F.R. § 58.133 (2014) (regarding somatic cell count in milk prior to pasteurization).

²²⁶ *How Many Pus Cells Are in Your Milk*, FOOD MATTERS (Apr. 23, 2009), <http://foodmatters.tv/articles-1/how-many-pus-cells-are-in-your-milk>.

²²⁷ *HSUS Report*, *supra* note 221, at 1–2.

²²⁸ *Cows for Dairy*, *supra* note 218.

²²⁹ *Id.*

²³⁰ *HSUS Report*, *supra* note 221, at 3.

²³¹ *Id.* at 6.

Consumers may have difficulty finding information regarding the quality of treatment present at a mainstream dairy.²³² One alternative that provides some guarantees for consumers is buying organic.²³³ Organic dairy cows must be provided access to pasture even while lactating.²³⁴ They may not receive certain medical treatment while lactating and must be fed organic feed.²³⁵ Though buying organic may solve some of raw milk advocates' input and processing concerns, organic milk is subject to the same federal and state pasteurization laws.²³⁶ It also has grown in scale to a point where many animal welfare concerns for organically produced milk are nearer to concerns for mainstream milk.²³⁷ Meanwhile, raw milk is often obtained from sustainable and organic small-scale family farms.²³⁸ Consumers want to be able to make the type of purchase that raw milk typically involves.

For a number of reasons, raw milk advocates want the opportunity to consume the product. They point to health benefits, taste benefits, and concerns over mainstream milk that include controversial inputs and animal welfare issues. Meanwhile, states permit or deny access to raw milk through various degrees of regulation—the level of regulation depends largely on how the state has weighed the balance between health safety and consumer sovereignty. The role of consumer sovereignty in consumer protection and its specific role with raw milk is exceptionally important because food choice is an intimate one connected to fundamental rights. Yet, the history of raw milk regulation and the circumstances under which pasteurization rules were promulgated reveal that discussions during this process wholly omitted consumer sovereignty.

²³² Lindsey Jahn, *Putting Trust on the Table: Boosting Consumer Confidence in the Food Industry*, FOOD MFG. (Feb. 24, 2014), www.foodmanufacturing.com/blogs/2014/02/putting-trust-table-boosting-consumer-confidence-food-industry; Albert Meijer, *Does Transparency Lead to More Compliance*, 5 EUR. FOOD & FEED L. REV. 264 (2007); *Research Shows Consumer Demand for Transparency on Food*, DROVERS CATTLENETWORK (Dec. 10, 2013), <http://www.cattlenetwork.com/cattle-news/Research-shows-consumer-demand-for-transparency-on-food-235228381.html>.

²³³ *National Organic Program*, U.S.D.A., <http://www.ams.usda.gov/AMSV1.0/nop> (last visited Oct. 9, 2014).

²³⁴ 7 C.F.R. § 205.239(a)(1) (2014) (“Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment”); 7 C.F.R. § 205.239(b)(2) (2014). (“The producer of an organic livestock operation may provide temporary confinement or shelter for an animal because of: . . . [t]he animal’s stage of life: Except, that lactation is not a stage of life that would exempt ruminants from any of the mandates set forth in this regulation”).

²³⁵ See 7 C.F.R. § 205.237 (2014).

²³⁶ 21 C.F.R. § 1240.61 (2014).

²³⁷ See Andrew Martin, *Industrial Organic Milk vs. Organic Family Farmers*, ORGANIC CONSUMERS ASS’N (Jan. 10, 2005), <http://www.organicconsumers.org/Organic/milk011105.cfm>.

²³⁸ Byrne, *supra* note 37, at 109; see also *Learn More-Cow and Goat-shares*, *supra* note 126; *Sources of Real Milk*, *supra* note 180.

III. REGULATING RAW MILK

Consumer sovereignty and health safety are both consumer protection concerns of heightened importance for food; the FDA can and should maximize the goals of both by lifting the ban on the sale of raw milk in interstate commerce and instead imposing consistent regulations that draw from state examples and ultimately better realize the sole objective of the original ban—protecting the health of milk consumers. This Part first argues that federal regulation of raw milk is necessary, discussed in Section A, because it would better meet the health safety objective of the original ban, it could counter the shortcomings of widely varying states regulation, and it would allow proper weight to be placed on consumer sovereignty. The focus of this Part then shifts in Section B to analyzing the costs and benefits associated with various state approaches in light of the competing consumer protection interests central to this Note. Lastly, a summary of the state regulatory methods that would best strike a balance between health safety and consumer sovereignty will be offered at the end of Part II.B.

A. *Federal Regulation of Raw Milk Is Necessary*

Federal regulation of raw milk is necessary because it would better meet the objectives of the original ban—protecting the health of milk consumers—and it could do so without sacrificing consumer sovereignty. Possibly the most important benefit of federal regulation would be consistent regulation. It could ensure that all raw milk was, in fact, actually regulated, as some state regulation fails to do. Consistently regulated raw milk could optimally limit sales to promote safe and informed consumption.

1. Federal Regulation Could Better Meet the Objectives of the Original Ban

One of the primary arguments made by the FDA, in the cases that forced the agency to prohibit raw milk in interstate commerce, was that a ban in interstate commerce would be only marginally effective.²³⁹ The FDA's findings showed that most of the product is sold at the local or state level, so a ban on interstate sales would have a limited effect on the safety and health concerns associated with raw milk.²⁴⁰ The United States District Court for the District of Columbia, however, was unconvinced for two reasons: the FDA did not provide a source for its determination that most sales were intrastate,²⁴¹ and even if that were the case, the risks of raw milk were so high that it was still

²³⁹ Pub. Citizen v. Heckler, 653 F.Supp. 1229, 1234–35 (D.D.C. 1986).

²⁴⁰ *Id.*

²⁴¹ *Id.*

arbitrary and capricious for the agency to not ban raw milk in interstate commerce.²⁴² Meanwhile, the states were left to set their own standards for intrastate sales of raw milk—approximately 30 permit it to some extent.²⁴³

The arbitrary and capricious standard is a high one.²⁴⁴ Naturally it begs the question: how could the court have found it so decisively clear—as would be required by the arbitrary and capricious standard—that the sale of raw milk posed such a risk to the public that it must be banned interstate when over half of the nation's states have found otherwise for intrastate sales?

One potential answer is that raw milk's safety concerns increase as time increases between production and consumption—pathogens can multiply over time.²⁴⁵ In other words, the farther the raw milk must travel, the longer the time between production and consumption. Limiting sales to intrastate imposes at least a limited geographical scope within which the product may travel.²⁴⁶ Additionally, sales within a limited geographic region keep producers and consumers in closer proximity, which can have the effect of increasing accountability.²⁴⁷ When producers and consumers interact directly (as many state regulations require for the sale of raw milk) producers are more connected to the individuals consuming their products and so presumably feel a greater duty to make quality and safe products.²⁴⁸ Consumers, in turn, have the ability to ask questions of the producers regarding a number of potential concerns.²⁴⁹ Proximity also reinforces consumer protection insofar as reputation is more

²⁴² *Id.*; *State-by-State*, *supra* note 90.

²⁴³ *Id.*

²⁴⁴ Rulemaking is unlawful if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” according to the Administrative Procedures Act, § 706(2)(A). “This review is focused and restricted, and it does not permit the court to substitute its judgment for that of the agency.” *Pub. Citizen*, 653 F. Supp. at 1238–39 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–15 (1971)).

²⁴⁵ Frederick J. Angulo et al., *Unpasteurized Milk: A Continued Public Health Threat*, 48 *CLINICAL INFECTIOUS DISEASES* 93 (2009), available at <http://cid.oxfordjournals.org/content/48/1/93.full.pdf+html>.

²⁴⁶ Though this probably is not all that true considering that people can travel to get the milk however far they want and the FDA will not take action against that; and even if the agency tried to take action, it would be questionable whether it could infringe on the freedom to travel in this way. *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F.Supp. 2d 668 (N.D. Iowa 2010).

²⁴⁷ Margaret Christie, *Eat Up and Take Action For Local Food*, CMTY. INVOLVED IN SUSTAINING AGRIC. 11 (2013), available at <http://www.buylocalfood.org/upload/resource/2013EatUpAndTakeActionForLocalFood.pdf>; Vern Grubinger, *Ten Reasons to Buy Local Food*, GROWING FOR MARKET (2010), available at <http://www.uvm.edu/vtvegandberry/factsheets/buylocal.html>.

²⁴⁸ Christie, *supra* note 247, at 11; *Why Buy Local?*, PA. BUY FRESH BUY LOCAL, <http://www.buylocalpa.org/why-buy-local> (last visited Oct. 9, 2014).

²⁴⁹ *Id.*; Gompert & Kleinschmit, *supra* note 184, at 7.

important and drives producers to value quality and safety.²⁵⁰ When a producer distributes products primarily at the local level, he or she has a limited market and a market that is likely more close-knit in terms of sharing product information, good or bad.²⁵¹

However, the in-state distinction ultimately proves arbitrary. The benefits from intrastate sales can only manifest for truly local sales where states impose regulations such as those that require consumers to purchase directly from producers, whether on farm or at a farmer's market. A producer that may be just minutes from the state border of a state that does not permit the sale of raw milk would be unable to make the short trip to a nearby farmer's market in a non-permitting state to sell his product; meanwhile, that same producer may be permitted within his own state to travel several hundred miles to sell his product or even to place his product in the hands of a retailer.²⁵²

Current regulation would permit raw milk to travel the full length of California, well over 700 miles long,²⁵³ for retail sales, but not travel just over the border to a nearby farmer's market in Nevada for a direct farmer-to-consumer sale.²⁵⁴ The former sale lacks the same accountability that the latter sale preserves.²⁵⁵ Thus, interstate sales of raw milk—when limited by regulation to a limited radius of sale instead of state boundaries—would likely better achieve the goal that raw milk sales be near-at-hand between farmer and consumer.

2. State Regulation Has Its Shortcomings

Where states ban the sale of raw milk, consumers have found creative ways of bypassing state laws to obtain the product.²⁵⁶ This often results in the consumption of a product that is wholly unregulated for human consumption.²⁵⁷ There are two primary methods producers and consumers use to transfer raw milk without performing the literal sale of raw milk for human consumption:

²⁵⁰ *Id.*

²⁵¹ *Id.*; see also Suzanne B. Bopp, *Declaring Sovereignty (Over Food)*, DROVERS-CATTLENETWORK (Aug. 16, 2013), <http://www.cattlenetwork.com/drovers/columns/consumer-trends/Declaring-Sovereignty-over-food-21992791.htm> (“Proponents of food sovereignty say that when operating at this level — local and personal — if a producer sells bad food, people will quickly know it and know where it came from, making it a sort of self-governing system.”).

²⁵² *State-by-State*, *supra* note 90.

²⁵³ See *State Size & Drive Times*, CAL. DREAM BIG, <http://www.visitcalifornia.com/Travel-Tools/State-Size-and-Drive-Times/> (last visited Oct. 9, 2014).

²⁵⁴ *State-by-State*, *supra* note 90.

²⁵⁵ Christie, *supra* note 247, at 7.

²⁵⁶ *Underground Raw Milk*, *supra* note 175.

²⁵⁷ *Id.*

(1) creating animal-shares, herd-shares, or farm-shares,²⁵⁸ and (2) selling the product as pet food.²⁵⁹

Some states have reacted by banning animal-shares, but none have gone so far as to ban farm-shares.²⁶⁰ In either case, the state likely has no regulations for the sale of raw milk for human consumption.²⁶¹ The transaction is governed solely by the consumer and producer. Regulating the sale of raw milk, instead of completely banning it, would permit the government to better protect the consumer by setting at least minimum standards for all raw milk sales.

Another method consumers use to obtain raw milk is by purchasing raw milk that is sold only for pet consumption.²⁶² Some states have imposed regulations that require raw milk for pet consumption to be dyed in order to deter human consumption.²⁶³ Many states, however, have not passed such regulations.²⁶⁴ Either way, consumers can—and do—obtain and ingest raw milk that is not regulated for human consumption at the federal or state level via the pet food exception.²⁶⁵ For a product that has such potential for harm—so much so that failure to regulate it was deemed arbitrary and capricious²⁶⁶—it seems counterintuitive to essentially choose no regulation (resulting from prohibition) over express regulation.

Where the safety of raw milk is of such concern, express regulation appears significantly preferable to regulatory prohibition with “under the table” transactions that provide little consumer protection. Share arrangements could still be legal, though they would probably be less utilized, to not interfere with property rights. However, raw milk for human consumption could be regulated no matter how the transfer manifested to ultimately allow a safer, federally regulated means to the same end. That federal regulation could, in turn, no longer rely on arbitrary state boundaries to limit the radius of sale, but instead could set one based more on useful geographical limits.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Adams et al., *supra* note 16, at 318–19 (Florida, Maryland, North Carolina, Virginia, West Virginia, and Wisconsin).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See Flynn, *supra* note 175; *Underground Raw Milk*, *supra* note 175.

²⁶⁴ *State-by-State*, *supra* note 90 (Indiana, Kentucky, Virginia, Alabama).

²⁶⁵ See, e.g., Fulton, *supra* note 175; Flynn, *supra* note 175; *Underground Raw Milk*, *supra* note 175.

²⁶⁶ See *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1238–39 (D.D.C. 1986).

3. Heightened Consumer Protection Concerns Require Federal Regulation of Raw Milk

Raw milk warrants higher consumer protection insofar as it concerns both health safety and consumer sovereignty. In *Public Citizen v. Heckler*,²⁶⁷ the court focused solely on the health concerns surrounding unpasteurized milk,²⁶⁸ and in fact, pasteurization can reduce common dangerous bacteria and viruses found in milk.²⁶⁹ Milk, in comparison to many other foods, is unique in that it is an ideal environment for bacteria and viruses to proliferate.²⁷⁰ To make matters worse, milk is pooled for processing, making it easy for contaminants to spread.²⁷¹ Between the nature of the contaminants, the ideal environment provided by milk, and the pooling process, health safety is of particularly heightened concern for milk. Thus, the court rightly ordered the FDA to regulate milk.

In promulgating its rule, however, the court and the FDA failed to also place proper emphasis on the heightened concern for consumer sovereignty when regulations affect consumer food choice.²⁷² Had each done so, as around 30 states have done, the regulatory scheme for milk would likely look much different and, arguably, should look much different: (1) food choice is an intimate decision and (2) it is often closely tied with a number of interests where autonomy, which is similar to consumer sovereignty, is highly protected.

Food consumption is an intimate decision.²⁷³ For example, there is a big difference between a consumer's choice between lawnmowers and a consumer's choice among foods.²⁷⁴ Consumer protection that leaves choice in whether to allow a substance to enter one's body—and become part of it—is quite different than that regarding many other consumer choices. First, imagine the level of disappointment one might feel upon discovering that his or her favorite model of lawn equipment has been removed from the market. Now consider this in comparison to how a person might be affected if a staple in her

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Marcia L. Headrick et al., *The Epidemiology of Raw Milk-Associated Foodborne Disease Outbreaks Reported in the United States, 1973 Through 1992*, 88 AM. J. PUB. HEALTH 1219, 1219–20 (1998); *FDA and CDC Remind Consumers of the Dangers of Drinking Raw Milk*, FDA (Mar. 1, 2007), <http://www.fda.gov/newsevents/newsroom/pressannouncements/2007/ucm108856.htm> (last visited Sept. 3, 2014).

²⁷⁰ *FDA and CDC Remind Consumers of the Dangers of Drinking Raw Milk*, *supra* note 269.

²⁷¹ *Id.*

²⁷² Korthals, *supra* note 82, at 214 (It is essential to take “a broadened perspective on food as an integral part of life styles and not only as something risky.”).

²⁷³ *Id.* at 206.

²⁷⁴ *See id.*

diet, one that is deeply rooted in her longstanding culture, or religion even,²⁷⁵ were removed from the market for health safety reasons. Second, imagine the level of violation one feels upon discovery that the lawnmower she purchased is defective for some mechanical reason. In comparison, imagine the level of violation one feels upon discovering that a food item in his or her refrigerator, a food item recently enjoyed and ingested, is contaminated. The latter events in both comparisons are invasive and penetrating. Thus, when formulating regulations that limit or eliminate access to food, it is essential that consumer sovereignty be properly weighed as a consumer protection concern in conjunction with health safety.²⁷⁶

Furthermore, that food choice is intimate is evidenced by how particularly important it is to the public.²⁷⁷ Diet and food choice have become a “hot topic.” Innumerable books, documentaries, articles, blogs, and so on provide endless information on dietary choices: vegan, paleo, vegetarian, macrobiotics, raw, etc.²⁷⁸ People care about what enters their bodies,²⁷⁹ often investing much time and energy into making such a personal decision.²⁸⁰

One particular personal diet choice is the raw foods diet.²⁸¹ It advocates consuming uncooked and unprocessed foods from all the major food groups.²⁸² The raw diet can include both raw meats and raw dairy.²⁸³ However, despite the at least equally great risk of raw meat consumption, as compared to raw dairy, raw meat is readily sold in interstate and intrastate commerce.²⁸⁴ Access to raw meat is available and sold on-farm, at farmer’s markets, at roadside stands, at retail stores, and even at restaurants with the intent that it be consumed raw.²⁸⁵ Interestingly, many of the harmful pathogens in raw milk are the same as those

²⁷⁵ See *id.* at 209.

²⁷⁶ See Morell et al., *supra* note 2; Anderson, *supra* note 88.

²⁷⁷ Korthals, *supra* note 82, at 202–03.

²⁷⁸ See, e.g., REBECCA WOOD, *THE NEW WHOLE FOODS ENCYCLOPEDIA* (2010); DIANE SANFILIPPO, *PRACTICAL PALEO: A CUSTOMIZED APPROACH TO HEALTH AND A WHOLE FOODS LIFESTYLE* (2012); KUSHI, *supra* note 114; POLLAN, *supra* note 3.

²⁷⁹ Korthals, *supra* note 82, at 203–04.

²⁸⁰ *Market Statistics*, PARTNERSHIP CAPITAL GROWTH, <http://www.pcg-advisors.com/marketstatistics> (last visited Sept. 3, 2014).

²⁸¹ *Raw Food Diet*, U.S. NEWS, <http://health.usnews.com/best-diet/raw-food-diet> (last visited Sept. 3, 2014).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ 21 U.S.C. § 601(k) (2012) (“The term ‘capable of use as human food’ shall apply to any carcass, or part or product of a carcass, of any animal, unless it is denatured or otherwise identified as required by regulations prescribed by the Secretary to deter its use as human food, or it is naturally inedible by humans.”).

²⁸⁵ FIDDES, *supra* note 54, at 87.

in raw meat.²⁸⁶ However, rather than require that all meat be cooked (like pasteurization for milk) before entering the stream of commerce, meat is preventatively regulated for health safety,²⁸⁷ which allows individuals access to the raw product. Meat regulations aim to inform consumers of the risks of consuming it raw,²⁸⁸ but consumers are allowed to do so at their own risk. Notably, meat is no less amenable to being precooked before being sold; in fact, many pre-cooked meat products are available to consumers. One might ask: who would buy a pre-cooked steak? Consumers thought cooked milk, (i.e., pasteurized milk), tasted funny when it was first introduced, but they apparently have gotten used to it. More importantly, meat is sold with the intent that it be consumed raw in delicacies such as sushi, sashimi, or steak tartare. Raw milk consumers are simply seeking the same type of access to a comparable product that is arguably less harmful, particularly when sold on a small scale.

Secondly, food consumption is so closely tied with a number of protected interests that it warrants heightened consideration of consumer sovereignty when formulating regulations.²⁸⁹ Food can be involved in an individual's culture, religion, health, and self-expression.²⁹⁰ Importantly, many of these realms have been legally determined to require heightened scrutiny when depriving the individual of his or her autonomy.²⁹¹ Food has a longstanding history with religion, from animal sacrifice²⁹² to modern kosher standards.²⁹³ Food and health are so closely tied that one ancient Chinese proverb states, "He that takes medicine but neglects diet, wastes the skill of the physician."²⁹⁴ Hippocrates, after whom Western medicine's Hippocratic Oath is

²⁸⁶ *Food Safety for Moms-to-Be: Medical Professionals - Foodborne Pathogens*, *supra* note 57; *see also supra* Part II.A.

²⁸⁷ 9 C.F.R. § 417.2 (2014); 21 C.F.R. § 120.7(c) (2014) (requiring HACCP plans).

²⁸⁸ *See, e.g.*, OHIO REV. CODE ANN. § 3717-1-03.5 (E) (2014); 25 TEX. ADMIN. CODE 229.164(s)(1) (2014).

²⁸⁹ *See* Morell et al., *supra* note 2 (questioner Ron Schmid, author of *The Untold Story of Milk*, asked: "What is freedom if not the right to choose the food you eat?"); RAW MILK FREEDOM RIDERS, *supra* note 1. As an aside, a recent movement, "Food Sovereignty," has been used to refer to the desire for food consumer sovereignty. *See* Anderson, *supra* note 88. This movement: (1) advocates food for people and that it is not just another commodity, (2) values food providers, (3) advocates localized food systems, (4) prefers control at the local level, (5) improves knowledge and skills in these local systems and producers, and (6) works with nature rather than against it. *Id.*

²⁹⁰ *See supra* Part II.C.

²⁹¹ *See supra* Part II.C.

²⁹² *Food and Religion*, LIFETIME LEARNING PROGRAMME, http://lifeisameal.leogems.org/food_and_religion.htm (last visited Sept. 3, 2014); Shatenstein & Ghadirian, *supra* note 103, at 225.

²⁹³ Shatenstein & Ghadirian, *supra* note 103, at 225.

²⁹⁴ PURTELL, *supra* note 101, at 93.

named, is quoted as saying, “Let food be thy medicine.”²⁹⁵ Food and personal expression take many forms. For example, veganism can represent one’s belief in animal rights or welfare, protection of the environment, and the promotion of a system with greater accountability and quality of life for workers.²⁹⁶

Thus, consumer sovereignty should not only be considered with food regulation, but it should be given significant weight; food consumption is an intimate decision and one rooted in autonomy as it relates to several protected interests. The fact that consumer sovereignty was wholly unconsidered in the reasoning for banning raw milk in interstate commerce is both alarming and inconsistent when compared with comparable food products such as raw meat. Federal regulation of raw milk would look much different, potentially like some state approaches, if both health safety and consumer sovereignty were properly weighed.

B. *The Consumer Protection Value of State Approaches*

States take a number of different approaches in regulating raw milk.²⁹⁷ Although some ban the sale of raw milk altogether, most permit the sale of raw milk to some extent.²⁹⁸ The most restrictive states that permit the sale of raw milk allow only cow-share, herd-share, or farm-share agreements.²⁹⁹ States may additionally allow on-farm sales or sales at farmer’s markets directly by producers.³⁰⁰ At the least restrictive end of the regulatory schemes, are states that permit retail sales.³⁰¹ Typically, state regulations require some sort of certification or permitting as well as labeling on products and possibly point-of-sale warning signs.³⁰² The variety in state regulation is evidence that there are, in fact, competing consumer protection interests to consider in formulating raw milk regulation, more than was considered in *Public Citizen v. Heckler*. A consumer protection analysis of these state approaches sheds light on how federal regulations can better strike a balance between health safety and consumer sovereignty.

²⁹⁵ Edelson, *supra* note 101.

²⁹⁶ Learn, *Vegan Action*, <http://vegan.org/> (last visited Sept. 3, 2014); *Why Vegan?*, THE VEGAN SOC’Y, <http://www.vegansociety.com/try-vegan/why-go-vegan> (last visited Sept. 3, 2014).

²⁹⁷ *State-by-State*, *supra* note 90.

²⁹⁸ *Id.*

²⁹⁹ *Id.*; see also Plummer, *supra* note 122.

³⁰⁰ *State-by-State*, *supra* note 90.

³⁰¹ *Id.*

³⁰² See, e.g., N.Y. COMP. CODES R. & REGS. tit. 1, § 2.3(b)(1)(iv) (2014) (A person can sell raw milk if “at the point of sale a sign is conspicuously posted, easily capable of being read, from such point, stating: ‘NOTICE: Raw milk sold here. Raw milk does not provide the protection of pasteurization.’”).

1. Location of Sale

Limiting the location of sale for raw milk is one way to protect consumers—both in terms of health safety and consumer sovereignty. Sixteen states, 13 of which have special restrictions, limit the sale of milk strictly to on-farm sales.³⁰³ Additionally, 16 states, 6 of which have special restrictions, allow some form of retail sales separate from on-farm sales.³⁰⁴ Only 18 states prohibit the sale of raw milk altogether.³⁰⁵

i. On-Farm

The closer consumers are to producers, the greater the achievable accountability between the two,³⁰⁶ which promotes both consumer protection objectives. When sales are made on-farm, the producer has greater incentive to produce safe, quality products for a number of reasons.³⁰⁷ In close proximity, it is easy for word to spread about the quality—or lack thereof—in a seller's products.³⁰⁸ Reputation is essential to maintain business in a surrounding community.³⁰⁹ Furthermore, when producers interact with their consumers directly—whether it is a mother and child, a family, or a next door neighbor—they are much more likely to ensure a quality product for more than simply quality's sake, but for the sake of the individual consuming it.³¹⁰ This can easily result in a heightened sense of duty, and as a result, diligence.³¹¹ In this way, on-farm sales enhance health safety.³¹²

³⁰³ *State-by-State*, *supra* note 90 (Alaska, Arkansas, Colorado, Illinois, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Rhode Island, Tennessee, Texas, and Wisconsin).

³⁰⁴ *Id.* (Arizona, California, Connecticut, Idaho, Maine, Missouri, New Hampshire, New Mexico, Nevada, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington).

³⁰⁵ *Id.* (Alabama, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maryland, Montana, New Jersey, North Carolina, North Dakota, Ohio, Virginia, West Virginia, Wyoming).

³⁰⁶ *Local Food Systems*, U.S. DEP'T OF AGRIC., http://www.ers.usda.gov/media/122868/err97_1_.pdf (last visited Oct. 9, 2014); Christie, *supra* note 247, at 7, 11; Grubinger, *supra* note 247.

³⁰⁷ *Local Food Systems*, *supra* note 306.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Our Mission, Know Your Farmer, Know Your Food*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=KYF_MISSION (last visited Sept. 3, 2014) [hereinafter *Our Mission*].

From the consumer's perspective, direct transactions with producers also increase consumer sovereignty by providing the consumer with more ready access to information about a product.³¹³ In the case of raw milk, consumers often have a number of concerns about the substance of the product itself as well as the production processes. Consumers can be concerned about the type of feed or medications given to animals³¹⁴ because these inputs can easily find their way into, or affect the quality of, milk.³¹⁵ Another serious substance concern might involve what kind of preventative measures are in place or what testing is done on the milk or animals to ensure its safety.³¹⁶

As far as the processes are of concern, consumers may want to know how the animals are treated in order to obtain compassionately produced dairy.³¹⁷ Treatment questions may include whether and how much animals are let out to pasture or what is done with the regularly produced offspring that a lactating animal must produce in order to continue lactating.³¹⁸ Other processing questions might involve how the milk is obtained from the animals,³¹⁹ how often it is obtained,³²⁰ where it is processed, how much it is processed, or how it is pooled or bottled.³²¹

When sales occur on-farm, producers and consumers of raw milk are in the best position to exchange information with transparency.³²² The "direct farmer-to-consumer relationship . . . ensure[s] that raw dairy is available only to those who intentionally seek it out and that consumers know the source."³²³ As a state regulatory approach, on-farm sales—through transparency—significantly enhance health safety and consumer sovereignty. Transparency and free exchange of information can occur beyond the farm, however, especially when the direct farmer-to-consumer relationship is maintained.

³¹³ *Id.*

³¹⁴ *See HSUS Report, supra* note 221.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* (whether the animals are milked by hand or by machine and if by machine, what kind of machine).

³²⁰ *Id.* One issue some consumers have with some mainstream milk producers is that lactating animals, for instance cows, are sometimes forced to produce up to three times the amount of milk they naturally would produce in a day. *Id.* This can result in serious discomfort to the animals. It also can lead to mastitis, which causes pus to flow along with the milk. *Id.*

³²¹ *Id.*

³²² *Local Food Systems, supra* note 306.

³²³ *Join the Real Milk Movement*, TEX. REAL MILK, <http://texasrealmilk.org/> (last visited Sept. 3, 2014) [hereinafter *Real Milk Movement*].

ii. Sales by Producer at Farmer's Markets and Local Stands

Many of the benefits of on-farm sales are present in sales at farmer's markets and local stands where the producer is involved in the sale.³²⁴ The opportunity to ask questions and for face-to-face accountability is still present.³²⁵ The primary difference between these and on-farm sales is that the consumer does not have the same ready access to inspect the animals, machinery, and process—though if sales were limited to a certain proximity to the farm, that distinction could be minimized.³²⁶

There are a number of additional benefits in allowing sales by producers at farmer's markets and local stands.³²⁷ Producers may have safer transport conditions, i.e., refrigerated trucks, to bring the milk from the farm to a location nearer to consumer's homes.³²⁸ Easier access via farmer's markets and stands can better suit the needs of elderly, disabled, and low income consumers who may have difficulty going or are unable to go to the actual farm.³²⁹ Fewer individuals on-farm lessens the exposure farm workers and farm animals have to pathogens brought in by the public.³³⁰

Farmer's market or stand sales enhance health safety and consumer sovereignty through transparency in much the same way that on-farm sales do because the farmer-to-consumer relationship is still present and, in addition, they provide raw milk access to more consumers. These sales further enhance health safety by providing better quality transportation of the product and limiting pathogen exposure.

iii. Retail Sales

Although retail sales can exhibit many of the accountability mechanisms at work in on-farm sales and sales at farmer's markets and local stands,³³¹ each mechanism's effectiveness is markedly lessened.³³² Instead of the actual producer handing over a product, the producer's information may be

³²⁴ *Local Food Systems*, *supra* note 306.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Real Milk Movement*, *supra* note 323.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* This is not necessarily a consumer protection issue, but for farms located farther away, bringing milk to farmer's markets may reduce overall travel involved in the transaction, consequently improving air quality, congestion, and public safety; additionally, local communities and farmer benefit from the additional opportunity for income.

³³¹ *Local Food Systems*, *supra* note 306.

³³² *Id.*

located on the product.³³³ An effort to contact the producer may or may not result in quality information or any information at all;³³⁴ whether or not a tour of facilities is available is similarly uncertain. Rather than an individual representing the integrity of a product, a brand name on the face of the product takes that individual's place.³³⁵

The nature of a retail sale transaction involving raw milk does not enhance health safety the same way the previously discussed transactions do.³³⁶ While retail sales achieve the greatest access to raw milk and most enhance consumer sovereignty, they may actually do so at the expense of health safety.³³⁷ Retail sales involve more handling and storage and therefore more opportunity for milk to be compromised.³³⁸ Time may be a critical part of promoting health safety for raw milk considering the limitations that some states regulations impose on the time lapse between the production and sale of raw milk.³³⁹ More importantly, retail sales may attract less knowledgeable or accidental consumers, consumers other than those “who intentionally seek it out and . . . consumers [who] know the source.”³⁴⁰ For a product like raw milk—one that involves such serious health safety concerns—it may be advisable for federal regulations to not permit retail sales in interstate commerce.

iv. Animal-Shares, Herd-Shares, and Farm-Shares

Presently, animal-shares, herd-shares, and farm-shares are a way to bypass bans on raw milk and often result in the consumption of wholly unregulated milk.³⁴¹ Lifting the federal ban on raw milk might diminish the use

³³³ *Food Safety*, GRACE COMM'NS FOUND., <http://www.sustainabletable.org/501/food-safety> (last visited Sept. 3, 2014).

³³⁴ It is an interesting exercise, and an important one, to pick up an item at the grocery store and make an attempt to find out the answers to questions you have about the product. It may be surprising how difficult it is to determine something as simple as the country of origin for the produce department's butternut squash. What is more difficult is obtaining answers about pesticide or herbicide usage, farmer worker treatment, etc. *See, e.g.*, Jim Slama, *Whole Foods' New Produce Ratings: Transparency Bears Fruit*, CIVIL EATS (Oct. 29, 2013), <http://civileats.com/2013/10/29/whole-foods-new-produce-ratings-transparency-bears-fruit> (last visited Sept. 3, 2014).

³³⁵ *See supra* Part II.B.

³³⁶ *See Our Mission*, *supra* note 312.

³³⁷ Nelson, *supra* note 202.

³³⁸ *Id.*

³³⁹ *See, e.g.*, 7 PA. CODE § 59a.411(a)(3)(i) (2014) (limiting the sale of raw milk to 17 days from production).

³⁴⁰ *Real Milk Movement*, *supra* note 323.

³⁴¹ *See supra* Part II.D.2.

of these arrangements because the original need would cease. Were they to continue, however, share arrangements may actually be a raw milk transaction that enhances both health safety and consumer sovereignty, so long as the arrangement is classified as a milk sale and brings the milk under regulation.³⁴² In fact, some states have done this.³⁴³

In share arrangements, consumers have a property interest in an animal, herd, or entire farm.³⁴⁴ Because of their investment, these consumers would likely have even better access to quality information about the product and conditions of production than consumers in other direct farmer-to-consumer sales.³⁴⁵ Share arrangements could be federally regulated such that the transfer of milk in this way is considered a sale so that a transaction that otherwise enhances health safety and consumer sovereignty—as much or more than other farmer-to-consumer transactions—is allowed and the milk is regulated.

v. *Proximity to Farm*

Limiting raw milk sales to within a certain radius of sale from the point of production serves a number of protective functions for the consumer in terms of both health safety and consumer sovereignty.³⁴⁶ With regard to health safety, less transportation increases the likelihood of freshness,³⁴⁷ which may be especially important for raw milk. As mentioned earlier, some state regulations require that milk be sold within a limited time from production.³⁴⁸ Moreover, a limited radius of sale can define the community served and enhance the role that reputation plays in ensuring health safety.³⁴⁹ It does guarantee consumers are within a limited distance from the production site so that consumers have more access to inspect.³⁵⁰ A smaller radius of sale, in general, reinforces the accountability in direct farmer-to-consumer sales.³⁵¹

Importantly, a limited radius of sale does not render the same arbitrary differences that occur when sales are limited by state boundaries. Some states are potentially smaller than the optimal radius of sale for enhancing health safety and consumer sovereignty, while other states may be much larger.

³⁴² Wan, *supra* note 131.

³⁴³ *Id.*

³⁴⁴ *Share Agreements, supra* note 128.

³⁴⁵ *Id.*

³⁴⁶ *See Local Food Systems, supra* note 306.

³⁴⁷ *Id.*

³⁴⁸ *See, e.g.,* 7 PA. CODE § 59a.411(a)(3)(i) (2014) (limiting the sale of raw milk to 17 days from production); 330 Mass Code Regs. 27.08 (D) (2014) (limiting the sale to within 5 days).

³⁴⁹ *See Local Food Systems, supra* note 306.

³⁵⁰ *Id.*

³⁵¹ *Id.*

Moving away from these arbitrary boundaries is essential to adequately address consumer sovereignty in raw milk regulation. Raw milk consumers want access to the product and the current patchwork of state regulations does not consistently provide that access. That is not to say that federal regulations that limit the radius of sale to optimally promote health safety and consumer sovereignty would ultimately provide access to raw milk for everyone in the nation, but at least the access would be determined by balancing consumer protection considerations and not arbitrary state boundaries.

2. Labeling

Product labeling and point of sale warning signs can be critical methods of getting important information to consumers for both health safety and consumer sovereignty purposes.³⁵² Labels on raw milk promote health safety by including production dates to indicate freshness; stating clearly that it is raw to avoid unintentional consumption; and warning of risks in general and for specific populations.³⁵³ Labels on raw milk promote consumer sovereignty to the extent they provide information to consumers that allows them to make knowledgeable choices.³⁵⁴

i. Warning Label on Product

When a product is labeled on its packaging, consumers have easy access to information that can help them assess health risks and make informed choices.³⁵⁵ Warning labels for raw milk can disclose the risks specifically associated with drinking it.³⁵⁶ They can forwardly disclose that raw milk is not pasteurized and explain the benefits of pasteurization.³⁵⁷ An example of this in raw milk labeling is Massachusetts's labeling requirement: "Raw milk is not pasteurized. Pasteurization destroys organisms that may be harmful to human health."³⁵⁸ Other state labeling requirements are more specific about risks to the

³⁵² *Food Labeling*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/foodlabeling/> (last visited Sept. 3, 2014).

³⁵³ *See supra* Part II.D.3.

³⁵⁴ *See supra* Part II.D.3.

³⁵⁵ *See Information Guide on Product Labeling*, WORLD FED'N OF DIRECT SELLING ASS'NS, <http://www.wfdsa.org/cepi/ConsumerModule/index.cfm?fa=part4> (last visited Sept. 3, 2014) [hereinafter *Information Guide*]. *But see* Ruth C. Eng, *Do Warning Labels on Alcoholic Beverages Deter Alcohol Abuse?*, 59 J. SCH. HEALTH 3 (1989), available at <http://www.indiana.edu/~engs/articles/warn.html> (last visited Sept. 3, 2014).

³⁵⁶ CAL. CODE REGS. tit. 17, § 11380 (a) (2014); 330 MASS. CODE REGS. 27.00(F)(1) (2014).

³⁵⁷ 330 MASS. CODE REGS. 27.08(F)(1) (2014).

³⁵⁸ *Id.* The words "not pasteurized" must be not less than "twice the height of any other lettering" or not less than an eighth of an inch in height, whichever is greater. *Id.*

individual as well as the heightened risk raw milk may pose to the young, elderly, or those with compromised immune systems.³⁵⁹ These raw milk labels resemble quite closely the warnings that are required for raw meat, another raw animal product that is currently allowed in interstate commerce.³⁶⁰

As a result of labeling, consumers who still choose raw milk may be more likely to ensure the quality of the product through the various accountability methods discussed in this Note, such as speaking with the producer or inspecting.³⁶¹ They may also be more likely to use care in keeping the raw milk refrigerated and in ensuring that the raw milk is consumed within a safe time frame.³⁶² In formulating federal regulation for raw milk, the labeling requirement should be specifically tailored to maximize its potential to promote health safety and consumer sovereignty; this can be done by drawing from the most thorough state examples.³⁶³

ii. Warning Signs at the Point of Sale

Informed consumption of raw milk so enhances both health safety and consumer sovereignty that consumer protection for this product may also warrant warning signs at the point of sale.³⁶⁴ Warning signs at the point of sale for raw milk may resemble the raw meat warnings in restaurant menus.³⁶⁵ They often call attention to a difference, a particular risk, and then advise the consumer to proceed cautiously.³⁶⁶ Warning signs provide another layer of labeling so that unsuspecting consumers do not inadvertently purchase raw milk, thinking it is pasteurized milk.³⁶⁷ These signs serve a purpose themselves and reinforce product labeling: if a consumer were to purchase raw milk

³⁵⁹ CAL. CODE REGS. tit. 17, § 11380 (a) (2014); 330 MASS. CODE REGS. 27.00(F)(1) (2014).

³⁶⁰ 9 C.F.R. § 317.2 (2014); FEDERAL FOOD LABELING REQUIREMENTS, *supra* note 59, at 51–52. One focus of labeling is on the safe handling of raw meat; the same sort of on-product labeling for raw milk might similarly prove beneficial.

³⁶¹ *See* Engs, *supra* note 355.

³⁶² *Id.*

³⁶³ *Information Guide*, *supra* note 355.

³⁶⁴ *See, e.g., Questions About Consumer Advisories for Food Establishments Serving Raw or Undercooked Foods*, ALLEGHENY CNTY. HEALTH DEP'T, <http://www.achd.net/food/rawfood.html> (last visited Sept. 3, 2014) [hereinafter *Consumer Advisories*] (“A consumer advisory is a publicly available written statement that informs consumers that a ready-to-eat food of animal origin is raw, undercooked, or not otherwise processed to eliminate disease causing organisms, and the food therefore poses a risk. A consumer advisory consists of two distinct parts: disclosure and reminder. A consumer advisory goes on the menu or on whatever consumers read to make their food selections.”).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*; *see also* 330 MASS. CODE REGS. 27.08(F)(2) (2014); WASH. ADMIN. CODE § 246-215-03615(s) (2014).

accidentally, they may be less likely to notice on-product labeling and special handling requirements.

Multiple layers of warning information can help to ensure that raw milk consumers mean to consume the product, that they do so with access to risk information, and that they potentially do so with more care.³⁶⁸ Federal regulation of raw milk that includes warning signs would enhance consumer sovereignty and health safety through knowledge, just as these same labeling methods do for raw meat and other risk-posing consumer products.³⁶⁹

3. Advertising

Limits on advertising may enhance both health safety and consumer sovereignty by limiting consumers of raw milk to those who desire and actively seek the product.³⁷⁰ Consumers have no less choice to obtain the product, just less access to information as to how to obtain the product and, therefore, consumer sovereignty may be marginally affected.

Meanwhile, health safety has the potential to be greatly improved by limits on advertising. For the most part, raw milk consumers are not accidental consumers.³⁷¹ They seek raw milk often because of some knowledge or research that drives them to want it.³⁷² Information in the general marketplace may be imperfect, but this can be countered with product labeling and warning signs.³⁷³ The key point is that seekers are more likely looking for the benefit—and risk—information.³⁷⁴ Knowledgeable consumers are more likely to inquire, inspect, and be cautious.³⁷⁵ Thus, balancing both consumer protection interests favors limits on advertising in federal regulation.³⁷⁶

³⁶⁸ See *Consumer*, *supra* note 364.

³⁶⁹ See *id.*

³⁷⁰ See *supra* Part II.D.3.

³⁷¹ See *Real Milk Movement*, *supra* note 323; CTR. FOR INTEGRATED AGRIC. SYS., UW-MADISON COLL. OF AGRIC. AND LIFE SCIS., PERCEPTIONS OF RAW MILK'S RISKS AND BENEFITS (2010), available at <http://www.cias.wisc.edu/wp-content/uploads/2010/07/rb83a.pdf> [hereinafter PERCEPTIONS] (supporting the assertion that raw milk consumers are typically intentional and knowledgeable consumers).

³⁷² See *Real Milk Movement*, *supra* note 323.

³⁷³ See *supra* Part II.D.3.

³⁷⁴ See *Real Milk Movement*, *supra* note 323; see also PERCEPTIONS, *supra* note 371.

³⁷⁵ See *Real Milk Movement*, *supra* note 323.

³⁷⁶ This Note only argues that raw milk should be regulated and in a manner that best utilizes state examples that optimize consumer protection concerns; it does not necessarily argue the specific degree to which or manner in which raw milk should be regulated. The constitutionality of limits on advertising for raw milk is beyond the scope of this Note.

4. Certification Requirements

The amount of pre-screening of raw milk per state ranges from no certification requirements³⁷⁷ to very detailed initial certification and continued monitoring.³⁷⁸ Ensuring quality and safety of raw milk on the front-end, much like the regulations for raw meat, is critical to health safety. In fact, certification, more than any other form of regulation, has the potential to enhance health safety.³⁷⁹

Though exactly what certification should involve is beyond the scope of this Note, some examples of how state approaches to certification enhance health safety are as follows. Certification can set high quality standards for the end product: at least one state requires that raw milk meet the same standards as Grade A pasteurized milk.³⁸⁰ Licensing³⁸¹ or permitting³⁸² can provide a log of producers to track consumption and outbreaks. Uniform bottling standards promote sanitary conditions.³⁸³ Post-bottling cooling requirements aim to minimize the spread of pathogens.³⁸⁴ Monitoring the health of animals periodically may be a critical part of ensuring the safety and quality of unpasteurized milk.³⁸⁵ This can be reinforced through periodic testing of the milk itself to monitor issues such as bacteria count, somatic cell count, and sediment.³⁸⁶ Standards regarding environmental conditions may lessen contamination.³⁸⁷ In order to set and monitor the effectiveness of all of these possibilities, a commission specific to raw milk might be established.³⁸⁸ Ultimately, raw milk regulation would probably look a lot more like raw meat regulation, and focus on certification, if it considered both health safety and consumer sovereignty. It would focus on contamination prevention at every

³⁷⁷ NEB. REV. STAT. § 2-3969 (2014). However, this usually applies to incidental sales. *See, e.g.*, 410 ILL. COMP. STAT. 635/8 (2014).

³⁷⁸ *See, e.g., Retail Raw Milk: A Quick Guide for Producer-Processors*, WASH. STATE DEP'T OF AGRIC. (Apr. 2011), available at <http://agr.wa.gov/foodanimal/dairy/docs/RetailRawMilkGuide042111.pdf>.

³⁷⁹ *See supra* Part II.E.3.

³⁸⁰ ARIZ. REV. STAT. ANN. § 3-606(b) (2014).

³⁸¹ ARIZ. REV. STAT. ANN. § 3-607 (2014); KAN. STAT. ANN. § 65-778(a) (2014).

³⁸² CAL. FOOD & AGRIC. CODE § 33226 (2014); CONN. AGENCIES REGS. § 22-172(b) (2014); MO. CODE REGS. ANN. tit. 2, § CSR 80-3.030 (2014).

³⁸³ ARIZ. REV. STAT. ANN. § 3-605 (2014); MO. CODE REGS. ANN. tit. 2, § 80-3.070(25) (2014).

³⁸⁴ CAL. FOOD & AGRIC. CODE § 35891(c) (2014); MISS. CODE ANN. § 75-31-65(3)(d)(iv) (2014).

³⁸⁵ CAL. FOOD & AGRIC. CODE § 35891(a) (2014) (once every two months).

³⁸⁶ CONN. AGENCIES REGS. § 22-133-129 (2014).

³⁸⁷ MISS. CODE ANN. § 75-31-65(3)(d) (2014).

³⁸⁸ NEV. REV. STAT. § 584.207 (2014).

stage of the process so that the end product was something that consumers could safely choose.

In sum, applying this analysis to form a proposed federal regulatory checklist, milk sales could be safely and responsibly regulated by utilizing the following state approaches: limit sales to those involving a direct farmer-to-consumer transaction; restrict the radius of sale; require product labeling to fully disclose the lack of pasteurization and potential hazards and then reinforce product labeling with point-of-sale warning signs; limit advertising; and, most importantly, establish a standardized certification process for the production of certified raw milk.

IV. CONCLUSION

Consumer sovereignty and health safety are both consumer protection concerns of heightened importance for food; the FDA can and should maximize the goals of both by lifting the ban on the sale of raw milk in interstate commerce and instead imposing consistent regulations that draw from state examples and ultimately better realize the sole objective of the original ban—protecting the health of milk consumers.

Raw milk advocates seek the product due to health benefits, taste benefits, and concerns over mainstream milk, including controversial inputs and animal welfare issues. In recognition of this position and of the importance of consumer sovereignty, many states allow access to raw milk in varying degrees. Yet, the history of federal raw milk regulation reveals that discussion wholly omitted consumer sovereignty. This tradeoff is both improper and unnecessary. Consistent federal regulation would eliminate the need for raw milk advocates to go “underground” and consume raw milk that is under-regulated or entirely unregulated. Actual regulation, in lieu of a ban, would render the treatment of raw milk no longer inapposite to other food regulation—in particular, meat regulation.

Though it was determined that the failure to ban raw milk in interstate commerce was arbitrary and capricious, given the FDA’s stance that most sales were intrastate and that most states now allow intrastate sales in some form, it seems very difficult to argue that raw milk is so apparently harmful that it must be banned. Indeed, it appears the only thing arbitrary and capricious about the banning of raw milk in interstate commerce is the ban itself.

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