

Alternative Organic: Legal Issues in Marketing Uncertified Organic Products

by

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Abstract: This research scrutinizes the current state of the USDA organic label. In response to growing concerns about USDA's organic label and what it represents, some non-certified producers are directly marketing their organically-grown products through personal relationship with buyers and eschewing the USDA-sanctioned organic brand. This paper analyzes the rights of this emerging "alternative organic" movement to market products as organically grown, without USDA certification.

I. Introduction

In 1990, the United States adopted its National Organic Program (NOP) in the Organic Foods Production Act (the 1990 Act).¹ At that time, organic food production and demand in the U.S. had been increasing steadily for approximately twenty years.² Twenty-two states had some form of organic food labeling or organic certification for producers.³ That state-by-state regulatory environment, however, made interstate sales of organic products difficult. The NOP was intended to facilitate interstate commerce in organic production, establish national standards for organic production methods, and assure consumers that items sold met those standards.⁴

A decade later, when the United States Department of Agriculture (USDA) finally released its original rule on national organic standards, then-Agriculture Secretary Dan Glickman stated, "Let me be clear about one other thing. The organic label is a marketing tool. It is not a statement about food safety. Nor is 'organic' a value judgment about nutrition or quality."⁵

Today, Glickman's perspective seems startling and naïve. Value judgments about food and food production methods are rampant.⁶ Monsanto, one corporate face of industrial agriculture, is vilified by some because its herbicide RoundUp allegedly causes cancer and other physical maladies.⁷ According to USDA organic certification mandates, all such chemical herbicides or fertilizers are prohibited in organic production.⁸ Similarly, genetically modified organisms (GMOs) such as seeds, and produce therefrom, are banned in many countries around

¹ 7 U.S.C. §§ 6501- 6522 (2017).

² Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?* 52 FOOD & DRUG L.J. 537, 539 (1997).

³ *Id.*

⁴ 7 U.S.C. § 6501 (2017).

⁵ Dan Glickman, *Release of Final National Organic Standards* U.S. DEP'T OF AGRIC., (Dec. 20, 2000), available at <http://www.ecomall.com/greenshopping/usdafinal.htm>.

⁶ See, e.g., THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 12 (Andrew Kimbrell ed., 2002). See also, Michael Pollan, *An Animal's Place*, N.Y. TIMES (Nov. 10, 2002), <http://www.nytimes.com/2002/11/10/magazine/an-animal-s-place.html> ("A growing and increasingly influential movement. 149 (2014).

⁷ See, e.g., Josh Axe, *Monsanto Roundup Linked to Infertility and Cancer*, FOOD IS MEDICINE, <https://draxe.com/monsanto-roundup/> (2018) of philosophers, ethicists, law professors and activists are convinced that the great moral struggle of our time will be for the rights of animals."). One commenter contends that food choice is a fundamental constitutional right. Emily Semands, *Food Choice: Should the Government Be at the Head of the Table?* 67 OKLA. L. REV

⁸ 7 U.S.C. § 6504 (1) (2017). A facility cannot be certified organic until three years after ceasing use of chemical herbicides and fertilizers. 7 U.S.C. § 6504 (2) (2017).

the globe.⁹ USDA-certified organic producers cannot use GMOs.¹⁰ Seemingly, the NOP is linked to value judgments about food quality and safety,¹¹ and certified organic acreage,¹² sales,¹³ value,¹⁴ and imports all see dramatic increases in the United States.¹⁵

At the same time, however, the United States has pursued controversial public policies that protect large-scale, traditional food production methods and participants. Examples of such policies include food label laws to protect the agricultural economy of the adopting state,¹⁶ state “ag-gag” laws that silence investigation of farming practices,¹⁷ state preemption of local anti-GMO voter initiatives,¹⁸ federal preemption of state GMO labeling laws,¹⁹ and even a constitutional right to protect “modern” agricultural methods and technology in North Dakota.²⁰ These legislative efforts protect industrialized, mass food production from scrutiny and competition.

Such tensions in U.S. food politics suggest that organic production, certification and marketing need new attention. If Glickman’s earlier statement is true, and USDA’s organic label carries no indicia of nutrition or quality, can farmers eschew it and market the merits of their organic processes and products in their own way, particularly in ways that differentiate their products from mass-produced food?²¹ This research explores that emerging issue. Part II of this paper provides an overview of USDA organic regulations, including organic labeling and other marketing. Part III discusses historic and recent concerns about the USDA organic label, at least according to some farmers and interest groups. In light of these concerns, Part IV analyzes the emerging “alternative organic” movement – efforts by non-certified producers to market their

⁹ Yelena Sukhoterina, *Sorry, Monsanto: GMO Crops Now Banned in 38 Countries, Grown in Only 28*, ALTHEALTH WORKS (April 21, 2016), <http://althealthworks.com/9778/list-of-38-countries-that-banned-gmos-and-28-that-grow-themyelena/>.

¹⁰ 7 U.S.C. § 6502(21) (2017).

¹¹ Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market*, 32 UCLA J. ENVTL. L. & POL’Y 40 (2014).

¹² Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746, 5751 (Jan. 18, 2017).

¹³ *Id.* at 5750.

¹⁴ *Id.* at 5751.

¹⁵ *Id.* at 5755 (showing 2014 organic exports at \$553 million versus imports at \$1.2 billion).

¹⁶ See Rita Marie Cain, *Food, Inglorious Food: Food Safety, Food Label, and Free Speech*, 49 AM. BUS. L. J. 275 (2012).

¹⁷ See Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL. 31 (2015). These laws in Utah and Idaho have been stricken as unconstitutional restraints on free speech. See *Animal Legal Defense Fund v. Wasden*, Opinion, No. 15-35960 D.C. No. 1:14-cv-00104- BLW (Jan. 4, 2018); *Animal Legal Defense Fund v. Herbert*, Memorandum Order and Decision, No. 2:132-cv-00679-RJS (July 7, 2017).

¹⁸ See generally, Rita-Marie Cain Reid, *Jackson County Oregon’s Ban on Genetically Modified Seed: Competing Rights to Farm in Interstate Commerce*, 7 FOOD STUDIES: AN INTERDISCIPLINARY J. 23, 28-29 (2017).

¹⁹ National Bioengineered Food Disclosure Standard, Pub. Law. 114-216, § 1, July 29, 2016, 130 Stat. 834. This recent federal GMO label law permits use of USDA certification as sufficient proof of a “non-GMO” label, a traditional organic product differentiator. 7 U.S.C. § 6524 (2017). The USDA has two years to establish other GMO labeling regulations.

²⁰ N.D. CONST. art. XI, § 29. Missouri also has a constitutional right to farm, but it does not expressly protect “modern” methods or technologies, as in North Dakota. MO. CONST. art. I, § 35. Nevertheless, the political rhetoric preceding the Missouri election claimed the amendment would protect industrial agriculture, pitting it against smaller and organic farms. See *Missouri Right-to-Farm, Amendment 1* (August 2014), BALLOTPEdia, http://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_%28August_2014%29. (Last visited Feb. 14, 2018).

²¹ Michael D. Veldstra, Corrine E. Alexander, Maria I. Marshall, *To Certify or Not to Certify? Separating the Organic Production and Certification Decisions*, 49 FOOD POLICY 429, 434 (2014).

organic production methods and products without reference to “USDA,” but often misusing “organic,” at least according to the NOP. Part V addresses the First Amendment rights of these uncertified operations to use “organic” separate from USDA certification. This section analyzes a variety of regulated marketing regimes and compares and contrasts them to the organic certification protocol. Each of these examples sheds light on the free speech rights of uncertified, “alternative organic” operations. The paper concludes with recommendations and future research.

II. Organic Regulation under USDA

The 1990 Act establishes a few general standards and a few specific prohibitions for organic production. The Act also establishes a National Organics Standards Board (NOSB) to determine what additional substances can and cannot be used in organic production,²² and grants the Secretary of Agriculture oversight of the NOP, including the NOSB.²³

A. Organic Certification and Standards

According to the 1990 Act, an organic agricultural crop must be produced without the use of “synthetic chemicals” and on land that has not had any synthetic chemicals applied to it for the preceding three years.²⁴ Prohibited in crop production are materials such as phosphorous, lime, potash, arsenic, lead salts and plastic mulches.²⁵ For livestock production, feed must be organically produced and cannot include plastic pellets for roughage, nor manure, or urea.²⁶ Hormones and antibiotics are prohibited to stimulate growth and all medications, except vaccines, must be limited to addressing illness.²⁷ Dairy cows must be fed on lands under organic management for one year before their milk products can be sold as organic. Beyond these standards, the NOSB recommends permissible and prohibited organic substances to USDA, known as the National List.²⁸

In addition to establishing these organic standards, the 1990 Act also creates the organic certification scheme.²⁹ Farms and handlers are certified by certifying agents.³⁰ States may implement their own certification programs³¹ upon approval by USDA.³²

²² 7 U.S.C. § 6518 (2017).

²³ *Id.*

²⁴ 7 U.S.C. § 6504 (1) – (2) (2017).

²⁵ 7 U.S.C. § 6508 (b) – (c) (2017).

²⁶ 7 U.S.C. § 6509 (c) (1) (2017).

²⁷ 7 U.S.C. § 6509 (c) – (d) (2017).

²⁸ 7 U.S.C. § 6518 (2017).

²⁹ 7 U.S.C. § 6503 (a) (2017).

³⁰ 7 U.S.C. § 6503 (d) (2017).

³¹ 7 U.S.C. § 6503 (b) (2017).

³² USDA AGRICULTURAL MARKETING SERVICE, *State Organic Programs*, <https://www.ams.usda.gov/services/enforcement/organic/state-compliance>. (Last visited Feb. 14, 2018). Currently, fifteen states are approved as certifying agents. USDA AGRICULTURAL MARKETING SERVICE, *State Certifying Agents*, <https://www.ams.usda.gov/services/enforcement/organic/state-certifying-agents>. (Last visited Feb. 14, 2018). California is not a certifying agent state. Rather, it has its own organic program that oversees all organic enforcement within the state. USDA AGRICULTURAL MARKETING SERVICE, *California State Organic Program*, <https://www.ams.usda.gov/services/enforcement/organic/state-compliance-ca>. (Last visited Feb. 14, 2018). California is the largest organic producer in the United States. 82 Fed. Reg. 5746 at 5762. It is the only state with its own organic standards and program.

The regulations to be organically certified are vast and complex.³³ For producers, they address issues such as soil fertility and crop nutrient management,³⁴ pest, weed and disease management,³⁵ buffer zones to protect against runoff and unintended application of prohibited substances from non-organic farms,³⁶ and a three-year land conversion process from conventional agriculture.³⁷ If products are to be branded as organic, every producer and handler of it must be certified under this USDA system.³⁸

Certified operations must establish and maintain organic plans,³⁹ which must include details of practices and procedures to be used, substances and their sources and locations, monitoring to be performed, and five-year recordkeeping of all the foregoing.⁴⁰ Once certified, accredited certifying agents annually inspect organic operations to ensure regulatory compliance.⁴¹

The only exemption from these certification mandates applies to organic operations whose annual gross organic sales are \$5000 or less but still “comply with the applicable organic production and handling requirements.”⁴² These exempt operations may sell their products as “organic” without certification, but they cannot represent their products as “certified organic” or reflect any USDA seal or mark, or any certifying agent’s mark.⁴³ These products cannot be used by other buyers as ingredients in processed products to be labeled as “organic,”⁴⁴ but the exempt producer can use them as ingredients in its own processed products, labeled as an “organic” ingredient.⁴⁵

As noted, the 1990 Act anticipated that organic standards would be addressed continually by the NOSB. The NOSB is a fifteen-member volunteer board.⁴⁶ Four of its members must represent organic producers.⁴⁷ Two of its members must own or operate organic handling operations.⁴⁸ One member must be from a retail establishment with significant organic trade.⁴⁹ Three members must represent consumer protection interest groups.⁵⁰ One member must be an organic certifier.⁵¹ Finally, the board must include three experts in environmental protection or

³³ This analysis is not intended to address all the details of organic certification. For a comprehensive statement on organic certification requirements, see USDA AGRICULTURAL MARKETING SERVICE, *National Organic Program Handbook: Guidance and Instructions for Accredited Certifying Agents and Certified Operations*, https://www.ams.usda.gov/sites/default/files/media/Program_Handbk_TOC.pdf. (Last visited Feb. 14, 2018). This seven-page document is merely the table of contents for the Handbook.

³⁴ 7 C.F.R. § 205.203 (2017).

³⁵ 7 C.F.R. § 205.206 (2017).

³⁶ 7 C.F.R. § 205.206 (c) (2017).

³⁷ 7 C.F.R. § 205.202 (b) (2017).

³⁸ 7 C.F.R. § 205.100(a) (2017).

³⁹ 7 C.F.R. § 205.400(b) (2017).

⁴⁰ 7 C.F.R. § 205.201 (2017).

⁴¹ USDA AGRICULTURAL MARKETING SERVICE, *Organic Enforcement*, <https://www.ams.usda.gov/services/enforcement/organic/>. (Last visited Feb. 14, 2018).

⁴² 7 C.F.R. § 205.101(a)(1) (2017).

⁴³ 7 C.F.C. § 205.301 (a) (2017).

⁴⁴ 7 C.F.R. § 205.101(a)(1) (2017).

⁴⁵ 7 C.F.C. § 205.301 (b) (2017).

⁴⁶ 7 U.S.C. § 6518 (2017).

⁴⁷ 7 U.S.C. § 6518 (b) (1) (2017).

⁴⁸ 7 U.S.C. § 6518 (b) (2) (2017).

⁴⁹ 7 U.S.C. § 6518 (b) (3) (2017).

⁵⁰ 7 U.S.C. § 6518 (b) (5) (2017).

⁵¹ 7 U.S.C. § 6518 (b) (7) (2017).

resource conservation,⁵² and one expert in toxicology, ecology or biochemistry.⁵³ The Secretary of Agriculture appoints members from public nominees for five year terms.⁵⁴ Controversies surrounding this body, its members, and their decisions regarding the National List are some of the motivating forces behind the alternative organic movement, as will be discussed in Parts III and IV.

B. Organic Marketing under the NOP

The 1990 Act creates very clear and pervasive constraints on organic marketing.

- (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and
- (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.⁵⁵

“In accordance with this chapter” includes the certification requirements discussed above. The only exemptions from these marketing constraints are for small farmers selling no more than \$5000 in agricultural products⁵⁶ and for processed foods.⁵⁷

Clearly, the statute intends to take complete ownership of “organic” and all variations of the word under the USDA-Certified brand. USDA regulations address other labeling variations and add more detail. For example, “organic,” may not be used “in a product name to modify a nonorganic ingredient in the product.”⁵⁸ Products “sold, labeled, or represented as ‘100 percent organic’ must contain (by weight or fluid volume, excluding water and salt) 100 percent organically produced ingredients.”⁵⁹ Products “sold, labeled, or represented as ‘organic’ must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products.”⁶⁰ The remaining five percent of ingredients must be nonagricultural substances, or agricultural substances not commercially available in organic form, but produced consistent with the National List.⁶¹ Only these agricultural products can carry the USDA-Certified seal.⁶²

Organic packaged foods, such as a plastic shell of spinach, can include USDA’s seal and the seal or logo of the certifying agent on the package (as long as the certifier’s logo is not bigger

⁵² 7 U.S.C. § 6518 (b) (4) (2017).

⁵³ 7 U.S.C. § 6518 (b) (6) (2017).

⁵⁴ 7 U.S.C. § 6518 (c) - (d) (2017).

⁵⁵ 7 U.S.C. § 6507 (a) (1) (A) & (B) (2017).

⁵⁶ 7 U.S.C. § 6507 (d) (2017).

⁵⁷ 7 U.S.C. § 6507 (c) (2017). A processed food can use the word “organic” on its primary label to describe its ingredients as organically produced only if the process food contains “at least 50 percent organically produced ingredients by weight, excluding water and salt.” *Id.* at § 6507 (c) (1). If the processed food product contains less than 50 percent organically produced ingredients (by weight, excluding water and salt), the word “organic” still can appear in the list of ingredients for that processed food, but only to describe those ingredients that are organically produced. *Id.* at 6507 (c) (2).

⁵⁸ *Id.*

⁵⁹ 7 C.F.R. § 205.301 (a) (2017).

⁶⁰ *Id.* at (b).

⁶¹ *Id.*

⁶² 7 U.S.C. § 6505 (c) (2017).

than USDA's).⁶³ Packaged foods that are "100% organic" or "organic" must state "Certified organic by..." and then identify the handler's certifying agent, below the name of the certified handler.⁶⁴ For packaged foods that are "organic," but not "100% organic," the ingredient statement on the package must differentiate the organic ingredients with "organic" or an asterisk explaining the ingredient is organically produced.⁶⁵

Multi-ingredient products (boxed cereal or cookies, for example) have information panels and ingredient lists. USDA permits multi-ingredient products to be represented as "made with organic *specified ingredients or food group(s)*" in the information panel if a product contains at least seventy percent organic ingredients (by weight or fluid volume, not including salt and water).⁶⁶ Multi-ingredient packaged products with less than seventy percent organic ingredients may identify the organic ingredients in the ingredient statement as "organic." If so, they also may state the percentage of organic ingredients on the information panel. These products may not display the USDA organic seal anywhere on the package,⁶⁷ nor any identifying mark of a certifying agent.⁶⁸ "Congress allowed USDA the flexibility to establish these lower tiers so that food processors would not be discouraged from purchasing organic ingredients simply because their final products would not qualify for the official ninety-five percent seal."⁶⁹

The "alternative organic" movement has emerged from problems in USDA's complex regulatory organic scheme described above. These concerns are discussed next.

III. Concerns with USDA Organic

Organic oversight established by the 1990 Act has been problematic since its inception. The Act included a directive for USDA to issue proposed regulations within 540 days.⁷⁰ One suggestion of early problems in the NOP was the decade-plus it took USDA to finalize regulations under the Act. After repeated extensions to the statutory deadline, USDA issued its first proposed regulations in 1997.⁷¹ USDA adopted final regulations in 2000, but they were not fully implemented until 2002.⁷² Various concerns in the statutory and regulatory scheme are discussed next.

A. In the Beginning, Congress Created an Organic Problem

⁶³ 7 C.F.R. § 205.303 (a) (4) & (5).

⁶⁴ *Id.* at (2).

⁶⁵ *Id.* at (b).

⁶⁶ 7 C.F.R. § 205.301 (c) (2017).

⁶⁷ 7 C.F.R. § 205.304(b)-(c) (2017).

⁶⁸ 7 C.F.R. § 205.305 (2017). One author provides a handy table for the various permissible uses of USDA and organic certifier seals. See Chenglin Liu, *Is "USDA ORGANIC" A Seal of Deceit: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J INT'L L. 333, 341 (2011).

⁶⁹ Amaditz, *supra* note 2, at 543.

⁷⁰ 7 U.S.C. § 6521 (a) (2017).

⁷¹ According to one commentator, the Bush administration was "openly hostile" to the concept of organic agriculture. The initial Board was full of "political appointments with conflicts of interest" regarding meaningful organic standards. John Bell Clark, *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 with Particular Reference to the Great Lakes*, 26 U. TOL. L. REV. 323, 331-32 (1995).

⁷² Michelle Friedland, *You Call that Organic? The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 382-83 (2005).

One concern that has dogged organic producers from the outset is the lack of any clear definition of “organic.”⁷³ The statute only intended to establish *methods of production*, not actual health or quality claims for food or other organic products, which makes organic product differentiation especially problematic.⁷⁴ For example, the statute did not declare that organic products would be pesticide-free, or even establish a maximum pesticide residue permitted in organic products. Instead, the Act prohibited use of synthetic pesticides in organic production and USDA established pesticide-residue testing and reporting.⁷⁵ USDA rejected a cap on pesticide residue in organic products because, if it were to forbid sale of organic products above a certain residue level, this would establish “organic as being a ‘safer’ food, and our program is not a food safety program.”⁷⁶

Clearly, when regulating organics, USDA was as concerned about maintaining a positive public perception about mass-produced food as it was about establishing organic standards. Thus, while consumers might purchase organic food expecting to avoid pesticide exposure,⁷⁷ the federal law only established organic production methods (no synthetic pesticides on crops) but did not guarantee any specific level of pesticide exposure or lack thereof in organic products.⁷⁸ Recently, this issue of pesticide exposure in organic food had one commentary characterizing organic food safety as a “hoax.”⁷⁹ While consumers (and those commentators) might expect that organic food will be “pesticide free,” neither the Act, nor USDA, ever defined that as an organic characteristic.⁸⁰

The Act’s legislative history recognized that its focus on production methods, not the end product, would create marketing concerns. “[L]egislators made clear that the OFPA does not affect farmers and food producers who truthfully claim that their products are produced without

⁷³ See generally Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746, 5757 (Jan. 18 2017).

⁷⁴ Valerie J. Watnick, *supra* note 11, at 43. See also Amaditz; *supra* note 2, at 541.

⁷⁵ The regulations regarding pesticide residue testing and reporting are imposed on certifiers, not producers. Annually, five percent of the facilities any certifier inspects must include pesticide residue testing. 7 C.F.R. §205.670 (d) (2017). The expense of such testing is imposed on the certifiers, not the organic operations. 7 C.F.R. §205.670 (c) (2017). Accordingly, if all certifiers adopted the minimum standard, which their economic interest would motivate, 95% of certified organic operations would go untested every year for pesticide exposure.

⁷⁶ Memorandum from Lon S. Hatamiya, Administrator, Agricultural Marketing Service, USDA, to Michael V. Dunn, Assistant Secretary, Marketing and Regulatory Programs, USDA (May 1, 1997). Excerpts from the memo can be found at <http://www.motherjones.com/politics/1998/05/organic-engineering-memo-6/>. (Last visited Sept. 23 (2017). The same memo expresses concern that banning GMOs from organic products would cause foreign trading partners to assume GMOs were unsafe for importation.

⁷⁷ Pesticide exposure was a major impetus behind the 1990 Act, which passed in the aftermath of public outcry over the pesticide brand Alar found in apples. Clark, *supra* note 71, at 327. A 1989 CBS *60 Minutes* segment that warned of cancer risk for children from Alar in apples resulted in significant public pushback against Alar and apples. The fallout to the apple industry from the broadcast prompted several states to pass food label laws. See Cain; *supra* note 16, at 278.

⁷⁸ Amaditz *supra* note 2, at 542. One author describes the shortcomings of USDA regulations regarding pesticide exposure when organic fields are contaminated after natural disasters, such as flooding from hurricanes and tropical storms. Patricia Robert, *NOTE: The Aftermath of Irene: Organic Farming, Consumer Protection and Revising Federal Policies*, 14 VT. J. ENVTL. L. 303, 310-13 (2012).

⁷⁹ Drew L. Kershen and Henry I. Miller, *The Colossal Hoax of Organic Agriculture*, FORBES (July 29, 2015). (Reprinted at <http://www.barfblog.com/2015/07/the-colossal-hoax-of-organic-agriculture/>).

⁸⁰ Other examples of the disconnect between consumers’ and NOSB’s meaning of “organic” surfaced in the initial organic rulemaking. USDA’s first proposed rules would have permitted GMOs, sewage sludge as fertilizer, and irradiation in organic production. In the most public comments USDA had ever received, those three agricultural practices were universally opposed and removed from the final rules. See Friedland, *supra* note 72, at 383-84.

pesticides, as long as they do not make organic claims.”⁸¹ This history also recognized the potential for consumer confusion over such competing claims.⁸² In 2017, USDA acknowledged continued confusion in the marketplace over the meaning of “organic.”⁸³

Arguably, in light of the statutory emphasis on production methods, not organic products, the organic regulatory framework only establishes standards for USDA-controlled brands such as “Organically Grown,” or “Produced Using Organic Methods,” as well as “USDA Certified Organic.” Nevertheless, the NOP does not limit itself to those, more accurate, labels. Instead the statute and regulations capture all marketing uses of the term “organic.”⁸⁴ The free speech implications of that broad, restrictive scope are analyzed in Part V below.

The next concern about the organic regulatory scheme is the ongoing establishment of organic standards. The Act establishes categories and criteria for inclusion or exclusion from the National List of substances permitted in organic production.⁸⁵ The law empowers the NOSB to promulgate, and thereafter revise, the National List.⁸⁶ According to one commentator, the organic statutory scheme was novel in its call for practitioner input via the NOSB.⁸⁷ This approach, however, “also represents the statute's greatest weakness and renders it vulnerable to unwise or contrary appointments to the board.”⁸⁸ The Act also incorporates Environmental Protection Agency (EPA) standards,⁸⁹ which are vulnerable to varying degrees of enforcement zeal and shifting political tides.⁹⁰ Complaints about appointments of industrial food producers to the NOSB, and the resulting dilution of organic standards, will be discussed further in Parts III.B and IV.

Finally, although the statute was intended to nationalize organic production standards, it did not preempt state standards. On the contrary, it expressly provides for state certification that is no less than the federal standard.⁹¹

On the one hand, Congress acknowledged that most organic production expertise resides at the grass-roots level and, thus, federal intrusion should be kept to a minimum. In addition, the legislators recognized that states need to develop standards that address specific local and regional needs. On the other hand, Congress was concerned that restrictive state standards could disrupt interstate commerce and noted that it did not anticipate a need for excessive state rules.⁹²

⁸¹ Amaditz *supra* note 2, at 544.

⁸² *Id.* See also Watnick; *supra* note 11, at 58. Watnick proposes to solve the product/production methods dichotomy in the current regulatory scheme with stricter standards and end product testing. *Id.* at 74-76.

⁸³ Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746, 5757 (Jan. 18 2017).

⁸⁴ See *supra* notes 43-45, 57-69 and accompanying text.

⁸⁵ The seven criteria are: 1) the potential that such substances will have detrimental reactions with other farming materials; 2) the toxicity and environmental persistence of the substance and its products; 3) the probability of environmental contamination during production, use, or misuse of the substance; 4) human health effects; 5) effects on the ecosystem; 6) available alternatives; and 7) compatibility with sustainable agriculture. 7 U.S.C. § 6518(m) (1) – (7).

⁸⁶ 7 U.S.C. § 6517(a)-(d) (2017).

⁸⁷ Clark, *supra* note 71, at 329.

⁸⁸ *Id.*

⁸⁹ 7 U.S.C. § 6518 (l) (2017).

⁹⁰ Jody Freeman and Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Paul Gilman, *Science, Policy, and Politics: Comparing and Contrasting Issues in Energy and the Environment*, 73 SOC. RES.: AN INTERN'L Q. 1001 (2006).

⁹¹ 7 U.S.C. § 6507 (b)(2) (2017).

⁹² See Amaditz; *supra* note 2 at 543, citing S. REP. NO. 357, *reprinted in* 1990 U.S.C.C.A.N. at 4949-50.

As was noted above, only California has its own organic standards and certification now.⁹³ Other early state adopters of organic standards now enforce the federal regulatory regime only.⁹⁴ If Congress intended federal intrusion be kept at a minimum, its approach failed. One of the recommendations in this analysis, explained in Part VI, would return organic regulation to grass-roots organizations, although not to state government control.⁹⁵

B. Influence of Big Ag

In the decade that followed the 1990 Act, ten of the top thirty North American food producers acquired organic brands.⁹⁶ For example, Dean Foods bought Horizons and Alta Dena dairies and now controls two-thirds of supermarket organic milk sales.⁹⁷ Food giants market under well-known organic labels, masking the “Big Ag” consolidation and leading to the phenomenon of “Big Organic” – large firms that meet that organic standards but operate like mainstream food producers.⁹⁸

As noted above, the 15-member National Organics Standards Board (NOSB), appointed by the Secretary of Agriculture,⁹⁹ makes recommendations for the National List of permitted and prohibited substances in organic production.¹⁰⁰ Industrial agriculture’s representation on the NOSB has been a concern throughout its history. Here are some examples of the mass food producers that have been represented on the NOSB through their employees:

- Beech-Nut Foods;¹⁰¹
- General Mills (four representatives occupying three handler seats and the scientist seat);

⁹³ See *supra* note 32. Utah eliminated its separate certification program in 2009 to save money in the recession. “The loss of the organic certification program also ends the state’s law enforcement of its organic standards, which insured the integrity of UDAF certified products.” *Utah Eliminates State Organic Certification Program*, BEYOND PESTICIDES (Feb. 13, 2009), <http://beyondpesticides.org/dailynewsblog/2009/02/utah-eliminates-state-organic-certification-program/>.

⁹⁴ *Supra* note 32.

⁹⁵ Watnick proposes a new USDA “local” label for production within 150 miles of its point of sale. See *supra* note 11 at 76. Another commentator advocates for a USDA “Organics Plus” model in which additional metrics could be layered on the existing organic system, such as “produced on a small family farm,” “pasture raised,” “tested GMO and pesticide residue free.” Kate L. Harrison, *Comment: Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 232-33 (2008). The analysis herein does not support these approaches. USDA’s speech restraints in the organic economy should not be expanded to additional terms that uncertified producers use to differentiate their products. See *infra* Part V.

⁹⁶ Stephanie Strom, *Has 'Organic' Been Oversized?* N.Y. TIMES, July, 7, 2012, at BU1, available at <http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html>. See also, Phillip H. Howard, *Organic Industry Structure Information Graphics*, <https://msu.edu/~howardp/organicindustry.html>. (Last visited Sept. 19, 2017).

⁹⁷ Brian K. Obach, ORGANIC STRUGGLE: THE MOVEMENT FOR SUSTAINABLE AGRICULTURE IN THE UNITED STATES 142 (MIT Press, Cambridge MA 2015).

⁹⁸ *Id.* at 140-42. See also Douglas H. Constance, Jin Young Choi, Holly Lyke-Ho-Gland, *Conventionalization, Bifurcation, and Quality of Life: Certified and Non-Certified Organic Farmers in Texas*, 23 SOUTHERN RURAL SOCIOLOGY 208-10 (2008). (The process by which organic agriculture increasingly takes on the characteristics of mainstream industrial agriculture is characterized as conventionalization. Bifurcation is the result of conventionalization, when organic agriculture adopts a dual-structure of smaller, lifestyle-oriented producers and larger, industrial-scale producers).

⁹⁹ 7 U.S.C. § 6518 (2017).

¹⁰⁰ 7 C.F.R. § 205.2 (2017).

¹⁰¹ Obach, *supra* note 97, at 147.

- Dean Foods (occupying the farmer seat);
- Campbell Soup Company (occupying a handler seat);
- Grimmway Enterprises, Inc. (occupying a farmer seat);
- PurePak Inc. (occupying the environmentalist seat);
- Smucker's (occupying a handler seat);
- Purina Ralcorp (occupying a handler seat); and
- Driscoll's (occupying a farmer seat).¹⁰²

One of the General Mills appointees, Katrina Heinze, originally was appointed to serve in the consumer advocate seat. Public backlash led her to decline that appointment, only to be re-appointed and installed in the scientist seat.¹⁰³

Critics allege that these commercial food representatives have recommended questionable additions to the National List. Organic industry watchdog, the Cornucopia Institute, complains that technical reviews to the NOSB frequently are the work of Big Food executives, consultants or "closely aligned academics."¹⁰⁴ NOSB uses these reviews to evaluate items for the National List. In one case, DHA and ARA oils from genetically modified algae and soil fungus were added to the list, on the petition of multinational corporation Royal DSM/Martek Biosciences Corporation.¹⁰⁵ The primary NOSB proponent of this addition was Tracey Miedema, in her NOSB consumer representative role, beginning in 2006. Miedema, however, never worked for any consumer advocacy organization. From 2001-04, she was Associate Marketer at General Mills' Small Plant Foods division. From 2005-10, she was National Sales and Marketing Manager at Stahlbush Island Farm. Stahlbush Island Farm is a split organic and conventional producer, only one third of which is certified organic production. Thereafter, Earthbound Farm employed Miedema.¹⁰⁶ Already one of the largest organic produce growers and marketers in the U.S, Earthbound was acquired by Whitewave in 2009, owner of Horizon Organic Milk, both of which had been under the Dean Foods corporate umbrella.¹⁰⁷ Earthbound already had an employee on the NOSB, John Foster.¹⁰⁸ This dynamic between this one NOSB-member and multiple mass food producers reflects the concern about competing organic and industrial agriculture motives within the NOSB and USDA.¹⁰⁹

¹⁰² THE CORNUCOPIA INSTITUTE, *The Organic Watergate—White Paper Connecting the Dots: Corporate Influence at the USDA's National Organic Program*, 8 (2012), <https://www.cornucopia.org/USDA/OrganicWatergateWhitePaper.pdf>.

¹⁰³ Obach, *supra* note 97, at 148.

¹⁰⁴ Cornucopia, *supra* note 102, at 4.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 3-4, 7.

¹⁰⁷ See *supra* note 97 and accompanying text. Earthbound subsequently was sold to French firm, Danone, which markets Dannon and Oikos yogurts in the U.S. John Chadwell, *Earthbound Farm Included in Sale of WhiteWave Foods to French Company for More than \$12 Billion*, BENITOLINK, <https://benitolink.com/earthbound-farm-included-sale-whitewave-foods-french-company-more-12-billion> (July 9, 2016).

¹⁰⁸ Cornucopia, *supra* note 102, at 7. Nothing in the statute or regulations prevents double representation on the NOSB by one organization.

¹⁰⁹ Cornucopia (and many others) cite the on-again, off-again history of food additive carrageenan as another example of weak NOSB standards. *Id.* at 4-5, 10-17. See also Carrie A. Scrufari, *Substances Generally Recognized as Safe - Until They're Not: Challenges in Protecting the Food Supply in a Processed World*, 36 STAN. ENVTL. L.J. 219, 254, 261 (2017); Erin Toomey, *NOTE: How Organic Is Organic? Do the USDA's Organic Food Production Act and National Organic Program Regulations Need an Overhaul?* 19 DRAKE J. AGRIC. L. 127, 144 (2014); Strom, *supra* note 96. In 2016, the NOSB decided to de-list carrageenan. Jeff Gelski, *Vote Goes Against Carrageenan in Organic Foods*, FOOD BUS. NEWS (Nov. 18, 2016), http://www.foodbusinessnews.net/articles/news_home/Regulatory_News/2016/11/Vote_goes_against_carrageenan.a

IV. Alternative Organic Marketing

Online searches reveal numerous discussions about farmers who use organic methods, and could qualify for USDA certification, but who choose not to be certified by USDA.¹¹⁷ This approach is called “non-certified organic,”¹¹⁸ or “organic but not certified,”¹¹⁹ or “alternative organic” in this analysis.¹²⁰ As discussed above, most commercial uses of the word “organic” outside USDA’s certification scheme is prohibited.¹²¹ The only permissible use of “organic” without certification is by producers with less than \$5000 in annual sales, and those small users still must meet all the requirements for certification, just not undergo USDA’s certification process.¹²²

Observational research reveals a major disconnect between USDA’s regulation of “organic” and common commercial usage. For example, the Brookside Farmers’ Market is a neighborhood market in Kansas City, Missouri, that is widely perceived in the community as an “all organic” market.¹²³ This is understandable since the market’s website states that it is “an organic, local, vendor-only market. Producers use organic, sustainable and cruelty-free practices, travel less than 100 miles to market, and those who grow, raise or make every product are the ones who sell it to you directly.”¹²⁴ In fact, however, only four of eighteen Brookside sellers for 2017 display the USDA organic brand, and of these only two mention USDA certification on

discussion of the problems in imported organics, *see* Liu, *supra* note 68. (While the organic regulatory scheme “has significantly facilitated global trade, especially with regards to the importation of organics to the U.S. market, it does not provide a reliable system to ensure the integrity of organics from other countries.” Liu, *supra* note 68, at 378).

¹¹⁷ *See, e.g.*, K. Annabelle Smith, *For Many Small Farmers, Being Certified 'Organic' Isn't Worth the Trouble*, CITYLAB (Aug. 13, 2014), <https://www.citylab.com/life/2014/08/for-many-small-farmers-being-certified-organic-isnt-worth-the-trouble/375968/>. *See also*, *Describing non-certified organic practices. Help? Discussion Board*, HOZZ (Nov. 10, 2011), <http://forums.gardenweb.com/discussions/2026266/describing-non-certified-organic-practices-help>.

¹¹⁸ Fred Rohe’, *Noncertified Organic*, THE SMART FARM MOVEMENT, <http://www.thesmartfoodmovement.com/chapter/non-certified-organic/>. (Last visited Feb. 14, 2018).

¹¹⁹ Cambria Bold, *Organic, But Not Certified: Are Alternative Produce Labels Legit?* KITCHN, (Feb. 24, 2015), <http://www.thekitchn.com/beyond-organic-are-alternative-produce-labels-legit-food-news-216487>.

¹²⁰ The author’s coined term should not be confused with a couple of organic producers using similar trademarks. *See* THE ORGANIC ALTERNATIVE, www.theorganicalternative.com (Texas grape producer). (Last visited Feb. 14, 2018), and ORGANIC ALTERNATIVES, <http://organicalternatives.com/?age-verified=ffd8bc169f> (Colorado marijuana dispensary). (Last visited Feb. 14, 2018). In 2010, one author proposed “Alternatives to Organic Certification” for fish, which currently are not USDA-certified organic. Jessica Hass, *Note: Don't Take the Bait: Why USDA Organic Certification is Wrong for Salmon*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 589, 608-13 (2010).

¹²¹ *See supra* notes 57 through 69 and accompanying text. One blogger mistakenly contrasts “certified organic” versus “organically grown” and shows photos of that usage by producers at a farmers’ market, Olivia Whitener, *Certified Organic vs. Organically Grown*, FARM TO BLOG (Nov. 9, 2014), [HTTPS://FARMTOBLOG.WORDPRESS.COM/2014/11/09/CERTIFIED-ORGANIC-VS-ORGANICALLY-GROWN/](https://farmtoblog.wordpress.com/2014/11/09/certified-organic-vs-organically-grown/). As discussed above, “organically grown” is actually the most accurate characterization of what USDA certification measures. *See supra* notes 73 through 84 and accompanying text.

¹²² *See supra* notes 42 through 45 and accompanying text. *See, e.g.*, George Kuepper, *Small Scale Organics: A Guidebook for the Non-certified Organic Grower*, KERR CENTER FOR SUSTAINABLE AGRICULTURE 3, 9 (2007), <http://kerrcenter.com/wp-content/uploads/2014/10/small-scale-organics.pdf>.

¹²³ For example, after moving to the area only two weeks earlier, a colleague of the author characterized the Brookside Farmers’ Market as “all organic.” In multiple conversations between the author and shoppers and neighbors, this belief was repeated.

¹²⁴ BROOKSIDE FARMERS MARKET, *About the Market*, <http://brooksidefarmersmarket.com/about-the-market/market-general-information/>. (Last visited Feb. 14, 2018).

their individual vendor descriptions or personal pages.¹²⁵ Six apparently uncertified Brookside sellers use the word “organic” on their individual vendor descriptions.¹²⁶

In Raytown, Missouri, a small suburban city in the Kansas City metro area, the farmers market organizers clearly understand the difference between USDA-certified organic producers and those who are not. According to the market website: “Organic Grower/Producer USDA Certified Organic: Growers/producers who wish to sell in this category must have completed the USDA certification process for producers of organic food and other organic agricultural products.”¹²⁷

At the same time, however, the market allows:

Non-Certified Organic/Natural Grower/Producer

Growers/producers who wish to sell in this category must adhere to the following guidelines. “Natural foods” are foods that should be:

- Minimally processed and/or do not contain any food additives, or do not contain particular additives such as hormones, antibiotics, sweeteners, food colors or flavorings that were not originally in the food.
- Organic/Natural food is produced by farmers who emphasize the use of renewable resources and conservation of soil and water to enhance environmental quality for future generations.
- Organic/Natural meat, poultry, eggs, and dairy products come from animals that have not been given antibiotics or growth hormones.
- Organic/Natural food is produced without using conventional pesticides, fertilizers made with synthetic ingredients or sewage sludge, bioengineering, or ionizing radiation.¹²⁸

Despite understanding USDA certification for organic growers, these market organizers clearly do not understand USDA restrictions on use of the word “organic” for non-certified producers. The market lists six vendors for 2017, none of whom are shown to be USDA-certified.¹²⁹

By contrast, the Bentonville, Arkansas farmers’ market is a large market with over seventy vendors on the Bentonville town square. The market makes no claims about the production practices of the vendors on its website.¹³⁰ The website, however, provides vendors a detailed direct marketing guide which is authored by academics from nearby agriculture and law

¹²⁵ BROOKSIDE FARMERS MARKET, *Farmers and Producers*, <http://brooksidefarmersmarket.com/farmers-producers/vendor-profiles/>. (Last visited Feb. 14, 2018). Not every producer that is shown on the website sells every week. One day in 2017 when the author visited this market, only one vendor was showing the USDA-certified organic brand.

¹²⁶ *Id.* Mama Tu’s Family Farm, Meta Coffee Roasting Company, Sacred Sun Cooperative Farm and Urbavore Urban Farms all use “organic” in some way in their general descriptions on the Brookside Farmers and Producers page. Click through on the links for Garden of Peace and Ki Koko Farms to see their “organic” descriptions.

¹²⁷ RAYTOWN FARMERS MARKET, *General Information 3*, <https://www.raytownfarmersmarket.com/files/RFMGeneralInformation.pdf>. (Last visited Feb. 14, 2018).

¹²⁸ *Id.* at 4.

¹²⁹ RAYTOWN FARMERS MARKET, *Complete List of Vendors*, <http://www.raytownfarmersmarket.com/vendors.php>. (Last visited Feb. 14, 2018).

¹³⁰ THE 2017 BENTONVILLE FARMERS MARKET, <https://www.downtownbentonville.org/farmersmarket>. (Last visited Feb. 14, 2018).

schools.¹³¹ This publication only uses the term “organic” to describe USDA regulations and processes for organic production and certification.¹³²

The author’s observational research at the Bentonville market in July 2017 found only one vendor misusing the organic label, a formerly certified meat producer whose certification had lapsed years earlier. He contended he maintained the same practices but did not re-certify when Missouri (where his ranch is located) quit participating as a USDA certifier.¹³³

Scant academic research has been done on the alternative organic movement in the United States. One 2014 analysis surveyed 1559 “organic” and conventional fruit and vegetable producers from sixteen states.¹³⁴ The same sixteen states have 808 USDA-certified organic fruit and vegetable producers, of which 336 participated in the survey.¹³⁵ The authors separately studied the decision to use organic methods and the decision to certify under USDA organic mandates. Of 1016 usable responses regarding the decision to use organic methods, the study found 36% (365 producers) were using exclusively organic methods, 19% were using a mix of organic and conventional methods, and 45% were strictly conventional.¹³⁶ The authors noted “philosophical” grounds to use organic methods, such as concern for the environment, as a basis for choosing organic production.¹³⁷ Women and less experienced farmers were more likely to produce organically, as well as those in the Northeast or Southern United States versus the Midwest.¹³⁸

Of the 556 usable responses on the decision to certify, 71% (396 respondents) were completely uncertified, almost half as many as the 808 USDA-certified organic producers in the same geographic area.¹³⁹ The remaining 19% (109) were certified for all their production and 9% (51 producers) were mixed certified and uncertified.¹⁴⁰ The authors note that farm size is a

¹³¹ Michaela Tarr, A. Bryan Endres, Jody M. Endres, Nicholas R. Johnson, ARKANSAS DIRECT FARM BUS. GUIDE, http://nationalaglawcenter.org/wp-content/uploads/assets/articles/tarr_directfarm.pdf (2010).

¹³² *Id.* at 12, 33, 103, 107, 128, 136-38, 149-51, 154-61.

¹³³ Face-to-face interview with Richard Potter in Bentonville, Arkansas, July 1, 2017. The website for this vendor displays his 2003 certificates and describes the operation as “GRASS FED certified organic cattle raised on a certified organic farm. (2003).” (Emphasis in original). Potter opines on his website:

I would like to say that I am "saddened" by the very fact that there is such a thing as "organic" food because I believe that ALL food should be raised in this manner and that there should be no need for such a category. There is, however and I hope I can help people be healthy and improve their world, at least a little. (Emphasis in original).

R. P. CATTLE, <http://www.organiccattle.com/>. (Last visited Feb. 14, 2018).

¹³⁴ Michael D. Veldstra, Corrine E. Alexander, Maria I. Marshall, *supra* note 21, at 430-31 (2014). This study is based on a Food Industry MarketMaker database of 4312 members. Registered members of Food Industry MarketMaker tend to be small and medium-sized farms that intend to direct market food to consumers. *Id.* at 430.

MarketMaker is a network that connects food producers with retailers, grocery stores, processors, caterers, chefs, and consumers. Founded by the University of Illinois, partners include twenty state universities or state departments of agriculture, as well as food and agricultural organizations that strive “to build a virtual infrastructure that brings healthier, fresher, and more flavorful food to the average consumer.” MARKETMAKER, *About Us*, <https://foodmarketmaker.com/main/about>. (Last visited Sept. 28, 2017).

In 2008, Constance, et. al. did a much smaller study in Texas of 84 organic producers, of which 50 were certified and 34 were uncertified. *See supra* note 98, at 221.

¹³⁵ Veldstra et. al., *supra* note 21, at 431.

¹³⁶ *Id.* at 433.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

significant factor in the decision to certify, since some of the respondents (exact number not given) were exempt based on sales less than \$5000.¹⁴¹ Paperwork and cost of certification were perceived as more severe constraints on certification by alternative and mixed-certified producers than by certified producers. Interaction with the certifier and confusion over the process were also statistically significant in the decision not to certify.¹⁴²

Surprisingly, philosophical agreements with organic methods was significant in the decision *to be certified*.¹⁴³ Many assume the alternative organic movement is motivated by the concerns discussed above regarding Big Food influence on organic standards.¹⁴⁴ This finding linking philosophical *agreement* and certification defies that.¹⁴⁵ The authors conclude that policy makers need to make certification cheaper and easier to motivate certification in the alternative segment.¹⁴⁶

All of the producers in the study relied on direct farm-to-market sales.¹⁴⁷ In fact, the authors opine that “local has become the new organic,” as producers use the local brand to substitute for the certified organic label.¹⁴⁸ Nevertheless, the study magnifies a major problem for alternative organic producers to grow their operations: the need for the organic label to sell to the wholesale market.¹⁴⁹ This significant market constraint for alternative organic producers raises the question whether broad monopolization of “organic,” under USDA’s certification umbrella impermissibly constrains the free speech rights of alternative organic producers. This issue is analyzed next.

V. Free Speech Rights of Alternative Organic Marketing

As much of the foregoing discussion reveals, matters of food and food production methods are heavily value-laden and political. One author argues that food choice (unpasteurized “raw” milk, in particular) is a constitutional right and any government intrusion on it should be subject to strict scrutiny.¹⁵⁰ Another argues that GMOs in food, and previous refusals by FDA to require GMO labeling, implicate free exercise of religion for many, Buddhists in particular.¹⁵¹ Another argues that the gap between consumer understanding about organic products and USDA’s regulation of organic processes actually harms the public discourse regarding agricultural policy.¹⁵² These views suggest that strict free speech standards

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *supra* notes 96 through 109 and accompanying text.

¹⁴⁵ Organic watchdog, Cornucopia Institute, also reflects this dichotomy. It vigorously challenges USDA shortcomings in protecting organic standards. See *supra* notes 102 through 109 and accompanying text. Nevertheless, it also continues to support USDA organic certification as the crucial vehicle for consumer protection. THE CORNUCOPIA INSTITUTE, *Frequently Asked Questions*, <https://www.cornucopia.org/faq/>. (“The organic label is the most stringently regulated and trustworthy label on foods in the marketplace. The majority of participants in the organic community have high integrity.”) (Last visited Nov. 8, 2017).

¹⁴⁶ Veldstra et. al, *supra* note 21, at 435.

¹⁴⁷ *Id.* 434.

¹⁴⁸ *Id.* at 435.

¹⁴⁹ *Id.* at 434. See also Constance, et. al., *supra* note 98, at 214-15, 223.

¹⁵⁰ Emily Semands, *COMMENT: Food Choice: Should the Government Be at the Head of the Table?* 67 OKLA. L. REV. 149, 183-90 (2014).

¹⁵¹ Jones, *supra* note 113, at 433-41 (2006).

¹⁵² Friedland, *supra* note 72, at 417-27.

could apply to regulation of organic marketing, rather than the commercial speech test that usually applies to advertising regulation.¹⁵³

Analyses of mixed commercial and non-commercial speech, and how such messages will be treated under the First Amendment, are voluminous. The government regulations in question in those analyses cover a wide variety of commerce.¹⁵⁴ Where speech by organic farmers would fall into that discussion of political versus commercial speech could warrant separate, full treatment of its own.

Further, USDA's requirement of certification before a producer can use the organic label suggests prior restraint, a type of government restriction on free speech that is presumed unconstitutional.¹⁵⁵ Historically, prior restraints often involved licensing or certification requirements,¹⁵⁶ seemingly analogous to USDA organic certification. Nevertheless, these laws usually targeted media outlets,¹⁵⁷ or public demonstrations.¹⁵⁸ Beyond the timing of the government intervention in advance of the communication, those prior restraints on speech have little to compare to USDA organic certification. Accordingly, this analysis of USDA organic marketing restrictions will focus on the lower level of scrutiny applied to commercial speech regulations. As will be shown, the current USDA approach is constitutionally questionable, even under this intermediate scrutiny.¹⁵⁹

Central Hudson Electric Corp. v Public Service Commission of New York, established that truthful advertising is protected under the First Amendment.¹⁶⁰ Nevertheless, government can justify advertising regulations if the interest underlying the regulation is substantial, the regulatory approach directly advances that interest, and does not excessively impinge on the

¹⁵³ See generally *Cent. Hudson Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565-66 (1980). *Central Hudson* struck down a regulatory commission's order prohibiting a public utility's promotion of electricity use.

¹⁵⁴ See, e.g., Jennifer E. Rothman, *Commercial Speech, Commercial Use and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1974-84 (2015); Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever be Noncommercial?* 37 AM. J. L. AND MED. 388 (2011); Lee Ann W. Lockridge, *When is a Use in Commerce a Noncommercial Use?* 37 FLA. ST. U.L. REV. 337, 354-64 (2010); Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L.J. 127, 144-48 (2007); Rita Marie Cain, *Nonprofit Solicitation Under the Telemarketing Sales Rule* 57 FED. COMM. L. J. 81, 87-102 (2004).

¹⁵⁵ *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). According to one author, the scrutiny applied to prior restraints is so strict that the U.S. Supreme Court never has upheld a law that it characterized as a prior restraint. See Marin Roger Scardato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

¹⁵⁶ See generally Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBLEMS, 648, 650-52 (1955). Emerson explains that the British licensing system for publishers of books and pamphlets was a strong impetus for inclusion of the First Amendment in the U.S. Constitution.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 664-67.

¹⁵⁹ Todd S. Heyman, *Why the Commercial Speech Doctrine Will Prove Toxic to the USDA National Organic Program*, 39 COLUM. J. ENVTL. L. 1 (2014), asserts that the Supreme Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), creates a new, heightened intermediate scrutiny for commercial speech that protects against content regulation, previously permitted under *Central Hudson*. Heyman, at 35. Under this new *Sorrell* test, Heyman concludes the marketing restrictions in the NOP could not survive. Another analysis makes a similar assertion about the Supreme Court's decision in *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015). *Reed*, however, clearly involved regulatory treatment of *non-commercial* speakers. See John H. Cohnsen and Henry I. Miller, *The USDA's Meaningless Organic Label*, AGRICULTURE 24 (Spring 2016). As is discussed below, these alternative legal analyses, with tougher levels of scrutiny than historic commercial speech cases, are not necessary to conclude that the NOP is unconstitutional in its marketing restrictions.

¹⁶⁰ 447 U.S. at 565-66.

speaker's message.¹⁶¹ At least the last two of these criteria in the *Central Hudson* test, when applied to USDA's NOP, reflect an excessive, unconstitutional approach.

A. Substantial Government Interest

If USDA claimed that organic regulation protects the public from unsafe food, it easily could meet the substantial government interest requirement for its organic marketing protocols (or even the compelling interest standard under strict scrutiny, if that test were applied).¹⁶² From the outset, however, USDA repeatedly has disclaimed that organic standards, certification and marketing were indicia of food safety or quality.¹⁶³ Neither food safety nor food quality can justify current organic regulation without upending decades of USDA policy to remain neutral in the 'organic versus industrialized agriculture' debate regarding safety and quality of those competing production methods.

Nevertheless, USDA still has a substantial government interest in regulating organic production and sale, found in Congress's original legislative purpose in the 1990 Act. Congress sought to create national organic standards, and to inform and protect consumers that organic products they purchase meet those standards.¹⁶⁴ This statutory basis for USDA regulation should suffice under *Central Hudson's* substantial government interest requirement. "Regulated speakers rarely challenge the government's interest, and the government has been able to successfully proffer an interest that the Court agrees is substantial."¹⁶⁵ Thus, the crux of the free speech issue is whether organic marketing restrictions meet the remainder of the *Central Hudson* test: the regulation must directly advance the government's asserted interest in consumer protection,¹⁶⁶ and the regulation cannot be more extensive than necessary to serve that government interest.¹⁶⁷

B. USDA Organic Marketing Restrictions Do Not Directly Advance Consumer Protection

The NOP has not provided consumer protection that the 1990 Act sought to provide. On the contrary, consumer understanding of the organic market is muddled. Consumers believe that they are buying organic "products," but only are buying items produced according to certain

¹⁶¹ *Id.* at 564.

¹⁶² Michael T. Roberts, *FOOD LAW IN THE UNITED STATES* 131 (Cambridge Univ. Press 2016) (explaining that courts consistently uphold warrantless government searches under the Fourth Amendment based on the government's strong interest in food safety).

¹⁶³ *See supra* notes 5 through 15, 76 through 79 and accompanying text.

¹⁶⁴ *See supra* note 4. Congress also sought to facilitate interstate commerce in organic products, while not disrupting existing local approaches. As discussed above, interstate commerce in organics has boomed under the 1990 Act, but local regulation is virtually non-existent. *See supra* notes 91 through 94 and accompanying text. Congress's express authority to regulate interstate commerce cannot justify excessive free speech restrictions, however. "[T]here is nothing novel about a holding that one constitutional provision prohibits what another permits, especially if the two provisions protect different interests. There would be no Commerce Clause objection to a law banning the interstate shipment of material critical of the federal government, for example. That such a law would likely be unconstitutional under the First Amendment hardly nullifies or renders meaningless Congress's commerce power; it merely qualifies it or subordinates it to another constitutional principle." Brannon P. Denning and Norman R. Williams, *Wynne: Lose or Draw*, 67 VAND. L. REV. EN BANC 245, 256 (2014).

¹⁶⁵ Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 426-27 (2012).

¹⁶⁶ *Central Hudson*, 447 U.S. at 564.

¹⁶⁷ *Id.*

methods.¹⁶⁸ In some cases, consumers' expectations for those products differ significantly from what they buy under USDA certified methods, such as expectations regarding pesticide exposure discussed above.¹⁶⁹ When words like "misleading," "deceit," "hoax," "meaningless," and "cynical," pervade mainstream and academic commentary regarding USDA's organic program,¹⁷⁰ the consumer protection interest for restricting commercial speech under the program seems weak, at best. USDA acknowledges that consumers are vastly confused about the meaning of "organic."¹⁷¹ Arguably, when organic marketing regulations have been in effect for nearly two decades, but consumers still do not understand the meaning of the basic term "organic," the program is falling short of directly advancing the government's consumer protection interest.

Similarly, as discussed above, farmers' market organizers do not properly limit the use of the word "organic" to advance consumer understanding. Such mistakes are easy to spot with casual observational research. Yet USDA enforcement against these mistakes seems non-existent.¹⁷² When one academic study reflects half as many "alternative organic" respondents (i.e. non-certified) as all the USDA-certified producers for the same region, the vast USDA organic regulatory scheme seems completely deficient at advancing the government's consumer protection interest.

The Supreme Court addressed a comparable disconnect when applying *Central Hudson's* second and third requirements in *Greater New Orleans Broadcasting Association v. United States*.¹⁷³ In that case, the Supreme Court struck down federal prohibitions on casino advertising by FCC licensees in states where casino gambling is legal.¹⁷⁴ The Court acknowledged the government's legitimate interest in protecting the public from social ills associated with gambling, and in helping like-minded states to do the same.¹⁷⁵ Nevertheless, the Court noted "crosscurrents" in federal policy such as state-run lotteries and tribal casinos that are exempt from federal constraint.¹⁷⁶ These countervailing federal policies made the asserted anti-gambling interest difficult for the Congress to defend against a free speech challenge, according to the Court.¹⁷⁷

Comparable "crosscurrents" can be asserted of USDA's attempt to protect consumers by stringently regulating organic certification and marketing, while providing weak and ineffectual enforcement of the organic brand against the confusion and misuse discussed above. Further,

¹⁶⁸ See *supra* notes 74 through 83 and accompanying text.

¹⁶⁹ *Id.*

¹⁷⁰ See Friedland *supra* note 72, Liu *supra* note 68, Kershner and Miller *supra* note 79. See also Julie Kelly and Henry I. Miller, *How Organic Agriculture Became a Special Interest Bonanza*, SAN DIEGO UNION TRIBUNE (April 1, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-organic-label-misleading-miller-20170331-story.html>. ("The organic label is no more than a marketing tool. And it's a cynical one, because so many unsuspecting consumers are ripped off by the high prices of organic products, without palpable benefit"); John H. Cohn and Henry I. Miller, *The USDA's Meaningless Organic Label*, AGRICULTURE 24 (Spring 2016).

¹⁷¹ See *supra* note 83 and accompanying text.

¹⁷² See, e.g., Caelainn Barr, *Organic-Farming Boom Stretches Certification System*, WALL STREET JOURNAL (Dec. 9, 2014), <https://www.wsj.com/articles/organic-farming-boom-stretches-certification-system-1418147586>.

¹⁷³ 527 U.S. 173 (1999).

¹⁷⁴ *Id.* at 176. The Court previously had upheld the same federal law when the broadcasts were in a state where the gambling was illegal. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

¹⁷⁵ *Id.* at 185-86.

¹⁷⁶ *Id.* at 187.

¹⁷⁷ *Id.*

USDA weakens the organic brand when it remains neutral on any alleged quality or safety differences between organic and mass-produced food, even when those are the very values consumers seek from organic purchases.¹⁷⁸ Additional “crosscurrents” are suggested when USDA appoints mainstream food producers to the NOSB and accepts watered down organic standards, (literally, in the hydroponics controversy discussed above).¹⁷⁹ In *Greater New Orleans Broadcasting*, the Supreme Court stated that the government could maintain such competing positions.¹⁸⁰ Nevertheless, such juxtaposition in public policy makes it difficult to justify free speech constraints under *Central Hudson’s* second and third requirements.¹⁸¹

C. Organic Regulations Are Excessive in Light of the Asserted Government Interest

As explained, USDA’s organic regulations are extensive and expensive, and completely prohibit any hint of “organic” in promotions by uncertified producers (except exempt small farms). Such an outright ban on the use of the word “organic,” or any indirect suggestion of it, without prior government qualification, is the most stringent form of speech restriction. Supporters contend that such a pervasive regulatory scheme, with its certification requirements, standards, and marketing restrictions, is necessary for consumers to know if a so-called organic product has been produced consistently with certain minimum expectations.¹⁸² As will be discussed next, multiple regulatory schemes reveal that USDA’s rigorous prior organic certification process is excessive. Consumers can receive the information they need about organic production methods and products without producers being USDA-certified in advance (or at all).

1. USDA’s Organic Label Variations

As was explained above, USDA organic labeling regulations are significantly nuanced and multi-various. Among the possibilities that consumers might see on food packaging are the USDA Organic seal, an organic certifier’s seal, “100% organic,” “organic,” and “made with organic ingredients.” Processed foods will have primary labels, ingredient lists with an asterisk and may or may not have the USDA seal and/or the certifier’s seal, depending on the percentage of organic ingredients.¹⁸³

Further, exempt producers (less than \$5000 in organic sales) may sell their products as “organic,” but not as “certified organic.” They cannot use the USDA organic seal or any certifying agent’s mark.¹⁸⁴ These sellers can sell their own processed products as “organic,” but other sellers whose products include ingredients from these same exempt sellers cannot sell them as “organic.”¹⁸⁵

All these variations within USDA’s own organic labeling scheme reflect that consumers can differentiate variations within certified organic products. Arguably then, consumers also

¹⁷⁸ Ronnie Cummins, *10 Reasons Why Consumers Buy Organics*, ECOWATCH (Apr. 24, 2014), <https://www.ecowatch.com/10-reasons-consumers-buy-organic-1881899943.html>.

¹⁷⁹ See *supra* note 109 and accompanying text.

¹⁸⁰ 527 U.S. at 187.

¹⁸¹ *Id.* at 187-92.

¹⁸² See, e.g., Heyman *supra* note 159, at 40; CORNUCOPIA INSTITUTE *supra* note 145.

¹⁸³ See *supra* notes 58-69 and accompanying text.

¹⁸⁴ 7 C.F.C. § 205.301 (a) (2017).

¹⁸⁵ 7 C.F.C. § 205.301 (2017).

could differentiate between producers that are USDA certified versus alternative producers who are organic, but uncertified (just like the exempt producer).¹⁸⁶ Accordingly, organic regulations that ban all organic marketing without prior USDA-approved certification seem excessive.

Other systems that could promote organic standards and protect consumers are recommended in Part VI, as meaningful alternatives to the USDA organic scheme. With meaningful, cheaper and less burdensome alternatives available to protect organic standards and provide consumer protection, USDA's monopolization of "organic" or any indirect suggestion of "organic" is unconstitutional.

2. Non-Organic Food Safety Laws

Other food labeling and safety protocols reveal the excessiveness of USDA's organic regulatory scheme. USDA regulates the production of meat, poultry, and eggs.¹⁸⁷ Fruits, nuts, dairy, seafood, and vegetables are within the scope of the Food and Drug Administration ("FDA").¹⁸⁸ Each of these systems include various food labeling protocols.¹⁸⁹

In 2001, USDA implemented an inspection regiment known as HACCP, Hazard Analysis Critical Control Point.¹⁹⁰ HACCP has been characterized as "management-based regulation"¹⁹¹ in which producers self-identify potential risks throughout food processing, and establish minimal values at which the risks can be controlled or eliminated at critical control points.¹⁹² Instead of USDA inspectors looking for contamination and removing defective products, "HACCP takes a preventative approach by requiring the placement of controls on conditions that pose threats to contamination throughout the process..."¹⁹³ Food safety tasks have shifted from USDA inspectors to the facilities' own employees.¹⁹⁴

Seemingly, if industry self-regulation and reporting suffices for USDA's general food safety protocol, the prior third-party certification mandates imposed on organic producers seems excessive to qualify to market themselves as "organic" -- especially when USDA long contends that its organic protocols do not certify food safety, just organic methods.

¹⁸⁶ Based solely on this "organic, but uncertified" alternative to the current NOP, Heyman concluded that the current USDA system violates *Sorrell's* interpretation of *Central Hudson*. Heyman *supra* note 159, at 36-39.

¹⁸⁷ The Food Safety and Inspection Service ("FSIS") is the primary body within USDA that carries out food safety authority under multiple enabling statutes. See generally USDA—FOOD SAFETY & INSPECTION SERVICE, *About FSIS*, (last modified Jan. 26, 2018), <http://www.fsis.usda.gov/wps/portal/informational/aboutfsis>.

¹⁸⁸ The Federal Food, Drug, and Cosmetic Act (FFDCA) established the Food and Drug Administration (FDA) in 1938. Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified in scattered sections of 21 U.S.C.).

¹⁸⁹ See generally FOOD AND DRUG ADMINISTRATION, *Guidance for Industry: A Food Labeling Guide* (last updated Nov. 14, 2017), <https://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm2006828.htm>. See also USDA, *Food Labeling Fact Sheets* (last modified Feb. 3, 2017), <https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling>.

¹⁹⁰ See generally Hazard Analysis and Critical Control Point (HACCP) Systems, 21 C.F.R. §§ 120.1-.25 (2001).

¹⁹¹ Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 696-98 (2003).

¹⁹² Lauren Gwin & Arion Thiboumery, *Local Meat Processing: Business Strategies and Policy Angles*, 37 VT. L. REV. 987, 1001 (2013); Eva Merian Spahn, *Keep Away from Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669, 710-11 (2011).

¹⁹³ Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 438 (2011).

¹⁹⁴ *Id.* at 439.

Until 2011, FDA exercised its food safety authority by supporting industry self-regulation and investigating safety problems after the fact.¹⁹⁵ FDA lacked all authority to mandate preventative safety measures prior to 2011 (while prior organic certification had been in place since 2000). In the face of increasing food contamination incidents,¹⁹⁶ however, the 2011 Food Safety Modernization Act (FSMA) created several new duties and powers in FDA.¹⁹⁷ For the first time, FDA is required to mandate comprehensive safety standards for production and handling of raw fruits and vegetables.¹⁹⁸ Nevertheless, FSMA still does not require any prior certification or approval for facilities to produce under new FDA standards. FSMA required all high-risk domestic food facilities be inspected within five years of enactment, and then at least once every three years after that.¹⁹⁹ All other domestic food facilities are to be inspected within seven years of enactment, and then at least once every five years thereafter.²⁰⁰ Additionally, under FSMA, food importers have the primary role in verifying the safety of the imported food from foreign suppliers.²⁰¹

Obviously, FDA's statutory safety mandates are much more lenient than USDA's prior organic certification, and annual re-inspection. Unlike organic regulation, Congress created a safety protocol for most U.S. food that gives food producers and sellers the primary role in a predominantly self-governing system.²⁰² These general food safety approaches suggest USDA's organic protocols are excessive when they require prior independent certification to market as organic, especially when that certification bestows no indicia of safety.

Finally, the FSMA specifically exempts small farm operations, whose annual sales are less than \$500,000 and all within 275 miles of the farm.²⁰³ Despite this recent approach in federal food safety law, that a small farm could have half million in sales, the small farm exemption for organic certification remains at the 1990 level of \$5000 in sales. This low threshold sweeps far more operations into the organic regulatory scheme than the current federal safety regime, again revealing the excessive scope of USDA's current NOP.

3. Other Labeling Laws

Most claims about products (both food and others) are subject only to after-the-fact enforcement, not prior certification mandates. For example, what any seller may claim about

¹⁹⁵ See generally David Saxowsky, *Milestones in U.S. Food Law*, NO. DAKOTA ST. UNIV. FOOD LAW, <https://www.ag.ndsu.edu/foodlaw/overview/history/milestones> (scroll down to 2010). (Last visited Feb. 14, 2018).

¹⁹⁶ In June, 2011, Dole Fresh Vegetables, Inc. of Monterey, California, voluntarily recalled over two thousand cases of "Italian Blend" salad bags in twelve U.S. states and Canada after random sampling by the Ohio Department of Agriculture found the bacteria listeria. *Dole Recalls Thousands of Bags of Salad Greens*, FOOD SAFETY NEWS (June 24, 2011), <http://www.foodsafetynews.com/2011/06/dole-recalls-thousands-of-bags-of-salad/>. Listeria was the pathogen found on cantaloupes from one large Colorado facility in the fall of 2011 that caused thirty-three deaths and 147 confirmed cases of listeriosis across twenty-eight states. CTRS. FOR DISEASE CONTROL & PREVENTION, *Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado*, (Aug. 27, 2012), <http://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html>.

¹⁹⁷ U.S. FOOD & DRUG ADMIN., *FDA Food Safety Modernization Act (FSMA)*, <http://www.fda.gov/Food/GuidanceRegulation/FSMA/> (last updated Feb. 6, 2018).

¹⁹⁸ 21 U.S.C. § 350h(a)(1)(A) (Supp. IV 2011).

¹⁹⁹ 21 U.S.C. § 350j (b) (1) and (2) (2011).

²⁰⁰ 21 U.S.C. § 350j (c) (1) and (2) (2011).

²⁰¹ *Id.* at § 384a(a)(1) (2013).

²⁰² See generally Tacy Katherine Hass, *New Governance: Can User-Promulgated Certification Schemes Provide Safer, Higher Quality Food?* 68 FOOD & DRUG L.J. 77, 86 (2013).

²⁰³ 21 U.S.C. § 350g(l) (2011).

food relative to health or nutrition is determined by FDA after a review of scientific evidence.²⁰⁴ Thus, a seller of calcium tablets may include on the label a statement that “calcium prevents osteoporosis” because that claim has met the statutory standard, according to FDA.²⁰⁵ Individual sellers, however, do not have to be pre-certified by government-approved certifiers to assert that their tablets are calcium and prevent osteoporosis.²⁰⁶ Like most sellers of most products, the calcium seller must have a basis on which to assert that its product is what it says it is, (calcium) but governmental pre-qualification of sellers’ products or production methods are not necessary. Thereafter, if any seller’s tablets are not actually calcium or have less calcium than the law requires to claim they prevent osteoporosis, that seller would be subject to potential fraud and false advertising claims.²⁰⁷

If this self-regulatory labeling approach applied in organics, a rancher like Richard Potter,²⁰⁸ whose cattle only grazes on grass, are not given antibiotics except for infection, who composts manure to prevent groundwater runoff, and who has maintained all these practices more than three years, could call his ranch organic, under federal organic standards that impose all those criteria. If any of those norms for organic ranching turned out not to be true on his ranch, Potter would be subject to legal action. Proof of alleged false claims would be on the complainant, such as the FDA, the FTC, or private plaintiffs.

This self-regulatory labeling approach applies for most products sold in the U.S., even ones over which the federal government has flexed some regulatory muscle. Important public policies, such as avoiding use of certain minerals from places known for terrorism,²⁰⁹ protecting the environment,²¹⁰ and informing consumers about source countries of their food,²¹¹ all are advanced with much lower regulatory burdens than organic certification.²¹² These typical, self-

²⁰⁴ Any food that expressly or impliedly claims health or nutrition benefits that have not been authorized by FDA are deemed “misbranded” by the statute. 21 U.S.C. §343(r) (2017). Since 1990, FDA has approved twelve health claims for food. U.S. FOOD AND DRUG ADMINISTRATION, *Authorized Health Claims That Meet the Significant Scientific Agreement (SSA) Standard* (last updated Jan. 12, 2018), https://www.fda.gov/Food/LabelingNutrition/ucm2006876.htm#Approved_Health_Claims. In 2017, FDA proposed to revoke labeling claims regarding soy protein and reduced coronary heart disease. FOOD AND DRUG ADMINISTRATION, *Proposed Rule, Food Labeling: Health Claims; Soy Protein and Coronary Heart Disease*, 82 Fed. Reg. 50324 (Oct. 31, 2017).

²⁰⁵ 21 C.F.R. §101.72 (2017).

²⁰⁶ “FDA does not pre-approve labels for food products.” FOOD AND DRUG ADMINISTRATION, *Guidance for Industry: A Food Labeling Guide* 4 (last updated Nov. 14, 2017), <https://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm2006828.htm>. “Food certifications are typically performed by an unassociated “third-party” certifier who validates, usually through audits, that the inputs and/or processes used to produce food products are as claimed on the label.” Western Center for Risk Management Education, *Certification and Labeling Considerations for Agricultural Producers* 12 (2005), <http://wec.farmmanagement.org/Publications/certification/certificationbookprint.pdf>.

²⁰⁷ See generally Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA’s Resources and Regulatory Authority*, GOVERNANCE STUDIES AT BROOKINGS (June, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf.

²⁰⁸ See *supra* note 113.

²⁰⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

²¹⁰ Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. §260.2, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>. (Last visited Feb. 9, 2017).

²¹¹ 19 U.S.C. §1304 (2017).

²¹² Publicly-traded companies must file an audited Conflict Minerals Disclosure Report of their due diligence regarding source countries of their conflict minerals. 17 C.F.R. §249b.400 (2017).

regulatory approaches suggest that consumer protection can be accomplished without prior, independent certification and annual recertification of the producer. Thus, USDA's NOP is excessive for producers who seek to market as "organic."

One regulatory system in the U.S. that requires prior certification comparable to the NOP is the Energy Star brand for electronic goods.²¹³ This system allows use of the Energy Star trademark upon independent certification that particular goods meet mandated energy efficiency standards.²¹⁴ While this example seems comparable to USDA's prior organic certification, a significant difference directly implicates free speech. Unlike USDA's entire monopolization of the word "organic," and any indirect suggestion of it, sellers of electronics that do not submit for the Energy Star brand still can truthfully market the energy efficiency of their goods, using words and phrases such as "energy," "energy savings," or "energy efficiency." The Energy Star brand is distinctive from those other, general terms.²¹⁵ Just like any trademark, Energy Star maintains its distinctiveness²¹⁶ by limiting the products that can carry the brand, pursuant to its standards.²¹⁷ Unlike USDA's claim over "organic," however, the Energy Star brand does not take a general, descriptive word, and every other marketing hint of energy efficiency, out of sellers' promotion arsenal. The legitimate branding requirements imposed by the Energy Star program do not support the vast marketing constraints the NOP imposes on all direct and indirect references to "organic." Further issues regarding trademark law relative to organic marketing are discussed additionally under Future Research.

VI. Recommendations and Future Research

Because truthfulness is the basic premise for any advertising protection under the First Amendment,²¹⁸ some mechanism is necessary to confirm that all who claim to be selling organic products are meeting a commonly understood standard. Heyman believes the current USDA regulatory scheme protects organic standards and, without it, organic products would decline.²¹⁹

Regarding environmental claims, "[m]arketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims." Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. §260.2 (2017), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf> (citing FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (1984)).

U.S. Customs and Border Protection can hold an item in custody until it complies with country of origin labeling. 19 U.S.C. §1304(j) (2017). Nevertheless, prior labeling is waived for many reasons, including the prohibitive expense of marking prior to importation. 19 U.S.C. § 1304(a)(3)(C) (2017). Alternatively, the importer can opt to pay a 10% duty in lieu of marking country of origin prior to importing. 19 U.S.C. § 1304(i) (2017).

²¹³ "ENERGY STAR® is the government-backed symbol for energy efficiency, providing simple, credible, and unbiased information that consumers and businesses rely on to make well-informed decisions." ENERGY STAR, *About Energy Star*, <https://www.energystar.gov/about>. (Last visited Feb. 9, 2018).

²¹⁴ "EPA ensures that each product that earns the label is independently certified to deliver the quality, performance, and savings." *Id.*

²¹⁵ ENERGY STAR, *Logo Examples*, <https://www.energystar.gov/about/energy-star-brand/logos-and-graphics>. (Last visited Feb. 9, 2018).

²¹⁶ See, e.g., U.S. PATENT AND TRADEMARK OFFICE, *Trademark Manual of Examining Procedure, Evidence of Distinctiveness*, §1202.03(d) (Oct. 2017).

²¹⁷ ENERGY STAR, *Energy Star Brand Book*, <https://www.energystar.gov/about/energy-star-brand/energy-star-brand-book>. (Last visited Feb. 9, 2018).

²¹⁸ Central Hudson, *supra note* 153, at 563-64.

²¹⁹ Heyman, *supra note* 159, at 1, 6.

For this reason, he bemoaned his own conclusion that current commercial speech jurisprudence does not give USDA the right to regulate “organic” as it currently does.²²⁰

What organic advocates like Heyman and Cornucopia Institute²²¹ overlook in their continued support of USDA organic regulation, however, is that the NOP is not the only mechanism for protecting organic standards and providing consumer protection. A variety of self-regulatory activities in agriculture, on which consumers already rely, can replace USDA’s monopoly certification system for organic.

A. Alternative Vehicles to Maintain (or Improve) Organic Standards

Self-regulatory groups already protect organic standards and methods among their members. Their efforts offer meaningful alternatives to protect consumers in lieu of USDA regulation. For example, Certified Naturally Grown offers peer-review certification processes that confirm that its participating producers do not use “synthetic fertilizers, pesticides, herbicide, or GMOs, just like certified organic farmers.”²²² The program includes annual inspections and a three-year transition period for land moving into organic production, just like USDA’s mandates.²²³ Instead of government-approved certifiers, however, participating members inspect each other.²²⁴ Minimum participation dues are \$110, but the program recommends \$200.²²⁵ Recordkeeping is required, but the form is at the participant’s discretion.²²⁶ All participants must agree to conduct another’s peer review annually.²²⁷ The program has over 750 members in 48 U.S. states and four Canadian provinces.²²⁸ According to one critique, the Certified Naturally Grown seal,

means that the farm’s practices are similar to those of a certified organic farm.

The differences in the standards are minor; the main difference is in how those requirements are verified. The bottom line is that the seal signifies that the farmer shares a commitment to farming practices that build soil health, do not rely on synthetic pesticides, synthetic fertilizers, animal drugs, and GMOs, and provide humane living conditions for farm animals.²²⁹

Food Alliance is a non-profit certifier of sustainable food production, originally started by Oregon State University and Washington State University in 1994.²³⁰ It differentiates itself from USDA organics by certifying humane treatment of animals and workers,²³¹ which USDA has not consistently mandated for certified organic producers.²³² It also does not approach

²²⁰ *Id.* at 40.

²²¹ CORNUCOPIA INSTITUTE, *supra* note 145.

²²² CERTIFIED NATURALLY GROWN, *Produce Certification* (2015), <http://www.cngfarming.org/produce>.

²²³ CERTIFIED NATURALLY GROWN, *Annual Requirements* (2015), <http://www.cngfarming.org/requirements>. The three-year transition period is found by clicking through to the linked Declaration.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ CERTIFIED NATURALLY GROWN, *Who We Are* (2015), http://www.cngfarming.org/who_we_are.

²²⁹ CONSUMER REPORTS, *Greener Choices* (Sept. 6, 2017), <http://greenerchoices.org/2017/08/07/certified-naturally-grown/>.

²³⁰ FOOD ALLIANCE, *History of Food Alliance* (2016), <http://foodalliance.org/about-us/history-of-food-alliance/>.

²³¹ FOOD ALLIANCE, *General FAQs, What’s Wrong with Organics* (2016), <http://foodalliance.org/general-faqs/>.

²³² Peter Whoriskey, *Should ‘USDA Organic’ Animals be Treated More Humanely? The Trump Administration Just Said No*, THE WASHINGTON POST (Dec. 15, 2017) (stating that USDA has been developing organic requirements for

chemical pesticides and fertilizers the same as USDA, which generally prohibits all synthetic interventions unless a natural substitute does not exist.²³³ Instead, Food Alliance emphasizes production practices that avoid pests, and then relies on the World Health Organization list of extremely hazardous and highly hazardous materials for its prohibited substances.²³⁴ One commentator claims Food Alliance has “set the bar for sustainable agriculture, much in the way that the U.S. Green Building Council spearheaded energy conservation with their LEED rating system.”²³⁵

Food Alliance certification is done exclusively by a third party that also certifies organics for USDA.²³⁶ Certification lasts three years and costs \$750-\$1200 for farms and ranches.²³⁷ For six months in 2013, Food Alliance ceased certifying and closed its offices.²³⁸ It re-established certifications, with a number of agricultural producers helping it to restructure and recapitalize.²³⁹ Its current list of certified businesses shows 121 producers in ten U.S. states, plus Alberta, Canada and Chihuahua, Mexico. Food Alliance markets its certified businesses to commercial food buyers.²⁴⁰ As noted above, this is a distribution channel that is perceived to be closed to alternative organic producers but could be accessible under an alternative to USDA certification.²⁴¹

Volume purchasers could represent another meaningful alternative organic standards-setting system that could protect consumers outside of USDA certification. In the years before passage of the FSMA,²⁴² a consortium of very large produce buyers launched their own food safety initiative. Calling themselves the Food Safety Leadership Council (FSLC), members included McDonald’s, Disney, Wal-Mart and Darden (owner of Olive Garden, Red Lobster and Longhorn Steakhouse restaurant brands). These and other similarly large food service operations and grocery chains created their own farm safety standards. Dubbed “super-metrics” for their stringency beyond what produce handlers’ agreements in California and Arizona required, producers and sellers who hoped to tap the market of very large buyers had to verify compliance

animal welfare “for years,”) https://www.washingtonpost.com/news/wonk/wp/2017/12/15/should-usda-organic-animals-be-treated-more-humanely-the-trump-administration-just-said-no/?utm_term=.f0ad833ed2b5; Lydia Wheeler, *USDA Withdraws Welfare Rules for Animals Certified 'Organic,'* THE HILL (Dec. 18, 2017) (describing the withdrawal of “Obama-era rules,” that would have taken effect in March, 2018), <http://thehill.com/regulation/365432-usda-withdraws-welfare-rules-for-animals-certified-organic>.

²³³ See *supra* notes 75 through 78, 112-15 and accompanying text.

²³⁴ FOOD ALLIANCE, *Food Alliance Standard for Crop Operations* 6-7 (2015), <http://17o51ch4tg32rabu52au3dt1.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/FA-SS-01-crops-2015.pdf>, This integrated pest management system was developed by Dr. Paul Jepson, Oregon State University, and is applicable to any crop in any region of North America. See *supra* note 223. See also OREGON STATE UNIVERSITY, *Integrated Plant Protection Center* (2015), <http://www.ipmnet.org/Staff-Paul.htm>.

²³⁵ Matty Byloos, *What is Food Alliance Certification*, PLANET MATTERS AND MORE, (July 15, 2011), <http://planetmattersandmore.com/sustainable-agriculture-2/what-is-food-alliance-certification/>.

²³⁶ INTERNATIONAL CERTIFICATION SERVICES *Food Alliance Certification*, <http://www.ics-intl.com/food-alliance.html>. (Last Visited Nov. 1, 2017).

²³⁷ FOOD ALLIANCE, *Get Certified, Crop Producers, Crop FAQs* (2016), <http://foodalliance.org/food-alliance-inspectors-2/>. Food Alliance also charges licensing fees to market under the Food Alliance brand. *Id.*

²³⁸ See *supra* note 219.

²³⁹ *Id.*

²⁴⁰ FOOD ALLIANCE, *Info for Commercial Food Buyers* (2016), <http://foodalliance.org/info-commercial-food-buyers/>.

²⁴¹ See *supra* note 149 and accompanying text.

²⁴² See *supra* notes 195 through 197 and accompanying text.

with these private safety mandates.²⁴³ Potentially, if USDA did not monopolize all marketing and sales of “organics,” similar market-driven standards for alternative organics could emerge. Such standards might even be stronger than USDA’s current organic standards, with their alleged Big Ag taint and complete blind eye to safety or quality. However, an organic version of the Food Safety Leadership Council cannot emerge if such a group could not use the word “organic” to market its efforts.²⁴⁴

As these examples reflect, systems exist, or are possible, to help alternative organic producers prove the truthfulness of their organic claims. With such viable alternatives available, USDA’s monopoly on organic certification and marketing needs to be set aside. Alternative certification systems could thrive and improve sustainable agriculture if USDA’s system was toppled by a free speech challenge, which should succeed as shown above.

B. Future Research

As mentioned, separate research could show that organic marketing qualifies as social speech that would subject USDA’s organic regulatory rules to even tougher First Amendment scrutiny than discussed herein. But that research stream seems purely academic when this analysis shows that current organic marketing constraints could not survive intermediate scrutiny. On the other hand, the overlap between USDA organic marketing rules and other legal issues still are worth investigation.

1. Organic as an Indefensible Trademark

Trademark law is laden with free speech concepts that may be instructive in critiquing USDA’s organic marketing approach. In the United States, intellectual property rights cannot be established in words or graphics abstractly. Trademarks are only protected when marks are used in commerce to distinguish one producer’s product from others’.²⁴⁵ This requirement in U.S. intellectual property law is based on the general free speech principle that no one can take words out of the public domain and own them, except under the limited circumstances that trademark law has established to balance speech and commercial interests.²⁴⁶ Arguably, the NOP has taken “organic” out of the public domain, without distinguishing it sufficiently for consumers to understand that “organic” actually only means “USDA Certified,” or “Grown Using USDA

²⁴³ Shermain Hardesty & Yoko Kusunose, *Growers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs*, UNIV. OF CALIF. FARM PROG. RES. BRIEF 4 (Sept. 2009), <http://sfp.ucdavis.edu/files/143911.pdf> See also A. Bryan Endres and Nicholas R. Johnson, *SYMPOSIUM: Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 64-65 (2011).

²⁴⁴ Veldstra et. al, *supra* note 21, at 435, recommend food retailers subsidize alternative organic producers to bring them under the USDA organic mantle by overcoming the cost of USDA certification. Another commentator advocates for a USDA “Organics Plus” model in which additional metrics could be layered on the existing organic system, such as “produced on a small family farm,” “pasture raised,” “tested GMO and pesticide residue free.” Kate L. Harrison, *Comment: Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 232-33 (2008).

²⁴⁵ See *supra* note 216 and accompanying text.

²⁴⁶ Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 410, 418, 450-51 (2008).

Certified Methods.”²⁴⁷ In a trademark case, would a court deny protection for a term that has such a lack of distinctiveness and such an undifferentiated public understanding? According to one commentator, “trademark law does not play by the usual First Amendment rules.”²⁴⁸ Research into trademark cases and ownership of labeling terms could further reveal that USDA has overstepped in its monopolization of “organic.”

2. GMO Labeling

In 2016, Congress passed the National Bioengineered Food Disclosure Standard regarding presence or lack of genetically modified organisms (GMOs) in food.²⁴⁹ The law expressly preempts all state GMO labeling laws.²⁵⁰ Under this new federal standard, GMO labeling regulations shall not treat GMOs “as safer than, or not as safe as,” a non-GMO counterpart, solely because of the use of GMOs.²⁵¹ USDA organic certification is established as sufficient to claim a food is “non-GMO.”²⁵² It remains to be seen what other certification, if any, will satisfy to label a product as non-GMO. Will USDA also monopolize “non-GMO” under its organic certification scheme, further limiting a common differentiator used in alternative organic marketing? If not, will permissible alternative certification for non-GMO food suggest meaningful alternative organic certifications, too? These are some issues the GMO labeling rulemaking could answer. Seemingly, this new statutory standard lays the foundation for the next round of disputes between food regulators and organic marketers regarding free speech rights to differentiate organic products.

Conclusion

In *Central Hudson*, the Court noted features of commercial speech that permit it to be regulated with a lower level of scrutiny than political or social speech: (1) commercial speakers have extensive knowledge of markets and products, and (2) commercial speech is not “susceptible to being crushed by overbroad regulation.”²⁵³ Arguably, neither of those protective features apply to alternative organic producers who are denied any ability to market as organic by opting out of USDA certification. As the Market Maker study showed, alternative organic parties often are small producers, and less established in farming.²⁵⁴ They likely lack the same knowledge of food markets as their Big Organic competitors and are especially susceptible to the crushing effect of USDA’s organic certification process, with its costs and administrative demands. As a result, they opt out of USDA’s certification process, and attempt to market their products with messages and labels and distribution channels that commonly misuse “organic,”

²⁴⁷ See Jonathon Weinberg, *On Commercial - and Corporate - Speech*, 99 MARQ. L. REV. 559, 573, 579-83 (2016), contending that USDA has taken the word “organic” and poured meaning into it in a way that is not legally controversial. As explained throughout this analysis, USDA’s taking of the word “organic” and the meaning it poured into it is controversial.

²⁴⁸ *Id.* at 579.

²⁴⁹ Pub. Law. 114-216, § 1, July 29, 2016, 130 Stat. 834.

²⁵⁰ 7 U.S.C. § 1639b (e) and 7 U.S.C. § 1639i (b).

²⁵¹ 7 U.S. C. § 1639b (b)(3).

²⁵² 7 U.S. C. § 6524.

²⁵³ 447 U.S. at 564 n.6.

²⁵⁴ See *supra* note 134, at 433.

all to the detriment of consumers' understanding of the organic market. Nothing in USDA's extensive and intensive organic regulatory scheme satisfies the letter or spirit behind *Central Hudson's* lower scrutiny for commercial speech regulation. A new approach is needed along the lines proposed herein.