

January 2016

Foreword: The Food Law Era

Nathan Cortez

Southern Methodist University, Dedman School of Law

Recommended Citation

Nathan Cortez, *Foreword: The Food Law Era*, 19 SMU SCI. & TECH. L. REV. 377 (2016)

This Foreword is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Foreword: The Food Law Era

*Nathan Cortez**

We may be living in a golden age of food law and policy. Interest in how our food is sourced, manufactured, marketed, and consumed has perhaps never been higher. This widespread interest, in turn, has triggered fierce debates over the state of the relevant science and the appropriate balance between public health regulation, markets, and consumer autonomy. Public trust in the food industry (and even food regulators) fluctuates wildly depending on the news cycle. Important questions of food law and policy remain deeply contested.

These contests demand unprecedented attention to food by legislators, regulators, and judges. Congress has managed to pass multiple food-related bills even during a time of debilitating partisan division on Capitol Hill. In 2010, Congress passed the Food Safety Modernization Act¹—the most important food safety bill since the 1938 Federal Food, Drug, and Cosmetic Act²—amplifying the FDA’s statutory authority and shifting both the agency’s and industry’s safety focus from enforcement to prevention. More recently, Congress has stepped in to resolve contentious debates such as whether foods made with genetically-modified organisms (GMOs) should be required to disclose their GMO ingredients. In 2016, Congress passed the National Bioengineered Food Disclosure Standard,³ including mandatory disclosure of a relatively narrow set of GMO foods and preempting state and local GMO labeling laws. At the same time, efforts by Congress and President Obama to consolidate regulatory authority over food safety in a single agency—rather than the current scheme relying on multiple agencies—failed to generate sufficient support.⁴

Outside of Congress, state legislatures have passed numerous controversial food labeling bills. Vermont was one of four states to pass a mandatory GMO labeling law (over twenty-five states proposed such legislation),⁵

* Callejo Endowed Professor of Law, Associate Dean for Research, Southern Methodist University, Dedman School of Law.

1. FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2010) (codified as amended in scattered sections of 21 U.S.C.).

2. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in 21 U.S.C.).

3. National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016) (codified as amended at 7 U.S.C. 1621).

4. Diana Winters, *Putting Humpty Dumpty Together Again: Consolidating Regulatory Authority Over Food Safety*, HEALTH AFF. BLOG (Feb. 23, 2015), <http://healthaffairs.org/blog/2015/02/23/putting-humpty-dumpty-together-again-consolidating-regulatory-authority-over-food-safety/>.

5. NAT’L CONF. OF ST. LEGS., *State Legislation Addressing Genetically-Modified Organisms, GMO Legislation Summary* (June 22, 2016), <http://www.ncsl.org/research/agriculture-and-rural-development/state-legislation-addressing-genetically-modified-organisms-report.aspx>.

which took effect in July 2016.⁶ In 2016 alone, forty-seven states considered over 550 different food-related bills,⁷ perhaps reflecting impatience with federal policymakers.

Most of the successful federal and state bills are implemented in some way by regulatory agencies. These agencies are confronted regularly with questions of optimal oversight over food safety, quality, labeling, and advertising. At the federal level alone, multiple agencies—such as the U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), and the Federal Trade Commission (FTC)—regularly see food controversies landing on their doorsteps. For example, the FDA faced pressure to further delay the effective date of its long-awaited restaurant menu labeling rule,⁸ while the FTC engaged in a high-profile, years-long enforcement action against POM Wonderful for making deceptive health claims about its products,⁹ and in the process setting important precedent for the scientific substantiation of such claims.

Not to be left out, courts have also issued several major food opinions in recent years. For example, in 2014, in *American Meat Institute v. USDA*,¹⁰ the D.C. Circuit Court of Appeals resolved longstanding uncertainty regarding the government interest that may be asserted to protect mandated disclosures under the relatively lenient *Zauderer* standard,¹¹ upholding the USDA's country-of-origin rule for meat product labels. That same year, the U.S. Supreme Court, in *POM Wonderful v. Coca-Cola*,¹² held that the Federal Food, Drug, and Cosmetic Act (FDCA) does not preclude a competitor from bringing an unfair competition claim under the Lanham Act,¹³ allowing POM Wonderful's claims against Coca-Cola's pomegranate-based products to proceed. Further, in 2015, a U.S. District Court in Vermont allowed the Grocery Manufacturers Association (GMA) and other plaintiffs to proceed with a First Amendment challenge against Vermont's mandatory GMO labeling

6. Genetically Engineered Food Labeling Act, Act 120, VT. STAT. ANN. tit. 9, § 3043 (West 2016).

7. NAT'L CONF. OF ST. LEGS., *Environmental Health Legislation Database* <http://www.ncsl.org/research/environment-and-natural-resources/environmental-health-legislation-database.aspx> (last visited Feb. 1, 2017) (search for "Food Safety" bills in year 2016).

8. Nutrition Labeling of Standard. Menu Items, 79 Fed. Reg. 71,156, 71,239–40 (Dec. 1, 2014) (codified at 21 C.F.R. pt. 11, 101).

9. In the Matter of Pom Wonderful LLC, Roll Glob. LLC, Resnick & Tupper, 155 F.T.C. 1, 1 (2013).

10. *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc).

11. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

12. *POM Wonderful v. Coca-Cola*, 134 S. Ct. 2228, 2228 (2014).

13. 5 U.S.C. § 1125 (2012).

law.¹⁴ An appeal to the Second Circuit was pending¹⁵ when Congress preempted the statute.¹⁶

All this “law” has generated a torrent of interest in legal academia. Conferences focused on food law and policy abound, followed by the creation of new food law centers. For example, UCLA Law School founded the new Resnick Program for Food Law and Policy.¹⁷ Harvard Law School has a new Food Law and Policy Clinic,¹⁸ as well as a Food Law Lab residing within the Law School’s health law and biotechnology center.¹⁹ These efforts join long-established programs like Michigan State’s Institute for Food Laws and Regulations,²⁰ one of the best-known programs of its kind.

The SMU Dedman School of Law is happy to commemorate our third Food Law Forum, held in September 2016, with this issue of the SMU Science & Technology Law Review. The Food Law Forum has been a collaboration between SMU’s Tsai Center for Law, Science, and Innovation and Mike Walsh at Strasburger & Price. This year, we were happy to welcome a new collaborator, the Michigan State Institute for Food Laws and Regulations, whose expertise adds a significant dimension to our programming. The goal of the Food Law Forum is to convene experts in food law and policy from academia, private practice, government, and industry to discuss emerging trends. From this standpoint, the Forum has been a success.

The five articles in this issue give a brief glimpse into the variety and quality of the discussions at the annual Food Law Forum. Melissa Card’s article, *The Paradox of Clean Food and the Food Safety Modernization Act – Understanding the Law of the FDA Preventive Controls for Human Food Rule*, considers how the “clean” food trend—an undefined term referring generally to food that is natural, organic, and minimally-processed, with no GMO ingredients—often conflicts with modern food safety principles, though it need not. Barry Conlon’s article, *The Dynamics of Domestic and International Cargo Theft*, gives a sobering glimpse into sophisticated gray

14. *GMA v. Sorrell*, 102 F. Supp. 3d 583, 595, 635 (D. Vt. 2015).

15. *GMA v. Sorrell*, No. 15-1504 (2d Cir. Aug. 5, 2016).

16. NAT’L ASS’N OF MFRS., *Law Center, Vermont Labeling Law for Genetically Engineered Products* <http://lawcenter.nam.org/results.aspx?idGroup=991> (last visited Feb. 1, 2017).

17. UCLA L., *Resnick Program for Food Law & Policy* <https://law.ucla.edu/centers/social-policy/resnick-program-for-food-law-and-policy/about/> (last visited Feb. 1, 2017).

18. HARV. L. SCH., *Food Law and Policy Clinic* <http://hls.harvard.edu/dept/clinical/clinics/food-law-and-policy-clinic-of-the-center-for-health-law-and-policy-innovation/> (last visited Feb. 1, 2017).

19. THE PETRIE-FLOM CTR., *The Food Law Lab* <http://petrieflom.law.harvard.edu/research/food-law-lab> (last visited Feb. 1, 2017).

20. MICH. ST. U., *Institute for Food Laws and Regulations*, <http://www.iflr.msu.edu> (last visited Feb. 1, 2017).

markets for stolen goods. Joseph Fielder, in *Legal Risk and the Scientific Process*, speaks to the interplay between food safety risk and legal risk, informed by methods that food scientists and lawyers use to mitigate risks in their respective fields. Joanna Sax, in *Contours of GMO Regulation and Labeling*, uses decades of scientific research to puncture several broadly-held beliefs about the content and safety of GMO foods, arguing that our labeling laws should better reflect this research rather than ill-informed consumer perceptions. Finally, Diana Winters, in *Less May Be More: Reading into FDA's Labeling Requirements*, evaluates the merits of three disclosure-based food labeling policies, including the Nutrition Facts label and efforts to define what "healthy" and "natural" mean, finding value in some efforts but not others.

We hope this issue gives readers a brief and partial glimpse of the quality and diversity of content at the annual Food Law Forum. As with every year, there is much more to discuss than time permits.