A Supplemental Labeling Regime for Organic Products: How the Food, Drugs, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem

Ariele Lessing

Follow this and additional works at: http://scholarship.law.missouri.edu/jesl

Part of the Environmental Law Commons

Recommended Citation
Available at: http://scholarship.law.missouri.edu/jesl/vol18/iss3/2

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Ariele Lessing*
# A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>418</td>
</tr>
<tr>
<td>II. Conventional Agriculture</td>
<td>419</td>
</tr>
<tr>
<td>III. Origins and Provisions of the National Organic Program</td>
<td>425</td>
</tr>
<tr>
<td>A. The Necessity of a Federal Definition of “Organic”</td>
<td>426</td>
</tr>
<tr>
<td>B. Organic Standards</td>
<td>428</td>
</tr>
<tr>
<td>C. Organic Certification</td>
<td>431</td>
</tr>
<tr>
<td>D. Foreign Organics</td>
<td>433</td>
</tr>
<tr>
<td>IV. The Food and Drug Administration Regulation of “Misleading” Labels</td>
<td>435</td>
</tr>
<tr>
<td>V. Consumers and the OFPA</td>
<td>438</td>
</tr>
<tr>
<td>A. The Benefits of Market-Driven Legislation</td>
<td>438</td>
</tr>
<tr>
<td>B. The Importance of Consumer Information</td>
<td>440</td>
</tr>
<tr>
<td>C. Dream v. Reality: Consumer Motivations for Buying “Organic”</td>
<td>441</td>
</tr>
<tr>
<td>1. Organic Food Does Not Necessarily Come From Small Farms</td>
<td>443</td>
</tr>
<tr>
<td>2. Organic Does Not Indicate Ethical Labor Practices ...</td>
<td>445</td>
</tr>
<tr>
<td>3. Organic Does Not Mean Sustainable</td>
<td>447</td>
</tr>
<tr>
<td>4. Organic Food, Like Conventional Food, is Susceptible to Political Corruption</td>
<td>449</td>
</tr>
<tr>
<td>D. Problems with Asymmetric Information for Consumers</td>
<td>451</td>
</tr>
<tr>
<td>VI. The Barriers to a Market Solution to the Organic Problem</td>
<td>453</td>
</tr>
<tr>
<td>A. USDA Monopolizes the Word “Organic”</td>
<td>453</td>
</tr>
<tr>
<td>B. FDA Regulation of “Misleading”</td>
<td>455</td>
</tr>
<tr>
<td>C. History of “Misleading” Regulation</td>
<td>458</td>
</tr>
<tr>
<td>D. State Labeling Regimes Hindered by Free Speech Restrictions</td>
<td>461</td>
</tr>
<tr>
<td>VII. The Solution: A Supplemental Labeling Regime for Organics</td>
<td>461</td>
</tr>
<tr>
<td>A. New Labels Would Not be Misleading Under the FDCA</td>
<td>463</td>
</tr>
<tr>
<td>B. Possible Program Models</td>
<td>465</td>
</tr>
<tr>
<td>1. European Union</td>
<td>465</td>
</tr>
<tr>
<td>2. Kosher Industry in the United States</td>
<td>467</td>
</tr>
<tr>
<td>C. Why a Supplemental Labeling System Would Work in the United States</td>
<td>471</td>
</tr>
</tbody>
</table>
1. Existing Environmental Certifiers Can Create Supplemental Labeling Standards.......................... 471
2. The Organic Movement's Dedication.......................... 473

VIII. Potential Pitfalls to a Supplemental Labeling Regime ................. 474
   A. Enforcement .................................................................... 474
   B. Over-Information and Consumer Confusion ....................... 475
   C. Consequences of Consumer Education ............................... 476

IX. Conclusion ........................................................................... 478
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

ABSTRACT

Organic food sales have steadily risen in the United States since the 1990 ratification of the Organic Food Production Act and the establishment of the National Organic Program in 2000. However, the current definition of “organic” under the National Organic Program does not accurately or comprehensively reflect consumer motivations for purchasing organic foods. In most cases, consumers purchase organic food because they presume it to be environmentally sustainable, socially responsible, and supportive of local or small farmers. This article sets forth the problems with conventional agriculture and the subsequent establishment of the National Organic Program in the United States. Then, the article points out the flaws and the origins of those flaws in the National Organic Program, focusing on the loose regulation of foreign organics and the disconnect between consumer expectations and the reality of certified organic products. Finally, it proposes a flexible, supplemental set of organic standards whose implementation is currently hindered by stringent regulation by the Food and Drug Administration of “misleading” food labels. The proposed solution is to create an exception for organic labels in the Food and Drug Administration’s label regulations to allow organic certifiers to create a plurality of organic labels that meet consumer concerns regarding environmental sustainability, ethical labor practices, food miles, chemical contamination of food and support for community farming.

I. INTRODUCTION

Many Americans strive to make principled decisions about the agricultural products they consume. In today’s market, there are myriad choices available to consumers; however there is little transparency in the food labeling process to make these choices clear to consumers. To address their concerns about agriculture and its environmental, health, social, and ethical impact, many Americans are paying a steep premium for products with the USDA organic label, assuming the organic seal represents their values. However, this is not always the case. In fact, while the organic label provides important information regarding pesticide use, livestock feed, livestock pasturing, and restrictions on genetic
engineering, the label is inadequate to do the job consumers assume it does. In turn, without proper information regarding their organic purchases, consumers cannot be a sufficient regulatory force on the organic market. While the free market might be able to remedy this problem with new labels regarding the precise processes an organic product undergoes, the current Food and Drug Administration ("FDA") regulations will likely prohibit such labels as "misleading." Due to the unique characteristics of the organic industry, the FDA should not strictly regulate supplemental labels as misleading, but rather allow a labeling system that reflects the panoply of reasons consumers purchase organic food. This paper suggests a method of providing consumers with the transparency of information they seek to make principled food decisions.

II. CONVENTIONAL AGRICULTURE

In order to fully appreciate the purpose and significance of the organic food movement, one must first have a rudimentary understanding of the realities of the conventional food system in the United States. Before 1950, agricultural production depended largely on mechanisms designed to strengthen the link between agriculture and ecology.¹ Crop rotation, whereby farmers would plant different crops on different fields during different seasons, served to naturally stave off insects, weeds, and diseases by breaking their life cycles.² In addition to crop rotation, pre-1950s farmers guarded against bad weather or pestilence by planting many different crop varieties.³ This type of crop variation protected farmers from losing everything due to crop-specific diseases or insects that favored one crop over another, as well as protecting them from weather patterns that disproportionately affected a certain type of crop.⁴ Although very little machinery was used, most farms did not need to hire vast amounts of cheap labor or specialized equipment for harvesting because the crop yield

² Id.
³ Id.
⁴ See id.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

was small enough for the family and community to perform most of the required labor. Despite the fact that this technique proved less productive from a pure gross yield standpoint, a less industrial method of farming produced relatively few signs of environmental degradation compared to the modern conventional methods.

In contrast to this earlier, pre-1950s method of farming, modern conventional agriculture puts an incredible strain on the environment through industrialization, economies of scale, and increased pressure to produce from the farming subsidy structure in the United States. Crop rotation is no longer the preferred method to keep insects, weeds, and

---

5 Id.
6 See, e.g., Holger Kirchmann et al., Can Organic Crop Production Feed the World?, in ORGANIC CROP PRODUCTION: AMBITIONS AND LIMITATIONS 39 (Holger Kirchmann & Lars Bergström, eds., Springer 2009) (claiming that organic yields are 25–50% lower than conventional yields depending on manure quality); Paul Mäder et al., Soil Fertility and Biodiversity in Organic Farming, 296 SCI. 1694, 1694–95 (2002) (finding organic crop yields to be 20% lower than conventional yields); N. Halberg & I. Sillebak Kristensen, Expected Crop Yield Loss When Converting to Organic Dairy Farming in Denmark, 14 BIOLOGICAL AGRIC. AND HORTICULTURE 25, 31 (1997), available at http://orgprints.org/15850/1/15850.pdf (citing a 24% lower yield on organic dairy farms than on conventional dairy farms in Denmark). There are some environmental scholars and scientists, however, who believe that even gross yields can be improved upon by a return to pre-industrial farming. See Mäder, supra note 6, at 1697. These authors argue that modern method of farming favors growing a single genetic strain of a single crop varietal on all of a farmer’s fields—a method known as monoculturization, as well as poor soil nutrition. See Mäder, supra note 6, at 1695; TONY WINCH, GROWING FOOD: A GUIDE TO FOOD PRODUCTION 61 (Springer 2007) (advocating “break crops,” or crop rotation, as a way to reclaim crop yields diminished from the use of monocultures). Monoculturization leads to the genetic vulnerability of American cropland, making it disproportionately susceptible to disease and pestilence, thus rendering gross yields defenseless against the possibility of total wipeout. NAT’L RESEARCH COUNCIL (U.S.) COMM. ON GENETIC VULNERABILITY OF MAJOR CROPS, GENETIC VULNERABILITY OF MAJOR CROPS 76–78, 127, 152–53, 264 (National Academy of Sciences 1974). Additionally, poor soil nutrition negatively affects conventional crop yields because it stunts “biologic activity,” or growth. See Mäder, supra note 6, at 1695.
7 See Altieri, supra note 1.
diseases at bay; instead pesticides, herbicides, and other chemical inputs are increasingly required to keep conventional crop production levels high. Moreover, modern farming has moved away from planting a variety of crops, and is increasingly drawn toward single-plant monocultures. Alarmingly, planting only one genetic variety of a plant—monocultures—makes American crops more genetically vulnerable to plagues and dependent on high chemical inputs such as pesticides and synthetic fertilizers. Furthermore, farming has increased in size over the last sixty years to the point that most conventional farms today use migrant laborers to help plant and harvest acres upon acres of farmland, which are increasingly owned by fewer and fewer producers.

The technologies making this monumental shift toward specialized monoculture crops and industrial-scale production possible are collectively termed, rather inaptly, the "Green Revolution." This technological revolution included improved mechanization and technology, the development of chemical fertilizers and pesticides, genetic engineering, and the development of antibiotics and growth stimulants for animals. The Green Revolution began after WWII in the 1940s and continued through the 1960s, shifting the focus of American agriculture toward high crop yields and the replacement of human labor with machines and chemical technology. It has pushed modern farming away from its "green" pastoral roots and toward an industrialized reality where chemical pesticides, synthetic manures, machines, and migrant labor have

---


10 See id.

11 See generally Aimee Shreck et al., Social Sustainability, Farm Labor, and Organic Agriculture: Findings from an Exploratory Analysis, 23 AGRIC. AND HUMAN VALUES 439 (2006).

12 See Altieri & Nicholls, supra note 9, at 124.

13 See Altieri & Nicholls, supra note 9, at 125; see also Mary Jane Angelo, Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment, 17 GEO. MASON L. REV. 593, 602 (2010).

14 See Angelo, supra note 13, at 602.
replaced the natural pest-resistance methods and socially responsible labor systems of pre-1950s farming.\textsuperscript{15}

Although modern agricultural technology and the Green Revolution are renowned by some as the miracle solution to world hunger and a testament to human productivity, conventional agriculture today is harming the environment at a distressing rate.\textsuperscript{16} Some of the ecological problems most directly attributable to modern agriculture are problems with soil, including erosion and nutrient depletion.\textsuperscript{17} Threats to the national water supply also arise from environmentally irresponsible agricultural methods, including water pollution, salinization, and alkalinization.\textsuperscript{18} Water pollution is often caused by pesticides, synthetic fertilizers, and animal manure which end up as runoff and pollute nearby water channels.\textsuperscript{19} Furthermore, modern agricultural methods are the largest user of water in the United States, heavily contributing to water shortages across the country.\textsuperscript{20} Modern agriculture further harms the environment through greenhouse gas emissions, which in turn contribute to global warming.\textsuperscript{21}

\textsuperscript{15} Id. at 602–03.
\textsuperscript{17} See Altieri & Nicholls, \textit{supra} note 9, at 125.
\textsuperscript{18} Id.
\textsuperscript{20} See Eubanks, \textit{supra} note 8, at 254 (describing in particular a 2007 conflict between Georgia, Florida, and Alabama about rights to water from the Apalachicola–Chattahoochee–Flint River Basin); see also Adelman & Barton, \textit{supra} note 16, at 10.
\textsuperscript{21} See Adelman & Barton, \textit{supra} note 16, at 15–17; Ruhl, \textit{supra} note 19, at 291. The three greenhouse gases that are emitted through modern agriculture are carbon dioxide,
The conversion of natural land to cropland, use of chemical fertilizers, and use of synthetic fertilizers all produce greenhouse gas emissions.22 When transported by wind, these gases can do widespread damage not only to the conventional farm, but also to the natural ecosystems surrounding the farm.23 Animal waste is another agricultural source of air pollution, with animal feed lots emitting dangerous toxins such as hydrogen sulfide, ammonia nitrogen, and methane.24 Certain animal feeding operations have been found to emit levels of hydrogen sulfide, a particularly toxic and flammable gas, in excess of what the Environmental Protection Agency ("EPA") has determined is for safe production.25

Human health is also negatively impacted by these modern agricultural methods. The water pollution and water threats that come from farm fertilizers and livestock production endanger the health of the water drinking population; as of the year 2000, more than 14 million Americans drink herbicide- and pesticide-tainted water.26 Further, towns with drinking wells located in close proximity to animal feeding operations are in danger of ingesting water contaminated with nitrates; citizens near livestock farms are also more likely to breathe in ammonia nitrate emissions.27 Of course, one need not live in close proximity to a farm or livestock operation to be in danger from modern conventional farming methods. Dangerous air emissions from farms can travel great


23 Id.


25 See Ruhl, supra note 19, at 292.


distances to cities and other urban centers. Finally, the traditional synthetic fertilizers that are used on most conventional farms produce nitrogen oxide emissions in the air. Nitrogen oxide is a component of tropospheric ozone, a component of smog and a serious threat to human health.

Modern agriculture has further harmed human health indirectly by impacting the foods people eat. The increasing specialization of farms due to agricultural technology and federal commodity subsidization has led American farmers to grow more and more corn because of its hardy quality and high yield. The glut of corn on the market has in turn led to an increase in corn-products, such as high fructose corn syrup and corn-based livestock feed. A national diet of high fructose corn syrup and other corn-based products has been linked to obesity and diabetes in humans. Furthermore, forcing livestock to eat corn-based feed has made the meat, eggs, and milk they produce fattier and therefore less nutritionally sound for human consumption. Corn is an unnatural foodstuff for livestock, such as cattle, whose digestive systems are not made to process corn. In order to fend off the natural diseases and health problems which arise from their unnatural feed, producers often give their animals subtherapeutic doses of antibiotics. These antibiotics eventually

28 Carol J. Hodne, Rural Environmental Health & Industrial Agriculture: A Case Example of Concentrated Animal Feeding Operations, in CRITICAL ISSUES IN RURAL HEALTH, 61, 64–65 (Nina Glasgow et al. eds., 2004).
30 Id.
31 See Hodne, supra note 28, at 67 (commenting on the economic advantages for farmers who grow only corn).
32 See Angelo, supra note 13, at 612.
33 See, e.g., A. Bray, Samara Joy Nielsen & Barry M. Popkin, Consumption of High-Fructose Corn Syrup in Beverages May Play a Role in the Epidemic of Obesity, 79 AM. J. CLINICAL NUTRITION 537, 537 (2004); see also Angelo, supra note 13, at 612.
35 See id. at 160.
make their way into the human population, which has been cited by some as contributing to an increase of antibiotic-resistant bacteria colloquially known as "superbugs."37

Because modern agriculture is so harmful to the environment and to human health, consumers began to look for a more earth and body friendly alternative, and organic food moved onto the national scene.38

III. ORIGINS AND PROVISIONS OF THE NATIONAL ORGANIC PROGRAM

In the years since Congress passed the Organic Food Production Act ("OFPA") in 1990 and the United States Department of Agriculture ("USDA") implemented its regulations with a final rule in 2000 establishing the National Organic Program ("NOP"), organic food sales have been steadily rising.39 In 2006, the Harris Study concluded that U.S. organic food sales were growing by 21% annually. 40 Similarly documenting the rise in organic food sales, the Organic Trade Association’s ("OTA") 2007 Manufacturer Survey found the American public purchased $16.7 million worth of organic products in 2006, or 2.8% of total U.S. retail food sales.41 By 2008, over 70% of American grocery stores stocked organic foods, demanding a price premium of 20–30% for their organic products.42 Consumers are willing to pay such a price

40 CHERYL BALDWIN, SUSTAINABILITY IN THE FOOD INDUSTRY 162 (Wiley-Blackwell and the Inst. of Food Tech. eds., 2009).
premium because they believe the organic seal on the product indicates a certain level of quality and process.\textsuperscript{43} That is to say, they trust that the provisions of the OFPA and the NOP are in line with their own values regarding organic food.\textsuperscript{44} However, the terms of the OFPA and the NOP are not necessarily clear to the growing population of consumers who buy organic products.\textsuperscript{45} An understanding of the provisions of the OFPA and the NOP is necessary to an understanding of the problem facing the public today.

A. The Necessity of a Federal Definition of "Organic"

The Organic Food Production Act was originally designed to clarify a confusing array of competing state and private definitions of what organic meant.\textsuperscript{46} Since the 1970s, industry and state use of the term "organic" created a plethora of confusing marketing strategies that put consumers at risk of fraud and deception.\textsuperscript{47}

The organic food industry began in the United States with a Pennsylvania farmer, Jerome Rodale, who first promoted the use of


\textsuperscript{43} See Baldwin, supra note 40, at 166 (citing a study showing that just under half of polled consumers understood what percentage of organic ingredients was guaranteed by the USDA Organic seal).

\textsuperscript{44} See id.

\textsuperscript{45} See Dr. Stephen Barrett, "Organic" Foods: Certification Does Not Protect Consumers, (July 17, 2006), http://www.quackwatch.org/01QuackeryRelatedTopics/organic.html (stating that many consumers who pay the organic price premium believe that organic foods are healthier and safer, despite the fact that the USDA position is that "[n]o distinctions should be made between organically and non-organically produced products in terms of quality, appearance, or safety.").


compost over chemical pesticides and fertilizers. Rodale’s views gained popularity with the 1962 publication of Rachel Carson’s “Silent Spring,” and by the early 1970s, a small-scale, direct marketing organic industry was born. However, some farmers and producers tried to take advantage of the lack of regulation surrounding the term “organic” by labeling conventional foods organic and demanding the organic premium for them. States first responded to the confusion and fraud on the organic market with organic certification laws in the 1970s. Oregon was the first state to establish definition of organic in 1973, followed by California in 1979. By 1991, twenty-two states had passed an organic regulation, with no two definitions of organic identical, and industry definitions were equally abundant and changeable. This confusing array of state definitions and industry definitions led consumers to demand a standard federal definition of organic they could rely on when making purchases.

The lack of uniformity negatively affected individual consumers, the domestic organic market, and the international organic market. Consumers, often uncertain about the reliability or consistency of an organic label, were hesitant to pay a premium price without certainty in what they were purchasing. Additionally, producers were reluctant to put forth the extra effort and cost to provide organic food because the

51 Id.
52 Lathrop, supra note 47, at 891–92.
53 Id. at 891.
54 Id. at 891–92.
55 See id. at 892; see also 7 U.S.C. § 6501 (2006).
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

market was unreliable, and composed of distrusting and sometimes uneducated consumers.  
Lastly, the creation of a standard definition was thought useful for international organic trade and foreign trust in U.S. organic exports.

B. Organic Standards

The Organic Food Production Act of 1990 ("OFPA") regulated the organic market by directing the USDA to set national standards for organic food.  The purpose of the OFPA was threefold: to establish national standards for the marketing or organically produced products, to assure consumers of consistency in these organic standards, and to facilitate interstate commerce in organic produce.  There was a secondary goal of improving environmental sustainability through stewardship of farmland and organic farming methods.  The stated market-based purpose of the OFPA, as well as the secondary Senate goal of environmental sustainability, led to an elegant statute whereby the federal organic labeling system would be overseen by the USDA and executed by private certifying agents.

In 2000, the USDA created the National Organic Program ("NOP") to manage the organic regulations in accordance with the OFPA.  To further the intent of the legislature to create a thriving organic market, the USDA placed responsibility for implementing the organic regulations with the Agricultural Marketing Service ("AMS").  Furthermore, the USDA's Secretary of Agriculture established an organic certification program for producers and handlers of organically produced

---

58 See Lathrop, supra note 47, at n.55.
59 See Rawson, supra note 46, at 3-4.
61 Id.
65 Id.
agricultural products by consulting with the National Organic Standards Board ("Standards Board"). The Standards Board, composed of fifteen members with expertise in organic farming or a financial stake in the organic market, was crafted in order to provide the Secretary with a panel of scientists, farmers, retailers, environmental protection experts, and consumer groups. The statutory make-up of the Standards Board reflects the original legislative purposes of market development and environmental sustainability through congressionally mandated retailers and environmental experts.

The federal standards for organic produce, as established by the AMS in conjunction with the Standards Board, are process-based and input-based. The standards are process-based in that the regulations focus almost exclusively on the food production process, not the final food product. They are input-based because they focus on what substances can and cannot go into the food production, such as pesticides and synthetic chemicals, without detailed mention of different farming methods, transport of produce, or other sustainability concerns. The regulations allow the Secretary, in consultation with the Administrator of the EPA and the Secretary of Health and Human Services, to establish a "National List of Allowed and Prohibited Substances" as well as a list of allowed products that have been determined safe for human health and the environment.

NOP regulations prohibit genetically modified food from receiving organic certification. Specifically, NOP regulations state that

---

68 See generally 7 C.F.R. pt 205 (2011) (regulating agricultural methods and identifying substances acceptable for use on farms and with livestock that produce organic food).
72 Genetically modified food is also referred to as genetically engineered food, bioengineered food, or GMOs.
in order to be sold as “100 percent organic,” “organic” or “made with organic ingredients,” an agricultural product must not be produced using “excluded methods,” which include cell fusion, microencapsulation and recombinant DNA technology. Equally, organic production processes exclude farming practices that would be damaging to soil or cause soil erosion.

These process-based and input-based regulations are better for the environment than their conventional counterparts because they prohibit synthetic pesticides and genetically modified food, both of which are damaging to the environment. Pesticides in particular can be harmful to the environment and human health, causing water pollution, growing pesticide-resistance in diseases and insects, crop losses, and accidental pesticide poisonings in humans. Although the prohibition on pesticides and genetically modified food in the current organic regulations is more environmentally sound and appears to be healthier than conventional farming, the organic regulations do not address many concerns that are important to consumers, including overall health and long-term environmental sustainability. Some disadvantages of these approaches are that the process-based nature of the regulations ignores the possibility, for example, that organically produced food can be tainted by pesticides

75 See 7 C.F.R. § 205.203 (2011). The importance of healthy soil to a farming system cannot be overstated. If the farm is viewed as an independent ecosystem, the health of the soil is vital to the survival of the farm ecosystem. In fact, healthy organic soil has been found to produce greater long-term profitability for farms because of the higher soil quality in organic agriculture. John P. Reganold, Effects of Alternative and Conventional Farming Systems on Agricultural Sustainability, FOOD & FERTILIZER TECH. CENTER 2 (2007), available at http://www.agnet.org/htmlarea_file/library/20110726133921/bc44001.pdf.
76 See Altieri & Nicholls supra note 9, at 124, 129.
77 David Pimental, Anthony Griener, & Tad Bashore, Economic and Environmental Costs of Pesticide Use, in ENVIRONMENTAL TOXICOLOGY: CURRENT DEVELOPMENTS, 122–33 (John Rose ed. 1998); Carroll, supra note 39, at 120.
79 See infra part V. C.
blowing onto the foods from nearby fields. The input-based nature of the regulations similarly ignores the possibility that consumers who buy organic foods are interested in more than what pesticides went into the food production.

C. Organic Certification

To be certified organic and receive the “USDA organic” seal, a farm must go through a rather lengthy and costly conversion process. First, a farm must not use any of the prohibited items on the National List for a full three years before certification; similarly, livestock producers must feed their livestock only organic feed for a full twelve months before the sale of the milk or meat. Next, a farm must gain certification through

80 See Friedland, supra note 50, at 391-97.
81 See 7 C.F.R. § 205.311 (2011). There are three different labels an organic product can have: A “100% organic” product contains all natural ingredients, an “organic” product must contain at least 95% organic ingredients, and a product “made with organic ingredients” must contain at least 70% organic ingredients. 7 C.F.R. § 205.605 (2011); U.S. DEP’T OF AGRIC., AGRIC. MKTG. SERV., NAT’L ORGANIC PLAN: BACKGROUND INFO., http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004443.
82 7 C.F.R. § 205.642 (2011); 7 U.S.C. §§ 6504(2), 6505(a)(2) (2006); A. Bryan Endres, An Awkward Adolescence in the Organics Industry: Coming to Terms with Big Organics and Other Legal Challenges for the Industry’s Next Ten Years, 12 DRAKE J. AGRIC. L. 17, 31 (2007). The cost of certification can be a particular hardship for farmers who do not own the land they till because the transitioning tenant farmer might find it difficult to convince his landlord that conversion is cost-effective. Id. Despite the eventual profit increase from the organic price premium, transitioning farmers and landowners must deal with a three-year period of diminished profits and increased costs while the farm is converted. Id. Moreover, the typical year-long agricultural lease does not provide the assurance that a transitioning farmer would need that in three years, he will be able to reap the benefits of his conversion labors. Id. Additionally, the landowner might not wish to be bound to a lease longer than the traditional year-long lease. Id. National organic standards only apply to farmers who sell more than $5,000 annually, likely due to the cost of conversion and certification. 7 C.F.R. § 205.101(a)(1) (2011); 7 U.S.C. § 6505(d) (2006). Farms that make less than $5,000 annually are not held to the OFPA requirements and may market their produce as organic even if it does not meet the USDA standards. See 7 C.F.R. § 205.101(a)(1).
83 7 C.F.R. § 205.105, 205.603 (2011); 7 U.S.C. §§ 6504(2), 6509(c)(1), (e)(2)(B) (2006). Organic livestock, like produce, has a list of prohibited inputs for animals, including but
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

an accredited certifying agent.\textsuperscript{84} To gain certification, the farmer or livestock producer must create an organic plan for future management of crops and livestock that must be approved by the certifying agent.\textsuperscript{85}

Certifying agents must apply to the USDA for accreditation.\textsuperscript{86} These government organizations, independent organizations, and individuals must first submit an application to the Secretary of Agriculture showing their expertise in organic farming.\textsuperscript{87} The Secretary must then determine whether the petitioning certifier has sufficient expertise to be accredited.\textsuperscript{88} Furthermore, the Secretary may establish a peer review panel to evaluate the petitioner's qualifications to be an accredited certifying agent.\textsuperscript{89} Each certifying agent must include a provision for annual on-site inspection of producers and periodic residue testing of products for prohibited inputs or pesticides in organic plans.\textsuperscript{90} The certifier is then responsible for collecting the cost of certification from producers in the form of reasonable fees.\textsuperscript{91}

Admirably, the OFPA is designed to reduce the governmental cost of organic certification by shifting the burden to certifiers, and therefore to consumers who directly benefit from the organic product.\textsuperscript{92} This fiscally prudent framework, however, can be problematic as it creates a "race to the bottom" among certifiers who are competing with one another for the business of aspiring organic producers.\textsuperscript{93} While this naturally occurring race to establish lenient standards and fee competition might be stopped

\textsuperscript{86} 7 U.S.C. § 6514(b)(1).
\textsuperscript{87} 7 U.S.C. § 6514(b)(2).
\textsuperscript{88} 7 U.S.C. § 6514(b).
\textsuperscript{89} 7 U.S.C. § 6516; see infra part V. C.
\textsuperscript{90} 7 U.S.C. § 6506(a)(5).
\textsuperscript{92} See id.
\textsuperscript{93} Endres, supra note 82, at 32–33.
by proper USDA/AMS oversight, as mandated in the OFPA, enforcement continues to be a problem for the NOP. In the 2010 Audit Report, the USDA Office of Inspector General found that NOP officials failed to properly oversee and regulate the NOP standards.

The Office of the Inspector General is tasked with issuing a comprehensive audit and accompanying recommendations to the AMS to improve the oversight of the NOP. The 2010 audit report found that AMS officials do not take the appropriate enforcement actions against certifiers who fail to comply with organic standards, or delay enforcement action for a significant period of time. This oversight results in so-called “organic” operations using prohibited pesticides and failing to pay the civil penalties for NOP violations as mandated in the OFPA. The AMS further failed to assemble a peer review panel to annually evaluate USDA accreditation procedures and failed to perform any residue testing at all, both of which are required by the OFPA under certain circumstances.

The failure of the USDA to properly oversee the certifying agents and so-called “organic” producers who operate under the NOP directly contributes to the certifiers’ race to the bottom and the undermining of organic regulations in the United States.

D. Foreign Organics

Many difficulties in organic enforcement come from the challenges of overseeing organic imports from foreign countries. The OFPA allows for imported organic food, provided that the Secretary determines

---

95 See id. at 2–3.
96 See id. at 11.
97 Id. at 8.
98 Id. at 8–9. One of the prohibited pesticides that the Office of the Inspector found in use on so-called “organic” farms was paraquat—a highly toxic herbicide. Id. at n.19.
100 See Audit Report 2010, supra note 94, at 28–30; Endres, supra note 82, at 27–28.
such products have been produced in compliance with an organic certification program equivalent to the NOP. However, in recent years, the amount of organic fraud relating to foreign imports is staggering. Part of the problem is a chronic undersupply of organic products in the United States. For example, the organic meat market is highly dependent on imports, with imports accounting for more than 60% of organic pork sold in the U.S., due to the lack of an infrastructure designed to support a domestic organic meat market, including an insufficient number of organic certified slaughterhouses, processing plants, and distribution channels.

Unfortunately, despite the high percentage of organic imports, the AMS has not made adequate provisions to perform the required onsite reviews of five of the forty-four foreign certifying agents. These five unsupervised foreign agents certify approximately 1,500 foreign organic operations; NOP officials have little assurance that these 1,500 foreign organic operations are complying with USDA regulatory standards.

Lack of oversight of foreign organic operations lead to mislabeled

---

101 7 U.S.C. § 6505(b) (2006). NOP allows for three options for permitting imported agricultural products, including (1) a USDA accredited certifying agent certifies the foreign product, (2) the USDA recognizes the ability of the foreign government to accredit their own certifiers, and (3) the USDA negotiates an equivalency agreement with the foreign government. U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GENERAL, N.E. REGION, Audit Report 01001-02-Hy, Agric. Mktg Serv. Nat’l Organic Program, 3 (July 2005).


103 See ALICE BYERS, DANIELE GIOVANNUCCI & PASCAL LIU, VALUE-ADDING STANDARDS IN THE NORTH AMERICAN FOOD MARKET: TRADE OPPORTUNITIES IN CERTIFIED PRODUCTS FOR DEVELOPING COUNTRIES, FAO COMMODITIES AND TRADE PAPER, 18 (Pascal Liu et al. eds., 2008).

104 Endres, supra note 82, at 27.

105 7 C.F.R. §205.508(b) (2011); Audit Report 2010, supra note 94, at 28. The AMS’s excuse for not performing the on-site reviews of these five foreign certifying agents was that the agents were located in three countries with travel warnings issued by the U.S. Department of State: Israel, Bolivia, and Turkey. See Audit Report 2010, supra note 94, at 29. However, the warnings did not prohibit travel, and in fact many Americans traveled to those countries during the years when NOP officials failed to perform their on-site reviews. See id.

products, the use of uncertified livestock feed, and a failure to maintain certification records. Additionally, onsite inspections and certification decisions were made by the same individual, against NOP requirements, creating conflicts of interest that were not disclosed by the certifying agents. Moreover, China, which is on the way to becoming the world’s largest exporter of so-called “organic” foods, has an institutional history of corruption and fraud as well a problem with pollution and toxic sludge, lending little credibility to the quality of the exports.

Despite foreign organic fraud, lower production costs make foreign organic producers attractive to large supermarket chains. Thus their products have become prominent, albeit questionable, organic choices for consumers. For instance, Wal-Mart’s dependency on foreign sources such as China can lead to increasingly large and widespread imports of foreign food that is marketed under the organic label, yet whose process information is unknown or substandard.

IV. THE FOOD AND DRUG ADMINISTRATION REGULATION OF “MISLEADING” LABELS

Although under the organic regulations, private certifiers may permit the use of their own label in addition to the USDA “organic” label, organic food is still subject to the food labeling regime of the FDA. In the last few decades, the FDA has begun regulating food labels as

107 Id. at 28.
108 Id. at 29–30.
109 MARK ALAN KASTEL, CORNOCPIA INSTITUTE, WHITE PAPER, WAL-MART: THE NATION’S LARGEST GROCER ROLLS OUT ORGANIC PRODUCTS: MARKET EXPANSION OR MARKET DELUSION? 8 (Sept. 27, 2006) (noting a Beijing Consumers Association report stated that 10% of Chinese organics were counterfeit).
110 Endres, supra note 82, at 27.
111 See KASTEL, supra note 109, at 6–7.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

“misleading” despite the information’s relevance to the consumer.\textsuperscript{113} This stringent regulation of “misleading” labels is dangerous to the organic industry because it may prevent producers from affixing labels or additional certifications that make a value judgment about the superior quality of organic products. These labels that indicate values, however, are precisely what consumers are looking for when they purchase organic products.\textsuperscript{114}

Pursuant to the Federal Food, Drug, and Cosmetic Act ("FDCA"), the FDA can prohibit voluntary food labels and claims if they appear to be "misleading."\textsuperscript{115} To determine whether a label is misleading, the FDA considers to what extent the label "fails to reveal facts material" in light of the representation on the label or claim.\textsuperscript{116} A label is prohibited if it affirmatively misleads a consumer, omits information that is “material,” or if specifies information that would cause a consumer to mistakenly purchase a product due to a confusing or deceptive label.\textsuperscript{117} Therefore, the crux of the FDA analysis is inextricably linked with whether the information is important to consumers.\textsuperscript{118} In the past, the FDA has

\textsuperscript{113} See, e.g. FDA GUIDANCE FOR INDUSTRY: VOLUNTARY LABELING INDICATING WHETHER FOODS HAVE OR HAVE NOT BEEN DEVELOPED USING BIOENGINEERING; DRAFT GUIDANCE, January 2001, [hereinafter “FDA Guidance for Industry: Bioengineering”] (the FDA has found that consumer interest is not enough to allow producers to label their products as having been produced without genetic engineering); see also Memorandum from the Mellman Group to the Pew Initiative On Food And Biotechnology (2006), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Public _Opinion/Food_and_Biotechnology/2006summary.pdf (discussing that public opinion weighs in favor of more information about whether their food was bioengineered).


\textsuperscript{116} Id.
\textsuperscript{117} See id.
\textsuperscript{118} Lara Beth Winn, Special Labeling Requirements for Genetically Engineered Food: How Sound are the Analytical Frameworks Used by FDA and Food Producers?, 54 FOOD & DRUG L.J. 667, 670 (1999).
regulated labels such as "fresh" and those that show a product's geographic origin under the misleading standard of Section 321(n).\textsuperscript{119}

The FDA's regulation of misleading food labels can be very helpful to consumers when information about a product is otherwise difficult to ascertain. For example, in 2003, the Smucker's company was cited under Section 321(n) for a label on its spreadable fruit which read "100% Simply Fruit" when in reality, the spread contained less than 50% of the identified fruit flavor, and over 50% of varied fruit syrups.\textsuperscript{120} In this case, the FDA's regulation of claims that are misleading will protect consumers who would otherwise be misinformed, and might purchase the fruit spread based on the misleading label.

However, in other situations, where consumers require more information to make principled purchasing decisions, the FDA's regulation of misleading claims can hamper consumers' ability to make an informed choice. For example, the FDA has decided it is misleading to claim that a food is free of genetically modified organisms or does not use bioengineering.\textsuperscript{121} The FDA justifies this regulation because most foods do not contain "organisms" at all and because such a claim implies that bioengineered food is inferior to food that was created without bioengineering.\textsuperscript{122} The FDA has determined that use or non-use of genetic engineering in food production does not create a material difference in food; therefore no value judgment, including a judgment that non-genetically modified food is safer, healthier or of higher quality, may be implied by a label indicating the absence of genetic engineering.\textsuperscript{123} This stringent application of the FDA's mandate against misleading labels

\textsuperscript{119} See id. at 676–77.
\textsuperscript{120} Letter from Michael F. Jacobson, Ph.D., Executive Director, Center for Science in the Public Interest to Joe Levitt, Director, Center for Food Safety and Applied Nutrition, Food and Drug Administration (May 13, 2003), http://www.cspinet.org/new/pdf/smuckers_complaint.pdf.
\textsuperscript{121} See FDA Guidance for Industry: Bioengineering, supra note 113, at 3, 6.
\textsuperscript{122} Id. at 5.
\textsuperscript{123} See id. at 6.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

contradicts consumer interests, which are overwhelmingly in favor of knowing whether or not their food was created with bioengineering.  

V. CONSUMERS AND THE OFPA

A. The Benefits of Market-Driven Legislation

The OFPA is an example of a market-driven law designed to provide consumers with information about a product in order to influence that consumer’s purchasing decision. The OFPA forces producers to disclose information to a third-party certifier and eventually to the consumer, which in theory, allows consumer markets to provide regulatory pressure by demanding this information reflect certain standards. There is evidence in favor of the effectiveness of market-driven laws, which shows that consumers can be an efficient regulatory force. For instance, whereas government authority on food quality issues is compartmentalized between different regulatory agencies, including the USDA, FDA, and the EPA, consumers are not similarly pigeon-holed; consumers as a single group can comprehensively assess the variety of risks and benefits associated with a purchase in a way that no single government authority can. Additionally, lawmakers are prone to oversimplify consumer choices. Genetically engineered food presents a good example of the

124 Memorandum from the Mellman Group to the Pew Initiative On Food And Biotechnology (November 16, 2006), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/PublicOpinion/Food_and_Biotechnology/2006summary.pdf. In 2006, 34% of American consumers believed genetically modified foods were basically safe, 29% believed they were basically unsafe, and 37% did not have an opinion. Id. at 4. Interestingly, 41% of American consumers who were aware of government regulation of genetically modified foods said there was too little regulation, while 19% said there was just enough regulation and only 16% said there was too much regulation. Id. at 5.


126 See generally id. (stating that policymakers often underestimate the wisdom and rationality of American consumers).

127 See id. at 590.

128 See id. at 584.
consequences of this type of legislative reduction. The FDA has asserted its position that genetically engineered food is safe for human consumption when that food is physically identical to its conventional counterpart. Therefore, no label is required on genetically engineered food resembling and composed of the same ingredients as the non-genetically engineered food it is modeled after. However, many consumers wish to avoid genetically engineered food because it violates an ethical, environmental, or health-based principle that transcends physical product difference, not because it differs physically or nutritionally from conventional food.

Consumers have often been ahead of the government regarding supposed science-based regulation. Typically, consumers are more risk-averse than regulators; when this risk aversion manifests itself through the purchase of organic foods, these organic consumers are buying a type of insurance against possible undiscovered or unproven risks of conventional foods. This insurance, paid through the organic price premium, is expected to protect consumers against government regulation that might be politically driven, corrupted by industry lobbies, or based on bad science. Consumers, unlike regulators, know and act on the assumption that scientific dogma can be disproven and politics can influence regulatory decisions.

130 See id.
131 The Mellman Group, supra note 124, at 8.
132 See Donald T. Hornstein, The Road Also Taken: Lessons From Organic Agriculture For Market and Risk-Based Regulation, 56 DUKE L.J. 1541, 1568 (2007).
133 See id. at 1573. For example, in 2000 to 2003, the public became aware of the possibility that a widely used pesticide called atrazine caused endocrine disruption in humans. The consequences of such disruption were seen in puberty and reproductive processes. Prior to 2000, in recognition of this danger, the EPA had mandated an extra ten-fold margin of safety for atrazine’s tolerance in humans. However, in 2000, the pesticide industry successfully convinced the EPA to relax the ten-fold safety margin because there was “no reliable evidence” that atrazine caused endocrine defects, only studies that showed the potential risks. Id. at 1567–72.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

B. The Importance of Consumer Information

Ideally, the OFPA would direct the USDA to oversee a truthful flow of information regarding organic production from farmer to consumers who, in turn, would punish, or “regulate” those farmers that do not live up to their organic standards. The vulnerability of the OFPA, and, in turn the entire NOP, is that consumers must first receive the specific type of information needed, and then understand and trust the information in order to exert this regulatory pressure. Since information about food is largely transmitted through food labels rather than direct consumer-to-producer communication, the quality of the food label is roughly equal to the quality of the consumer information, which then reflects on the quality of the regulation itself.

The history of organic policy in the United States has been consistently in favor of developing and facilitating a free market for organics, rather than creating a subsidy system for direct government support of organic food. This choice underscores the government’s general position on organic food: the organic sector is a marketing opportunity and the food itself is merely a “differentiated product available to consumers.” Organic food, according to the government, has no inherent value over its conventional counterpart; organic is simply

\]

\[\text{135 Direct marketing is also an option for farmers and producers with small-scale}
\]

\[\text{operations who sell their produce and animal products at local markets. However those}
\]

\[\text{farms that engage in direct marketing typically are small enough to avoid the regulatory}
\]

\[\text{regime of the NOP in the first place. See Kate L. Harrison, Note, Organic Plus:}
\]

\[\text{Regulating Beyond the Current Organic Standards, 25 PACE ENVTL. L. REV. 211, 220}
\]

\[\text{(2008).}
\]

\[\text{136 See generally Carolyn Dimitri & Lydia Oberholtzer, Market-Led Versus Government-}
\]

\]

\[\text{publications/WRS0505/wrs0505.pdf (describing the different organic policy approaches}
\]

\[\text{taken by the United States and the European Union). In contrast to the U.S. market-}
\]

\[\text{driven approach to organics, the European Union uses a regulation-driven approach and}
\]

\[\text{provides green payments to farmers who choose to transition to organic production. See}
\]

\[\text{id at 15.}
\]

\[\text{137 Id. at 2.}
\]
another choice available to consumers. However, this reluctance to make a value judgment on organic food is out of step with a consumer demographic that purchases organic food, and indeed pays a price premium, precisely because of a perception that organic food offers a greater value than conventional food.

C. Dream v. Reality: Consumer Motivations for Buying “Organic”

Unfortunately, the USDA label is an insufficient guarantee for what many consumers are looking for when they buy organic. There is no single motivation for buying organic products, nor is there a single definition of what organic means. “Organic” tends to refer to a philosophy, rather than a concrete set of regulations or physical characteristics of a certain product. According to the International Federation of Organic Agriculture Movements (IFOAM), the term “organic” indicates a “production system that sustains the health of soils, ecosystems, and people. It relies on ecological processes, biodiversity and cycles adapted to local conditions, rather than the use of inputs...[it] combines tradition, innovation and science to benefit the shared environment.”

Consumers instinctively relate to this definition when they communicate their reasons for buying organic, citing health, environmental sustainability, ethics, social justice, food safety, animal welfare, taste, and overall quality. For instance, in a 2004 Whole Foods Market survey, 58% of consumers believed organic foods were better for the environment, 57% thought they were supporting small farmers with organic purchases, 54% assumed organic was better for their health, and

138 See id. at 11.
139 Pollans, supra note 62, at 641.
42% felt organics were of overall higher quality.143 Three years earlier, in a 2001 Food Marketing Institute study, 66% of consumers reported buying organic food for health and nutrition, while 26% reported purchasing organics for reasons of perceived environmental sustainability.144

In the past, organic food was sold predominantly through the producers directly at farmers’ markets or farm stands, or indirectly through natural food and organic retailers.145 Because many consumers who bought organic food for principled reasons trusted the retailer from whom they were buying, the value of the organic label was less crucial.146 However, in recent years the number of consumers purchasing organic food from conventional grocery stores has gone up precipitously.147 Since 2000, industry surveys indicate that over 50% of the total amount spent on organic food, $7.8 billion annually, was purchased in conventional grocery stores.148 The increasing availability of organics to consumers, both in terms of price and presence in the grocery stores, has increased consumption, creating a positive feedback loop and spurring mega-

143 Whole Foods Market, Organic Foods Continue to Grow in Popularity According to Whole Foods Market Survey, (October 21, 2004), http://wholefoodsmarket.com/pressroom/blog/2004/10/21/organic-foods-continue-to-grow-in-popularity-according-to-whole-foods-market-survey/; Dimitri & Oberholtzer, supra note 136, at 2. A Harris survey from 2007, however, found that 40% of the 850 consumers polled bought organic foods for perceived health benefits, while only 8% bought organic because they thought it was better for the environment. See Baldwin, supra note 40, at 166.

144 Dimitri & Greene, supra note 42. Consumers also appear to be unaware of the amount of organic ingredients included in USDA certified “organic” foods. See Baldwin, supra note 40, at 166. Consumers also seem to be unaware of what the “organic” seal truly means. A poll of 850 consumers found that almost half of consumers thought that the USDA “organic” seal always indicated 100% organic ingredients. See Baldwin, supra note 40, at 166. Only a quarter of the consumers understood that the label “organic” indicated only 95% organic ingredients. See Baldwin, supra note 40, at 166.

145 Dimitri & Greene, supra note 42, at 2. From 1990 to 1996, specialty natural food stores, which made up only 1% of the total food retail market, sold two-thirds of all organic foods. By 2000, natural food stores sold only 48% of all organic foods. Id.


147 See Dimitri & Greene, supra note 42, at 2.

148 Id.
retailers to make organics even more available. For those consumers who only began buying organic foods once they became more accessible in the grocery stores, the integrity of the USDA label is particularly meaningful, because the consumers might not be educated about the difference between what the label means and what they seek by buying “organic.” These consumers likely were not an active part of the organic movement when the OFPA and NOP were being constructed, and thus probably do not already understand how narrow the USDA guidelines are. Therefore, it is now, more than ever, that the USDA organic seal must live up to its responsibility as an effective indication of the organic standards that consumers want, rather than a formalistic stamp of approval for market savvy mega-retailers. Unfortunately, there is an increasing breakdown in communication between the consumer ideal that the organic price premium indicates quality, environmental sustainability, and ethical food processes and the reality of the USDA’s minimal input and process-based standards.

1. Organic Food Does Not Necessarily Come From Small Farms

The 57% of consumers polled who thought that organic purchases support small, local farms are mistaken. As discussed above, the USDA organic label is a guide of process and inputs; it indicates that a product has been created without synthetic pesticides or genetically modified

---

149 See NORBERG-HODGE, MERRIFIELD & GORELICK, supra note 146, at 106–08 (noting the growth of mega-retailers in organic trade and advocating for a return to local organic farming and avoidance of “artificially cheap, distantly produced products”).

150 See Whole Foods Market, Organic Foods Continue to Grow in Popularity According to Whole Foods Market Survey, (October 21, 2004), http://wholefoodsmarket.com/pressroom/blog/2004/10/21/organic-foods-continue-to-grow-in-popularity-according-to-whole-foods-market-survey/ (indicating that consumers buy organic food because they perceive it as healthier and of environmental quality); but see 7 C.F.R. § 205.102 (2010) (showing that USDA organic standards are predominantly concerned with disallowance of certain pesticides and genetic engineering, as well as ensuring certain soil conservation practices in food production).

organisms, and it was grown on USDA-approved organic land with a soil preservation plan. Contrary to the popular belief, federal organic regulations favor large, industrial farms that can afford the cost of transition and whose producers often own the land upon which they farm and raise livestock. Additionally, the low cost of international organic imports disproportionately hurts small farms that cannot compete with low prices made feasible by low foreign labor costs and questionable organic certification systems. Large industrial farms often do not adhere to the organic philosophy that most consumers think of when they consider organic purchases. For example, in 2007, a large-scale dairy producer named Aurora Organic Dairy, was cited for failure to give its dairy cows sufficient pasture land, as required by the NOP. Aurora eventually settled this issue through a consent agreement with the USDA, but soon after had to defend a class-action lawsuit against consumers alleging that Aurora marketed milk as “organic” when in fact, it was conventionally produced.

The national standards for organic food also thwart local food networks and small farmers by encouraging contract sourcing by national supermarkets and mega-retailers such as Wal-Mart. National supermarket and mega-retailer chains recruit and contract with organic

153 See Endres, supra note 82, at 31.
154 See id. at 28; see also JIM BINGEN & LAWRENCE BUSCH, AGRICULTURAL STANDARDS: THE SHAPE OF THE GLOBAL FOOD AND FIBER SYSTEM 207 (Springer ed., 2006) (noting that in China, the advantages of size, infrastructure, state sovereignty, and authoritarianism have led to a dominant market share for China in the international market).
157 Goodman, supra note 151, at 216.
growers in order to give that grower national exposure.158 In turn, the local food network is harmed as only the few organic growers with contracts dominate the market due to their exposure in national chain stores.159 As illustrated by these examples, the consumer ideal of supporting the environmental and community benefits of small, local farms through organic purchases is not supported by the USDA organic regulations.

2. Organic Does Not Indicate Ethical Labor Practices

Due to the reality that USDA certified organic enterprises can be as large and as profit-driven as their conventional counterparts, consumers who buy organic food because they want to support fair labor practices are not achieving their goal.160 Organic farms often require more manual labor than their conventional counterparts because they tend to use less machinery.161 The prohibition on chemical pesticides also creates the need for alternative forms of pest and weed control, which are usually applied manually. Despite, or perhaps due to, their increased need for manual labor, organic operations often use non-union, migrant laborers and pay them the same low market wages162 that conventional operations do, undermining the idea that organic agriculture, by definition, supports

---

158 See id.
159 See id.
160 See id.
162 See Shrek, Getz & Feenstra, supra note 11, at 441. For example, market wages for a migrant farmer working on an organic raspberry farm in 2006 were $500 a week at peak season, but merely $200 a week during the rest of the year. Jason Mark, Workers on Organic Farms Are Treated as Poorly as Their Conventional Counterparts, GRIST, Aug. 2, 2006, at 1, available at http://grist.org/article/mark/. Additionally, poor health among conventional farm laborers is well documented, including illnesses from pesticide exposure, the physical rigors of the job, and the psychological stressors of long hours and poverty. See GLASGOW, JOHNSON & MORTON, supra note 28, at 174–77. Farm workers are also disproportionately exposed to safety hazards from heavy farm machinery, knives, and heavy lifting. See id. at 175.
fair labor. In fact, organic farms often fail to provide living wages and health insurance to farm workers, as do their conventional counterparts. Unfortunately, there is also growing evidence that organic farms, like their conventional counterparts, respond to efforts at employee unionization with "intimidation and harassment." Finally, there has been a noted increase in allegations of sexual discrimination, minimum wage law violations, and child labor law violations on large-scale organic farms.

Even though USDA certified organic farm workers are often treated as poorly as their conventional counterparts, consumers continue to ascribe a socially responsible component to organic agriculture that does not exist. Consumers might feel that because organic production forbids many dangerous pesticides, working conditions are safer for farmers on organic farms. Additionally, consumers might mistakenly believe that the OFPA and the NOP have built in provisions for improved working conditions. However, neither the OFPA nor the NOP include any provisions that would improve working conditions or give any additional rights to farm laborers. In an interview on the subject, a representative of United Farm Workers pointed out the chasm between the common consumer perception that organic workers are treated better and

163 See Goodman, supra note 151, at 216.
164 See Shrek, Getz, & Feenstra, supra note 11, at 441.
165 Mark, supra note 162.
166 For example, Willamette River Organics, a large Oregonian organic producer has been charged several times with violating minimum-wage laws. See Mark, supra note 162. Additionally, Threemile Canyon, an organic dairy farm in Oregon was charged in 2004 with sexually discriminating in hiring workers. See United Farm Workers, Key Campaigns: Threemile Farms Chronology, http://www.ufw.org/_page.php?menu=organizing&inc=keycampaign/threemile/Threemilechron.htm.
167 See Shrek, Getz, & Feenstra, supra note 11, at 443 (noting that both farmers and consumers often mistakenly believe that better working conditions are built into the organic standards).
168 See id. at 442.
169 See id.
the reality that organic producers are mirroring their conventional counterparts in their treatment of farm workers.\footnote{See Mark, \textit{supra} note 162.}

3. Organic Does Not Mean Sustainable

Although organic farming adheres to several of the tenets of sustainability, such as prohibiting pesticide use and mandating a soil conservation plan,\footnote{7 U.S.C. §§ 6508(b), 6513(b)(1) (2006).} there is a notable difference between USDA organic guidelines and sustainable farming. Sustainable farming, like the organic philosophy, is difficult to define concretely because it incorporates many different definitions and motivations. According to the EPA, sustainable farming “meets the needs of the present without compromising the ability of further generations to meet their own needs.”\footnote{U.S. ENVTL PROT. AGENCY, http://www.epa.gov/agriculture/tsus.html.} Sustainable farming usually includes several of the following characteristics: “low-till” farming,\footnote{No-till farming is a method of planting crops without plowing and without chemical herbicides in order to reduce soil erosion and preserve soil nutrients. See Macilwain, \textit{supra} note 38.} crop rotation,\footnote{Crop rotation is the successive cultivation in a specified order on the same field to conserve soil nutrition. See Altieri, \textit{supra} note 1.} low-energy or renewable energy use in production, water-saving methods, antibiotic-free and hormone-free livestock, pesticide-free crops, animal welfare and animal rights, small farms, local farms, low “food miles,”\footnote{“Food miles” is the term to describe the distance a food has traveled from farm to consumer. Food miles are a good indicator of the energy used to transport the food. See Dept. For Env’t, Food & Rural Affairs, Food Industry Sustainability Strategy 50 (2006), http://archive.defra.gov.uk/foodfarm/policy/foodindustry/documents/fiss2006.pdf.} and pollution-prevention techniques.\footnote{See generally Gale Buchanan, Address at the Sustainable Agriculture Research and Education 20th Anniversary at the New American Farm Conference (March 25, 2008), available at http://www.sare.org/Events/Past-Conferences/New-American-Farm-Conference-2008/Plenary-Speakers (discussing the role sustainable practices play in the national economy, rural communities, and the future of agriculture law).}

USDA organic guidelines are not characterized by sustainable methods instead they adhere to a handful of the sustainable characteristics
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

above that are included in the national definition of "organic."\textsuperscript{178} For instance, the USDA makes no mention of fuel efficiency in the NOP; organic foods can travel trans-nationally and, increasingly, internationally before arriving at their retail destination, logging hundreds or thousands of food miles and using a significant amount of fossil fuels.\textsuperscript{179} Unlike sustainable farmers, who are typically members of their farming community, organic food can be produced by farming corporations whose members neither live nor farm where the farmland is located.\textsuperscript{180} Sustainable food is devoted to soil conservation and preventing soil erosion,\textsuperscript{181} and although the NOP standards mention soil conservation, these standards are often ignored by large-scale producers.\textsuperscript{182} Even in organic agriculture, pervasive industrialization has taken hold; the widespread use of specialized inputs like pesticides and other chemical products to keep yields from being diminished by pests or disease runs counter to the "philosophical and ethical foundations" of environmental sustainability.\textsuperscript{183} Additionally, while sustainable food practices mandate adequate pasture and free-grazing for livestock, organic food from large-scale suppliers often does not provide such space for their animals.\textsuperscript{184}

The USDA's choice to create a formal definition of organic that encompasses only a few sustainable practices is logical in light of the


\textsuperscript{181} Soil erosion causes problems for aquatic species that live, eat, and reproduce in waters downstream of agricultural areas, resulting in many environmental hazards, including low streambeds. See WALTER NEBEKER THURMAN, ASSESSING THE ENVIRONMENTAL IMPACT OF FARM POLICIES 50 (AEI Press 1995).

\textsuperscript{182} See 7 U.S.C. § 6513(b)(1) (2006); but see SAMUEL FROMARTZ, ORGANIC INC.: NATURAL FOODS AND HOW THEY GREW 226–27 (Harcourt, Inc. 2007).

\textsuperscript{183} Goodman, supra note 151, at 216.

\textsuperscript{184} See, e.g., Harrison, supra note 135, at 226–27.
complications of enforcing a national set of bright-line standards for the organic industry and market like the OFPA strives to create. However, this choice renders the organic label devoid of any meaningful sustainability guarantee. Consumers who want the opportunity to purchase food on sustainable principles can only support such practices if provided with additional label information.

4. Organic Food, Like Conventional Food, is Susceptible to Political Corruption

The Standards Board, whose task it is to recommend organic standards to the Secretary of Agriculture, is comprised of fifteen experts in the environmental, marketing, and organic agriculture fields. Although the OFPA only allows one position on the Standards Board to be filled by a retailer "with significant trade in organic products," in December of 2006, four industrial-scale retailers were appointed to the NOSB. This infiltration of big business allows the representatives of General Mills and Campbell Soup Co. to influence the national organic standards for the United States. Furthermore, these four business representatives replace the valuable board positions of the scientist with no industry ties, the consumer interest advocate, and the organic handler or processor. The vulnerability of the Standards Board puts the legitimacy of the NOP in jeopardy because it allows the organic industry disproportionate influence over the government regulations to which it is held; in essence, filling the Standards Board positions with corporate representatives allows industry to govern itself.

185 See Lathrop, supra note 47, at 895–97.
189 Id.
190 Id.
There has also been significant pressure from special interest groups to "water down" the definition of "organic" to increase their profit margin.\textsuperscript{192} For example, in 2003, a Georgia poultry company called Fieldale Farms persuaded Congressman Nathan Deal of Georgia to add a last minute provision onto an omnibus spending bill in the U.S. House of Representatives.\textsuperscript{193} The provision allowed Fieldale to feed its animals non-organic food, yet still use the "USDA organic" label if the organic food was too expensive, or double the price of standard non-organic food.\textsuperscript{194} Fortunately, the vehement reaction of the organic movement caused Congress to pass a bill reversing Section 771 less than 60 days later.\textsuperscript{195} Although Fieldale Farms ultimately did not succeed in its attempted corrosion of the organic label, it stands as an illustrative example of how the label is susceptible to changes which would corrupt the purpose of the label.\textsuperscript{196}

In 2007, dairy farmers made a similar attempt to dilute the potency of the organic standards by hiring lobbyists and secretly approaching the USDA regarding a new rule after the closing of a public comment period.\textsuperscript{197} The dairy processors proposed a weaker standard to allow industrial dairies to deny pastureland to their lactating cows.\textsuperscript{198} Again, a vocal and active organic movement forced the USDA to specify pasture requirements for lactating cows. However, the incident again made evidence the national organic standards' vulnerability to industry tampering.\textsuperscript{199}

\begin{footnotes}
\item[192] See Carroll, \textit{supra} note 77, at 133.
\item[193] See \textit{id.} at 134.
\item[195] See Carroll, \textit{supra} note 77, at 137.
\item[198] See \textit{id.; but see} 7 C.F.R. § 205.237(a) (2010) (stating livestock feed requirements under the National Organic Program).
\end{footnotes}
D. Problems with Asymmetric Information for Consumers

The purpose of federal organic legislation is to standardize and regulate the market for organic food. While this goal is laudable, it comes with a responsibility: once the government takes on the burden of regulating a market, it has a continuing obligation to inform consumers of the science, public health, environmental and ethical ramifications of their purchases. Where the government fails to provide adequate consumer information in market regulation, the government promotes an unhealthy and inefficient market that will ultimately fail. The organic market is an example of government failure to fully inform consumers of the implications of their purchases. Without a more transparent labeling system that allows consumers to purchase according to their organic philosophy, the organic market will become increasingly inefficient and anemic, in direct contravention of the OFPA.

The most worrisome risk to an organic label that fails to match consumer expectations is the loss of value to the label itself. If consumers feel that the organic label’s potency has been diluted by the industry, politics, or governmental misunderstanding of what “organic” actually means to the organic community, consumers will distrust and eventually disregard the label. The loss of value to the label will likely result in a depressed organic market because consumers will not hold organic products in high esteem, and therefore will not be willing to pay the price premium associated with the label. Moreover, the increasing organic sales of mega-retailers like Wal-Mart may cheapen the “organic brand” because of the mega-retailers’ push to drive down prices and further

202 Id.
203 See Harrison, supra note 135, at 228; Gutman, supra note 140, at 2375; see also 7 U.S.C. § 6501(1)–(3) (2006).
204 See KASTEL, supra note 109, at 12.
205 See id.
standardize the industry. Although the OFPA was created to provide some uniformity and standardization to the organic market, such efforts were important only insofar as they vitalized the organic market. Over-standardization and uniformity to the point where consumers lack choice will kill, rather than reinforce, the organic market. David G. Cox, the Cornucopia Institute’s attorney for some of their organic enforcement claims against the USDA, sums up the rift between consumer expectations and USDA reality: “when consumers find out that their milk has come from factory farms in desert states whose scale of operations endanger the livelihood of hardworking families, and the milk is then shipped all around the country, they feel betrayed.”

Farmer disillusionment is another risk the organic market faces when its labels are too far removed from the ideals of the organic movement. Farmers may recognize the diminishing value of the organic brand among consumers, and question whether the label is worth the cost of regulatory compliance, transition, and annual fees to certifiers, which can amount to more than $1,000 a year. Especially for small farmers, who must already compete with low prices from industrial farms, eroding consumer trust might persuade them to forego NOP compliance. As Bill Evans, a California farmer with 2,000 acres of farmland who has considered going organic, states, “if big business kills the name . . . why go organic?”

Consumer distrust of the organic label, coupled with farmer disillusionment with the NOP creates a situation where the small-scale

---

206 See Endres, supra note 82, at 26; but see Baldwin, supra note 40, at 213 (arguing that putting mega-food retailers such as Wal-Mart in a position of power will allow the retailers to exert an environmentally responsible influence over suppliers and consumers).
207 See Lathrop, supra note 47, at 890–92; see also 7 U.S.C. § 6501(3) (2006) (stating the purpose of the OFPA to support a national organic food market).
208 See, e.g., Endres, supra note 82, at 26.
209 See Kastel, supra note 197.
211 See id.
212 See id.
213 See id.
producers that started the organic movement are turning away from the organic label. Instead, these small-scale farms are exceeding government regulations by farming according to their own definitions of organic and foregoing organic certification altogether. When the regulatory system caters to the most minimalist definition of organic, as done by the NOP, "movement farmers," who are committed to a more ideological definition of organic, will begin to market directly to their communities through farmers' markets and CSAs, strengthening local markets while hurting the national market that the OFPA seeks to build. If the USDA organic label continues to be devalued by lack of consumer faith, the national organic market will founder as its most dedicated farmers exit in favor of direct marketing to a smaller, more local, consumer base.

VI. THE BARRIERS TO A MARKET SOLUTION TO THE ORGANIC PROBLEM

A. USDA Monopolizes the Word "Organic"

There is a significant disconnect between consumers' views of what organic means, and the USDA definition of organic that governs the official "organic" label. Ideally, this divide would be bridged by the free market, as it has been with other eco-labels. For example, small

---

214 Harrison, supra note 135, at 213.
215 Id.
216 The term "CSA," or "community supported agriculture" represents an alternative food system whereby a community of individuals pledge support to a farm operation so that farmers and consumers provide mutual support and responsibility of food production. United States Department of Agriculture National Agricultural Library, Community Supported Agriculture, (May 5, 2011), http://www.nal.usda.gov/afsic/pubs/csa/csa.shtml.
217 See Goodman, supra note 151, at 218.
218 See id.
219 See, e.g., Christopher Wedding, Toward Greater Ecological Intelligence in the United States: Ten Statements with Statistics and Commentary Regarding Ecolabels, 6 SUSTAINABILITY: SCI., PRAC., & POL’Y 1, 39 (2010) (noting that transparency and information makes consumers increasingly receptive to purchasing based on environmental and safety ideals and giving the examples of ENERGY STAR, LEED, and Green Seal in the United States).
farmers who surpass government regulations in pursuit of their organic ideals would theoretically be able to label their foods with those ideals and thereby fill a hole in the market for sustainable foods that go beyond USDA's organic label. However, existing government labeling regulations work against any increased strictness favored by the organic market because the government has a monopoly on the word “organic.”

This works to the detriment of any farmers whose personal standards go above and beyond those of the USDA, but are different than USDA standards. Under the NOP, no certifier may hold a producer to any standard different than those espoused by the USDA, regardless of the heightened sustainability of those standards. Therefore, the USDA prevents its certifiers from providing a higher standard of certification than “USDA organic.”

The stymied potential of the free market to fix the organic program was recognized as early as 2005, when Arthur Harvey, a Maine organic blueberry farmer, sued the Secretary of Agriculture, alleging that the standards of the NOP were inconsistent with the OFPA. Harvey argued it was wrong that neither the OFPA nor the NOP allowed private certifying agents to require stricter standards than those required by the USDA. Although the court found against Harvey on this count, he was prescient in his recognition that the uniform requirements of the NOP prevent a certifying agent from establishing a reputation based on stricter standards for organic production. This inability for private certifiers to create a quality-based reputation hinders a free market solution to the problems of organic fraud and diminishing organic standards, problems which are only compounded as mega-retailers enter the market and...

---

221 Harrison, supra note 135, at 228.
223 Harvey v. Veneman, 396 F.3d 28, 35 (1st Cir. 2005).
224 Id. at 44.
225 The court found against Harvey's argument, deferring to agency discretion in interpreting gaps in legislation. See Veneman, 396 F.3d at 45.
226 Id. at 44–45.
certifiers who are less dedicated to organic ordeals engage in a competitive race to the bottom.\textsuperscript{227}

B. FDA Regulation of “Misleading”

The FDA’s labeling regime, which all foods in the United States are subject to, also creates a barrier to a market solution of the organic problem. The FDA regulates food labels under the Food, Drug, and Cosmetic Act ("FDCA"), which charges the FDA with protecting the public from misbranded food.\textsuperscript{228} Food is deemed misbranded if the label is “false or misleading” in “any particular” or in any “material aspect.”\textsuperscript{229} To determine whether a label is misleading, the FDA takes into account the affirmative representations made or suggested by the statement, word, design, or device, as well as the extent to which the label omits material facts in light of those representations.\textsuperscript{230} There are two types of food labels: mandatory labels and voluntary labels.\textsuperscript{231} Mandatory labels are required when a food contains an ingredient that would be important for consumers to know, whereas a voluntary label is permitted if the label is not misleading and it provides information that consumers might use in their decision to purchase the product.\textsuperscript{232}

The FDA has regulated misleading food labels strictly by carving out a narrow definition of what is pertinent to consumers. For instance, the FDA has consistently refused to require a mandatory label for genetically modified foods, despite the overwhelming consumer interest in knowing whether their food is a result of bioengineering.\textsuperscript{233} The FDA’s

\textsuperscript{227} See Green, supra note 179, at 813.
\textsuperscript{230} 21 U.S.C. § 321(n).
\textsuperscript{232} See 21 C.F.R. § 101.43, 101.45.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

position is that bioengineering itself is not a material change to a food, and therefore does not require a mandatory label. The FDA refuse to mandate a bioengineering label, but it prevents voluntarily labeling of genetically modified food because it would be misleading to imply that non-genetically modified foods are superior to their conventional counterparts. Additionally, the FDA claims there is no material difference between milk from cows treated with growth hormones and milk from cows that have not been so treated, thus restricting voluntary labels discussing growth hormones. In a case that was settled in 2007, Monsanto Inc., a producer of bovine growth hormone, sued a small Maine producer, Oakhurst Dairy, over Oakhurst’s use of the label, “Our Farmers’ Pledge: No Artificial Growth Hormone.” Though the settlement terms were confidential, Oakhurst’s new labels speak to the FDA’s reluctance to allow labels to advertise that foods are made without hormones. The pledge on the new labels reads, “No Artificial Growth Hormone Used” and the labels include a disclaimer that the FDA does not recognize a significant difference in milk from cows treated with synthetic growth hormones.

The FDA is particularly strict for labels that denote a food is “free” of a certain product. For instance, a producer’s statement that a food product is “GMO-free” is misleading according to the FDA, because GMO is an abbreviation for “genetically modified organism” and most foods do not contain organisms. Similarly, the FDA has also disallowed dairy farmers from labeling their milk products “hormone-

consumers view genetic modification negatively and require added compensation before accepting genetically modified foods such as bananas, cornflakes, or ground beef).


See id.


See Barboza, supra note 236.

free” because “naturally occurring hormones are present in all milk and milk products.”

Despite the fact that the FDA strictly enforces the misleading standard with voluntary labels, it is more lenient with voluntary labels that mitigate a mandatory label. For example, foods with a mandatory label of “treated with radiation” are encouraged by the FDA to add a voluntary “consumer education” label such as “this treatment does not induce radioactivity.” Similarly, when producers choose to label their food to reflect any bioengineering process, the FDA encourages them to add a consumer education label such as “these tomatoes were genetically engineered to improve texture.” Thus, in cases where industry is helped by a voluntary label educating consumers as to the details of the food process, the FDA not only permits, but explicitly encourages such detailed labels.

Although the FDA’s regulation of misleading labels is inappropriately strict when applied to organic foods, there are good reasons for the FDA to regulate certain food labels as misleading. For example, the use of terms such as “fresh” and “natural” have been used to mislead consumers, forcing the FDA to address the issue in the 1990s. Although the FDA was unable to define “natural” as concretely and reductively as the USDA has defined “organic,” the agency did publish an informal guidance policy in 1991 defining natural as having no artificial or synthetic inputs. Like “natural,” the term “fresh” lies somewhere

---

243 See 56 Fed. Reg. 60421, 60466 (proposed Nov. 27, 1991). In January 2008, the FDA announced its intentions to abandon the effort to formally define “natural” because of more pressing concerns, a finite budget, and evidence that consumers were not being sufficiently misled to make defining “natural” a priority. See Lorraine Heller, ‘Natural’
between “puffery” and consumer information that must not be misleading. To address the issue, the FDA regulated the claim “fresh” as a brand or descriptive term, and prohibited its use on items that have been frozen, thermally or chemically processed, and on food containing ingredients that have been concentrated or processed. Additionally, the indiscriminant use of labels as “low calorie,” “reduced calorie,” “sugar free” and “reduced sugar” in the early 1990s necessitated regulation through the Nutrition Labeling Education Act (“NLEA”) to protect consumers from deceptive claims. The NLEA allowed the FDA to define certain terms regarding these health claims, such as “light.” Interestingly, the FDA’s regulation of these claims was also motivated by consumer desire for consistency and information about what the various health claims meant, a motivation yet to be truly implemented for organic claims.

C. History of “Misleading” Regulation

In the past, the FDA has required labeling and advocated for voluntary labels based on whether consumers wanted to use the information in their purchasing decision. For example, in 1986, the FDA required mandatory labeling for irradiated food. From then on,
where processing was not obvious, food bore the "radura" symbol and the label "treated with radiation" or "treated by irradiation." The initial impetus behind the irradiation labeling regime was consumer interest in whether their products were treated with radiation. In fact, half the comments the FDA received on their proposed irradiation rule addressed retail labeling and over 80% of those urged labeling to prevent consumer deception. The FDA specifically addressed the significance consumers placed on information from retail labels in the FDCA. Indeed, the FDA stated that the materiality of the information under Section 201(n) of the FDCA was not based on the worth of the information, but on "whether consumers view such information as important." As the irradiation example shows, the FDA has a history of regulating food processes based on the importance of the information to a consumer where the final product is made "in semblance of a traditional food" even if food safety is not implicated. For example, "bleached" flour, "enriched" farina, orange juice "from concentrate" and "pasteurized" orange juice must all be so labeled.

Despite this rich history of making labeling decisions based on consumer interest, and its particular success with irradiation labels, the FDA has changed its stance on the importance of consumer interest in its regulation of irradiated food. In November of 1997, Congress limited the FDA labeling of irradiated food by prohibiting the FDA from requiring a label statement to use print larger than that required for ingredients. Further, Congress directed the FDA to reconsider the label requirement.

252 Id.
253 Id.
254 See id.
255 Id.
257 Id.; 21 C.F.R §§ 137.205, 137.305(6)(b)(1), 146.145(c), 146.140(d)(2) (2011).
258 Irradiation in the Production, Processing, and Handling of Food, 64 Fed. Reg. 7834 (Feb. 17, 1999). In August of 1998, the FDA clarified that although irradiation labels need be “prominent and conspicuous,” prominence did not mean larger than usual type size.
altogether and seek public comment on changes. In 2007, the FDA issued a proposed rule that suggested changing the labeling regime for irradiation. The new regime would require only those foods that were materially changed to bear the radiation symbol and label, and in certain cases would allow specific producers to use the label “pasteurized” instead of “treated by irradiation.”

The focus on physical change over consumer interest in knowing what their food contains echoes the debate about mandatory labels for genetically modified food; the old FDA approach mandated labels for irradiated food because consumers wanted to know that their food was irradiated, while the new FDA approach looks only at whether the physical make-up of the technologically altered food product is identical to the food it attempts to imitate. The FDA’s stated justification for the change admits as much by explaining the policy shift as a change in focus from the process the food undergoes to the material difference of the end product.

It is evident the FDA is less concerned with consumer interest in knowledge, and more concerned with the food industry’s ability to sell materially identical food without scaring consumers who can’t tell the difference between food and technologically altered food products without a descriptive label. This new FDA policy should not apply, however, to the organic sector because, as noted above, organic food regulations are explicitly based on the food process. Consequently, the FDA should regulate organics with the same attention to consumer interest that characterized its 1986 labeling regulations for irradiated food and its labeling of enriched flour, bleached flour, and juice from concentrate.

259 See id. at 7835.
260 See Irradiation in the Production, Processing, and Handling of Food, Proposed Rule, 72 Fed. Reg. 16291 (April 4, 2007). This rule has yet to become a “Final Rule” and be enacted.
261 See id.
262 See id. at 16295; 51 Fed. Reg. 13,376, 13,388; see also, FDA Guidance for Industry: Bioengineering, supra note 113.
264 See id.
D. State Labeling Regimes Hindered by Free Speech Restrictions

Some states, unsatisfied with the FDA’s new focus on the superficiality of the finished product, have taken it upon themselves to mandate labeling of certain food processes and ingredients that concern its citizens. However, some of these states have found themselves thwarted in federal court by the First Amendment’s protection of commercial speech. For instance, at issue in International Dairy Foods Ass’n v. Amestoy, was a Vermont law requiring dairy farmers to label products from cows treated with growth hormone. Vermont based its law on the theory of consumers’ right to know what goes into their milk. The law was ultimately found unconstitutional by the Second Circuit, who granted a preliminary injunction requested by a group of dairy associations on free speech grounds. That court never decided the case on the merits, but did note that “FDA has concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated with food products derived from cows treated with rBST.” Although the court did not doubt that Vermont’s interest in satisfying its consumer’s demand for information, it held that even “strong consumer concern” was not a substantial interest justifying the restriction on commercial speech that an involuntary, state-mandated labeling regime would create.

VII. THE SOLUTION: A SUPPLEMENTAL LABELING REGIME FOR ORGANICS

In order to fix the problem created by consumer distrust of the organic system and the resulting loss of faith in the label, the FDA should abandon the restrictive interpretation of its FDCA labeling authority and allow certifiers to offer, and producers to affix, non-misleading labels to

---

266 See, e.g., Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996).
267 See id. at 70.
268 Id. at 67
269 Id. at 73.
270 Id. at 73–74.
271 Id. at 73.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

organic food. The USDA organic certification would open the door for a supplemental labeling system that permits labels currently considered "misleading" under the FDA’s interpretation of the FDCA. The initial USDA organic certification would in large part address the FDA’s fears of such labels deceiving consumers because the certification narrows the range of producers who are issuing these labels to those who are already under government supervision. This is the only way to put consumers in the regulatory role that the OFPA has set out for them: “if private market behavior is to serve the expansive evaluative function ... proposed for it, then consumers should receive an informational context that is appropriately robust for the role they are being asked to serve.”

In order to give consumers the information they need to make a principled purchase about the sustainability of their food, a food labeling system whose plurality of labels matches the plurality of sustainable options is necessary. In this plural system, labels would include an organic certification and an additional label where warranted, such as “locally grown,” “produced according to biodynamic farming methods,” “small-farm grown,” “polyculture methods used,” or “locally produced.” The precise definitions and wording of these labels can be left to the certifiers, provided that the USDA supervises the certifiers according to the OFPA guidelines. Labels such as “natural” and “fresh” would not be included in a supplemental labeling regime because the FDA has already defined or issued guidance on these terms. Moreover, if specific problems arise with abuse of a particular label, the FDA could address those situations as they arise in the same manner as the agency dealt with the controversies over “natural” and “fresh.”

This supplemental labeling system could also alleviate the problems of imported food with questionable organic certification because

---

273 Kysar, supra note 125, at 535.
275 See, e.g., Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,422.
consumers would be more aware of their food choices.\textsuperscript{277} As of 2007, nearly 40\% of organics came from overseas, where organic fraud is well documented.\textsuperscript{278} United States’ demand for organics is greater than domestic organic supply, creating a market for foreign organics that runs counter to the philosophy of the organic movement.\textsuperscript{279} The need for “quick and easy organic production” is enlarging the gulf between the consumer ideal of organic and the actual quality of the food purchased.\textsuperscript{280} However, the U.S. demand for organics will likely shift as consumers become more discerning and begin to search for specific attributes in organic food that satisfy their individual reasons for buying organic. As consumers begin to seek out certifications and labels indicating specific qualities and levels of organic integrity, the market for imported organics will likely diminish.\textsuperscript{281}

A. New Labels Would Not be Misleading Under the FDCA

The FDA supports the use of independent certifying agents to meet safety and security standards in U.S. food.\textsuperscript{282} Since the FDA already trusts independent certifiers for food safety, and the USDA trusts independent certifiers to award the organic seal,\textsuperscript{283} independent certifiers should be trusted to enforce a supplemental labeling regime. The FDA can hold supplemental certifiers accountable to the same standards mandated by the OFPA, including a comprehensive self-assessment, on-site audits, and assessment of the certifiers’ conformity to the stated standards.\textsuperscript{284}

Food labels are found misleading under the FDCA when they omit information that is “material” or if they include information that would

\textsuperscript{277}See generally Endres, supra note 82, at 28 (noting both the increasing American demand for organics, causing an increase in foreign imports, and the power of consumers to make choices that reflect their values when given information about their food).

\textsuperscript{278}See Audit Report 2010, supra note 94, at 28; Endres, supra note 82, at 35.

\textsuperscript{279}Endres, supra note 82 at 27.

\textsuperscript{280}Green, supra note 179, at 819.

\textsuperscript{281}See id.

\textsuperscript{282}FOOD AND DRUG ADMIN., DEPT. OF HEALTH AND HUMAN SERVS., Guidance For Industry: Voluntary Third-Party Certification Programs for Foods and Feeds (Jan. 2009).

\textsuperscript{283}See id.; 7 C.F.R. § 205.400 (2011).

cause a consumer to mistakenly purchase a product due to a confusing or
deceptive label. Using this definition of misleading, the FDA is
statutorily permitted to create a more relaxed interpretation for labels on
food that is already certified organic and may create a supplemental
labeling system for these foods without contravening the purpose of the
FDCA. Rather than mislead consumers, the additional labels would
attempt to clear up a misunderstanding between consumers and the USDA
organic label, which currently does not reflect consumers’ organic ideals.
Supplemental labels can avoid being misleading by neither affirmatively
suggesting false food qualities, nor by omitting important information
about the food’s production process.

The accuracy and precision of the supplemental label can be left to
a government-supervised set of certifiers, who should insist on meaningful
standards for each label attribute. The FDA has touted the benefits of
explanatory labels on food in order to inform consumers in certain cases,
such as “these tomatoes were genetically engineered to improve texture”
or “this product contains high oleic acid soybean oil from soybeans
developed using biotechnology to decrease the amount of saturated fat.”
Both of these labels educate consumers in the context of a negative label.
The first label is a voluntary disclosure of genetic modification with an
explanation to make the tomatoes more attractive to consumers who might
otherwise be put off by biotechnology. The second is a mandatory
disclosure of high oleic acid that, again, helps explain the process and
alleviate consumer concerns.

Supplemental organic labels can use explanatory labels in the same
way, educating consumers and managing expectations by explaining what
the organic process does and where its value lies. For example, “these
organic tomatoes tested 100% negative for pesticide residue upon
harvest,” “this zucchini has traveled less than fifty miles from its source,”
“the workers who picked these apples were paid a living wage” and, “this

\[289\] See id.
\[290\] See id.
organic kale was grown without industrial machinery to reduce the amount of oil consumed in its production.” These exemplary labels both explain the value of the process and tell consumers what it is they are, and are not, buying. A consumer who wishes to buy locally harvested food for reasons of community development will know the tomatoes, apples, and kale mentioned above were not necessarily harvested locally, however the zucchini was. Equally, a consumer who wishes to buy food that has been harvested using the most energy efficient methods might willingly pay the premium price for the kale produced without industrial machinery.

B. Possible Program Models

1. European Union

In the European Union (“EU”), organic standards are regulated by each member state, which establishes a regulatory authority to provide licenses to importers.\(^1\) In June 2007, the EU organic production and labeling regulations were revised, and those revisions came into effect on January 1, 2009.\(^2\) Previous to the 2007 amendments, organic regulations had been evolving in the EU since 1991, when a foundation was laid for consumer protections and producer standards regarding organic food in all EU member states.\(^3\) By 1999, those regulations included animal products and had provisions for animal welfare, veterinary treatment, and manure management.\(^4\) Then, in March of 2000, a voluntary seal was introduced letting consumers know that the product has been approved organic: “Organic Farming – EC Control System.”\(^5\) In 2006 and 2007, new regulations on organic production and labeling were developed and

---

\(^1\) Dimitri & Oberholtzer, *supra* note 136, at 14.


A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS

subsequently implemented in 2008. These most recent regulations establish a new EU label and open up development of standards for wine and other specialized products, as well as improving regulations on organic imports to the EU. The overarching EU guidelines prohibit the use of GMOs in organic production, and prohibit all but the "technically unavoidable presence" of genetically modified organisms in organic products, stating that they are "incompatible with the concept of organic production." The regulations specify soil fertility, animal welfare, open air grazing for livestock, and, notably, "consumer confidence" as organic values. The regulations also specify that flexibility is necessary because of geographic, climatic, and cultural difference between countries. Accordingly, the EU organic regulations, allow for EU member states to develop their own national regulations and national logos for organic products. The EU regulations also allow private certifiers to label products as organic. The current organic regime in the United States would benefit from a labeling system that took into account consumer views of issues such as GMOs, the geographic differences between states, and the differences in consumer values between different states. For example, in states with a large dairy industry, such as Vermont, the hormone content of milk might be important to consumers, whereas in states with a large beef industry, such as Texas, animal antibiotics might be more important to consumers. Similarly, different state geographies present different problems for organic farmers. For instance, in windy plain states, the transference of pesticides by wind from non-organic farms to organic ones is a concern that mountainous states might not need to worry about.

299 See id.
300 See id.
In the EU, each importer must provide a list of producers and handlers, and each of those producers and handlers must be certified by an accredited certifying agent.\textsuperscript{302} The EU has an existing network of certifiers, some of whom insist on stricter standards than those stated in the EU organic legislation.\textsuperscript{303} Each certifier has a unique set of standards, and a reputation for those standards, typically different or above the EU or member state regulations.\textsuperscript{304} The allowance of different levels of organic certification creates a tiered structure of different certificates with different worth to countries and consumers.\textsuperscript{305} Most EU countries require certifiers to approve producers under the EU organic regulations at the producer's request, in which case the certifier will affix the EU regulation label and the member state label, but not the private certification label.\textsuperscript{306} This ensures the relevance of the EU organic regulations and allows certifiers with more rigorous standards to maintain a business relationship with those producers who only live up to the baseline organic standards.

2. Kosher Industry in the United States

The kosher foods industry in the United States is also a plural system with an active community whose members buy kosher food for a variety reasons, including quality, cleanliness, taste, and faith that the label truly represents the portion of meat they are buying.\textsuperscript{307} The market for kosher food, like the market for organic food, has grown in the last decade.\textsuperscript{308} In 2000, the U.S. kosher market was approximately nine million consumers; by 2008, kosher sales had grown over 15% and accounted for $12.5 billion in sales, as reported by the market research

\textsuperscript{303} DMITRI \& OBERHOLTZER, \textit{supra} note 136, at 12.
\textsuperscript{304} See id. at 14.
\textsuperscript{305} See id.
\textsuperscript{306} See id.
\textsuperscript{307} Gutman, \textit{supra} note 140, at 2367.
Kosher food is also similar to organic food in that it demands a price premium and thus presents an opportunity for consumer fraud.\textsuperscript{309} The FDA does not strictly regulate kosher certification under the "misleading" standards of the Nutrition Labeling and Education Act because kosher products indicate a religious certification.\textsuperscript{311} Instead, kosher laws in the United States are privately enforced by third-party certifiers who use a trademarked symbol to label products as adhering to kosher standards.\textsuperscript{312} Each certifier develops a reputation for certain standards and practices important to its demographic; these standards can address issues of concern to the consumer community that go beyond the religious standards of kosher food.\textsuperscript{313} Consumers buy from certifiers they trust, whose standards reflect the consumers' principles.\textsuperscript{314} Similarly, the organic industry in the United States might develop a spectrum of different certifiers who address the different environmental, health, social, and ethical concerns behind organic consumption. For example, two different certification bodies might accommodate two different sets of consumers, one who buys organic because they want to support local farmers, and one who buys organic because they want their food produced through low-energy methods.\textsuperscript{315}

The kosher industry depends on the integrity and dedication of independent certifying agents, who historically operate without much guidance or supervision from a central authority.\textsuperscript{316} There are over 70 national kosher certifiers and over 100 international kosher certifiers.\textsuperscript{317}

\textsuperscript{309} Id.
\textsuperscript{310} See Gutman, supra note 140, at 2368.
\textsuperscript{312} Gutman, supra note 140, at 2376.
\textsuperscript{313} Id. at 2377.
\textsuperscript{314} See id. at 2377–79.
\textsuperscript{315} See id. at 2380.
Typically, the kosher certifying agents and the producers have a close relationship with one another that prevents the producers from trying to defraud the certifiers.\textsuperscript{318} Instead, the closeness between certifier and producer creates certain expectations on behalf of the certifier, preventing the kosher certifiers from engaging in a free market race to the bottom with their standards.\textsuperscript{319} However, although the kosher industry depends on independent certifiers with varying guidelines, the Rabbinical Council of America has suggested general industry guidelines in the wake of news stories decrying the mistreatment of laborers and animals which have the potential to tarnish the reputation of the kosher seal.\textsuperscript{320}

Iowa-based Agriprocessors Inc., the nation’s largest kosher meatpacking plant, is run by the Rubashkin family of New York.\textsuperscript{321} It represents for the kosher industry what industrial farms represent for the organic industry: a failed experiment at combining a deeply held food philosophy with the mechanics of modern mass production.\textsuperscript{322} Like mega-retailers and industrial organic farms such as Aurora Organic Dairy, Agriprocessors’ food sells in major retail chains such as Wal-Mart and Trader Joe’s.\textsuperscript{323} Also like Aurora Organic Dairy and industrial organics of its ilk, Agriprocessors came under attack for failing to live up to the spirit behind the kosher movement by violating the ethical and social tenets of the label.\textsuperscript{324}

In 2004, People for the Ethical Treatment of Animals (“PETA”) released footage of Agriprocessors’ cattle in pain for several minutes after their required ritual slaughter.\textsuperscript{325} Since the PETA report of cruelty at their

\textsuperscript{318} See ETHICAL GUIDELINES FOR THE KOSHER INDUSTRY, supra note 316, at 1.
\textsuperscript{319} See id.
\textsuperscript{322} See id.
\textsuperscript{323} See id.
\textsuperscript{324} See id.
\textsuperscript{325} See Levi Brackman & Rivkah Lubitch, Kosher Slaughterhouse Owners Surrounded by Scandal, YNETNEWS.COM (May 5, 2008), http://www.ynetnews.com/articles/
Iowa facility, other ethical transgressions of Agriprocessors, Inc. have come to light which caused the kosher community to re-evaluate what kosher certification in America really meant.326

One kosher certifier, O.U. Kosher, threatened to withdraw its seal of kosher certification unless Agriprocessors changed its management, forcing the company to name a new chief executive officer.327 However, challenging the infringing producers was not enough for the kosher community, and consumers demanded a new certification.328 The new certification was conceived by Rabbi Morris Allen of Minnesota and was originally called Hechsher Tzedek or "Justice Certification."329 The certification, later called magen tzedek or "seal of justice," takes into consideration ethical and social justice ideals with respect to "labor concerns, animal welfare, environmental impact, consumer issues and corporate integrity."330

Kosher consumers, like organic consumers, were unhappy with the existing levels of certification for kosher food.331 However, unlike organic consumers, the kosher community was able to demand and implement a

0,7340,L-3577905,00.html. The Rubashkin family, owners of Agriprocessors, Inc. were further plagued by bad press involving the charges of fraud and misusing of federal government grant money incurred by the business family’s son and son-in-law, respectively.


new, more stringent level of environmentally and socially sustainable certification.\(^{332}\) This is because the power of the kosher community to act as an organized group was not thwarted by USDA monopolization of the standards for "kosher," nor by FDA regulations of "misleading" labels and FDA fear of food quality implications. The action of O.U. Kosher in demanding higher standards from Agriprocessors represents the opposite of what is happening in the organic industry today. Rather than engaging in a race to the bottom, the pressure of the kosher community and the close relationship between certifier and producer forced O.U. Kosher to hold Agriprocessors accountable.\(^{333}\) Similar "trickle up" influence would be possible for organic consumers and certifiers if the FDA regulations on supplemental labels encouraged consumer awareness rather than end-product aesthetics.

C. Why a Supplemental Labeling System Would Work in the United States

1. Existing Environmental Certifiers Can Create Supplemental Labeling Standards

There are existing certifiers, both international and domestic, whose standards are already higher than the USDA and who would be in a good position to establish standards for a supplemental labeling system.\(^ {334}\) For example, the definition of "organic" used by the International Federation of Organic Agricultural Movements ("IFOAM") includes farming methods that "promote the environmentally, socially, and economically sound production of food."\(^ {335}\) These standards, while arguably more nebulous than the USDA standards, are also more rigorous. A farm which adheres to these "environmentally, socially, and economically sound" methods would be worthy of having its products

\(^{332}\) See id.

\(^{333}\) See ETHICAL GUIDELINES FOR THE KOSHER INDUSTRY, supra note 333, at 1; Yoffie, supra note 327.

\(^{334}\) See, e.g., DMITRI & OBERHOLTZER, supra note 136, at 12.

come with a label or additional certification seal stating that its production methods were in accordance with the stricter IFOAM organic standards with a brief explanation of those standards.

IFOAM is not the only organic certifier whose standards are more rigorous than those of the FDA. The Nebraska based Organic Crop Improvement Association ("OCIA") has a definition of "organic" similar in philosophy to that of IFOAM: "an organic food system . . . enhances life and health, is ecologically and economically sustainable, and gives a fair return and dignity to its merchants, to its laborers, and to the stewards of its living soil." Demeter International, a European-based certifier, is also an existing non-profit certifying agent with specific standards for biodynamic farming that exceed U.S. government regulations for organic food. Demeter has created a Biodynamic® Brand that embodies the principles of biodynamic farming, including the recognition of the entire farm as a living organism and energy-saving farming techniques. Unlike IFOAM and OCIA, Demeter certification reflects a specific type of farming whose basic standards involve a spirituality and recognition of the farm organism beyond that of traditional organic farming.

---

339 See id. at 5, Harrison, supra note 135 at 231. It has been noted by scholars that certifiers such as OCIA, Demeter, and IFOAM embody the philosophical principles of the organic movement. See, generally, Luanne Lohr, Implications of Organic Certification for Market Structure and Trade, 80 AM. J. OF AGRIC. ECON. 1125, 1127 (1998).
2. The Organic Movement’s Dedication

In order for a supplemental labeling system to work effectively, the organic movement must be passionate and organized enough to come together and produce certifiers who are willing to create new labels and standards for sustainable organics. Although certifiers currently exist to step into this role, the industry requires more competition and more diversity in specializations from certifying agents in order for the supplemental labeling system to be meaningful. The organic community in the United States is dedicated and coordinated enough to create these new labeling standards.340

Consumer education in the organic community does not lie dormant; rather, “consumption communities organized around process-related issues appear destined to become some of the most active and visible citizens’ groups of global society.”341 These active, organized, organic communities spoke with a powerful voice during the years when the USDA was finalizing the definition of organic. For example, a barrage of consumer comments stopped the USDA from allowing bioengineering, irradiation, and sewage sludge from being allowed in USDA organic food.342 Similarly, the organic industry, led by the Organic Trade Association, rallied when organic standards stood to be compromised by Section 771 of the Consolidated Appropriations Resolution of 2003, which would have allowed producers to use non-organic feed for cows whose milk was later marketed as “organic.”343 The organic community

340 See Kysar, supra note 125.
341 Id. at 590.
A SUPPLEMENTAL LABELING REGIME FOR ORGANIC PRODUCTS advocated for the Organic Restoration Act of 2003 to repeal Section 771, shocking Congress with the force of their convictions.344

With this history and tradition of affection change, the organic community certainly has the power and dedication to come together and demand a better regime for organic labeling.

VIII. POTENTIAL PITFALLS TO A SUPPLEMENTAL LABELING REGIME

A. Enforcement

The success of a supplemental system of organic labels is dependent on enforcement of the current organic standards, which act as a gatekeeper for the supplemental labels. Accordingly, the USDA and FDA must improve their enforcement and supervision of third-party certifiers since these independent certifying agents would also be in charge of additional labels.345 Certifier honesty is crucial to the quality of consumer information because certifiers communicate information about producers to consumers each time they allow a producer to display the USDA organic seal. Consumer information, in turn, is crucial to the effectiveness of a market-driven regulation like the OFPA.346

In March of 2010, the U.S. Department of Agriculture’s Office of the Inspector General found that the NOP officials need to further improve controls on enforcement of organic products and standards.347 Currently, NOP does not do a sufficient job of taking enforcement actions against improperly marketed non-organic products sold under the USDA organic

---


345 See generally Audit Report 2010, supra note 94.

346 Kysar, supra note 125, at 561.

Further, NOP does not incorporate periodic residue testing into its enforcement, in direct contravention of the OFPA. NOP also continues to violate the provisions of the OFPA in failing to assemble a peer review panel to annually evaluate accreditation procedures for third-party certifiers. If the NOP fails to address these enforcement issues, it will likely be unable to properly enforce the standards of third-party certifiers with additional sustainability standards. However, the NOP’s response to the audit report indicates that it will begin to address these enforcement issues immediately. When the 2005 Audit Report revealed similar flaws in NOP’s enforcement protocol, NOP addressed eight out of ten recommendations in time for the 2010 audit. This shows that although the fairly new and under-funded national organic program is experiencing growing pains, it is capable of making progress toward strict, reliable enforcement of organic standards.

B. Over-Information and Consumer Confusion

Consumer confusion resulting from an abundance of conflicting information about which foods were genuinely organic served as the motivating factor behind Congress’s passage of the OFPA. There is a possibility that a supplemental labeling regime for organic foods, which

348 Id. at 8–9.
349 Id. at 16–17.
350 Id. at 18–19.
351 AGRIC. MKTG. SERV. RESPONSE TO OIG AUDIT RECOMMENDATIONS, OIG AUDIT REPORT NO. 01601-03-HY (Mar. 2010), available at http://www.usda.gov/oig/webdocs/01601-03-HY.pdf, [hereinafter “AMS RESPONSE TO AUDIT”]. The AMS response specifically notes an upcoming increase in the agency’s budget and staff that will help them respond in full to the recommendations of the Office of the Inspector General.
352 AUDIT REPORT 2010, supra note 94, at 10, 18, 19, 35. However, the former NOP director also responded that the agency’s inability to effectively oversee the organic standards was due to lack of resources, a problem that must be addressed by Congress or the USDA. See id. at 9.
353 See generally, AMS Response to Audit, supra note 351 (outlining specific strategies to address recommendations of the Office of the Inspector General).
would allow producers to trumpet the sustainability and ethical values of their products, will result in another cacophony of messages that confuses the consumer. However, this potentiality is frustrated when one takes into account that the only food products permitted to access the supplemental labeling system will already have been certified USDA Organic. This will limit the pool of producers applying for such certification to those already committed to the organic cause and willing to apply for organic certification. These producers will be less likely to commit organic fraud because of their dedication to the organic philosophy, assuming that the USDA does an adequate job of weeding out corrupt producers by strictly enforcing the NOP standards. One need only look to the kosher industry to see an example of how little oversight is needed when producers are committed to the underlying certification philosophy.

Kosher food certification operates without much guidance or central supervision.\textsuperscript{355} It is instead reliant on the integrity of producers and certifiers.\textsuperscript{356} Furthermore, the relationship between kosher producers and certifiers deters producers from lowering their standards in order to attract more business.\textsuperscript{357} A similarly close relationship between producers and certifiers founded upon shared ideals could exist within the organic food industry if the supplemental labeling regime applies only to those producers already certified organic, and who choose to advertise the extra sustainability or ethical measures taken with their products. Such a relationship would deter fraud and certifying agents' inclination to lower their own standards in order to get more business. This closeness and the producers' natural allegiance to the organic movement will likely thwart the same type of grand-scale consumer fraud that prompted the need for the OFPA.

C. Consequences of Consumer Education

Another potential pitfall of a supplemental labeling system is the fear that consumers might misjudge the effect of their choice. A criticism

\footnote{\textsuperscript{355} See ETHICAL GUIDELINES FOR THE KOSHER INDUSTRY, supra note 316, at 1.}
\footnote{\textsuperscript{356} See id.}
\footnote{\textsuperscript{357} See id.}
of consumer education through labeling is that consumers make choices that they think will benefit their interests, but in fact do not.\textsuperscript{358} It is argued that misguided consumers will make choices based on imperfect information that harm a certain industry.\textsuperscript{359} This argument has been used by genetically modified food producers and supporters who fear that mandatory labeling, declaring the food to have been genetically engineered, will scare consumers away from a perfectly safe food product.\textsuperscript{360}

However, the preceding argument is flawed for two reasons. First, it ignores consumers' true intelligence, and second, it fails to distinguish between mandatory and voluntary labels. For consumers, what looks like irrationality might simply be a choice that policymakers did not consider; often, consumers are not irrational or misguided, but simply expressing an aversion to risk and a more diverse collection of concerns than legislators do.\textsuperscript{361} Consumers consider a wider network of ethical, environmental, social, and health concerns than policy-makers and therefore, their choices might not be misjudgments, but rather might be made for a different effect than those of lawmakers.\textsuperscript{362}

Additionally, the argument that consumer education might give consumers only enough information to misjudge the effect of their choice fails to make a relevant distinction between voluntary labels, which are typically positive and mandatory labels, which are typically negative.\textsuperscript{363} Negative mandatory labels may scare consumers because they serve as a warning; therefore, even consumers who do not understand the warning understand its ominous tone and may stay away from a food that is safe for that particular consumer. In contrast, positive voluntary labels provide valuable information to discerning consumers who make principled purchases.\textsuperscript{364} Positive labeling aids those consumers in making an

\textsuperscript{358} See Kysar, supra note 125, at 581.  
\textsuperscript{359} See id. at 584.  
\textsuperscript{361} Kysar, supra note 125, at 584.  
\textsuperscript{362} See id. at 581.  
\textsuperscript{363} See id. at 561–62.  
\textsuperscript{364} Byrne, supra note 360, at 78.
educated purchase that lines up with their preferences. A supplemental labeling system for organic products would be comprised of voluntary labels with positive claims, effectively educating a market of consumers who care about the organic processes and origins of their food.

IX. CONCLUSION

Although many Americans view the organic label as a way to assuage their concerns about the environmental, health, social, and ethical impact of modern agriculture, the USDA organic label fails in many ways to represent the values Americans ascribe to it. The lack of transparency in the food labeling process renders the organic label inadequate to provide all the information consumers seek. The free market is unable to remedy the inadequacies of the USDA organic label with a more informative supplemental labeling system because the current FDA regulations will likely prohibit such labels as "misleading." A supplemental labeling system might be successfully modeled off of the European Union’s organic labeling system or the United States’ kosher labeling system, both of which provide myriad information for consumers with different purchasing motivations. A supplemental organic labeling system may take into account the size of the farm of origin, the environmental sustainability of farming methods, the treatment of laborers and health of the finished food product. Such a system would likely address the concerns of American consumers who seek to make more informed, environmentally sustainable and socially responsible organic choices. The organic community in the United States has the responsibility now to demand from federal agencies an organic labeling regime that, like those labeling regimes in Europe and the kosher industry, gives consumers the information they need to make informed food choices.

365 See id.